LAW AND RELIGIOUS MINORITIES IN MEDIEVAL SOCIETIES: BETWEEN THEORY AND PRAXIS

Religion and Law in Medieval Christian and Muslim Societies

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LAW AND RELIGIOUS MINORITIES IN MEDIEVAL SOCIETIES: BETWEEN THEORY AND PRAXIS

DE LA TEORÍA LEGAL A LA PRÁCTICA EN EL DERECHO DE LAS MINORÍA RELIGIOSAS EN LA EDAD MEDIA

Edited by
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INTRODUCTION

Ana Echevarria and Juan Pedro Monferrer-Sala

One of the main concerns of every historian of the Middle Ages dealing with legal material is how to address the relation — and often the tension — between theory and practice in a given historical, religious or cultural context. Of course, this is especially sensible when we think of the regulation of minorities in medieval societies. And more so if we consider this topic in its religious context, under the complex and changing relations that developed between Jewish, Christian and Islamic communities throughout the Middle Ages.

The first part of this volume, 'From sacred texts to social regulation', deals with the relations between theology and law, intrinsic to medieval societies, and their impact in the regulations about minorities, or in the way in which minorities designed their insertion in majority societies that allowed them to practice their own law without compromising their own principles. The elaboration of legal tracts and compilations — be it revered commentaries to the Bible and the Qur'ān (Talmud, Ḥadīth, writings of the Church fathers) or those belonging to specific legal genres — was intended to provide, at least theoretically, the bases for Jewish, Christian and Muslim societies. But in close contact with other religious groups, these legal standards might change or adapt, or require a different reading, a fact which makes theory resemble praxis, to some extent. For instance, as Mark Cohen notes in his article in this volume, the chief legal authorities in the Jewish community during the early Islamic centuries, the Babylonian Gĕ'ônîm, made accommodations in Talmudic law to deal with changing economic and social circumstances and to give Jewish courts more flexibility in dealing with new situations, in order to avoid Jews having recourse to Muslim legal courts allowing them to find more desirable judicial outcomes.

In that context, theological and religious strictures may find particular ways of being translated into law, as María Arcas Campoy, Delfina Serrano and Camilla Adang show in this volume. These sacred texts and their commentaries portray those outside the religious community of the faithful, and display decisions about what kinds of relations and contacts with religious others are licit or illicit. Although these boundaries may be questioned, or directly set aside in practice, it is important to take them into account to see the evolution of social dealings among the diverse Abrahamic religions.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

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The articulation between sacred text and legal manifestations may vary according to whether a certain group constitutes a minority or a majority. For instance, Biblical principles on relations between Christians and non-Christians may take different forms in Christian societies, where they hold the majority and can design the policies of the state, than the ones they would adopt when Christian minority communities live in Muslim societies. Certain details of these aspects are addressed in the articles by Johannes Pahlitzsch, David Wasserstein, and Ana Echevarria. In a sense, and complementing this field of analysis, Echevarría's article discusses the role played by the *quḍāt* during the Mudejar period through the transmission and application of Islamic texts among Muslim communities living under Christian rule in the Iberian Peninsula. She concludes that the *qāḍī* is treated in greater detail in the *Llibre de la çuna e xara*, a kind of local law written for Mudejars under noble jurisdiction which even includes a formulary for their sentences, better than in a general royal code such as the *Leyes de moros*, or the more religiously oriented *Breviario sunní*. Monferrer-Sala's contribution focuses on the diachronic use of the terms *namūs* and *sharīʿah* among Christian authors embodying a double meaning, firstly, in relation to the figure of the Prophet Muḥammad, who is represented as a legislator, and secondly in relation to the Qur'ān, which is conceived as a legislative *corpus*. Those concepts prove the value that Christian authors gave to the nuances of law related to the Prophet and the Qur'ān. Wasserstein's contribution deals with the relationship between minorities, subjected languages, dominant language and legal texts. In his article he discusses what he calls 'refinements', i.e. those cases where differences from the norm are to be expected but define the norm itself. These differences, according to Wasserstein are explained from their geographical location of the minorities under the strength of the Arabic language imposed by the conquerors.

Hundreds of medieval legal texts (*fueros*, fatwās, *ḥisba* manuals, legal treatises, parliamentary ordinances, etc.) as well as narrative texts (chronicles, hagiography, etc.) describe day-to-day contacts between Jews, Christians and Muslims. In the second section 'Negotiating daily contacts and frictions', the authors give some examples of these dealings and their contribution to the demarcation of religious groups. Although distinctions were enforced between religious groups, they did not remain the same over time, as daily interactions changed in response to changing political and cultural mores. For instance wine-drinking, studied by Myriam Wissa and Arcas Campoy, seems to have been widespread among Iberian and Egyptian Muslims until the late eleventh century despite legal pressure, and the same was true for other food regulations. Marisa Bueno takes up this problem of evolution by analysing the regulations for the use of public bath-houses for dhimmīs in al-Andalus and contrasting them with Christian fueros in Iberia, to determine whether Christian uses were stricter than former Islamic ones.

This of course poses the ever-present problem of the relationship between normative texts and social realities: for instance, when a rabbi prohibits Jews from attending Christian festivals or a *fuero* establishes rules for the ransoming of Muslim captives, how are we to know to what extent such regulations were respected? Only documentary sources, and few references in other literary or legal works, provide answers to this question. Clara Almagro Vidal's contribution, for instance, deals with the identity of religious minorities and the application of the law under the rule of the military orders in Castile concluding that although the legal texts do not describe perfectly the situation of the religious minorities in those lands under the military orders they give significant information of the day to day life of those minorities as well as the attitudes towards them. Yolanda Moreno's study of an agreement signed in the Iberian city of Talavera de la Reina in the fifteenth century brings us a view of the extraordinary complexity of the nuances involved in dealing with housing and the inviolability of sacred space, following rules that had been working for centuries, but which could still be negotiated in order to keep social rest.

The third part, entitled 'Application of the law', studies how, once the legal framework had been negotiated between the minority community and the authorities of the dominant religion, the application of the norms produced a new context of adaptation to specific situations and to different operative legal registers. Not only were the representatives of a minority chosen to exercise judicial authority, but also the mediators, translators, legal advisors, solicitors, and witnesses acting between the two communities were regulated. And often they had to act by applying legal codes which in many cases had to be reinterpreted in light of the specific conditions of the minority. Turning to one or other legal system may have been profitable for minorities. The diachronic approach taken by Serrano introduces seven texts written by Andalusi Muslim jurists from the 10th to the 12th century, specifying the conditions under which it was possible for a *dhimmī* to have his case heard by a Muslim judicial authority in cases where no Muslim was involved. These address motives, attitudes and expectations behind opting for Islamic justice either at the initiative of the litigants or of their natural judges. The role of witnesses was so important to Muslim jurists that their definition of *dhimmī* witnesses and the questions of where, when and with which formula they should swear their oaths (*aymān*) in disputes adjudicated by a Muslim *qāḍī* was a matter carefully addressed in their treatises, and the object of Adang's article.

For the minority, it was a different issue. For example, in the fifteenth century, various Castilian and Aragonese cities accepted the presence of *alcaldes* or chief *qāḍīs* appointed by the king and accepted by the *aljamas*, but other cities preferred to abide by the judgments of the Christian *alcaldes* or even the ecclesiastical authorities, as Echevarria, Almagro Vidal and Moreno show. In both cases, the

execution of the sentence was the responsibility of Christian police and capital punishments could be commuted to fines. The elaboration of modifications to the legal codes, for acceptance by the rulers of a majority faith who ruled over a certain minority represent a new reworking of law for use by alien courts, and in this sense they are different from works conceived for the internal use of the religious community, because they had to perform a bridging function between two systems of law. The implementation of all these treatises in the legal practice of the courts provides for this late period an excellent way to test relations and tensions between theory and practice.

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I

FROM SACRED TEXTS TO SOCIAL REGULATION / DEL TEXTO SAGRADO A LA REGULACIÓN SOCIAL

DEFENDING JEWISH JUDICIAL AUTONOMY IN THE ISLAMIC MIDDLE AGES

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From their very beginnings as a minority living in a Gentile world — whether it was under the rule of Persia, the Hellenistic Near Eastern kingdoms, Rome, Byzantium, Latin Christendom, or Islam — Jews have enjoyed a substantial amount of communal autonomy. In practice, this meant freedom of worship, the privilege to maintain synagogues and appoint communal officials, and the right to live by their ancestral laws. The latter, a natural consequence of the personality of law in those times, entailed the all-important privilege of maintaining courts to administer Jewish law. Not surprisingly, however, Jews occasionally had recourse to Gentile tribunals. The rabbis of the Mishna (completed *c.* 200 CE) were compelled to tolerate this practice, while seeking to regulate it. They ruled (Mishna Giṭṭin 1:5): 'Any document drawn up in Gentile registries (*arkha'ot shel goyim*) is valid, even if its signatories are Gentiles, except for writs of divorce and writs of manumission of slaves'. Rather than 'courts', *arkha'ot* in this context is better rendered as 'registries', as Danby recognizes in his translation of the Mishna,[1] for that is what the Rabbis sanctioned, namely, notarization of documents and contracts concerning pecuniary transactions (the Talmud exemplifies this with sales and gifts), for which Jews understandably felt they needed the backing of the state.

In medieval Europe, Jews' propensity for resorting to Gentile (Christian) courts — secular courts, including royal tribunals but not ecclesiastical courts, which eschewed jurisdiction over the Jews altogether — proved problematic. Northern European, Italian, Spanish, and Eastern European rabbis made efforts to restrain Jews from pursuing this course, which they characterized as 'denunciation' or 'informing', *malshinut* in Hebrew (literally the word means 'speaking ill', or 'bad-mouthing', from the root *lashon*, meaning both 'tongue' and 'language'). The fear was that one Jew might use the courts of the 'Gentile nations' (*ummot ha-'olam*, in Hebrew), to unfairly get the better of another, a concern that was already present in the Talmudic period. In medieval Europe, there was particular apprehension lest Christian magistrates bring anti-Jewish prejudices to bear in

1 *The Mishnah*, trans. Herbert Danby (Oxford: Oxford University Press, 1931), 307.

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handling a case between Jews, even meting out collective punishment to an entire community.[2] At the same time, at least in the early period, dating back at least to Carolingian times, Jews often benefited from a royal policy that required mixed litigations to be heard in the royal court. There the king could better protect the Jews, whose trading activities benefited the kingdom or at least the nobility, from harassment by Christians.[3]

Following the Islamic conquests, evidence points to extensive Jewish reliance on the Islamic judiciary.[4] Jews were not alone in this regard. Uriel Simonsohn's comparative study shows that Syriac Christians followed the same pattern.[5] Economic factors as well as a general confidence in the fairness of *sharīʿa* courts played a major role in Jews' choice to seek out their precincts. Islamic courts, moreover, were better equipped than the Jewish judiciary to adjudicate and enforce certain types of law, especially commercial law arising out of merchant practice, for the simple reason that the civil law of the Talmud reflected a less developed, agrarian economy. Islam, on the other hand, brought a 'commercial revolution' in its wake, and Islamic law in its formative period accounted for, and in fact assimilated, the custom of the merchants into the *sharīʿa*.[6]

Islamic Policy

Islamic policy on non-Muslim recourse to Muslim courts — courts which, it is important to recall, until approximately Ottoman times, adjudicated both religious and civil law — exhibits ambivalence regarding the adjudication of non-Muslims.[7] Statements like the following by a twelfth-century jurist express Islam's

2 Louis Finkelstein, *Jewish Self-Government in the Middle Ages* (New York: Jewish Theological Seminary of America, 1924), 150-60, 264, 304; David Kaufmann, 'Jewish Informers in the Middle Ages', *Jewish Quarterly Review*, o.s 8 (1896), 217-38; Elka Klein, *Jews, Christian Society, and Royal Power in Medieval Barcelona* (Ann Arbor: University of Michigan Press, 2006), 153-54.

3 Amnon Linder, *The Jews in the Legal Sources of the Early Middle Ages* (Detroit: Wayne State University Press, 1997), 333–43

4 See the section, 'Interplay of Laws', in S. D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza* (5 vols plus Index Volume by Paula Sanders. Berkeley and Los Angeles: University of California Press, 1967-93), 2:395-402.

5 Uriel Simonsohn, *A Common Justice: The Legal Allegiances of Christians and Jews under Early Islam* (Philadelphia: University of Pennsylvania Press, 2011).

6 A. L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970). My book-in-progress, tentatively titled *Maimonides and the Merchants: Law and Society in the Post-Talmudic Geniza World*, deals centrally with this question. The present article draws on research underlying that book.

7 Gideon Libson, 'Legal Autonomy and the Recourse to Legal Proceedings by Protected Peoples, according to Muslim Sources during the Gaonic Period' (Hebrew), in *Ha-islam ve-ʿolamot ha-shezurim bo* (The Intertwined Worlds of Islam: Essays in Memory of Hava Lazarus-Yafeh), ed. Nahem Ilan (Jerusalem: Hebrew University, Institute of Asian and African Studies, Makhon Ben-Zvi, and Mossad Bialik, 2002), 334-92.

policy of recognizing *dhimmī* judicial autonomy this way: 'We are commanded to leave them and what they believe alone', and 'The protected people are bound by what is among them'.[8] Mixed litigation — cases involving Muslims and non-Muslims — naturally had to be brought before a *qāḍī*. But some Muslim jurists permitted *sharī'a* courts, at the *qāḍī*'s discretion, to hear cases involving only non-Muslims, and some even insisted on the primacy of Islamic jurisdiction in such cases, asserting the territoriality of Islamic law and the hierarchical hegemony of Islam over the religious minorities. This principle is embodied in the maxim *ilzām ḥukm* (or *aḥkām*) *al-islām 'alayhim*, 'subjection to the authority [*ḥukm*] (or laws [*aḥkām*]) of Islam'.[9]

The Qur'ān itself laid the foundation for these contending views. 'If they come to you (Muḥammad), either judge between them or decline to interfere... If you judge, judge in equity between them' (Sura 5:42); and 'Judge between them by that which Allah hath revealed, and follow not their desires, but beware of them lest they seduce you from some part of that which Allah hath revealed unto you. And if they turn away, then know that Allah's will is to smite them for some sin of theirs. Lo! many of mankind are evil-livers' (Sura 5:49).[10]

The formulary for the pact with non-Muslims in al-Shāfi'ī's *Kitāb al-umm* (*c.* 800), whose school of law was dominant in medieval Egypt,[11] tells us something about the status of *dhimmī* merchants in Islamic courts. In dealings between *dhimmī*s and Muslims, al-Shāfi'ī says, supervision rests with the Islamic authorities. Regarding intra-*dhimmī* commercial affairs, however, 'we shall not supervise transactions between you and your coreligionists or other unbelievers nor inquire into them as long as you are content'. But, it goes on to say, 'if one of you or any other unbeliever applies to us for judgment, we shall adjudicate according to the law of Islam'.[12]

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8 Quoted in Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Gaonic Period* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School: Distributed by Harvard University Press, 2003), 80, from al-Kāsānī (d. 1191), *Kitāb badā'i' al-ṣanā'i' fī tartīb al-sharā'i'*.

9 Néophyte Edelby, 'The Legislative Autonomy of Christians in the Islamic World', in *Muslims and Others in Early Islamic Society*, ed. Robert Hoyland (Aldershot: Ashgate, 2004), 53-58 (17-22); Antoine Fattal, 'How the *Dhimmis* were Judged in the Islamic World', in ibid., 92-94 (11-13).

10 Ibid., 90-91 (8-9). See also Simonsohn, *A Common Justice*, 5-6 and Libson, 'Legal Autonomy', 387-88.

11 S. Mahmassani, *Falsafat al-tashrī' fi'l-islām* (The Philosophy of Jurisprudence in Islam), trans. Farhat J. Ziadeh (Leiden: Brill, 1961), 29.

12 *Kitāb al-umm* (8 vols. Cairo: Maktabat al-Kūliyāt al-Azharīya, 1961), 4:197-98; English translation in Bernard Lewis, *Islam: From the Prophet Muhammad to the Capture of Constantinople* (2 vols. New York: Harper & Row, 1974), 2:219-23. It is often decried as a discriminatory measure against non-Muslims that the testimony of Jews and other *dhimmī*s was not accepted in mixed litigations in Muslim courts because they were considered untrustworthy, lacking the attribute of *'adāla*, 'honesty', 'fairness', the same ethical quality required of those wishing to serve as professional witnesses (*'udūl*) in a Muslim religious court. The authority standardly cited for the intestability of *dhimmī*s is Fattal, *Le statut légal des non-musulmans en pays d'Islam* (Beirut: Imprimerie Catholique, 1958), 361-63. But *dhimmī*s could testify against one

We may go so far as to say, following Goitein's insight, thatMuslim jurists considered non-Muslim courts to be 'part of the system' to a certain extent, a kind of branch of central authority, and that this alone, encouraged *dhimmīs* to seek out their venues. In his paper for the RELMIN conference on the legal status of *dhimmī*s in the Islamic West, Christian Mueller makes a similar claim.[13] Indeed, Jewish and Muslim judges often cooperated with each other. A Jew might solicit the opinion of a Muslim jurist as to whether Islamic law permitted a certain action. Maimonides was once asked for a ruling in a case where two married sisters had asked Muslim jurists (*fuqahā' al-muslimīn*) about their entitlement in Islamic law to exercise the right of preemption to purchase property of an adjacent Muslim neighbor.[14] A Muslim judge might return a case to the Jewish court if he did not wish to rule in the matter.[15] When a dispute over a young wife's right to grant her husband ownership of part of her dowry was brought before a Muslim *qāḍī* and the judge was presented by the parties with contradictory claims

another in a Muslim court (ibid., 365). The bountiful evidence for Jewish recourse to *sharī'a* courts in Jewish responsa and in the Geniza documents speaks loudly in favor of the fair treatment that Muslim judges accorded them. Furthermore, Jews and other non-Muslims were permitted to take oaths in the Islamic court, and, as in Jewish law, an oath had evidentiary force. Usually, the Jewish party was permitted to follow Jewish protocol and utter the name of God in the Jewish manner, often in the synagogue (ibid., 365-66). When, for instance, a Muslim demanded that a Jew swear an Islamic oath in the name of Allah, the Gaon who was consulted cautioned the Jewish party to treat this as gravely as a Jewish oath, which meant he should try to avoid the imprecation if possible. *Teshuvot ha-geonim*, ed. Ya'akov Mussaphia (Lyck: Rudolph Siebert, 1864), 15 (no. 40); cf. *Teshuvot ha-geonim*, ed. Nahman Nathan Coronel (Vienna, 1871; reprint Jerusalem, 1967), 5a (no. 40); Libson, *Jewish and Islamic Law*, 85. Libson (ibid., 115), notes that '[a]ll oaths in Muslim courts were required to be taken in God's name, even by Jews appealing in these courts, to which there is copious evidence in Muslim literature. There was no difference between oaths imposed on Jews and other minorities (*milla*) and those administered to Muslims'. Also his notes 16-17 on pp. 282-83, citing echoes in Gaonic responsa and in other halakhic works. Importantly, Libson points out (p. 262 note 41) that he found no mention in sources he studied (up to the twelfth century) of the offensive 'Jews' Oath', allegedly dating from the turn of the ninth century. This oath is quoted in al-Qalqashandī's fifteenth-century epistolographic manual, *Ṣubḥ al-a'shā*, and cited as evidence of age-old Muslim hostility toward the Jews by certain modern writers. The oath formula is translated into English in Norman A. Stillman, *The Jews of Arab Lands: A History and Source Book* (Philadelphia: Jewish Publication Society of America, 1979), 165-66.

13 Goitein, 'The Interplay of Jewish and Islamic Laws', in *Jewish Law in Legal History and the Modern World*, ed. Bernard S. Jackson (Leiden: Brill, 1980), 61, 66, also cited in Libson, *Jewish and Islamic Law*, 103. Christian Mueller, 'Non-Muslims as Part of Islamic Law: Juridical Casuistry in a Fifth/Eleventh-century Law Manual', in *The Legal Status of Ḏimmī-s in the Islamic West*, eds Maribel Fierro and John Tolan (Turnhout: Brepols, 2013), 21-63. In the same volume, in the article by David Wasserstein ('Families, Forgery and Falsehood: Two Jewish Legal Cases from Medieval Islamic North Africa'), the author writes (p. 335), from a different angle and with due caution, '[i]t seems to me that we can say that, with many limitations and restrictions, and with variations chronologically and geographically, Jewish and Christian — *ḏhimmī* — law was recognized as the law of the Jews and Christians of Islam; was therefore and to that extent incorporated into the law of the land; and therefore, to that extent, formed part of Islamic law'.

14 Moses b. Maimon, *Teshuvot ha-Rambam*, ed. Joshua Blau (3 vols. Jerusalem: Mekize Nirdamim, 1957-61; vol. 4 Jerusalem: Reuben Mass, 1986), 1:145 (no. 90); *Med. Soc.*, 2:298 and 591 note 33.

15 *Med. Soc.*, 2:402.

about Jewish law, he decided to wait before deciding 'until we read what the Ra'īs (namely, Maimonides, the *ra'īs al-yahūd*) writes about this'.[16]

Jewish Merchants and Islamic Courts

Given the Mishnaic dispensation regarding notarization of legal documents issued by non-Jewish tribunals, and given Muslim openness to *dhimmī* attendance in *qāḍī* courts, it is not surprising that Jews in the Islamic world seized the opportunity to appear before the *qāḍī* and his professional witnesses in order to draw up and register deeds and contracts, whether they were in business with Muslims or with fellow Jews. Islamic contracts (called in Judeo-Arabic *ḥujja bi-madhhab al-goyim* or sometimes *kitāb 'arabī be-'eidei goyim*), often crop up in intra-Jewish litigation that came before the Jewish *beit din* or before a jurisconsult like Maimonides.[17] As noted below, the Babylonian Geonim applied the Mishnaic dispensation to Islamic courts, provided the *qāḍī* and the professional witnesses were known to be just and honest. Maimonides codified this Gaonic 'policy' in his Code, singling out deeds of sale and deeds of debt as satisfying these criteria (the Talmud does not include deeds of debt, though it includes gifts) because they were the two most common types of transactions which Jewish merchants drew up in Muslim courts and two of the most common types of business that they brought before a *qādī* for adjudication.[18] I also suspect that he specified these commercial cases in order to exclude other, unacceptable reasons for going to Muslim tribunals, such as issues of personal status and commercial disputes that involved transactions that might not have been proper according to Jewish law.

When business disputes arose, Jewish traders regularly took advantage of the option offered by Islamic authorities to seek redress in their courts. In this regard, the evidence of the Geniza and the responsa doubtless represents but the proverbial tip of the iceberg, since we only hear about this when there was a problem that brought merchants before the *beit din* and, in turn, left a paper trail in the legal documents from the Geniza or in the responsa of the rabbis. As in earlier times and in other regimes, Islamic legal institutions, part of the state apparatus, offered a degree of enforcement that was far more effective than the coercive tools available to the Jewish judiciary, and, as noted, in some cases Islamic commercial

16 *Teshuvot ha-Rambam*, ed. Blau, 2:347-48 (no. 191).

17 For the first expression see ibid., 1:39 (no. 27). For the second, see TS 16.138: 'I, Khalaf b. Khalaf b. 'Ezrōn have an Arabic document bearing testimony of non-Jews (i.e., Muslims) (*kitāb 'arabī be-'eidei goyim*) concerning a partnership that was between us…' ed. and trans. Phillip I. Ackerman-Lieberman, 'A Partnership Culture: Jewish Economic and Social Life Seen through the Legal Documents of the Cairo Geniza' (PhD dissertation, Princeton University, 2007), doc. no. 47.

18 *Hilkhot malveh ve-loveh*, 'Laws regarding Lender and Borrower' 27:1. In his Commentary on the Mishna (Giṭṭin 5:1) he specifies *'uqūd al-buyū' wa'l-ashriya*, 'deeds of sale and purchase'.

law was more pertinent than the law of the Talmud. Much of Jewish business was conducted in accordance with merchant custom that had currency in the Middle Eastern marketplace and that, as Udovitch has shown, had been incorporated into Islamic law during its formative period.[19] The temptation to cross over to the Muslim judiciary must have been even greater in those places, especially small Jewish settlements, where Jewish courts were presided over by laymen — elders and other dignitaries in the community who often lacked thorough training in the profundities of Jewish law.[20]

Although this boundary-crossing to Islamic tribunals chipped away at Jewish autonomy, Rabbinic authorities were realists. Where economic loss was involved, such as a debt or an inheritance or a deposit needing to be collected from a fellow Jew, and one litigant spurned the Jewish authorities, a Gaon ruled (citing Talmudic sources) that a claim could and indeed should be made in a Muslim court, even in the case of a Jew owing money to a Muslim. This was conditional, however, on the Muslim court being immune to bribery (often a tall order in a society given to bribery as a favorite means of gaining desired results); that it was just in its decisions; and that it accepted the testimony of Jews.[21] Furthermore, non-Muslims could take an oath in an Islamic court, and oaths, like third-party testimony, had evidentiary value.[22] Though this reflected a non-discriminatory feature of Islamic justice, it presented a potentially dangerous situation for a Jew if his Jewish co-litigant, unrestrained by the presence of Jewish judges and witnesses, swore falsely, even if unwittingly. Undoubtedly, with that in mind, *dhimmī* litigants were regularly sent to take their oath in their own house of worship, where the form of the oath — for Jews, uttered while holding or in the presence of a holy object like the Torah — would more likely prevent prevarication.[23]

Gaonic Accommodation

Given the strong centrifugal forces pulling Jews into the circle of Islamic justice, the Babylonian Geonim made accommodations. We need only refer to an oft-cited responsum of a Babylonian Gaon, head of the Jewish yeshiva in Islamic

19 Udovitch, *Partnership and Profit in Medieval Islam*.

20 Aharon Nachalon, *Qahal ve-taqqanot qahal be-toratam shel ha-geonim* (The Kahal and its Enactments in the Gaonic Period) (Jerusalem: Institute for Research in Jewish Law, Hebrew University of Jerusalem, 2001), 81-90.

21 *Teshuvot ha-geonim sha'arei ṣedeq* (Salonika, 1792; reprint Jerusalem: Kelal U-Ferat, 1966), part 4, chapter 7:4 and the source cited in the previous note, 86-87.

22 Above note 12; Muhammad Khalid Masud, Rudolph Peters and David S. Powers, eds, 'Qāḍīs and their Courts: An Historical Survey', in *Dispensing Justice in Islam: Qadis and their Judgements*, ed. Muhammad Khalid Masud, et al. (Leiden and Boston: Brill, 2006), 27.

23 See Camilla Adang's article in the present volume.

Iraq, answering a query about the permissibility of relying on Muslim courts. The responsum, echoing the Mishnaic dispensation, states, famously:

> Our view is as follows: In the city in which we dwell, Baghdad, all the witnesses who serve in Muslim courts are educated, wealthy, great men who have never been accused of theft or lying or falsehood. They are familiar with their law and are called *mu'addilīn* (Arabic 'just', 'honest', referring to the *'udūl*, the professional witnesses in Muslim courts). In instances where Jews have had a deed of sale or a loan document notarized in Muslim courts and these documents have been admitted by the Muslim judge, we, too, recognize the legality of those documents and consider them valid in our own court. This is our custom and we practice it all the time. In other large cities in Babylonia there are also Muslim witnesses serving officially as court witnesses and they are similarly pious about their law and scrupulous about avoiding falsehood and prevarication, though we cannot know what is in their hearts.[24]

Notwithstanding this ruling, Jewish recourse to the Muslim judicial system greatly exceeded the notarization of documents envisioned by the Mishna and by the Geonim. Jews regularly brought matters of personal status, such as disputes about inheritance and litigation arising from business collaboration, to the *qāḍī*'s attention.[25] Both the Babylonian Geonim, the principal halakhic authorities in the Islamic world from the seventh to the eleventh centuries, and Maimonides (1138-1204), were aware of this transgression of the Mishnaic concession and addressed this challenge to Jewish judicial autonomy.

Another famous ruling of the Geonim similarly illustrates their pragmatism. The pronouncement is found in a responsum, perhaps by Hayya Gaon (d. 1038), addressing a question about the *suftaja*, an order of payment functioning like a modern check. Long-distance traders employed this commercial instrument, and Jews may have begun using it as early as the mid-eighth century.[26] Some Islamic legists objected to the device; others approved it. The Gaon permitted its use, even though the Talmud (Bava Qama 104b) ruled against employing a similar device called *diyoqne* (*diyuqne*), a word betraying its origins in the pre-Islamic

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24 *Teshuvot ha-geonim*, ed. Abraham Eliyahu Harkavy (Berlin: Tsvi Hirsch Ittskovski, 1887), 140 (no. 278). Also see *Teshuvot ha-geonim*, ed. Coronel, 6a (no. 51). See Simonsohn, *A Common Justice*, 185-87 for a translation of the responsum. Also Libson, *Jewish and Islamic Law*, 85, 102.

25 For a discussion of the Gaonic material see Simonsohn, *A Common Justice*, chapter 6. Also Jessica M. Marglin, 'Jews in *Sharī'a* Courts: A Family Dispute from the Cairo Geniza', in *Jews, Christians and Muslims in Medieval and Early Modern Times: A Festschrift in Honor of Mark R. Cohen*, ed. Arnold E. Franklin, Roxani Eleni Margariti, Marina Rustow and Uriel Simonsohn (Leiden and Boston: Brill, 2014), 207-25.

26 See Walter J. Fischel, *Jews in the Economic and Political Life of Mediaeval Islam* (London: Royal Asiatic Society, 1937), 17-21; *Med. Soc.*, 1:242-45; Libson, *Jewish and Islamic Law*, 84-85, 96-97, 262 note 34, 270-71 note 30. The *suftaja* may have originated in the seventh century; see Michael Morony, 'Commerce in Early Islamic Iraq', *Asien Afrika Lateinamerika* 20 (1993), 711.

Greco-Roman period.[27] The responsum is significant, not only because it illustrates Gaonic adjustment to economic change, but also for its specific reference to the term 'law (or custom) of the merchants'.

> Our law (*fiqh*) does not support the sending of a *suftaja*, as our rabbis said: 'One may not send money with a *diyoqne*, even if witnesses have signed it'. However, when we saw that people use it in doing business with one another, we began admitting it in court, lest trade among people cease. We sanction it, no more and no less, in accordance with the 'law of the merchants' [*ḥukm al-tujjār*]. Such is the law and nothing should be altered in it.[28]

The occurrence of the concept *ḥukm al-tujjār* in a Gaonic legal opinion, sanctioning a practice frowned upon by the Talmud but essential in the monetized economy of the Islamic world, is telling. It is reminiscent of the term *lex mercatoria*, 'law merchant' in medieval Europe, used to describe a body of marketplace practices peculiar to merchants and which A. L. Udovitch long ago suggested had a counterpart in the medieval Islamic world.[29] Leaving aside the contentious debate about the merchants' law in Europe — whether such a corpus of laws really existed; if it did, where it first appeared; whether these customs originated with merchants rather than with legislation by the 'state'; whether they represented the

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27 The Babylonian Talmud explains that money cannot be transferred via an agent if the document (a power of attorney) bears a *diyoqne*, even if there are signatures. Scholars correctly identified the etymology of this word as coming from the Greek term for 'image' (cf. English: icon), though they were mystified by the initial '*d*.' See the summary of views in J. Ostersetzer, 'The דיוקני in Legal Documents in Talmudic Jurisprudence' (Hebrew), *Tarbiz* 11 (1940), 39-55. Setting aside the philological difficulty of the prefixed '*d*,' Ostersetzer explains how legal documents among the Greek papyri from Hellenistic Egypt included, for authenticating purposes, the physical description of the parties concerned. This was rejected for powers of attorney by the Babylonian Amoraim. As to the philological problem, Professor Roxani Eleni Margariti of Emory University kindly researched the term for me and informed me that the word apparently derives from the Greek phrase found, for instance, in Plato and Plutarch, *di'eikonos* (literally 'through an image'). Thus, when the Talmud says 'one may not send money *with a diyoqne*' (*be-diyoqne*), the Hebrew prefix '*be*' ('with') is actually pleonastic, indicating that the rabbis (also modern scholars) did not understand the structure of the original loan-word. A *suftaja* is called *diyoqne* in an eleventh-century letter, TS 13 J 8.14 line 10, ed. Menahem Ben-Sasson et al. eds, *Yehudei siṣilia 825-1068: Te'udot u-meqorot* (The Jews of Sicily 825-1068: Documents and Sources) (Jerusalem: Makhon Ben-Zvi, 1991), 154-55 (no. 35); also ed. Moshe Gil, *Ereṣ yisrael ba-tequfa ha-muslemit ha-rishona (634-1099)* (Palestine during the First Muslim Period [634-1099]) (3 vols. Tel-Aviv: Tel-Aviv University and Ministry of Defense, 1983), 2:596-98 (no. 326); English translation in Shlomo Simonsohn, *The Jews in Sicily Volume One, 383-1300* (Leiden: Brill, 1997), 81-83.

28 *Teshuvot ha-geonim*, ed. Harkavy, 216 (no. 423). See *Med. Soc.*, 1:242-45, and on this responsum see 2:328; quoted in Libson, *Jewish and Islamic Law*, 84-85, 96-97; and Mark R. Cohen, *Under Crescent and Cross: The Jews in the Middle Ages* (Princeton: Princeton University Press,1994; new edition 2008), 93.

29 A. L. Udovitch, 'The "Law Merchant" of the Medieval Islamic World', in *Logic in Classical Islamic Culture*, ed. G. E. von Grunebaum (Wiesbaden: O. Harrassowitz, 1970), 113-30. The legal historian Chibli Mallat concurs. Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007), 313 (*'ādat al-tujjār, ta'āmul al-nās, ta'āruf bayn al-nās, wajh al-tijāra*).

common, 'transnational' practice of merchants everywhere; how these customs were 'transplanted' from place to place[30] — it is clear that the Geonim were aware of, and concerned about, new merchant practices that contradicted Talmudic halakha. Their solution was to override the law and sanction the *suftaja*, 'lest trade among people cease'.[31] Saadya Gaon (d. 942) expressed the Gaonic rationale this way: 'Concerning whatever merchants trade with, *diyoqna'ot* (plural of *diyoqne*) are not acceptable according to strict law, but the merchants have disregarded [the prohibition] in order to facilitate their transactions'.[32] This comment and the remark, 'we saw that people use it in doing business with one another', in the responsum quoted above, represent near perfect descriptions of the 'law merchant', so well known from European economic history. The Jewish legal establishment certainly knew that if they did not accommodate the *suftaja*, in any dispute concerning this device, Jewish merchants would simply resort to Islamic courts where the commercial instrument was recognized. Gaonic acceptance of the *suftaja* meant that Jewish merchants could bring litigations involving this financial device before the Jewish *beit din*, rather than seeking resolution in the court of the Muslim judge.

Maimonidean Accommodation

Like the Geonim, Maimonides confronted the reality of Jewish recourse to the Muslim judiciary on a regular basis. In his Commentary on the Mishna, completed in 1168, just a few years after his arrival in Egypt from the West, Maimonides took note of Jewish merchants' penchant for registering commercial documents in Muslim courts. Echoing the Geonim and commenting on Mishna Giṭṭin 1:5, he acknowledged the validity of business contracts (*'uqūd al-buyū' wa'l-ashriyya*, 'deeds of sale and purchase') drawn up in an Islamic court (*majlis al-qāḍī*) 'on the condition that it is well known among the Jews that the (professional) witnesses and that particular *qāḍī* do not take bribes'.[33] Concerning the Mishna's exclusion of divorce documents and the like, he explains further that since these entail 'acknowledgment and denial' (*al-iqrār wa'l-inkār*), they 'cannot be attested by

30 See Albrecht Cordes, 'The Search for a Medieval *Lex mercatoria*', (2003) Oxford University Comparative Law Forum 5 at ouclf.iuscomp.org and more recently, Emily Kadens, 'The Myth of the Customary Law Merchant', 90 *Texas Law Review* (2012), 1153-1206, summarizing in her notes previous discussions of this controversial issue.

31 On Jewish merchants' adherence to the custom of the merchants, see also. S. D. Goitein, 'The Interplay of Jewish and Islamic Laws', 70-71.

32 *Teshuvot ha-geonim sha'arei ṣedeq*, part 4, chapter 6:8, cited in Libson, *Jewish and Islamic Law*, 270 note 30.

33 Moses Maimonides, *Mishna 'im perush rabbenu Moshe ben Maimon*, ed. and trans. Joseph Kafiḥ (6 vols. Jerusalem: Mossad Harav Kook, 1964-69), 3:205 (Giṭṭin 1:5).

Gentiles under any circumstances'. As his career in Egypt progressed, the great legist received numerous questions involving Jews who resorted to Islamic courts, either to register and validate contracts or for actual litigation.[34] He objected when Jewish judges as well as litigants sanctioned this boundary crossing.[35]

Maimonides also confronted the reality of Jewish recourse to Muslim courts in his massive and comprehensive 14-volume code of Jewish law, the *Mishneh Torah*, which he completed in Egypt around 1178. He continued the strategy of the Geonim to accommodate the custom of the merchants, but in a more subtle and often invisible manner. He updated halakhot that applied to the agricultural world of the Talmud by adding a reference to commerce. He carried over and expanded Gaonic accommodations to make the halakha more applicable to merchants, especially to merchants engaged in long-distance trade.[36]

Long-distance trade requires heavy reliance on collaboration with other merchants, whether partners or agents. Talmudic partnership law requires a formal, written contract and other legal procedures, including provision for obligating a partner to swear a judicial oath in court if suspected of malfeasance. But Talmudic partnership law lacked the flexibility that inter-regional commerce demanded. Merchant letters in the Geniza reveal a more common, less formal, and suppler type of commercial collaboration. It relied upon *agents* rather than partners, an aspect of the custom of the merchants that the Talmudic law of agency did not foresee. This way of doing business, which Goitein called 'informal [business] co-operation' or 'formal friendship' and which has since been discussed by Udovitch, Greif, Goldberg and others, had its roots in the custom of Muslim merchants.[37]

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34 See, for instance, *Teshuvot ha-Rambam*, ed. Blau, 1:6-8 (no. 5): a Muslim rental contract and litigation in the Muslim court; ibid., 2:350 (no. 193) (*iltamasat minhu kitābat al-sheṭar be-nimmusei goyim*, 'she asked him to write the deed (for paying the late marriage payment her divorced husband owed her) in the Gentile [i.e., Muslim] court'); ibid., 2:456 (no. 250) (*qad athbata maḥḍar 'inda qāḍī al-muslimīn*, 'he had authenticated a deed in the court of the Muslim *qāḍī*'); ibid., 2:488 (no. 260) (*wa-aẓharat masṭūr... wa-huwa be-'arkha'ot shel goyim fa-athbatathu 'inda al-shofeṭ wa-staḥlafahā al-shofeṭ bi-ḥaḍrat shāhidīn goyim 'adilīn ['ādilīn] 'alā al-masṭūr*, 'she produced a deed...from the court of the Gentiles [i.e., Muslims] which she had authenticated before the judge. The judge had sworn her concerning the deed in the presence of honest (professional) Gentile witnesses'. See also the index at the end of volume 3 of Blau's edition, *Teshuvot ha-Rambam*, 210, s.v. *'arkha'ot shel goyim*. A quick search of the database of the Princeton Geniza Project browser, using an appropriate keyword like *goyim* ('gentiles', namely, Muslims) or *dinei goyim*, dramatically reveals the extent of Jewish recourse to Muslim courts. For Goitein's discussion of the phenomenon see *Med. Soc.*, 2:398-402.

35 Maimonides chastised a local Jewish judge for referring a dispute between two partners sharing ownership of a courtyard house to the Muslim court when that judge learned that one of the litigants had drawn up the agreement regarding leasing the house to renters in an Islamic tribunal. *Teshuvot ha-Rambam*, ed. Blau, 2:685-86 (no. 408).

36 I discuss these accommodations in my book (above note 6).

37 *Med. Soc.*, 1:164-69. Goitein introduced the term 'formal friendship' in his article 'Formal Friendship in the Medieval Near East', *Proceedings of the American Philosophical Society* 115 (1971), 484-89. See also A. L. Udovitch, 'Formalism and Informalism in the Social and Economic Institutions of the Medieval

Elsewhere I have described briefly how Maimonides came to terms with this new form of commercial agency that was unknown to the Talmud.[38] A full, detailed analysis of this important halakhic innovation and others will be presented in my forthcoming book.

Partnership with a Muslim

Here I discuss a halakha in Maimonides' Code that responds to a different common practice of Jewish businessmen, namely partnership with Muslims. As a matter of general principle, forming a partnership with a non-Jew is prohibited by the Talmud — and in the Mishneh Torah, for that matter — if the non-Jew is a pagan idolater.[39] Interreligious partnerships did, however, occur. Three issues concerned the rabbis. Since non-Jews are permitted to work on the Sabbath, the rabbis were worried that the non-Jewish partner, acting as agent for the Jew for half the work he did that day, would put the Jew in the position of violating the commandment to rest on the Sabbath. Second, the rabbis were concerned about the possibility that, in litigation with his Jewish partner, the pagan might have to take an oath and would naturally do so in the name of his god(s), or, being happy with the outcome of a business deal with a Jew, would go to his temple and thank his god(s). The Jewish partner would then be violating a Biblical prohibition that 'the names of other gods shall not be heard on your lips' (Exodus 23:13), which the rabbis took to mean: 'the name of a pagan god shall not be uttered because of you'. Thirdly, the Jewish partner would transgress the commandment 'You shall not place a stumbling block before the blind' (Leviticus 19:14). Idolaters worshiping their gods in their pagan temples were 'blind' to the fact that they were obligated to observe certain basic 'natural' laws, the 'Seven laws of the sons of Noah', among which was the commandment to worship one God alone.

In the Talmudic tractate on Idolatrous Worship ('Avoda Zara), the rabbis sought to regulate partnerships between Jews and pagans so as to prevent the

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Islamic World', in *Individualism and Conformity in Classical Islam*, ed. Amin Banani and Speros Vryonis (Wiesbaden: Harrassowitz, 1977), 61-81; Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge and New York: Cambridge University Press, 2006) and his articles listed in his bibliography; Jessica Goldberg, *Trade and Institutions in the Medieval Mediterranean: Geniza Merchants and their Business World* (Cambridge: Cambridge University Press, 2012). I discuss this scholarship in my article 'A Partnership Gone Bad: Business Relationships and the Evolving Law of the Cairo Geniza Period', *Journal of the Economic and Social History of the Orient*, 56 (2013), 218-63 and at greater length in my forthcoming book (above note 6).

38 Cohen, 'A Partnership Gone Bad', 249-50 and "The 'Custom of the Merchants' in Gaonic Jurisprudence and in Maimonides' '*Mishneh Torah*'", in *The Festschrift Darkhei Noam: The Jews of Arab Lands*, ed. Carsten Schapkow et al. (Leiden and Boston: Brill, 2015), 104–07.

39 Babylonian Talmud Sanhedrin 63b; Bekhorot 2b; Mishneh Torah, Laws of Agents and Partners, 5:10.

Jew from violating the above-mentioned injunctions. Unsurprisingly, the halakha assumes the partnership to be agricultural.

> If a Jew and an idolater (‘*oved kokhavim*, ‘star worshiper’) received a field in partnership (as sharecroppers), the Jew may not say to the idolater ‘take your portion (of the proceeds earned) on the Sabbath and I will (do the same) on a weekday’. If they had stipulated this at the outset, it is permissible, but if they are settling accounts, it is forbidden (‘Avoda Zara 22a).[40]

Manuscripts of the Talmud and the first printed edition, which was, in turn, based on a manuscript, have the word *goy*, usually translated ‘Gentile’, instead of ‘idolater’.[41] The word *goy* is applied in the Bible to the non-Israelite, idolatrous pagan nations, though, in its core meaning of ‘people’, it sometimes refers to the Israelite people themselves (Genesis 35:11; Deut 4:7). In Talmudic antiquity, certainly in the time of the Mishna, before the triumph of Christianity, the typical *goy* was an idolater. In medieval Europe, Christians suspected Jews of using the expression ‘*goyim*’ pejoratively to malign them, a problem that became acute when Christians began to become familiar with the Talmud in the twelfth century. Since it became dangerous for Jews to allow the word *goy*, with its assumed derogatory connotation, to appear in the pages of the Talmud, the expression ‘star worshiper’, an appellation unequivocally reserved for idolaters, was substituted for the term *goy* by Christian censors or by the Jews themselves.

European Jews in the early and high middle ages lived mostly in small communities dispersed far and wide, and depended heavily on doing business with their Christian neighbors. A theoretical belief that Christianity was a latter-day form of polytheism because of the belief in the Trinity, along with the concern that a Jew in partnership with a Christian would violate one or more of the three prohibitions mentioned above, complicated Jewish economic life. Thus the twelfth- and thirteenth-century commentators on the Talmud and Rashi, the Tosafists, found ways to differentiate between the Christians of their time and the pagans of old. The concern over Gentile oath-taking was therefore suspended, and business with Christians was sanctioned.[42] The concern about Jews benefiting from profits earned by a non-Jewish partner’s labor on the Sabbath remained, however.

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40 As explained by Rashi, AD loc., if, without formally stipulating conditions, the Jew instructs his non-Jewish partner to take the Sabbath earnings for himself, it is as if he appoints him his agent for half the work that day, which is forbidden. If, however, they stipulate this in advance, the partnership is valid, unless they wait each week to settle accounts.

41 My thanks to Christine Hayes for checking the manuscripts for me.

42 See Tosafot on ‘Avoda Zara 2a s.v. *lifnei eideihem shelosha yamim* and Jacob Katz, *Exclusiveness and Tolerance: Studies in Jewish-Gentile Relations in Medieval and Modern Times* (Oxford: Oxford University Press, 1961), 32-36. The medieval German commentator on Maimonides’s Code, *Haggahot maimuniyyot*, explains these things in his comments to Laws of Agents and Partners 5:10.

In the Islamic world, Jews were mostly concentrated in urban areas, where they engaged in commerce, banking, small artisanal industries, and retailing (as well as medicine and government service). Partnerships, whether among Jews or with non-Jews, principally Muslims, marked the economic order to a much greater extent than in the Talmudic period. A ninth-century Iraqi Gaon's repetition of the Talmudic rule prohibiting Jews from forming partnerships with Gentiles fell on deaf ears.[43] Jewish merchants entered into partnerships with Muslim merchants, doubtless in greater numbers than the occasional mention of this in Geniza documents and responsa indicate. Islamic law itself condones partnership with *dhimmīs*, provided the Muslim serves as the active partner, in order to forestall transactions involving items, like pork and wine, that are forbidden in Islam, or usury. In practice, however, as Jewish sources show, Muslims freely assumed the role of sedentary partner while the Jewish partner traveled and did business.[44] Interfaith partnerships in trade and in crafts were normal and frequent and offered Jews and Muslims ample opportunity to form bonds of friendship and trust, an essential ingredient in medieval merchant relations.[45]

In his halakhic writings, Maimonides maintained that Muslims were proper monotheists, hence not subject to restrictions the Talmud placed on interaction with idolaters.[46] Thus, the issue of a Muslim partner pronouncing a pagan oath, transgressing the commandment to worship one God, was a non-issue. The other problem that concerned the Talmudic sages — work done by a non-Jewish partner on the Sabbath — did matter, because of the very same halakhic principle operating for all non-Jews, regardless of religion: a Jew is not supposed to benefit from work done by a Gentile partner on the Jewish day of rest.

The Geonim in their day received many queries — some of them discovered among the Geniza fragments — about partnerships with Muslims and had to address the halakhic questions that such arrangements raised. The issue in their legal opinions is, as expected, not the validity of the partnership per se, but,

43 Mann, 'The Responsa of the Babylonian Geonim,' *Jewish Quarterly Review* 10 (1919), 332.

44 Cohen, *Under Crescent and Cross*, 96.

45 On interfaith commercial arrangements see *Med. Soc.*, 2:293-96.

46 See *Teshuvot ha-Rambam*, ed. Blau, 2:725-28 (no. 448), his famous letter to the Muslim proselyte Obadiah; also in Isaac Shailat, ed. *Iggerot ha-Rambam* (Letters and Essays of Moses Maimonides) (2 vols. Maaleh Adumim: Yeshivat Birkat Mosheh, 1988), 1:238-41; and Mishneh Torah, *Hilkhot ma'akhalot asurot*, Laws of Forbidden Foods 11:7 and 13:11. See Ya'akov (Gerald) Blidstein, 'The Status of Islam in Maimonidean Halakha' (Hebrew), in *Ra'av-tarbutiyut bi-medina demoqraṭit vi-yehudit* (Multiculturalism in a Democratic and Jewish State), ed. Menachem Mautner et al. (Tel Aviv: Ramot, 1998), 465-76, with references to other literature. Eliezer Schlossberg, 'Maimonides' Attitude towards Islam' (Hebrew), *Pe'amim* 42 (1990), 42-45, notes that in other, non-halakhic writings, Maimonides' attitude was harsher.

typically, the question of profits from work done by the Muslim on the Sabbath.[47] Characteristic of the transitional nature of Jewish economic life from agriculture to commerce in early Islamic Iraq, a responsum of R. Naṭronai b. Hilai (Gaon from 857/858 to 865/866), concerns 'a Jew and a Gentile (here, *goy* = Muslim) who acquired a field in partnership'.[48] Another Gaonic responsum, regarding a partnership in ploughing, asks whether, when the Gentile drives the animal to pull the plough on the Sabbath, his Jewish partner violates the commandment to let one's animals rest on that day.[49] Another questioner asked about the halakhic consequences when a Gentile irrigates a field held in partnership with a Jew on the Sabbath.[50] Notwithstanding Jews' extensive involvement in trade during the Gaonic period, often in partnership with Muslims, agriculture and interdenominational partnerships in agriculture did not completely cease.[51]

Maimonides received a question about an interfaith partnership between Jews and Muslims who operated a craft business together (the questioner wasn't sure if it was glass-making or goldsmithery). Asked what to do about earnings produced on the Sabbath, he ruled concisely that the profit earned on the Sabbath accrued to the Muslim alone, the earnings of Friday or any other weekday belonged to the Jewish partner alone, and the two should divide the rest of the week's profits equally between them.[52]

In the Code, which was intended as a new and permanent canon of Jewish law, Maimonides worked the everyday reality of interreligious partnerships into the language of the halakha. Departing from the text of the Talmud in 'Avoda Zara quoted above, however, and taking into account the transformed economy of the Islamic world, he codified an updated version of the ancient ruling, switching the emphasis from an agrarian to a commercial context and shifting it from the Laws of Idolatry to the Laws of the Sabbath.

> Regarding a person who forms a partnership with a Gentile (*goy* = Muslim) in a hand-craft, or in commerce or in a store (*bi-mela'kha o bi-seḥora o ba-ḥanut*), if they stipulated at the outset that the income of the Sabbath will be the Gentile's alone, be

47 For instance, Louis Ginzberg, *Geonica* (2 vols. New York: Jewish Theological Seminary, 1909), 2:187, 194-95; *Teshuvot geonei mizraḥ u-ma'arav*, ed. Joel Müller (Berlin: P. Deutsch, 1888),14b (no. 50) (partnership in hand-craft); *Teshuvot ha-geonim*, ed. Mussaphia 24-25 (nos. 65, 67, and 68).

48 *Teshuvot Rav Naṭronai bar Hilai Gaon*, ed. Robert (Yeraḥme'el) Brody (2 vols. Jerusalem: Ofeq Institute, 1994), 1:168-69 (no. 62). Brody (168 note 2) suggests that the substitution of the word 'purchased' (*laqeḥu*) for the word 'received (in contract as sharecroppers)' (*qibbelu*) found in the Talmud has to do with the specific circumstances of this particular partnership.

49 Ginzberg, *Geonica*, 2:195; also discussed in Shraga Abramson, *'Inyanot be-sifrut ha-geonim* (Jerusalem: Mossad Harav Kook, 1974), 263-64.

50 *Teshuvot ha-geonim*, ed. Mussaphia, 24 (no. 65).

51 Libson, *Jewish and Islamic Law*, 41.

52 *Teshuvot ha-Rambam*, ed. Blau, 2:360 (no. 204); *Med. Soc.*, 2:296.

> it a little or a lot, and the income of a different day in place of the Sabbath will be the Jew's alone, it is permissible. But if they did not stipulate this at the outset, then when they come to divide (things) up, the Gentile takes the income of all the Sabbaths for himself and the rest they divide between them. He does not add anything for him (the Jew) for the Sabbath unless they stipulated (such) at the outset. If they received a field in partnership as sharecroppers, the law is the same (Laws of the Sabbath 6:17).

In the next halakha (6:18) Maimonides echoes the opinion of the Geonim, but adds at the beginning a nuance of his own.

> If they did not stipulate (at the outset) and came to divide up the profit and the income of the Sabbath is not known, it is my opinion that the Gentile should take one-seventh for himself and the rest should be divided (between them). If a person gives money to a Gentile to do business with it, even though the Gentile transacts business on the Sabbath, he (the Jewish partner) shares the profit with him equally. Thus ruled all the Geonim.

Several things are to be remarked on here. First, Maimonides places the ruling among the Laws of the Sabbath, not where someone familiar with the Talmud would expect to find it in the Code, namely, among the Laws of Idolatry. He did so, it seems, because the essential issue in partnership with a member of the dominant Gentile group in his own milieu was work done on the Sabbath, not the idolatrous nature of the partner's religion. Since Maimonides himself ruled that Muslims were steadfast monotheists, the Laws of Sabbath constituted for him a more logical and essential place for the halakha.

Noteworthy, too, is Maimonides' use of the word *goy*, found in many printed versions of the Code.[53] In the Muslim world *goy* was non-pejorative. It was the word standardly applied by Jews to Muslims (Christians were called *naṣrānī*, the normal medieval Arabic term, or *'arel*, a Hebrew word meaning 'uncircumcised').[54] Conversely, when repeating elsewhere the abovementioned Talmudic halakha

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53 Reflecting the orientation of Jews from Christian lands, in some commentaries the term is *nokhri*, 'heathen foreigner'; e.g. Maggid Mishneh, by Vidal of Tolosa, Spain, 14th century, and Leḥem Mishneh, by the 16th-century Salonican rabbi Abraham de Boton, whose ancestors had been expelled from Christian Spain. In some late commentaries the term *kuti* (Cuthean), a name for the sect of the Samaritans, is found. On *kuti* as a euphemism for expurgated *goy* in the Talmud see William Popper, *The Censorship of Hebrew Books* (New York: Burt Franklin, 1899), 59. The famous Gaon of Vilna, Elijah ben Shlomo Zalman Kremer (1720-97), whose comments are printed in the margin of the Talmud page, had '*goy*' in his printed Talmud.

54 *Med. Soc.*, 2:278. Characteristically, a query to Maimonides concerning two sisters who owned a portion of a courtyard-house in Alexandria with a *goy* refers to him in the next sentence as a Muslim. *Teshuvot ha-Rambam*, ed. Blau, 1:145 (no. 90). Juxtaposition of *goy* and *'arel*: ibid., 10 (no. 7). Cf. also S. D. Goitein and Mordechai A. Friedman, *India Traders of the Middle Ages: Documents from the Cairo Geniza ('India Book')* (Leiden and Boston: Brill, 2008),133 note 55. See also Libson, *Jewish and Islamic Law*, 283 note 21.

prohibiting partnership with an idolater (Agents and Partners 5:10), Maimonides eschews the word *goy*; rather, he writes, 'it is forbidden to form a partnership with an idolater' (*'oved kokhavim u-mazalot*, 'worshiper of stars and constellations').

Third, Maimonides, who was well aware of the diversified urban occupational profile of the Jews of his time, gives primacy to hand-crafts, commerce, and retailing. In addition to the vast amount of data on commerce in the Geniza, the documents attest abundantly to the widespread Jewish involvement in crafts, as many as 265 different types.[55] The agricultural partnership envisioned by the Talmud was sharecropping, hence the language 'received a field in partnership', whereas the most common partnerships in Maimonides' time, apart from partnerships in long-distance trade, were small-scale craft partnerships, which Goitein called 'industrial partnerships'.[56]

Fourth, Maimonides introduces as his own opinion a method for dividing the income of the partnership when the proceeds of the Sabbath were unknown. Rather than opening the door to arguments, the codifier ordains that one-seventh of the week's total earnings should go to the Muslim and the income for the other six days should be divided equally between them. In this way, he sought to avoid weekly haggling between the Jew and his Muslim partner, a logical — and equitable — solution, aimed, it seems, at avoiding conflict that could end up in litigation in an Islamic court, which had exclusive jurisdiction in mixed litigations between Muslims and non-Muslims.

Finally, as a conscientious codifier of ancient Jewish law, Maimonides does not suppress the Talmudic language specifying 'field' entirely. For one thing, Jews in the Geniza world were not completely detached from the soil.[57] In Maimonides' agriculturally rich Andalusian homeland, in particular, Jews still farmed in the eleventh and twelfth centuries. The responsa of the great Talmudist R. Isaac Alfasi of Lucena, Spain (d. 1103), and of his student, R. Joseph ibn Migash (d. 1141), bear ample witness to this.[58] Moreover, since Maimonides intended the Code as a permanent canon of Jewish law, one that was to remain in effect even in the messianic age, he had to include all possibilities, including agricultural partnerships. Nonetheless, characteristic of his method of updating, he shifted the word 'field' to the end, almost as an afterthought, subordinating the original, agrarian context to other, more prominent aspects of the urban economy (crafts, commerce, and

55 *Med. Soc.*, 1:99.

56 Ibid., 1:362-67, Appendix C Industrial Partnerships.

57 *Med. Soc.*, 1:116-27.

58 *She'elot u-teshuvot R. Yiṣḥaq Alfasi*, ed. Wolf Leiter (Pittsburgh, PA: Makhon Ha-Rambam, 1954), 38b (no. 100; sale of a field); 38b-39a (no. 101; a vineyard); 43b-44a (no. 131; fig tree grove in Granada); 54a (no. 177; a fruit grove). *She'elot u-teshuvot R. Yosef Migash*, ed. Simḥa Ḥasida (Jerusalem: Makhon Lev Sameaḥ, 1991), 149-50 (no. 156; sale of a garden to a son); 86-87 (no. 100; two brothers partners in a field); 105 (no. 116; a vineyard).

retailing) in his own day — with the pithy sentence: 'If they received a field in partnership (as sharecroppers), the law is the same'.

In contrast, Alfasi, whose epitome of the Talmud, the *Halakhot*, sticks closely to the language and running text of the Talmud, and who deals with Jewish agricultural activity in Spain in his responsa, limits the example to partnership in a field.[59] This makes Maimonides' departure from the language of the Talmud here all the more striking.

A responsum of his son, Abraham, presents the same ruling in answer to a query regarding a town that holds its market on the Sabbath. The questioner wanted to know if it was permissible to appoint a Muslim as his agent (*wakīl*) to buy and sell on his behalf in that town on the Sabbath. Abraham ruled favorably, provided the Jew did not state explicitly to the Muslim that he should do so on that day.[60] This responsum is particularly significant because it proves that Jews engaged with Muslims, not only in formal partnerships, but also in informal agency relations of the type that dominated commercial collaboration in the Geniza world.

The commentators on the Code, who discuss the halakhic aspects of the passage in Maimonides' Code, say nothing about the transposition of the law of partnership with a non-Jew from one context to another, namely, from the Laws of Idolatry to the Laws of the Sabbath.[61] Nor do they flinch at the addition of the words 'hand-craft', 'commerce' and 'store' featured at the beginning, or the relegation of the Talmud's original language about partnership in a field to the end. There was Gaonic precedent for expanding the range of partnerships to encompass urban professions, and Maimonides' formulation fit the post-Talmudic economy with which the commentators themselves were familiar. The addition, 'commerce or store', was adopted later on by the Shulḥan 'Arukh, the sixteenth-century code by R. Joseph Caro, which is canonical for traditional Jews to this day, along with additional examples of non-agricultural partnerships omitted by Maimonides, though, notably, out of faithfulness to the Talmud, Caro restored the word 'field' to its pride of place at the beginning of the list.[62]

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59 Page 7b in the pages of Alfasi's epitome in the printed Talmud.

60 *Teshuvot Rabbenu Avraham ben ha-Rambam* (Abraham Maimuni Responsa), ed. A. H. Freimann and trans. S. D. Goitein (Jerusalem: Mekize Nirdamim, 1937), 53-54 (no. 51). Some twenty Gaonic responsa regarding economic dealings with Gentiles that impinge on the commandment to rest on the Sabbath were found by B. M. Lewin, *Oṣar ha-Geonim, Volume 2: Shabbat* (Haifa: N. Warhaftig Press, 1930), 10-17.

61 Summarized by Joseph Kafiḥ in his commentary on the Code, *Mishneh Torah* (23 vols. Kiryat Ono: Makhon Mishnat Ha-Rambam, 1984-96), 3:132-34.

62 *Oraḥ ḥayyim* 245:1. If the amount of Sabbath earnings was known, the Gentile was entitled to that, but if not, Maimonides' solution is to award one-seventh of the entire week's income to him.

Defending Jewish Judicial Autonomy

I believe we can suggest a reasonable motive for Maimonides' accommodation in the Code of merchant practice, of which the halakha just discussed is but one of many.[63] Like the Geonim, Maimonides was fully aware of the extensive interplay between Jewish and Islamic commercial practice and of Jewish reliance on Islamic law and adjudication. In face of this frequent and troublesome crossing of boundaries, Maimonides, like the Geonim, took pains to accommodate the new reality while preserving the integrity of Jewish judicial autonomy.

Emblematic of this delicate balancing act is the well known Maimonidean *taqqana* of 1187 that included a provision prohibiting recourse to Islamic courts, though in a responsum mentioning the *taqqana* he makes an exception for 'a person who is unable to go to [alt. is prevented from going to] (*tamanna'a min*) a Jewish court'.[64] This proscription, with the exception noted, was already anticipated by him a decade or more earlier in a stern ruling in the Code in the Laws of the Sanhedrin (26:7). Maimonides signaled the importance of this halakha by making it the climax of twenty-six chapters dealing with every conceivable aspect of courts of law, adjudication, and punishments.

> Whoever adjudicates by Gentile law (*dinei goyim*)[65] and in their courts, even if their law is similar to Jewish law, is a wicked person. It is as if he cursed and blasphemed and raised his hand against the Torah of Moses our master. As is stated: 'These are the rules that you shall set before them' (Exodus 21:1), 'before them' and not before the Gentiles, 'before them' and not before lay judges. If the Gentiles possess coercive power and a Jewish litigant's contending party is violent and he (the plaintiff) cannot get his due in a Jewish court, he should first summon him (the other party) to the Jewish court, and if the latter refuses to appear, he should obtain permission from the Jewish court and extract his due from the contending party in a Gentile court.

The Talmud (BT Giṭṭin 88b) is Maimonides' source, but the language and rhetoric, according to which the violator is said to have 'cursed and blasphemed and raised his hand against the Torah of Moses our master', goes well beyond the language of the Talmud and hints at the scope of the problem in his own society. In a kind of mirror image of the Muslim debate regarding jurisdiction over *dhimmī* affairs, he ruled in this halakha that recourse to Muslim courts was permissible

63 For others see my forthcoming book (above note 6).

64 On the *taqqana*, see *Teshuvot ha-Rambam*, ed. Blau, 2:624 (no. 347) and note 4; 2:685 (no. 408); 1:39-40 (no. 27, containing the above-mentioned exception).

65 The reading *dinei goyim* of many manuscripts and some commentaries, rather than *dayyanei goyim*, 'Gentile judges', of the printed editions, is to be preferred. See *Mishneh Torah*, ed. Shabse Frankel (15 vols. Jerusalem: Hoṣa'at Shabse Frankel, 1975-2007), vol. 12 *Shofeṭim*, 88 (note in margin) and 12:598.

— *with the authorization of the Jewish court*. He doubtless knew that most Islamic law schools extended *sharī'a* jurisdiction to non-Muslims even if only one of the contending parties wished to appeal to the *qāḍī*.[66] His innovative halakha, discussed by me elsewhere, in which Maimonides drew an analogy between an unpaid business agent and the Mishnaic partner known as 'son of the house', thereby holding an agent suspected of misdoing liable to the same oath of probity as the Mishnaic 'oath of partners',[67] seems to have been motivated by the same desire: to discourage disputing Jewish merchants from repairing to Muslim tribunals.

Like the Geonim, Maimonides knew that Jews, especially Jewish merchants, regularly applied to Islamic courts, and, like the Geonim, he presumably knew that Islamic courts had a fairly decent record in meting out justice to *dhimmī*s. In this fluid environment of legal pluralism, in which non-Muslims could more or less freely choose between parallel legal systems and in which Muslim judges normally dealt fairly with non-Muslims, Maimonides' *taqqana* of 1187, and especially his ruling at the end of the Laws of Sanhedrin in the Code, were meant to impose a measure of control over a widespread and patently irreversible phenomenon. Maimonides' solution for preserving Jewish judicial autonomy was to reserve authority for the Jewish judges to determine when and under what circumstances the principle of exclusive Jewish adjudication could be suspended.[68] If the Jewish establishment could not prevent Jews, particularly Jewish merchants, from resorting to Muslim courts, at least they could regulate the practice by monitoring it.

Generations later, in the middle of the fourteenth century, Maimonides' great-great grandson, the Nagid Joshua (d. 1355), the administrative and judicial leader of the Jewish community of Egypt, presided over a special Jewish tribunal that screened cases before they could be submitted to a Muslim judge. It is possible, indeed likely, that this institution, called *beit din li'l-mutaḥaddithīn*, 'the court for "informers"', that is, a court that authorized litigation in a Muslim religious

66 Libson, *Jewish and Islamic Law*, 81-82.

67 See above note 38 and in my book (above note 6) chapter 7.

68 On legal pluralism as a framework for evaluating Jewish and Christian autonomy in the Islamic Middle Ages see Simonsohn, *A Common Justice.* Marina Rustow addresses the same issue from a different perspective, showing how Jewish leadership in medieval Egypt actively sought the intervention of Muslim state authorities in internal communal affairs when it served their interests, despite the adverse effect this could have on Jewish autonomy. Marina Rustow, 'At the Limits of Communal Autonomy: Jewish Bids for Intervention from the Mamluk State', *Mamluk Studies Review* 13 (2009), 133-59. In a suggestive article that indirectly impinges on the issue of the autonomy of non-Muslim communities, Timur Kuran uses the concept of legal pluralism as the operative concept in explaining why non-Muslims disproportionately dominated economic modernization in the Middle East beginning in the late 18th century. They had access to the jurisdiction of European courts in the Middle East and were able to invoke the protection of European colonial powers. This enabled them to take advantage of the legal structure of modern capitalism and gain an advantage over Muslims, who were unable to take shelter in European courts because of the requirement that they live by Islamic law alone. Timur Kuran, 'The Economic Aspect of the Middle East's Religious Minorities: The Role of Legal Pluralism', 33 *Journal of Legal Studies* (June, 2004), 475-515.

court, owed its origins to Maimonides' *taqqana* of 1187 and particularly his ruling in the Code at the end of the Laws of Sanhedrin. Like his illustrious ancestor, and responding to the many transformations in Jewish life under Islam, Joshua Nagid used this court to enforce a semblance of Jewish authority and judicial autonomy in face of powerful centrifugal forces.[69]

Jews in Muslim countries continued to capitalize on the opportunity that Muslim courts offered right down into the twentieth century. The records of these courts have proved to be an invaluable source for the history of Jews in Islamic lands in later medieval and modern times. At the same time they illustrate the *longue durée* of Jewish ease in Islamic courts as well as Muslim fairness when dealing with *dhimmī*s.[70] Though legally and socially inferior to Muslims — subject to restrictions imposed by the *dhimma* system right down to the nineteenth

69 Mark R. Cohen, 'Correspondence and Social Control in the Jewish Communities of the Islamic World: A Letter of the Nagid Joshua Maimonides', *Jewish History* 1 (Fall 1986), 39-48. I did not make the connection with Maimonides in that article.

70 Amnon Cohen and Elisheva Simon-Pikali, *Yehudim be-veit ha-mishpaṭ ha-Muslemi: ḥevra kalkala ve-irgun qehillati bi-Yerushalayim ha-'Otmanit: ha-me'ah ha-shesh-'esreh* (Jews in the Moslem Religious Court: Society, Economy and Communal Organization in the XVIth Century Documents from Ottoman Jerusalem) (Jerusalem: Yad Izhak Ben-Zvi, 1993); Amnon Cohen, *Yehudei Yerushalayim ha-me'ah ha-shesh-'esreh lefi te'udot turkiyot shel beit ha-din ha-shar'ī* (Ottoman Documents on the Jewish Community of Jerusalem in the Sixteenth Century) (Jerusalem: Yad Izhak Ben-Zvi, 1976); idem, *A World Within: Jewish Life as Reflected in Islamic Court Documents from the Sijill of Jerusalem (XVIth Century)* (2 vols. Philadelphia: Center for Judaic Studies, University of Pennsylvania, 1994); idem, *Jewish Life under Islam: Jerusalem in the Sixteenth Century* (Cambridge, MA: Harvard University Press, 1984); Amnon Cohen and Elisheva Simon-Pikali, *Yehudim be-veit ha-mishpaṭ ha-Muslemi: ḥevra kalkala ve-irgun qehillati bi-Yerushalayim ha-'Otmanit: ha-me'ah ha-sheva'-'esreh* (Jews in the Moslem Religious Court: Society, Economy and Communal Organization in the XVIIth Century Documents from Ottoman Jerusalem) (2 vols. Jerusalem: Yad Izhak Ben-Zvi, 2010); eidem, *Yehudim be-veit ha-mishpaṭ ha-Muslemi: ḥevra kalkala ve-irgun qehillati bi-Yerushalayim ha-'Otmanit: ha-me'ah ha-shemoneh-'esreh* (Jews in the Moslem Religious Court: Society, Economy and Communal Organization in the XVIIIth Century Documents from Ottoman Jerusalem) (Jerusalem: Yad Izhak Ben-Zvi, 1996); eidem, *Yehudim be-veit ha-mishpaṭ ha-Muslemi: ḥevra kalkala ve-irgun qehillati bi-Yerushalayim ha-'Otmanit: ha-me'ah ha-tesha'-'esreh* (Jews in the Moslem Religious Court: Society, Economy and Communal Organization in the XIXth Century: Documents from Ottoman Jerusalem) (Jerusalem: Yad Izhak Ben-Zvi, 2003); Joseph R. Hacker, 'Jewish Autonomy in the Ottoman Empire: Its Scope and Limits. Jewish Courts from the Sixteenth to the Seventeenth Centuries', in Avigdor Levy, ed., *The Jews of the Ottoman Empire* (Princeton: Darwin Press and Institute of Turkish Studies, 1994), 153-202; Haim Gerber, *Crossing Borders: Jews and Muslims in Ottoman law, Economy and Society* (Istanbul: Isis Press, 2008), 70-71; Najwa al-Qattan, 'Dhimmīs in the Islamic court: Legal Autonomy and Religious Discrimination', *International Journal of Middle East Studies* 31 (1999), 429-44; Élise Voguet, 'Les communautés juives du Maghreb central à la lumière des *fatwa*-s mālikites de la fin du Moyen Âge', in *The Legal Status of Ḏimmī-s in the Islamic West*, eds Fierro and Tolan, 301-05; Jessica Marglin, 'In the Courts of the Nations: Jews, Muslims, and Legal Pluralism in Nineteenth-Century Morocco' (PhD dissertation, Princeton University, 2013); Aomar Boum, *Memories of Absence: How Muslims Remember Jews in Morocco* (Stanford: Stanford University Press, 2013), 43-55 (cases of litigation in *qāḍī* courts involving Jews in southern Morocco, prior to the mass exodus of most of Moroccan Jewry after 1956); Ron Shaham, 'Jews and the Sharī'a Court in Modern Egypt', *Studia Islamica* 82 (1995), 113-36; Mark S. Wagner, *Jews and Islamic Law in Early 20th-Century Yemen* (Bloomington and Indianapolis: Indiana University Press, 2015).

century (the twentieth century in Yemen) — access to the same legal system as their Muslim neighbors permitted the Jews of the pre-modern Islamic world to enjoy some of the benefits the Jews of Christian Europe would achieve only through their formal, civil emancipation following the French Revolution, but without compromising their religious and communal identity and solidarity.

THE MELKITES AND THEIR LAW: BETWEEN AUTONOMY AND ASSIMILATION

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As is well known, the indigenous Christians under Muslim rule, characterized as *ḏimmīs*, were granted far-reaching, internal autonomy in legal matters, especially in the areas of matrimonial and inheritance law. Because they were defined as a religious community, leadership and adjudication were the responsibility of the respective religious leaders.[1] In Mamluk Egypt this function of the Greek orthodox patriarchs of Alexandria is demonstrated in a document of approbation of which the text could be found in the chancery manuals of Ibn Faḍl Allāh al-ʿUmarī (d. 749/1349) and al-Qalqašandī (d. 821/1418):

> 'He is the leading figure amongst the members of his religious community, and the one with legal authority over them (*al-ḥākim ʿalayhim*) whilst ever he remains their head. They refer to him in all legal matters concerning what is illicit, and for all their internal legal affairs (*fī l-ḥukm baynahim*) in which judgement is to be made according to the divine revelation of those parts of the Torah not abrogated by the Gospels. The religious system (or rather: the revealed law, *šarīʿa*) of the Gospels is founded on forbearance and long-suffering …'[2]

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1 For the status of the *ḏimmīs* cf. A. Fattal, *Le statut légal des non-musulmans en pays d'Islam*, Recherches publiées sous la direction de l'Institut de Lettres Orientales de Beyrouth 10 (Beirut 1958); W. Kallfelz, *Nichtmuslimische Untertanen im Islam: Grundlage, Ideologie und Praxis der Politik frühislamischer Herrscher gegenüber ihren nichtmuslimischen Untertanen mit besonderem Blick auf die Dynastie der Abbasiden (749-1258)*, Studies in Oriental Religions 34 (Wiesbaden 1995); M. Levy-Rubin, *Non-Muslims in the Early Islamic Empire. From Surrender to Coexistence*, Cambridge Studies in Islamic Civilization (Cambridge 2011). For the position of the heads of the Churches cf. F. Wittreck, *Interaktion religiöser Rechtsordnungen. Rezeptions- und Translationsprozesse dargestellt am Beispiel des Zinsverbots in den orientalischen Kirchenrechtssammlungen*, Kanonistische Studien und Texte 55 (Berlin 2009), pp. 20f., with additional literature.

2 Ibn Faḍl Allāh al-ʿUmarī, *al-Taʿrīf bil-muṣṭalaḥ aš-šarīf* (Cairo 1894/1895), pp. 144f.; al-Qalqašandī, *Ṣubḥ al-aʿšā fī ṣināʿat al-inšā'*, 14 vols (Cairo 1963-72, repr. 1913-19), XI, p. 393; trans. by C. E. Bosworth, 'Christian and Jewish Religious Dignitaries in Mamlûk Egypt and Syria: Qalqashandī's Information on their Hierachy, Titulature, and Appointment', *International Journal of Middle East Studies*, 3 (1972), 59-74, 199-216 (p. 201). Further examples of similar documents of approbation could be found in N. Edelby, 'L'origine des jurisdictions confessionnelles en terre d'Islam', *Proche-Orient Chrétien*, 1 (1951), 192-208 (pp. 206f.); L. Conrad, 'A Nestorian Diploma of Investiture from the Taḏkira of Ibn Ḥamdūn: The Text and its Significance', in *Arabica et Islamica. Festschrift for Iḥsān ʿAbbās on His Sixtieth Birthday*, ed. by Wadād al-Qāḍī (Beirut 1981), pp. 209-29; G. Khan, 'A Document of Appointment of a Jewish

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

 10.1484/M.RELMIN-EB.5.109348

It was possible, under these circumstances, for a Melkite legal system to develop. Two phases could be distinguished in the development of their collections of laws. In the eighth century work began on translating into Arabic and compiling relevant texts. Most of these amounted to various apostolic or pseudo-apostolic canons as well as to regulations of the early local synods and the ecumenical councils.[3] In a second phase, the beginning of which dates back at least to the twelfth century, the collection was extended to include a number of texts relating to civil law one of them being the Arabic translation of the Greek *Procheiros Nomos*, which was published around 900 by the Byzantine emperor and constitutes a selection of the most commonly used regulations of public and civil law, in 40 titles taken from Justinian's Corpus.[4]

From the thirteenth century onwards no noteworthy extension of the Melkite legal collection took place. A comparison with Byzantine law reveals that the Melkites despite their affiliation to the Byzantine imperial Church adopted the corpus of the Byzantine law books only partially.[5] The oldest part of the Melkite collection was indeed an independent tradition of the so called Antiochene *Corpus Canonum* (or *Graecum*)[6] which constitutes also the basic stock of the legal collections of the other Oriental Churches.[7] Furthermore various legal texts were included in the Melkite Corpus that were unknown or not approved in

Leader in Syria Issued by al-Malik al-Afḍal ʿAlī in 589 AH/1193 AD', in *Documents de l'Islam médiéval: Nouvelles perspectives de recherche*, ed. by Y. Rāġib (Cairo 1991), pp. 97-116 (especially p. 99 [Arabic] and p. 102 [English]).

3 J.-B. Darblade, *La collection canonique arabe des Melkites (XIII^e-XVII^e siècles)*, Codificazione canonica orientale: Fonti, serie 2, fasc. 13 (Harissa 1946), pp. 48 and 154f.; J. Nasrallah, *Histoire du mouvement littéraire dans l'église melchite du V^e au XX^e siècle. Contribution à l'étude de la littérature arabe chrétienne*, vol 2, T. 2 (750-X^e s.) (Louvain and Paris 1988), pp. 189 and 195f.; D. Schon, *Codex Canonum Ecclesiarum Orientalium und das authentische Recht im christlichen Orient. Eine Untersuchung zur Tradition des Kirchenrechts in sechs katholischen Ostkirchen*, Das östliche Christentum, N.F. 47 (Würzburg 1999), pp. 96-98 and 101f.; H. Kaufhold, 'Sources of Canon Law in the Eastern Churches', in *The History of Byzantine and Eastern Canon Law to 1500*, History of Medieval Canon Law 4, ed. by W. Hartmann and K. Pennington (Washington 2012), pp. 215-342 (pp. 225-36).

4 Darblade, *La collection canonique arabe*, p. 155; E. Jarawan, *La collection canonique arabe des Melkites et sa physionomie propre d'après documents et textes en comparaison avec le droit byzantin*, Corona lateranensis 15 (Rome 1969), pp. 22-30; Nasrallah, *Histoire du mouvement littéraire*, II, 2, pp. 189 and 195f., and III, 1, pp. 347-55; Schon, *Codex Canonum Ecclesiarum Orientalium*, pp. 98-102.

5 Darblade, *La collection canonique arabe*, pp. 164-67; Nasrallah, *Histoire du mouvement littéraire*, II, 2, pp. 189 and 195f., and III, 1, p. 343.

6 Jarawan, *La collection canonique arabe*, pp. 95-109.

7 E. Schwartz, 'Die Kanonessammlungen der alten Reichskirche', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kanonistische Abteilung 25, 56 (1936), 1-114; W. Selb, 'Die Kanonessammlungen der orientalischen Kirchen und das griechische Corpus Canonum der Reichskirche', in *Speculum iuris et ecclesiarum. Festschrift für* Willibald M. Plöchl zum 60. Geburtstag, ed. by H. Lentze and I. Gampl (Vienna 1967), pp. 371-83; idem, art. 'Orientalisches Kirchenrecht', in *Kleines Wörterbuch des Christlichen Orients*, ed. by J. Aßfalg with P. Krüger (Wiesbaden 1975), pp. 168-78; Kaufhold, 'Sources of Canon Law in the Eastern Churches', p. 216.

Byzantium and whose origin could be described as common Syrian or common oriental, as the Statutes of the Old Testament or the Syrian-Roman Lawbook.[8] Until the translation of the *Procheiros Nomos* Justinian's *Corpus Iuris* was not adopted by the Melkites, again similar to the other Oriental Churches.

The expansion of the Melkite legal collection which took place in the twelfth century, maybe even earlier,[9] has to be seen in the context of the general development of the law of the Oriental Churches under Muslim rule. The East- and West-Syrian Churches disposed of a rich tradition of their own canons that were issued by a numerous synods between the 5th and the 14th centuries.[10] From the twelfth/ thirteenth century scholars in all Oriental Churches were increasingly busy with legal matters. Thus it seems that the Melkites participated in a general trend. However we do not have any systematic works on law of the Melkites and no Melkite legal scholar is known by name from this period.[11] In contrast the Copts, Armenians, West- and East-Syrians had since the thirteenth or respectively the 14th century their own Nomokanons written for example by Bar Hebraeus, Abū l-Fadāʾil Ibn al-ʿAssāl, or ʿAḇdīšō bar Brīḵā.[12] However the achievements of the Melkites in the sphere of law should not be underestimated. By translating the *Procheiros Nomos* into Arabic a totally new text was incorporated into the Melkite collection.[13]

But what were the motives for these extensions of the existing legal collections by all the Oriental Churches at this period? In fact the Muslim rulers appear to have expected that the *ḏimmī* communities were capable of existing as legally autonomous units. For this reason, at least in certain cases, the creation of legal collections was requested on the part of the Muslims in order to preserve order

8 Darblade, *La collection canonique arabe*, p. 166. W. Selb, *Orientalisches Kirchenrecht*, vol 1: *Die Geschichte des Kirchenrechts der Nestorianer (von den Anfängen bis zur Mongolenzeit)* (Vienna 1981), p. 38. For the dissimination of the Statutes of the Old Testament cf. G. Graf, *Geschichte der christlichen arabischen Literatur*, 5 vols (Città del Vaticano 1944-53), I, p. 584; for the Syrian-Roman Lawbook cf. *Das Syrisch-römische Rechtsbuch*, ed., trans and comm. by W. Selb and H. Kaufhold, 3 vols (Vienna 2002).

9 Cf. J. Pahlitzsch, *Der arabische Procheiros Nomos. Untersuchung und Edition der arabischen Übersetzung eines byzantinischen Rechtstextes*, Forschungen zur Byzantinischen Rechtsgeschichte 31 (Frankfurt am Main 2014), p. 33*, for the dating of the Arabic translation of the *Procheiros Nomos*.

10 Kaufhold, 'Sources of Canon Law in the Eastern Churches', pp. 216f.

11 Nikon from the Black Mountain from the second half of the eleventh century, who was of Byaxntine origin, is an exception; for the Arabic tradition of his Taktikon cf. J. Rassi, 'Le manuscrit arabe Sinaï 385: S'agit-it desPandectes de Nicon de la Montagne Noire (XIe siècle)?', *Parole de l'Orient*, 34 (2009), 157-236. The Greek original has recently been published: *Das Taktikon des Nikon vom Schwarzen Berge. Griechischer Text und kirchenslawische Übersetzung des 14. Jahrhunderts*, Monumenta linguae Slavicae dialecti veteris 62, ed. by C. Hannick with P. Plank, C. Lutzka and T. Afanas'eva (Freiburg 2014). However Nikon's writings were not included into the Melkite legal collections; cf. also Schon, *Codex Canonum Ecclesiarum Orientalium*, pp. 106-13.

12 Kaufhold, 'Sources of Canon Law in the Eastern Churches', pp. 252f., 285f., and 311-13.

13 The Arabic translation of the *Procheiros Nomos* was published by Pahlitzsch, *Der arabische Procheiros Nomos*.

and inner peace within the respective *ḏimmī* communities.[14] Thus according to the Coptic 'History of the Patriarchs' the Coptic Patriarch Cyril II issued 1086 AD a pastoral letter with 34 canons at the behest of a Muslim emir. Inspired by God, the emir said the following to the ecclesiastics assembled in his presence:

> 'Be all of you of one law (*šarʿ wāḥid*), and do not disagree, and obey your chief, and be like him ... These Canons (*al-qawānīn*) which ye have compiled, I have no need of them, but I demanded them of you in order that the observance of them may be renewed among you, since it came to my knowledge that ye were far from keeping to them and (from) reading them'.[15]

In a colophon of the Armenian Nerses of Lambron, who completed translations of Syriac and Byzantine legal texts, this was described in great detail:

> '... in the year 1193...there arose a request to his holiness (the Armenian *Katholikos* Grigor IV) from the inhabitants of the cities and the country districts for a city law; for the Ishmaelite prefects, who sat in the cities as judges, had no jurisdiction over the Armenians, but referred those seeking justice to their own law; then an order of the chief *Meliks* to the judges of the cities stated, that they were to leave these ones to the court of their national law. The contesting parties tended to turn to the church for the statutory law to be commanded by the priests and the chief priests; they however possessed no codified ordinances, by which basis the law is decided, as they saw with other nations, Christian as well as Muslim, that is among the Romans (i.e. Latins), the Hellenes (i.e. Byzantines), the Syrians, the Egyptians, the Arabs, the Persians, and our current rulers the Turks. ... When we afterwards made inquiries in the library of the residence of the *katholikos*, we found no law, only canons ... a civil law however was not found among the Armenians ... Being very disappointed with this state of affairs, the patriarch (*hayrapet*) commissioned further investigations among the other nations'.[16]

In the law book of Mḫitʿar Goš, which in contrast to the Cilician milieu of Nerses of Lambron was composed in Greater Armenia, is a quite similar statement, that

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14 R. B. Rose, 'Islam and the Development of Personal Status Laws Among Christian Dhimmis: Motives, Sources, Consequences', *The Muslim World* 72 (1982), 160-79 (p. 165).

15 Sāwīrus Ibn al-Muqaffaʿ, *Tārīḫ baṭārikat al-kanīsa al-miṣrīya*, II, 3: *Christodoulos-Michael (AD 1046-1102)*, ed. and trans. by A. S. Atiya, Y. ʿAbd Al-Masīḥ, and O. H. E. Burmester as *History of the Patriarchs of the Egyptian Church, Known as the History of the Holy Church* (Cairo 1959), pp. 216 (Arabic), 339f. (English). Graf, *Geschichte der christlichen arabischen Literatur*, II (1947), pp. 323f.

16 An Edition of the text is in N. Akinian, 'Life, Work and literary activity of St. Nerses of Lambron' (in Armenian), *Handes Amsory*, 68 (1954), pp. 1805-. I am indebted to Zachary Chitwood for the translation. A German translation could be found in J. Karst, 'Grundriß der Geschichte des armenischen Rechts', *Zeitschrift für vergleichende Rechtswissenschaft*, 19 (1906), 313-411 333-42 (pp. 337f.), which has been reprinted in H. Kaufhold, *Die armenischen Übersetzungen byzantinischer Rechtsbücher. Erster Teil: Allgemeines, zweiter Teil: Die 'Kurze Sammlung' ('Sententiae Syriacae')*, Forschungen zur byzantinischen Rechtsgeschichte 12 (Frankfurt a. Main 1997), pp. 8f.

the accusation was made both by Christians and non-Christians that there was no 'code (*datastan*)', that is civil legislation, for which reason many honour the unbelievers 'and hold their statutes lawful'. As the seventh reason for the composition of this law book is given correspondingly 'lest, if the code does not exist in writing, people have recourse to foreigners (i.e. unbelievers)'.[17]

On the one hand this example demonstrates the openness of the Oriental Churches to the adaptation of the texts of other churches as apparent from the adoption of the Byzantine *Ecloga* and *Procheiros Nomos* by the Coptic Church.[18] On the other hand clearly not only the Melkites lacked civil law texts until the twelfth century in their own language. It is noteworthy that in roughly the same period they all busied themselves with correcting this problem. If one believes the sources and we are dealing here with not a mere literary *topos*, then a significant reason for this consisted of the direct request of the Muslim authorities. In Mḫitʿar Goš it is however also apparent, that the rich legal literature of the Muslims was seen as a sign of cultural superiority over non-Muslim minorities, which one wanted to counter via the expansion of collections of their own law.[19]

The increasing collection, recording and to an extent standardization of church legal praxis represents the attempt of the church leadership to reach a greater degree of legal certainty in their respective communities, and thus to hinder the members of their respective churches from turning from their own ecclesiastical jurisdiction to that of the Muslims.[20] This was already a problem from the time of the Early Islamic period for the Oriental churches, as well as for Judaism. Thus in the sixth canon of the Nestorian *Katholikos* George of the year 676 a strict prohibition is uttered:

> 'The lawsuits and quarrels between Christians should be judged in the church; and should not be judged outside (it), as (in the manner of) those who are without a law; but rather they should be judged before judges who are appointed by the bishop with the consent of the community, from amongst the priests, known for (their) love of truth and reverence for God, who possess the knowledge and sufficient understanding

17 Mḫitʿar Goš, *The Lawcode [Datastanagirk'] of Mxit'ar Gōs*, trans. by R. W. Thomson (Amsterdam and Atlanta 2000), pp. 69, 71, and 72. Karst, 'Grundriß der Geschichte des armenischen Rechts', pp. 378, 381, and 383.

18 Selb, *Orientalisches Kirchenrecht*, I, p. 39; H. Kaufhold, 'Römisch-byzantinisches Recht in den Kirchen syrischer Tradition', in *Atti del Congresso Internazionale 'Incontro fra canoni d'oriente e d'occidente'*, ed. by R. Coppola, Bari 1994, I, pp. 136-39; idem, 'Sources of Canon Law in the Eastern Churches', p. 238. Translations into Arabic which was spoken by Copts, West- and East-Syrians, and Melkites alike facilitated the exchange, Kaufhold, 'Sources of Canon Law in the Eastern Churches', p. 218.

19 According to Wittreck, *Interaktion religiöser Rechtsordnungen*, p. 234, this was the actual function of the legal collections of the non-Chalcedonian canonists.

20 Selb, *Orientalisches Kirchenrecht*, I, pp. 214f.; Rose, 'Islam and the Development of Personal Status Laws', p. 168.

> of the affairs brought for judgement; … Yet no one from amongst the believers may usurp, on his own authority, the judicial decisions over the believers, without the permission of the bishop and the consent of the community'.[21]

Calling upon Islamic courts without a doubt damaged the autonomy of the *ḏimmī* communities. In a similar fashion Johnathan Ray emphasizes for the Jewish communities in Spain in the thirteenth century that their communal autonomy was above all undermined by Jews themselves, by turning to Christian judges.[22] By means of such prohibitions, which were continually renewed until the 14th century and the effectiveness of which was apparently quite limited, the leadership of the various minorities clearly sought to preserve the integrity of their community, on which in the end their own societal position depended.[23] The members of the community were by contrast accustomed to continually overstepping the boundaries of their own community in daily life via contact with the Muslim majority community (in the sense of a dominant social group), so that they unconsciously altered through this cultural contact and exchange the reality of their own life.[24]

In order to counteract such changes, precisely the respective group leaderships conducted a policy of conscious segregation, as Jens Oliver Schmitt has demonstrated via the example of the so-called Levantines in the Ottoman Empire. Here one must differentiate between work or business and private contact and between contacts of individuals and of communities. Strategies of coexistence in the public

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21 Translation by U. Simonsohn, *A Common Justice. The Legal Allegiances of Christians and Jews under Early Islam*, Divinations: Rereading Late Ancient Religion (Philadelphia 2011), pp. 103f. Cf. also Wittreck, *Interaktion religiöser Rechtsordnungen*, p. 22 with note 30, for further examples.

22 J. Ray, *The Sephardic Frontier. The Reconquista and the Jewish Community in Medieval Iberia* (Ithaca, N.Y. 2006), p. 136.

23 Edelby, 'L'origine des jurisdictions confessionnelles en terre d'Islam', p. 203 note. 50. Cf. also U. Simonsohn, 'Communal Boundaries Reconsidered: Jews and Christians Appealing to Muslim Authorities in the Medieval Near East', *Jewish Studies Quarterly*, 14 (2007), 328-63, and idem, *A Common Justice*, pp. 147-73, who however tries to qualify the picture of a stark dichotomy between the leaders and the members of the communities.

24 Ulrich Gotter's concept of identity groups which are subject to continual processes of acculturation and exchange and which as a consequence have to construct their identity again and again in a continuous discourse about themselves and the others, appears in this context to be a suitable model for the situation of the *ḏimmi* communities, U. Gotter, '"Akkulturation" als Methodenproblem der historischen Wissenschaften', in *Wir — ihr — sie: Identität und Alterität in Theorie und Methode*, Identitäten und Alteritäten 2, ed. by W. Eßbach (Würzburg 2000), pp. 373-406 (pp. 391-95). For cultural exchange cf. also J. Osterhammel, 'Kulturelle Grenzen in der Expansion Europas', *Saeculum*, 46 (1995), 101-38; and R. Barzen, V. Bulgakova, F. Musall, J. Pahlitzsch, and D. Schorkowitz, 'Kontakt und Austausch zwischen Kulturen des europäischen Mittelalters. Theoretische Grundlagen und methodisches Vorgehen', in *Mittelalter im Labor. Die Mediävistik testet Wege zu einer transkulturellen Europawissenschaft*, Europa im Mittelalter. Abhandlungen und Beiträge zur historischen Komparatistik 10, ed. by M. Borgolte, J. Schiel, B. Schneidmüller, and A. Seitz (Berlin 2008), pp. 195-209.

sphere could be found alongside a strong segregation in the private.[25] The members of the community thus had no intention to demolish the boundaries of their group through their behavior.

However there were very practical reasons that caused the members of the Christian communities to turn to the *qāḍī*. The weak point within the concept of the legal autonomy of the *ḏimmīs* consisted namely in the problem of the implementation of a decision of a church court, as the Šāfiʿī scholar al-Māwardī (d. 450/1058) in his *al-aḥkām as-sulṭānīya* had already recognized. As the fourth precondition for taking over the office of a judge he states:

> '... because it is essential to valid testimony, implied in God's assertion, glorify and exalt Him: 'And God will not give the unbelievers any way over the faithful' [sura 4, 141] an infidel may stand in judgment neither over Muslims nor over heathens. Abū Ḥanīfa made it optional to appoint him to a judgeship among his own people. Although governors have been known to do this, it is more in the nature of the appointment of a leader or chief, not of a judge (*taqlīd zaʿāma wa-riʾāsa wa-laysa bi-taqlīd ḥukm waqaḍāʾ*). His decision is binding upon them only in so far as they feel they are bound by it, not because it is necessary to them. The decision he renders in regard to his people does not have to be accepted by the sovereign. Should the people refrain from referring their cases to him (the *ḏimmī* judge), they should not be forced to do so, and the rules of Islam shall be more binding upon them'.[26]

In contrast to the *qāḍī* only penitential discipline was available to ecclesiastical judges as a means of implementing their decisions. Disobeying judges with regard to church or secular affairs was declared by the ecclesiastical leadership to be a sin of such magnitude that it could lead to excommunication.[27] This represented a significant means of coercion, excommunication meaning ejection from the community and thus the loss of social status and all social contacts. Yet this means of coercion does not appear to have sufficed, especially when the possibility always lay open to the *ḏimmīs* to turn to Islamic law as essentially an appeal in case of a unfavorable decision. There the case would be reworked according to Islamic law, just as al-Māwardī stated.[28]

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25 O. J. Schmitt, *Levantiner. Lebenswelten und Identitäten einer ethnokonfessionellen Gruppe im Osmanischen Reich im 'langen 19. Jahrhundert'*, Südosteuropäische Arbeiten 122 (Munich 2005), pp. 452-57.

26 Al-Māwardī, *al-Aḥkām as-sulṭānīya wal-wilāyāt ad-dīnīya* (Bulāq 1909), p. 62; trans. by W. H. Wahba as: *The Ordinances of Government* (Reading 1996), p. 73. Cf. W. Z. Haddad, 'Ahl al-dhimma in an Islamic State: The Teaching of Abu al-Hassan al-Mawardi's al-Ahkam al-Sultaniyya', *Islam and Christian-Muslim Relations*, 7 (1996), 169-80.

27 Selb, *Orientalisches Kirchenrecht*, I, p. 44.

28 Cf. Pahlitzsch, *Der arabische Procheiros Nomos*, pp. 37–41.

There however existed the possibility that this device served rather the opponents in a legal dispute. In order to be prepared for this instance, it stands to reason that the case was immediately resolved according to the rules of Islamic law or directly before the *qāḍī*. This must have inevitably led to the adoption of Islamic law by the *ḏimmīs*.[29] Thus the *nomokanon* of Ibn al-ʿAssāl contains elements of Islamic law as does the *nomokanon* of the Syrian orthodox *Marphian* Bar Hebraeus. Inheritance law in particular was strongly influenced by Islamic law in the Syrian orthodox Church.[30] Other parts of the respective legal collections remained largely free from Islamic influence. Obviously they no longer possessed any practical meaning for the jurisdiction of the Oriental Churches, since in temporal affairs church authority was probably restricted to marriage and inheritance law.[31] According to Gideon Libson, who discerned an adaptation of Jewish law to Islamic law, paradoxically an important reason for it consisted of the fear of the community leadership for its autonomy; it seems the use of Islamic law in Christian and Jewish courts made resort to Islamic courts superfluous.[32]

With regard to the Melkite law collections however, it is remarkable that this strategy of assimilating their legal code to the regulations of Islamic Law did not happen. In the contrary it seems that between the end of the eleventh and the beginning of the thirteenth centuries the Melkites turned in a hither to unknown way to Byzantium and adopted directly Byzantine law by translating the *Procheiros Nomos* into Arabic.[33] So one might ask oneself how the Melkite legal practice actually looked like under these circumstances. At least for the time of the

29 For the importance of legal security for the *ḏimmīs* cf. S. Goitein, *A Mediterranean Society. The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*, 6 vols, (Berkeley, Los Angeles and London 1967-93), II: *The Community* (1971), p. 398; G. Libson, *Jewish and Islamic Law. A Comparative Study of Custom During the Geonic Period*, Harvard Series in Islamic Law (Cambridge, MA 2003), p. 101; Simonsohn, *A Common Justice*, p. 148.

30 For Ibn al-ʿAssāl cf. A. d'Emilia, *La compravendita nel capitoli XXXIII del nomocanone di Ibn Al-Assal. Note storico-esegetiche*, Pubblicazioni dell'Istituto di Diritto Romano e dei Diritti dell'Oriente Mediterraneo 5 (Milano 1938); idem, 'Influssi di diritto Musulmano ne capitolo XVIII, 2 del nomocanone arabo cristiano di Ibn al-ʿAssāl', *Rivista degli Studi Orientali*, 19 (1941), 1-15; H. Kaufhold, 'Der Richter in den syrischen Rechtsquellen. Zum Einfluß islamischen Rechts auf die christlich-orientalische Rechtsliteratur', *Oriens Christianus*, 68 (1984), 91-113 (pp. 102-05); in general cf. K. Samir, 'L'utilisation des sources dans le Nomocanon d'Ibn al-ʿAssāl', *Orientalia christiana periodica*, 55 (1989), 101-23. For Bar Hebraeus and the Syrian orthodox Church cf. C. A. Nallino, 'Il diritto musulmano nel Nomocanone siriaco cristiano di Barhebreo', in idem, *Raccolta di scritti editi e inediti*, Publicazioni dell'Istituto per l'Oriente, 6 vols (Rome 1939-48), IV: *Diritto musulmano, diritti orientali cristiani* (Rome 1942), pp. 214-90, first published in *Rivista degli Studi Orientali*, 9 (1922/23), 512-80; H. Kaufhold, 'Islamisches Erbrecht in christlich-syrischer Überlieferung', *Oriens Christianus*, 59 (1975), 18-35; idem, 'Über die Entstehung der syrischen Texte zum islamischen Recht', *Oriens Christianus*, 69 (1985), 54-72.

31 H. Kaufhold, *Die Rechtssammlung des Gabriel von Basra und ihr Verhältnis zu den anderen juristischen Sammelwerken der Nestorianer*, Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung 21 (Berlin 1976), pp. 128f.

32 Libson, *Jewish and Islamic Law*, pp. 102f.

33 Cf. above note 9.

Crusades we have some evidence from which conclusions also for the situation under Muslim rule might be drawn since the crusaders seem to have maintained the Islamic system of legal autonomy of the indigenous Christian communities. According to the assizes of the Kingdom of Jerusalem the Melkites had their own law courts to deal with their internal affairs in accordance with their own laws with the exception of capital crimes.[34] Outside of the crusader states we have evidence of a *mağlis* of the bishop of Sinai Simeon from 1197, which was very likely the court for the internal jurisdiction of the Melkite Christians in Simeon's diocese.[35]

We have also some information about Byzantine legal knowledge that was available in Jerusalem in the first half of the twelfth century since some laws of the crusaders followed Byzantine models.[36] Furthermore for 1122 a certain Georgios is documented who held the secular offices of the *archon* and *krites*, i.e. judge, together with the ecclesiastical office of the *chartophylax* acting thus as a deputy for the Greek patriarch who was expelled by the Crusaders. This Georgios was obviously Greek speaking as many of the Melkite higher clergy at this period because of the re-establishment of Byzantine rule in Northern Syria in the tenth and eleventh centuries. So it can be assumed that Byzantine-Roman law was still available and applied in twelfth-century Jerusalem.[37]

This would explain why the Melkites in contrast to the other Oriental Churches did not create their own canons and had only a very limited selection of legal texts in Arabic at their disposal until the expansion of their law collection. It seems that at least during the eleventh and twelfth centuries actually much more texts were available to them, since they had access to the rich tradition of Greek Byzantine legal sources that still could be used in the original by the Greek speaking higher clergy. With regard to the *Procheiros Nomos* several Greek manuscripts can be located in Sinai and Palestine for the period between the eleventh and the

34 John of Ibelin, *Le livre des assises*, The Medieval Mediterranean 50, ed. by P. W. Edbury (Leiden 2003), pp. 54f. The report of Jean of Ibelin, that the Melkites asked Godfrey of Bouillon immediately after the establishment of crusader rule for the installation of such a court that was called *Cour des Suriens*, is thus certainly a literary fiction, cf. the introduction by Peter Edbury, ibidem, p. 34. J. Pahlitzsch and D. Weltecke, 'Konflikte zwischen den nicht-lateinischen Kirchen im Königreich Jerusalem', in *Jerusalem im Hoch- und Spätmittelalter. Konflikte und Konfliktbewältigung – Vorstellungen und Vergegenwärtigungen*, Campus Historische Studien 29, ed. by D. Bauer, K. Herbers, and N. Jaspert (Frankfurt and New York 2001), pp. 119-45.

35 Cf. below note 43.

36 B. Z. Kedar, 'On the Origins of the Earliest Laws of Frankish Jerusalem: The Canons of the Council of Nablus, 1120', *Speculum*, 74 (1999), 313-21.

37 Pahlitzsch and Weltecke, 'Konflikte zwischen den nicht-lateinischen Kirchen im Königreich Jerusalem', pp. 128-30.

thirteenth centuries.[38] Thus there was still a living Melkite tradition of occupation with Byzantine law by means of the original sources.

A second motive for the Melkites to adopt with the *Procheiros Nomos* a century old Byzantine law book was probably that thus they intentionally positioned themselves in the legal tradition of the Roman Empire just like the Byzantines did by adopting Justinian law.[39] The Melkite collections could therefore also be interpreted as an expression of the way they saw themselves — as another means of underlining that they belonged to the Byzantine orthodox world. In the answer of Theodoros Balsamon, one of the leading legal scholars of Constantinople from the end of the twelfth century to a question from the Melkite patriarch of Alexandria, sent to him in Greek, whether it is reprehensible that his congregation was not familiar with the Basilica, another Byzantine law book, this close connection to Byzantium comes across very clearly. His answer was,

> 'Those who pride themselves on an orthodox way of life, whether they come from the Orient, from Alexandria or somewhere else, are called '*Rhomaioi*' (Romans, i.e. Byzantines) and must be governed in accordance with the laws'.[40]

The strong connection to Byzantine law could thus be also attributed to the initiative of the local ecclesiastical leadership under direct influence or rather orders of Constantinople. This strong control from outside of the Islamicate world surely contributed to the fact that no Islamic rules were incorporated into the Melkite law which is a big difference in the development of the Melkite law in comparison with the other Oriental Churches.

Nevertheless also inside the Melkite community the above mentioned fundamental conflict between the ecclesiastical leadership and the members of the community regarding their relation to Islamic law and Islamic jurisdiction existed. In daily life transactions the Melkites seem to have assimilated to a high degree to the Islamic environment. This shows the example of an Arabic contract of sale concluded in 1169 in Jerusalem under Crusader rule between the Georgian

38 Pahlitzsch, *Der arabische Procheiros Nomos*, pp. 51f*.

39 P. E. Pieler, 'Rechtsliteratur', in H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner* Handbuch der Altertumswissenschaft Abt. 12: Byzantinisches Handbuch 5, 1-2, 2 vols (Munich 1978), II: *Philologie, Profandichtung, Musik, Mathematik und Astronomie, Naturwissenschaften, Medizin, Kriegswissenschaft, Rechtsliteratur*, pp. 343-480 (p. 351); L. Burgmann, 'Das byzantinische Recht und seine Einwirkung auf die Rechtsvorstellung der Nachbarvölker', in *Byzanz und seine Nachbarn*, Südosteuropa-Jahrbuch 26, ed. by A. Hohlweg (Munich 1996), pp. 277-95 (p. 277).

40 G. A. Rhalles and M. Potles, *Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων*, 6 vols (Athens 1852-59, repr. Athens 1966) IV (1854), p. 451. K. G. Pitsakes, 'Ἡ ἔκταση τῆς ἐξουσίας ἑνὸς ὑπερόριου πατριάρχη· ὁ πατριάρχης Ἀντιόχειας στὴν Κωνσταντινούπολη τὸν 12ο αἰώνα', in *Byzantium in the 12th century*, Ἑταιρεία βυζαντινῶν καὶ μεταβυζαντινῶν μελετῶν, διπτύχων — παραφύλλα 3, ed. by N. Oikonomides (Athens 1991), 117-39 (pp. 100f.).

abbot of the Monastery of the Holy Cross and native Arabic-speaking Christians which had been testified by a Greek presbyter of the Anastasis.[41] This document demonstrates thus on the one hand the multi-ethnic composition of the orthodox community in Jerusalem, but it is on the other hand distinguished by the fact that it was based entirely on the form Islamic sales agreements take. It is even dated according to hijra years 571 AH . We can say, then, that Islamic standards had shaped the business practices of the Melkites to such an extent that they were retained even in the crusader states 70 years after the conquest of Jerusalem.[42]

Another example is the adoption of the legal institution of the *waqf*, the Islamic pious foundation, by Melkite Christians. From the late twelfth century on we have documentary evidence that endowments of property by Christians to Christian institutions were actually established as a *waqf*. A series of documents refer to the endowment of a Christian *raʾīs* of the west coastal region of Ṭūr in Sinai named Mālik ibn Ḥubāra to the monastery of St. Catherine on Mt. Sinai. While the original endowment deed is dated 1197 the foundation has been confirmed in three later documents of which two have been written in a Christian context while one has been issued by a *qāḍī*. The first document of confirmation from the same month as Mālik's original document (October 1197) has been made in the *maǧlis* (legal court) of Simeon, the Melkite bishop of Sinai, which nevertheless corresponds to the form of Muslim *iqrār*-documents. While there can be no doubt that we have here a Christian pious foundation following the rules of the Islamic law, the usual Islamic phrases for designating a *waqf* were not used. It seems that there was still a certain reluctance to call this endowment explicitly a *waqf*. In another confirmation of Mālik ibn Ḥubāra's legal dispositions issued 1276 AD again by a Christian court we finally find the Islamic standard phrase '*waqfan ṣaḥīḥan šarʿiyyan muʾabbadan*'.[43] So while it seems that in 1197 the outright adoption of the Islamic form was still avoided, in 1276 the take-over of the Islamic usage by a Melkite court is completed.

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41 J. Pahlitzsch, *Graeci und Suriani im Palästina der Kreuzfahrerzeit. Beiträge und Quellen zur Geschichte des griechisch-orthodoxen Patriarchats von Jerusalem*, Berliner Historische Studien 33, Ordensstudien 15 (Berlin 2001), pp. 181-88 and pp. 314-24 (edition with translation and commentary).

42 That the distinct formalism of Islamic contracts of sale defined the contracts of the non-Muslim minorities can also be shown with the example of the documents of the Jewish community from the Cairo where the Islamic form was used as well in legal transactions between Jews, cf. G. Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections*, Cambridge University Library, Genizah Series 10 (Cambridge 1993), p. 1.

43 D. S. Richards, 'Some Muslim and Christian Documents from Sinai Concerning Christian Property', in *Law, Christianity and Modernism in Islamic Society. Proceedings of the Eighteenth Congress of the Union Européenne des Arabisants et Islamisants*, Orientalia Lovaniensia Analecta 86, ed. by U. Vermeulen and J. M. F. van Reeth (Leuven 1998), pp. 161-70. For Christian *waqf* in general cf. J. Pahlitzsch, 'The Development of Christian Waqf in the Early and Classical Islamic Period (7th to 12th C.)', in *Les fondations pieuses waqf-habous chez les chrétiens et les juifs en terre d'Islam*, ed. by R. Deguilhem and S. Saliba (in print).

As Donald Richards points out the documentation of this foundation illustrates the existence of internal Christian courts operating alongside the Muslim legal system as well as the Christian use of the Muslim legal system by requiring at the same time confirmations from the *qāḍī*.[44] It is obvious that this regular recurrence to the *qāḍī*-court influenced the form of the legal documents of the Christians as has been demonstrated with the above mentioned contract of sale from 571/1169.

In conclusion it could be determined that, contrary to the other Oriental Churches, the Melkite collection of law even after its expansion in the twelfth and thirteenth centuries was not influenced by Islamic Law. On the contrary at this time the ecclesiastical leadership tried to preserve the Melkite identity as *rhomaioi*/*rūmī* and accepted the Byzantine demands to adopt Byzantine law. The most important witness for this perception is the very literal Arabic translation of the *Procheiros Nomos*. On the other hand in daily life the Melkites adopted Islamic Law. So there seems to be a fundamental contradiction between the Melkite self-conception as Byzantines following Byzantine law and their assimilation to the Islamic environment. Without a doubt these different aspects of Melkite identity mirror the views of the different social groups of the Melkite community. However I believe one should not overemphasize this conflict between leadership and community. Thus also in the sphere of law as in many other spheres the picture of a hybrid culture emerges, a culture that does not have to choose between autonomy and assimilation. Different legal systems existed side by side and could be used depending on which one was more profitable at a certain moment in time. This is undoubtedly an example of non-Muslim minorities understanding how also to benefit from their special situation. They were certainly not just repressed victims, rather they had at their disposal various possibilities which were not available to Muslims, be it the choice of legal system or for example the more or less unrestricted switching between Christian and Muslim zones of sovereignty.[45]

44 Richards, 'Some Muslim and Christian Documents from Sinai', p. 170.

45 Cf. J. Pahlitzsch, 'Ärzte ohne Grenzen: Melkitische, jüdische und samaritanische Ärzte in Ägypten und Syrien zur Zeit der Kreuzzüge', in: *Gesundheit – Krankheit. Kulturtransfer medizinischen Wissens von der Spätantike bis in die Frühe Neuzeit*, ed. by K. P. Jankrift and F. Steger (Cologne, Weimar, Vienna 2004), pp 101–19 (French translation: Médecins sans frontières. Médecins melkites, juifs et samaritains en Égypte et en Syrie à l'époque des croisades, in: Trivium 8 (2011) [online], mis en ligne le 16 mai 2011. URL: http://trivium.revues.org/3962); idem, 'Mediators Between East and West: Christians under Mamluk Rule', *Mamluk Studies Review*, 9, 2 (2005), 31–47.

CADÍES, ALFAQUÍES Y LA TRANSMISIÓN DE LA SHARĪʿA EN ÉPOCA MUDÉJAR

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La posibilidad de mantener la propia ley es quizá una de las características más específicas del mudejarismo, el estatus protegido del que gozó la población musulmana en los reinos cristianos desde el siglo XI, y por tanto la que marca mayores continuidades con el periodo propiamente islámico en todos los territorios de la Península Ibérica. Una vez establecido el marco jurídico básico negociado entre la comunidad sometida y las autoridades de la religión dominante en los pactos de conquista, la aplicación de la norma produce un nuevo contexto de adaptación a las situaciones particulares y a los distintos registros legales imperantes. No solamente se elige a los representantes de la minoría que pueden ejercer la judicatura, sino también a los mediadores – traductores, asesores legales, procuradores – que actuarán entre las dos comunidades. Y éstos deberán hacerlo mediante la aplicación de compilaciones de doctrina de jurisconsultos y códigos legales emitidos por la autoridad política que, en muchos casos, deben ser reinterpretados a la luz de las condiciones coyunturales concretas de la minoría.[1] Mi contribución analizará el importante papel desempeñado por las altas instancias de la judicatura islámica de época mudéjar en la adaptación, transmisión y aplicación de los textos jurídicos islámicos entre los musulmanes que vivían bajo dominio cristiano en la Península Ibérica.

Las autoridades judiciales y su designación: ¿a quién complacemos, a los musulmanes o a los cristianos?

En la cúspide de la jerarquía judicial islámica de época mudéjar, tal como se reconocía implícitamente por las autoridades cristianas al aceptar que siguieran rigiéndose por su ley, se encuentra el *alcalde mayor de las aljamas del reino* en Castilla, y el *cadí general del reino* en Aragón y Valencia, cargos traducidos en las fuentes del

1 Sobre la dicotomía del sistema jurídico islámico, entre la *shari'a* con su aplicación en el *fiqh* y el *qanun* que la complementa, véase F. M. Pareja, *Islamología*, 2 vols (Madrid: Fe y Razón, 1952) II, 525; U. Heyd, *Studies in Old Ottoman Criminal Law* (Oxford: Oxford University Press, 1973), y K. S. Vikor, *Between God & the Sultan. A History of Islamic Law* (Londres: C. Hurst & Co., 2005), 207-14.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

10.1484/M.RELMIN-EB.5.109349

periodo por el *qādī al-qūdāt o al-ŷamāʿa*,[2] el cadí de la comunidad que figuraba en la cúspide de la jerarquía judicial desde el califato de Córdoba. Estos funcionarios, los más importantes del Estado omeya, se perpetuaron hasta el reino de Granada, pero la terminología no poseyó necesariamente el mismo contenido en todas las épocas y formaciones políticas, tanto en cuanto a las relaciones con el califa, rey o sultán, como en particularidades como el nombramiento de delegados, etc.[3] En un segundo rango, puede probarse también la relación directa entre los conceptos de *qāḍī*/'alcalde mayor de la aljama de...' a nivel local, en Castilla, y el cadí de una localidad en Aragón, organización que recuerda el principio defendido por Ibn Rušd de un solo cadí por localidad, aunque no aparezca mencionado en los tratados teóricos mudéjares.[4]

La legalidad del nombramiento de los cadíes islámicos por poderes cristianos venía debatiéndose desde el siglo XII ante la situación siciliana bajo el dominio Hohenstaufen, pues las fetuas de los jueces que impartían jurisdicción en la isla eran cuestionadas por los tunecinos, con quienes mantenían importantes vínculos comerciales.[5] Según pasó el tiempo, la situación quedó aceptada de hecho, si no de derecho, y el abanico de opiniones se abrió. Según Ibn Abī Zamanīn, podía designar al cadí cualquiera que ostentara el poder. En Castilla, es evidente que

2 Los documentos en lengua árabe hallados en la RAH, traducen literalmente un cargo por el otro: A. Echevarria y R. Mayor, 'Las actas de reunión de una cofradía islámica de Toledo, una fuente árabe para el estudio de los mudéjares castellanos', *Boletín de la Real Academia de la Historia*, CCVII/ III (2010), 257-93. En contra de lo que opina J.-P. Molénat, 'Alcaldes et alcaldes mayores de moros de Castille au XV^{e} siècle', en *Regards sur al-Andalus (VIII^{e}-XV^{e} siècle)*, ed. François Géal (Madrid: Casa de Velázquez, 2006), 147-68, concretamente 151. Para facilitar la identificación se usará sistemáticamente *cadí* para Granada y Aragón y *alcalde de la aljama* para los castellanos, respetando así lo habitual en las fuentes medievales.

3 Desde la época temprana, la autoridad de los cadíes varía incluso entre el califato 'abbasí y el omeya de al-Andalus, según E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Leiden: Brill, 1960), 185-91; D. Serrano Ruano, 'Judicial Pluralism under the Berber Empires (last quarter of the 11th. Century CE-first half of the 13th century CE)', *Bulletin d'Études Orientales*, 63 (2015), 245-76: 248 y M. Tillier, *Les cadis d'Iraq et l'état abbaside (132/750-334/945)* (Damasco: Institut Français du Proche Orient, 2009). Para la definición de sus competencias en Castilla, me remito a A. Echevarria, 'De cadí a alcalde mayor. La elite judicial mudéjar en el siglo XV', *Al-Qantara*, XXIV-1 (2003), 139-68 y XXIV-2 (2003), 273-89. Para Granada, M. I. Calero Secall, 'Rulers and Qadis: Their Relationship during the Nasrid Kingdom', *Islamic Law and Society* 7/2 (2000), 235-55. Para Valencia, M. V. Febrer Romaguera, 'Los Bellvis, una dinastía mudéjar de alcadíes generales de Valencia, Aragón y principado de Cataluña', en *Actas del III Simposio Internacional de Mudejarismo* (Teruel: Centro de Estudios Mudéjares, 1989), 277-90. Los cadíes generales de Aragón y sus subordinados no han recibidoun tratramiento separado, pero son el objeto de varios capítulos en J. Boswell, *The Royal Treasure. Muslim Communities under the Crown of Aragon in the Fourteenth Century* (New Haven: Yale University Press, 1977), 43-50, 80-83; K. Miller, *Guardians of the Faith. Religious authorities and Muslim communities in Late Medieval Spain* (New York: Columbia University Press, 2008), 56-57.

4 A. Carmona, 'Le malékisme et les conditions requises pour l'exercice de la judicature', *Islamic Law and Society*, 7/2 (2000), 122-58: pp. 133-34.

5 A. Echevarria, 'Las minorías religiosas en el Mediterráneo durante el siglo XII', in *El mundo del geógrafo ceutí al-Idrisi* (Ceuta, Instituto de Estudios Ceutíes, 2011), 59-80.

estaba reconocida la designación del alcalde mayor de las aljamas del reino o de un territorio por el rey, siempre que fuera aceptado por las propias aljamas posteriormente; en Granada, Arcas Campoy ha señalado el papel principal del sultán y su cadí mayor en la designación de cadíes, con intromisiones puntuales de jeques y caudillos de la frontera en algunas poblaciones secundarias.[6] La delegación de funciones que suponía este nombramiento, al no referirse a las gestión de intereses personales del gobernante, no cesaba con la muerte de éste, sino que continuaba hasta que el sucesor proveyera, bien confirmando al cadí en su puesto, o bien designando a otro diferente,[7] lo que recoge Yça Yabir en su Breviario *sunní* como una de las características del funcionamiento del cadiazgo en Castilla en el siglo XV:

> 'Non se priva el alcalde por muerte a probaçion de *su mayor o superior* fasta que *el venidero* ponga o lo prive por espeçial mandado'.[8]

Las funciones a las que hacen referencia los nombramientos de alcaldes mayores por los monarcas ibéricos parecen las mismas que se adjudican al *rab* mayor de la corte, juez representante de la comunidad judía[9] y se basan de alguna manera en los requisitos establecidos por la jurisprudencia mālikí. Las cualidades del juez habían ido desgranándose en los tratados de derecho hasta conformar un prototipo generalmente aceptado en al-Andalus, que pasaría después a las comunidades mudéjares con ligeras variaciones.[10]

En el nombramiento de los alcaldes mayores castellanos, se especifican una serie de atributos que recuerdan en su espíritu a lo contenido en las obras islámicas:

> 'E porque vos, don Farax de Belvis, su fijo, veçino de la dicha çibdad, soys persona *abill e ydonia y sufiçiente e pertenesçiente para vsar del dicho ofiçio*, e por muchos, buenos e

6 Para opiniones contrarias a la designación por alguien que no tenga la potestad tal como se entiende en el Islam, véase A. Carmona, 'La figura del cadí en los textos jurídicos malikíes', en *Actas del II Congreso Internacional Encuentro de las Tres Culturas* (Toledo, 1985), 89-96: 91; Echevarria, 'De cadí a alcalde mayor', 158-59; M. Arcas Campoy, 'Noticias sobre el cadiazgo en los últimos años del reino nazarí: la frontera entre Murcia y Granada', *Revista del Centro de Estudios Históricos de Granada y su reino*, 6 (1992), Segunda Época, 203-10: 205-06.

7 Carmona, 'La figura del cadí', 90.

8 Yça Yabir, *Breviario sunní*, Biblioteca Nacional de Madrid, MS 2076, fol. 47v. En este trabajo presentaré algunos fragmentos comparativos de las dos ramas de manuscritos españoles, concretamente el MS 2076 de la Biblioteca Nacional de Madrid (fechado hacia 1550, a partir de ahora, *Breviario sunní*), considerado por Wiegers la transmisión más antigua. G. Wiegers, *Islamic Literature in Spanish and Aljamiado. Yça of Segovia, his Antecedents and Successors* (Leiden: Brill, 1994), 115, y el procedente de la Biblioteca Tomás Navarro Tomás del CSIC en Madrid, RESC 60 (anteriormente Junta-60), datado hacia 1595-1612 por las marcas de papel en Wiegers, *Islamic Literature*, 119-20.

9 A. Echevarria, 'Pautas de adaptación de los mudéjares a la sociedad castellana bajomedieval', en *Actas del IX Simposio Internacional de Mudejarismo* (Teruel, Centro de Estudios Mudéjares, 2004), 47-60.

10 Carmona, 'Le malékisme', 123.

> leales serviçios que fezistes al dicho rey don Juan nuestro padre y al señor don Enrrique nuestro hermano, cuyas animas Dios aya, y aveys fecho y fazedes de cada día'.[11] En otro documento, más brevemente, 'acatando *vuestra sufiçiençia e ydoneydad*'.[12]

Más ampliamente se recoge en el *Breviario sunní* de Yça Yabir de Segovia, que traduce:[13]

> 'El alcalde conviene que sea *buena persona, discreta y pacífica, entendido en los derechos y en los fechos de sus anteçesores, sabidores y de buen consejo*, non juzgue con saña nin con pensamiento oyra. Juzgue por el Alcorán o por el açuna o por determinaçion de algun doctor de la ley. Quando con alguna de las tres librare, basta su sentençia. Y non se afinque en su juicio sin se aconsejar segun su consejo con alfaquíes sabidores en los derechos para dar definitiva sentençia, y si los consejos non concordaren, libre con los más claros a la causa y basta'.

Otra condición fundamental era la recepción del alcalde por las aljamas. El rey designa, pero las aljamas tienen que reconocerlo.[14] Pero las aljamas deben ajustarse al derecho islámico, y muchas veces no son buenas conocedoras del mismo, por faltarles alfaquíes formados, o por intereses personales de los mismos. Por ello, el alcalde mayor puede reconvenirles, como en el caso de los toledanos, a quien Bellvís dice que según el derecho islámico no pueden renunciar su justicia en las autoridades cristianas, pues no es lícito:

> 'por vosotros fue respondido aquello ser en perjuyzio desa dicha çibdad de Toledo e de la justiçia della, diziendo que los moros desa dicha çibdad avían renunciado en

11 Sobrecarta de Isabel la Católica, en que se inserta otra de 20-10-1475, confirmando el nombramiento de D. Farax de Belvis como alcalde mayor de las aljamas de moros de sus reinos. Archivo General de Simancas (a partir de ahora (AGS), Registro General del Sello (RGS), fol. 570. Archivo Municipal de Murcia, Cartulario real 1453-78, fols 263-64, ed. J. Torres Fontes: 'El alcalde mayor de las aljamas de moros del reino de Castilla', *Anuario de Historia del Derecho Español* 32 (1962), 131-82: 175-80.

12 Nombramiento de Yuçaf Engeniero, moro, como alcalde mayor de la aljama de Guadalajara, Sevilla, 20 de marzo de 1491, recogido en un pleito. Archivo de la Real Chancillería de Valladolid, Reales Cartas Ejecutorias (RCE), caja 45-5, fol. 5r.

13 Yça Yabir, *Breviario sunní*, fol. 46v. Sobre esto no hay capítulo en la *Risala* de Qayrawani, ni ninguna observación. Misma versión, más legible pero con variaciones de transcripción, en el Archivo General de la Nación, Mexico, MS Inquisición, Ex. 1, fol. 61v–63r. En Biblioteca Tomás NavarroTomás del CSIC, RESC/60, cap. 44, fol. 60r–62r, distinta versión. Resume pues, básicamente, las cinco condiciones que recoge para esta época más tardía Carmona, 'Le malékisme', 126. El documento se refiere a la consulta al consejo de los alfaquíes y muftíes, quienes en sí mismos son considerados más sabios que los cadíes. A. K. Reinhart, 'Transcendance and Social Practice: Muftīs and Qādis as Religious Interpreters', *Annales Islamologiques*, 27 (1993), 10–13.

14 'A todas las aljamas de los moros de los dichos nuestros reynos y señoríos, y a los viejos, veedores e regidores e otras qualesquier personas dellas, que vos ayan y resçiban por su alcalde mayor de las dichas aljamas', AGS, RGS, fol. 570. La falta de reconocimiento de las aljamas o de una de ellas, anulaba la designación real. Véase Echevarria, 'De cadí a alcalde mayor', 160-68.

> vosotros su previllejo e jurediçion en este caso e quel dicho don Farax non podía tener el dicho ofiçio; e porque caso que los dichos moros en vosotros renunciasen la dicha jurediccion, *por el dicho don Farax de Balvis me fue dicho que los dichos moros desa çibdad non lo pudieron fazer por ser en grande agravio e perjuyzio de las aljamas de los moros destos dichos mis regnos e de los previllejos y usos y costumbres que dello tienen* [estos privilegios son precisamente el juzgarse por la sunna y sharīʿa] e en perjuyzio del dicho don Farax, mi alcalde mayor e del dicho su ofiçio, e caso que en vosotros renunçiasen la dicha jurediçion non lo pudieron fazer porque primeramente avía de ser fecho saber a las dichas aljamas de mis regnos y al dicho don Farax ser primeramente sobre ello llamado e oydo y vencido por fuero e por derecho[15]'.

En Castilla y Aragón, durante los siglos XIV y XV, tanto el alcalde mayor de los moros (o cadí general) como el monarca y su audiencia, debían juzgar 'según la ley e açunna de moros',[16] término repetido en numerosos documentos relativos a juicios y contratos.

El establecimiento de la cadena que debía regir los juicios se estipula también en otro de los nombramientos de época de los Reyes Católicos. Éste presenta el problema de haberse constituido en prueba dentro de un juicio en el que se acusa a esta parte de presentar documentos falsos, por lo que no es posible determinar hasta qué punto la construcción de la pirámide judicial que afectaría a los mudéjares es fruto de la mente de Abrahen Xarafí, o más bien de la organización judicial de la época de Juan II – cuando se sancionan las chancillerías reales como organismo de apelación – o de su hija, Isabel:[17]

> 'e queremos e es nuestra merçed que la sentençia o sentençias, mandamiento o mandamientos, que de vos el dicho don Abraham Xarafi, nuestro alcalde mayor de las dichas aljamas, fueran apeladas, que la dicha apelaçion sea para ante nos e para ante los del nuestro consejo, e non para ante otro juez nin persona alguna, e mandamos e

15 Las cursivas son mías. AGS, RGS, fol. 570.

16 Real Chancillería, RCE, c. 39-7, fol. 3r.

17 AGS, RGS, enero 1475, fol. 362.También se encuentra, más desarrollado, en el documento presentado por Abrahen Xarafí como prueba en sus pleitos contra Belvís. Archivo de la Real Chancillería de Valladolid, RCE, caja 39-7, fol. 3r (1491, agosto, 30). 'E otrosy es mi merçed e voluntad que todas las apdaçiones que se interpusyeren de los mandamientos o sentençias que dieren o fizieren asy el alcalde del aljama de los moros de la villa de Aranda como de los otros alcaldes que vos por vos pusyeredes en las dichas çibdades e villas e lugares veyan e sean para ante vos el dicho Abrahen Xaraf como a mi alcalde e juez mayor e non para una otra persona alguna para que vos conoscades dellos e de qualquier cosa e parte dello e lo determinedes segund vuestra ley Açuna de moros e la sentençia o sentençias, mandamiento o mandamientos que fueren apelados de vos el dicho don Abrahen Xarafi mi alcalde mayor de las aljamas vengan e parescan ante mi en el mi consejo para que ende se determine e libre segund la dicha vuestra ley e Açuna de moros. E otrosy mando por esta dicha mi carta a los nuestros alguaziles de las dichas mis çibdades e villas e lugares que agora son o seran de aquí adelante e a qualquier dellos que cunplan e fagan cunplir qualesquier cartas o mandamientos que vos el dicho Abrahen Xarafi e vuestros lugares tenientes o qualquier dellos les dieredes o fizieren o fizieredes dar'.

> defendemos a qualasquier juezes e justiçias de los dichos nuestros regnos e señoríos de qualquier juridiçion que sean, que non conoscan nin entiendan de conoscer de pleitos algunos çeviles nin criminales que tocaren de moro a moro de que a vos el dicho don Abraham Xarafi, nuestro alcalde mayor e a los dichos vuestros logares tenientes, pertenescan oyr e librar e determinar e conosçer, ca nos por la presente los ynibimos e avemos por ynibidos del conoscimiento e esecuçion de todo ello'.

Por lo tanto, las sentencias que se quisieran recurrir por parte de los mudéjares, si habían sido dadas por un alcalde mayor o cadí local, debían ser remitidas al alcalde mayor de las aljamas del reino o cadí general; de allí, si su fallo quería recurrirse, debía pasar directamente al tribunal real, es decir, a la chancillería ya en esos momentos.

En cuanto a la jerarquía de los cadíes de época mudéjar, no tiene que ver necesariamente con el prestigio en el conocimiento o ejercicio de la ley, o al menos esto no se ve abiertamente en las fuentes. Es evidente que todos los personajes encumbrados por el rey al rango de cadí general o alcalde mayor de las aljamas eran alfaquíes. Solo en la corona de Aragón se observa un desplazamiento del ejercicio de este cadiazgo a un cristiano en momentos puntuales, pero la casuística está todavía por estudiar detalladamente. En general, se observa un ascenso desde los rangos más bajos de judicatura urbana, ostentada por los miembros más jóvenes de las familias de alfaquíes, a los principales destinos. En el caso de los mudéjares castellanos, los alfaquíes parecen pasar de Toledo o Guadalajara a la alcaldía mayor del reino, pero a un nivel más bajo es difícil establecer las redes, por la desaparición de documentos y por la mayor fragmentación de la red judicial.[18] Sí es más fácil seguir este movimiento en la judicatura mudéjar aragonesa, donde los cadíes generales del reino pasaban antes por ciudades como Borja o Calatayud, Zaragoza, etc., pero queda por hacer el estudio sistemático.

La reformulación de la norma en lengua romance

La reiteración del juicio 'según la ley e açunna de moros' plantea la cuestión de la utilización de la lengua árabe en el habla y la escritura dentro del contexto del derecho.[19] Al hacerse cargo de la justicia de moros y judíos, el rey y sus delegados

18 Véase A. Echevarria, 'La autoridad de los cadíes y sus circunscripciones territoriales: un estudio comparativo entre Castilla y Granada', en *De la alquería a la aljama*, ed. A. Echevarria y A. Fábregas, (Madrid: UNED, 2015, 297–325.

19 Los documentos castellanos explicitan claramente: 'que vos ayan e tengan e reçíban por nuestro alcalde mayor de las dichas aljamas de los dichos moros de los dichos nuestros regnos e señoríos, e usen con vos e con vuestros logares tenientes en el dicho oficio de alcaldía en todos los casos, e cabsas e cosas, asy çeviles como criminales, que acaesçieren e se movieren entre qualesquier moros de las dichas aljamas e non con otra presona alguna; los quales podades librar e determinar vos e los dichos vuestros logares tenientes por vuestra sentençia o sentençias segund ley e Açunna de moros, e que la sentençia o sentençias que sobrello

se encontraban con un problema fundamental: o respetaban al pie de la letra los derechos de las minorías a ser juzgadas por sus propias leyes o, al menos, respetaban el espíritu de este corpus legal para evitar roces con las aljamas. Pero, en primer lugar, debían familiarizarse con una legislación que hasta ese momento no habían tenido que aplicar. Además de la dispersión de dictámenes característica del derecho islámico, los alcaldes cristianos carecían de recopilaciones escritas de leyes por las que regirse. A esto hay que añadir el matiz religioso que tenía la judicatura islámica, de la que estaba desprovista la castellana.

Para solucionar el primer problema, era evidente que tenían que recurrir a los propios musulmanes, que deberían facilitarles información sobre sus sistemas de autorregulación, en los que las autoridades cristianas no se habían inmiscuido hasta entonces. La mayor dificultad a este respecto era que la sunna y la sharīʿa se seguían consultando e interpretando en lengua árabe — la cual, en contra de lo pensado hasta ahora, se mantenía en Castilla todavía en la década de 1420, como demuestra la reciente documentación de las reuniones de la cofradía de la mezquita de Tornerías en Toledo. Esa fue la puerta para la traducción de fuentes legales islámicas al castellano, a saber, las famosas *Leyes de Moros*,[20] el *Llibre de la suna e xara de los moros*[21] y la redacción del *Breviario sunní* de Yça Gidelli. Parece que por fin puede demostrarse la necesidad de que estos textos fueran puestos a disposición de las dos partes de la comunidad: el primero, para servir como guía a los tribunales castellanos, como opinan Barceló, Carmona y Wiegers,[22] y el segundo para guiar a una comunidad musulmana prácticamente hispanoparlante, que va a quedar desprovista de la posibilidad de acudir a su alcalde para aclarar cuestiones de tipo teológico y moral — aparte de legales – y de los intérpretes más cualificados de las obras escritas en árabe. A mediados del siglo XV varias ciudades de Castilla han aceptado ya de hecho la jurisdicción cristiana – los alcaldes y corregidores, así como la apelación en la Chancillería real – como forma de resolver sus pleitos, aunque solo en algunas ocasiones se renuncia específicamente a la sunna y sharīʿa como referencia legal. Dentro de la jerarquía de normas aplicables a los mudéjares, pues, la jurisprudencia islámica sigue estando equiparada al derecho real y a los fueros, dentro de la jerarquía de normas, y el corpus se sigue ampliando mediante el recurso a opiniones legales de jurisconsultos islámicos.

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dieredes e pronunçiaredes las llevades e fagades llevar a efecto e devida esecuçion quanto a como devades segund la dicha ley e Açuna de moros'. AGS, RGS, enero 1475, fol. 362.

20 A. Carmona, 'Textos jurídico-religiosos islámicos de las épocas mudéjar y morisca', *Áreas. Revista de Ciencias Sociales*, 14 (1992), 13-26.

21 Para la legislación musulmana del reino de Valencia, este uso cristiano de las fuentes traducidas ha quedado suficientemente demostrado, a mi entender, por C. Barceló, *Un tratado catalán medieval de derecho islámico: el Llibre de la çuna e xara dels moros*, (Córdoba: Universidad de Córdoba, 1989), XIV.

22 Wiegers, *Islamic Literature*, 58-59.

Las anónimas *Leyes de moros*, traducción adaptada y modificada del famoso y también conocido por los mudéjares *Kitāb al-Tafrīʿ* de Ibn al-Ŷallāb al-Baṣrī (m. 988), pueden ser según Carmona comparables a los manuales de jueces que circulaban en al-Andalus, escritos por Ibn Abī Zamanīn, Ibn Hishām al-Azdī, etc.[23] El manuscrito escrito en castellano de las *Leyes de moros* presenta unas características paleográficas que pueden corresponder a fines del siglo XIV, o la primera mitad del XV. A falta de un estudio más detenido, podemos decir que en este códice, que se preveía iba a ser utilizado en la supervisión por parte de los cristianos de la aplicación del derecho islámico, se han omitido todos los libros dedicados a *ʿibādāt* (el culto divino), y se ha alterado el orden de los libros dedicados a los *muʿāmalāt* (regulación de la conducta respecto a los semejantes).[24] En él faltan, sin embargo, respecto a los tratados andalusíes, varios capítulos sobre la esclavitud y la manumisión, el derecho ritual, la sociedad comanditaria y la aparcería en regadío, bien por haberse adaptado a las nuevos usos en Castilla, o porque se han perdido los folios correspondientes. Además,el espacio dedicado a cuestiones penales es ínfimo (sólo un 10% del total de las leyes). No puede descartarse a este respecto una influencia del derecho cristiano, pero es un asunto que aún está por estudiar. Este códice, descrito repetidamente como 'cuaderno de leyes' por sus copistas posteriores, tiene un formato que corroboraría su posible utilización en forma de *cuaderno de cortes* para ser aprobado por los regentes de Juan II, Fernando de Antequera y Catalina de Lancaster, en algún momento durante las Cortes de Guadalajara de febrero 1408, según recogen dos autores del siglo XIX, que dan como fecha el 9 de noviembre de 1408: 'se rubricó el quaderno de las Leyes para los Moros'.[25] Dado que las actas de dichas cortes no están recogidas en las compilaciones habituales cotejadas para la realización de la monumental Cortes de los

23 *Leyes de moros*, Biblioteca Real de Suecia, MS Tilander Esp. 1. Redactado en papel, cuenta con 88 fol. Ver A. Carmona, 'El autor de las *Leyes de moros*', en *Homenaje al Prof. José M. Fórneas Besteiro* (Granada: Universidad de Granada, 1995), 957-62 y 'Textos jurídico-religiosos', 20-21,23; S. Abboud-Haggar, 'Las leyes de moros son el libro de *al-Tafrī*', *Cuadernos de Historia del Derecho*, 4 (1997), 163-201. Un estudio detallado de la trayectoria del manuscrito y sus copias, con estado de la cuestión bibliográfico en J. C. Villaverde Amieva, 'El papel de Francisco Antonio González sobre "códices escritos en castellano con caracteres árabes" (RAH, año 1816) y noticia de las copias modernas de Leyes de moros', en *Aljamías. In memoriam Álvaro Galmés de Fuentes y Iacob M. Hassan*, ed. R. Suárez García e I. Ceballos (Gijón: Trea, 2012), 131-214.

24 Pareja, *Islamología*, II, 525-27.

25 Sobre las Cortes, que trataron entre otras cosas de la cuestión granadina, *Crónica de Juan II*, ed. C. Rosell, vol. II, pp. 302-03. Sobre la rúbrica de las leyes de moros por los regentes, I. Jordán de Asso y M. de Manuel, *Instituciones del derecho civil de Castilla* (Madrid, 1786), LXXX, cit. Villaverde Amieva, 'El papel', 212. Ninguno cita la procedencia de esta noticia. Aunque Villaverde relaciona esta rúbrica con el ordenamiento del traje de los moros de 1408, dicho documento no tiene ni mucho menos el rango de 'cuaderno', y el ordenamiento de Valladolid de 1412, no es un cuaderno de cortes y no son leyes de moros, sino relativas a las dos minorías, musulmanes y judíos, por lo que no encaja con la definición de la rúbrica.

antiguos reinos de León y de Castilla, de la Academia de la Historia (siglo XIX), es imposible por ahora comprobar este extremo.

El *Llibre de la suna e xara de los moros*[26] datado el 3 de marzo de 1408 y copiado en torno a 1464 en traducción al valenciano para que el señor de Sumacárcer pudiera emitir sentencia para los mudéjares de su señorío, es anónimo. Según recogían los *Furs* de Valencia, el noble debía seguir el consejo de un cadí islámico designado por él mismo o por el rey de Aragón, Aplicado en esta forma solo a los mudéjares de este señorío, aunque actualmente se ha publicado bajo el título de 'legislación de los musulmanes de Valencia', lo que llama a cierta confusión sobre el destino de su uso. Las abundantes repeticiones de las mismas cuestiones hacen pensar en una compilación a partir de un libro de fetuas, ordenado según las materias tradicionales de derecho islámico.

En cuanto a tratados religiosos, que sí abarcan también las cuestiones de credo y ritual (*'ibādāt*), y que por tanto pueden presumirse dirigidos a la comunidad musulmana, mudéjar o morisca, sin otros intermediarios, el que más difusión conoció en ambos momentos, el mudéjar y el morisco, fue sin duda el *Breviario sunní* de Yça de Segovia. Sus manuscritos presentan dos familias de variantes, una sin duda más antigua, que puede retrotraerse al manuscrito original de propio Yça – y que podríamos definir por tanto de 'etapa mudéjar' aunque las copias que nos han llegado sean más modernas – y otra desarrollada en la segunda mitad del siglo XVI por parte de los moriscos.[27]

En cuanto a la autoría de la norma, en la Castilla anterior a las conversiones masivas puede hablarse de un cuadro en el que la ley puede ser producida por la mayoría cristiana, o puede respetarse la de la minoría, que normalmente no es elaborada sobre la marcha, sino 'rescatada' del corpus establecido, en algunos casos adaptado o actualizado para continuar siendo utilizado en el contexto de sumisión al monarca cristiano. A su vez, podemos ver como los intereses de los cristianos pueden de alguna manera influir en la adopción de normas o en temas que resultan de interés en la situación concreta, variando de alguna manera el espíritu de la ley islámica, pero sin salirse de lo considerado lícito. Es el caso de normas sobre las conversiones a otra religión contenidas en las *Leyes de moros* o

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26 Barceló, *Un tratado catalán*, 8, 88. Nueva ed. Vicent Garcia Edo, Vicent Pons Alós: *Suna e Xara: la ley de los mudéjares valencianos (siglos XIII-XV)*, (Castellón: Universidad Jaume I, 2009). Cuenta con 59 fols en papel, copiados probablemente a partir de un códice, y contiene 366 leyes.

27 Wiegers, *Islamic Literature*, 115-23; idem, 'Breviario Çunní, de Içа de Gebir', in *Memoria de los moriscos: escritos y relatos de una diáspora cultural*, ed. A. Mateos Paramio and J. C. Villaverde Amieva, Madrid: Sociedad Estatal de Conmemoraciones Culturales, 2010, pp. 130-33; idem, 'Içe de Gebir'. en D. Thomas & A. Mallett (eds), *Christian-Muslim Relations: A Bibliographical History*, (Leiden: Brill, 2013), 462–68. M. J. Feliciano, 'Yça Gidelli y la Nueva España; Un manuscrito del *Breviario Sunní* en el Archivo General de la Nación (México, D.FOL.)', *Aljamía*, 13 (2001), 48-51; idem, 'Breviario çunní de uso de la Inquisición', en *Memoria de los Moriscos*, 172-73.

en el *Llibre de la çuna e xaria*, que no son objeto del presente trabajo, o del hecho de que la aprobación de la ley requiera de un proceso de compilación ordenado desde la corona castellana o aragonesa, que ratifique esas normas en sus cortes. El pragmatismo – que podríamos considerar equivalente por el lado islámico a la *maṣlaḥa* (interés público) — domina la situación.

La actuación de cadíes y alfaquíes en los pleitos, según el derecho islámico de época mudéjar

Para comprender la actuación de los cadíes en los siglos XIV y XV, periodo de florecimiento de estos tratados mudéjares, hay que tener en cuenta la evolución del derecho islámico en este periodo. Sabemos que en el XV, los sultanes otomanos se dedicaron a publicar los denominados *qanuns* basadas seguramente en las compilaciones bizantinas, pues coincide que los Omeyas también las emitieron en los primeros tiempos del islam. Dichas leyes derivan directamente de la autoridad del sultán y sus tribunales, diferentes de los que aplicaban la sharīʿa, aunque también formados por ulemas y alfaquíes, y son paralelas pero mucho más detalladas que las del *fiqh* propiamente dicho. Pero a la hora de su aplicación, los dos sistemas legales — el 'de sharīʿa' y el 'no- sharīʿa', según los denomina Vikor — confluyen en el cadí, que es quien sentencia y aplica la norma de uno y otro, con consejo del muftí[28]. Los qanuns podían completarse con otros tipos de normas. Según Vikor, 'The sultan could issue an *emr* (*ʿamr*), order, to the qadi. This had the same relation to qanun as a fatwa had to the sharīʿa: it could explain or specify a qanun, or for that matter function as a new qanun. But the sultan could not force the qadi to adjudicate according to the *emr*…'[29] Aunque por ahora no hay testimonio de esto en otras dinastías anteriores o contemporáneas, como la selyuquí o la mameluca, estos decretos u ordenamientos han dejado huella en Granada. A mediados del siglo XV, si hacemos caso de lo recogido por Conde en su *Historia de la dominacion de los arabes en España*, se produjeron una serie de disposiciones – traducidas por Conde como 'ordenamiento' o 'código' – que afectaban a la forma en que debían juzgar los cadíes en Granada, y que por extensión pudieron tener un impacto en el derecho de la minoría islámica en Castilla. En este ordenamiento (*amr*) de Yūsuf I[30] (1333-54) los cadíes vieron reafirmado su criterio para posibilitar una reducción de las penas de la sharīʿa, sin precedentes hasta entonces:

28 Sobre la diferencia entre la actuaciäon de uno y otro, Reinhart, 'Transcendance and social practice', 18.
29 Vikor, *Between God & the Sultan*, 210.
30 J. A. Conde, *Historia de la dominacion de los arabes en España sacada de varios manuscritos y memorias arábigas* (Madrid:García, 1821), III, pp. 137-47. S. Calvo Capilla, 'La religiosidad nazarí en época de Yūsuf I (1332-54) según un texto traducido por José Antonio Conde, después llamado "Código de Yusuf"' (en prensa). Agradezco a Susana Calvo que me facilitara acceso a su trabajo inédito.

'Ordenó que en los delitos de adulterios y homicidios y otros que se castigan con pena de muerte, si los cómplices y reos no confiesan, no se les pueda dar la pena de muerte si no hay cuatro testigos de vista que depongan de una obra y de un mismo tiempo. Los adúlteros tenían pena de morir apedreados, y los solteros que cometen fornicio tienen pena de cien azotes, el varón desnudo y la mujer sobre su alcandora, y después el varón un año de destierro, *y el rey Jucef ordenó que hubiese en estos delitos alvedrio de juez* y los pusiese en prisión, y siendo iguales los obligase a casar y pagar azidake a la mujer, y también mando que a los que por justicia fuesen muertos se les lavase y cafanase, y se les enterrase con las azalaes y en los mismos cementerios que a los otros Muzlimes.

También estableció que hubiese alvedrio de juez en las penas de los hurtos. La ley era, que cuando alguno hurtare de casa, huerto o termino cercado se señorío ageno, que no sea en valdío, yermo y cosa sin guarda, que sea su valor cuarto de dobla de oro, o peso de tres adirhames de plata, o de ahí arriba, le corten la mano derecha, sea varón o hembra, siervo o libre, si el varón tiene ya quince años y la hembra trece, por el primer hurto la mano derecha, por el segundo el pie izquierdo, y por el tercero la mano izquierda, por el cuarto el pie derecho, y por el quinto se le atormentaba y ponía en prisión perpetua. *Quiso el rey que por el primer hurto se le azotase y encarcelase*, por el segundo se le cortase la mano izquierda o el pie, y ordenó otras muchas cosas para el buen gobierno'.[31]

La sustitución de las penas capitales o de la amputación, pena raramente presente en los casos reales de juicio de etapa mudéjar, encuentra así la corroboración en fuentes granadinas, resultando ser un fenómeno general, y no debido a las limitaciones del estatuto mudéjar.[32] Es evidente que en sociedades en las que los ciudadanos deben participar en la defensa — cuya necesidad era especialmente acuciante en Granada — recurrir a penas que incapacitaran para el combate no tenía mucho sentido. Las referencias al libre albedrío de los jueces se recogen también en el *Breviario sunní*, en el que se les reconoce cierta autonomía en un buen número de temas: 'El juez a lugar de usar albedrío en las sangres y en las tenençias y posiçiones y en los huérfanos y en sus vienes y en lo proçesado, non dando lugar a maliçias'.[33]

Por otra parte, la capacidad de los alcaldes de las aljamas para aplicar penas físicas o de cárcel a los mudéjares castellanos aparece explicitada en un documento procedente de la aljama de Magacela (Badajoz), perteneciente a la Orden de

31 Las cursivas son mías. Conde, *Historia de la dominacion*, 145-46.

32 Para la sustitución de penas de hurto por otras, y los castigos de amputación para quienes falsificaran documentos, D. Serrano Ruano, 'Twelve Court Cases on the Application of Penal Law under the almoravids', en *Dispensing Justice in Islam. Qadis and their Judgments*, ed. M. K. Masud, R. Peters y D. S. Powers (Leiden: Brill, 2006), 473-93.

33 Yça Yabir, *Breviario sunní*, fol. 47v. Sobre las tenencias, véase Abboud-Hagar, S. (ed.): *El tratado jurídico de al-Tafrī' de Ibn al-Ğallāb*, (Zaragoza: Institución Fernando el Católico, 1999), II, 536-40.

Alcántara, en el que el maestre Melén Suárez ordena al comendador que haga cumplir las ordenanzas concedidas a la aljama de los musulmanes, en las que se les autorizaba a no aceptar testimonios de cristianos en pleitos contra los musulmanes – lo mismo ocurriría con ellos, no se aceptaría su testimonio en pleitos contra cristianos-; se les concedía el privilegio de permanecer en sus propias prisiones, y se sancionaba la imposibilidad de ser sometidos a tortura excepto a manos del alcalde musulmán.[34] Este documento no solo demuestra la existencia de alcaldes mayores propios en las comunidades dependientes de órdenes militares, sino también una capacidad de aplicación de penas físicas que no aparece en otras fuentes. Sin embargo, al tratarse por ahora de una excepción no es posible extraer una norma. La referencia a prisiones propias viene confirmada por el título correspondiente en las *Leyes de moros*:[35]

> 'Titulo commo el alcalle a de tener preso al que lo meresçe.
> Otrosi el alcalle que tenga preso el que meresçiere la presyon. Et la presyon cunple en todos los derechos sy quien por debda o por otra rrason. E non a presyon el que non ha de que pague. Et el que paresçe su pobredat conuiene quel alcalle cate por el, e la presyon non sea tiempo cierto. Et conuiene al alcalle que cate en fecho de los presos e non aluengue su presyon. Et el que sopiere su pobredat desenbargue. Et el que sopiere que anda nemiga rretroigal en la presyon'.

Por otra parte, confirma la posibilidad de los alcaldes mayores castellanos de ejercer y aplicar la justicia criminal, y no solo la civil, frente a lo que ocurría en Granada y Aragón,[36] aunque hubo reiterados intentos por parte de algunos monarcas castellanos por limitar el ejercicio de la jurisdicción criminal, sobre todo durante los reinados de Juan I y Enrique III, pero parece que las aljamas consiguieron recuperar esta capacidad, a juzgar por las quejas de los diputados en las Cortes de Madrigal de 1476.[37] El hecho de que se reconozca a Abrahen Xarafí en los documentos previamente mencionados su poder sobre los alguaciles y la

34 1369, noviembre, 10. Villanueva (aldea de Magacela, Badajoz). Recogido en A. Torres y Tapia, *Crónica de la Orden de Alcántara* (Madrid: Ramírez, 1763), II, pp. 91-92. Cit. B. Palacios Martín, *Colección diplomática medieval de la Orden de Alcántara (1157-1494)*, 2 vols (Madrid: 2003), II, 465, doc. 672. Agradezco a la Dra. Clara Almagro Vidal que me proporcionara esta referencia.

35 *Leyes de moros*, fol. 59r.

36 M. I. Calero Secall, 'La justicia, cadíes y otros magistrados', en *El reino nazarí de Granada*, *Historia de España* (coord. M. J. Viguera Molins), vol. VIII.3 (Madrid: Espasa Calpe, 2000), 365-427: 406-07. Este tema fue planteado en un primer momento en Echevarria, 'De cadí a alcalde mayor', 287, pero tiene implicaciones más complejas, que son las tratadas en este punto.

37 A. I. Carrasco Manchado, *De la convivencia a la exclusión. Imágenes legislativas de mudéjares y moriscos, siglos XIII-XVII* (Madrid: Sílex, 2012), 210-14; M. C. Redondo Jarillo, 'La comunidad mudéjar de Plasencia durante el reinado de los Reyes Católicos', *Medievalismo*, 23 (2003), 291-341: 296.

ejecución de la sentencia es, por lo tanto, un uso propio de Castilla,[38] basado bien en una influencia del derecho cristiano tanto romano como de los fueros, o en los atributos del cadiazgo almohade, que era el imperante a la hora de la firma de los pactos que sancionaron el estatuto de los mudéjares andaluces.[39]

Tanto en las *Leyes de moros* como en el *Llibre* y en el *Breviario sunní* se caracterizan las tres figuras principales: el alcalde mayor del reino o alcadí mayor, el alcalde de la aljama u ordinario, y los jueces de arbitrio, además de un cuerpo de alfaquíes que funcionan como consejo del cadí o alcalde mayor, como en época andalusí. De hecho, lo que sanciona la legitimidad del juicio del alcalde mayor mudéjar es este consejo emitido por los alfaquíes o muftíes más próximos.[40] En los documentos que nos han llegado de juicios penales en época mudéjar hay constancia de la actuación de cada uno de ellos, salvo de los árbitros, cuya designación aparece sin embargo en los protocolos notariales de diversas ciudades. El trabajo de estos árbitros se describe detenidamente en el *Breviario sunní*:[41]

> 'El juez puede tomar dos hombres buenos y mandarles que ygualen y avengan a los pleyteantes en las cosas de mucha obscuridad que non se pierdan en pleyto. Non pasa que el juez libre en pleyto de grande quantia o de crimen entre el estraño y su fijo, nin entre el estraño y su padre, debe tomar consigo quien oya para lo librar sin sospecha. Quando el *alcalde arbitro o arbitros* ovieren oydo las partes e ynformaçion de los testigos y escripturas y dieren sentençia en mucho o poco contra amos o qualquiera dellos en quantidad y numero sabido y comportable non a lugar ninguno de las partes de lo contradeçir, tanto que non le mande cosa que non sea haram y mucho menos si juraron. Y todo *jues ordinario* lo a de confirmar, y asi mismo si lo otorgaren los procuradores quando alguno se obligare por otro ausente de estar o facer estar, por que [por «quien»] quiere que sea sin tener poder para ello y sin que el lo sepa, aquello non pasa nin prende al obligado cosa que sea. Quando dos personas se ygualaren sobre alguna división y conveniençia y dello oviere testigo con la una parte en negoçio çivil en que non aya cosa de haram y se clamare el uno al juez sobre ello, el juez non le desfaga mas confirmelo'.

38 'E mandamos a los nuestros alguaçiles e esecutores que cunplan e esecuten realmente e con efecto e fagan cunplir e esecutar las sentençias e cartas e mandamientos que dieredes e pronunçiaredes sobra razon de los dichos pleitos e cabsas, así vos el dicho don Abraham, nuestro alcalde mayor, como los dichos vuestros logares tenientes entre los dichos moros e moras de las dichas aljamas de los dichos nuestros regnos e señoríos', AGS, RGS, enero 1475, fol. 362, ed. Torres Fontes, 'El alcalde mayor', 173.

39 Calero Secall, 'La justicia', 369.

40 'Y non se afinque en su juicio sin se aconsejar segun su consejo con alfaquíes sabidores en los derechos para dar definitiva sentençia'. Yça Yabir, *Breviario sunní*, fol. 46v.

41 Yça Yabir, *Breviario sunní*, fol. 47v.

Y también se reconoce su actuación y limitaciones en las *Leyes de moros* castellanas:[42]

> 'Titulo de los alcalles árbitros commo han de judgar.
> Otrosy an alcalles árbitros judgaren un pleito, e plase al uno de las partes e non al otro, sea cierto el juysio sy el que lo judga sabe algo de los derechos, o sy judgo cosa que es pasada entre las gentes maguer conçertase con juysio del alcalle o non, sy non saliere de derecho que paresca a las gentes que judgo mal. Et otrosy quando dos judgaren un pleito árbitros e lo negare el que judgan sobre el, non puede el uno prouar con el otro'.

Solo en el *Llibre* y en pleitos de la corona de Aragón se habla de autoridades cristianas actuando en lo que sería el papel del alcalde mayor del reino, hasta la segunda mitad del siglo XV, en que los alcaldes cristianos se apoderan también de las prerrogativas de los mudéjares en Castilla.[43] Anteriormente, solo podían arrogarse autoridad sobre la minoría islámica en caso de que el musulmán renunciase expresamente sus derechos, y aceptase no regirse por la ley islámica. Así se contiene en numerosos casos que afectaban, por ejemplo, al establecimiento de contratos de censo o alquiler en casas que no pertenecían a musulmanes, siempre con la fórmula 'renunçio el previllejo de los moros' o 'renunçio las leyes de los moros'.[44]

El tratamiento detallado que reciben los juicios y su desarrollo en las fuentes mudéjares permite percibir la continuidad con el periodo propiamente islámico a pesar de las limitaciones que sufría la minoría. Las vistas del juicio debían tener lugar siempre en la mezquita, donde los asuntos internos de la comunidad podían dirimirse sin intromisiones de los demás grupos religiosos. En el caso de mujeres, unos sugieren que se tome el testimonio de día y otros que de noche para que no se las vea:

> 'Oyan en el almachid, donde puedan llegar a él el pobre y viejo y la muger a deçir de su derecho, y desque aya fecho el demandador de breve plazo al que responda el demandado, y escrivalo quien sea fiel como non se olvide, y develos señalar el juez de su mano y asentar los testigos y desque concluya librelo como dicho es. [...] y tomenles juramento a los testigos por el nombre de Allah, aquel que non a otro señor sino El y sea sobre crimen o sobre çevil, en publico lugar del almachid sean juramentados, y si fuere muger de las que de dia salen por la calle, tambien jure en el almachid, y si

42 *Leyes de moros*, fol. 59r.

43 El proceso se ve muy claramente en el estudio de B. Catlos, *The Victors and the Vanquished. Christians and Muslims of Catalonia and Aragon, 1050-1300* (Cambridge: Cambridge University Press, 2004).

44 Archivo Histórico Provincial de Ávila, Prot. 460, fol. 7v, 10v, año 1449. O mismo se aprecia en las escrituras de la morería nueva de Ávila, propiedad del monasterio de Sancti Spiritus, en AHN Clero Secular-Regular, Ávila, leg. 534-1, en los que todos los musulmanes aceptan regirse por el derecho canónico en lo que respecta a estos contratos.

> no tomeselo en su casa un hombre delante de los de su casa, y tomen juramento a los christianos o judios en los lugares que ellos an de mayor devoçion en sus adoratorios'.[45]

Lo mismo parece ocurrir en el señorío valenciano, según el *Llibre*:

> 'CLXIV. Que.l sagrament deu ser fet en la meçquita. Aquest sagrament deu ésser feit tots temps en la mezquita de aquells, presents les parts davant l'alcadí o alfaquí o altres bons hòmens sarrahins de aquell[s]'.[46]

El alcalde, ante todo, no puede juzgar sin recurso a los testimonios de testigos probados. Su conocimiento personal de la causa no le permite llegar a una sentencia. En esto coinciden todos los autores malikíes,[47] por lo que los diversos tratados no hacen más que insistir en lo habitual. Las *Leyes de moros*[48] y el *Llibre de la çuna e xara* lo tratan cumplidamente:

> 'Titulo commo el alcalle un pleito (*sic*)
> Otrosy el alcalle judgara un pleito e despues lo negara e testimoniaren desque lo judgo, rresçiban su testimonio e se çierre el juysio et non se pierda el pleito por su negoçio. Et otrosy quando dixiere el alcalle, que él que judgo un pleito, e negare el que dio sentençia contra el, non rreçiba su dicho del alcalle, synon testimonio que fue sobre su sentençia. Et otrosy quando testimoniaren dos testigos sobre testimonio de dos testigos et negaren los testigos primeros o oluidaren o tornaren de su testimonio, non pasen los testigos postrimeros'.
> 'XXXIII. Co[m] negun alcadí no deu donar sentència sinó sobre ço que davant li serà posat. Negun alcadí en negun negoci no deu donar sentència sinó sobre alló que davant aquell serà posat e provat e request de les parts; temps deu haver de deliberació sobre qualsevol negocis dels savis scients de Çuna e de Xara'.[49]

En cambio, el *Breviario sunní* solo hace a este respecto una breve mención:

> 'Non juzgue el juez con lo que el supiere mas diga su dicho ante otro juez que lo conozca, y si los pleyteantes ante el se denostaren, o el uno al otro, y vieren testigos ende, castiguenlo en el grado que merezca'.[50]

45 Yça Yabir, *Breviario sunní*, fol. 46v-47v.
46 *Llibre de la çunna e xara*, ed. C. Barceló, 42.
47 Un ejemplo contemporáneo, el granadino al-Nubbahi (cuya obra fueescrita entre 1372-86), dedica todo un epígrafe a esta cuestión. Cuellas Marqués, *Al-Maqaba*, 110-11. También Abboud-Hagar, *El tratado jurídico de al-Tafrī'*, II, 482-83.
48 *Leyes de moros*, fol. 59r.
49 *Llibre de la çunna e xara*, ed. C. Barceló, 8-9.
50 Yça Yabir, *Breviario sunní*, fol. 47r.

Otro aspecto que se resalta es cómo actuar si el juicio del alcalde resultara nulo o debiera ser enmendado, en parte porque aquí sería donde intervendrían autoridades no musulmanas, y a estos momentos es a los que están destinadas las compilaciones en castellano. El *Breviario sunní* habla del 'juez que actúa sobre él', sin especificar:

> 'E si alguna parte se sintiere agraviada y lo ficiese saber y entender al juez y el juez conoçiere que erró algo en su sentençia, emiendelo aunque salga de su poder. E si *el juez que sobre el viere* de conoçer fallare que jusga por qualquiera de tres rraçones susodichas, non debe rebocar su sentençia mas afirmarla, y si dio mala sentençia sea llamado que diga por donde la dio porque al que le aconsejo sea cargado el error y costas dellos al juez primero el qual lo mande a su consejero'.[51]

En todos los compendios se destaca el papel de las cartas de testimonio, legalizadas por notarios o alfaquíes, y la cuestión de las firmas conocidas, lo que da a entender que los alcaldes o cadíes de las distintas comunidades y los alfaquíes se conocen entre ellos o pueden buscar gente cercana que los conozca. En las *Leyes de moros* se prevén los pasos a seguir para tener en cuenta estas pruebas[52]

> 'Titulo de commo escriue un alcalle a otro carta.
> Otrosi quando escriuiere un alcalle a otro carta en algunt derecho que paso ante el, non judgue por aquella carta syno con testimonio que sea testimonio sobre su carta. Et non rreçiban el testimonio sobre su letra sy non enbiare desir el fecho commo paso, que se declare la rrason. E sy alguna demanda demandaren uno a otro e lo negare e paresçiere el rrecabdo con su nombre, e lo negare e testimoniaren dos testimonios sobre su letra non declarando bien la rrason, ay en ello dos juysios: lo uno quel judgaran los testigos sobre la letra, e lo otro que non /f. 59v/ le paguen cosa. Et quando dixieremos quel judgaran con los testimonios sobre la letra sy ha de jurar con los testigos o non ay dos cosas, que le judgaran con los testigos sobre la letra. E lo otro que non se judguen con los testigos fasta que paren con ellos e que aya su derecho con los testigos e la jura. E quando le testimoniare un testimonio sobre la letra ay dos cosas: quel judgue con aquel testimonio sobre la letra con su jura e lo otro que non le judgue por ello'.

El *Breviario sunní*, más brevemente, considera que 'El alcalde deve de escrevir carta de receptoria a los otros alcaldes de los lugares donde fuere neçesario y los otros complirlas si conosçieren non ser dubdosas tal que bayan ende testigos y, declarada la costa sobre que y como sean preguntados o notificados en lo que cumpla, y tomenles juramento a los testigos por el nombre de Allah, aquel que

51 Yça Yabir, *Breviario sunní*, fol. 47r.
52 *Leyes de moros*, fol. 59r.

non a otro señor sino El y sea sobre crimen o sobre çevil, en publico lugar del almachid sean juramentados'.

Más brevemente, el *Llibre* recomienda que no se tengan en cuenta las cartas si no consta que los testimonios contenidos en ellas son válidos:

> '[CCCXXXIV. negun alcadí no deu haver faça a algua carta sarrahina si no li era cert dels testimonis contenguts en la carta.]
> Negun alcadía no deu haver faça [a] alguna carta sarrahina si donchs primerament no li era cert, dels testimonis contenguts en la carta per la part demana[nt], que.ls testimonis scrits en la dita carta sien bons, puix que.l covengut negà aquella carta'.[53]

En conclusión, podemos decir que sobre la figura del cadí y su actuación en los juicios, comparativamente entre los distintos tratados, presenta mayor detalle el código nobiliario (*Llibre de la çuna e xara*), que llega incluso a incluir un formulario para la sentencia,[54] seguido de las Leyes de moros, seguramente por tratarse de códigos de leyes con connotaciones fundamentalmente prácticas. El menos detallado en este tema es el *Breviario sunní*, que en cambio será mucho más explícito en cuestiones rituales y de culto, y ello por la misma naturaleza de la obra.

Apéndice. Textos

Leyes de moros

f. 58v/ **Titulo que non judgue el alcalle por lo que el sabe.**
f. 59r/ Non pase al alcalle que judgue por lo que el sabe nin el alhudud nin en otro derecho ninguno. Et si algo sopiere dello, es testimonio en ello. Et al de testimoniar con el ante otro jues e sea en ello commo un testimonio. Et cumple para el alcalle que non judgue entre las partes saluo ante los testigos con el que oyan el pleito. Et que judgue por su testimonio et non por lo que el jues sabe.

Titulo commo el alcalle un pleito (*sic*)
Otrosy el alcalle judgara un pleito e despues lo negara e testimoniaren desque lo judgo, rresçiban su testimonio e se çierre el juysio et non se pierda el pleito por su negoçio. Et otrosy quando dixiere el alcalle, que él que judgo un pleito, e negare el que dio sentençia contra el, non rreçiba su dicho del alcalle, synon testimonio que fue sobre su sentençia. Et otrosy quando testimoniaren dos testigos sobre testimonio de dos testigos et negaren los testigos primeros o oluidaren o tornaren de su testimonio, non pasen los testigos postrimeros.

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53 *Llibre de la çunna e xara*, ed. C. Barceló, 95.
54 Garcia Edo y Pons Alós: *Suna e Xara*, pp. 193-94.Véase apéndice, *Llibre de la çunna e xara*, ley 206.

Titulo de commo escriue un alcalle a otro carta.
Otrosi quando escriuiere un alcalle a otro carta en algunt derecho que paso ante el, non judgue por aquella carta syno con testimonio que sea testimonio sobre su carta. Et non rreçiban el testimonio sobre su letra sy non enbiare desir el fecho commo paso, que se declare la rrason. E sy alguna demanda demandaren uno a otro e lo negare e paresçiere el rrecabdo con su nombre, e lo negare e testimoniaren dos testimonios sobre su letra non declarando bien la rrason, ay en ello dos juysios: lo uno quel judgaran los testigos sobre la letra, e lo otro que non /f. 59v/ le paguen cosa. Et quando dixieremos quel judgaran con los testimonios sobre la letra sy ha de jurar con los testigos o non ay dos cosas, que le judgaran con los testigos sobre la letra. E lo otro que non se judguen con los testigos fasta que paren con ellos e que aya su derecho con los testigos e la jura. E quando le testimoniare un testimonio sobre la letra ay dos cosas: quel judgue con aquel testimonio sobre la letra con su jura e lo otro que non le judgue por ello.

Titulo commo el alcalle a de tener preso al que lo meresçe.
Otrosi el alcalle que tenga preso el que meresçiere la presyon. Et la presyon cunple en todos los derechos sy quien por debda o por otra rrason. E non a presyon el que non ha de que pague. Et el que paresçe su pobredat conuiene quel alcalle cate por el, e la presyon non sea tiempo cierto. Et conuiene al alcalle que cate en fecho de los presos e non aluengue su presyon. Et el que sopiere su pobredat desenbargue. Et el que sopiere que anda nemiga rretroigal en la presyon.

Titulo de los alcalles árbitros commo han de judgar.
Otrosy an alcalles árbitros judgaren un pleito, e plase al uno de las partes e non al otro, sea cierto el juysio sy el que lo judga sabe algo de los derechos, o sy judgo cosa que es pasada entre las gentes maguer conçertase con juysio del alcalle o non, sy non saliere de derecho que paresca a las gentes que judgo mal. Et otrosy quando dos judgaren un pleito árbitros e lo negare el que judgan sobre el, non puede el uno prouar con el otro.

Breviario sunní

[f. 46v] Capitulo 46. De los alcaldes ordinarios y arbitros y de sus juizios.

El alcalde conviene que sea buena persona, discreta y pacífica, entendido en los derechos y en los fechos de sus anteçesores, sabidores y de buen consejo, non juzgue con saña nin con pensamiento oyra. Juzgue por el Alcorán o por el açuna o por determinaçion de algun doctor de la ley. Quando con alguna de las tres librare, basta su sentençia. Y non se afinque[*sea fizie* en ms. Mexico] en su juicio sin se aconsejar segun su consejo con alfaquíes sabidores en los derechos para dar

definitiva sentençia, y si los consejos non concordaren, libre con los más claros a la causa y basta.

Oyan en el almachid, donde puedan llegar a el el pobre y viejo y la muger a deçir de su derecho, y desque aya fecho el demandador de breve plazo al que responda el demandado, y escrivalo quien sea fiel como non se olvide, y develos señalar el juez de su mano y asentar los testigos y desque concluya librelo como dicho es. [f. 47r] Non de lugar a maliçias, ni reçiva testigos que el conozca que non se devan rrecevir. Non de lugar a contradeçir los buenos salvo a los que obran causa justa contra ellos. Podrán ser preguntados en lo que non les preguntaron o se les olvido de deçir. E si alguna parte se sintiere agraviada y lo ficiese saber y entender al juez y el juez conoçiere que erró algo en su sentençia, emiendelo aunque salga de su poder. E si *el juez que sobre el viere* de conoçer fallare que jusga por qualquiera de tres rraçones susodichas, non debe rebocar su sentençia mas afirmarla, y si dio mala sentençia sea llamado que diga por donde la dio porque al que le aconsejo sea cargado el error y costas dellos al juez primero el qual lo mande a su consejero.

Non juzgue el juez con lo que el supiere mas diga su dicho ante otro juez que lo conozca, y si los pleyteantes ante el se denostaren, o el uno al otro, y vieren testigos ende, castiguenlo en el grado que merezca. El alcalde deve de escrevir carta de receptoria a los otros alcaldes de los lugares donde fuere neçesario y los otros complirlas si conosçieren non ser dubdosas tal que bayan ende testigos y, declarada la costa sobre que y como sean preguntados o notificados en lo que cumpla, y tomenles juramento a los testigos por el nombre de Allah, aquel que non a otro señor sino El y sea sobre crimen o sobre çevil, en publico lugar del almachid sean juramentados, y si fuere muger de las que de dia salen por la calle, tambien jure en el almachid, y si no tomeselo en su casa un hombre delante de los de su casa, y tomen juramento [f. 47v] a los christianos o judios en los lugares que ellos an de mayor devoçion en sus adoratorios.

Non se priva el alcalde por muerte a probaçion de *su mayor o superior* fasta que *el venidero* ponga o lo prive por espeçial mandado.

El juez a lugar de usar albedrío en las sangres y en las tenençias y posiçiones y en los huérfanos y en sus vienes y en lo proçesado, non dando lugar a maliçias.

El juez puede tomar dos hombres buenos y mandarles que ygualen y avengan a los pleyteantes en las cosas de mucha obscuridad que non se pierdan en pleyto. Non pasa que el juez libre en pleyto de grande quantia o de crimen entre el estraño y su fijo, nin entre el estraño y su padre, debe tomar consigo quien oya para lo librar sin sospecha.

Quando el *alcalde arbitro o arbitros* ovieren oydo las partes e ynformaçion de los testigos y escripturas y dieren sentençia en mucho o poco contra amos o qualquiera dellos en quantidad y numero sabido y comportable non a lugar ninguno de las partes de lo contradeçir, tanto que non le mande cosa que non sea haram y

mucho menos si juraron. Y todo *jues ordinario* lo a de confirmar, y asi mismo si lo otorgaren los procuradores quando alguno se obligare por otro ausente de estar o facer estar, por que [por 'quien'] quiere que sea sin tener poder para ello y sin que el lo sepa, aquello non pasa nin prende al obligado cosa que sea. Quando dos personas se ygualaren sobre alguna división y conveniençia y dello oviere testigo con la una parte en negoçio çivil en que non aya cosa de haram y se clamare el uno al juez sobre ello, el juez non le desfaga mas confirmelo.

Y quando *el alcalde ordinario* fuere [f. 48r] reclamado de alguna sentençia o postura en que aya engaño de haram, anulle y revoque lo que tocare en haram y afirme y mande cumplir lo fincable.

Llibre de la çuna e xara

XXXII. Si algunt alcadí d[on]ará sentència per amor o pahor o mala voluntat. Si algun alcadí, per dinés, hoi o mala voluntat, amor o temor, corrupció o engan, scientment contra algun donarà alguna sentència contra Çuna o les oppinions de aquells savis appellats Almelich, Reffeni, Fambeli e Abofani, se deu restituhir a aquell contra lo qual ha donat la sentència tot allò que perdé per aquella sentència: e no-res-menys a deguda pena deu ésser punit a coneguda de l'alcadí o del senyor, segons Çuna.

XXXIII. Co[m] negun alcadí no deu donar sentència sinó sobre ço que davant li serà posat.

Negun alcadí en negun negoci no deu donar sentència sinó sobre alló que davant aquell serà posat e provat e request de les parts; temps deu haver de deliberació sobre qualsevol negocis dels savis scients de Çuna e de Xara.

XXXIV. Com totes les penes declarades no poden ésser tengudes.

Totes les penes [que] declarades o seran poden ésser tengudes e deminuhides, segons presumpcions, la condició e la fama de les persones, a arbitre de l'alcadí segons Çuna.[55]

XLI. Com lo alcadí, segons bona consciència, darà sentència e.y pecarà ignorantment.

Si algún alcadí, segons bona consciència sua, haurà donat alguna sentència en algun feit, en la qual sentència en alguna cossa (sic haurà peccat, segons Çuna dementre que açò no haja feit per amor, o per oi o per engan, a alguna cosa no és tengut.

55 *Llibre de la çunna e xara*, ed. C. Barceló, 8-9.

XLII. D'aquells qui fan fals sagrament.

Si algú haurà feit fals testimoni per qualsevol rahó, com açò li será provat manifestament, açò [a con]eguda de l'alcadí o del senyor, segons Çuna, deu ésser punit.[56]

CLXIV. Que.l sagrament deu ser fet en la meçquita.

Aquest sagrament deu ésser feit tots temps en la mezquita de aquells, presents les parts davant l'alcadí o alfaquí o altres bons hòmens sarrahins de aquell[s].[57]

CCXXI. Que degun alcadí en feit civil ne criminal no pot jutjar de nit e anant per la carrera ne volent menjar.

Negun alcadí en alguns feits cevils o criminals no pot, de nit o anant per la carrera e volent menjar, jutgar, mas de dia deu jutgar, sehent en la manera acostumada de jutgar.[58]

CCLXXI. Que si algù será condemnat per alcadí a açots, sia o no l'alcadí [present], los hi poden donar.

Segons Çuna e observança del Regne, si algun sarrahí serà condempnat per alcadí a alguns açots, a coneguda de l'alcadí o del senyor de aquells lochs – si és acostumat donar açots – poden aquells donar a aquell condempnat e jatsia l'alcadí sia present o no, segons que mills los serà vist fahedor; los quals açots deven ésser donats, segons la qual.li[tat] del feit, majors segons lo qual malfeitor serà en aquells condempnat. Ara, segons los Furs, no poden ésser donats per lo senyor del loch sinó tro en cent.

CCLXXII. Per privilegi real qui a conèxer del[s] sarraïns.

Per privilegi real lo Batle General del regne, del senyor Rei e dells Òrdens e lo Procurador del Regne de València deu[en] conèxer del[s] sarrahins dells nobles e dells cavallers.[59]

[CCCXXXIV. negun alcadí no deu haver faça a algua carta sarrahina si no li era cert dels testimonis contenguts en la carta.]

Negun alcadía no deu haver faça [a] alguna carta sarrahina si donchs primerament no li era cert, dels testimonis contenguts en la carta per la part demana[nt], que.ls testimonis scrits en la dita carta sien bons, puix que.l covengut negà aquella carta.[60]

[178] CLXXVIII. Que nengun non és tengut, [per]què sia convengut, pagar los messions en degun pleit.

56 *Llibre de la çunna e xara*, ed. C. Barceló, 11.
57 *Llibre de la çunna e xara*, ed. C. Barceló, 42.
58 *Llibre de la çunna e xara*, ed. C. Barceló, p. 58.
59 *Llibre de la çunna e xara*, ed. C. Barceló, p. 75.
60 *Llibre de la çunna e xara*, ed. C. Barceló, p. 95.

Nengun non és tengut, perquè sia convengut, pagar los messions en alguns pleits, segons Çuna, si donchs no haurà menat maliciosament lo dit pleit, segons Çuna.[61]

[206]. CCVI. En qual manera tot alcadí deu donar sentència[62]

En qual manera tot alcadí deu donar sentència en tots feits, així civills com criminals, segons Çuna:

> Comparech n'aital, aital dia e tal any davant mi, aital alcadí, e dix que aital lo havi[a] nafrat ab aital arma, de tantes nafres, en aital loch de la sua persona, per què demana e requer davant aquell ésser donada la sentència, segons Çuna. On jo, alcadí, vista la demanda e requesta feita per lo dit aital e la resposta feta per lo dit n'aital e les deposicions de aquells, e vistes encara totes altres coses que les dites parts, davant mi, dir e al·legar vollgueren, com a mi sia cert de la intenció de aital, així com per confessió del dit n'aital, com per los testimonis produhits per lo dit n'aital. E per mor d'açò, jo prenc sentència, segons Çuna, que semblants nafres sien fetes en la persona del dit n'aital per lo dit n'aital, si fer se poden, e si fer no.s poden, que pach la pena de les dites nafres segons Çuna. E donada sentència per lo dit alcadí, en aital loch e aital dia e aital any. Presents les parts dessús dites e presents testimonis aitals.

E si les parts no seran presents, lo alcadí pot donar sentència en aquesta manera:

> A instància del clamant do per sentència, si així és com lo dit aital aferma, provar se pot e provar se porà manifestament que així sia feit, segons Çuna encara do sentència que aital, per rahó de castiguació, reheba aitants açots, lon vel bataca.

E així mateix, de cas de mort, deu donar sentència, e de paraules injurioses, deutes, promissions e altres qualsevol feits, l'alcadí tots temps [deu] recomptar tot lo negoci en sa sentència. E si.l demanador no provarà alguna cosa de la sua intenció, lo alcadí deu donar així sentència:

> Com a mi no sia cert de la intenció del dit n'aital, per ço done per sentència que lo dit n'aital sia de la dita demanda, proposada contra ell per lo dit n'aital, de tot en tot per tots temps absolt.

E si.l feit serà arbitrari, lo dit alcadí deu dir així:

> Do per sentència que.l dit n'aital reheba per sentència aitants açots, lany o bataca, per castígació, per tal que als altres sia exemple.

61 Garcia Edo y Pons Alós: *Suna e Xara*, p. 188.
62 Garcia Edo y Pons Alós: *Suna e Xara*, pp. 193-94.

E si per alguns hereus alguna mort serà demanada, que per testimonis [no] sia provada mas ab carta sia testimoniada e demostrada, l'alcadí deu donar sentència en aital manera:

> Do jo per sentència que aital sia scapçat, feits primerament e abans los sagraments que.s deuen fer, segons Çuna, per los hereus de l'ocís.

E si serà trobat que.lls dits hereus o algú de aquells no volrà fer los dits sagraments, lo alcadí deu donar sentència en aquesta manera:

Do per sentència que.l dit n'aital, acusat per los dits sagraments, segons que fer se deuen segons Çuna, [d]e la dita pena de mort, de tot en tot per tots temps, absolch.

E sots aquestes maneres tot alcadí pot e deu donar sentència en tots [e] sengles negocis, així cívills com criminals, segons Çuna.

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STRADDLING THE BOUNDS: JEWS IN THE LEGAL WORLD OF ISLAM

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It is a commonplace to say that medieval Islam was a set of oral societies. It is equally a commonplace to say that it was a set of highly literate societies. The two statements do not necessarily contradict each other — at least so long as we are clear what we mean by them.[1] What stands out in them is the contrast with the societies of medieval Christendom, which were largely oral and not literate.[2]

Both orality and literacy imply language — but they do not say anything about which language or what sort of language is in use. The Arab world, or what was becoming the Arab world in the middle ages, was either monoglot or on the way to being monoglot. This should not be misunderstood: to say that the Arab world was monoglot then was a bit like saying the USA is monoglot today. There were plenty of other languages around — on the edges, in certain groups within the societies of the Arab world, groups defined by race, or by religion, or by ethnicity, or by class, or by history. But Arabic, whether by this we mean the literary language or the so-called dialects in all their super-rich variety, was the default language; it represented the linguistic norm towards which all worked or in some way aspired, or from which some deviated in a wide variety of ways. Arabic came in in the seventh and eighth centuries and — with the major exception of Iran (New Persian) and minor exceptions in north Africa (Berber) and possibly al-Andalus (where Romance may have subsisted for many centuries), all of them on the edges — effectively wiped the linguistic slate of what became the Arab world clean and started anew. Arabic — the language — offers us one very simple and convenient way of defining that Arab world.[3]

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1 See, e.g., Gregor Schoeler, *The oral and the written in early Islam*, trans. Uwe Vagelpohl, ed. James E. Montgomery, London and New York, Routledge (Routledge Studies in Middle Eastern Literatures, 13), 2006; id., *The genesis of literature in Islam: from the aural to the read*, trans. Shawkat M. Toorawa, Edinburgh, Edinburgh University Press, 2009; and the articles collected in *Arabica*, 44, 3-4, 1997.

2 See, e.g., Michael Richter, *The Formation of the Medieval West: Studies in the Oral Culture of the Barbarians*, Dublin, Four Courts Press, 1994; and the articles collected in id., *Studies in Medieval Language and Culture*, Dublin, Four Courts Press, 1995.

3 David J. Wasserstein, 'Why did Arabic succeed where Greek failed? Language change in the Near East after Muhammad', *Scripta Classica Israelica*, 22, 2003, pp. 257-72 (reprinted in Scott Fitzgerald Johnson (ed.), *Languages and Cultures of Eastern Christianity: Greek*, Farnham, Surrey and Burlington, Vermont,

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

10.1484/M.RELMIN-EB.5.109350

Nothing is absolute, of course, and the exceptions I have noted demonstrate that, as do several refinements not on the edge. As a general statement about the linguistic character of that world, however, it is safe to say that everyone in that world either knew or understood that it was necessary to know that language. All other languages existed there in some sort of counterpoint to Arabic.

What I should like to do here is to consider some of what I just called those refinements. That is to say, not situations on the edge, where differences from the norm are to be expected and at the same time help us to define that norm itself. Differences of this sort are to be explained, in very large part at least, by the geography of the initial conquests and in effect serve to mark the physical limits of those world-changing events. At the same time, while they mark the limits, Berber and New Persian, in their different ways, also demonstrate the strength of the Arabic imprint on the language behavior of the conquered: other languages, Christian Aramaic and Coptic, Greek and Latin, all disappear into the maw of Arabic. But New Persian and Berber, both of them at the outer edges, the fringes of those early conquests, somehow survive, or, rather like Anglo-Saxon in England after 1066, go underground, to re-emerge, heavy with Arabic borrowings and influence, centuries later.[4] Their geographical positions, on the edge of the conquests, seem to explain that handily enough.

That edge is easy (if not, on that account, necessarily free of difficulties). But refinements within are more difficult to understand, and call for different kinds of explanation. Those refinements boil down finally to the Jews. Others disappear: Zoroastrians convert to Islam. And the language behaviour of Christians under Islam can be summed up very simply: either they convert to Islam, acquiring Arabic along the way; or they acquire Arabic and conversion to Islam is but a matter of time (the Palestinian Christians and the Christians of Iraq, who have survived — just — to this day, offer good examples of this, not the opposite — and in Syria, Maʿlūlā and its sister villages may suggest something different, but recent news suggests, sadly, that such an interpretation would be a mistake. Much

Ashgate Variorum (The Worlds of Eastern Christianity, 300-1500, vol. 6), 2015, pp. 467-82); Robert Hoyland, 'Language and Identity: the twin histories of Arabic and Aramaic (and: Why did Aramaic succeed where Greek failed?)', *Scripta Classica Israelica*, 23, 2003, pp. 183-99.

4 The comparison between the fates of Anglo-Saxon and Middle Persian, following the Norman and the Arab conquests respectively, is striking. Each disappears for a time, but re-emerges centuries later, heavily influenced by the language of the conquerors. In the Norman case, however, what is even more striking is that the Normans had themselves undergone a language change following their earlier conquest and settlement in what is now Normandy. In the process they had given up a Scandinavian language not unrelated to the Anglo-Saxon of England. The comparison between the linguistic histories of England and Iran seems to deserve more study. See also David Wasserstein, 'There and Back Again: Iranian Islam and Iberian Islam in the Middle Ages', *Transition Periods in Iranian History*: Actes du Symposium de Fribourg-en-Brisgau (22-24 mai 1985) (= *Studia Iranica*, Cahier 5),1987, pp. 255-63.

the same is true of the Christians of Egypt too. Those of Lebanon alone may be a different case.)

If we look at spoken language, then everyone is tending to Arabic. It may take longer in certain cases — different communities, different geography, different developments, and so on. But Arabic is the endpoint of the process. Writing is where the refinements become necessary. The Jews do not simply go over to Arabic. Instead, they acquire, or adopt, or construct, an array of language forms and uses that differs from, at the same time as it parallels, that in use among the Muslims. Among the Muslims the Qur'ān represented the supreme form of the language, followed in prestige by poetry and ornate prose. Prose of non-ornate sort, such as we might find in historical works or other works of intellectual but not strictly literary interest, was less highly regarded and so on. Shopping lists and other minor writings, perhaps the least. Among the Jews, a similar but parallel scale existed — the Bible represented the summit of linguistic excellence; and medieval Hebrew poetry came to be composed, deliberately, in a style and a language based closely on those of the Bible, ignoring so far as possible later developments in the language. Literature of the higher sort — *maqāmāt* and so on — was written usually in a prestige form of Hebrew paralleling that of the Arabic used in similar genres. Historical works were rare in medieval Jewry, but they are cast in a looser form of Hebrew, while philosophy and medicine and other works are very often written in Arabic — in a form of the language that is often labeled Judeo-Arabic (The term is loaded). And legal works, partly for reasons of tradition and partly for convenience, are often written in Aramaic.[5]

These are rough and ready guidelines, but they represent a serious, deliberate and committed effort by Jews to behave linguistically in ways that parallel how the Arab Muslims behaved. That effort did not produce its results overnight. It took a very long time: Saadya made his translation of the Bible some three centuries after the conquests — its creation, as well as the status it achieved, are markers along the road I am describing.[6]

Two features stand out here, of course: the first, and what differentiates Jews from Christians in medieval Arab Islam, is the successful attempt to insist on

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5 See Chaim Rabin, 'Hebrew and Arabic in medieval Jewish philosophy', in *Studies in Jewish Religious and Intellectual History Presented to Alexander Altmann on the Occasion of his Seventieth Birthday*, ed. S. Stein and R. Loewe, Alabama, 1979, pp. 235-45; Rina Drory, *Models and Contacts: Medieval Arabic Literature and Its Impact on Jewish Literature*, Leiden, Brill (Brill's Series in Jewish Studies), 2000; David J. Wasserstein, 'Langues et frontières entre juifs et musulmans en al-Andalus', in *Judíos y musulmanes en al-Andalus y el Magreb, Contactos intelectuales*, ed. Maribel Fierro, Madrid, Casa de Velázquez, 2002, pp. 1-11.

6 Richard C. Steiner, *A biblical translation in the making: the evolution and impact of Saadia Gaon's Tafsīr*, Cambridge, Mass., Harvard University Center for Jewish Studies, 2010; Sidney H. Griffith, *The Bible in Arabic: the Scriptures of the 'People of the Book' in the language of Islam*, Princeton, Princeton University Press, 2013.

languages of difference, on languages that are culturally specific to the Jews. Why this should have happened, and happened with success, is not entirely clear — the Bible-translation by Saadya that I just mentioned might have been a waystation on the road to full arabization. That it was not raises a question, the answer to which may lie in the second of these two features.

This is that, for reasons which become obvious once we have considered their language choices, the Jews write in a script different from that normal among the Arabs: virtually all Jews in medieval Arab Islam do their writing in Hebrew script, whatever the language they are writing in that script. Why should they have done this? Why did they not go over, lock, stock, and barrel, to the use of Arabic script? Christians — or many Christians — go over to Arabic fairly quickly, and, not surprisingly, also to Arabic script. Jews, by contrast, build up a battery of languages which include, alongside the newest member, Arabic, also Hebrew and Aramaic. Written before the conquests in what we now label the Hebrew script, these two could easily, as Semitic languages, have been re-written in Arabic letters, transcribed into the new writing standard. What prevented that, we may suppose, is a combination of two other phenomena: on one hand, the retention of the Hebrew language itself as the language of prayer and with that, for religious reasons, of the scriptures, and, on the other, of the Hebrew script for the scriptures. The character of the Bible, in particular of the Pentateuch, in the form of the scrolls used in the synagogue, imposed the retention of the old script. The liturgy, which continued to be in Hebrew and Aramaic, also contained much taken from the scriptures, and this fact alone, which implied the retention of the Hebrew script for those portions of their written material, must have given an impetus to the retention, or the use, of that same script for the rest.[7]

These differences and these parallels mark out the Jews of Islam. While they *spoke* the same language as their neighbours (the differences in speech were for the most part insignificant and similar to those that separate religious Jews in the USA or certain pre-War western European countries from their neighbours), in their literary creativity they sought, not to imitate, but to parallel what their neighbours did; they did the same sorts of things, but with a different set of linguistic tools. Those tools set up barriers between Jews and Muslims. The barriers protected the Jews, both at the level of the individual who sought to hide what he was writing from his neighbours and, more importantly, at the communal

7 It is not quite a parallel, but we may think of old German Jewish prayer books, in which the instructions about what sections of prayers should be added or omitted on certain occasions, are written in German, but in Hebrew script. Samaritans are a different type of test case here — but they failed.

level by giving the community a cultural identity that was quite literally defined by language — and also script.[8]

Such an identity works very well for communities that are essentially separate. But the Jews lived among the Muslims. The ghetto is a Christian invention, and Islam knows little if any real ethnically-based occupational differentiation. Jews and Muslims lived and worked alongside each other all over the Arab world during the middle ages. This involved them occasionally also, willy nilly, in legal cases. In what follows I should like to look at several kinds of legal case that bring Jews into contact with Muslims and Islamic government, or Islamic law and legal institutions. All involve documents, and, against the background that I have sketched above, it is the documents, it seems to me, that offer a particular interest in our present context. All of these documents come from the Islamic west — al-Andalus or north Africa; and from roughly the same period, the tenth to the twelfth centuries. All involve Jews and the Islamic legal institutions. Two come from the small collection of *she'elot u-teshuvot* (Jewish legal responsa in Hebrew and Aramaic, occasionally also Arabic) put together from manuscript by Harkavy a century ago.[9] The second category is represented by a *fatwā*, an Islamic legal *responsum*, from the latefifth/eleventh-century collection of Ibn Sahl.[10] And the last category is represented by two cases from the vast collection of *fatwās* of al-Wansharīsī (ninth/fifteenth century).[11]

My first category here contains two cases, both concerning inheritance. I discussed them in an earlier study, but from a different angle.[12] The first is a dispute over an estate from the early part of the eleventh century.[13] Two sons argued over their respective shares in their parents' estate, effectively taken away by government action many years earlier. Islamic law gives all sons an equal share, but these were Jews, and Jewish law gives the oldest a double share. So it was important to know which son was the elder. Here arose the dispute. One claimed to be older; the other, for his part — note the language — said 'I do not know that you are the

8 Uriel I. Simonsohn, *A Common Justice, The legal allegiances of Christians and Jews under early Islam*, Philadelphia, University of Pennsylvania Press, 2011, p. 9, notes the linguistic aspect but not the significance of script.

9 Albert (Avraham) Harkavy, *Studien und Mitteilungen aus der Kaiserlichen Oeffentlichen Bibliothek zu St. Petersburg*, IV, *Responsen der Geonim (zumeist aus dem X.-XI. Jahrhundert)* (usually known simply as *Teshuvot ha-Geonim*), Berlin, 1887.

10 Thami Azemmouri, 'Les *Nawāzil* d'Ibn Sahl, section relative à l'*iḥtisāb*', *Hespéris Tamuda*, 14, 1973, pp. 7-107.

11 Aḥmad ibn Yaḥyā al-Wansharīsī, *al-Mi'yār al-mu'rib wa-al-jāmi' al-mughrib 'an fatāwā 'ulamā' Ifriqiyya wal-Andalus wal-Maghrib*, ed. Muḥammad Ḥajjī, 13 vols, Beirut, Dār al-Gharb al-Islāmī, 1981-83.

12 David J. Wasserstein, 'Families, Forgery and Falsehood: Two Jewish legal cases from medieval Islamic North Africa', in *The Legal Status of Dimmī-s in the Islamic West (Second/Eighth-Ninth/Fifteenth Centuries)*, ed. Maribel Fierro and John Tolan, Turnhout, Brepols (Religion and Law in Medieval Christian and Muslim Societies, 1), 2013, pp. 335-46.

13 *Teshuvot ha-Geonim*, pp. 15-17, no. 38.

older'. How to decide? In the absence of modern means such as birth certificates, other means came into play. The elder one (if that is what he was) produced two documents: one was the parents' wedding contract, or *ketubba*, that showed the date of the marriage; the second was 'another document' that reported, in the father's words, a date for that son's birth showing him to have been born close, but not too close, to the date of the parents' marriage. But the second son rejected the 'other document' asserting that the first son had altered a figure in it, from a *waw*, for 'six', to a *dalet*, for 'four'. The change is simply the addition of a horizontal bar to the top of a vertical line (or even the slight lengthening of an existing one, depending on how the letter *waw* was written). The change antedated his birth by two years. The 'elder' son was actually born two years later than he had claimed, but since the alleged change placed his birth four years after the marriage, another child, possibly the second claimant, could have been born first, in that interval (again we note that he did not claim to be the elder; all he claimed was that he 'did not know' that the other was. The possibility of the birth of another son is thus elegantly raised here by the allegedly younger son).

My second case in this category concerns property too. Also from north west Africa, it tells of a man in fear of the government who tried, like many people, to hide his property.[14] Very sensibly, he put it in his wife's name and divorced her, trusting her not to cheat him out of it. Time went by and in the end they both died. Eventually — it was a time of turmoil — the heirs sought their inheritance. Who was entitled to inherit? The legal heirs of the husband, or those of the wife? Everything turned on the divorce: if the divorce was valid then clearly — if unhappily — her heirs were entitled to the property. If the divorce was invalid, then the marriage was still intact, and the property should go elsewhere. The problem was that the divorce had been a trick — at the time of the divorce, the man had told one of the legal witnesses that it was being done simply for legal reasons, to trick the government. That alone was sufficient to invalidate a divorce. Despite that, all turned, in the end, on a technical point: had the *get*, the formal writ of divorce, been properly served on the wife?

My second category offers a complicated case, from the *fatwā* collection of Ibn Sahl, in which a slave claims that he is actually a free man and that he has been forcibly converted to Judaism by his Jewish owner.[15] The Jew asserted that he had bought the man four years earlier from another Jew in Toledo, and at that time he was a Jew; and he claimed further, that 'I never beat or imprisoned him'. The slave retorted that he was a free man born of free parents, a Muslim son of Muslim parents in Toledo, that he had come 'here' (i.e. to Cordoba) from Toledo

14 *Teshuvot ha-Geonim*, pp. 173-75, no. 341.99.2.

15 Ibn Sahl, *loc.cit*., pp. 74-75. The case comes from the Umayyad period.

three years earlier in the company of a Jew, and stayed with him in a *funduq*. After that, he had gone to work for this Jew.[16] Later, when he said he was a Muslim and wanted to leave, the Jew struck him and held him prisoner — here the slave showed his back, all covered with bruises that he could not have inflicted on himself. This evidence appeared to confirm that he was free. But the Jew claimed that he had witnesses who knew the man and that he also possessed a document (Ar. *ʿahda*) concerning him written in Hebrew (? Does this mean language or script or both? We are not told.). The case was sent to the emir for investigation. At this point things became more complicated: the Jew asked for the man to be detained on his behalf, but the emir claimed that he had run away. The Jew then declared that in fact the emir had taken him off to his country estate and that he had been in the custody of the qadi (Ar. *majlis ḥukūmat al-qāḍī*) all the time. There is a barely suppressed suggestion of impropriety. And the Jew asked that the emir be fined the value of the youth. This was the question that the *qāḍī* had been asked to decide.

The fatwa given by Ibn Sahl was that the qadi had decided wisely, the notion of fining the emir was out of the question — the Prophet had said 'an emir cannot be fined' — the youth had been present all the time. Here what stands out is the fact that the document attesting to the youth's status — whether as employee or as slave — is simply ignored. The document is in Hebrew (or Aramaic) and on that account unreadable by virtually any Muslim, so that the Jew is left to find other means to win his rights. His demand for compensation, in the form of a fine on the emir, is inadmissible, though the fact that he can make such a demand is in itself suggestive: might it have been realistically possible to fine the emir, or an emir there at that time? Stories are known, of course, in which an emir, even an Umayyad emir in al-Andalus, submits to the authority of the law, but we should not too easily assume that this applied in every case. Even if some such stories reflect true happenings, it is safe to suppose that most of them came into being to burnish a ruler's mage. When the emir actually did obey a court, he certainly did so only when it suited him or he had no alternative.

My two cases from al-Wansharīsī both concern jurisdiction. Both are from the fourth-fifth/tenth-eleventh centuries. The first case concerns two Jews who differed about which court to use. A Jew claimed that a Jewish woman was suing him in a Jewish court with claims ostensibly against his father, but actually against himself. He, however, possessed a *sijill* from the chief *qāḍī* (the *qāḍī al-jamāʿa*) as well as documents drawn up in 'Arabic script' (*khaṭṭ ʿarabī*), and could bring Muslim witnesses to support his position. Beyond that, the Jewish judges were

16 It is worth noting here, as so often, the dialogic character of our material. Cf. Brinkley Messick, 'Textual properties: writing and wealth in a shariʿa case', *Anthropological Quarterly*, vol. 68, no. 3 (Anthropological Analysis and Islamic Texts), July 1995, pp. 157-70.

hostile to his father (It is worth recalling that the Jewish communities were very small — inevitably everyone knew everyone, so such a claim could be true and, if so, have considerable importance). He wished to go to a Muslim court. The woman, for her part, claimed that the Jewish judges approved the justice of her claim against the man, on the basis of what her Jewish witnesses testified. If the case left the Jewish instance, she asserted, she would lose her rights.

The case attracted some interest, and we have five separate answers to the legal enquiry here. While they offer different answers, what they have in common is that all recognize, in greater or lesser degree, the significance of the enmities and hostilities internal to the Jewish community. And the fact that the documents presented by the man appear all to be in Arabic made the option of a Muslim court easily acceptable. The woman's preference for the Jewish court clearly had personal roots — again we recall the small size of such communities — and offered good grounds for her objection to going to a Muslim court, where, whatever the legal aspects and the documents, she would be likely not to know the judges, while the man might be in a better position to influence the outcome. Here, documents in Arabic script help a case — the woman mentions no documents. If she had had any that supported her, the likelihood is that they would have been in Hebrew or Aramaic, not least because any documents in Arabic would have strengthened the case for going to a Muslim instance.

The final case is similar and also concerns jurisdiction. A Jew who had been sued by another Jew sought to have the case tried by a Muslim instance. The plaintiff claimed that he had good Jewish evidence and preferred a Jewish court on that account. But the second Jew claimed to prefer a Muslim court because he had a '*wathīqa 'arabiyya*', an Arabic document. Does this mean a document in Arabic language (but possibly in a non-Arabic script, such as Hebrew)? or one in Arabic language and Arabic script, such as we saw in the previous case? We are not told explicitly, though the fact that we are told this in a Muslim *fatwā*, and that nothing about Hebrew script is mentioned, may suggest that a document in both Arabic language and Arabic script is meant here.

The question which court should be allowed to decide the case was sent to Ibn al-'Aṭṭār, who said that if the man produced his document and if his witnesses were good Muslim ones, then the case must go to a Muslim court, not a Jewish one. Does this mean that a document in Arabic (language, or language and script) trumps a set of documents in Hebrew (language, or language and script)? Another possibility is that we should see the documentary question as necessarily combined with that of the witnesses — Muslim witnesses who will not appear in a Jewish court. What stands out here, nevertheless, is that, while apparently Muslim witnesses are involved, and a document is presented in Arabic, the case is between two Jews, and the decision by one of them to seek a non-Jewish court

depends on an external force, a Muslim mufti. His decision, in its turn, is based on the fact that witnesses (all? some?) are Muslim. It is not clear how important the character of the document is — all that we hear is that it must be produced, not whether the language and/or script in which it is written has any relevance to the decision, nor even anything about its contents.

Discussion

In all three sets of cases here, documents are present; in all three documents are important; in all three it is alleged that their contents are decisive for the case at hand; yet at the same time in all three their importance lies not so much in what they contain as, indirectly, in the language and/or script in which they are written. When the documents are in Arabic (and in Arabic script), then, regardless of what they say, the Islamic court can and usually does move to take cognizance of them and of their case; when they are in Hebrew (or Aramaic), and in Hebrew script, courts and individuals alike prefer either to leave the case to the Jews or to find a way to ignore the documents.

This seems to tell us much about documents. Uriel Simonsohn has recently offered helpful explanations of the practices of choice of forum by members of different religious confessions in medieval Islam.[17] Jeanette Wakin and Brinkley Messick, among others, have done much in recent decades to show us the importance of documents in the life and practice of law in the Islamic world.[18] And we tend, perhaps naturally, to assume that documents have a decisive importance, both because of our own modern norms and because, for the medieval world, documents are basically all that we have. If medieval Islam was, as I suggested at the start, a literate society (or set of societies), that does not, or not yet in the tenth to the twelfth centuries, mean that the written word enjoys exclusivity, or even primacy, over the oral. All of these cases, in their different ways, seem to show courts and judges and legal experts and private individuals alike tending to a preference to avoid the written if that is possible. Each of them, in its different way, shows us documents which may contain material that would be decisive in our eyes, yet in each case those involved — Jews and Muslims — choose to go down a different path to find a solution. In the first two cases, the documents are in Hebrew or Aramaic and those involved do not wish — or perhaps are unable — to go to an Islamic instance. Possibly the stakes dictate a preference for a

17 Cf. Simonsohn (n. 8).

18 Jeanette A. Wakin, *The function of documents in Islamic law: the chapters on sales from Ṭaḥāwī's Kitāb al-shurūṭ al-kabīr*. Edited with an introduction and notes, Albany, State University of New York Press, 1972; Brinkley Messick, *The calligraphic state: textual domination and history in a Muslim society*, Berkeley (Comparative studies on Muslim societies, 16) University of California Press, 1993.

Jewish solution. In the case from Ibn Sahl, we hear about a 'Hebrew document' (? Aramaic), but this is given no weight whatever as against the oral testimonies that are available. And in the cases from al-Wansharīsī, the fact that only Jews are involved is of no weight in the face of documents cast in Arabic language and script and, still more strongly, Muslim witnesses. What the documents themselves say, however, is scarcely considered in any of these cases.

This may also tell us something about languages, and about practical problems of translation — how to get translation; how to authenticate it (In fact, though this is not stated in any of these cases, it may well be that what is critical here is not the language itself but the script — what is written in Arabic script can be read; what is written in Hebrew script cannot be, or not easily, even if it is in Arabic, at least in the eyes of a Muslim court);[19] and, more importantly, how much authority to grant to documents from a despised other and in a language, or simply a script, that is identified with that other.

Let me return for a moment to that issue I began with, of the medieval Arab world as one tending more and more to monoglossia. What I have been trying to do here is draw attention to some of the bounds or refinements that we must place on that image. The bounds are real, and the Jews, as these cases show, straddle those bounds. They do not, like the arabophone Muslims, reside solely on one side; nor do they — despite their use of Hebrew and Aramaic as languages alongside Arabic and the Hebrew script for writing — reside wholly on the other. The sheer reality of the authority of the Islamic state, in effect the *umma* or the *Dār al-Islām*, as realized in the many independent states of medieval Islam, together with the larger structure of the Islamic legal system, keeps them on the one side. Yet at the same time that same Islamic legal system grants them the status and the means to maintain and profit from features that belong on the other side. Such cases thus have much to tell us about how members of that despised other minority group could use the system to manoeuvre for their benefit against each other, adding an extra layer of legal potential to their struggles with each other and in this apparent position of disregard enjoying a distinct advantage over their Muslim neighbours. Perhaps a little paradoxically too, the closer that world approaches to monoglossia, the greater the advantage that situation creates for those who straddle the bounds.

19 Though here we should also not under-estimate the challenges and problems implicit in trying to offer an Islamic court a translation of a legal document in Aramaic.

II

NEGOTIATING DAILY CONTACTS AND FRICTIONS / NEGOCIANDO CONTACTOS Y FRICCIONES DIARIAS

EL CRITERIO DE LOS JURISTAS MALIKÍES SOBRE LOS ALIMENTOS Y LAS BEBIDAS DE LOS *DIMMÍES*: ENTRE LA TEORÍA Y LA PRÁCTICA

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Introducción

En el marco de las relaciones de los musulmanes con las minorías religiosas hay que destacar las que mantuvieron con la gente del Libro (*ahl al-Kitāb*), judíos y cristianos residentes en los territorios del Islam (*dār al-Islām*) y bajo su protección o *ḏimma*, según capitulaciones.[1] También los zoroastrianos (*maǧūs*) gozaban de la consideración de *ḏimmíes* y con frecuencia aparecen citados junto a los *kitābíes*, sin embargo las relaciones con los *maǧūs*, al parecer, no estaban claramente definidas en los primeros tiempos del Islam. El propio califa ʿUmar b. al-Khaṭṭāb (m. 23/644) mostraba sus dudas al respecto, alegando que no sabía cómo tratar con ellos, a lo que ʿAbd al-Raḥmān b. ʿAwf[2] le respondió 'Doy fe de que yo he oído al Enviado de Dios — Dios lo bendiga y lo salve — decir: Tratad con ellos como tratáis con la gente del Libro'.[3] Así, pues, según este hadiz recogido en el *Muwaṭṭa'*, judíos, cristianos y *maǧūs* deberían ser tratados del mismo modo, pero teniendo en cuenta su contextualización en el capítulo titulado, 'La capitación (*ǧizya*) de la gente del Libro y los *maǧūs*', parece ser que se refiere únicamente a esta cuestión.[4]

Las normas sobre las relaciones con los adeptos de estas religiones,[5] cuyos principios están perfilados ya en el Corán y la *sunna*, se fueron desarrollando y detallando, quedando así definido su estatus de *ḏimmíes* tal y como aparece en los tratados jurídicos *mālikíes*. No obstante, las opiniones y criterios de los juristas no

1 Este trabajo ha sido realizado dentro del proyecto de investigación 'Documentos de la Granada nazarí y mudéjar: estudio de las colecciones (derecho, economía y sociedad)'. Ministerio de Ciencia e Innovación FFI2012-37775.

2 *EI2* I, 1960, p. 87, Houtsma y Watt, ''Abd al-Raḥmān b. ʿAwf'. Hombre destacado de los Banū Zuhra de Qurayš, figura entre los primeros musulmanes.

3 Mālik b. Anas, p. 177 y al Jabi, *Le Consentement*, p. 146.

4 Mālik b. Anas, *Muwaṭṭa'*, p. 177, nota 1: así lo hace constar el editor, Aḥmad Rātib ʿAmūš.

5 Es de obligada referencia la obra ya clásica de A. Fattal, *Le statul légal des non-musulmans en pays d'Islam* y la más reciente de M. Fierro y John V. Tolan (eds), *The Legal Statuts of Ḏimmi-s in the Islamic West*.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

 10.1484/M.RELMIN-EB.5.109351

siempre eran coincidentes por lo que la interpretación y aplicación de las mismas podían variar según el lugar, el momento, las circunstancias y, desde luego, según las preferencias doctrinales de los cadíes, alfaquíes, muftíes, etc.

Muchos y variados fueron los contactos entre los musulmanes y los *ḏimmíes*, pues unos y otros no solo compartían espacios comunes, sino también otras muchas actividades de la vida cotidiana consideradas lícitas, sin olvidar las relaciones que mantenían en situaciones generadas por conflictos bélicos. Entre estos contactos destacan los referidos a los alimentos y las bebidas, sobre los cuales los juristas *mālikíes* fueron desarrollando una detallada normativa no sólo respecto a la licitud o prohibición para los musulmanes de consumir los alimentos y las bebidas de los *ḏimmíes*, sino también sobre otros aspectos vinculados a ellos como son el sacrificio de los animales, los contratos de compraventa, las herencias, las deudas, etc.

El trabajo que presentamos, aun tratando un tema conocido en lo fundamental y estudiado por algunos investigadores,[6] está concebido y desarrollado desde una perspectiva distinta, conducente a dos objetivos bien definidos: a) en primer lugar, la exposición de las opiniones de los juristas *mālikíes* relativas a los alimentos y bebidas de los *dimmíes* a partir de varios tratados de *fiqh* (desde el siglo VIII al XVI) y b) ordenar y analizar la materia tratada para mostrar que dichas opiniones, divergentes en muchos casos, constituyeron la base jurídica de las fetuas, sentencias y ordenanzas de los tratados de *ḥisba*, donde queda reflejada la adaptación de la teoría a la práctica, generada por factores determinantes en diferentes espacios y tiempos.

Los alimentos y las bebidas de los ḏimmíes en los tratados jurídicos mālikíes

En el Corán se encuentran varias aleyas que ordenan a los musulmanes comer alimentos buenos (*ṭayyib*) y puros (*ṭāhir*) y por lo tanto considerados lícitos o permitidos (*ḥall*/*ǧāz*/*mubāḥ*), tanto los de naturaleza inerte (*ǧamad*), como los de origen animal (*ḥayawān*).[7] Los alimentos permitidos a los musulmanes son muchos y variados, por ello las normas jurídicas principalmente se refieren a aquellos que por su naturaleza les están prohibidos o sin llegar a estarlo son considerados reprobables y también debido a diversas causas relacionadas sobre todo con los procesos de manipulación o el modo de adquisición.

6 Entre los estudios sobre este tema hay que destacar el documentado artículo de García Sanjuán 'El consumo de alimentos', pp. 109-46, donde son abordados diferentes aspectos del consumo por parte de los musulmanes de alimentos de judíos y cristianos a partir, principalmente, de fuentes jurídicas de carácter práctico como son las fetuas, tratados de *ḥisba*.

7 Sobre las opiniones de los principales jurista *mālikíes* acerca de los alimentos, véase el artículo de Arcas Campoy, 'Los alimentos en el derecho *mālikí*', pp. 112-19.

Según los tratados jurídicos *mālikíes*, son considerados alimentos de naturaleza inerte los vegetales (*nabāt*) y los de origen mineral. A este grupo pertenecen la sal, las frutas frescas, secas y en conserva, los cereales, las hortalizas, las legumbres y derivados vegetales, como el aceite, la harina y otros. En principio todos estos alimentos les están permitidos a los musulmanes, con la salvedad de los que han sido mezclados con los impuros (*naǧāsāt*), las bebidas fermentadas (*muskirāt*) y los nocivos para la salud como el veneno (*samm*).

En cuanto a los alimentos de naturaleza animal, exceptuando el cerdo y la sangre, que son alimentos impuros, y los que no han sido debidamente sacrificados, los musulmanes pueden comer la carne de infinidad de animales marinos, aves, mamíferos y otras criaturas del reino animal, si bien las opiniones de los juristas oscilan en algunos casos entre la licitud, la reprobación e incluso la prohibición. Asimismo, son considerados en principio lícitos una serie de alimentos derivados de origen animal, como huevos, miel, leche, etc.

En estrecha relación con los alimentos se encuentran las bebidas. Las prohibiciones, aunque escasas, son rotundas y se centran en aquellas que producen embriaguez (*sakra*/*sukr*/*iskār*), es decir, las bebidas alcohólicas (*nabīḏ*),[8] que incluyen no solo el vino (*khamr*) sino también otros líquidos fermentados obtenidos de la miel, el arroz, el mijo, los dátiles y las mezclas de dos o más de ellos. Las opiniones de los juristas son unánimes en este punto, sin embargo difieren respecto a algunas bebidas no catalogadas en este grupo.

Todas estas normas respecto a la licitud y la prohibición son también aplicables a los alimentos procedentes de los *dimmíes*, por lo que la mayoría de ellos podían ser consumidos por los musulmanes. Esta amplitud de alimentos permitidos también se hace extensible a los procedentes de todas las gentes del libro (*ahl al-Kitāb*), lo que aparece documentado ya en los primeros tiempos del Islam, en la conquista de Siria, cuando se indica que sus habitantes suministraban a los ejércitos víveres y productos alimenticios: aceite, carneros, trigo, etc.

Veamos a continuación las opiniones de destacados y conocidos juristas *mālikíes*, incluido el propio Mālik b. Anas (m. 179/796), sobre el consumo de alimentos y bebidas de los *ḏimmíes* por parte de los musulmanes a través de varios tratados jurídicos seleccionados y ordenados cronológicamente.

Al-Mudawwana al-kubrà

Las primeras referencias jurídicas sobre los alimentos de los *ḏimmíes* aparecen en la *Mudawwana*,[9] en la que Saḥnūn (m. 240/854) recoge las opiniones de su

8 Sobre la ingestión de bebidas alcohólicas, véase Arcas Campoy, 'Las bebidas alcohólicas', pp. 269-77; y 'Consumo y penalización', pp. 115-26.

9 Saḥnūn, *Mudawwana*, vol. II, tomo III, pp. 67-68.

maestro, Ibn al-Qāsim (m. 191/806), y éste a su vez de Mālik b. Anas, principalmente en lo que atañe a los animales sacrificados por los *kitābíes*, incluidos los impúberes y las mujeres.

A instancias de Saḥnūn, Ibn al-Qāsim asegura que Mālik reprobaba (*yakrahu*) la carne degollada por los cristianos (*al-naṣārà*) o los judíos (*al-yahūd*), pero consideraba aceptable que un cristiano sacrificara la víctima de un musulmán. Y añade Ibn al-Qāsim que ocurre lo mismo si se trata de un judío.

Sobre esta cuestión Ibn al-Qāsim indica que a Mālik 'le desagradaban (*yastaṯqilu*) los sacrificios (*ḏabā'iḥ*) de los judíos y de los cristianos, pero no los prohibía (*yuḥrimu*)' y a continuación manifiesta (Ibn al-Qāsim): 'Yo opino que lo que no agrada de lo que sacrifican los judíos no se coma'. Sin embargo, Mālik no consideraba lícito (*taḥillu*) el sacrificio del musulmán que se convierte al cristianismo (*naṣrāniyya*) o al judaísmo (*yahūdiyya*) por tratarse de un apóstata.

Respecto a los sacrificios de judíos y cristianos pertenecientes a la gente de la guerra (*ahl al-ḥarb*), le respondió: 'Sean de la gente de la guerra o de los que están entre nosotros, los judíos y los cristianos, según Mālik, son iguales en sus sacrificios (*ḏabā'iḥ-hum*)', pues reprobaba consumir la carne sacrificada por ellos, aunque sin llegar a prohibirlo. Igualmente rechazaba comprar la carne de sus carnicerías (*maǧāzir*) pero tampoco lo consideraba prohibido y añade Mālik [reforzando así su parecer] que ʿUmar b. al-Jaṭṭāb ordenó que en los territorios (*buldān*) del Islam se prohibiera a los cristianos y los judíos estar en sus zocos como cambistas (*ṣayārifa*) o carniceros (*ǧazzārūn*).

Por último, indica Ibn al-Qāsim que oyó decir a Mālik sobre el cristiano que vende vino (*khamr*) por un dinar que era reprobable (*karaha*) para el musulmán hacer transacciones comerciales ni comer los alimentos comprados por el cristiano con aquel dinar.[10]

Al-Risāla Al-Qayrawānī (m. 386/996)

Al-Qayrawānī se limita a decir sobre los *ḏimmíes*, que 'No hay mal (*lā ba's*) en comer alimentos de la gente del Libro y [los animales] sacrificados por ellos. Es reprobable (*karaha*) comer las partes grasas (*šuḥūm*) [de los animales sacrificados por] los judíos para ellos, pero no está prohibido (*taḥrīm*). No se debe comer lo que ha sido sacrificado (*ḏakā*) por los *maǧūs*, pero no están prohibidos sus alimentos que no [comporten ser] sacrificados [por degollamiento]'.[11]

10 Saḥnūn, *Mudawwana*, vol. II, tomo III, pp. 74-5.
11 Al-Qayrawānī, *Risāla*, pp. 158-59.

Muntakhab al-aḥkām[12] de Ibn Abī Zamanīn (m. 399/1008)

Ibn Abī Zamanīn incluye en el libro IV del *Muntakhab al-aḥkām* un capítulo acerca del cristiano, deudor de un musulmán, que muere y deja vino o cerdos.

Este capítulo ofrece un fragmento procedente de la *Wādiḥa*[13] de Ibn Ḥabīb (m. 238/852) que contiene las preguntas que formuló a su maestro, Muṭarrif (m. 220/835), y las repuestas de éste sobre el tema en cuestión. La primera respuesta al respecto es la siguiente: 'Si lo ha legado a un cristiano, opino que se venderá esto y se pagará lo que se debía a los musulmanes y, si no lo ha legado, entonces el cadí encargará de ello a un *ḏimmí*, se venderá y luego se pagará [la deuda] a los musulmanes porque Mālik dijo: 'No encuentro mal que se pague lo que debe el cristiano al musulmán con el importe (*ṯaman*) del vino y de los cerdos o de lo que Dios ha prohibido"'.

A continuación explica que se permite al musulmán cobrar de la venta del vino y los cerdos porque 'Dios ordenó tomar la capitación (*ǧizya*) de ellos y son mencionados en su Libro indicando la licitud de esto'. Y termina manifestando que tanto Muṭarrif como Aṣbag b. al-Faraǧ (m. 224-25/839-40), a quién también preguntó, seguían el criterio de Ibn al-Qāsim.

Qidwat al-ġāzī[14] de Ibn Abī Zamanīn (m. 399/1008)

Aunque de temática específica como es el *ǧiḥad*, generalmente traducido por guerra santa, la *Qidwat al-ġāzī* se incluye en los tratados de *fiqh*. Su autor, Ibn Abī Zamanīn, ofrece en esta obra las opiniones de varios juristas sobre diversos temas relacionados con las acciones bélicas y las conductas de los combatientes, entre los que se encuentran los alimentos de los *kitabíes* y los *maǧūs* en territorio enemigo.

En primer lugar alude a los alimentos tomados al enemigo por los musulmanes, indicando que la *sunna* les permite consumirlos sin estar obligados a compartirlos con la tropa si lo obtenido es utilizado sólo para cubrir sus necesidades. Pero si a la hora de regresar aún le quedan alimentos, deberá entregar el excedente como limosna, pues no les es lícito consumirlo con su familia, salvo que se trate de algo sin importancia como bizcocho (*kaʿk*) o un poco de cecina (*qadīd*).

Entre los juristas citados en la obra se encuentra ʿAbd al-Malik b. Ḥabīb,[15] quien opina que 'no hay mal en comer los productos compuestos de harina (*sawqī*) y manteca (*samn*) como tampoco lo hay en que se coma queso (*ǧubn*) de los

12 Ibn Abī Zamanīn, *Muntajab al-aḥkām*, II, pp. 541-42.
13 Ibn Ḥabīb, *Kitāb al-Wādiḥa*, pp. 73 ár./82-83 tr.
14 Ibn Abī Zamanīn, *Kitāb qudwat al-ġāzī*, pp. 200-05.
15 Véase M. Arcas Campoy, 'El criterio de Ibn Ḥabīb sobre algunos aspectos del *ŷihād*', pp. 921-22.

Rūm o algo semejante procedente de los enemigos, siempre que sean gente del Libro (*ahl al-Kitāb*), sin embargo no se comerá el queso de los *maǧūs*'.

También se refiere Ibn Ḥabīb al préstamo (*salaf*) de alimentos tomados al enemigo, indicando que no es lícito y si alguien lo hace no podrá considerarse acreedor ya que hay obligación de compartir si no los necesita. Sin embargo encuentra aceptable intercambiar trigo (*qamḥ*), cebada (*šaġīr*), miel (*ʿasal*) o manteca (*samn*) porque según los ulemas no se trata de una venta (*bayʿ*) sino de una manera de compartir lo obtenido.

Bidāyat al-muǧtahid wa-nihāyat al-muqtaṣid de Ibn Rušd ***al-Ḥafīd*** (m. 595/1198)

En el capítulo que trata de los sacrificios considerados lícitos e ilícitos según su procedencia,[16] Ibn Rušd, el célebre Averroes, distingue tres grupos: a) los aceptados como lícitos, b) los unánimemente prohibidos y c) los que son objeto de discrepancias. En este último grupo están incluidos los sacrificios realizados por los judíos y los cristianos a los que dedica un extenso comentario, que comienza con estas palabras. 'En cuanto a la gente del Libro, los ulemas están de acuerdo respecto a la licitud de sus sacrificios (*ḏabāʾiḥ*) según Su palabra (de Dios), ensalzado sea: "Los alimentos (*ṭaʿām*) de quienes han recibido el Libro os son lícitos (*ḥill*), y vuestros alimentos les son lícitos a ellos" (Corán. V, 5). Pero discrepan en los detalles (*tafṣīl*)'.

El resto del capítulo recoge sus comentarios y reflexiones, a partir de la citada aleya, sobre diferentes aspectos referentes a los sacrificios llevados a cabo por cristianos de los Banū Taglib o los apóstatas y, respecto a la gente del Libro, sobre los sacrificios con la invocación del nombre de Dios, los animales sacrificados que les están prohibidos, el modo del sacrificio o el consumo de la grasa (*šaḥm*), entre otras cuestiones. También alude a las discrepancias sobre los sacrificios de los *maŷūs*, considerados politeístas (*mušakirūn*) por unos y equiparables a los *kitābíes* por otros, que se basan en el hadiz que así lo aconseja. Asimismo, se hace eco del problema que plantean los sabeos (*ṣābiʾūn*) principalmente respecto a su inclusión entre la gente del Libro.

Por último cabe señalar que Ibn Rušd, al referirse a los sacrificios de los cristianos y judíos de origen árabe, explica que las divergencias de los juristas radican en la dudas sobre si pueden ser considerados gente del Libro tal y como lo son el pueblo de Israel (*Banū Isrāʾīl*) y los bizantinos (*Rūm*).

16 Ibn Rušd *al-Ḥafīd*, *Bidāya* I, pp. 449-53. Véase también la traducción de este capítulo en A. García Sanjuán 'El consumo de alimentos de los *ḏimmíes*', pp. 138-42.

Mukhtaṣar fī l-fiqh[17] de Khalīl b. Isḥāq (m. 767/1365)

El *Mukhtaṣar* contiene un capítulo sobre los alimentos y las bebidas en el que se encuentras varias referencias a la gente del Libro (*ahl al-Kitāb*) principalmente relacionadas con el sacrificio (*ḏakā*) de los animales.[18] Tras explicar los pormenores del proceso del sacrificio, Jalīl indica que los musulmanes pueden comer la carne de los animales degollados aunque proceda de samaritanos (*sāmariyyā*) o de *maǧūs* (*maǧūsiyyā*) cristianizados, siempre que lo hayan hecho por cuenta propia, que también sea lícito para ellos y que haya estado presente un musulmán conocedor del ritual. Sin embargo rechaza comer lo que es ilícito (*gayr ḥill*) para un judío si también así está considerado por la ley islámica (*šarʿ*), pero de no ser así, entonces lo considera reprobable. En cuanto al sacrificio realizado por un cristiano o un judío por encargo de un musulmán hay dos opiniones opuestas.

Así mismo rechaza (*karaha*) que los no musulmanes sean carniceros (*ǧazāra*), el préstamo (*tasalluf*) de dinero proveniente de la venta de vino *khamr*), el consumo de grasa (*šaḥm*) de animales procedentes de los judíos y también de lo que haya sido sacrificado para honrar la Cruz (*ṣalīb*) o a Jesús (*ʿĪsà*), pero considera totalmente prohibido (*ḥarām*) comer las piezas de caza mordidas a la vez por el perro de un *maǧūs* y el de un musulmán.

Entre los actos de los *dimmíes* que merecen ser castigados (*ʿuzzira*)[19] figura su exhibición pública en estado de embriaguez, así como mostrar el vino, que le será confiscado. Y, por último, en el capítulo dedicado a los testamentos[20] hay referencias a la validez del legado de un infiel (*kāfir*) a un musulmán, siempre que no sea vino (*khamr*).

Qawānīn de Ibn Ǧuzayy (m. 741/1340)

Este tratado de derecho comparado de Ibn Ǧuzayy ofrece las opiniones de los principales juristas mālikíes sobre diversos aspectos de los alimentos de los *dimmíes*. El capítulo dedicado a los sacrificios (*ḏabāʾiḥ*), que contiene un buen número de referencias sobre el tema,[21] comienza indicando que hay discrepancias respecto a la licitud del sacrificio de animales realizado por la gente del Libro, los *maǧūs* y los sabeos (*ṣābiʾūn*).

17 Jalīl b. Isḥāq, *Mujtaṣar fī fiqh*, pp. 89-90, 106 y *Abrégé de la Loi Musulmane*, I, pp. 177-78, 217.
18 Jalīl b. Isḥāq, *Mujtaṣar fī l-fiqh*, pp. 89-90 y *Abrégé de la Loi Musulmane*, I, pp. 177-78.
19 Jalīl b. Isḥāq, *Mujtaṣar fī l-fiqh*, pp. 106, y *Abrégé*, I, pp. 217. Se trata de una medida correctiva a discreción del *imān*.
20 Jalīl b. Isḥāq, *Mujtaṣar fī l-fiqh*, p. 298, y *Abrégé*, IV, p. 75.
21 Ibn Ǧuzayy, *Qawānīn*, pp. 200-01.

En cuanto a los *kitābíes* judíos (*yahūd*) y cristianos (*naṣārà*), hay unanimidad en considerar lícito lo que hayan sacrificado sus hombres y mujeres. No obstante, hay diferentes opiniones respecto a cuestiones referentes a la aplicación de las normas jurídicas (*furū'*), como es el caso del sacrificio realizado por un *kitābí* árabe, lícito para la mayoría (*ğumhūr*), o en sentido contrario, el del apóstata (*murtadd*), rechazado también por la mayoría, salvo por Abū Isḥāq (m. 459/1067). Y si un *kitābi* sacrifica un animal en representación (*nā'ib*) de un musulmán existen dos opiniones entre los *mālikíes*, pero todos lo consideran lícito si el sacrificio lo hace por su cuenta, salvo que esté destinado a una de sus fiestas (*'ayd-hum*) o a sus iglesias (*kanā'is-hum*) pues entonces se considera reprobable (*makrūh*), si bien es lícito según Ašhab (m. 204/820).

Dentro del *maḏhab* malikí también se advierten discrepancias cuando se trata de una víctima prohibida (*muḥarrama*), pues oscilan entre la prohibición (*man'*) para Ibn al-Qāsim, la permisión (*ibāḥa*) para Ibn 'Abd al-Ḥakam (m. 214/829), y la reprobación (*karāha*) para Ašhab. Lo mismo ocurre con respecto a las grasas (*šuḥūm*) de sus víctimas. E indica Ibn Ğuzayy que cuando el *kitābī* alega no haber participado en el sacrificio del animal 'comeremos [la carne], pero si sabemos que ellos consideran lícito la carroña (*mīta*) como los cristianos (*naṣārà*) de al-Andalus o desconfiamos de ello, no comeremos lo que ellos ocultan'. Y añade que a los musulmanes les está prohibido comprar las víctimas (*ḏabā'ih*) de los judíos y a éstos comprárselas a musulmanes, si bien la acción contractual tendrá validez.

También hay referencias a otros alimentos que algunos rechazan por su procedencia y modo de obtención. Ibn Ša'bān (m. 355/966) reprueba la cecina (*qadīd*) de los *rūm* y su queso (*ğubn*) porque contiene cuajo (*infa/iḥa*)[22] de la carroña (*mīta*) y explica al-Qarāfī (m. 684/1285) que el rechazo se debe a la prohibición (*taḥrīm*) de comer la carroña y porque ellos estrangulan a los ganados (*bahā'im*) y los golpean hasta que mueren. Sobre esta cuestión Al-Ṭurṭūšī (m.520/1126) añade que la prohibición de comer su queso también puede provenir de la impureza (*yanğis*) del vendedor o el comprador o de la balanza utilizada.

Respecto a los sacrificios de los *mağūs* y los sabeos (*ṣābi'ūn*), la mayoría los considera ilícitos (*lā taŷūz*), aunque sobre los últimos algunos discrepan porque consideran que su religión (*dīn*) está entre la de los *mağūs* (*mağūsiyya*) y la cristiana (*naṣrāniyya*) y también se dice que creen en la influencia de las estrellas (*ta'ṯīr al-nuğūm*).[23]

22 La causa del rechazo al comer el queso de los *maŷūs* radica en la utilización del cuajo que no procede de animales sacrificados según la ley islámica para su elaboración. Sobre esta cuestión véase Arcas Campoy, 'El criterio de Ibn Ḥabīb', p. 921, nota nº 27.

23 Se refiere a la astrología.

En el capítulo dedicado a la transacción comercial (*tiğğāra*) en territorio enemigo[24] consta la prohibición de comprarles alimentos, salvo sal, aceite y verduras. Sin embargo la relación contractual (*muʿamala*) con *dimmíes* es lícita (*ğā'iza*), aun sabiendo que practican la usura (*ribā*) o venden vino (*khamr*) y cerdo (*khanzīr*), si bien Mālik rechaza (*karaha*) que el musulmán venda una mercancía a un *ḏimmí* si sabe que el dinero obtenido procede de la venta de vino o de cerdos. Así pues, los tratos entre un musulmán y un *dimmí* son lícitos siempre que también lo sean para los musulmanes y, si no lo son, se seguirá el mismo criterio (*ḥukm*) que se aplica a los musulmanes.

Tuḥfat al-anfus wa-šiʿār sukkān al-Andalus de Ibn Ḥuḏayl (m. 812/1409)

Ibn Ḥuḏayl indica en este tratado de *ğihād*[25] que no se debe impedir a la tropa consumir víveres del enemigo siempre que sea necesario y debiendo repartir el excedente. Esta afirmación la basa en la opinión de Ibn Ḥabīb. También considera lícito, siguiendo el criterio de Ibn al-Qāsim y Sālim,[26] quedarse con víveres y grasa (*wadak*) de los *rūm* y consumirlos en su hogar con su familia, pero es reprobable su venta. Tampoco hay inconveniente en comer alimentos mezclados con manteca (*samn*) y miel (*ʿasal*) del enemigo para elaborar el *sawīq*[27] ni en consumir la carne de las víctimas si no han sido sacrificadas en un ritual religioso.

En cuanto al pan, es lícito comer el de los *rūm*, pero no el de los *mağūs* ni los animales sacrificados por ellos.[28] Por último, volviendo a citar a Ibn Ḥabīb, refiere que les está permitido a los combatientes aprovechar los alimentos y bebidas del enemigo pero no llevarlos a sus familias, salvo que se trate de algo insignificante, como cecina o galletas.

Suma de los principales mandamientos y devedamientos de la ley y çunna o ***Breviario çunní*** de Içe de Gebir (s. XV)

Este tratado de época mudéjar, escrito en castellano hacia 1462, es obra de Içe de Gebir, alfaquí y muftí de la aljama de Segovia. El autor insiste en la prohibición de aceptar el sacrificio de animales realizado por no musulmanes, aunque en caso de necesidad estaría permitido según sus palabras: 'Si alguno se biere en la necesidad

24 Ibn Ŷuzayy, *Qawānīn*, p. 319.
25 Ibn Ḥuḏayl, *Tuḥfat*, pp. 38 ár/199-202 tr.
26 Ibn Ḥuḏayl, *Tuḥfat*, pp. 38 ar/200 tr., nota nº 39: L. Mercier indica que probablemente se trata de un liberto de Abū Ḥudayfa, célebre por sus conocimientos del Corán.
27 *EI*2, IX, 1998, pp. 97-98, Waines, 'Sawīḳ'. El *sawīq* es una comida a base de trigo y cebada muy extendida por todo el oriente medio en época medieval. Se recomendaba a los viajeros y servía de alimento para las tropas en campaña.
28 Arcas Campoy, 'El criterio de Ibn Ḥabīb', p. 921, nota 27.

y no podrá haber degollado de muçilim y no se lo quisieren dar a degollar a él y hallare quien de otra ley se lo deguelle por la bia que está dicha, coma dello el muçilim y béaselo él degollar y no se parta de alli hasta que tome de lo que él propio bio degollar'.[29]

En el capítulo dedicado a vino, tras referirse a su prohibición, explica la permisión de hacer y beber arrope siguiendo las indicaciones del califa ʿUmar, aunque no debe mezclase con nada, ni siquiera con agua y añade que '*el arrope que se haze del mosto del cristiano es esquibo y contra çunna*'.[30]

Kitāb al-Tafrīʿ de Ibn al-Ğallāb (m. 378/988), versión aljamiada del siglo XVI.

Este tratado[31] recoge varias referencias a los alimentos de los *ḏimmíes*, comenzando por la prohibición de aceptar las víctimas sacrificadas por cristianos y judíos para los musulmanes.[32] También contiene otras consideraciones sobre los alimentos de los *kitabíes* y *maǧūs*:[33] 'I bien puede con la provisión de los del alkitāb i sus degollados; i esquivaron los sebos de los judíos, sines de ser ḥaram a ello; i no coman de lo que degüella el judío de los camellos porque sea ḥaram sobre ellos. I bien pueden comer en lo que no ay degüella a ello de las viandas de los almaǧūses; y no pasa comer de sus degollados; i no coman de sus quesos por el cuallo aquel que es en ello'.

En cuanto a las bebidas en el capítulo titulado 'El libro de los brebajes' se indica la prohibición de transacciones comerciales de vino entre cristianos y musulmanes así como de poseerlo, debiendo en este caso de derramarlo. Por último, al referirse al vinagre, hay opiniones contrarias pues para unos está prohibido (*ḥarām*), mientras que para otros se considera lícito (*ḥalāl*) si se ha formado por un proceso natural, y añade que '*i bien puede con lo que faze vinagre el cristiano del vino*'.[34]

Análisis y comentario

Tras lo expuesto en el apartado anterior se hace necesaria la ordenación y análisis de los datos aportados por los juristas desde varios puntos de vista.

29 Içe de Gebir, *Suma*, p. 326.
30 Içe de Gebir, *Suma*, p. 395.
31 Existen varias copias de transmisión en romance aljamiado y una versión parcial bajo el título de las *Leyes de Moros* (s. XIV), según indican Carmona, 'El autor de las *Leyes de Moros*', pp. 957-62; y Abboud-Haggar, 'Las *Leyes de Moros*', pp. 163-201.
32 Abboud-Haggar, *al-Tafrīʿ*, II, p. 258.
33 Abboud-Haggar, *al-Tafrīʿ*, II pp. 271-72.
34 Abboud-Haggar, *al-Tafrīʿ*, II, pp. 275-76.

En primer lugar hay que considerar la tipología y cronología de las fuentes documentales de este trabajo, un total de diez tratados de derecho *mālikí*, de carácter jurisprudencial aunque con diferentes enfoques y objetivos jurídicos.[35] Así pues, entre las fuentes consultadas figuran, además de la *Mudawwana*, una obra de jurisprudencia propiamente dicha (*Muntakhab al-aḥkām*), dos compendios jurídicos (*Risāla* y *Mukhtaṣar fī l-fiqh*), dos tratados de derecho comparado (*Bidāya* y *Qawānīn*) y dos tratados de *ğihād* (*Qidwat al-ğāzi* y *Tuḥfat al-anfus*). A las citadas obras hay que añadir el *Breviario çunní*, de época mudéjar, y la versión aljamiada del *Kitāb al-tafrī'*. En cuanto a los aspectos temporales y espaciales de las obras hay que destacar el amplio período cronológico abarcado, del siglo VIII al XVI, y la diversidad de procedencias de sus autores (Irak, Medina, Egipto, Túnez, al-Andalus y Castilla).

Otra cuestión a tener en cuenta es la clasificación de los actos de los musulmanes, según la ley islámica (*šarī'a*), en cinco tipos: 1) obligatorios (*wāğib*), que merecen recompensa por realizarlos y castigo por no realizarlos; 2) recomendables (*mandūb*), con recompensa pero no es castigada su omisión; 3) permitidos o lícitos (*ḥal, ğā'iz*), legalmente son indiferentes; 4) reprobables (*makrūh*), aunque se desaprueban no se castigan; y 5) prohibidos (*ḥarām*), que merecen ser castigados. También son aplicables estas normas al consumo de los alimentos entre los cuales, como indican los tratados jurídicos, la inmensa mayoría están permitidos frente a la prohibición absoluta y unánime de escasísimos productos alimenticios, sin olvidar los que también, sin ser numerosos, son calificados de reprobables o son objeto de opiniones divergentes.

A todo ello hay que añadir que las grandes diferencias marcadas por la diversidad de culturas, ámbitos geográficos y religiones son realmente escasas, como ponen de manifiesto los tratados jurídicos utilizados en este trabajo. Ciertamente, los musulmanes podían consumir infinidad de alimentos de adeptos de otras religiones, unos bajo su protección (*ḏimma*) por ser considerados unánimemente gentes del Libro (*ahl al-kitāb*), como los cristianos (*naṣārà*) y los judíos (*yahūd*), y otros sobre los que había discrepancias respecto a esta cuestión, entre los que se encontraban los zoroastrianos (*maŷūs*), los samaritanos (*sāmariyya*) y los sabeos (*ṣābi'ūn*). También les estaba permitido comer alimentos de los enemigos, si éstos pertenecían a gentes del Libro, como es el caso de los bizantinos (*Rūm*) y el pueblo de Israel (*Banū Isrā'īl*).

Por último, no hay que olvidar un factor importante como es la distinción entre alimentos y bebidas de los *ḏimmíes*, en tierra del Islam (*dār al Islām*), y del enemigo, en territorio de guerra (*dār al-ḥarb*).

35 Sobre las características de este tipo de obras, Arcas Campoy, 'Algunas consideraciones' y 'Valoración actual'.

Tras estas consideraciones previas, procede ordenar y exponer un resumen de las referencias de los juristas malikíes recogidas en las diez obras consultadas:

a) Consumo de alimentos y bebidas

El primer punto a destacar es la prohibición absoluta y unánime de la carne de cerdo (*khanzīr*), mientras que otros alimentos son considerados lícitos o sobre ellos hay distintas opiniones. Existe unanimidad respecto a la licitud de comer alimentos de los *kitābíes* entre los que se encuentran bizcocho (*kaʿk*) y cecina (*qadīd*), si es una cantidad pequeña, harina (*sawqī*) y manteca (*samn*) para elaborar el *sawīq*[36] y el pan (*ḫubz*) y la grasa (*wadak*) de los *rūm*. Otros oscilan entre la reprobación y la licitud, como el queso de los *rūm*, y otros son reprobables, como la cecina de los *rūm* y el pan y queso (*ǧubn*) de los *maǧūs*.[37]

En cuanto a las bebidas, la prohibición rotunda recae sobre el vino (*khamr*) en tanto que se permite el arrope (*ṭilāʾ*)[38] si no se ha mezclado con nada y se reprueba el obtenido del mosto de un cristiano. También hay referencias sobre el vinagre cuya catalogación oscila entre la prohibición y la licitud, siempre y cuando se haya transformado por un proceso natural, pues siendo así se permite el consumo incluso del que obtienen del vino los cristianos.

b) Sacrificio (*ḏabāʾiḥ*) de los animales

El modo de sacrificio de los animales constituye un factor determinante en la alimentación de los musulmanes ya que la ley islámica (*šarīʿa*) obliga a degollarlos y a desangrarlos. En principio la mayoría de los juristas, con algunas discrepancias, consideran lícitos los sacrificios realizado por los *kitābíes*, incluidas las mujeres y los impúberes, si lo hacen para ellos. Asimismo son aceptadas las víctimas sacrificadas por cristianos o judíos para un musulmán, siempre que también esto sea lícito para ellos y se haga en presencia de un musulmán que certifique el buen cumplimiento del ritual. Sin embargo, hay un rechazo generalizado al consumo de la grasa (*šaḥm*) de las víctimas sacrificadas por los judíos para ellos, así como la carne de los sacrificios de los cristianos para sus fiestas religiosas y también a los

36 *EI2*, IX, 1998, pp. 97-98, Waines, 'Ṣawīḳ': es un preparado culinario a base de trigo y cebada muy extendido en oriente medio durante la edad media. Se recomendaba a los viajeros y se servía de comida a las tropas en campaña. Nota repetida, ojo.

37 Según una cita de Lévi-Provençal, un pequeño grupo de normandos convertidos al Islam se dedicó a la producción de quesos en Sevilla y Córdoba. Sin embargo esta afirmación queda descartada por J. Aguadé, '¿Hubo quesos normandos en al-Andalus?', pp. 471, quien advierte que dicha cita es una interpretación errónea de la opinión de Ibn Ḥabīb sobre el queso de los *maŷūs*, recogida en el tratado de *ḥisba* de Ibn ʿAbd al-Raʾūf, ya que 'no se refiere al queso de los normandos sino al que producían los zoroastrianos en Oriente, a quienes los árabes también denominan *maŷūs*'.

38 *Ṭilāʾ* es un concentrado resultante de reducir por cocción dos tercios de vino u otra bebida alcohólica. Véase M. Arcas Campoy, 'Las bebidas alcohólicas en el derecho mālikí', p. 272.

sacrificios realizados por los musulmanes convertidos al cristianismo o al judaísmo por ser considerados apóstatas.

Igualmente se considera lícito comer la carne de los animales debidamente sacrificados por samaritanos y *maǧūs* cristianizados,[39] siempre que lo hagan por cuenta propia, mientras que los sacrificios de los *maǧūs* y los sabeos, oscilan entre la aceptación y la reprobación. Un último dato a añadir es la prohibición de comer la pieza de caza mordida a la vez por el perro de un musulmán y el de un *maǧūsī*.

c) Transacciones

Varios juristas hacen referencia a distintos tipos de transacciones, como la compraventa, el intercambio o trueque y el préstamo. Es reprobable el establecimiento de carnicerías (*maǧāzir*) de *dimmíes* en los zocos, así como comprar carne en ellas, pero no está prohibido. En cuanto a las transacciones comerciales (*tiǧāra*) realizadas en territorio enemigo, el rechazo es generalizado, salvo en el caso de la sal, el aceite o las legumbres, en cambio se considera lícito el intercambio de trigo (*qamḥ*), cebada (*ša'īr*), miel (*'asal*) o manteca (*samn*) del enemigo porque se trata de un trueque y no de una compraventa. Igualmente es reprobable que un musulmán haga transacciones comerciales o que coma alimentos comprados con el dinero procedente de la venta de vino de un cristiano. A todo ello hay que añadir la prohibición de comprar vino a un *ḏimmí* y la del préstamo de alimentos tomados al enemigo y de dinero procedente de la venta del vino.[40]

d) Herencias

La prohibición del vino y de la carne de cerdo alcanza a los legados de los cristianos a los musulmanes. Pero si se trata del legado de un cristiano deudor de un musulmán se venderá el vino y los cerdos y se entregará su importe al musulmán acreedor.

Conclusiones

Todo lo expuesto hasta aquí nos lleva a reconsiderar la catalogación de los tratados de jurisprudencia como obras meramente teóricas, sin dimensión temporal y espacial Y es que el contenido e intención de las fuentes utilizadas también ponen de manifiesto otros aspectos de carácter práctico.

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39 Jalīl b. Isḥāq es el único autor que hace referencia a estos dos grupos religiosos. Los samaritanos forman un grupo distinto del judaísmo oficial del que se diferencia, entre otras cosas, por tener el Pentateuco como único libro bíblico cuyo texto además es diferente. En cuanto a los *maŷūs* cristianizados, Jalīl parace referirse a grupos de origen indo-iranio que acabaron cristianizados. Debo esta información sobre los samaritanos y los *maŷūs* cristianizados al profesor Juan Pedro Monferrer.

40 Sobre las transacciones comerciales del vino, remito al extenso y bien documentado artículo de Hernández López, 'La compraventa de vino'.

En este sentido hay que destacar la abundancia y diversidad de opiniones (*aqwāl*) de juristas, que no sólo eran estudiadas en el plano teórico por otros sino que también servían de guía y asesoramiento para funciones de tipo práctico. Por otra parte, la composición de obras de este género, por su propia naturaleza, propiciaron durante una larga etapa cronológica la proliferación de composiciones que sucesivamente se nutrían de contenidos de las anteriores e incorporaban las coetáneas.

Es precisamente en la diversidad de opiniones, plagadas de pormenorizadas cláusulas referentes a situaciones concretas, reales o posibles, dónde residía la posibilidad de optar, dentro de los márgenes legales, por interpretaciones o aplicaciones de normas sobre las que no había un criterio unánime y que constituían una importante base jurisprudencial. En este sentido tanto la aceptación como el rechazo de determinadas opciones respondían generalmente a las preferencias personales y doctrinales de los alfaquíes respecto a distintas realidades, cotidianas o extraordinarias, de la población. Así pues, se puede afirmar que las obras de jurisprudencia contribuyeron en gran medida a la adaptación de ciertas normas jurídicas a las necesidades del momento, recogidas principalmente en fetuas y tratados de *ḥisba*.[41] Las opiniones de los juristas sobre los alimentos de los *ḏimmíes*, entre la teoría y la práctica, son un buen ejemplo de ello.

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'TWENTY-FIVE HUNDRED *KNIDIA* OF WINE ... AND TWO BOATS TO TRANSPORT THE WINE TO FUSTĀT'. AN INSIGHT INTO WINE CONSUMPTION AND USE AMONGST THE *DHIMMĪS* AND WIDER COMMUNITIES IN UMAYYAD EGYPT

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The question of wine[1] sales in medieval Cairo has been documented and there are a number of historical records which suggest that *wine consumption* was still prevalent.[2] In medieval Egypt it was very popular among Christian and Muslim Cairenes to drink wine openly on the boats on the Nile and on the river banks, particularly during the Coptic festivals of *Nawrūz* and *Laylat al-Gîtās*.[3] In spite of very fragmentary sources, there are clear indications of periods in which wine

1 The present article is part of a broader on-going research topic. In this study (Myriam Wissa, '*Bridging religious difference in a multi-cultural eastern Mediterranean society: Communities of artisans and their commercial networks in Egypt from Justinian to the 'Abbasids*'), the winemakers and wine production figure prominently.

2 Paulina Lewicka, 'Restaurants, Inns and Taverns that Never Were: Some Reflections on Public Consumption in Medieval Cairo', JESHO 48/1 (2005), 40–91 (p. 71): 'There is a significant number of accounts proving that wine was indeed not uncommon in Egypt and its capital throughout the middle Ages.[...] It is exceptionally difficult to form any universal conclusions concerning public wine consumption in medieval Cairo, for through the ages the wine-dealers' and their customers' fortunes depended, in a particular way, on the authorities' unstable attitudes towards the forbidden drink. True, both the local population and the members of the ruling elites, drank, though for different reasons'.

3 In these Coptic holidays celebrated up to the fifteenth century by both Christians and Muslims, eating and drinking in public was customary. Several Muslim authors such as Al-Musabbihi Akhbar *Misr*, Al-*Makrizi*, *Khitat*, *Ibn'Iyas*, *Badā'i' al-zuhūr* and Al Qalqashandi, *Subḥh al-a'sha* provide a snapshot on this in their chronicles. For a discussion see Hoda Lutfi, 'Coptic Festivals on the Nile: Aberrations of the Past?'in: *The Mamluks in Egyptian Politics and Society*, ed. by Thomas Philipp and Ulrich Haarmann (Cambridge: University Press, 1998), pp. 254-82; Boaz Shoshan, 'High culture and popular culture in medieval Islam', *Studia Islamica* 73 (1991), 67-108, (p. 86); B. Shoshan, *Popular Culture in Medieval Cairo*, (Cambridge Studies in Islamic Civilization, Cambridge University Press, 1993),148 (p. 46) and Yehoshua Frenkel, Popular Culture (Islam, Early and Middle Periods), *Religion Compass* 2/2 (2008), 195-225 (pp. 203-04). Similarly, the medieval Jewish communities used wine sacramentally in feasts, prayers, and at religious events. The Geniza documents refer to various types of wine-traders. See S. D. Goitein, A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza, (Los Angeles: University of California Press, 1983) I: Daily Life, p. 258.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

 10.1484/M.RELMIN-EB.5.109352

production and consumption were particularly monitored by the Muslim authorities for the state tax revenue. Al-Maqrizi, in his annal for 592/1196, stated that there was a tax on *ḫamr*[4] re-introduced that year. He also reported the existence of *qa'at* (halls) and *hawanit* (shops) where wine was sold.[5] The wine shops, even if tolerated by the Fatimid, Ayyubid and Mamluk rulers[6] for revenue purposes, did not enjoy 'legal' recognition.

In Umayyad Egypt, Coptic and Greek ostraca of the seventh and eighth centuries from Edfu, Bawit and Wadi Sarga provide evidence of wine production and consumption and may indicate its significance to the Umayyad rulers. A closer look at these documentary records is highly revealing. This article draws on this and other evidence to explore whether Islamisation had achieved a subtle accommodation prohibiting wine production, selling and consumption in accordance with the '*Šuruṭ 'Umar*';[7] it highlights the continuing drinking practices in the early Islamic period; it shows how early Islamic law could be flexible in responding to social changes. The article also demonstrates how early Muslims used a prohibited drink, wine while negotiating commercial transactions with non-Muslims.

Did Wine Consumption Cease with the Upsurge of the Caliphate?

In the pre-Islamic period *Gāhiliyya* wine drinking was common in Egypt, Syria, Mesopotamia, Iran, North and South Arabia.[8] Though al-Walid b. al-Mughira, Abu *Dhar* al-Ghifari, Waraqah b. Nawfal prohibited wine drinking,[9] At-Tabari[10] accounts for the Meccan aristocracy's love of wine: 'When the *'Ad* delegation stopped off at the home of Mu'awiya bin Bakr, they remained with him for a month, drinking wine while the two singing-girls (called al-garādatān, 'two

4 This generic term refers to wine, beer and spirits. For an overview of the debate on *Khamr* see A. J. Wensinck and J. Sadan, Encyclopedia of Islam 2,'Khamr' IV, pp. 994-8.

5 Al-Makrīzī, *Kitāb Al-Sulūk Li-Ma'rifat Duwal Al-Mulūk*, ed. by Mustafa Ziada, (Egyptian Library Press, Cairo,1934), p. 134; Lewicka, 'Restaurants, Inns and Taverns', p. 72.

6 Several Ayyubid and Mamluk edicts list forbidden practices such as wine-making, grape-pressing, wine-selling and drinking to excess, but make no reference to premises designed for wine drinking. Lewicka, 'Restaurants, Inns and Taverns', p. 74.

7 A thorough insight into *Šuruṭ 'Umar'* is provided by Mark R. Cohen, 'What was the Pact of 'Umar? A Literary-Historical Study', JSAI 23(1999), pp. 100-57.

8 Vineyards extended across Oman and Yemen, namely Shibam and kawkaban. For a detailed study on this subject see M. Maraqten, 'Wine drinking and wine prohibition in Arabia before Islam', *Proceedings of the Seminar for Arabian Studies, Proceedings of the Twenty Sixth seminar for Arabian studies held at Manchester on 21st-23rd July 1992*, 23 (1993) p. 95.

9 Maraqten, 'Wine drinking and wine prohibition', p. 111.

10 Abu Ga'far Muhammad bin Gārīr at-Tabarī, *Ta'rīḫ ar-rusul wal-mulūk* 1,ed.by Muhammad Abu 1-Fadl Ibrahim (al-Qāhira, 1960), p. 219.

locusts') of Mu'awiya b. Bakr sang for them'.[11] Another example which reflects the importance of wine for the Arabs in the *Gāhiliyya* is the prolific drinker Imru'l -Qais.

The concept of prohibition of wine in the Islamic period can be understood from many different perspectives.[12] It has been asserted that 'there is a clear distinction between earthly wine and the wine of Paradise which does not lead to drunkenness'.[13] This consideration should be taken with a degree of caution. The Umayyads and 'Abbasids had developed an elaborate wine culture;[14] together with the Aghlabids, their cultural practice was often at variance with Islamic law, as caliphs, courtiers and the elite drank wine copiously.[15] Scenes of wine drinking and wine vessels[16] are occasionally depicted in Islamic art, and wine is commonly mentioned in poetry of the Umayyad period, in particular that of the caliph al-Walid I. Wine parties (*majalis*) are referenced in the subsequent khamriyya poetic *genre*.[17] Wine poetry[18] makes clear that the Muslim elite enjoyed widespread drinking. The wine pool recorded from al-Walid II in his desert castle at Khirbat al-Mafjar shows strong evidence of the drunkenness of the Umayyad caliph.[19] In addition to *magalis al- ḫamr* which continued in the 'Abbasid tradition, from the earliest days of their history the rulers of Baghdad had tolerated the custom of residents going out to spend their evenings in the wine houses and 'taverns' located along the banks of the Tigris.[20] The monasteries of Iraq and Syria, which

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11 Maraqten,'Wine drinking and wine prohibition' p. 106: 'This tradition, which had been found under the Nabataean kings, continued in Mecca and other cities like Yatrib and later is found in Islam'.

12 This point is emphasised by Robert Hillenbrand, 'Wine in Islamic Art and Society', in: *Court and Craft: A Masterpiece of Northern Iraq*, ed. by Rachel Ward (London, 2014), p. 38: 'Yet the very definition of what constitute alcohol has been hotly contested. A typical case is that of a mild fermented liquid called *nabidh*, usually made from raisins or dates; its consumption was legal if it was no more than two days old, though thereafter it became stronger-and illegal'.

13 Hillenbrand, 'Wine in Islamic Art', p. 38.

14 The Umayyad (in particular 'Abd al-Malik, Yazid I, al-Walid I, Sulaiman and Hisham) and 'Abbasid rulers were wine enthusiasts. See Hillenbrand, 'Wine in Islamic Art', p. 38.

15 O. Grabar, 'Ceremonial and Art at the Umayyad Court', (unpublished PhD diss., Princeton 1955); R. Hillenbrand, 'La dolce vita in early Islamic Syria: the evidence of later Umayyad palaces', *Art History* V/1 (1982), 1-35, (p. 13 and 28). Miskawayh and al-Mas'udi provide a thorough account of the 'Abbasid Caliphs al-Qahir, al-Radi and al-Mustaqfi.

16 A thorough description of the drinking vessels in Arabia before Islam is provided by Maraqten, 'Wine drinking and wine prohibition', pp. 96-7. For example the kings of al-Hira, Ghassan and Petra used gold vessels to drink wine.

17 See J. E. Bencheikh, 'Khamriyya', *EI* IV, (Leiden 1978), 998-1009. For a recent scholarship on this subject, see the themed volume *Khamriyya as a World Poetic Genre: Comparative Perspectives on Wine Poetry* ed. by Kirill Dimitriev and Christine van Ruymbeke Publisher TBC, 2016 (forthcoming).

18 J. Colville, Poems of Wine and Revelry: The Arabic bacchic poetry of Abu Nuwas, (London 2005) pp. 120-24; J. Bencheikh, Poésies bachiques d'Abu-Nuwas: thèmes et personnages, *BEO* 18, 1963-64, pp. 7-84.

19 Hillenbrand,'Wine in Islamic Art', p. 39.

20 Lewicka, 'Restaurants, Inns and Taverns', p. 50.

became popular destinations for the Arab elites who enjoyed alcohol privately, are widely referred to in Arabic *khamriyya* poetry and in *dayriyyāt* literature.[21]

Furthermore, medieval Muslim alchemists improved the art of distillation. Intoxication by wine was instrumental as a metaphor for some early Sufis to achieve a close mystical connection with God.[22]

As an extension to this evidence, one could envisage that during the early Islamic period wine continued to be produced in Egypt and across the Muslim world extensively for consumption and use. What does this suggest?

The Production and Circulation of Wine in Egypt

In Egypt, the tradition surrounding wine production and consumption is rich and varied.The Ancient Egyptians consumed beverages regularly, in particular beer and wine.[23] Until the seventh century, great estates, both secular and monastic, were the foremost wine producers and the production and consumption of wine did not cease immediately following the Muslim conquest. A seventh-century Arabic letter, the oldest very likely, written in North Africa and sent to a town in Egypt (Bahnasa/Oxyrhynchus?) accounts of the importance of trade in wine and textiles.[24] While the secular estates began to lose their prominence, the monastic estates continued to be major suppliers for local and caliphate use.[25] These new forms of social and economic relations, which developed between the Muslim rulers and *dhimmīs*, reveal the many inconsistencies in the policies of the Arab governors. Archaeological evidence demonstrates that wine consumption was widespread in Egypt and there was significant production until the late tenth century.[26] Wine continued to be exported via sea trade in the same containers

21 Hilary Kilpatrick, 'Monasteries Through Muslim Eyes: The Diyarat Books', in Christians at the Heart of Islamic Rule: Church Life and Scholarship in 'Abbasid Iraq,ed. by David Thomas, (Leiden 2003) pp. 19-37.

22 M. A. Sells, *Early Islamic Mysticism: Sufi, Qur'an, Miraj, Poetic and Theological Writings*, (Paulist Press, New Jersey1996), p. 68.

23 M. A. Murray, N. Boulton and C. Heron, 'Viticulture and Wine Production', in: *Ancient Egyptian Materials and Technology*, ed. by Paul T. Nicholson and Ian Shaw (Cambridge, 2000)p. 57,7-608; D. Meeks, 'Oléiculture et viticulture dans l'Égypte pharaonique', in: *La production du vin et de l'huile en Méditerranée*, ed. by Marie-Claire Amouretti, Jean-Pierre Brun *BCH-Suppl.* 26, (Paris,1993) pp. 3-38 and P. Montet, *La vie quotidienne en Égypte au temps des Ramsès (XIII^e-XII^e siècles avant J.-C)*,(Paris, 1946) pp. 90 and 94 maintains there were 'cabarets' or taverns in Ancient Egypt.

24 P. M. Sijpesteijn, *Shaping a Muslim State: The World of a Mid-Eighth-Century Egyptian Official* (Oxford Studies in Byzantium), (Oxford University Press, 2013), 424 (p. 92).

25 This was also true in Gaza, Syria and Iraq.

26 Evidence for this includes ceramics spanning the ninth to the eleventh centuries and deposits of amphorae that once held stored and imported wine and oil. For a good insight on the typology of the jars see the article of Antigone Marangou and Sylvie Marchand,'Conteneur importés et égyptiens de Tebtynis (Fayoum) de la deuxième moitié du IV^e siècle av. J.C.au X^e siècle apr. J.C. (1994-2002)' in *Amphores d'Égypte de la Basse époque à l'époque Arabe*, ed. by Sylvie Marchand and Antigone Marangou, *Cahiers*

used in the earlier periods such as *magarikon* and other containers.[27] Ceramic evidence shows that Islamic prohibition of wine consumption did not affect wine production.

Equally informative is the documentary evidence. The Zenon papyri, dating back to the third century are essential for knowledge of viticulture. The text of two leases[28] points to a large workforce of winemakers rewarded in kind for their labour which included watering the vineyards twice a month in the winter and ten times a month in the summer until the harvest in the month of Thoth.[29] As stated earlier in late fifth-, sixth- and seventh-century Egypt, great estates such as that of the Flavii Apiones in Oxyrhynchus were the main wine producers: wine production is well documented in the Apion papyri from this locality.[30] However, wine importation from Rhodes does suggest that the local production was not enough to satisfy demand. Wine was also an important commodity in money-lending or loans[31] and, more significantly, in the economy of the monasteries. Christian monasteries in Egypt (and also those in Palestine, Syria and Iraq) were brought within the administrative and economic structures of the newly Arabised state apparatus. Known for their vineyards, these monasteries became the biggest producers of wine in the Muslim lands. The documentary material shows that the Coptic monasteries sourced revenue to meet their needs from their agricultural products, mainly wine.[32] Found in various locations in Egypt including both monasteries and private houses, the texts of the papyri and ostraca — letters, accounts

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de la céamique égyptienne, 8/1 (Le Caire: IFAO, 2007) pp. 239-94; For a more specific insight into the 'Abasid Amphorae see Chr. Vogt, Ph. Gouin, G. Bourgeois, M. Schvoerer, M. Girard, S. Thiébault, ' Notes on Some of The Abbasid Amphorae of Istabl 'Antar-Fustat (Egypt)', *BASOR* 326, (2002), pp. 65-80.

27 In Egypt, from the third to the ninth century, the vessels and amphorae for storing *wine* and oil differ markedly from the vessels destined for other commodities.

28 Seyna Bacot, 'La circulation du vin dans les monastères d'Égypte à l'époque Copte' in *Le commerce en Égypte ancienne*, ed. By Nicolas Grimal and Bernadette Menu, ifao, Bibliothèque d'étude 121, (Le Caire, 1998), p. 270.

29 The Coptic month Thoth (inherited from the Ancient Egyptian calendar) corresponds to the dates between 11th of September and 10th of October in the Gregorian calendar. For a complete coverage of the Coptic-Egyptian calendric system see Myriam Wissa, 'Le calendrier copte héritage du calendrier pharaonique' in *De la Linguistiqe au Gnosticisme* II, ed. by Marguerite Rassart-Debergh and Julien Ries, Publications de l'Institut Orientaliste de Louvain 41,(Louvain-la-Neuve, 1992) pp. 163-77.

30 T. M. Hickey, *Wine, Wealth, and the State in Late Antique Egypt: The House of Apion at Oxyrhynchus. New texts from Ancient Cultures*, (Ann Arbor: University of Michigan Press, 2012), Pp. xvii, 229.

31 For example the archives of Koloje, a Coptic woman from Jeme and moneylender indicate credit transactions in wine. See Terry G. Wilfong, *Women of Jeme: lives in a Coptic town in late antique Egypt*, (University of Michigan Press, 2002) pp. 117-49.

32 T. S. Richter, 'Cultivation of Monastic Estates in Late Antique and Early Islamic Egypt: Some Evidence from Coptic Land Leases and Related Documents', in *Monastic Estates in Late Antique and Early Islamic Egypt: Ostraca, Papyri, and Essays in Memory of Sarah Clackson*,ed. by A. Boud'hors, J. Clackson, C.Louis and P. Sijpesteijn, (Cincinnati, 2009), PP.205-15.

and tax receipts — in both Coptic and Greek illustrate wine production, delivery and requisition.

In the seventh and eighth centuries wine *production*, deriving from a long standing practice, was widespread. A significant body of information on wine circulation, consumption and requisition can be gleaned from the the archives of Papas discovered in Tell Edfu and the documentation of the monastery of Apa Apollo in Bawit and Apa Thomas in Wadi Sarga.The two monasteries of Bawit and Wadi Sarga had a wine producing history which extended over centuries. Several thousands of monks in these monastic institutions alongside people of the monasteries and from outside, who consumed wine, were already a significant market.[33]

The Wine of Edfu: An Archetypal Product of the Umayyad Consumer Society

Edfu was very prosperous since the second millennium B.C. The city had a long standing tradition of winemaking and produced wine of wide notoriety from its vast vinyards; viticulture, there, is thought to have been introduced in Pharaonic Egypt and was developed in the Ptolemaic period.[34] The wine of Edfu became a mass-market product and a large number of amphorae were used to store and ship wine.

Tell Edfu, one of the very few remaining city mounds accessible for excavation, is unique as three thousand years of Egyptian history are preserved in the stratigraphy of a single mound. Administrative activities of scribes (who did accounting, opened and sealed containers, received letters on ostraca or inscribed pottery shards and listed commodities written on them) from the various epochs of the long Egyptian history are extensively recorded. The ten campaigns conducted by the French Institute and the two campaigns led by the Polish in Tell Edfu[35] unearthed several hundred papyri and ostraca, all belonging to the archives of Flavius Papas, an aristocrat landowner, head of local administration and pagarch of Apollonos Ano (modern *Edfu*) under the rule of Qurra b. Shariq (governor of Egypt) and the reign of Mu'āwiya.[36] This large body of documentary

33 Bacot, 'La circulation du vin ', p. 272.

34 During the Ptolemaic, Roman, and Byzantine periods, Red Sea trade network were between the Nile emporia of Edfu and Berenike.

35 H. Henne, 'Rapport sur les fouilles de Tell Edfou, 1921-1922', *Fouilles de l'Institut Français d'Archéologie Orientale* I/2, (Le Caire, 1924), pp. 4-6, pl. XI; Jean Gascou, 'Edfou au Bas Empire d'après les trouvailles de l'Ifao', in *Tell Edfou soixante ans après*, *Actes du colloque franco-polonais*, *Le Caire-15 octobre 1996*, ed. by N. Grimal (*Fouilles Franco-Polonaises* 4), 1999, pp. 14-5.

36 See the topic article of Clive Foss, 'Egypt under Mu'āwiya. Part I: Flavius Papas and Upper Egyp't. *Bulletin of SOAS*, 72,1, (Cambridge University Press, 2009), 1-24.

records, mostly in Greek[37] with a small amount in Coptic, dating from the second half of the VII[th] century, was stored in a ceramic jar.[38] They illustrate, among other aspects, the importance of Egypt for supplying materials and commodities and testifies to the exchanges between a provincial *dhimmī* high local official in Upper Egypt and the Islamic regime in Fustāt. From the Arab governor[39] in Fustāt, the orders were given to the amīr[40] or *dux* in the Thebaid (Antinoe) and subsequently to Papas.

Two particularly relevant texts[41] are informative. The first is *P. Apoll.10*, a letter from 704 AD; in this correspondence, the Emir imposed provision of 2500 *knidia*[42](10,750.00 litres) of wine from Apollonos. The letter reports that two boats, supervised by the deacon Epiphanius,were necessary to transport the wine to Fustāt via Antinoe. Edfu is located in the southern reach of the Thebaid ans lies 800 km south of Fustāt, a journey of several weeks by boat. This letter indicates increasing demand for wine from Qurra, the Umayyad governor of Egypt.[43] The second document *O. Ifao Co 65* mentions that Severos gives 6 measures — *magarika*[44] of wine to 'a man of the Emir.

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37 Published first by Roger Rémondon, Papyrus grecs d'Apollônos Ano, Cairo, 1053 with additional documents listed in Jean Gascou et Klaus A. Worp, 'Problèmes de documentation apollinopolite', in *Zeitschrift für Papyrologie und Epigraphik* 49 (1982), pp. 83-95. An additional document was published by Jean Gascou, 'Papyrus grecs inédits d'Apollônos Ano', *Hommages à la mémoire de Serge Sauneron* II, Cairo 1979, 25-34.

38 A full description and analysis of this amphora is provided by Sylvie Marchand, 'La "jarre aux papyrus" d'Edfou et autres jarres de stockage d'époque arabe découvertes à Tebtynis, Fayoum (deuxième moitié du VII[e]-X[e] siècle apr. J.-C.)' in *Functional aspects of Egyptian ceramics in their archaeological context*, ed. by Bettina Bader and Mary F. Ownby, *OLA* 217, (Leuven,2013), pp. 327; 329-34 and pl. 1 p. 347 and pl. 2 p. 348.

39 Foss, 'Egypt under Mu'āwiya', p. 9: 'The governor rarely appeared, his will lies behind many if not most orders'.

40 For this title, see Soheir S. Ahmed, 'Professions, Trades, Occupations and Titles in Coptic (Alphabetically)', *Journal of Coptic Studies* 12 (Peeters, 2010) p. 116.

41 Seyna Bacot, 'Le vin à Edfou', in *Amphores d'Égypte de la Basse époque a l'époque Arabe*, ed. by Sylvie Marchand and Antigone Marangou, *Cahiers de la céamique égyptienne*, 8/2 (Le Caire: IFAO, 2007) pp. 713-20 (p. 714).

42 *Knidion*, a name for an amphora, is often attested in Late Antiquity and subsequently used as a Coptic measure. For wine measures see Tascha Vorderstrasse, 'Terms for vessels in Arabic and Coptic Documentary Texts', in *Documents and the History of the Early Islamic World*, ed. by Alexander T. Schubert and Petra M. Sijpesteijn, (Brill, 2014), p. 213; N. Kruit and K.Worp, 'Geographical Jar Names: Towards a Multi-Disciplinary Approach', *AFP* 46/1, 2000, pp. 65-146; Bacot, 'Le vin à Edou', pp. 715-16 and Lionel Casson, 'Wine Measures and Prices', *Byzantine Egypt*, Transactions and Proceedings of the American Philological Association 70 (1939), pp. 6-8.

43 See the discussion in Frank Trombley, 'Sawirus ibn al-Muqaffa' and the Christians of Umayyad Egypt', in *Papyrology and the History of Early Islamic Egypt*, ed. by Petra Sijpesteijn and Lennart Sundelin (Leiden,2004), 199-226.

44 *Magarikon* (singular) refers to a specific type of amphorae associated with commercial exchange in the Mediterranean basin. Bacot,'La circulation du vin', p. 270. In addition, *Magarikon* is predominantly a

Furthermore, a requisitioning order for taxes in kind is reported in *P. Apoll.101* which indicates a requisition of 239 measures of wine and vinegar.

Other fragments, in particular legal acts, detail the terms of wine exchange and selling. They list the price paid and mention that the buyer, who provides the containers, should ensure that the jars are new (*O.Ifao Co 30*) and in good condition[45] for the delivery of the wine.

The Wine of the Monastery of Apa Tomas in Wadi Sarga

Wadi Sarga is another example of a major wine supplier in Umayyad Egypt.The monastery of the *Holy Rock*, dating from the sixth century to the late eighth centuries, is dedicated to Apa Thomas, a Coptic archimandrite.[46] Located in Wadi Sarga, a valley in the western desert roughly 25 km south of Asyut, the monastery was established on the site of a former pharaonic stone quarry. The vineyards of the monastery stretched across Egypt in the Hermopolite and Herakleopolite nomes and extended further north to the Fayyum producing a large variety of wines: the unmixed (pure) wine was particularly praised. Following the vintage 25,665 L.[47] were transported on camels from the scattered vineyards to Wadi Sarga, the site of the monastery which was excavated by R. Campbell Thompson from 1913 to 1914.

In 1922 Crum and Bell published 385 Coptic and Greek texts on ostraca[48] from the monastery,[49] consisting mainly of wine receipts, accounts, and other epistolary documents.[50] The goods transported were mostly wheat and *wine,* as evidenced by the surviving receipts from the Byzantine and early Islamic periods (5th–8th centuries)[51] such as *P. Sarga 344* (a receipt for a payment of wine

measure for wine in Edfu and Bawit. See Bacot, 'Le vin à Edou', p. 716; Vorderstrasse, 'Terms for vessels', p. 213 and Kruit and Worp, 'Geographical Jar Names', pp. 65-146.

45 Bacot, 'Le vin à Edou', pp. 718-19.

46 According to Andrew T. Crislip, *From Monastery to Hospital: Christian Monasticism & the Transformation of Health Care in Late Antiquity*, (University of Michigan Press, 2005), p. 161, n. 170, the monastery was coenobitic rather than a lavra.

47 Ewa Wipszycka, 'Resources and economic activities of the Egyptian monastic communities (4th-8th century)', *The Journal of Juristic Papyrology*, XLI (2011), 159-263 (p. 208).

48 *O.Sarga* is the papyrological standard used in the Checklist of Editions of Greek, Demotic, and Coptic Papyri, Ostraca and Texts (lib.duke.edu) to refer to these ostraca.

49 See W. E. Crum and H. I. Bell, *Wadi Sarga: Coptic and Greek Texts from Excavations Undertaken by the Byzanine Research Account* (Copenhagen, 1922), 1-13.

50 Additional unedited material up to 1100 items are catalogued in the British Museum data base under the direction of Elizabeth O'Connell, curator of the Coptic section. The study of this material is currently part of the research project of Dr Jennifer Cromwell at the University of Copenhagen. Dr Cromwell published on line *Wine and monks in Christian Egypt* http://blog.britishmuseum.org/2013/07/10 and delivered several talks on the subject.

51 J.Cromwell, 'Identifying Scribes at Wadi Sarga: Accounting For Wine — Problems and Preliminary Observations', Ancient Egyptian Language and Texts 5, Oxford, 25 May 2013. Jennifer Cromwell is

by the monastery); *P. Sarga 189.4* (order for the delivery of wine which dates to the eighth century)[52] and *213-340* (receipts for wine deliveries). Wine is also listed alongside other items in a contract of work for a carpenter *P.Sarga161* as a method of payment for his wage: '25 artabae of corn and 12 lahe of *wine*, [... of] folder, 4artabae of barley, 2 jars of wine (according to the vintage), a cloak, a sackcloth(garment),a [...] and a (pair of) sandals yearly'.[53] Specific infrastructures and means of transport — barges, boats and camels — were also attested in Wadi Sarga, as in most of the Coptic monasteries, to ensure the connection with other monasteries and facilitate the transport of commodities. *P.Sarga 93* reads: '[...] and provide 3 good camels for wine for us...When the camels come up (down?) loaded with fodder, send them out to us, that we may load them with wine for coming down (up?). Farewell in the Lord'.[54] The logistics of wine production and transportation are not fully documented. This fragmentary example records three camels per day to carry wine. Some other ostraca testify to the traffic of wine and frequently speak of the request of camels.[55]

Taken together both literary and documentary evidence alongside scenes of wine drinking in Islamic art, offer a remarkable insight into wine production, consumption and requisition in the Umayyad period. In spite of the coercive factor on the interpretation of the fragmented context of the the archives of Edfu and Wadi Sarga, these texts, and other texts from Bawit, help understand the early Muslim attitude toward unlawful beverages in Islam and contextualise certain facts that run counter to the prevailing Islamic paradigms. As pointed out by Emilie Savage-Smith'[...] legal prohibition does not necessarily imply lack of practice [...] wine drinking continued to be practiced in Islam, though clearly prohibited'.[56]

In addition, the archives demonstrate how Muslims were involved with non-Muslims in economic relationships and how the Umayyad regime adopted an accommodating position, encouraging the adoption or continuance of existing practices; in so doing reveal much about the nature of the Umayyad state.

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currently conducting a two-year post-doctoral research *Monasteries as Institutional Powers in Late Antique and Early Islamic Egypt: Evidence from Neglected Coptic Sources* at the University of Copenhagen. Dr Cromwell's research project 'aims to reassess and establish the economic position of Coptic monasteries in Late Antique and Early Islamic Egypt (5th–8th centuries CE) on the basis of the neglected evidence from the monastery at Wadi Sarga and the University of Copenhagen papyrus collection' (Source: Department of Cross-Cultural and Regional Studies, University of Copenhagen website).

52 Lincoln H. Blumell, 'Two Coptic Ostraca in the Brigham Young University Collection', *Chronique d'Égypte*, 88, 175 (Bruxelles, 2013), pp. 182-87.

53 Ahmed, 'Professions', p. 116.

54 Wipszycka, 'Resources and Economic activities', p. 213.

55 Bacot, 'La circulation du vin', p. 270.

56 Emilie Savage-Smith,'Attitudes toward Dissection in Medieval Islam', *Journal of the History of Medicine and Allied Sciences* 50 (1995) 67-8.

Furthermore, this accommodation highlighted later in al-Maqrizi annals for 1194[57] and in medieval Fustāt, where minor dealers stored and sold wine on the decks of smaller vessels,[58] attests to the progressive legal concepts and institutions, which in Medieval Islam, countered *shari'a* in different threads of *fiqhs* or Islamic jurisprudence. Thus fostering the emergence of initiatives that respond to the specific needs tells us more about the early Muslim Caliph's rule characterised by an innovative flexibility set away from the rules which were translated into a hierarchy of rules by the 'Ulama'.

57 '[...] al-Malik al-'Aziz 'Utman, son of Salah ad-Din lifted the ban on forbidden practices and "a hashish mill' was established in Harat al-Mahmudiyya, and the mizr-cellars *buyut al-mizr* became protected. [...] However, in 663/1265 Sultan Baybars while in Syria decided to abolish mizr-taxes, wrote to his viceroy in Egypt, to eliminate the mizr-cellars (buyut al-mizr) and wipe out its traces and demolish its cellars, and break its vessels ...' See Al-Maqriz, *Suluk*, I, p. 525 and Lewicka, 'Restaurants, Inns and Taverns', p. 73.

58 Goitein, *Mediterranean Society, Daily Life*, p. 259.

IN THE EYES OF OTHERS: *NĀMŪS* AND *SHARĪʿAH* IN CHRISTIAN ARAB AUTHORS. SOME PRELIMINARY DETAILS FOR A TYPOLOGICAL STUDY[1]

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Introduction

The use of the terms *nāmūs* and *sharīʿah* in the writings of Christian authors is of twofold interest, for what it tells us regarding their view of the Prophet Muḥammad, treated in these writings as a lawgiver, and of the Qur'ān, largely seen as a legislative *corpus*. In providing a diachronic survey of the uses of the Arabic loanword *nāmūs* in texts of various types, this paper seeks to examine the value ascribed to this concept by Christian authors, focussing especially on links with the term *sharīʿah*, with the Prophet and with the Qur'ān.

Muslim authors, *mutatis mutandis*, used the term *nāmūs* in the sense of 'divine law', 'cosmic law' or 'celestial law', and thus akin to *sharīʿah*,[2] though not fully equivalent (cf. the expression *nāmūs al-sharīʿah*, i.e. the Muslim law).[3] Within traditional Islam, for example, the laws governing creation are known by the formula *nāmūs al-khilqah*, i.e. 'the law of creation'.[4] Christian authors also used the term *nāmūs* with the sense of 'divine law', as in Maḥbūb al-Manbijī when describing the Jewish sects: *firqat al-kuttāb alladhī yuqāl lahum kuttāb al-nāmūs wa-muʿallimūna*, i.e. 'the sect of the scribes who are called scribes and doctors of the Law'.[5] However, Christian authors, by contrast, developed a use of the term in the sense of 'natural law', i.e. the law with which man is endowed from his creation

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1 This study is part of the Research Project FFI2014-53556-R: 'Study and Edition of the Greek, Arabic and Latin Biblical and Patristic Mss', granted by the Spanish Ministry of Economy and Competitiveness.

2 M. B. Hooker, 'Sharīʿa', in EI², IX, pp. 331-38.

3 Cf. Al-Qalqashandī, *Ṣubḥ al-ashā' fī ṣināʿat al-inshā'*, ed. Muḥammad 'Abd al-Rasūl Ibrāhīm, 14 tomes in 7 vols (Cairo: Wizārat al-Thaqāfah wa-l-Irshād al-Qawmī, 1963), VIII, p. 69.

4 Yassine Essid, *A Critique of the Origins of Islamic Thought* (Leiden: E.J. Brill, 1995), p. 195; Sayyed Hossein Nasr, *Religion and the Order of Nature* (Oxford: Oxford University Press, 1996), pp. 132-33, and 156, n. 20.

5 Alexandre Vasiliev, 'Kitab al-'Unvan. Histoire universelle écrite par Agapius (Mahboub) de Menbidj', in *Patrologia Orientalis*, ed. R. Graffin and F. Nau (Paris: Firmin-Didot et Cie, 1910), VII, p. 489 [33].

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

 10.1484/M.RELMIN-EB.5.109353

by virtue of his spiritual essence, which in turn guides him in his dealings. It is a sign of unity between God and man, a sign manifest in the expression constantly encountered (on 22 occasions) in the letters of St. Antony: 'the law of promise' or 'the law of the covenant'.

The term used in the Arabic version of St Antony's letters is the loanword *al-nāmūs* (*namūsō* in the Syriac version), which gives rise to a variety of Arabic expressions like *nāmūs al-ṭabīʿah* ('the law of nature') and *nāmūs al-ʿaqlī* ('the spiritual law'), and to Syriac expressions like *namūsō d-bīnā* ('the law of nature') and *namūsō d-ḥūbō* ('the law of law'). All these expressions, and others, point to a confusion of meaning, generated by the interpretations offered by Arab and Syriac translators of the Greek term ὁ νόμος τῆς ἐπαγγελίας, which St. Antony used as a loanword.[6]

The Syriac term *namūsō* ('law') is open to a range of interpretations, depending on the context in which it occurs, and on the referent, i.e. the source term it translates. In fact, *nāmūs* — apart from the traditional interpretation as 'law'[7] — also appears in the sense of *waṣāyā* ('commandments') in early Christian apocryphal works, including the Arabic and *karshūnī* recensions of the *Meʿarath Gazzē* or 'Cave of Treasures' (*Spelunca Thesaurorum*).[8]

This work, thought to have been composed in around the 6th century AD,[9] speaks of the *waṣāyā Ādam*, literally 'the commandments of Adam'. The plural *waṣāyā* must be understood as 'testament', and in this specific case as the 'Testament of Adam', in the light of references to be found in works like the *Chronicon pseudo-dyonisianum*, which uses the term *namūsō* to denote the transmission of those precepts from Adam to the twelve wise men through his son Seth.[10] But this is not the only use made of the term *namūsō* in the *Meʿarath Gazzē*;

6 Samuel Rubenson, *The Letters of St. Antony: Monasticism and the Making of a Saint*, 'Studies in Antiquity & Christianity' (Minneapolis MN: Fortres Press, 1995), pp. 73-74, n. 1.

7 Carl Bezold, *Die Schachtzhöhle aus dem syrischen Texte dreier unedirten Handschriften* (Leipzig: J. C. Hinrichs'sche Buchhandlung, 1883), p. 35.

8 On this apocryphal Syriac work, *vide* Anton Baumstark, *Geschichte der syrischen Literatur mit Ausschluß der christlich-palästinensischen Texte* (Bonn: A. Marcus and E. Webers, 1922, rep. Berlin: Walter de Gruyter, 1968), pp. 95-96 § 14b.

9 S. P. Brock, 'Jewish traditions in Syriac sources', *Journal of Jewish Studies*, XXX (1979), 212-32 (p. 227). Cf. Andreas Su-Min Ri, 'La Caverne des Trésors. Problémes d'analyse littéraire', in *Symposium Syriacum 1984: Literary Genres in Syriac Literature (Gröningen — Oosterhesselen 10-12 September)*, ed. H. J. W. Drijvers et al., 'Orientalia Christiana Analecta' 229 (Rome: Pontificium Institutum Studiorum Orientalium, 1987), pp. 183-90, which dates a possible primitive version to the 3rd century AD. For a rejection of that dating, *vide* Clemens Leonhard, 'Observations on the Date of the Syriac *Cave of Treasures*', in *The World of the Aramaeans. Studies in Language and Literature in Honour of Paul-Eugène Dion*, ed. P. M. Michèle Daviau et al., 'Journal for the Study of the Old Testament Supplement Series' 326, 3 vols (Sheffield: Sheffield Academic Press, 2001), pp. 255-88, which prefers to place it in the 6th-7th centuries AD.

10 See the interesting explanation of the legend in Ugo Monneret de Villard, *Le leggende orientali sui magi evangelici*, 'Studi e Testi' 163 (Vatican City: Biblioteca Apostolica Vaticana, 1952), pp. 53-68. Cf. Andreas

elsewhere, it appears in the phrase *namūsō d-benay ʿidtō* ('the law of the sons of the church'), i.e. the law of the church which must be obeyed by all Christians.[11]

These are by no means isolated cases — the term was in frequent use among Christian authors — and we can conclude this brief introduction by noting that Christian Arab authors used the term *nāmūs*, with the essential meaning of 'law', to refer to the commandments handed down by God to Moses. Thus, for example, the Arabic version of the Apocalypse of Baruch has Moses announce: *in antum taʿdaytum al-nāmūs fa-innakum satubdidūna wa-tufriqūna* ('If you break the law you will be dispersed and scattered'); this translation of a Syriac original[12] takes *namūsō* as being the equivalent of *al-nāmūs*.[13]

Loanword nāmūs in Early Islam

Of particular interest for our purposes is the use made in early Islam of the term *nāmūs* by Muslim authors. As we have seen, *nāmūs* is an Arabic loanword derived from the Syriac *nāmūsō*, 'order, law', which is in turn a borrowing from the Greek νόμος. The Greek term is used in the Septuagint on seven occasions (along with *dabar* (1), *miṣwah* (4) and *mishpāṭ* (5)) to translate the Hebrew תורה (*tôrâ*).[14]

The Peshīṭtā also uses *nāmūsō* to translate תורה/νόμος. The loanword *nāmūs* in fact derives from an Aramaic term which, together with a variety of other elements,[15] was in use in the Prophet Muḥammad's milieu even before he embarked upon his first preaching at Mecca.[16]

It is interesting to note Ishū'bokht's treatment of *namūsā* ('ideal law') in contrast to *dinā* ('applied law') adopted from the Sassanian law perhaps taken

Su-Min Ri, *Commentaire de la Caverne des Trésors. Étude sur l'histoire du texte et des ses sources*, Corpues Scriptorum Christianorum Orientalium 581, Subsidia 103 (Leuven: Peeters, 2000), pp. 345-46.

11 Su-Min Ri, *Commentaire de la Caverne des Trésors*, p. 377.

12 See on this issue Juan Pedro Monferrer-Sala, 'Reconstrucción de un texto siriaco perdido: "Apocalipsis de Baruc" y sus testimonios siriaco, árabe y griego de los fragmentos papiráceos de Oxírrinco', *Aula Orientalis. Revista de estudios del Próximo Oriente Antiguo*, 31/1 (2013), pp. 63-78.

13 *The Arabic text of the Apocalypse of Baruch*. Edited and translated with a parallel translation of the Syriac text by F. Leemhuis, A. F. J. Klijn, G. J. H. van Gelder (Leiden: E. J. Brill, 1986), pp. 128-29.

14 Edwin Hatch and Henry A. Redpath, *A Concordance to the Septuagint and the Other Greek Versions of the Old Testament (including the Apocryphal Books)* (Oxford: Clarendon Press, 1906), p. 185b.

15 John Bowman, 'The debt of Islam to monophysite Syrian Christianity', in *Essays in Honour of Griffithes Wheeler Thatcher (1863-1950)*, ed. E. C. B. MacLaurin (Sydney: Sydney University Press, 1967), pp. 191-216. See also Sidney H. Griffith, 'Syriacisms in the "Arabic Qurān": Who were "those who said 'Allāh is third of three" according to *al-Mā'ida* 73?', in *A Word Fitly Spoken: Studies in Mediaeval Exegesis of the Hebrew Bible and the Qur'ān, Presented to Haggai Ben-Shammai*, ed. M. Bar-Asher, S. Hopkins, S. Stroumsa & B. Chiesa (Jerusalem, The Ben-Zvi Institute, 2007), pp. 83*-110*.

16 Cf. Siegmund Fraenkel, *Die aramaischen Fremdwörter im Arabischen* (Leiden: E.J. Brill, 1886, rep. Hildesheim-New York: Georg Olms, 1982), p. 278.

from the *Avesta*.[17] A similar comparison, although from a different standpoint, is made by the 10th-century philosopher al-Fārābī in his *Kitāb al-millah* ('Book of Religion') between *millah* ('religion') and *dīn* ('creed'), and between *sharīʿah* ('law') and *sunnah* ('tradition').[18]

Another striking feature of this concept, apart from its use in early Islam, is the fact that it was interpreted in the *sunnah* and Islamic tradition as a reference to the Archangel Gabriel,[19] or as a mediator in the process of God's revelation to Muḥammad.[20] In fact, within the context of the tradition transmitted by al-Bukhārī (and also mentioned in Ibn Hišām's *tahḏīb* of Ibn Isḥāq's *al-Sīrah al-nabawiyyah*), the expression *al-nāmūs al-akbar* must be viewed as a reference to the Hebrew *tôrâ*.[21] The *hadīth*, as it appears in Ibn Hišām's text[22] and is reported in the opening pages of al-Bukhārī's *Ṣaḥīḥ*,[23] deserves examination:

> '[...] Waraqah was a Judaeo-Christian, he read the books and heard the people of the Torah and the Gospel. [Khadīja] reported to him what she had been told by the messenger of God — may God bless and preserve him — of what he had seen and heard. Then Waraqah b. Nawfal exclaimed:
> Holy, Holy! By he who has Waraqah's soul in his hand! Khadīja! If you are telling me the truth, then the 'Great Law' (*al-Nāmūs al-Akbar*) has come, that was brought by Moses, so he is the prophet (*nabī*) of this community (*umma*). Tell him.
> And Khadīja left, and returned to the messenger of God — may God bless and preserve him — and told him what Waraqah b. Nawfal had said. When the messenger of God — may God bless and preserve him — concluded his retreat he did as he used to, and started to walk around the Kaʿba. Then Waraqah b. Nawfal, finding him walking around the Kaʿba, said [to him]:
> — "Nephew! Tell me what you saw and heard".
> — The messenger of God — may God bless and preserve him — told him, and Waraqah replied:

17 *Syrische Rechtsbücher. Vol. 3. Corpus juris des persischen Erzbischofs Jesubocht. Erbrecht oder Canones des persischen Erzbeschofs Simeon. Eherecht des Patriarchen Mâr Abhâ*, ed. Eduard Sachau (Berlin: Verlag von Georg Reimer, 1914), Book I §§ 7,9 (pp. 14 and 16, Syriac, 15 and 17, German trans.). I owe this reference to my colleague Uriel Simonsohn. Cf. Jean-Marie Fiey, *Communautés syriaques en Iran et Irak des origins à 1552*, 'Collected Studies' 106 (London: Variorum, 1979), p. 295.

18 Cf. *Alfarabi, The Political Writings. 'Selected Aphorisms' and Other Texts*. Translated and Annotated by Charles E. Butterworth (Ithaca NY: Cornell University Press, 2004, rep. of 2001), pp. 96-97.

19 Cf. R. Aigrain, 'Arabie', in *Dictionnaire d'histoire et de geographie ecclésiastiques*, ed. A. Baudrillart et al. (Paris: Letouzey et Ané,), fasc. III, 1158-1339 (col. 1265).

20 Thomas P. Hughes, *A Dictionary of Islam* (Anarkali, Lahore: Premier Book House, 1964, rep. of 1885), p. 429.

21 Al-Bukhārī, *Ṣaḥīḥ*, 9 tomes in 3 vols (Riyad: Maktabat al-Maʿārif, s.d.), I, pp. 3-4.

22 Ibn Hishām, *al-Sīra al-nabawiyya*, ed. Muṣṭafā al-Saqqā, Ibrāhīm al-Abyārī and ʿAbd al-Ḥafīẓ Shalabī, 5 tomes in 3 vols (Beirut: Dār al-Khayr, 1990), I, 191.

23 Al-Bukhārī, *Ṣaḥīḥ*, I, p. 3.

> — By he who has my soul in his hand, you are the prophet of this community! For you have received the Great Law that Moses received, to deny it, discredit it, despoil it and fight it [...]'.
>
> 'Khadīja then accompanied him to her cousin Waraqah b. Nawfal b. Asad b. ʿAbd al-ʿUzzā, who during the PreIslamic Period became a Judaeo-Christian and used to write in Aramaic. He would write from the Gospel in Aramaic as much as God wished him to write. He was very old, and had lost his eyesight.
>
> Khadīja said to him:
> Cousin, listen to your cousin!
> Waraqah answered:
> Cousin! What have you seen?
> The messenger of God, may God bless and preserve him, reported what he had seen, and Waraqah said to him:
> — This is *al-nāmūs* that God sent down to Moses'.

In both texts, the term *nāmūs* clearly refers to the Torah. Indeed, for a polemicist of the stature of Timothy I, the figure of Muḥammad bears some similarity to that of Moses, the lawgiver of the Hebrew people,[24] although — unlike Moses — Muḥammad is denied the status of prophet.[25] This negative view on the part of the Nestorian Patriarch is shared by John of Damascus, who labels Muḥammad a false prophet.[26]

The view of Muḥammad as a false prophet leads to the relationship of *nāmūs* with other concepts like *ṣidq* (cf. Syriac *zedqā*, Hebrew *ṣedeq*)[27] as occurs in the apocryphal work entitled *History of Joseph the Carpenter* where it is said that Joseph was pious (*sadīq* <δίκαιος) because he observed the Law (δίκε <תורה).[28]

In the aforementioned account of the first revelation of the Prophet Muḥammad, the role of Waraqah b. Nawfal is crucial for ascertaining the doctrinal source giving rise to the use of the term *nāmūs* shortly before the Prophet started preaching at Mecca, a city whose political situation at the time was

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24 Samir Khalil Samir, 'The Prophet Muḥammad as seen by Timothy I and other Arab Christian authors', in *Syrian Christians under Islam*, ed. David Thomas (Leiden — Boston — Köln: Brill, 2001), 75-106 (p. 94).

25 Samir, 'The Prophet Muḥammad', p. 77.

26 Daniel J. Sahas, *John of Damascus on Islam: The 'Heresy of the Ishmaelites'* (Leiden: E. J. Brill, 1972), pp. 73-74.

27 Cf. *The Book of Jonah in four Oriental versions, namely Chaldee, Syriac, Aethiopic and Arabic*, with glossaries, edited by William Wright (London — Leipzig: Williams and Norgate — F. A. Brockhaus, 1857), p. 106.

28 J. P. Monferrer-Sala, '*Marginalia semitica* II: entre la tradición y la lingüística', *Aula Orientalis. Revista de Estudios del Próximo Oriente Antiguo*, 25/1 (2007), 115-27 (pp. 116-19).

influenced by the Abyssinian Monophysite Christianity of the kingdom of Axūm, which appears to have had a decisive impact at this early stage.[29]

However, the form of Christianity professed by Khadīja's cousin still remains unclear. The description of Waraqah provided by Ibn Hishām's *Tahdhīb*, although seemingly ambiguous, is in fact relatively straightforward. The chronographer Theophanes (died *c.* 818 AD) tells us of an exiled, wandering heretic monk — known in some manuscripts as Sergios (ὀνόματι Σέργιον κακόδοξον) — referred to as a *ḥanīf* (<*ḥanpā*),[30] in whom Khadīja had placed her trust.[31]

A similar role — though with an inversion of values in Theophanes' account — is played by Waraqah b. Nawfal in Islamic tradition.[32] Ibn Hišām notes that Waraqah 'was a Christian, read the books and heard the people of the Torah and the Gospel'. This tells us that Waraqah had become a Christian (*kāna Waraqah qad tanaṣṣara*). The verb *tanaṣṣara* is a neologism derived from the loanword *naṣrānī*, and thus distinguishes Waraqah from a *ḥanīf*, i.e. from the Mandaean gnostics to whom the plural *hunafā'* appears to allude, and with whom Muḥammad was to identify shortly afterwards; the concept *muslimūn*, initially equivalent to *ḥunāfā'*,[33] was to come later.

That Waraqah was a Judaeo-Christian with some expertise in the writing of Aramaic is evident in the information contained in the dual copulative sentence *wa-kāna yaktubu al-kitāba al-ʿibrānī fa-yaktubu mina l-Injīl bi-l-ʿibrāniyya*).[34] In this context, the expression *al-ʿibrāniyya* clearly refers not to Hebrew, but to an Aramaic dialect.

It is interesting to note, incidentally, that the information provided by Theophanes regarding a wandering monk who has been exiled or banished — identifiable in functional terms as Waraqah — matches not only the view of the Eastern Christian tradition but also the 'Legend of Baḥīrā' as it developed in the post-Islamic Iberian Peninsula.[35]

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29 Irfan Shahîd, 'Islam and *Oriens Christianus*: Makka 610-22 AD', in *The Encounter of Eastern Christianity with Early Islam*, ed. Emmanouela Grypeou, Mark N. Swanson and David Thomas (Leiden — Bston: Brill, 2006), pp. 9-31. Cf. Franz Altheim and Ruth Stiehl, *Die Araber in der alten Welt* (Berlin: Walter de Gruyter, 1968), V/1, pp. 316-58.

30 J. P. Monferrer-Sala, '*Ḥanīf* <*ḥanpā*. Dos formas de un mismo concepto en evolución. Notas filológicas en torno a un viejo problema', *Anaquel de Estudios Árabes*, 14 (2003), pp. 177-87.

31 Cf. Aigrain, 'Arabie', fasc. III, col. 1266.

32 Cf. Robert G. Hoyland, *Seeing Islam as others saw it: a survey and evaluation of Christian, Jewish and Zoroastrian writings on early Islam*, 'Studies in Late Antiquity and Early Islam' 13 (Princeton NJ: The Darwin Press, 1997), p. 479.

33 See Monferrer-Sala, '*Ḥanīf* <*ḥanpā*', pp. 177-87.

34 Al-Bukhārī, *Ṣaḥīḥ*, I, p. 3.

35 Ana Echevarría, *The Fortress of Faith: The Attitude towards Muslims in Fifteenth Century Spain* (Leiden — Boston — Köln: Brill, 1999), p. 125. Cf. Fernando González Muñoz, *Exposición y refutación del Islam. Versión latina de las epístolas de al-Hāšimī y al-Kindī* (A Coruña: Universidade da Coruña, 2005), pp. XXXV, 100 (Latin text), 240 (Spanish trans.).

Clearly it is difficult to ascertain with any certainty the precise nature of Waraqah's Christian beliefs, but the fact that the earliest strata of the Qur'ān contain unquestionable evidence of Judaeo-Christian influence,[36] added to the fact that the Aramaic etymon *naṣārà* is the Syriac *naṣrāyē* (cf. Gr. ναζωραῖοι),[37] points directly to an Arab-speaking Judaeo-Christian group known as '*Naṣrānī*',[38] whose presence in the trading enclave of Mecca is amply attested in surviving records.[39]

This serves to highlight, yet again, the Aramaic element informing the early years of the Prophet's mission. It is into this Aramaic, and specifically Judaeo-Christian, setting that the term *nāmūs* was received in early Islam.

Nāmūs in Christian Arab Translators

In the Greek text of the New Testament the term νόμος is used on nine occasions in the Gospel of Luke, and appears 19 times in the Acts[40] with the sense of 'law', 'usage, 'custom'.[41] The specific passages addressed here are: 2:22,23,24,27,39; 10:26; 16:16,17; and 24:44.[42]

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36 M. P. Roncaglia, 'Éléments Ébionites et Elkasaïtes dans le Coran', *Proche-Orient Chrétien*, 21 (1971), pp. 101-26.

37 See Arthur Jeffery, *The Foreign Vocabulary of the Qur'ān*, with a foreword by G. Böwering and J. D. McAuliffe (Leiden — Boston: Brill, 2007), pp. 280-81. On *naṣrāyō* (sing. de *naṣrāyē*) see Simon C. Mimouni, 'Le Judéo-christianisme syriaque: mythe littéraire ou réalité historique?', in *VI Symposium syriacum 1992* (University of Cambridge, Faculty of Divinity 30 August — 2 September 1992), ed. René Lavenant (Rome: Pontificio Istituto Orientale, 1994), 269-79 (pp. 274-77).

38 Claude Gilliot, 'Les 'informateurs' juifs et chrétiens de Muḥammad: reprise d'un problème traité par Aloys Sprenger et Theodor Nöldeke', *Jerusalem Studies in Arabic and Islam*, 22 (1998), pp. 84-126. Cf. Richard Bell, *The Origin of Islam in Its Christian Environment* (London: Frank Cass & Co. Ltd., 1968, rep. of 1926), p. 149.

39 J. Dorra-Haddad, 'Coran, predication nazaréenne', *Proche-Orient Chrétien*, 23 (1973), pp. 148-51. Cf. François De Blois, '*Naṣrānī* (Ναζωραιος) and *ḥanīf* (ἐθνικος): studies on the religious vocabulary of Christianity and of Islam', *Bulletin of the School of Oriental and African Studies*, 65 (2002), pp. 1-30.

40 *A Concordance to the Greek New Testament*. According to the texts of Westcott and Hort, Tischendorf and the English Revisers, edited by William F. Moulton and Alfred S. Geden (Edinburgh: T&T Clark, 1897), pp. 667-68.

41 Henry George Liddell & Robert Scott, *A Greek-English Lexicon* (New York — Chicago CI: American Book Company, 1897, 8th ed.), p. 1009; James Hope Moulton & George Milligan, *The Vocabulary of the Greek Testament illustrated from the papyri and other non-literary sources* (London: Hodder and Stoughton, 1914-29), p. 429, G. W. H. Lampe, *A Patristic Greek Lexicon*, Oxford: Clarendon Press, 1961, pp. 920-2; G. Abbott-Smith, *A Manual Lexicon of the New Testament* (Edinburg — New York: T&T Clark, 2005, rep. of 1936), p. 304.

42 The following notes have been developed further in J. P. Monferrer-Sala, 'Arabic renderings of νόμος and νομικός in an eleventh century Greek-Arabic lectionary', *Folia Orientalia*, 49 (2012), pp. 309-17.

Verse	Greek	Complement	Translation	Peshīṭtā
2:22	κατὰ τὸν νόμον	+ Μωυσέως	'according to the law' |of Moses|	ܐܘܪܝܬܐ ܕܡܘܫܐ
2:23	ἐν νόμῳ	+ κυρίου	'in the law |of the Lord|'	ܒܢܡܘܣܐ ܕܡܪܝܐ
2:24	ἐν τῷ νόμῳ	+ κυρίου	'in the law |of the Lord|'	ܒܢܡܘܣܐ ܕܡܪܝܐ
2:27	τοῦ νόμου	κατὰ τὸ εἰθισμένον +	'|according to the custom| of the law'	ܕܢܡܘܣܐ ܓܢܝܬ ܢܡܘܣܐ
2:39	τὸν νόμον	+ κυρίου	'to the law |of the Lord|'	ܠܢܡܘܣܐ ܕܡܪܝܐ
10:26	ἐν τῷ νόμῳ	—	'in the law'	ܒܢܡܘܣܐ
16:16	ὁ νόμος	—	'the law'	ܢܡܘܣܐ
16:17	τοῦ νόμου	—	'of the law'	ܡܢ ܢܡܘܣܐ
24:44	ἐν τῷ νόμῳ	Μωϋσέως	'in the law |of Moses|'	ܒܢܡܘܣܐ ܕܡܘܫܐ

Taking as example a Melkite Palestinian Arabic version from the eleventh century (MS BnF Suppl. grec 911), the Arab translator opted for the following renditions of the term:

Verse	Arabic	Translation
2:22	على ما في توراة |موسى|	'according to the law'(of Moses)
2:23	في ناموس |الربّ|	'in the law (of the Lord)'
2:24	في ناموس |الربّ|	'in the law (of the Lord)'
2:27	|سُنّة| الناموس	'|the custom| of the law'
2:39	في ناموس |الربّ|	'to the law (of the Lord)'
10:26	في التوراة	'in the law'
16:16	الناموس	'the law'
16:17	من التوراة	'of the law'
24:44	في ناموس |مُوسى|	'in the law (of Moses)'

The translator has chosen two different Arabic terms to translate the Greek νόμος: whilst the Peshīṭtā uses the single word *namūsō*, the Arab translator makes use of both *tawrāh* and *nāmūs*. It should be noted here that in the Septuagint,[43] apart from *dābār* 'word', the term νόμος chiefly renders Hebrew *tôrâh* 'law', 'usage', 'custom, but also *ḥuqqâh* 'statute' of special ritual laws or of established customs.[44] The only apparent regularity in cases where the term takes a postponed nominal object is to be found in the formula *nāmūs al-Rabb* 'the law of the Lord' (2:23,24,39).

In the two phrases in which Moses is the nominal object (2:22; 24:44), the translator uses both *tawrāt Mūsā* (2:22) and *nāmūs Mūsā* (24:44). In the single case of a preceding nominal object, *sunnat al-nāmūs* (2:27), he opts to eschew *tawrāh*. In the three remaining cases (10:26; 16:16,17) in which the term occurs with no nominal object, he uses either *tawrā^t* (10:26, 16:17) or *nāmūs* (16:16).

The strategies adopted by the translator of MS BnF Suppl. grec 911 cannot be ascribed to linguistic considerations. Comparison with other versions like MS Sin. Ar. 72 (year 897), from a Greek original shows that the translator opted to use the term *nāmūs* throughout the text.[45] The same occurs in the Viennese MS (17th c.) rendered from the Syriac Peshīṭtā,[46] and the Copto-Arabic version edited by Watts.[47]

A particularly interesting feature is the translation of the reference in 2:27 to Ex 13:1-16, through the phrase κατὰ τὸ εἰθισμένον τοῦ νόμου 'according to the custom of the law' (cf. Peshīṭtā *'aykanō fĕqīd b-namūsō* 'as is commanded in the law'): while Sin. Ar. 72 and Watts' edition both give *ka-'ādat al-nāmūs* ('according to the law'),[48] which is not far from the Viennese MS *kamā yajib fī l-nāmūs* ('as it must be according to the law'),[49] the translator of MS BnF Suppl. grec 911 has opted for *mā jarat bihi sunnat al-nāmūs* ('what was common to the custom of the law').

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43 Johannes F. Schleusner, *Novus thesaurus philologico-criticus sive Lexicon in LXX et reliquos interpretes graecos ac scriptores apocryphos Veteris Testamenti*, 3 vols (London — Glasgow — Leipzig: Jacob Duncan, 1821, 1822, 1829), II, pp. 508-9.

44 F. Brown, S. R. Driver & C. H. A. Briggs, *Hebrew and English Lexicon of the Old Testament*. With an appendix containing the Biblical Aramaic based on the Lexicon of William Gesenius (Boston — New York: Houghton Mifflin Company, 1906), pp. 435-6, 349-50.

45 Samir Arbache, *Une ancienne version arabe des Evangiles. Langue, texte et lexique*, 3 vols (doctoral thesis, Université Michel de Montaigne Bordeaux III, 1994) I, pp. 106, 107, 130, 167.

46 *Die Vier Evangelien arabisch aus der wiener Handschrift herausgeg-eben*, ed. Paul de Lagarde (Leipzig: F. A. Brockhaus, 1864), pp. 69, 70, 85, 95, 108. Cf. Georg Graf *Geschichte der christlichen arabischen Literatur* (Vatican City: Biblioteca Apostolica Vaticana, 1944), I, p. 151.

47 *Kitāb al-'Ahd al-Jadīd ya'nī Injīl al-Muqaddas li-Rabbinā Yasū' al-Masīḥ*, ed. Richard Watts (London, 1820), pp. 73, 74, 90, 100, 115. Cf. Graf, Geschichte, I, p. 141.

48 Arbache, *Une ancienne version*, I, p. 106; *Kitāb al-'Ahd al-Jadīd*, p. 73.

49 *Die Vier Evangelien*, p. 69.

Accordingly, it would seem reasonable to assume that the translator of the Arabic text in MS Suppl. grec 911 must have had some solid reason for using a different translation of the Greek term νόμος depending on whether it was linked to Moses or to God. The evidence suggests that he sought to distinguish, in exegetical terms, between the post-Exilic *Tôrat Mōshē* (תורת משה; LXX νόμος Μωϋσέως) and the *Tôrat Yahweh/'Adônay* (תורת יהוה; LXX νόμος κυρίου), i.e. 'the law of the Lord'. With this distinction the Arab translator has opted to convey in Arabic the meaning of the two expressions, separating what he understood as divine revelation — transmitted by Moses (*tawrāh*) — from divine revelation in the fullest sense of the term, but seen as man's indispensable moral guide to living, as it appears in Ps 119/118.[50]

Although the term νόμος κυρίου is found in the Septuagint, the formula appearing in Luke, καθὼς ἐν τῷ νόμῳ i.e. 'as is written in the law of the Lord', reflects not the Septuagint wording, but rather an idiom found in 2 Chr 31:3; 35:26 כַּכָּתוּב בְּתוֹרַת יְהוָה 'as is written in the Law of the Lord', cf. Arabic *kamā kutiba* (< κατὰ γέγραπται) *fī nāmūs al-Rabb* 'as it was written in the law of the Lord' (2:23), and *kamā qīla* (< κατὰ τὸ εἰρημένον) *fī nāmūs al-Rabb* 'as it was said in the law of the Lord' (2:24).

Nāmūs and sharīʿah in Apocalyptic Texts

Though employed conservatively among Arab translators of biblical texts, the term *nāmūs* is used more freely by other Christian writers, with a purpose that on occasion transcends the purely lexical. Interestingly, *nāmūs* occurs with reference to the *sharīʿah* in conjunction with the Prophet Muḥammad, in order to create a specific portrait of the Prophet as he was viewed by these authors.

The texts comprising this literary genre include the *codex Vaticano arabo 158* (fols 99v-111v) and the *Paris arabe 153* (fols 461v-469v). Both texts are part of the same manuscript family covering a work known to us as the 'Apocalypse of Pseudo-Athanasius'.[51] This work features in the opening lines of the Ms as *Ruʾyā Abū-nā* (*sic!*) *al-baṭriyark Atanāsiyūs baṭriyark al-Iskandariyyah*, a title which mistakenly attributes authorship to the celebrated partiarch Athanasius of Alexandria († 373 d.C.).

50 A. Robert, 'Le sens du mot Loi dans le Ps. CXIX', *Revue Biblique*, 46 (1937), pp. 182-206.

51 Cf. Graf, *Geschichte*, I, p. 277. A description of Par. ar. 153 can be found in Gérard Troupeau, *Catalogue des manuscrits arabes. I. Manuscrits chrétiens*, 2 vols (Paris: Bibliothèque nationale, 1972), II, p. 87 (nº 6147/5) and in Troupeau, 'De quelques apocalypses conservées dans des manuscrits arabes de Paris', *Parole de l'Orient*, 18 (1993), 77-79. See also Harald Suermann, 'Koptische arabische Apokalypsen', in *Studies on the Christian Arabic Heritage in Honour of Father Prof. Dr Samir Khalil Samir S.I. at the Occasion of his Sixty-Fifth Birthday*, ed. Rifaat Ebied and Herman Teule (Leuven — Paris — Dudley MA: Peeters, 2004), 25-44 (p. 31).

The text itself, a homily for the feast-day of Saint Michael the Archangel,[52] appears to date from around 715 d.C./96 H.,[53] thus coinciding with the appearance of a whole series of apocalyptic texts in Palestinian and Mesopotamian milieux. These fascinating writings were widely used as a form of political propaganda against Arab-Islamic expansion in the Middle East,[54] once local Christian communities had had time to reflect on the theological and political ramifications of the Arab invasion'.[55]

Among the many noteworthy motifs in this Copto-Arabic apocalypse,[56] the section devoted to the Arabs contains a sentence of particular interest for our present purpose, referring to the Prophet Muḥammad. The text reads:

> وبعد زمان يقوم في العرب إنسان الذي صاحب الشريعة وعدد اسمه ستة وستين وستمائة
>
> 'And after a brief time there will rise up among the Arabs[57] a man who is chief of the law[58] and the number of his name is six hundred and sixty-six'.

Here, the author of the Apocalypse of Pseudo-Athanasius makes use of an expression formed by two terms of great importance: *ṣāḥib al-sharīʿah*. The word *sharīʿah* alludes directly to the Islamic legal *corpus*, but indirectly to the Qur'ān. The term *ṣāḥib*, linked to its antecedent *insān*, refers us indirectly to the numerical

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52 Cf. Francisco Javier Martínez, *Eastern Christian Apocalyptic in the Early Muslim Period: Pseudo-Methodius and Pseudo-Athanasius*, 'Ann Arbor University Microfilms International' (Washington DC: The Catholic University of America, 1985), pp. 248-74.

53 Cf. Robert G. Hoyland, *Seeing Islam as others saw it: a survey and evaluation of Christian, Jewish and Zoroastrian writings on early Islam*, 'Studies in Late Antiquity and Early Islam' 13 (Princeton NJ: The Darwin Press, 1997), p. 285.

54 Cf. H. Suermann, 'Einige Bemerkungen zu syrischen Apokalypsen des 7. Jhds.', in *IV Symposium Syriacum 1984. Literary Genres in Syriac Literature (Groningen — Oosterhesselen 10-12 September)*, ed. Han W. Drijvers, 'Orientalia Christiana Analecta' 229 (Rome: Pontificium Institutum Studiorum Orientalium, 1987), 327-35 (pp. 328-29); F. J. Martínez, 'The Apocalyptic Genre in Syriac: The World of Pseudo-Methodius', in *IV Symposium Syriacum 1984*, pp. 337-52.

55 Victoria L. Erhart, 'The Church of the East during the Period of the Four Rightly-Guided Caliphs', *Bulletin of the John Rylands University Library of Manchester* 78/3 (1996), 55-71 (p. 56). Cf. Gerrit J. Reinink, 'East Syrian Historiography in Response to the Rise of Islam: The Case of John bar Penkaye's *Ktāba d-rēš mellē*', in *Redefining Christian Identity: Cultural Interaction in the Middle East since the Rise of Islam*, ed. J. J. van Ginkel et al. (Leuven — Paris — Dudley MA: Peeters, 2005), 77-89 (p. 88).

56 J. P. Monferrer-Sala, '"The Antichrist is coming..." The making of an apocalyptic *topos* in Arabic (Ps.-Athanasius, Vat. ar. 158 / Par. Ar. 153/32)', in *Bibel, Byzanz und christlicher Orient. Festschrift für Stephen Gerö zum 65. Geburtstag*, ed. D. Bumazhnov et al., 'Orientalia Lovaniensia Analecta' 187 (Leuven: Peeters, 2011), pp. 653-78; J. P. Monferrer-Sala, '"Texto", "subtexto" e "hipotexto" en el "Apocalipsis del Pseudo Atanasio" copto-árabe', in *Legendaria Medievalia en honor de Concepción Castillo Castillo*, 'Horizontes de al-Andalus' 1, ed. Raif Georges Khoury, J. P. Monferrer-Sala, Mª J. Viguera Molins (Córdoba: Ediciones El Almendro — Fundación Paradigma Córdoba, 2011), pp. 403-29.

57 *ʿArab*.

58 *Ṣāḥib al-šarīʿah*.

computation of the name Muḥammad in the absence of the name itself. In thus associating the Prophet with the number 666 (Rev 13:18), the author is giving him the number of the Beast, thus identifying him with the second beast (θηρίον).

This second beast is 'another beast coming up out of the earth' (Rev 13:11-18; cf. Da 7:3 = LXX 7:17), who will later (Ap. 16:13; 19:20; 20:10) be branded 'false prophet' (ψευδοπροφήτης), the label applied by John of Damascus to Muḥammad.[59] The Greek term ψευδοπροφήτης refers not to an unspecified or generic 'false prophet', but rather to the Antichrist, who deceives the people with his false signs (σημεῖα). Clearly, in referring to Muḥammad as *ṣāḥib al-sharīʿah* and linking him to the number 666 the author of the Apocalypse of Pseudo-Athanasius is referring to the Antichrist.[60]

It is interesting to note that the false signs worked by the Antichrist are labelled σημεῖα (sg. σημεῖον) in Greek, a term which — of the various translation options available[61] — the Christian Arab translators chose to render by the Aramaic loanword *āyāt* (sg. *āyah*), a well-known Qur'ānic technicism. These *āyāt* that together shape the *sharīʿah*, i.e. the Qur'ān, are the false signs worked by Muḥammad as the new Antichrist, according to the portrait of the Prophet offered by the Christian writers who viewed him as a false lawgiver, this being one of the titles that Pseudo-Athanasius gives to the Antichrist.[62]

Indeed, the author uses the verb *ḍalla — yaḍillu* ('to lead [someone] astray') in reference to the followers he will gain, who will pay heed to his signs and as a consequence will behave 'lawlessly' or, perhaps more strictly, will cease to behave in accordance with the 'Law', i.e. the תורה or Law of God.[63] This failure to act in compliance with divine Law, an inherent feature of the falseness of the Antichrist, at the same time marks hostility towards God; it is a feature to be found in other writings, including 'The Life and Works of Saint Gregentios', Archbishop of Ẓafār (cf. *Dialexis* Δ 509-12).[64]

It is interesting to note that in the Coptic text of the Apocalypse of Elijah (2:40) the Antichrist is alluded with several names among which is that of 'the

59 Sahas, *John of Damascus*, pp. 73-74.

60 J. P. Monferrer-Sala, 'Un daimónion llamado Machoúmet', *Al-Andalus-Magreb*, 14 (2007), pp. 91-101.

61 J. P. Monferrer-Sala, 'Sacred readings, lexicographic soundings: cosmology, men, asses and gods in the Semitic Orient', in *Sacred Text: Explorations in Lexicography*, ed. J. P. Monferrer-Sala and A. Urbán (Frankfurt am Main: Peter Lang, 2009), 201-18 (pp. 213-15).

62 Monferrer-Sala, '"Texto", "subtexto" e "hipotexto"', p. 409.

63 Cf. John C. Reeves, *Trajectories in Near Eastern Apocalyptic: A Postrabbinic Jewish Apocalypse Reader* (Boston: Brill, 2006), p. 122.

64 *Life and Works of Saint Gregentios, Archbishop of Taphar*, edited by Albrecht Berger with a contribution by Gianfranco Fiaccadori, 'Millennium Studies zu Kultur und Geschichte des ersten Jahrtausends n.Chr.' 7 (Berlin — New York: Walter de Gruyter, 2006), pp. 692, 694 (Greek), 693, 695 (English trans.).

Lawless' (ebol Nqi panomos),[65] which is the same epithet ascribed to Beliar in the Greek text of the Martyrdom of Isaiah (2:4, cf. 2Thes 2:3).

This was by no means an *ex nihilo* creation on the part of Christian Arab writers. This portrait of the Prophet was undoubtedly in circulation among Syriac authors, who linked the Prophet Muḥammad directly to the drawing-up of the 'laws' (*sharāʾiʿ*). This is confirmed by the chronographer Michael the Syrian († 1199),[66] who — echoing earlier texts — tells us in his *opus magnum*, the *Maḵtbanūth Zaḇnē*, that Muḥammad:

> ܘܣܡ ܠܗܘܢ ܢܡܘ̈ܣܐ ܐܝܠܝܢ ܕܡܢ ܐܠܗܐ ܐܡ̣ܪ ܗ̣ܘܐ ܕܠܗ ܐܬܝܗܒܘ ܕܢܩܝܡ ܠܗܘܢ
>
> 'established the laws (*namūsē*), which he said were given to him by God that he might establish them'.[67]

The referent of the Syriac plural *namūsē* in Michael the Syrian's text is clearly *sharāʾiʿ*, understood as the whole set of legal provisions forming the corpus denoted by the term *sharīʿah*.

In view of the foregoing, we can conclude that Christian Arab writers made various uses of the loanword *nāmūs*, depending on the context in which the term appears:

a. translation of biblical texts;
b. interpretation of the concept in theological and exegetical works;
c. application of the concept in a non-Christian context, specifically here when the term is used instead of *sharīʿah*.

In the third case, the reference of *nāmūs* to *sharīʿah* is combined with a reference to Muḥammad as the false lawmaker claiming to follow divine revelation, thus associating him with the figure of the Antichrist in apocalyptic literature.

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65 *The Apocalypse of Elijah*, ed., translation and study Albert Pietersma, Susan Turner Comstock & Harold W. Attridge, 'Texts and Translations. Pseudepigrapha Series' 19/9 (Chico CA: Scholars Press, 1979), pp. 39-40.

66 *Chronique de Michel le Syrien, Patriarche jacobite d'Antioche (1166-1199)*, éditée pour la premier fois et traduit en français par Jean-Baptiste Chabot, 4 vols (Paris: Ernest Leroux, 1899, 1901, 1905, 1910). On the author and his work, see Jan van Ginkel, 'A man is not an island. Reflections on the historiography of the early Syriac Renaissance in Michael the Great', in *The Syriac Renaissance*, ed. Herman Teule et al. (Leuven — Paris — Walpole MA: Peeters, 2010), pp. 113-21. See also the note prior to the edition of the text by J.-B. Chabot, 'La chronique de Michel le Syrien', *Comptes-rendus des séances de l'Académie des Inscriptions et Belles-Lettres* 43 (1899), pp. 476-84. See also Ignatius Aphram Barsoum, *The Scattered Pearls: A History of Syriac Literature and Sciences*, trans. Matti Moosa (Piscataway NJ: Gorgias Press, 2003, 2nd rev. ed.), pp. 445-48, and Rubens Duval, *La littérature siriaque* (Paris: Librairie Victor Lecoffre, 1907), pp. 196-98.

67 Michael the Syrian, *Chronographie*, IV, p. 406, col. b, lines 15-17 (Syriac), II, p. 404 (French).

At first glance, the most striking feature of this association is the fact that the Prophet Muḥammad should be viewed as the precursor of the Antichrist or as the Antichrist himself. Yet a secondary feature proves even more crucial for our present purposes: the view of the Prophet Muḥammad as a false lawgiver. This view constitutes an attack not only on the person of Muḥammad as a prophet, but also on his work and on his text, the Qur'ān, which in Christian Arab writings is indirectly branded false, in that it is the work of a person who falsified laws of allegedly divine origin.

LOS VAPORES DE LA SOSPECHA. EL BAÑO PÚBLICO ENTRE EL MUNDO ANDALUSÍ Y LA CASTILLA MEDIEVAL (SIGLOS X–XIII)

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El espacio del baño está dedicado al cuidado del cuerpo, la purificación y la higiene y al mismo tiempo es espacio donde el hombre se muestra en todo su esplendor y miseria a las miradas ajenas, por lo que se consideró como un lugar favorable a la promiscuidad sexual y a los encuentros fuera de la norma. Ese carácter sospechoso, alimentado por la penumbra y los vapores, lo convirtió en una diana privilegiada para críticas y censuras de moralistas y juristas tanto de la comunidad musulmana como cristiana, lo que condujo a la reglamentación jurídica de su uso. Históricamente constituyeron un espacio privilegiado donde confluyeron diversas actividades, individuales y colectivas en la tradiciones judías, romanas, bizantinas, islámicas y en la Europa latina medieval, con distintos usos y funciones en cada periodo: baños médico-termales por la calidad de las aguas, baños para la purificación ritual, baños higiénicos y de placer.[2]

Los baños musulmanes no son herederos directos de la tradición romana, sino a través de la tradición bizantina tanto a nivel de estructura: mas pequeños que las termas, y con diferente uso. La principal diferencia entre ambos son los postulados cristianos que habían calado fuertemente en la sociedad bizantina. Se trata de suprimir el componente de placer a partir de la introducción de corrientes ascéticas en la construcción del pensamiento cristiano, llegándose a pensar que la sucia barba de un filósofo era la prueba de su austeridad y de su fidelidad.[3]

El uso del baño generó en los textos cronísticos andalusíes estereotipos contrapuestos de ambas sociedades. Estos describían al musulmán asociado a los refinados baños privados y palaciegos, un mundo de perfumes y de lujos que dieron pie múltiples leyendas, construyendo así mismo la imagen de los cristianos

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2 Una aproximación a los distintos usos del baños en Boisseuil, '*Le bain espaces et pratiques*', pp. 5-12.

3 Veyne, *Histoire de la vie privée*, I, p. 85, Cuffel, 'Polemicizing Women's Bathing', pp. 171-88.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

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como gentes sucias. En el siglo XI al Bakrī, describe a los habitantes del 'país de los gallegos', como 'gente vil y traidora' insistiendo en su falta de higiene: 'ellos ni se lavan si se limpian al año más que una o dos veces con agua fría. No lavan sus vestidos desde que se los ponen hasta que puestos se hacen tiras, creen que la suciedad que conlleva su sudor proporciona bienestar y salud a sus cuerpos'.[4] El estereotipo se consolida en el siglo XIV en los escritos de al-Himyarī siguiendo el tratado de al Bakrī: 'No se lavan mas que una o dos veces al año. No lavan nunca sus vestidos desde el día que los estrenan hasta que se convierten en harapos[5]'. El mismo autor asocia el mundo andalusí a los baños y al lujo a través de un relato relativo a la construcción de un baño suntuoso ofrecido a la hija del señor yemení de Almería en un contexto de rivalidad nupcial entre el caudillo cristiano Tudmir y el jefe musulmán de Rayyo (Málaga).[6] En el siglo XVII, Al-Maqqarī presenta a los andalusíes como personas extremadamente limpias describiendo anécdotas individuales de la vida cotidiana, como el caso de un hombre pobre que prefería quedarse sin comer y gastarse hasta su última moneda en comprar jabón, a aparecer en público con la ropa sucia.[7]

Incluso en la propia cronística cristiana se fomentaron estereotipos descriptivos a fin de establecer una diferencia con las costumbres y los hábitos del Otro. Se fomentó así la idea de que los baños disminuían las fuerzas de los aguerridos caballeros cristianos que participaban en la lucha contra el Islam a través de una referencia del *Chronicon Mundi* de Lucas de Tuy,[8] reproducida en la *Primera Crónica General* a propósito del fracaso de la Batalla de Uclés (1108), donde murió el infante Sancho. El texto narra como Alfonso VI pregunta a los sabios de la Corte la causa de que sus caballeros no pudieran pelear ni soportar la hueste, a lo que los sabios contestaron 'que porque entraban mucho a menudo en los bannos e se daban mucho a los vicios. El rey fizo entonces derribar todos los bannos de su regno et fizo a los cavalleros trabajar en muchas huestes[9]'.

El retrato caricaturesco de los caballeros malolientes fue desdibujado a través de diversos trabajos como el de Anibal Ruiz Moreno,[10] o Lepoldo Torrés Balbás donde se probaba ampliamente el uso del baño en los reinos cristianos antes y después de la conquista castellana de al-Andalus. Lo cierto es que en ambas sociedades todos se bañaban, y el agua respondía diferentes funciones y utilidades.

4 Al Barkri, *Kitāb al masalik wa-l masalik*, p. 23.
5 Al-Himyarī, *Kitāb al Rawd*, p. 139.
6 Al-Himyarī, *Kitāb ar Rawd al-Mi'tar*, p. 85.
7 Al-Maqqarī, *The History of the Mohammedan Dynasties in Spain*, p. 117.
8 Lucas de Tuy, *Chronicum Mundi*, p. 377.
9 *Primera Crónica General de España*, cap. 884, p. 555.
10 Aníbal Ruiz Moreno, 'Los fueros públicos', pp. 152-57.

Diversos enfoques historiográficos y construcción normativa

La coexistencia de diversos grupos étnicos en un mismo espacio urbano y el uso de los baños públicos nos remite directamente a la problemática de la 'convivencia'. La cuestión ha preocupado a múltiples investigadores,[11] pero últimamente ha comenzado una nueva reflexión sobre el concepto, sobrepasando los viejos dilemas historiográficos y de representación de la sociedad hispana. Se abandona el enfrentamiento entre la supuesta idealización de la convivencia cultural hispano medieval y el problema de la identidad, mas allá de la búsqueda de las esencias patrias decimonónicas centrándose el análisis en diversas líneas que permitan sobrepasar el conflicto. Por un lado la búsqueda de las raíces comunes de la 'civilización islamo-cristiana' mediterránea, según la terminología propuesta por Richard Bulliet, permite analizar los puntos comunes entre ambas en función del sustrato jurídico cultural del mundo clásico,[12] idea que debe ser matizada con un análisis de las influencias orientales en el interior del sistema de pensamiento y de representación europeo.[13] Por otro lado los conceptos 'neighbouring faiths' y 'neighboring coproductions' desarrollados por David Niremberg, permiten analizar la problemática en terminos de relación especular, es decir como cada uno de los credos se define a si mismo en función a los otros así como la transmission de cosmovisiones y construcciones teológicas.[14]

En este sentido el análisis diacrónico de los baños durante el periodo andalusí y la ocupación castellana, permite señalar percepciones comunes y usos diferenciados. Por un lado, los teólogos y legisladores de ambas sociedades pusieron en evidencia temores compartidos heredados del mundo romano y bizantino, percibiéndose las casas de baños como lugares sospechosos, donde la intimidad, los vapores y la desnudez son factores proclives a fomentar la promiscuidad sexual y con ello, la ruptura del orden social establecido. Si bien los elementos de percepción de este espacio son comunes en ambas sociedades, el uso de los mismos corresponde a adaptaciones diversas de la tradición romana por parte de cada una de ellas. La coexistencia de colectivos musulmanes y cristianos en un mismo espacio bajo dos sistemas de dominación política, el islámico y el castellano-leonés tras el avance cristiano, permite establecer una comparación de las prácticas de uso bajo dos ópticas antropológico-juridícas diversas.

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11 Múltiples trabajos siguen mostrando el interés de esta polémica,entre otros trabajos: Glick, *Islamic and Christian Spain in the Early Middle Ages*, pp. 229, 366; Collin, Goodman. *Medieval Spain*, pp. 23-45; Novikoff, 'Between Tolerance and Intolerance', pp. 7-36, Martínez, *La convivencia en la España del Siglo XIII*, pp. 13-21; Liuzzo Scorpo, *Friendship in Medieval Iberia*, pp. 160-61, Tolan, 'Une convivencia bien precaire', pp. 385-94, Cailleaux 'Chrétiens, juifs et musulmans dans l'Espagne médiévale', pp. 257-71.

12 Bulliet, *The Case for Islamo-Christian Civilization*, pp. 19-20.

13 Rodríguez Mediano, 'Historia intelectual y proyecto científico', pp. 774-75.

14 Niremberg, *Neigboring faiths*, pp. 6–9.

En el trabajo de Powers se afirmaba que el concepto de segregación religiosa en los baños era una contribución general de la legislación cristiana medieval ya que no existía, ni dentro ni fuera de España, restricciones en el uso de los baños en el mundo islámico. Estas afirmaciones añadían una particular ironía a las aseveraciones de Américo Castro que consideraba los baños como uno de los primeros espacios de convivencia en la vida cotidiana,[15] ya que a través del uso de fuentes literarias había llegado a conclusiones bien diversas.

Con el propósito de comprender los usos del baño presentaré las normas de uso para los *dhimmīs* en el mundo andalusí y su contraste en la normativa foral, señalando las bases comunes y las diferencias entre la norma escrita, que prescribe las limitaciones de uso en los diferentes periodos, y las prácticas sociales que evidencian los restos de una sociedad dinámica donde las diversas comunidades coexisten escapando a la letra de la ley. Hay que señalar que la casuística jurídica relativa a estos pormenores es mas abundante en el mundo islámico que en el castellano, no solo por los tratados de *ḥisba*, sino también por las múltiples consultas realizadas por particulares a muftíes y juristas que a través de las fetuas permiten iluminar el uso del baño. En cambio, las fuentes castellanas son parcas en el tema, aunque existen algunas menciones en la normativa municipal y en leyes de aplicación general como *Las Partidas*, los procesos relativos a baños son muy escasos por lo que no se ha podido establecer el contraste documental en la praxis jurídica castellana para el periodo. La mayor parte de referencias documentales corresponden a contratos de naturaleza civil, compraventas, donaciones y traslados de propiedad de los baños para su explotación económica realizados en los primeros años de la ocupación castellana. La ausencia hasta el momento de documentos relativos a procesos criminales y penales que permitan ilustrar la realidad social y la transgresión de la norma en el uso del baño, dificultan la aproximación a la realidad social, lo que nos lleva a interrogarnos por las causas del silencio.

El mundo del baño es una temática frecuente en los últimos tiempos, abordada desde diferentes perspectivas: arqueológica, dada la gran cantidad de intervenciones urbanas que han permitido iluminar esta realidad así como trabajos pluridisciplinares que muestran la complejidad del tema.[16] El estudio del uso de los baños nos permite seguir una línea de análisis relativa a la construcción normativa en relación directa con la naturaleza de la norma en ambas sociedades y el

15 Powers, 'Frontier Municipal Baths', p. 664.

16 Fournier, 'Les bains publics de al-Andalus, espaces de convivialité (XI^{e}-XV^{e}siècle)', pp. 311-32; Santo Tomás Pérez, *Los baños públicos de Valladolid*; Izquierdo Benito, 'Vida cotidiana y cultura material', pp. 128-53, Constable, 'Cleanliness and Convivencia', pp. 257-69. Perspectivas arqueológicas: Pavón Maldonado, *Tratado de arquitectura hispanomusulmana*, Berges Roldán, *Los baños árabes*, Lavado, 'Los baños árabes y judíos', pp. 45-78, Passini, 'Los baños y el agua en Toledo', pp. 31-46, 'La juiverie de Tolède', pp. 301-26.

alcance político jurídico de los sistemas teológicos de cada sociedad, ofreciendo el contrapunto de la praxis jurídica con las limitaciones señaladas.

Fronteras de uso en el baño andalusí: segregación de género y limitaciones de uso

En principio no hay ninguna referencia al *hammām* en el Corán, solo la literatura de tradiciones el *hadīt* lo evoca en relación a las prácticas de pureza. El jurista de la Meca Atā b. Abi Rabāh (m.732) afirmaba que 'el hammām era la peor de las casas, nadie se puede cubrir y su agua no purifica'.[17] La cuestión del baño ilustra como la doctrina y los juristas tuvieron que regular una tradición fuertemente instalada en las áreas de expansión del Islam, adaptándola a sus presupuestos antropológicos básicos. La doctrina evolucionó en tres etapas, desde la interdicción total, tanto a hombres como mujeres, después se permitió el ingreso a los hombres siempre que aportaran un paño que cubriera los genitales, prohibiéndose a mujeres, y finalmente se permite a mujeres enfermas o parturientas.[18]

En el espacio del *dar al-Islam* el *hammām* está teñido de sospechas y temores sin que el mundo andalusí sea una excepción, y donde los juristas locales hacen eco de las polémicas existentes en la elaboración jurídica y doctrinal. Lo cierto es que los baños forman parte del paisaje urbano andalusí.[19] Los pequeños *balnea* fueron utilizados por los andalusíes bien para cumplir con los usos prescritos por la jurisconsultos, relacionados con las cuestiones de pureza ritual *ṭahāra*, que exige a los creyentes, tanto hombres como mujeres, una purificación del cuerpo antes de establecer contacto profundo con la divinidad. En este sentido encontramos distintos tipos de baños prescritos, grandes abluciones destinadas a limpiar las impurezas del cuerpo, tales como poluciones nocturnas; tras la menstruación femenina, o tras un parto. Es lo que se denomina *ghusl* o baño ritual, ya que los fluidos corporales son causas de contaminación mayor, y de pérdida de la pureza que impide el encuentro con la divinidad.[20] Las abluciones son también prescriptivas los viernes para eliminar las impurezas menores, donde no es necesaria la inmersión total, los días de fiesta, antes de una peregrinación o antes del matrimonio. Las fiestas constituían un momento de cumplir con la pureza ritual y los baños se convertían en espacios de encuentro en el día de la ruptura del ayuno al finalizar el Ramadán los baños se convertían en un hervidero de creyentes.[21]

17 Bayhaqī, *Shu'ab al-īmān*, VI, 158, nº 7772, cit., Benkheira, 'Hammām, nudité et ordre moral dans l'Islam médiéval', p. 338.
18 Benkheira, 'Hammām, nudité et ordre moral', p. 351.
19 Navarro Palazón, Jiménez Martín, 'Arqueología del baño andalusí', pp. 71-113; Torres Balbás, *Algunos aspectos del mudejarismo*, pp. 46-67.
20 Ventura, 'L'islām sunnita', pp. 124-25.
21 Vílchez, *Baños de Granada*, p. 16.

Pero también podían acudir por razones de higiene o por placer, y en todos los casos eran al mismo tiempo lugares de encuentro y de socialización. El poeta cordobés Ibn Baqī señala que el *hammām* es el espacio donde el cuerpo experimenta una gran voluptuosidad por el calor abrasador y el frío como la rama que goza del sol o la lluvia.[22] Dentro del baño se generaba un ambiente de igualdad como se hace eco en algunos poemas: 'es un lugar donde los hombres reunidos se parecen todos, ya sean criados ya sean señores. El hombre se codea con gentes que no son sus amigos, y su enemigo pude ser su compañero[23]'. Al margen de los pequeños *balnea* urbanos se siguieron utilizando algunas estaciones termales, *hammā* normalmente por cuestiones médicas. De este término se derivan algunos topónimos como Alhama del que hay ejemplos en Zaragoza (Alhama de Aragón), Murcia, Almería y Granada.[24]

El baño se integró en la geografía urbana, casi siempre en las proximidades de las mezquitas, de modo que la medina quedaba dividida en barrios autónomos con instituciones colectivas comunes. Las casas de baños podían ser privadas, instaladas en palacios y residencias de altos funcionarios, pero también públicas en las ciudades y en algunos pueblos, construidos por emires y grandes personajes que donaban sus rentas a las mezquitas para su funcionamiento gracias al sistema de la fundación piadosa de los habices. Un arrendador se encargaba de su funcionamiento contratando personal de baño, los *tayyāb*, masajistas, los que limpiaban el baño, atendían las caldera y se ocupaban de las lucernas.[25] Descripciones de estos baños gestionados por particulares fueron recogidas por Ibn 'Abdūn que describe la Sevilla del siglo XII.[26]

No existieron edificios específicos para la realización de los baños rituales, sino que era mas bien la intención del individuo lo que determinaba su función.

El baño en muchos textos islámicos es concebido como un espacio de placer, así Ibn Jaldún afirmaba que 'al respirar el vapor y penetrar el calor de esa atmósfera hasta su espíritu y calentárselo perciben una emoción de placer tan acentuada que a menudo se exteriorizaba en forma de cantos',[27] y como un lugar cargado de un erotismo incontestable asociando en ocasiones el placer sexual al placer del baño. Sobre el placer que ocasionaba Abd Allāh en el siglo XI afirmaba, 'se dice que la unión carnal es uno de los mayores remedios de la trabilis, por la alegría que experimenta en el momento de consumarla y que otro remedio es entrar en el

22 García Gómez, 'Muwassaha de Ibn Baqi de Córdoba. "Ma laday/sabrun mu'inu" con jarya romance', pp. 43-52.
23 Péres, *Esplendor de al-Andalus*, p. 343.
24 Vílchez, *Baños de Granada*, p. 12; Cressier, 'Prendre les eaux en al-Andalus', pp. 41-54; Eiroa Rodríguez, 'Los baños de Fortuna', pp. 8-29.
25 Vílchez, *Baños de Granada*, p. 17.
26 Ibn 'Abdūn, *Sevilla a principios del siglo XIII*, p. 191.
27 Ibn Jaldún, *Introducción a la Historia Universal*, p. 343.

baño por el placer que en el recibe el hombre[28]', considerado como alguno de los elementos que ayudan al goce erótico. Podemos citar en este sentido el *Tratado de la Higiene* de Ibn al-Jatīb, donde se especifica que el hombre de complexión biliar negra en el verano 'debe yacer con mujeres cuando hayan salido del baño y su cuerpo y cabello estén arreglados[29]'. El *hammām* como espacio de placer y como espacio de relación social constituye uno de los lugares donde se produce el nexo entre lo sagrado y lo sexual.[30]

Fronteras sexuales en los baños islámicos

El baño supone un momento de intimidad, donde la desnudez del cuerpo puede invitar al encuentro o la atracción sexual. A fin de evitar encuentros no deseados, y mantener las normas morales de la comunidad se separó el uso del baño femenino del masculino. La separación por sexos se establecía ya en el *Decreto de Adriano* (Adriano, 18-10-11) que prohibía el *balnea promiscua*, en las *Constituciones apostólicas* (380) donde se establecía que una mujer creyente no se bañaría jamás en un baño mixto[31] y con ecos en el cristianizado mundo bizantino.

El mundo musulmán, divide prolijamente los espacios femeninos y masculinos en una ordenada distribución de roles y funciones en la sociedad.

Algunos juristas limitaron el uso de los baños públicos a las mujeres con el fin de controlar sus actividades, evitando los contextos de posible promiscuidad sexual. Así Yahya ibn Umar (Jaén, 928-Susa 901), sólo permitía el baño a las mujeres que habían dado a luz o en los casos de enfermedad en los que el baño se prescribía por cuestiones de pureza e higiene:

> 'Se preguntó a Yahyá sobre qué ha de hacerse con el dueño de los baños cuando en ellos entran mujeres que no están enfermas ni recién paridas y contestó: – Nada hay contra él, mientras no se le avise de antemano. Si entonces reincide castíguesele a juicio del imán'.[32]

Del texto se desprende una cierta resistencia a la presencia habitual de las mujeres en los baños. En recopilaciones de derecho malikí posteriores aparecen las mismas preocupaciones, como en los textos del siglo XV de al-Burzulī.[33] Varios temores se escondían en estas prescripciones de los juristas malikíes ya que el baño constituía

28 Abd Allāh, *El siglo XI en primera persona*, p. 322.
29 Ibn al Jatīb, *Libro de la Higiene*, p. 248.
30 Heller, Mosbahi, *Tras los velos del Islam*, p. 291.
31 Ayan Calvo, *Constituciones apostólicas*, I, 6, 13.
32 García Gómez, 'Unas ordenanzas del zoco del siglo IX', p. 288.
33 De la Puente, 'Mujeres andalusíes y baños públicos', pp. 49-57; Marín, 'Derecho islámico medieval y fronteras de género: Reflexiones sobre los textos de al-Burzulī (m.841/1438)', pp. 21-40.

un espacio fuera del dominio masculino, donde las mujeres podían mantener relaciones con otros hombres fuera de los controles paterno y marital vulnerando las normas, o bien entre ellas mismas. La desnudez y la proximidad entre las féminas en el ambiente de intimidad del baño podía provocar relaciones lésbicas, *masfada*, una acción depravada que había que perseguir y eliminar.[34] Este temor provocó la regulación del uso femenino del baño determinándose las partes del cuerpo que podían ser exhibidas y limitando la autonomía de la mirada.[35] Pero la existencia de la normativa restrictiva del uso del baño no impidió que las mujeres dejaran de acudir. El jurista Ibn Hawt Allah recoje casos en los que describe como las mujeres sevillanas acudían con naturalidad al baño público.[36] Su uso podía conducirlas a situaciones y miradas indeseadas, bien por los hombres que merodeaban por los alrededores en el día del baño femenino, bien por otras mujeres. Al-Wansarisī recoge un caso de destrucción de un banco que se encontraba frente un *hammām*, en la Córdoba del siglo XII, porque los hombres se instalaban allí e intentaban importunar a las mujeres que salían del baño.[37] La misma prohibición aparece en la Sevilla del siglo XIII recogida en el Tratado de Ibn 'Abdūn:

> 'El vigilante de los baños públicos no debe instalarse en el vestíbulo de las termas cuando estén abiertas para las mujeres, ello es motivo de comercio carnal y fornicación'.[38]

El tratado de Ibn 'Abdūn es una obra teórica de dimensión práctica, los tratados de *ḥisba* remite a una práctica prescrita en el Corán que implica 'hacer el bien y prohibir el mal' lo que sitúa la obra como un modelo teórico-moral, pero con una conexión directa con la realidad de su tiempo y con el contexto urbano en el que la obra se desarrolla[39]

El uso femenino de los baños prescribía que el personal masculino debía ser sustituido por mujeres y se desarrollaban actividades semejantes a las del baño masculino. Además de los masajistas, comunes a ambos sexos, se introducía la presencia de perfumistas, maquilladoras y peinadoras vendiéndose toda clase de ungüentos para el cuidado de la piel. El baño deviene un lugar de reunión y de encuentro cotidiano, un espacio del que se apropian fuera del control masculino, y supuso un espacio de diferenciación social. Las mujeres de alto rango no solían acudir a las mezquitas y tampoco necesitaban ir a los baños públicos, sin embargo 'a las de menor categoría social su uso representaba la apropiación de un espacio

34 Habib, F*emale Homosexuality in the Middle East: History and Representations*, pp. 43-83; Murray, 'Womam — Woman Love in Islamic Societies', pp. 97-104.
35 Benkheira, 'La maison de Satan. Le *hammām* en débat dans l'Islam médiéval', pp. 391-443.
36 Marín, 'Ibn Hawt Allāh, (m.612/1215) y dos mujeres de Sevilla',pp. 209-19.
37 Lagardère, *Histoire et société en Occident musulman au Moyen Âge*, n°316, p. 312.
38 Ibn 'Abdūn, *Sevilla a principios del siglo XIII*, n°155, p. 151.
39 García San Juan, 'Judíos y cristianos', pp. 68-73.

exclusivo y su presencia en las vías de comunicación urbana suponían gérmenes de disfunción social[40]'. En el siglo X en Córdoba el alcázar tenia un *hammām* reservado a los miembros de la administración y a la familia del califa, pero en el resto de la ciudad hubo diversos baños públicos como señala Ibn Hawqāl en el ultimo cuarto del siglo X.[41] A través de la literatura jurídica y algunos tratados de derecho malikí, se ha puesto en evidencia como las mujeres libres, *hurra*, en las que reside el honor de la familia, tenían derechos muy limitados a la hora de bañarse fuera de sus casas y debían poseer en todo caso la autorización marital.[42] Ibn Baq citaba a Ibn 'At (m.609/1222) que prohibía a las mujeres ir al baño y que incluso fijó un castigo para ellas y el dueño de la instalación que les permitiera la entrada. El baño femenino fue un asunto controvertido en el reino nazarí, con opiniones y prácticas divergentes en Almería y Granada. En Almería el marido de las mujeres de clase alta debía dotarlas de los trajes pertinentes para acudir al *hammām*, además de la alheña, y gastos complementarios para masajistas y perfumistas. La práctica quedó confirmada en los textos que los alfaquíes almerienses enviaron a los granadinos, mostrándose favorables al obligatoriedad del marido a la provisión de gastos del baño ante la consolidación de uso de los baños, costumbre que los granadinos terminaron aceptando.[43]

Los baños termales también fueron objeto de separación sexual. A nivel material existen algunos casos evidentes de esta separación como muestran las descripciones de Ibn Baṭṭūta y Abd al-Basit al-Malatī refiriéndose a los baños de Alhama señalando la existencia de edificios simétricos y la existencia de aposentos separados para hombres y para mujeres.[44]

Musulmanes, cristianos y judíos en los baños

En el periodo tardoantiguo, parece que tanto cristianos, judíos como paganos compartían el mismo espacio adaptándolo a sus preceptos religiosos.[45] Resulta difícil precisar la medida en la que los baños en periodo emiral y califal tuvieron usos compartidos, pero todo parece indicar que los hombres compartían esos espacios. Durante los periodos almorávide y almohade las referencias relativas al uso de los baños por los *ḏimmī-s* no son muy generalizadas, aunque a través de algunas noticias se pueda valorar el uso compartido, bien entre hombres libres o como servidores de los mismos con ciertas limitaciones. Mujeres musulmanas y

40 Marín, 'La presencia de las mujeres', pp. 177-252.
41 Ibn Hawqāl, *Configuration de la terre*, p. 110.
42 De la Puente, 'Mujeres andalusíes y baños públicos', pp. 49-57.
43 El Hour, 'La indumentaria de las mujeres', pp. 106-07.
44 Cressier, 'Le bain termal (*al-hamma* en al-Andalus)', p. 192.
45 Bady, Foschia, 'Chrétiens, rabbins et païens dans le même bains', p. 1000.

cristianas frecuentaban el *hammām* en los mismos días, cuestión que aumentaba los temores de los juristas y moralistas del momento. Si el temor de las relaciones entre las mujeres musulmanas era grande, la cuestión se agravaba en los casos de las relaciones entre musulmanas y tributarias, bien fueran estas servidoras que acompañaban a las mujeres al baño para asistirlas en los mismos o tributarias libres que podían frecuentar el baño. Ello parece desprenderse de los comentarios de al-Qurtubī en el *Tasfīr*, en los que suscribe la prohibición de que las tributarias viesen a las musulmanas desnudas fundamentalmente por el temor de reproducir las descripciones a los hombres cristianos:

> 'La mujer musulmana no debe mostrar su cuerpo a una tributaria (*ḏimmīya*) en el Corán salvo si la *ḏimmīya* es esclava de la musulmana.
> Ciertos juristas han dicho que era lamentable que una mujer cristiana ayudara al parto a una musulmana o que ella vea su sexo.
> -Umar había oído decir que las tributarias iban al *hammām* con las mujeres musulmanas, habría que prohibir esta situación, pues no está permitido (según Qurtubī) que la tributaria vea a la musulmana en su desnudez.
> Entre los fundamentos de esta prohibición al Qurtubī señala en el Comentario de la Sura 20,31: "Ibn Abbas (uno de los primeros exégetas del Corán) dijo que no era autorizado a la mujer musulmana que ella fuese vista por una cristiana o una judía con el fin de que no la describa a su marido. Sobre esta cuestión hay divergencias entre los ulemas, si la infiel es la esclava de una musulmana ella puede mirar a su ama, a la inversa, no[46]"'.

Si bien el comentario coránico no tiene como objeto describir la realidad, se nutre de imágenes de la misma en la reflexión establecida sobre las prescripciones de pureza e impureza.

El uso de los baños por tributarias y musulmanas era una costumbre general en el mundo islámico, tanto en Córdoba como en Bagdad. En ese espacio alejado de la península se cuestionaba Ibn al-Jawzī, (397/1200) si era legítimo mirar a las tributarias, concluyéndo que fuese cual fuese el status de la mujer, mirarla en su desnudez estaba prohibido:

> '¿Pueden los hombres mirar a las mujeres tributarias en los baños? Se atribuye a Ibn Hanbal dos opiniones:
> a. Según la primera el musulmán es para la tributaria lo mismo que una mujer extranjera es para cualquier hombre

46 Al-Qurtubī,, *al-Jami' li Ahkam al-Quram*, 12/233. comentario a la Sura 24,31. Agradezco a Geraldine Genvrin la ayuda en la traducción de este fragmento, tesis en curso de la elaboración: *Élaboration du statut légal du dhimmī dans la doctrine malikite andalouse (XIe-XIIIe): Exégèses coraniques et sciences juridiques. Tesis doctoral en curso de elaboración. Université de Nantes.*

> b. Según la segunda la mirada de la tributaria debe ser considerada como la de cualquier musulmana, es decir, prohibida. No se puede mirar el cuerpo desnudo'.[47]

El uso común de mujeres tributarias y musulmanas de los baños provocó la reglamentación de las miradas y la suspicacia de los hombres, que temían el desarrollo de relaciones sexuales entre ellas en este contexto, así como la contaminación con las creencias de otras bañistas. Los juristas musulmanes se apropiaron de la bien establecida retórica de los baños públicos considerándolos como 'la casa de Satán[48]'.

El encuentro de hombres musulmanes y tributarios en los baños públicos es controvertido. Existen testimonios de que judíos y musulmanes se bañaban juntos en Oriente Medio,[49] mas en al-Andalus almohade el tratado de *ḥisba* de Ibn 'Abdūn no menciona el hecho del baño conjunto, pero si señala las prohibiciones de servicio por parte de los musulmanes a los tributarios en los baños, siendo mas adecuado que éstos trabajasen como masajistas o personal de higiene, fundamentado en la consideración del *ḏimmī* como 'gente vil':

> 'nº 153. Un musulmán no debe dar masaje a un judío, ni a un cristiano, así como tampoco tirar sus basuras ni limpiar sus letrinas, porque el judío y el cristiano son más indicados para estas faenas, que son faenas de gentes viles[50]'.

El precepto se centra en la exposición de trabajos viles, que sintetiza el rechazo general de los alfaquíes a toda actividad que denote superioridad de los protegidos con respecto a los musulmanes de acuerdo con el estatuto de la *ḏimma* que los sitúa en una condición de inferioridad.[51]

El baño en el mundo castellano medieval. Ecos de un pasado sospechoso y reconversión del baño islámico.

Al mundo castellano medieval parecen llegar los ecos de la sospecha que se cernía sobre el baño en el mundo tardo romano. Lugares privilegiados para la sociabilidad, se limpiaba el cuerpo, se hablaba pero también se jugaba y se cerraban tratos carnales, convirtiéndose algunos con el paso de los años en centros de promiscuidad sexual donde se practicaba la prostitución, lo que provocó la implantación de medidas restrictivas por parte de los autoridades. Los ecos de la sospecha llegaban desde el mundo latino como el estoico Séneca, que denuncia la corrupción de costumbres:

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47 Ibn al Jawnī, *Ahkhām al-nisā*, p. 33., Benkheira, 'Nudité et ordre moral', p. 98.
48 Benkheira, 'La maison de Satan', pp. 423-29.
49 Shatzmiller, 'Les bains juifs au XII^{e} et XIII^{e} siècle', p. 85.
50 Ibn 'Abdūn, *Sevilla a principios del siglo XIII*, nº153, p. 149.
51 García Sanjuan, 'Judíos y cristianos', p. 74.

'Encontramos la virtud en el templo, en el foro, en la Curia...el placer se esconde normalmente en las tinieblas, así en los baños y en las lugares donde se reduce la vigilancia, donde uno se encuentra sin fuerza tibio de vino ... y lleno de perfumes como un cadáver[52]'.

Aunque la Iglesia nunca prohibió los baños categóricamente, los Primeros Padres contribuyeron a la creación del imaginario de la depravación reforzando la asociación del baño a la glotonería y a las licencias sexuales. San Jerónimo afirmaba:'Aquel que ha sido bañado por primera vez en Cristo no tienen necesidad alguna de un segundo baño[53]'. Fundaba su teoría en la especulación teológica sobre la eficacia del baño espiritual, el bautismo, atribuyendo al agua bautismal una acción física sobre el cuerpo y sobre el alma, dando pie a las precauciones morales en el contexto de un ideal ascético que rallaba en la caricatura.[54] Se permitía el baño por prescripción medica, de este modo, el Papa Gregorio el Grande hizo saber a los habitantes de Roma que el baño tomado sin necesidad, por pura voluptuosidad, no era ni debía ser permitido ningún día del año, mas si se trataba del bien del cuerpo podía practicarse todos los días[55]'. En el ámbito ibérico San Isidoro se hacía eco de estas tendencias prohibiendo expresamente el uso de las termas, aunque fuera por el único deseo de limpiar el cuerpo ya que según la regla de San Leandro, 'la virgen de Cristo debe abstenerse de los baños' como del vino y de la gente. Pero a pesar de las sospechas, siguieron usándose las termas y los baños con un marcado carácter higiénico en el periodo visigodo[56] y altomedieval.

Desde la tardo-antigüedad los baños se asociaban al paganismo, centros de placer y pecado, habitáculos del demonio, que solo podían ser frecuentados tras la purificación de los mismos. En el siglo IV un padre de la Iglesia describía como un baño sirio era un lugar donde el diablo había puesto sus pies. Algunas de estas grandes instalaciones se reutilizaron en el periodo medieval como iglesias, por lo que se imponía un ritual de purificación de estos espacios, uno de los ejemplos mas significativos fueron las termas de Diocleciano purificadas en el siglo XI bajo el papa Urbano II antes de que fueran incluidas en un monasterio,[57] encontrando igualmente múltiples casos en el espacio hispano: Ermita de Nuestra Señora de los Remedios (Segóbriga, Cuenca), la Catedral de León, Santa María de Clunia (Peñalba de Castro, Burgos) entre otras.[58] El baño como actividad remite a la lujuria y se opone de forma clara a la noción cristiana de espiritualidad refugiada en una exaltación del cuerpo sufriente, lo que dio lugar en la literatura polémica

52 Séneca, *De la vie heureusse*, p. 729.
53 Hyeronimus, *Epistola*,14,10, p. 60.
54 Bady, Foschia, 'Chrétiens, rabbins, païens dans le même bain?', pp. 990–92.
55 Cabrol, Leclercq, *Dictionnaire d'Archeologie Chrétiene et de Liturgie, 'Bains',81, lignes 14-18*.
56 Velázquez Soriano; Ripoll López, 'Pervivencia del termalismo', pp. 555-80.
57 Yegull, *Baths, and bathing in clasical Antiquity*, pp. 317, 164 y 493.
58 Jiménez Sánchez, Salas Carbonel, 'Termas e iglesias', pp. 185-201.

antislámica de los siglos XII y XIII europeos a la crítica del baño a través de su caricatura.[59] La Iglesia estaba dispuesta a aceptar la práctica del baño si se la expurgaba del componente de placer y se reducía a su función medica y terapéutica.[60]

A pesar de las prohibiciones y críticas a su uso, existen baños en la España cristiana, bien construidos *ex novo* o bien reutilizando los pequeños *balnea* de periodos previos. En la España cristiana entre el siglo X y el XIII, no solo se reutilizaron los baños andalusíes existentes antes de la dominación castellana, sino que también se construyeron baños *ex novo* en las distintas ciudades. Se trataba de instalaciones mas humildes que los baños islámicos, aunque con cierta ascendencia de los mismos y con cierto componente nórdico con la existencia de cubetas, como muestra la imagen del *Lapidario* de Alfonso X.[61]

Lapidario, MSS (h-I-15). Monasterio del Escorial, fol. 69.r.

59 Biosca i Bas, 'Sine aqua saluari non volemus', pp. 29-44.
60 Yegull, *Baths, and bathing in clasical Antiquity*, p. 388.
61 *Lapidario*, fol. 69 r., 'El baño tiene cupulillas con lucernas escalonadas, las tinas son de duelas técnica de madera venida del norte de Europa', Menéndez Pidal, *La España del siglo XIII leída en imágenes*, p. 132.

De nueva construcción fueron los baños de Zamora, edificados por Alfonso III y de ubicación controvertida. Algunos consideran que la estructura del local de la bodega de Santa Lucia en la plaza del Cordón, conocido popularmente como 'La Cueva árabe[62]' fue parte de este baño; otros lo ubican en un antiguo solar de la Calle Baños. Solo esta clara su existencia a través de la documentación escrita, ya que se mencionan en una donación fechada en el 905 de 20 sueldos a de la catedral de Oviedo como contribución a la iluminación del templo: 'Concedimus intra civitatem Zamoram Balnea quae construximus ibi, quae adquirunt per unumquemque mensen viginti solidi AD opus luminis Ovetensi Ecclesiae[63]'. Así mismo diversos documentos de la Catedral de Oviedo de los años 897,905,908 y 945 mencionan la existencia de baños palatinos, y otras escrituras tanto de Lugo 910 y León de 1036 citan la existencia de baños en ambas ciudades,[64] posiblemente reutilizando instalaciones previas.

Destino de los baños tras la ocupación cristiana de las villas andalusíes

El avance castellano sobre los diferentes dominios de al-Andalus a partir del periodo taifa provocó una política de apropiación, transformación y reutilización de diversos edificios públicos del periodo islámico, entre otros los baños. Las transformaciones supusieron cambios físicos y también funcionales. Las lógicas de distribución espacial de ciudades islámicas y cristianas responden a diferentes bases antropológicas con repercusiones en la gestión de las estructuras comunitarias como los baños públicos. Tras la conquista los baños pasan a ser de propiedad real, siguiendo diferentes destinos: muchos fueron desafectados de su función; otros desaparecieron y fueron demolidos; otros continuaron su uso en manos de los nuevos propietarios y gestores cristianos, reportando en ambos casos grandes ingresos para la corona. Los juristas defendían que todos los bienes ganados al enemigo correspondían al señorío del Rey,[65] pero el rey tenía al mismo tiempo obligaciones con el clero y grandes señores cuyo apoyo siempre necesitó para mantener el equilibrio social, cediendo por tanto una parte de las propiedades como recompensa justa. Se puede tomar como ejemplo para describir la situación lo acontecido en dos ciudades: Córdoba y Sevilla. En el momento de la conquista de Córdoba había tres baños, según lo que se conoce como *Libro de las Tablas*, o *Libro de Diezmos de Donadíos de la Catedral de Córdoba*, entre otros el de Santa Catalina, otro próximo a la alhóndiga y un tercero que cedió al

62 Jambrina, 'Uncovering Jewish Zamora', pp. 11-13.
63 *Colección de documentos de la catedral de Oviedo*, doc.17, p. 57.
64 Sánchez Albornoz, *Estampas de la vida de León*, pp. 124-25.
65 Alfonso X, *Las Siete Partidas*, Partida I, Título XVIII, ley 2.

infante don Alonso de Molina.[66] En cuanto a Sevilla, Julio González hace una relación del destino de los 19 baños existentes tras la ocupación castellana, en el *Libro del Repartimiento.* La mayoría se situaban en las collaciones de la catedral, cedidos a los genoveses, Diego Corral y García Jofre y a la catedral misma; otros existentes en la collación de San Salvador, pertenecientes a la mezquita aneja, fueron cedidos al judío don Çulemam (Shalomon Ibn Zadok, recaudador de rentas con Fernando III y posteriormente embajador con Alfonso X) y más tarde donados por Alfonso X a la catedral en 1396; en la misma collación otros baños que pertenecieron a Pedro Rodríguez, corredor de la aduana, fueron vendidos a la catedral y años mas tarde se transformaron en mesón, uno de los usos mas frecuentes. Algunos baños siguieron en funcionamiento hasta el siglo XVI como el baño de san Juan de la Palma, con distribución de uso nocturno para los hombres y diurno para las mujeres, dotados con agua caliente y fría,[67] pero lo cierto es que progresivamente se fueron cerrando. En el siglo XVII quedaban solo dos en uso y en el XVIII se cierra el de San Ildefonso.[68]

En otras ciudades castellanas, los baños fueron también gestionados bien por particulares o por órdenes religiosas. En Toledo los Baños del Ángel situados en la judería fueron gestionados por cristianos,[69] el baño del arrabal fue cedido por Alfonso VIII al Monasterio de san Clemente, y confirmado por Alfonso X en 1254.[70] Un caso paralelo a éste último es de Elche, villa que a mitad del XIII formaba parte del la expansión castellana por el Tratado de Alcira (1244) cuyo señorío pertenecía al Infante don Juan Manuel. Los 'baños viejos' fueron cedidos en 1270 por el Infante a los Mercedarios del convento de Santa Eulalia con el fin de transformar dicho espacio en una capilla.[71]

Normas de uso de los baños públicos en la Castilla medieval

En las grandes ciudades como Toledo, cristianos, musulmanes y judíos tenían baño separado. Entre los siglos XII y XIII había catorce baños, una decena en uso en el siglo XI mientras que durante el XIII algunos de los mismos aparecen en las menciones documentales como 'derribados o hundidos'. En funcionamiento estaban los baños cercanos a San Justo usados por los cristianos,[72] los baños judíos

66 *Libro de los Donadíos de la catedral de Córdoba*, pp. 160-62.
67 Todos los ejemplos provienen de González, *Libro del Repartimiento de Sevilla*, I, pp. 520-24.
68 Torres Balbás, 'Notas sobre la Sevilla musulmana', p. 177.
69 Delgado Valero, *Toledo islámico*, pp. 405–10, Passini, 'La juiverie de Tolède', pp. 301-26.
70 Donación de Alfonso X en 1254, para que las monjas lo labrasen 'e que bannen e que fagan de el en el como ellas quisieren'. Menéndez Pidal, *Documentos linguísticos de España*, I, pp. 432-33.
71 Azuar, *et alii*, *Los baños árabes de Elche*, p. 5; Millán, 'El convento mercedarios de Santa Lucia', p. 445.
72 González Palencia, *Los mozárabes de Toledo*, vol, preliminar, pp. 53-54.

del Zeit en documentos de 1168[73] y 1297, 1303 y 1377[74] en uso hasta la segunda mitad del XIV, el baño de Yaix citado en un documento de 1242[75] y el de Ferro en servicio hasta 1385.[76]

Los diferentes *Fueros* prescriben normas de uso diferenciado por comunidad religiosa y sexo. Esta última idea de no es nueva, como se ha visto en lo que concierne a la reglamentación islámica y las leyes precedentes. El uso diferenciado para comunidades religiosas aparece ya delimitado en el Concilio de Trullo (692) convocado por el emperador Justiniano, reproducido con ligeras variantes en el *Decreto de Graciano* prohibiéndose vivir entre los judíos, comer sus alimentos recibir medicinas o bañarse entre ellos.[77]

Fue el *Fuero de Cuenca* (otorgado en 1190 y con redacción definitiva entre 1213 y la segunda mitad del XIII) marca la pauta a seguir, ya que su texto fue aplicado con ligeras variantes a la mayoría de localidades manchegas entre 1200 y 1255 y sirvió de base de redacción de los Fueros extensos que ampliaban la legislación otorgada en siglos precedentes a otras localidades castellanas, antes del intento de unificación legislativa con el *Fuero Real* (1255). En la redacción del *Fuero de Cuenca* comienza la recepción del derecho eclesiástico en la construcción del tratamiento de judíos y musulmanes, que culmina con las *Partidas.*[78]

En texto conquense se establece la norma de uso alterno del baño por comunidades y sexos, destinándose los lunes y miércoles a las mujeres, jueves y sábados para los hombres y los viernes y domingos para judíos. Destaca en esta disposición el silencio a la comunidad musulmana, que solo es mencionada como siervos acompañantes de los bañistas.[79] Se aplicó el derecho conquense en los *Fueros de Alarcón y Alcaraz* — otorgados por Alfonso VIII a principios del siglo XIII y redactados en romance a finales del mencionado siglo — *Fuero de Béjar* (1211), *Fuero de Iznatoraf* (1245), *Fuero de Zorita de los Canes* (siglo XIII), *Fuero de Baeza* — en poder castellano desde 1146 pero definitivamente incorporada a la corona de Castilla por Fernando III en torno a 1226, su fuero extenso data de finales del siglo XIII —, Fuero de Plasencia (1297), *Fuero Extenso de Sepúlveda* (1300). Todos ellos reproducen el uso alterno de comunidades y sexos, aludiéndose a los musulmanes como acompañantes de los bañistas, es decir, siervos, que no debían pagar por el uso de los mismos: 'mas los sirvientes de los varones siquier de las mujeres,

73 Delgado Valero, *Toledo islámico*, pp. 392-94.
74 León Tello, *Los judíos de Toledo*, II, doc.282, doc.308, doc.581; Passini, 'La juiverie de Tolède', pp. 301-26.
75 González Palencia, *Los mozárabes de Toledo*, vol. II, doc.559, p. 150.
76 Delgado Valero, *Toledo islámico*, p. 388.
77 Freidenreich, 'Sharing meals with non Christian', p. 48.
78 Pérez Martín, 'El derecho común y el Fuero de Cuenca', pp. 77-110.
79 *Fuero de Cuenca*, Capítulo II, ley 29, *Fuero de Cuenca*, cap.II, Ley 32.

nin los moros chicos non den nada'.[80] Igualmente en los fueros de la familia conquense se establecen las penas en caso de infracción de uso: diez maravedís en caso de que los hombres entraren en el baño en el día de las mujeres o las acechasen, siendo castigados con la pena de muerte en caso de abusos sexuales: 'Et el varon que otro dia en el vanno entrare et et ala muger fuerça fiziere ola desonrase sea despennado'. El ingreso femenino en los días u horas no asignados, bien durante la noche o en los días reservados para los hombres, implicaba la ausencia de protección jurídica ante los posibles abusos producidos en el establecimiento, ya que la entrada en los mismos suponía la infracción de la norma. Igualmente quedaban sin protección los cristianos que entrasen en los baños viernes y domingos, y los judíos que entrasen en el día de los cristianos: 'Et si xristiano en el dia de los judíos en el vanno entrara o el judío en el día de los xristianos et ally los judíos al xristiano o el xristiano al judío firiere o matare non peche por ende calonna'. De todo ello se desprende que los baños son lugares donde los delitos sexuales y las agresiones entre distintos colectivos eran frecuentes, y que podían ser usados por las mujeres escapando del control masculino y dando lugar a relaciones adúlteras e infidelidades que ponían en entredicho el orden moral de la sociedad medieval castellana.[81] Si bien desde la óptica jurídica parece que está clara la vocación del legislador de regular el uso de los mismos y las consecuencias derivadas del quebranto de las normas, quedando sin protección legal los delitos de asesinato o violaciones producidos fuera de los horarios establecidos, los reflejos en el registro documental no son evidentes, lo que nos lleva a interrogarnos sobre las causas de este silencio. La naturaleza de los delitos cometidos dentro de los mismos, adulterios, relaciones prohibidas, afectaban directamente al honor de las familias y de las personas, por lo que muchos de ellos pudieron ser silenciados o resueltos fuera de los cauces de la justicia ordinaria.

En el *Fuero de Brihuega* (1242) se establecen otros días de uso, 'lunes, miércoles et Sabado el banno sea para los barones, el Martes y el Ihueves seya de las mugieres, et el viernes de los iudeos[82]', estableciéndose penas de diez maravedís en caso de entrar en los días que no les correspondan.

En los Fueros de la tradición conquense llama la atención la disimetría en la regulación del baño de las comunidades judías y musulmanas que poblaban las villas castellanas. Se hace un reconocimiento expreso de su uso para los judíos en días específicos, los viernes (antes del Sabbath) y el Domingo, lo que pone en evidencia la importancia y el peso específico de esta comunidad en la sociedad

80 *Fuero de Alcaraz*, Ley 32 y 33, pp. 116-17; *Fuero de Alarcón*, tit.53-55, pp. 116-17; *Fuero de Heznatoraf*, leyes 51-54; *Fuero de Zorita*, tit.43,45; *Fuero de Sepúlveda*, tit.11,p. 103, *Fuero de Úbeda*, tit.9, ley 2, p. 264, *Fuero de Béjar*, tit. 67, 69, 70, p. 19, *Fuero de Plasencia*, Título 439.

81 Del Val Valdivieso, 'Las mujeres y los baños', pp. 221-29.

82 *Fuero de Brihuega*, ley 169.

castellana, integrándose sus costumbres en el ritmo de la vida urbana. Sin embargo no encontramos mención específica del uso de los baños por la comunidad musulmana, a pesar de que su presencia fue numerosa en las villas tras la expansión castellana.[83] ¿A que se debe el silencio en los Fueros castellanos mencionados? El *Fuero de Cuenca* fue otorgado en momentos próximos a la conquista de la villa, y redactado poco tiempo después, tras la ocupacion castellana de Cuenca las élites musulmanas y alcaides de la villa pasaron a ser considerados como cautivos de guerra y gran parte de la población fue considerada como siervos, que como ya se ha indicado utilizarían los baños en el mismo momento que sus señores. El texto sirvió como base legislativa para la redacción de Fueros Extensos, reproduciéndose la misma práctica. Quizá la causa del silencio fuese que se mantuviesen los baños especiales para los mismos, como afirma Anibal Ruíz Moreno.[84]

La división de los usos separados por comunidades es notoria en todas las normativas municipales, con excepción de los fueros de Extremadura, derivados del Fuero de Alfayate, es decir los fueros de Coria (1208-10), Cáceres (1229) y Usagre (1242-75). En ellos no mencionan ni a judíos ni a moros como posibles usuarios de estos establecimientos, determinándose solo la separación por sexos, jueves y domingos, las mujeres y para hombres el resto de la semana.[85] Si los hombres entraban en el baño en el día de las mujeres debían pagar un maravedí al concejo. Al igual que en caso conquense las referencias relativas a los musulmanes en estos textos aluden mayoritariamente a cautivos lo que puede explicar la elipsis. En lo que concierne a los judíos, hay evidencia de su presencia en Extremadura en el siglo XIII pues aparecen mencionadas en un registro de Sancho IV de 1283 y posteriormente en el padrón de Huete de 1290 donde Plasencia, Trujillo, Cáceres y Medellín aparecen como pecheros,[86] por lo que es posible que tuvieran sus propios baños como parece acreditar la existencia de un baño ritual en la ciudad de Coria en la calle del Albaicín cerca de la sinagoga.[87] Las noticias referentes a la explotación de los baños en estas localidades no son abundantes, siguiendo con el ejemplo cauriense hay una mención de los mismos en un documento de 1357 donde el cabildo de Coria alquila una casa a un canónigo en las proximidades de los baños, las casas del Obispo y la calle del Rey, sin especificar el uso de los mismos.[88]

En cualquier caso, la atribución del uso étnico religioso específico de los baños en función de la localización urbana, es decir su presencia en las consideradas

83 Echevarría Arsuaga, 'La mayoría mudéjar', pp. 7-30.
84 Ruiz Moreno, 'Algunos aspectos del mudejarismo urbano medieval', p. 55.
85 *Fuero de Utsagre*, § 127.
86 León Tello, *Los judíos de Toledo*, pp. 382-288; Lacave, 'Los judíos de Extremadura', pp. 201-13.
87 Hervás, *Documentos para la historia de Coria*, p. 59.
88 Martín Martín, *Documentación medieval de la Iglesia catedral de Coria*, doc.106, p. 175.

tradicionales juderías puede dar lugar a errores frecuentes, como el estudiado caso de Baza[89]

En el área aragonesa El *Fuero de Teruel* otorgado inicialmente en 1177, posee ciertos paralelismos con el de Cuenca. Teruel pasa a manos de Alfonso II en 1170 que le otorgará término y fuero en 1177 para proceder a su colonización, aunque la redacción definitiva del texto se consolida en 1247. En el texto turolense se regula el uso del baño de moros y judíos a los que se les asigna un solo día por semana, el viernes, estableciéndose una pena de treinta sólidos en caso de infracción, suma que debía ser entregada en tercio al juez, al alcalde y al almotacén, y se separa igualmente el uso de los baños para hombres y mujeres con la misma pena ante la infracción: mujeres, lunes y miércoles, y los hombres, martes, jueves y sábado.[90] La revisión de la documentación del Concejo de Teruel entre 1177 y 1377, solo aporta una noticia relativa a un baño cercano a la muralla en un documento fechado en 1324. El mismo corresponde a un acuerdo entre el convento de Santa María de Piedra y los oficiales del Concejo de Teruel para reedificarlo.[91]

Siguiendo con Aragón, tomamos como ejemplo las *Costums de Tortosa* (1271) que suponen un ejemplo de la recepción del derecho romano, y donde la presencia de los judíos en los baños ha sido bien estudiada.[92] En el texto no se establecen turnos de uso ni para musulmanes, cristianos ni judíos, 'Los bayns de Tortosa e de son terme son e deuen esser dels ciutadans et de la universitat. E tots les ciutadans e habitadors axi sarayns, jueus com crestians se deuen en aquels baynar' usándose los ingresos del baño para mantener los muros de la ciudad. Baños, molinos y hornos pertenecen al común y deben ser usados colectivamente, y el uso es producto de un pacto, ' convinença que sia feyta entre alguns sobre coses que ajen comunes[93]'. La condición de ciudadanos para todos los habitantes, sean musulmanes, judíos como musulmanes lleva aparejado un uso colectivo de los bienes públicos por parte de las comunidades minoritarias, ahora bien ¿implicaría ello el uso simultáneo del baño? Todo apunta a una práctica de uso colectivo, cuando el Obispo de Lleida Guillem de Montcada en las Constituciones del Sínodo de Lleida de 1280, amenazó con pena de excomunión de los cristianos que se bañaran conjuntamente con los sarracenos.[94] Poco tiempo después en Tortosa, en 1346 se delimitó el uso del baño en dos disposiciones consecutivas, una en la que se establecía el uso del baño los lunes para judías y vienes sarracenas, poco mas tarde se determinó que

89 Castillo, 'Nuevos datos en torno a la ubicación de la judería de Baza', pp. 57-64.
90 *Fuero de Teruel*, cap.291, pp. 347-53.
91 García Gargallo Mora, *El Concejo de Teruel*, vol. I., pp. 209-10.
92 Romano, 'Los judíos en los baños de Tortosa', pp. 57-64.
93 *Costums de Tortosa*, 1.1.15, p. 13; 3.13.11, p. 177.
94 Item moneatis parrochianos uestrs et eis sub pena excomunicationis mandetis.nec cum eis simul audeant in eisdem balneis balneare', cit. Thaler, *The Mudejars of Aragon*, pp. 162-65.

los judíos y judías solo podrían usar el baño el viernes, lo que determinaría que la comunidad estableciese las horas de uso para los distintos sexos.[95]

Volviendo a la legislación castellana, la articulación de uso de los baños se establece en los Títulos XXIV de *Las Siete Partidas* de Alfonso X, en las disposiciones relativas a judíos, sin que existan normas paralelas en lo que concierne al uso mixto de musulmanes y cristianos: '...E aún mandamos que ningund judío non sea osado de bañarse en baño en uno con los cristianos...[96]'. La ley VIII en la que se menciona la deseada separación, articula la coexistencia cotidiana entre ambos, estableciendo límites precisos, ningún cristiano podría vivir como servicio en casa de un judío ni servirle de guía, ninguno podría aceptar invitaciones de judío ni invitarlos ni beber el vino judiego, tampoco podrían utilizar los medicamentos elaborados por mano de judío. La disposición se inspira en el célebre canon 68 del IV Concilio de Letrán, que su vez está firmemente influenciada por el *Decretum*,[97] donde se prescribe que ningún cristiano, tanto si ha recibido órdenes sagradas como si es laico, coma pan sin levadora con los judíos, viva con ellos o en sus enfermedades los llame o reciba medicamentos de ellos o se bañe con ellos en los baños públicos. La disposición de las *Partidas* posee una doble lectura: por un lado trata de evitar el contacto entre los grupos por el temido peligro de la contaminación de la fe moral y de la corrupción de costumbres. La convivialidad del baño era vista por las autoridades religiosas como una oportunidad de promiscuidad sexual y al mismo tiempo un lugar favorable para el debate teológico y la contaminación de creencias. De hecho, este mismo temor se recoge en los manuales de confesores de los siglos subsecuentes, como el de Martín Pérez, donde se hace eco de las prohibiciones establecidas en el derecho canónico estableciéndose restricciones a la forma de relacionarse:

> 'De los omes e mugeres que sirven a los judíos e a los moros deves saber si son libres, quiero decir forros, o siervos. Si son libres, non lo deven fazer en ninguna manera, ca no conviene a ningund cristiano nin a ninguna cristiana morar nin servir nin criar fijo o fija de judío nin a moro, nin bañarse con ellos en un baño, nin comer su pan çençeño nin de las sus viandas'.[98]

Pero al mismo tiempo, las ley no obedece solo al miedo de una contaminación que provoca la exclusión heredado del *Codex Theodosianus* y de algunas *Novellae*

95 Romano, 'Los judíos en los baños', pp. 63-64. Otros casos aragoneses, Constable, 'Cleanlines and convivencia', pp. 264-66, Burns, 'Baths and Caravanserais', pp. 443-58.

96 *Las Siete Partidas*, Tomo III, Título XXIV, Ley VIII, p. 673.

97 *Decretum Magistri Gratiani*, c. 28,q.1,c. 13, p. 1087, 'Nullus eorum qui in sacro sunt ordine, aut laicus azima eorum manducet, aut cum esis habitet aut aliquem eorum in infirmitatibus suis vocet, aut mendicinam eorum in infirmitatibus suis vocet, aut mendicinam ab eis percipiat,aut cum eis balneo lavet'.

98 Martin Pérez, *Libro de las Confesiones*, § 150, p. 468.

imperiales trasmitidas después de la promulgación del código (438)[99], con impacto en las leyes visigóticas[100] y en el *Fuero Juzgo*, sino que trata al mismo tiempo de articular la existencia entre ambas comunidades sin vulnerar la ley interna y la concepción de las relaciones humanas de la comunidad judía. El baño higiénico también era practicado por los judíos, pero el contacto físico con los gentiles, el simple roce de los vestidos era considerado en las leyes judaicas como una contaminación que requería de abluciones extraordinarias.[101] Las mujeres debían purificarse tras las menstruaciones y partos, el uso del baño ritual diferenció muy pronto a las mujeres cristianas de las judías. El uso del baño sirvió en los siglos XIV y XV como indicio de falsas conversions, como se pone de manifiesto en los estudios de caso de procesos inquisitoriales.[102] La realización del baño ritual prescriptivo por la ley rabínica, plantea mas dificultades. Se establecían con rigidez las categorías de lo puro y lo impuro, las medidas de la piscina de inmersión y la cantidad de agua necesaria, así como su procedencia para que se considerara *kasher* – alrededor de 1000 litros de agua subterránea o de una corriente de agua –. Pero no siempre los judíos poseían un *micveh* en cada comunidad, ¿cómo afrontar entonces las prescripciones rabínicas? ¿Realizaban el baño ritual en cursos de agua corriente, *ma'ayan*, considerado según la ley como un medio de purificación aceptable? ¿Se desplazaban a localidades vecinas más grandes dotadas de *micvaot* Los interrogantes de cómo cumplían sus obligaciones son muchos y no de fácil respuesta, como señala Shatzmiller.[103]

Si bien la separación de las distintas comunidades parece clara sobre el papel, siempre hay una distancia entre lo legislado y lo practicado. Por un lado, la naturaleza de las *Partidas* como 'código aplicado' no está clara. La obra alfonsí supone la culminación de una verdadera política legislativa interpretada de modo diverso por los tratadistas. Hay quienes lo consideran como una continuación de otra obra anterior, el *Setenario*, iniciada ya por Fernando III y cuyo contenido revela una intención didáctica y doctrinal, que luego constituirá uno de los signos característicos de aquélla. Otros opinan que *Las Siete Partidas* no constituyen sino la expresión de un cambio de planes del monarca, ante la reacción provocada por el *Fuero Real*, pensó en unificar la jurisdicción señorial, municipal y real en un solo código. Otros tratan de vincular la interrupción en la elaboración del *Espéculo* y el origen de las Partidas con el 'fecho del Imperio', considerando estos últimos las obra como una síntesis de derecho medieval que pudiese ser

99 Mathisen, 'The Citizenship and Legal Status of Jews', pp. 35-53.
100 Collins 'Visigothic Law and regional customs in disputes in early medieval Spain', pp. 85-104.
101 Kantz, *Exclusiveness and Tolerance*, pp. 48-63.
102 Véase como ejemplo el caso de Catalina, mujer de García Sánchez que hacía la *tebila*, baño ritual después de su ciclo menstrual, *Fontes Iudeorum Regni Castellae* VII, *El tribunal de la Inquisición en Sigüenza*, p. 116.
103 Shatzmiller, 'Les bains juifs au XII^{e} et XIII^{e} siècle', p. 85.

aplicada a todo el Imperio cuyo destino Alfonso X ambicionaba regir.[104] Si bien el contenido doctrinal y enciclopédico de la obra es evidente, no es tan clara su aplicación práctica a mediados del XIII. Las *Partidas* suponen la completa recepción del *Ius Commune*, en Castilla,[105] Alfonso X y sus colaboradores construyen el edificio legal con leyes de diversa procedencia con un espíritu compilador mas que ejecutor práctico. Si bien Alfonso X tuvo intención de promulgarlas como cuerpo vigente: 'tenemos por bien et mandamos que se gobiernen por ellas et non por otra ley nin por otro Fuero',[106] nunca llegaron a publicarse formalmente, aunque su influencia si fue grande como compilación jurídica e inspiraron al tribunal de la Corte y los juristas, sino *ratione legis Imperio rationis.*[107] La vigencia de las Partidas no es evidente como cuerpo legal hasta su promulgación en 1348 por Alfonso XI en el *Ordenamiento de Alcalá* donde fueron declaradas derecho supletorio del Ordenamiento y de los fueros municipales,[108] siendo consideradas así hasta el siglo XIX.

A partir de las disposiciones forales y de las *Partidas* se comprueba que las limitaciones de uso hacen siempre referencia a los judíos, sin que existan referencias explícitas a los musulmanes. Pero si aceptamos valor testimonial de la vida peninsular del siglo XIII, a de las *Cantigas de Santa María* se podría completar la información relativa al uso de estos espacios por cristianos y musulmanes.[109] Tanto moros como judíos aparecen en distintas narraciones de la obra. Bagby estima la presencia de los judíos en treinta narraciones, mientras Carpenter los detecta en cuarenta, siendo en once ocasiones protagonistas de la historia.[110] Los musulmanes aparecen en catorce relatos[111] y solo en la Cantiga 212 aparece una alusión explícita de la presencia de una musulmana en un baño de Toledo, sin determinar si era libre o esclava. En la Cantiga mencionada se describe la costumbre del préstamo de joyas de las mujeres nobles a las mujeres más desfavorecidas para las bodas, así como la costumbre del baño nupcial. La historia a breves trazos es la que sigue: una madre pide a una noble la preciada joya que entrega a su hija

104 Pérez-Prendes, ' Las leyes de Alfonso X el Sabio', pp. 67-84, García Gallo, 'La obra legislativa de Alfonso X', pp. 133-39, Pérez Martín, 'La obra legislativa Alfonsina', pp. 9-63, Mac Donald, 'Law and politics: Alfonsos's Program of Political Reform', pp. 150-201; García García, 'La penetración del derecho clásico medieval en España', pp. 575-92, Decock, *Theologians and Contract Law*, pp. 33-34.

105 Pérez Martin, 'Las Siete Partidas', pp. 21-34.

106 *Las Siete Partidas*, Partida I, Prólogo, p. 17.

107 Martínez Marina, *Ensayo histórico-crítico sobre la legislación*, pp. 261-76.

108 *El ordenamiento de leyes que D. Alfonso XI hizo en las Cortes de Alcalá*, Titulo 28. Ley 1, p. 61, '...e los pleitos e contiendas que no se pudieran librar por las Leys desde nuestro libro e por los dichos fueros, mandamos se libren por las Leyes contenidas en las Siete Partidas que el rey don Alfonso nuestro bisabuelo mandó ordenar como quier que fasta aquí non se falla sean publicadas por mandato del Rey, ni fueron ávidas por Leyes'.

109 Menéndez Pidal, *La España del siglo XIII leída en imágenes*, pp. 8-11.

110 Bagby, 'The Jew in the Cantigas', pp. 670-588; Carpenter, 'The Portrayal of the Jew', pp. 15-43.

111 García Arenal, 'Los moros en las Cantigas', pp. 133-51.

para la boda, 'e levola a bañar com'é costum' en Toledo de quantas querer casar' (vv.31-32). Mientras estaba en los baños una mujer desconocida le roba el collar. Una mora que presencia el hecho acude a casa de la propietaria del collar y la narra la escena. El desenlace de la historia supone siempre la intervención milagrosa de la Virgen, que tras ser implorada hace que la propietaria recupere su collar. La escena del baño es llamativa, ya que muestra como mujeres musulmanas y cristianas compartían ese espacio y la naturalidad con la que se comunicaban entre sí, sin que sepamos nada sobre el estauto de libre o de sirva de la mora del relato.

En la normativa castellana los baños son uno de los espacios femeninos por derecho junto con los hornos, las fuentes o las tejedurías de modo que ante cualquier crimen o delito cometido en ese espacio el testimonio femenino era considerado como válido, siempre y cuando la testigo fuese hija de vecino de la villa.[112]

Oficinas del diablo y otros temores compartidos que justifican las fronteras de uso

Temores compartidos se esconden detrás de las normas jurídicas y las reflexiones morales relativas al uso de los baños tanto del periodo islámico como en el periodo cristiano. Bajo los preceptos de ambos sistemas normativos palpitan los mismos fantasmas de la impureza, la contaminación, la lujuria y el placer fuera del cuadro social establecido. Todas ellas son viejas polémicas ya presentes en el *Codex Theodosianus* que prescribía la conversión de los edificios públicos del paganismo, entre otros las termas y baños que eran considerados como 'oficinas del diablo'. Sorprende encontrar el mismo temor y la misma consideración en los juristas y moralistas islámicos que los consideran como *bayt al-shaytān*, lugares donde la plegaria es censurada, ya que allí el creyente se desprende de sus impurezas y aumenta el riesgo de contaminación con lo impuro. En la legislación castellana, a las visiones heredadas del derecho romano relativas a las casas de baños se une el temor a la contaminación religiosa, explícitamente después del IV Concilio de Letrán, lo que provoca una construcción normativa que articula el uso separado para las distintas comunidades.

La visión que considera a los baños cristianos como un primer espacio de segregación, debe ser extraordinariamente matizada. Con esa afirmación se alimenta el estereotipo de la segregación castellana en oposición a la tolerancia andalusí. Ambas posiciones deben ser matizadas y contextualizadas en el marco antropológico religioso en el que son originadas. Durante el periodo islámico el uso de los baños por las tres comunidades no fue tan libre como se puede pensar, la sospecha de relaciones prohibidas era una sombra que se cernía sobre el uso

112 *Fuero de Cuenca* Capitulo Título II, 32; *Fuero de Zorita, Ley* 45; *Fuero Real del rey don Alonso el Sabio copiado del códice del Escorial*, Ley VIII, p. 45.

de estas instalaciones, lo que llevó a una regulación restrictiva del uso femenino de los mismos y a limitaciones de contacto físico, que no siempre se cumplieron produciéndose relaciones fuera de la norma.

Así mismo, la articulación de la vida social de las distintas comunidades tras la expansión castellana fue problemática. En las tres comunidades del Libro la costumbre del baño estaba arraigada, con distintos usos y funciones. Aunque las prescripciones de baño ritual solo afectaban a musulmanes y judíos, todos acudían a los baños por cuestiones de higiene y enfermedad, por lo que se debía articular el uso de las instalaciones a fin de poder organizar la vida de cada uno de ellos sin vulnerar sus tradiciones propias. En este sentido la ley no ebe entenderse como un instrumento de 'segregación étnico-religioso', ya que no obedece a meros 'procesos discriminatorios', sino a un proceso de articulación de los cuerpos y de los espacios en diversos tiempos en aras de cumplir los preceptos teológico – legales de acuerdo con sus construcciones antropológicas básicas, donde lo sacro y lo profano, lo puro y lo impuro determinan las relaciones con los otros y que articulan las relaciones de vecindad.

A lo largo de los siglos subsiguientes en la legislación de Cortes se repitieron de modo constante las prohibiciones de cohabitación, haciéndose eco en las *Leyes de Ayllón* lo relativo al uso conjunto de los baños, pero no será hasta finales del XV y sobre todo en el XVI cuando aumenten las imágenes negativas relativas a estas instalaciones, recuperando el discurso de la sospecha asociado a la construcción del 'Otro musulmán' y el temor y la desconfianza al converso. Los baños se asociaron poco a poco a lugares de inmoralidad en la construcción del imaginario cristiano musulmán a finales de la Edad Media. En el siglo XVI en un marcado ambiente de intolerancia religiosa se juzgaba la desnudez del cuerpo durante el baño como una incitación al pecado. Los temores fueron explícitos y las sospechas que se cernían sobre los mismos arraigaron en el estereotipo de lugares de inmundicia y pecado, asociados a lo musulmán fueron las claves del discurso que provocó su extinción definitiva. Todas estas visiones tienen su eco en el discurso que Francisco Muley Nuñez, un hombre que en su infancia había sido el paje de Hernando de Talavera, dirigió a Pedro de Deza, el Presidente de la Audiencia de Granada, para protestar contra la Pragmáticas de Felipe II de 17 de Noviembre de 1566, ante la prohibición de los baños y la destrucción de sus instalaciones:

> 'Los baños son minas de inmundicias, la ceremonia del rito del moro requiere soledad. ¿Ceremonia de ir a hacerla en parte sospechosa? ...Pues lo que se puede decir que en los vaños pasan algunos pecados mortales, ansi a los cristianos como a los nuevamente convertidos: de mujeres hablo, que en yr a los dichos vaños se conçiertan con sus galanes, para que en los dichos vaños se junten con ellos: esto no se puede averiguar por ninguna vía; porque estando las mujeres en los dichos vaños, ansy cristianas viejas como nueuas, según tan muncho numero de mujeres y vañeras que las lavan, y durante

> las dichas mugeres en el vaño no entra ningún varón por la puerta dél; pues siendo esto ansi, no determino como se puede decir que se junten en el vaño para hacer los tales pecados, pues, podemos decir que alguna de las dichas mugeres viejas e nuevas tengan este mal pensamiento para juntarse con sus galanes, mejor aparejo ternán en yr a sus visitas, ansi en visitar yglesias, como en jubileos y farsas donde se topan las mugeres y hombres unos con otros, y ternian mejor aparejo en concertar posada de dejamineto donde se junten[113]'.

Las objeciones de la Iglesia para el cierre de los baños púbicos se centraban en el discurso de que los baños eran centros de proselitismo musulmán, provocando la ocasión del encuentro con los ritos musulmanes, donde la ablución preliminar a la plegaria es obligatoria, y son al mismo tiempo centros de encuentros sexuales ilícitos. El miedo a la contaminación del cuerpo y del alma sustentados por la iglesia como garante del cuerpo social y la Corona como brazo secular de la misma terminan con el vapor de la sospecha, cerrándose las pocas instalaciones que aún quedaban abiertas.

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III

APPLICATION OF THE LAW / LA APLICACIÓN DE LA LEY

SWEARING BY THE *MUJALJALA*: A *FATWĀ* ON *DHIMMĪ* OATHS IN THE ISLAMIC WEST

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Introduction

In his well-known *fatwā* collection entitled *al-Miʿyār al-Muʿrib wa-l-jāmiʿ al-mughrib ʿan fatāwī ʿulamāʾ Ifrīqiya wa-l-Andalus wa-l-Maghrib*, i.e. *The Clear Measure and the Extraordinary Collection of the Legal Opinions of the Scholars of Ifrīqiya, al-Andalus, and the Maghrib*, Abū l-ʿAbbās Aḥmad b. Yaḥyā al-Wansharīsī (d. 914/1508), who was mainly active in Fez, includes over five thousand legal responsa on nearly every topic imaginable issued by several hundred *muftī*s from al-Andalus, Tunisia, and the remaining lands of North Africa who lived roughly between 1000 and 1500 CE.[1] The original six-volume work, published in a twelve-volume edition,[2] contains *fatwā*s by some of the most important representatives of the Mālikī school in the Islamic West, such as the Andalusians Ibn Rushd al-Jadd (d. 520/1126), al-Shāṭibī (d. 790/1388) and Ibn Lubb (d. 782/1381), the Tunisians al-Māzarī (d. 536/1141) and Ibn ʿArafa (d. 803/1401), and the Moroccans Ibn al-Ḥājj (d. 737/1336) and al-ʿAbdūsī (d. in or after 843/1439), besides a substantial

1 On the author and his works, see David S. Powers, 'Aḥmad al-Wansharīsī (d. 914/1509)', in *Islamic Legal Thought. A Compendium of Muslim Jurists*, ed. by Oussama Arabi, David S. Powers, and Susan A. Spectorsky (Leiden, Boston: Brill, 2013), pp. 357-99 and Francisco Vidal Castro, 'Aḥmad al-Wanšarīsī (m. 914/1508). Principales aspectos de su vida', *Al-Qanṭara*, 12 (1991), 315-52; 'Las obras de Aḥmad al-Wanšarīsī (m. 914/1508). Inventario analítico', *Anaquel de Estudios Árabes*, 3 (1992), 73-112. More in particular about the *fatwā* collection, see Vidal Castro, 'El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones', *Miscelánea de Estudios Árabes y Hebraicos*, 42-3 (1993-4), 317-61, and 'El *Miʿyār* de al-Wanšarīsī (m. 914/1508). II: Contenido', *Miscelánea de Estudios Árabes y Hebraicos*, 44 (1995), 213-46.

2 Al-Wansharīsī, *al-Miʿyār al-Muʿrib wa-l-jāmiʿ al-mughrib ʿan fatāwī ʿulamāʾ Ifrīqiya wa-l-Andalus wa-l-Maghrib*, M. Ḥajjī and others (ed.), 12 vols, Rabat: Wizārat al-Awqāf / Beirut: Dār al-Gharb al-Islāmī, 1401/1981, 1403/1983. An inventory is provided by Vincent Lagardère in *Histoire et société en Occident musulman en Moyen Age. Analyse du* Miʿyār *d'al-Wanšarīsī* (Madrid: Casa de Velázquez, 1995). Brief descriptions of the *fatwā*s dealing with *dhimmī*s may be found in Hady Roger Idris, 'Les tributaires en Occident musulman médiéval d'après le *'Miʿyār'* d'al-Wanšarîsî', in *Mélanges d'Islamologie. Volume dédié à la mémoire de Armand Abel* (Leiden: E.J. Brill, 1974), pp. 172-96. A selection of these is presented in more detail in Mathias B. Lehmann, 'Islamic Legal Consultation and the Jewish-Muslim "Convivencia": Al-Wansharīsī's Fatwā Collection as a Source for Jewish Social History in al-Andalus and the Maghrib', *Jewish Studies Quarterly*, 6/1 (1999), 25-54.

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number of responsa and comments by al-Wansharīsī himself.[3] Among the less renowned scholars, we find Abū l-Qāsim (or Abū ʿAbd Allāh) Muḥammad b. ʿAbd al-ʿAzīz al-Tāzghadrī, who is represented in al-Wansharīsī's collection with fewer than twenty *fatwā*s of varying length which reveal his legal acumen as well as his familiarity with earlier Mālikī jurisprudence, prophetic *ḥadīth* and even *adab* literature.[4] It is one of these *fatwā*s, on oaths to be delivered by *dhimmī*s in general, and Jews in particular, that forms the main topic of the present contribution.[5]

The muftī: Muḥammad b. ʿAbd al-ʿAzīz al-Tāzghadrī

Little is known about al-Tāzghadrī. Although he is mentioned in several biographical dictionaries of Mālikī scholars, these tend to be very concise and moreover quite repetitive.[6] Originating from a village near Tangier, he seems to have spent most of his life in Fez, where he acted as *muftī* and preacher in the city's Great Mosque. A highly respected scholar in his own days, al-Tāzghadrī came to be remembered mainly as the author of a super-commentary on the commentary written by Abū l-Ḥasan al-Ṣughayyir (d. 719/1319)[7] on *al-Mudawwana al-kubrā*

3 In recent years the *fatwā*s issued by al-Māzarī, al-Shāṭibī and Ibn Lubb have been extracted from *al-Miʿyār* and published in separate volumes.

4 A longish *fatwā*, issued in 824/1421, is discussed in David S. Powers, *Law, Society and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002), pp. 128-34.

5 A more comprehensive discussion of *dhimmī* oaths according to the various Islamic schools of law is projected for a future publication.

6 Shams al-Dīn Muḥammad b. ʿAbd al-Raḥmān al-Sakhāwī (d. 902/1497), *Al-Ḍawʾ al-lāmiʿ li-ahl al-qarn al-tāsiʿ*, 12 vols (Cairo: Maktabat al-Quds, 1934-36), vol. XI, p. 140; Badr al-Dīn Muḥammad b. Yaḥyā al-Qarāfī (d. 1008/1599), *Tawshīḥ al-Dībāj wa-ḥilyat al-ibtihāj*, ʿAlī ʿUmar (ed.), Cairo: Maktabat al-Thaqāfa al-Dīniyya, 1425/2004, p. 260, no. 304; Abū l-ʿAbbās Aḥmad Ibn al-Qāḍī, (d. 1020/1611), *Dhayl Wafayāt al-aʿyān al-musammā Durrat al-ḥijāl fī asmāʾ al-rijāl*, Muḥammad al-Aḥmadī Abū l-Nūr (ed.), 3 parts in 2 vols (Cairo: Dār al-Turāth / Tunis: Al-Maktaba al-ʿAtīqa, 1392/1972), vol. III, p. 281; Ibn al-Qāḍī, *Jadhwat al-Iqtibās fī dhikr man ḥalla min al-aʿlām madīnat Fās*. 2 vols (Rabat: Dār al-Manṣūr, 1973-74), vol. I, p. 239; Aḥmad Bābā al-Tunbuktī (d. 1063/1652), *Kifāyat al-muḥtāj li-maʿrifat man laysa fī l-Dībāj*, Muḥammad Muṭīʿ (ed.), 2 vols (Rabat: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 1421/2000), vol. II, p. 132, no. 525; al-Tunbuktī, *Nayl al-ibtihāj bi-taṭrīz al-Dībāj*, 2 vols in 1 (Tripoli: Kulliyyat al-Daʿwa al-Islāmiyya, 1398/1989), vol. II, p. 166; Muḥammad M. Makhlūf, *Shajarat al-nūr al-zakiyya fī ṭabaqāt al-Mālikiyya*. 2 vols (Cairo, 1950-'52, reprint Beirut, n.d.), vol. I, p. 252, no. 915; Muḥammad b. Jaʿfar b. Idrīs al-Kattānī, *Kitāb Salwat al-anfās wa-muḥādathat al-akyās bi-man uqbira min al-ʿulamāʾ wa-l-ṣulaḥāʾ bi-Fās*, Muḥammad Ḥamza b. ʿAlī al-Kattānī (ed.), 3 vols (N.p., n.d.), vol. II, pp. 139-40, no. 551; ʿAbd al-Kabīr b. Hāshim al-Kattānī (d. 1350/1931), *Zahr al-ās fī buyūtāt ahl Fās*, wa-yalīhi Muḥammad b. ʿAbd al-Kabīr b. Hāshim al-Kattānī (d. 1362/1943) and *Tuḥfat al-akyās wa-mufākahat al-jullās fīmā ghafala ʿanhu ṣāḥib Zahr al-ās fī buyūtāt ahl Fās*, ʿAlī b. Manṣūr al-Kattānī (ed.), 2 vols (Casablanca: Maṭbaʿat al-Najāḥ al-Jadīda, 1422/2002), vol. I, pp. 213-14. I thank Fernando Rodríguez Mediano for some of these references.

7 Abū l-Ḥasan ʿAlī b. Muḥammad b. ʿAbd al-Ḥaqq al-Yāṣilūtī, *faqīh* of Fez, d. 719/1319. See Ibrāhīm b. ʿAlī b. Farḥūn (d. 799/1396), *Al-Dībāj al-mudhhab fī maʿrifat aʿyān ʿulamāʾ al-madhhab*, Maʾmūn b. Muḥyī al-Dīn al-Jannān (ed.), Beirut: Dār al-Kutub al-ʿIlmiyya, 1417/1996, pp. 305-06, no. 408; Ibn al-Qāḍī, *Durrat al-ḥijāl*, vol. III, pp. 243f., no. 1260; Makhlūf, *Shajarat al-nūr*, vol. I, p. 215, no. 757. Two *fatwā*s of his are discussed in detail in Powers, *Law, Society and Culture*.

by Saḥnūn b. Saʿīd al-Tanūkhī of Qayrawān (d. 240/854), who was unanimously acknowledged as one of the greatest authorities on Mālikī jurisprudence.[8] Saḥnūn was a disciple of Ibn al-Qāsim al-ʿUtaqī (d. 191/806), one of the most influential students of Mālik b. Anas (d. 179/795),[9] the eponym of the school, and is to a large extent to be credited with the establishment of Mālikism in North Africa. The *Mudawwana*, which, as will be seen presently, documents the views of Mālik and Ibn al-Qāsim in the form of questions and answers, has remained one of the most influential legal tracts in North Africa up to this day. Most sources on al-Tāzghadrī mention only one of his teachers, namely Abū Mahdī ʿĪsā al-ʿAllāl al-Maṣmūdī (d. 823/1420). Only the early twentieth-century biographer Muḥammad Makhlūf adds Abū ʿImrān Mūsā al-ʿAbdūsī (d. 776/1374) as one of his teachers. We are somewhat better informed about his students, some of whom became well-known scholars in their own right. The most intriguing piece of information provided by al-Tāzghadrī's biographers, however, is that he was perfidiously murdered in 833/1430 and that his killer was never identified. His assassination seems to have been religiously motivated; several sources mention that he would classify the prophets according to a certain hierarchy, which was clearly seen by some as verging on the heretical, for after all the Qurʾān states repeatedly that no distinction is to be made between God's prophets.[10] Ibn al-Qāḍī, after mentioning the fact that al-Tāzghadrī was killed, adds that this was the custom in such cases (*fa-māta maqtūl*^{an} *li-jary al-ʿāda bi-dhālika*).

Two of the *fatwā*s issued by al-Tāzghadrī that were included by al-Wansharīsī deal with the question where people — Muslims and *dhimmī*s respectively — are to swear a judicial oath (*yamīn*) if they live outside of town. Such judicial oaths fulfil a major role in Islamic procedural law as they can take the place of witness testimonies and other forms of evidence.[11] According to Herbert Liebesny,

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8 On Saḥnūn and his *Mudawwana*, see Jonathan E. Brockopp, 'Saḥnūn b. Saʿīd (d. 240/854)', in *Islamic Legal Thought. A Compendium of Muslim Jurists*, ed. by Oussama Arabi, David S. Powers, and Susan A. Spectorsky (Leiden, Boston: Brill, 2013), pp. 65-84; Miklos Muranyi, *Die Rechtsbücher des Qairawâners Saḥnūn b. Saʿīd. Entstehungsgeschichte und Werküberlieferung* [Abhandlungen für die Kunde des Morgenlandes, LII, 3] (Stuttgart: Franz Steiner; Deutsche Morgenländische Gesellschaft, 1999).

9 On him, see Yossef Rapoport, 'Mālik b. Anas (d. 179/795)', in *Islamic Legal Thought. A Compendium of Muslim Jurists*, ed. by Oussama Arabi, David S. Powers, and Susan A. Spectorsky (Leiden, Boston: Brill, 2013), pp. 27-41.

10 See Qurʾān 2:136, 285; 3:84 and 4:150.

11 On the judicial oath in Islam, see David Santillana, *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita*. 2 vols (Rome: Istituto per l'Oriente, 1938), vol. II, pp. 624-29; Peter Scholz, *Malikitisches Verfahrensrecht. Eine Studie zu Inhalt und Methodik der Scharia mit rechtshistorischen und rechtsvergleichenden Anmerkungen am Beispiel des malikitischen Verfahrensrecht bis zum 12. Jahrhundert* [Europäische Hochschulschriften, Reihe II: Rechtswissenschaft, Bd. 2177] (Frankfurt a/M., Berlin: Peter Lang, 1977), pp. 285-357; Christopher Melchert, 'The History of the Judicial Oath in Islamic Law', in *Oralité et lien social au Moyen Âge (Occident, Byzance, Islam): parole donnée, foi jurée, serment*, ed. by M.-Fr. Auzépy and G. Saint-Guillain (Paris: ACHCByz, 2008), pp. 309-26.

> The oath [...] has been and is being employed as a means to decide a dispute. The sworn statement by one of the parties, usually the defendant, ends the suit and the judge must decide in conformity with the sworn statement. The classical jurists of Islam accepted in principle the rule that the plaintiff had to prove his case through witnesses and that the defendant could clear himself through an oath. [...] As a rule the defendant must take the oath if the plaintiff cannot prove his case. The oath is only used where evidence is either non-existent or insufficient to adopt any other means of ascertaining the truth. [T]he oath in the technical sense means the Oath of Purgation, i.e. the act of clearing oneself from the suspicion of guilt by swearing that one is innocent, or alternately, of swearing to the guilt of the other party.[12]

Early Mālikī Opinions on Administering Judicial Oaths

In both responsa on oaths al-Tāzghadrī relies heavily on the views of Mālik as relayed to Saḥnūn by Ibn al-Qāsim. For the sake of clarity, the translation and discussion of the two *fatwā*s will therefore be preceded by the relevant section from Saḥnūn's *Mudawwana*.[13]

> I [Saḥnūn] asked: How should a *qāḍī* make a defendant swear, should he make him swear by God but whom there is no god, or should he add to this 'the Merciful the Beneficent, who knows what is hidden as well as what is manifest'? [Ibn al-Qāsim] said: Mālik said that he should be required to swear by God but whom there is no god without adding anything [to this formula]; this is the practice, and this is what people used to do. I said: Is it the same, according to Mālik, in the case of someone who takes the oath in addition to the testimony of his single witness and demands his due; does he only swear by God but whom there is no god [as well]? He said: Yes, that is what Mālik told us. I asked: Where do they swear, the one who made the claim before [the other] and the one who demands his due on the basis of his single witness in combination with his oath; where are they required to swear, according to Mālik? He said: Mālik said that with regard to anything of value, both parties are required to swear in the congregational mosque (*al-masjid al-jāmiʿ*). Mālik was asked: At the pulpit? And Mālik replied: I do not know about any pulpit other than that of the Prophet (God bless him and grant him salvation); as for the mosques in the provinces (*al-āfāq*), I do not know about their pulpits, but [all] mosques have spots that are more hallowed than others, and I feel that they should be made to swear in the spots that are most hallowed. Mālik also said: Here in Medina nobody is put under oath at the pulpit except for a sum of four dirhams or more. [Ibn al-Qāsim] said: I asked [Mālik], What about

12 Herbert Liebesny, *The Law of the Near and Middle East: Readings, Cases and Materials* (Albany: SUNY Press, 1975), pp. 251-52.

13 Saḥnūn b. Saʿīd, *Al-Mudawwana al-kubrā*, 6 vols (Cairo, 1323/1905, reprint Beirut: Dār Ṣādir, n.d.), vol. V, pp. 134-35. Saḥnūn repeats the part on the oaths of Jews, Christians and Zoroastrians on p. 201 in the same volume.

the oath of compurgation (*qasāma*), where is the oath for that administered?[14] He said: Mālik said: In the mosque, in front of the people, and at the end of the prayers. I [Saḥnūn] asked: What about the oath of imprecation (*liʿān*)?[15] He said: Mālik said, in the mosque and in the presence of the *imām*. I asked: Did Mālik not say to you that [the spouses] should exchange [their] oaths of imprecation at the end of the prayer? He said: I did not hear Mālik say that they should exchange oaths of imprecation at the end of the prayer, only that it should be in the mosque and in the presence of the *imām*. He said: I asked Mālik about a Christian woman married to a Muslim: where is she to utter her oath of imprecation? And Mālik said: In her church, and *ḥaythu tuʿaẓẓimu*, and she should only swear by God. I asked: Did Mālik mention to you that a Christian man and a Christian woman should swear in any of their oaths, or with any claim made by them or against them, or during the oath of imprecation, by God who revealed the Gospel (*al-Injīl*) to Jesus? He said: I only heard him say that they are to swear by God alone.[16] I said: And the Jews, did you hear him say that they should swear by God who revealed the Torah to Moses? He said: The Jews and the Christians are the same in Mālik's view. I asked: Do the Zoroastrians swear in their fire-temples? He said: I haven't heard anything from Mālik on that subject, but my view is that they should only swear by God *ḥaythu yuʿaẓẓimūna*. Ibn al-Qāsim said: I asked Mālik about the *qasāma* among people in the villages: where do they swear? And he said: As for people from [the precincts of] Mecca, Medina, and Jerusalem, I hold that they should be taken to these [respective] cities to deliver the *qasāma* there. [Mālik] added: As for the people of the provinces, I hold that they should be made to swear wherever they should be, except if this is close to a town (*miṣr*), at a distance of some ten miles,

14 The *qasāma* is an oath of compurgation, sworn fifty times by up to fifty people who declare that they had no hand in the murder of the person whose body was found in their quarter, village or town. On this practice and its presumed origins, see Patricia Crone, 'Jāhilī and Jewish law: the *qasāma*', *Jerusalem Studies in Arabic and Islam*, 4 (1984), 153-201, and Rudolph Peters, 'Murder in Khaybar: Some thoughts on the origins of the *qasāma* procedure in Islamic law', *Islamic Law and Society*, 9 (2002), 132-65.

15 On this oath of imprecation, see Susan A. Spectorsky, *Women in Classical Islamic Law. A Survey of the Sources* (Leiden, Boston: Brill, 2010), p. 38: 'The procedure of *liʿān* is described in 24:6-9. A man who wants to divorce his wife and at the same time deny the paternity of a child with which she is pregnant can publicly accuse her of adultery. In turn, she can avert the punishment for adultery by swearing she is innocent. If she does so, the husband is punished for slander as it is assumed that he cannot provide the eyewitness proof needed to prove his accusation: 24:6: *As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies, (swearing) by Allah that he is of those who speak the truth*; 24:7, *And yet a fifth, invoking the curse of Allah on him if he is of those who lie*. 24:8, *And it shall avert the punishment from her if she bear witness before Allah four times that what he says is indeed false*, 24:9, *And a fifth (time) that the wrath of Allah be upon her if he speaks truth*'.

16 According to the Ẓāhirī scholar Ibn Ḥazm of Cordoba (d. 456/1064), there was a good reason not to impose on a Christian an oath 'by God who revealed the Gospel to Jesus': 'There is not a single Christian who holds that God sent the Gospel down to Jesus, for according to the Christians, without a single exception, the Gospel consists of four histories, one of them written by Matthew, the other by John, both of whom are regarded by them as apostles; the third one was written by Mark and the fourth by Luke, two disciples of some of the apostles, according to every Christian on the face of the earth. They are all in agreement that these books were composed years after Jesus, peace be upon him, was taken up to heaven'. See Ibn Ḥazm, *al-Muḥallā*, Aḥmad Muḥammad Shākir (ed.), 11 vols (N.p.: Dār al-Fikr, n.d.), vol. IX, p. 387, *masʾala* 1784. Such an oath, he implies, would be devoid of any probative value.

> for then I think they ought to be taken to town and be made to swear in the mosque. I asked: What Mālik said about their being taken to those three mosques — Mecca, Medina, and Jerusalem — in order to swear the *qasāma* — from where should they be taken there, or from a distance of how many days should they be brought there, a ten-day journey away? He said: I did not discuss this with Mālik, but I do not doubt that the people of the district of Mecca, wherever they might be, would be taken to Mecca, that the people of the district of Medina, wherever they were, would be taken to Medina, and that the people of the district of Jerusalem, wherever they were, would be taken to Jerusalem. I asked: Does someone who swears an oath do so facing the *qibla*, in Mālik's view? He said: I haven't heard anything about this from Mālik, but I don't think that this is required of him.

After reading this exchange, it will now be easier to follow al-Tāzghadrī's line of reasoning in his *fatwā*s. Note the use of the phrase *ḥaythu tuʿaẓẓimu / yuʿaẓẓimūna*, which I have deliberately left untranslated, for reasons that will become clear later on. Suffice it to say at this point that although the most common meaning of *ḥaythu* is 'where', in certain contexts it can also mean 'when'.[17] Although the second responsum, about *dhimmī*s, is the more relevant for our purpose, it is directly related to the first one, which concerns Muslims, and I shall therefore present that one to begin with.

The Texts[18]

Where are those who do not have a congregational mosque made to swear?[19]

> Sīdī Abū l-Ḥasan al-Ṣughayyir[20] was asked about people who do not have a congregational mosque (*jāmiʿ*) at their disposal — do they swear [their oaths] where they are, or are they taken to the mosque?
> He replied: they will swear wherever they are, and will not be taken to the mosque.
> Al-Tāzghadrī replied: They will be taken to the mosque if they are at a distance that renders participation in the Friday prayer obligatory. It is written in the *Muhktaṣar*

17 See Edward William Lane, *An Arabic-English Lexicon*, 8 vols (London: Williams and Norgate, 1863-93), vol. II, p. 683 s.v. *ḥaythu*. Ignaz Goldziher dexterously avoided the choice between the two meanings and translates *ḥaythu yuʿaẓẓimūna* as 'd'une manière qu'ils considèrent eux-mêmes comme sacrée'; see his 'Mélanges judéo-arabes XIII: Le serment des Juifs', *Revue des Etudes Juives*, 45 (1902), 1-8, reprinted in Ignaz Goldziher, *Gesammelte Schriften*, ed. by Joseph Desomogyi, vol. IV. (Hildesheim: Georg Olms, 1970), pp. 333-40.

18 I have retained the captions that were added by the modern editors of *al-Miʿyār al-Muʿrib* and do not appear in the manuscripts.

19 *Ayna yuḥallafu man lā jāmiʿ lahum?* Al-Wansharīsī, *Al-Miʿyār al-Muʿrib*, vol. X, p. 309.

20 The scholar on whose commentary al-Tāzghadrī wrote a super-commentary in turn, see above.

> *al-Wāḍiḥa*:[21] A person who has to swear an oath will not be taken elsewhere, except in the case of the *qasāma*, for Mālik said: To Mecca, Medina and Jerusalem will be taken those who live in their districts. Ibn al-Qāsim said: Wherever they are in their districts [i.e. no matter the distance to the city]. [Mālik continued:] As for the people of the provinces: they shall be made to swear [their oaths] wherever they should be, except if they are close to a town, at a distance of some ten miles, for then, Mālik said, I think they ought to be taken to town and be made to swear in the mosque. End of quote.[22]
>
> You [petitioner] must think carefully after examining this matter, which of the answers of these two *shaykh*s is most apposite.

As in many other cases in *al-Miʿyār*, the actual query, the *istiftāʾ*, that prompted first al-Ṣughayyir and subsequently al-Tāzghadrī to formulate their opinions has been pruned to a minimum, so that we no longer know who sent the original request for a responsum or where from, and whether a solution was sought to a practical problem, for example by a *qāḍī*, or rather an answer to a theoretical issue.[23] We do not know where and in what state al-Wansharīsī found the original *fatwā*: were the two replies, the one by al-Ṣughayyir and the other by his commentator al-Tāzghadrī penned on separate sheets or rather together? Was the answer of the former indeed the one-liner that we have now, or was his reply shortened by al-Wansharīsī or an earlier compiler? Whatever the case may be, al-Ṣughayyir's opinion is categorical: an oath sworn on the spot is perfectly valid and there is no need to administer it in the congregational mosque. It would seem that al-Tāzghadrī was not satisfied with this reply, and felt the need to qualify it. He, too, believes in principle that it is not necessary for the Muslim litigant to be taken to a particular place of worship if the distance is too great, but if he should find himself within reasonable distance from a Friday mosque, he should be taken there to swear his oath. He bases this view on an earlier compendium of law that contains a statement by Mālik to this effect which follows upon an explanation of the exceptional case of the oath of compurgation to be sworn by the inhabitants of districts of Mecca, Medina, and Jerusalem. These are, after all, the three holiest cities in Islam where it is assumed no one would dare perjure himself. In

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21 A work by the 4th/10th century Andalusī scholar Abū Salama al-Faḍl b. Salama b. Jarīr (d. 319/931); see F. J. Aguirre Sádaba, 'Ibn Salama al-Ŷuhanī', in *Biblioteca de al-Andalus*, ed. by Jorge Lirola Delgado and José Miguel Perta Vílchez, 7+2 vols (Almeria: Fundación Ibn Tufayl), 2004-13, V (2007), pp. 191-96, no. 1087. *Al-Wāḍiḥa fī l-sunan wa-l-fiqh* is an early compendium of Mālikī law by the Andalusi scholar ʿAbd al-Malik b. Ḥabīb (d. 174/853). See on him M. Arcas Campoy and D. Serrano Niza, 'Ibn Ḥabīb al-Ilbīrī, ʿAbd al-Malik', *Biblioteca de al-Andalus*, III (2004), pp. 219-27, no. 509.

22 i.e., from the *Mukhtaṣar*. The exchange of views is in fact an extract from the passage in Saḥnūn's *Mudawwana* cited above.

23 On this procedure, see Wael B. Hallaq, 'From *Fatwā*s to *Furūʿ*: Growth and Change in Islamic Substantive Law', *Islamic Law and Society*, 1 (1993), 29-65.

the line that closes the text the petitioner is invited to choose either the reply of al-Ṣughayyir or that of our *muftī*. No preference is indicated, so that a *qāḍī* — if the petitioner was indeed a judge — could decide for himself whether to have the oath administered in the litigant's hamlet or village, or whether to summon him to town; issued by highly esteemed legal scholars, he could feel at peace with whichever of the two opinions he decided to adopt. The final comment is in all likelihood to be attributed to al-Wansharīsī, who frequently adds shorter or longer remarks to the texts he presents, often without pointing this out. We shall have occasion to come back to this issue later on.

We now turn to the second responsum. Here, too, we find no proper *istiftāʾ* and the text immediately opens with al-Tāzghadrī's reply to the question that is paraphrased only briefly and which may or may not originally have been sent by a *qāḍī*. The many persons mentioned in the *fatwā*, apart from those already encountered above, will be introduced in the discussion following the translation.

Where are Jews and Christians made to swear their oaths?[24]

> Al-Tāzghadrī replied, with regard to the *dhimmī* who lives in the desert and does not encounter a place of worship (*masjid*) that he hallows and who has to swear an oath, that he should swear wherever he might be. It is said in the *Mattīṭiyya*: Ibn Waḍḍāḥ said: I said to Saḥnūn that Ibn ʿAjlān said that a Jew should be made to swear on the Sabbath, and a Christian on Sunday, adding: 'I find that they are in awe of that [day]'. Said [Saḥnūn]: 'Where did he take that from?', to which [Ibn Waḍḍāḥ] replied: 'He took it from Mālik's statement "They should swear *ḥaythu yuʿaẓẓimūna*"'. At this [Saḥnūn] remained silent. Said Ibn Waḍḍāḥ: 'As if he approved of this'. He [also] said: 'I said to Saḥnūn, "In our country [al-Andalus], Ibn ʿĀṣim would make people swear to divorce [their spouses], and would thus strengthen (*yughalliẓu*) their oaths". He said, 'Where did he take that from?', and I replied: 'From the *ḥadīth* 'New judgments will be produced for the people to the extent that they produce new sins'. [Saḥnūn] then said to me, 'Someone like Ibn ʿĀṣim would interpret it like that'. End of quote.
>
> A [certain] *shaykh* said: '[Saḥnūn's] saying 'Someone like Ibn ʿĀṣim would interpret it like that' is ambiguous, and can be taken either as praise or as criticism'. [Another] *shaykh* said: 'When Qāḍī Abū ʿAbd Allāh al-Alīdī was acting as deputy Chief Judge in the city of Granada, he would impose upon a Jew whom he understood to be a contentious litigant a stern oath by the Torah which the Jews call the *Mujaljala*, this at the request of the opponent, and he would then accept it. Often they would refuse to swear by it, and in such a case [the judge] would dismiss the claim of the one refusing to swear by it, after his readiness to swear by something less [meaningful] had become clear [to him], so the opponent brought his argument to bear. Perhaps [al-Alīdī] required this

24 *Ayna yuḥallafu al-Yahūd wa-l-Naṣārā?* Al-Wansharīsī, *Al-Miʿyār al-Muʿrib*, vol. X, pp. 309-10.

> on the basis of the view of al-Lakhmī, who said that the awe felt by the unbeliever at the time of his oath is commensurate with his belief in its solemnity'. End of quote.

When we analyse al-Tāzghadrī's reply to the second query we see that here, too, he mainly relies on the personal views (*raʾy*) of earlier authorities, including Mālik b. Anas himself. Since the issue is not explicitly mentioned in the Qurʾān, this scripture is not referred to. One saying (*ḥadīth*) is mentioned, but it is variously attributed to Mālik, the Umayyad caliph ʿUmar ʿAbd al-ʿAzīz (regn. 99/717-101/720), and the Prophet Muḥammad. Let us look at the way the *muftī* builds his argument, viz. that *dhimmī*s living in remote areas, like Muslims, can usually swear their oaths wherever they might be, and that there are alternative ways to enhance the solemnity of the occasion and minimise the risk of perjury that are not bound to a specific place.

First of all, al-Tāzghadrī refers to a work entitled *al-Mattīṭiyya*, a legal tract written by the Andalusī *faqīh* Abū l-Ḥasan ʿAlī b. ʿAbd Allāh b. Ibrāhīm b. Muḥammad al-Anṣārī al-Mattīṭī (d. 570/1174).[25] Hailing from a small town near Algeciras, he served for a while as *qāḍī* in Jerez but was known first and foremost as an expert in notarial acts and contracts on which he wrote a voluminous tract entitled *al-Nihāya wa-l-tamām fī maʿrifat al-wathāʾiq wa-l-aḥkām*, commonly referred to as *al-Mattīṭiyya*. Al-Mattīṭī, who is al-Tāzghadrī's main source, refers in his book to the views of earlier representatives of the Mālikī school in the West, as reported by Abū ʿAbd Allāh Muḥammad b. Waḍḍāḥ.[26] This man, who died in 287/900, was mainly active in Cordoba, and was one of the most influential Mālikī scholars in al-Andalus at the time. Like many of his fellow-countrymen, he made several journeys in quest of knowledge (sg. *riḥla*), stopping for shorter or longer periods in the main cities of North Africa, Egypt, the Ḥijāz, Syria, Iraq and even faraway Khurāsān. In Qayrawān he used the opportunity to study with Saḥnūn. Ibn Waḍḍāḥ was one of the scholars who contributed to the acceptance of the science of *ḥadīth* in al-Andalus. Up to that point, Mālikī scholars had been very reluctant to recognize the accounts of the Prophet's acts and sayings as a source of authority besides their own opinions, let alone instead of them.[27] Another one of Saḥnūn's many Andalusī students

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25 See on him Ibn al-Qāḍī, *Jadhwat al-Iqtibās*, vol. II, p. 480, no. 540; al-Nāṣirī, *Kitāb al-Istiqṣā li-akhbār al-Maghrib al-Aqṣā*, Jaʿfar and Muḥammad al-Nāṣirī (ed.), 9 parts in 3 vols (Casablanca: Dār al-Kitāb, 1418/1997), vol. I/2, pp. 209-10; Makhlūf, *Shajarat al-nūr*, vol. I, p. 163, no. 502; F. J. Aguirre Sádaba, 'al-Mattīṭī, Abū l-Ḥasan', in *Biblioteca de al-Andalus*, VI (2009), pp. 523-27, no. 1540.

26 A detailed study of his life and works is provided by Maribel Fierro in her edition and translation of Ibn Waḍḍāḥ, *Kitāb al-bidaʿ (Tratado contra las innovaciones)*, (Madrid: Consejo Superior de Investigaciones Científicas, 1988). See also the same author's entry 'Ibn Waḍḍāḥ, Abū ʿAbd Allāh' in *Biblioteca de al-Andalus*, V (2007), pp. 545-58, no. 1294, with references to the primary sources.

27 See Maribel Fierro, 'The introduction of *ḥadīth* in al-Andalus (2nd/8th-3rd/ 9th centuries)', *Der Islam*, 66 (1989), 68-93.

was Muḥammad b. ʿAjlān al-Azdī of Zaragoza, who also met the Qayrawānī master during his *riḥla*. Ibn ʿAjlān, who did not nearly become as famous as Ibn Waḍḍāḥ and whose date of death is not known, is nonetheless praised as an eminent scholar who acted as *qāḍī* in his native town, and was particularly well-versed in the sciences of *farḍ* (calculating the division of inheritances) and *ḥisāb* (arithmetic) on which he is said to have written a fine book. The saying attributed to Ibn ʿAjlān in the *fatwā* under discussion, namely that Jews and Christians should swear their oaths on their respective holy days, which is how he interprets *ḥaythu yuʿaẓẓimūna*, is mentioned by several biographers, such as al-Khushanī (d. 361/971), Ibn al-Faraḍī (d. 403/1013) and, in their wake, Qāḍī ʿIyāḍ (d. 544/1149) and Ibn Farḥūn (d. 799/1396), and was apparently his main claim to fame.[28] The next scholar referred to in the *Mattīṭiyya*, as quoted by al-Tāzghadrī, is Ḥusayn b. ʿĀṣim b. Muslim b. ʿĀṣim, a well-known Andalusī *faqīh* who died in or after 180/796.[29] During his travels he was able to study with some of the most important scholars of the time, such as Ibn al-Qāsim, Ashhab b. ʿAbd al-ʿAzīz (d. 204/820), ʿAbd Allāh b. Wahb (d. 197/812), Muṭarrif b. ʿAbd Allāh (d. 220/835), and ʿAbd Allāh b. Nāfiʿ (d. *c.* 207/823), all of whom belonged to the founding generation of the Mālikī school. The sources tell us that like several other members of his family, he was employed as market supervisor in Cordoba, and that he kept a close watch on fair prices, being very harsh in his punishment of offenders: delinquent merchants would be beaten severely at his orders. According to the Andalusi historian Ibn Ḥayyān (d. 469/1076) this may account for the fact that people refrained from transmitting knowledge from him.[30] The fact — referred to in our *fatwā* — that he would make people swear an oath by divorce, meaning that they pledged to divorce their spouses

28 See on Ibn ʿAjlān: Ibn al-Faraḍī, *Taʾrīkh ʿulamāʾ al-Andalus*, Ibrāhīm al-Abyārī (ed.), 3 vols (Cairo: Dār al-Kitāb al-Miṣrī / Beirut: Dār al-Kitāb al-Lubnānī, 1410/1989), vol. II, p. 905, no. 1564; ʿIyāḍ b. Mūsā al-Yaḥṣubī (Qāḍī ʿIyāḍ), *Tartīb al-madārik wa-taqrīb al-masālik li-maʿrifat aʿlām madhhab Mālik*, Aḥmad Bakīr Maḥmūd (ed.), 4 parts in 3 vols (Beirut, Tripoli: Maktabat al-Ḥayāt, 1387/1967), vol. III/IV, pp. 164-65; Ibn Farḥūn, *Dībāj*, p. 337, no. 449; see also José López Ortiz, *La recepción de la escuela malequí en España* (Madrid, 1931), p. 142; M. Herrera Casais, 'Ibn ʿAylān, Yaḥyā', in *Biblioteca de al-Andalus*, VI (2009), pp. 451-51, no. 349.

29 See on Ḥusayn b. ʿĀṣim and his family: Maribel Fierro, 'Los Banū ʿĀṣim al-Taqafī, antepasados de Ibn al-Zubayr', *Al-Qanṭara*, VII (1986), 53-84. On the man in particular, see al-Khushanī, *Akhbār al-fuqahāʾ wa-l-muḥaddithīn. Historia de los alfaquíes y tradicionistas de al-Andalus*, María Luisa Avila and Luis Molina (ed.), Madrid: Consejo Superior de Investigaciones Científicas / Instituto de Cooperación con el Mundo Árabe, 1992, pp. 73-74; al-Ḥumaydī, *Jadhwat al-muqtabis*, Ibrāhīm al-Abyārī (ed.), 2 vols (Cairo: Dār al-Kitāb al-Miṣrī / Beirut: Dār al-Kitāb al-Lubnānī, 1410/1989), vol. I, pp. 299-300, no. 375; al-Ḍabbī, *Bughyat al-multamis fi rijāl ahl al-Andalus*, Ibrāhīm al-Abyārī (ed.), 2 vols (Cairo: Dār al-Kitāb al-Miṣrī / Beirut: Dār al-Kitāb al-Lubnānī, 1410/1989), vol. I, p. 328, no. 651; Qāḍī ʿIyāḍ, *Tartīb al-madārik*, vol. III/IV, pp. 28-30; López Ortiz, *La recepción*, p. 136.

30 Ibn Ḥayyān, *Al-Muqtabis min anbāʾ abnāʾ ahl al-Andalus*, Maḥmūd ʿAlī Makkī (ed.), Beirut: Dār al-Kitāb al-ʿArabī, 1393/1973, p. 77.

should their testimony be proven false, is cited by many sources, probably as an illustration for his unusual and even unreasonable rulings. For Muḥammad b. Ḥārith al-Khushanī, the author of *Akhbār al-fuqahāʾ wa-l-muḥaddithīn*, this very ruling constitutes proof that Ibn ʿĀṣim's authority extended well beyond the market. Ibn ʿĀṣim's argument that new offences call for new judgements shows that he was aware that his method of extracting reliable oaths was a novel one.[31] Following the lengthy quotation from *al-Mattīṭiyya*, the text adduces comments by two unidentified *shaykh*s. I am assuming that these additions, to be discussed below, are an integral part of al-Tāzghadrī's responsum, although the possibility that they were attached to the *fatwā* by al-Wansharīsī is not altogether to be excluded. It has already been mentioned that the compiler often adds personal comments as well as texts of related content to the *fatwā* he presents without necessarily indicating his involvement.[32] The first *shaykh*, who argues that Saḥnūn's saying 'Someone like Ibn ʿĀṣim would interpret it like that' is ambiguous, may be the above-mentioned Khushanī or someone else quoting him. Al-Khushanī reports the discussion between Ibn Waḍḍāḥ and Saḥnūn in his biographical entry on Ibn ʿĀṣim and adds that what Saḥnūn said neither indicates praise nor censure, although, he writes, Ibn Waḍḍāḥ seems to have understood it as praise for Ibn ʿĀṣim on the part of Saḥnūn.[33] If al-Tāzghadrī indeed regarded the threat with divorce as an acceptable way of extracting a truthful oath, he must have believed that Saḥnūn approved of Ibn ʿĀṣim's practice, so the first *shaykh*'s comment strengthens his argument. So far, the views quoted belonged to some of the earliest Mālikī scholars from the circles of Ibn al-Qāsim and Saḥnūn. The next opinion cited in the text under discussion, and the one from which I derived the title of the present contribution, is to be situated in al-Tāzghadrī's own time: the second unidentified *shaykh* reports the view, or rather the practice, of a man who acted as deputy Chief Judge in Naṣrid Granada. His name is given in our text as 'al-Alīdī'. However, no scholar by that name can be encountered in the

31 It was not unusual for men to swear of their own volition to divorce their wives. The novelty apparently lies in the fact that it is the judge who threatens to dissolve the marital bond if the husband is found to have committed perjury.

32 See on this issue Vidal Castro, 'El Miʿyār: I', p. 324: 'en ocasiones es difícil saber si el fragmento de una obra citada en el *Miʿyār* a continuación de la respuesta de un muftí, lo transcribe el muftí en cuestión para confirmar, completar o confrontar su opinión con la de otros autores y obras o es al-Wanšarīsī el que lo hace con el mismo fin. El hecho de que el autor utilice frecuentemente la expresión *qultu* ("dije") para introducir sus comentarios no implica que siempre lo haga y, además, muchas de las fetuas que van seguidas de estos fragmentos de otras obras o autores no parecen necesitar esos apéndices y parecen completas por sí solas'. In another article, the same author writes: 'En muchos casos al-Wanšarīsī incluye de cada *nāzila* diversas respuestas dadas por distintos alfaquíes y, a continuación, inserta, en ocasiones, su comentario personal, en el que se remonta a las fuentes y reproduce desde las opinions de los grandes maestros hasta la práctica jurídica de su tiempo'. See 'El Miʿyār: II', p. 220.

33 Al-Khushanī, *Akhbār al-fuqahāʾ*, p. 74.

biographical dictionaries, nor in the chronicles or the relevant legal tracts. Hady Roger Idris and, following him, Vincent Lagardère read his name as 'al-Ilbīrī', though without providing any further identification.[34] According to María Isabel Calero Secall, who has made a profound study of the judges of the kingdom of Granada, we should probably read 'al-Ilyurī' rather than al-Alīdī or al-Ilbīrī.[35] Abū ʿAbd Allāh Muḥammad al-Ilyurī, also known as Ibn Malīḥ, was briefly appointed Chief Qāḍī of Granada in 832/1429.[36] This was just one year before al-Tāzghadrī's violent death, but this does not mean that the *muftī* from Fez cannot have been aware of current developments in Granada. On the contrary, throughout the centuries there had always been lively (including polemical) exchanges and reciprocal visits between scholars in al-Andalus and North Africa, from Morocco to Tunisia, which were facilitated by the fact that both areas were the near exclusive domain of the Mālikī school. Legal treatises by authors from al-Andalus were avidly read and commented on by *ʿulamāʾ* in North Africa.[37] The last scholar whose opinion is referred to in our text, now, is al-Lakhmī. Although this *nisba* is very common among Andalusī and North African *fuqahāʾ*, the man in question is no doubt the Qayrawānī *muftī* Abū l-Ḥasan al-Lakhmī (d. 478/1085),[38] whose *Kitāb al-Tabṣira* is yet another commentary on Saḥnūn's *Mudawwana*. It is said that it may have been a statement by al-Lakhmī that gave 'al-Alīdī' the idea of imposing a stern oath by the *mujaljala* on Jewish litigants.

The Torah that the Jews Call al-Mujaljala

What, now, is meant by 'the Torah that the Jews call *al-mujaljala*', and how was an oath by it sworn? Since 'al-Alīdī', or perhaps the copyist or al-Wansharīsī himself, explicitly states that this is the name given to this book *by the Jews*, it is likely that the word *mujaljala* is of Hebrew origin, and means something rolled up, in other words, a scroll (*megilla*). I would suggest that with *mujaljala* not just

34 Idris, 'Les tributaires', p. 195, no. 122; Lagardère, *Histoire et société*, p. 460, no. 166.

35 Personal communication. The *nisba* Ilbīrī relates to Elvira, whereas al-Ilyurī indicates a relation with Íllora, which like Elvira is a town near Granada.

36 See María Isabel Calero Secall, 'La justicia, cadíes y otros magistrados', in *Historia de España Menéndez Pidal* VIII/3: *El reino nazarí de Granada (1232-1492). Política, instituciones, espacio y economía* (Madrid: Espasa Calpe, 2000), pp. 367-427 (p. 379). I thank the author for this reference. See now also E. Navarro i Ortiz, 'al-Ilyurī, Abū ʿAbd Allāh', *Biblioteca de al-Andalus*, VI (2009), pp. 386-87, no. 1469.

37 Maribel Fierro refers to a polemical exchange involving scholars from Granada, Fez and Tunis that took place during al-Tāzghadrī's lifetime; see her 'Religious Dissension in al-Andalus: Ways of Exclusion and Inclusion', *Al-Qanṭara* XXII, 2 (2001), pp. 463-87 (p. 473).

38 See on him Abū Zayd ʿAbd al-Raḥmān b. Muḥammad al-Dabbāgh (d. 696/1296) and Abū l-Faḍl Abū l-Qāsim b. ʿĪsā b. Nājī al-Tanūkhī (d. 839/1435), *Maʿālim al-Aymān fī maʿrifat ahl al-Qayrawān*, Ibrāhīm Shabbūḥ and others (ed.), 4 vols (Tunis: al-Maktaba al-ʿAtīqa / Cairo: Maktabat al-Khānjī, 1968), vol. III, pp. 199-200, no. 317.

any Torah scroll was meant, but one that was especially venerated by the Jews, namely a scroll kept in the holy ark in the synagogue. Swearing by such a book, even if not in its actual presence, would guarantee that the person delivering his oath would not dare to commit perjury. If I am correct in my assumption that the comments by the two unnamed *shaykh*s form part of al-Tazghadrī's *fatwā*, and that they are included in order to strengthen his argument that there are various ways of administering an oath that do not depend on a specific place, we may be justified in seeing the oath by the *mujaljala* as a statement similar to the formula 'I swear to God who revealed the Torah to Moses', which was admittedly rejected by Mālik, but accepted by several members of what would become his school. It would seem that the Granadan magistrate, along with the claimant, was deeply suspicious of the oath of a Jew who refused to swear by the *mujaljala* while being prepared to swear by something less venerable. It was the litigant's willingness to swear by the *mujaljala*, however, that inspired confidence in the truthfulness of his oath.

As was seen above, for Mālik b. Anas an oath by God, for Muslims and *dhimmī*s alike, was sufficient. He firmly resisted any attempt to get him to expand the formula to be pronounced, although he did recommend administering the oath *ḥaythu yuʿaẓẓimūna*, circumstances allowing. As Goldziher already pointed out, however, there was a growing tendency to add weight to the oath by adding ever more clauses to the formula. This would culminate in the very detailed oaths imposed in the Mamlūk empire on Jews, Christians, Samaritans, and others. These oaths, recorded by the secretary Shihāb al-Dīn al-ʿUmarī (d. 749/1349) and reproduced by Shihāb al-Dīn al-Qalqashandī (d. 1355/1418), have little to do with the beliefs of the members of these communities themselves.[39] It is therefore interesting to see that in the Mālikī West 'al-Alīdī' and, I assume, al-Tāzghadrī, who were both contemporaries of al-Qalqashandī, respected the principle that an oath can be assumed to have probative value only if sworn by something or at a place or time held sacred by the person delivering it. Contrary to what we might perhaps have expected, there is no echo in our text of the dispute concerning the authenticity of the Torah.[40]

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39 Goldziher, 'Le serment des Juifs', pp. 2-5. See Shihāb al-Dīn al-ʿUmarī, *Al-Taʿrīf bi-l-muṣṭalaḥ al-sharīf*, Muḥammad Ḥusayn Shams al-Dīn (ed.), Beirut: Dār al-Kutub al-ʿIlmiyya, 1408/1988, pp. 190-96 for oaths imposed on Jews, Christians, Samaritans, and Zoroastrians. Following upon these texts al-ʿUmarī presents the oaths that were imposed on groups within Islam that deviated from the Sunni norm. In al-Qalqashandī's work the *dhimmī* oaths are included within a larger discussion of the various non-Muslim denominations; see his *Kitāb Ṣubḥ al-aʿshā*, 14 vols (Cairo: Dār al-Kutub al-Sulṭāniyya, 1331/1913-1338/1919), vol. XIII, pp. 265-98. An English translation of the Jews' oath may be found in Norman A. Stillman, *The Jews of Arab Lands. A History and Source Book* (Philadelphia: Jewish Publication Society, 1979), pp. 267-68.

40 On this issue see, e.g. Camilla Adang, 'A Fourth/Tenth Century Tunisian *Mufti* on the Sanctity of the Torah of Moses', in *The Intertwined Worlds of Islam. Essays in Memory of Hava Lazarus-Yafeh*, ed. By N.

In the eyes of many Muslims the Jews and the Christians had tampered with their own holy scriptures, so that they can no longer be regarded as revealed books. This does not appear to have been a problem for 'al-Alīdī' (or the *muftī* referring to him, for that matter): he has the Jews swear by their Torah scroll since they themselves clearly believe in its sanctity, and that is good enough for him.

Ilan and others (Jerusalem: Ben-Zvi Institute, 2002), pp. vii-xxxiv, reprinted in Maribel Fierro (ed.), *Orthodoxy and Heresy in Islam* [Critical Concepts in Islamic Studies] London, New York: Routledge, 2014, vol. IV, pp. 35-54, which is based on two additional *fatwā*s included in al-Wansharīsī's *Miʿyār.*

FORUM SHOPPING IN AL-ANDALUS (II): DISCUSSING CORAN V, 42 AND 49 (IBN ḤAZM, IBN RUSHD AL-JADD, ABŪ BAKR IBN AL-ʿARABĪ AND AL-QURṬUBĪ)[1]

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It is no exaggeration to say that the Arabic Islamic sources depicting Andalusi Christians and Jews in action before the *sharīʿa* court and the reasons for their eventual resort to Islamic judicial authorities to the detriment of their own confessional tribunals is limited to a handful of fatwās and some scattered news transmitted in non legal sources. However scanty, these pieces of evidence yield valuable data on the subject when read between the lines in the light of the information provided by legal sources of other genres and by non legal sources from the same or different chronological and local settings. Yet a comparison with the potential for researching forum shopping offered by Ottoman court records, for example, may result depressing to students of the pre-modern Islamic West, where

1 Research to write this article has been carried out within the I+D Project 'In the footsteps of Abū `Alī al-Ṣadafī: tradition and devotion in al-Andalus (XI–XIII centuries)' funded by the Spanish Ministry of Economy and Competitiveness, ref. FFI2013-43172-P. I have consciously opted for the expression 'forum shopping' instead of that of 'legal pluralism' for though there was judicial pluralism in al-Andalus, Muslims were in principle not allowed to resort to non-Maliki judges, let alone non-Muslim judges, and the extent to which they could freely choose between different Muslim judicial instances (e.g. the *qāḍī*, the non-*qāḍī* judge, the *ṣāḥib al-maẓālim*, the *ṣāḥib al-madīna*, the *ṣāḥib al-shurṭa* or the *ṣāḥib al-ḥisba wa-l-sūq*) is not clear for lack of sufficient evidence. All we know (thanks to the work of Christian Müller) is that non-*qāḍī* judges could be given judicial competences that were, in theory, exclusive of *qāḍī*s. In using the expression 'forum shopping' I am aware that appearing before a Muslim judge may not have resulted only from *dhimmī*s' will but been imposed by circumstances that are not explicit in the sources on which we draw to illustrate this practice. Both considerations were raised by Uriel Simonsohn and Nathan Brown respectively in a brainstorming workshop on 'Law and Society in the Middle East' organized by Avi Rubin and Haggai Ram and held at Ben Gurion University (Beer-Sheva, Israel) on January 3-4, 2015. A typical case in which resort to a Muslim judge was imposed by the circumstances is that of the Andalusi Christians deported to Fez and Meknes in 1126 CE for having allegedly aided the Christian king of Aragon, Alfonso the 1rst, in his famous raid against al-Andalus a year before; those Christians subsequently requested from Muslim authorities permission to sell the properties they had left behind in al-Andalus. For a recent analysis of this case see my 'El recurso a las autoridades musulmanas por parte de los dimmíes en el Occidente islámico: de nuevo sobre la deportación de los cristianos tributarios al Magreb en 1126 d.C. (fetua de Ibn Ward)' in F. Roldán (ed.), *Culturas de al-Andalus*', Sevilla: Universidad, 2015: 175–94.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

 10.1484/M.RELMIN-EB.5.109356

such sources are practically non-existent. Be that as it may falling into despair will only be allowed when the possibilities offered by the many — and for the most part still unexplored — legal sources already at our disposal, have been exhausted to explore the phenomenon of forum shopping in al-Andalus, and many others, a stage we are very far from having reached yet.

With the aim to expand our present knowledge on forum shopping in al-Andalus this paper is going to focus discussions about the Coran verses that use to be quoted by Muslim jurists when addressing Christians' and Jews'[2] voluntary resort to Islamic justice, to wit, Qur'ān V 42 and 49.[3] The discussions I am going to deal with are either inserted in compilations of legal doctrine, like the two texts that are going to be examined in first place, or drawn from legal commentaries of the Qur'ān, as is the case with the two remaining texts. The first two texts that are going to be examined below have already been used in a forthcoming publication on forum shopping in al-Andalus.[4] There every jurist's specific interpretation of the relevant verses could not be discussed in full but inserted — in a summarized form — into each individual treatment of forum shopping, which transcends the verses in question and the Qur'ān as a legal source. Actually, these texts are excerpts from Ibn Rushd al-Jadd's *al-Bayān wa-l-taḥṣīl* — the latter work being a commentary to an earlier compilation of Maliki doctrine, namely al-Utbī's *Mustakhraja*- and from Ibn Ḥazm's *Muḥallā*.[5] The remaining two discussions come from the Qur'ān commentaries by Abū Bakr Ibn al-ʿArabī (d. 542 or 543/1147 or 1148)[6] and Abū ʿAbd Allāh Muḥammad b. Abī Bakr Ibn Faḥr

2 Though I am aware that the category of dhimmī includes the Zoroastrians as well, they are irrelevant as a distinctive social category in the history of the pre-modern Islamic West.

3 i.e. we start from locating commentaries or analysis of these specific verses in the selected sources (on which see below) but as we are going to show in what follows, other Qur'ān verses are also discussed in their connection, each author making his own association between the fundamental verses (i.e. Qur'ān V 42 and 49) and those he considers relevant to explain or further substantiate his particular interpretation of those verses.

4 See Delfina Serrano Ruano, '*Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā*: Ibn Rushd al-Jadd (Cordoba, d. 1126 c.e.) and the restriction of *dhimmī*s' shopping for Islamic judicial forums in al-Andalus', forthcoming in John Tolan et al. (eds), *Medieval Minorities: Law and Multiconfessional Societies in the Middle Ages*, section on 'The functioning of justice in multiconfessional societies', Religion and Law in Medieval Christian Societies (RELMIN 5), Nantes: Brepols.

5 See Ibn Rushd al-Jadd, Abū l-Walīd Muḥammad b. Aḥmad, al-Bayān wa-l-taḥṣīl wa-l-sharḥ wa-l-tawjīh wa-l-ta'līl fī masā'il al-Mustakhraja, ed. Muḥammad Hajjī, Beirut: Dar al-Gharb al-Islāmī, 1984, 20 vols, IV: 186-87; IX: 293-94; X: 21-23; Ibn Ḥazm, Abū Muḥammad `Alī b. Aḥmad, al-Muḥallà, ed. Aḥmad Muḥammadshā Kara, Cairo: Maṭba`at al-nahḍa, 1928-34, 11 vols, IX: 425-26, question (mas'ala) number 1795. On Ibn Ḥazm see now Adang, Camilla, Fierro, Maribel & Schmidtke, Sabine (eds), Ibn Ḥazm of Cordoba. The Life and Works of a Controversial Thinker, Leiden-Boston: Brill, 2013. On Ibn Rushd al-Jadd see Serrano Ruano, Delfina, 'Ibn Rushd al-Jadd' in Oussama Arabi, David Powers & Susan Spectorsky (eds), Islamic Legal Thought. A Compendium of Muslim Jurists, Leiden: Brill, 2013: 295-322.

6 See Abū Bakr Muḥammad b. `Abd Allāh b. Muḥammad b. `Abd Allāh b. Aḥmad b. Muḥammad b. `Abd Allāh al-Ma`āfirī al-Ishbīlī, Aḥkām al-Qur'ān, new improved ed. by Muḥammad `Abd al-Qādir `Aṭā, Beirut: Dār al-kutub al-`ilmiyya, 2003 (3rd ed.), 4 vols, II: 123-27 (Coran V 42) and 136-37 (Coran V

al-Anṣārī al-Khazrajī al-Qurṭubī (born in Cordoba, d. Egypt 671/1272),[7] both held until our very days as most authoritative and exemplary models of the genre of legal qur'ānic exegesis within and outside Malikism's sphere of influence.

The first two discussions are thus included mainly for the sake of detail and comparison since they have already been put to contribution to study forum shopping in an earlier publication of mine (see above). An examination of the contents of the two remaining texts in the light of the former ones reveal Abū Bakr Ibn al-ʿArabī (henceforth ABIA) as the main protagonist of the present search for illustrations of Muslim jurists' discourse on forum shopping and the judicial organization of Andalusi *dhimmī*s. His nuanced, at times inclusive and even apologetic perspective on the validity and unexpired continuity of the *dhimma* covenant should not be a surprise in a Sunni Maliki jurist like him. Yet this perspective has come somehow unexpectedly for a student used to characterizations of ABIA as a staunch anti-Christian Andalusi Muslim polemicist[8] who adopted harsh measures against the consumption of wine during his tenure as *qāḍī* of Seville to make a public show of his particular interpretation of the principle of enjoining good and forbidding evil.[9] Moreover, he expressed his

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49). On his biography see Lucini, María Mercedes, 'Ibn al-`Arabī, Abū Bakr' in Jorge Lirola Delgado and José Miguel Puerta Vílchez (dirs.), Enciclopedia de al-Andalus. Diccionario de autores y obras andalusíes, I, Sevilla-Granada, 2002: 457-68. For a general overview on the contents of Aḥkām al-Qur'ān and their significance see Serrano Ruano, Delfina, 'El Corán como fuente de legislación islámica: Abū Bakr Ibn al-'Arabī y su obra Aḥkām al-Qur'ān' in Miguel Hernando de Larramendi y Salvador Peña (Coords.), El Corán ayer y hoy. Perspectivas actuales sobre el Islam. Estudios en honor del profesor Julio Cortés, Córdoba: Berenice, 2008: 251-75.

7 See Abū `Abd Allāh Muḥammad b. Aḥmad b. Abī Bakr b. Farḥ al-Anṣārī al-Khazrajī al-Qurṭubī, *al-Jāmi` li-aḥkām al-Qur'ān wa-l-mubayyin li-mā taḍammana-hu min al-sunna wa-āy al-furqān*, ed. `Abd Allāh b. `Abd al-Muḥsin al-Turkī, Beirut: Mu'assasat al-Risāla li-l-ṭibā`a wa-l-nashr wa-l-tawzī`, 2006, VII: 488-94 (Qur'ān V 42) and VIII: 40-43 (Qur'ān V 49). Notwithstanding the relevance of his works, the *Jāmi`* very much in particular, data on Qurṭubī's life are scanty, a fact that is in tune with the scarcity of secondary literature dedicated to assess his contribution. See 'Ibn Farḥ al-Qurṭubī, Abū `Abd Allāh' in Jorge Lirola Delgado and José Miguel Puerta Vílchez (dirs & eds), *Biblioteca de al-Andalus, III, de Ibn al-Dabbāg a Ibn Kurz*, Almería: Fundación Ibn Tufayl de Estudios Árabes, 2004: 113–16, number 451 [entry prepared by the Editorial Board]. On Qurṭubī's *Jāmi`* see Rippin, Andrew, *Muslims. Their Religious Beliefs and Practices*, London-New York: Routledge, 2001: 154-55.

8 Dominique Urvoy qualifies him as one of the main moral and political authorities of his time and asserts that he and Qāḍī `Iyāḍ b. Mūsà were the most relevant anti-Christian polemicists of the Almoravid period. See Pensers d'al-Andalus. La vie intellectuelle a Codoue et Seville au temps des empires berberes (Fin XI^{e} siècle-début XIII^{e} siècle), Toulouse: Presses Universitaires du Mirail-Editions du CNRS, 1990: 83, 166. Also see Fierro, Maribel, 'La religión', in María Jesús Viguera et al., El retroceso territorial de al-Andalus. Almorávides y almohades. siglos XI al XIII, Historia de España Menéndez Pidal, VIII–II, Madrid: Espasa Calpe, 1997: 531, 533.

9 This specific aspect of ABIA's performance of qāḍīship in Seville is mentioned by a number of scholars but — to the best of my knowledge — the only one who identifies the correct relevant source, to wit, Ibn Idhārī's al-Bayān al-Mughrib, is Manuela Marín (see 'En los márgenes de la ley: el consumo de alcohol en al-Andalus' in Cristina de la Puente (ed.), Identidades marginales. Estudios Onomástico-Biográficos de al-Andalus, XIII, Madrid: CSIC, 2003: 302, note 111). According to Ibn `Idhārī, ABIA's

vehement rejection of other Qur'ān exegetes' tendency to resort to traditions coming from Judaism (*isrā'īliyyat*)[10] and likened Muslim anthropomorphists with the Jews in an extreme expression of abhorrence for those of his coreligionists whom he considered guilty of what he held to be the worst theological abomination plaguing his times.[11] Last, but not least, he did not limit himself to encourage the rulers and his fellow Andalusis to practice *jihād* against north Iberian Christians but took an active part as a combatant in several of the ensuing military campaigns.[12] Contrast is certainly not the most striking feature of ABIA's remarks on the legal exegesis of Qur'ān V 42 & 49, but the singularity of his stress on the continued validity of the *dhimma* covenant, for such an emphasis is absent from the remaining authors' approach, as well as, and above all, chronology. ABIA was arguing against the abolition of the *dhimma* pact in the eve of the Almohad conquest of al-Andalus.[13] For their new subjects, these political events meant forced adherence to the Almohad creed which, in the case of the Christians and the Jews among them, translated into a prohibition to practice their faiths. The reasons for the Almohads' abolition of the *dhimma* pact are not explicit in the written

agents intercepted a [Muslim] merchant who was carrying wine without having previously declared it before him in an attempt to divest it from his attention. When the man was questioned by the qāḍī, he fainted [scared by the qāḍī's dreadful reputation], denied the charges and said that the wine belonged to a female Christian servant of his for whom he had just bought it since her people's sacred law (shar`) allowed its consumption. ABIA exploded then and declared God's curse upon the seller and the buyer, the producer and the carrier, and upon the merchandise itself. Subsequently he ordered that this curse be implemented and made public, after which the merchant had to abandon the country since declaring him shunned was the worst possible punishment that the qāḍī might have inflicted on him — harsher than the physical punishment the same qāḍī had previously applied to a flautist in order to prevent him from exerting his art any more — [since the merchant could no longer practice his trade]. The interpretation of the Arabic text according to Iḥṣān `Abbās' edition, where several lacunas are marked by the editor, is mine. Also see Serrano Ruano, 'El Corán como fuente de legislación', pp. 255-56. ABIA's attitude towards the consumption of wine appears to have been much less moderate than his predecessor's, Ibn Rushd al-Jadd (see Hernández, Adday, 'La compraventa de vino entre musulmanes y cristianos dimmíes a través de textos jurídicos malikíes del Occidente islámico medieval' in Fierro and Tolan (eds), The Legal status of dimmi-s, pp. 254, 263-70), but as intolerant as his contemporary's, Qāḍī `Iyāḍ (See Serrano Ruano, Delfina, ``Iyāḍ b. Mūsā' in Jorge Lirola (ed.), Biblioteca de al-Andalus, VI Almería: Fundación Ibn Tufayl de Estudios Árabes, 2009: 408, 410.

10 See my 'El Corán como fuente de legislación', p. 263, and note 30.

11 See my '¿Por qué llamaron los almohades antropomorfistas a los almorávides?' in Maribel Fierro, Patrice Cressier & Luis Molina (eds), Los almohades: problemas y perspectivas, Madrid: CSIC/Casa de Velázquez, 2005, 2 vols, II: 833-34.

12 See Fierro, 'La religión', p. 440; Lucini, 'Ibn al-`Arabī, Abī Bakr', p. 459 and Serrano Ruano, 'El Corán como fuente de legislación islámica', p. 256.

13 Some of the preserved copies of ABIA's Aḥkām al-qur'ān mention 503/1109 as end-date but Sa`d A`rāb points out that this is probably a confusion with 530/1134-35 when ABIA retired to Cordoba, after resigning from his post as qāḍī of Seville, to teach and probably also, to write his works. See Serrano Ruano, 'El Corán como fuente de legislación islámica', pp. 257, 265.

sources comprising their ideology.[14] This fact has led some scholars to search for plausible origins and precedents in both Islamic doctrine and history.[15] The advantage offered by focusing on sources compiled by an author who, like ABIA, not only witnessed but also suffered the consequences of the power shift from the Almoravids to the Almohads[16] is that in his efforts to avoid its consequences — which he was able to anticipate — he counter-argued and in this way provided us with important clues to approach elements of the nascent Almohad ideology — with all its apparent contradictions and fluctuations — that are not explicit in the literature produced in the wake of the movement and within its own ranks. ABIA made clear and direct references to the source of the doctrines he strived to nuance or to undermine. It is true that one has to take the trouble to read a series of pages written in a convoluted Arabic style — which looks all the more discouraging when it is compared with Qurṭubī's clear and terse prose — and to live with the uncertainty of having understood him well.

In his works, ABIA displays a strong personality and confidence in his capacity to defeat his antagonists based on the scholarly credentials he acquired during his long stay in the East, where he could study with no more and no less an outstanding intellectual and spiritual authority as al-Ghazālī. No doubt, the soundness of his scholarly training and his social pedigree — he was the son of a high rank official who had been at the service of the ʿAbbādid taifa rulers of Seville — inclined him to face his antagonists with a sense of superiority but also with a rare frankness that led him to challenge stylistic and social conventions — in the same way he challenged received wisdom — to the detriment of hint and indirect style. Thanks to this psychological and intellectual constitution, specific details about persons, places and facts involved in the ideas ABIA strived

14 For a summary of the most relevant bibliography on this question see my 'Explicit cruelty, implicit compassion: Judaism, forced conversions and the genealogy of the Banū Rushd', Journal of Medieval Iberian Studies, 2 (2010), pp. 217-33. In this article I explore Averroes' genealogy in connection with his falling into disgrace, his ensuing banishment to Lucena and the rumour according to which his family descended from Jews and had no connection with the Cordoban Arab aristocracy.

15 See Maribel Fierro, 'Conversion, ancestry and universal religion: the case of the Almohads in the Islamic West (sixth/twelth-seventh/thirteenth centuries)', Journal of Medieval Iberian Studies, 2 (2010), pp. 155-73, at 157-60, and especially, also by the same author, 'Muslim Land without Jews or Christians: Almohad policies regarding the protected people' in Matthias M. Tischler and Alexander Fidora (eds), Christlicher Norden — Muslimischer Süden. Anspruche und Wirklichkeiten von Christen, Juden und Muslimen auf der iberischen Halbinsel im Hoch- und Spätmittelalter, Münster: Aschendorff Verlag, 2011: 231-47.

16 He lost one of his sons while trying to resist the assault of the Almohad troops over Seville. After the defeat, ABIA took part in the delegation of Sevillan notables who travelled to Marrakech to pay allegiance to ʿAbd al-Muʾmin, the new Almohad caliph. Rumour has it that he was poisoned by one of his disciples in their way back to al-Andalus, being buried in Fez where visit of his tomb continues to be a must-stop in the veneration (ziyāra) of a number of local saints also including Qāḍī ʿIyāḍ's burial place in Marraquech. See Lagardère, Vincent, 'Abū Bakr b. al-ʿArabī, grand cadi de Seville', Revue de l'Occident Musulman et de la Méditerranée, XL/2 (1985), pp. 91-102 and Lucini, 'Ibn al-ʿArabī, Abū Bakr', p. 459.

to refute or to promote have been preserved for us, making the risk to expose the researcher's interpretive and linguistic gaps worth the pain.

Al-Qurṭubī, for his part, bears a series of singular positions that approach him to Ibn Ḥazm's integral conception of Islamic jurisdiction, i.e. he advocates for a limitation of *dhimmī*s' legal autonomy. Yet Qurṭubī's view is not rooted in a literal interpretation of the relevant sacred sources, but only on practicality and state security considerations. However, and like Averroes — who remained in al-Andalus for all of his life — al-Qurṭubī — whose first training period elapsed before leaving for the East —[17] writes as if nothing had changed concerning *dhimmī*s' right to freely opt for Islamic justice let alone permission to practice their faith. Both he and ABIA provide us with additional arguments to explain Islamic law's exclusive jurisdiction over *dhimmī*s regarding theft and blood crimes.

The harshening of the Islamic legal discourse on the *dhimmī*s that has been observed in the sources relevant to study the history of the Almoravid period put the emphasis on the imposition of the already known distinctive and humiliating dress code, and on the prohibition for Jews to both dwell within the ramparts of the newly founded capital of the empire, Marrakech, and to perform high profile administrative and political positions — though the Almoravid emirs had no qualms at employing an army of Christian soldiers as mercenaries — with the Andalusi Maliki jurist settled in Alexandria, Abū Bakr al-Ṭurṭūshī (d. 520/1126), having pushed the legal limitations sanctioned by the *dhimma* pact as these had been traditionally interpreted and understood by Sunni jurists, to the brink of abolition.[18]

As to Ibn Rushd's fatwā recommending the deportation of a number of Andalusi Christians in 1126 CE on the grounds that they had aided the king Alfonso I of Aragon in an expedition against al-Andalus carried out a year before,[19] I have pointed out that it was not motivated by a general and unilateral abolition of the *dhimma* pact but based on the charge of high treason, which legal doctrine categorizes as one among a few actions that lead to the breakdown of the covenant, along with insulting Islam, Allāh or his Prophet, proselytism, rape and engaging in sexual relations with a Muslim woman.[20] Certainly Ibn Rushd's

17 He is presumed to have abandoned Cordoba after the city fell to the Castillians in 1236 CE. Subsequently and after completing his training with different Andalusi and Eastern masters, he settled in a place corresponding to today's El Minya in Egypt, where he remained until his death. See 'Ibn Farḥ al-Qurṭubī, Abū `Abd Allāh', p. 114.

18 See Fierro, 'Conversion, ancestry and universal religión', pp. 155-57 and Janina Safran, Defining Boundaries in al-Andalus: Muslims, Christians and Jews in Islamic Iberia, Ithaca-NY: Cornell University Press, 2013: 164-67. Also see my forthcoming 'Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā', section 1.

19 On this episode, see above.

20 See the conclusions in my 'Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā'.

reluctant attitude towards the practice of forum shopping entailed a limitation of *dhimmī*s' freedom to choose among different judicial venues and discouraged the use of Islamic courts as places for social interaction and exchange, but in this particular respect, his view does not seem to have been followed by Andalusi courts nor endorsed by the ruler in any manner. Had the contrary been the case, it is pertinent to ask to which point those *dhimmī* authorities interested in keeping their clients' litigations and legal issues under their control would have been disappointed. In the case of Ibn Ḥazm, as we are going to see next, the total submission to Islamic law he advocated did not affect Christians' and Jews' right to practice their faith.

Ibn Ḥazm

As I have just pointed out, Ibn Ḥazm holds an integral conception of Islamic jurisdiction embracing Muslims and *dhimmī*s alike, while keeping their inequality of rights.[21] In his view, there is no place for the judicial autonomy of the *dhimmī*s; only their freedom to practice their faiths and the corresponding rituals must be left untouched. In the *Muḥallā*, the first argument wielded by Ibn Ḥazm to advocate for the integrity of Islamic jurisdiction is an edict (*kitāb*) from ʿUmar b. al-Khaṭṭāb ordering, just one year before his death, to kill 'all the enchanters be they men or women (*kull sāḥir wa-sāḥira*) and to separate those Zoroastrians married with a female relative of the forbidden degree (*wa-farriqū bayna kull dhī raḥm maḥram min al-majūs*) [from their spouses]' whereas one of the transmitters of this story, Ibn Jurayḥ, had told that 'those *dhimmī*s who are among us receive the same *ḥadd* penalties as Muslims do' [when they incur in the corresponding crime].[22] Next Ibn Ḥazm quotes the opinion of al-Ḥasan al-Baṣrī, subscribed by Qatāda, Abū Sulaymān and [Ibn Ḥazm's] companions (*aṣḥābinā*) according to which inheritance matters among the *dhimmī*s must be settled on the basis of the Qurʾān. According to another tradition Muḥammad b. Abī Bakr wrote to ʿAlī b. Abī Ṭālib regarding a Muslim who had committed *zinā* with a Christian woman and ʿAlī replied that the Muslim should be punished with the corresponding *ḥadd* while the woman's case should be submitted to her

21 Serrano Ruano, 'Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā', section 6.

22 Though it testifies to Ibn Ḥazm's respect for the authority of caliph ʿUmar b. al-Khaṭṭāb, this tradition is not included in the known versions of the famous 'Pact of ʿUmar' to which Ibn Ḥazm refers elsewhere in connection with the legal status of the *dhimmī*s as '*Shurūṭ ʿUmar*'. See Bouchiba, Farid and Oulddali, Ahmed, 'Non-musulmans et *dhimmīs* dans le k*itab al-Muḥallā* d'Ibn Ḥazm al-ẓāhirī (m. 456/1064)' in Dominique Avon (ed.), *Sujet, Fidèle, Citoyen: Espace Européen (XI^e^ –XXI^e^ siècles)*, Bern, etc.: Peter Lang, 2014: 59-60, note 69. In fact, lack of reference to this specific document is a striking feature of the defense, or rejection, of *dhimmī*s' judicial autonomy and right to forum shopping made by the other three authors examined in this article.

people, an opinion to which both Abū Ḥanīfa and Mālik adhered, and which Ibn Ḥazm considers cancelled by a flaw in the chain of transmitters of the tradition. Subsequently he observes that a series of dissenters counter argued with Qur'ān II 256: 'There is no compulsion in religion' (*lā ikrāha fī l-dīn*)[23] meaning that judging the *dhimmī*s with other than their religious law entails compelling them to something alien to their religion. Ibn Ḥazm rejects this allegation stating that 'should the verse in question impose the prohibition to judge the *dhimmī*s with a law different from their own indigenous law, they, i.e. the dissenters [likely the Malikis and the Ḥanafis], would be the first to contradict the import of the verse which, in his view, is something very serious since they [i.e. the dissenters] make them [i.e. the *dhimmī*s] subject to the Islamic statutory sanctions for theft and **calumny** and prevent them from implementing their own internal laws to murder, homicide, bodily harm and **the enslaving of free persons** (***bayʿ al-aḥrār***)'. **To the argument that this is so because the *dhimmī*s have no capacity to settle the injustice [entailed by these crimes efficiently] (*ẓulm lā yuqirrūn ʿalay-hi*) — whereby he alludes to one of the reasons underlying Islamic exclusive jurisdiction over the settlement of those crimes and torts —** Ibn Ḥazm opposes the point that every action they undertake that goes against Islamic law involves an injustice they are not able to settle efficiently. If the Malikis and the Ḥanafis respond with Qur'ān V 42 'If they come to you for judgment, you can either judge between them, or decline' we, Ibn Ḥazm argues drawing on the authority of Ibn ʿAbbās, 'answer that this verse has been abrogated by Qur'ān V 49 'So judge between them according to what God has sent down', this being also the opinion of Mujāhid and ʿIkrima'. As additional textual arguments to defend his position Ibn Ḥazm points to Qur'ān II 193 'Fight them until there is no more sedition and all worship (*dīn*) is devoted to God', the term *dīn* as it appears in the Qur'ān and as it is used in the Arabic language meaning or pointing to the *sharīʿa*, i.e. it is used in a predominantly legal sense. He rebuts those who criticize him for not being fully consequent and for refusing to impose on the *dhimmī*s the fulfilment of Islamic rituals like prayer, fasting, pilgrimage, etc., stating that the Prophet Muḥammad did not oblige them to carry out such duties, contrary to the remaining laws, whereas 'it is well known that he established talio for a Jew who killed a Muslim girl and that he stoned two Jews for having committed *zinā* regardless of their autochthonous law'. Some pointed out that the stoning was not established on the grounds of Islamic law but on those of the Torah and that according to Qur'ān V 44 'the prophets who had submitted to God, judged according to it'

23 In general, I draw on The Coran. English translation by M. A. S. Abdel Haleem. Parallel Arabic Text, New York: Oxford University Press, 2010 second ed., though I have introduced a number of modifications to illustrate further the argumentative force of the coranic evidence adduced by the four authors examined in this article.

which for Ibn Ḥazm implied disbelief since such point represented Muḥammad as dispensing Jewish law to the detriment of Allāh's law. Concerning the import of the latter verse, Ibn Ḥazm explains that it refers to a story about the pre-Islamic prophets which does not mean that pre-Islamic prophetic laws be still in force; all the contrary, he claims; 'they have been superseded and abrogated by the *sharīʿa*';[24] to say the contrary would imply disbelief. Indeed, Qur'ān V 8 orders to be fair (*kunū qawāmīn ... bi-l-qisṭ*) whereas letting them impart disbelief, a law cancelled by God or a practice or saying forbidden by Him, is not fair, for He, the Almighty, said in Qur'ān V 2: 'Help one another to do what is right and good; do not help one another towards sin and hostility' whereas those who send them to the law of altered unbelief and to the order of that which has been abrogated and forbidden do not contribute to what is right and good but to sin and hostility. Finally Ibn Ḥazm invokes Qur'ān IX 29: 'They must be fought until they pay the *jizya* and agree to submit (*wa-hum ṣaghīrūn*)' which Ibn Ḥazm understands in the sense of submitting them to Islamic jurisdiction (*jary aḥkāmi-nā ʿalay-him*) **since as long as the jurisdiction of unbelief is in force 'we will not submit them but they will be the ones who will submit us'.**

Ibn Rushd al-Jadd

Ibn Rushd al-Jadd's critical review of Maliki legal doctrine as contained in al-ʿUtbī's *Mustakhraja* through putting it to the test of Islamic legal methodology (*uṣūl al-fiqh*) and its principles, produces the diametrically opposed result to the conclusions reached by Ibn Ḥazm. Averroes' grandfather strives to reduce *dhimmī*s' right to resort to Islamic justice to its minimum expression. His use of Qur'ān to substantiate his opinions on this specific point of doctrine starts with Qur'ān V 42 which he quotes in full: 'If they come to you for judgment you can either judge between them, or decline. If you decline, they will not harm you in any way, but if you do judge between them, judge justly: God loves the just'. He points out that the verse refers to the Torah because it was revealed in the context of the Jews who asked the Prophet to impart justice to two of them who had incurred in *zinā* and the Prophet sentenced them to stoning in accordance to the rule established in the Torah. He adds that an analogy must be drawn from this verse so that its import must be extended to similar situations in [which] statutory sanctions (*ḥudūd*) [committed by non-Muslims are submitted to a Muslim authority] in the sense that the nature of the jurisdiction of the Muslim judge is optional, not as proof that the Muslim judge must adjudicate on the basis of *dhimmī* law. In this connection, Ibn Rushd points to Qur'ān V 49 according

24 The same argument is mentioned by ABIA. See below, section 3.

to which the Muslim judge has to impart justice to them on the basis of 'what God has revealed', i.e. Islamic law. Ibn Rushd says that in Mālik's view, the verse applies [exclusively] to crimes and torts committed by the *dhimmī*s among themselves whereas for other scholars the verse covers additional cases like *ḥudūd*, in the sense that the latter must be judged taking the optional nature of Islamic jurisdiction established by Qur'ān V 42 into account. For Ibn Rushd, the most correct opinion in that respect is that Qur'ān V 49 established that he [i.e. the Prophet in his quality of judge] was obliged to apply what God had revealed in the Torah as long as the latter was in force (*in ḥukimat*) but that Qur'ān V 42 came to establish the obligation to judge according to what God had revealed in the Qur'ān whenever the latter acquired legal binding force so that Qur'ān V 49 abrogated the instruction to apply the Torah not the capacity to choose between judging or not doing so. This is because of Muslim scholars' consensus regarding the need to apply the Qur'ān to them, i.e. the *dhimmī*s [whenever they decide to submit to Islamic justice]. Others have told that both understandings of Qur'ān V 49 were abrogated by Qur'ān V 42 establishing the optional character of Islamic legal jurisdiction over the *dhimmī*s. **Some Malikis from Iraq held that the *imām* cannot send them to their judges if they ask him to judge them** but, Ibn Rushd observes, this is a rare opinion since abrogation is a precursory rule (***ḥukm ibtidā'ī***) that is not bound to that which comes before it (*lā yakūn maʿṭūf*^{an} *ʿalā mā qabla-hu*) and the fact that both revelations (*hatayn al-ātiyayn*) are bound to the verse establishing the capacity to opt does not indicate that any of them has abrogated the capacity to opt sanctioned by the verse.

Abū Bakr Ibn al-ʿArabī

Abū Bakr Ibn al-ʿArabī's *Aḥkām al-Qur'ān* provide us with the opportunity to delve into a so far unexplored author in connection to forum shopping, one who, leaving aside his centrality for the development of Malikism and Ashʿarism in al-Andalus, lived in a crucial period for the development of Islamic legal doctrines on the *dhimmī*s[25] with the Christians pressing the declining Almoravids from the North, the Almohad Maṣmūda from the Maghribi South and local rebel forces from within.[26]

The discussion relevant to forum shopping in Abū Bakr Ibn al-ʿArabī's *Aḥkām al-Qur'ān* starts in question number three (*al-mas'ala al-thālitha*) of a

25 See above.

26 For a lucid and still tenable account of this difficult period in the history of al-Andalus see Codera y Zaydín, Francisco, *Decadencia y desaparición de los Almorávides en España*, new ed. & preliminary study by María Jesús Viguera Molins, Pamplona: Urgoiti Editores, 2004.

joint section (section fourteen) dedicated to Qur'ān V 41-44.[27] The discussion opens with the issue of the Jews who reported to the Prophet two of their coreligionists on the charge of *zinā* or fonication. According to Ibn al-ʿArabī the issue can be summarized as follows: 'the people of the book [are of those who] came to an agreement (*ṣulḥ*) [with the Muslims] relying on the fundamental principle that they cannot be obliged to submit [to Islamic justice] **in nothing**. If they voluntarily want to submit to our [justice] and report their disputes to us, it is possible that what they submit to us falls into the category of an unjust act (*ẓulm*^{an}) that is not permitted in [any] religious law or a case the legal qualification of which in the *sharīʿa* differs [from its legal qualification in their respective sacred laws]. In the first instance, i.e. something that is forbidden in all the [involved] legal systems like **usurpation**, homicide and similar issues, **it is not possible to give power to some of them over the rest in [order to fix] these matters** (*lam yumakkan baʿḍu-hum min baʿḍ*^{in} *fī-hi*).[28] However, **if they voluntarily submit to us the decision to adjudicate a matter which the *sharīʿa* rules differently from what [is established by their respective confessional laws], the *imām* has the option to choose** between imparting justice among them or rejecting the assignment.

ABIA quotes Ibn al-Qāsim, for whom it is preferable that the assignment be rejected. This opinion is put in contrast to his own view, namely that [in the case that gave rise to Qur'ān V 42] the Prophet [limited himself] to enforce the ruling [concerning fornication found in the Torah] in order to demonstrate the corruptions, alterations, forgeries and subterfuges the Jews had introduced in the contents of the Torah. [The latter's untainted origins would nevertheless explain why the Torah and the Islamic *sharīʿa* coincide in establishing stoning as a punishment for adultery].

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27 Starting in Aḥkām, II, p. 121.

28 Note that ABIA doesn't say that protecting them from injustice is the obligation of the Muslim ruler by virtue of the dhimma covenant, like Ibn Rushd. The latter focuses on the Muslim ruler's duty to prevent that injustices be committed by or against his subjects not on the ruler's bestowal of authority upon a third to carry out this task. Ibn Rushd's approach thus admits the possibility that dhimmī authorities be put in charge of fixing these injustices by the Muslim ruler. ABIA's assertion, on the contrary, implies that entrusting the *dhimmī*s with the capacity to fix the injustices committed by their coreligionists is not possible, likely because of the risk that the ensuing power might turn dangerous for the Muslims, whereby his argument comes close to Ibn Ḥazm's claim of a general subordination to Islamic jurisdiction for the dhimmīs 'least they would turn the ones who subject the Muslims should their laws remain in force' even partially. In any case, comparison between Ibn Rushd's and ABIA's positions gives sense to Ibn Rushd's at times ambiguous presentation of the nature of Islamic legal jurisdiction over the dhimmīs in penal matters and his bid for wider autonomy in this regard. As we will see, in his defense of the Muslim umma ABIA is not concerned with the potential risk of social and religious syncretism carried by mingling and interacting with the qāḍī, his assistants and the other Muslim frequenters of the court nor does he try to limit dhimmīs' right to resort to Muslim authorities.

The fourth question (*al-masʾala al-rābiʿa fī l-taḥkīm min al-yahūd*) starts with the quote of another dictum by Ibn al-Qāsim on the same subject, this time focusing the specific case of 'those bishops who bring two coreligionists having committed fornication to the Muslim judge'. According to Ibn al-Qāsim, the bishop may opt for judging or refusing to do so since **the competence to judge and enforce the corresponding judgment [in this matter] belongs to the bishops** (*li-anna infādh al-ḥukm ḥaqq al-asāqifa*).[29] ABIA reports another opinion according to which when two *dhimmī*s turn to Muslim authorities (*al-imām*) to settle the crime of *zinà* committed by them, they are allowed to enforce the ruling [established by the *sharīʿa*] without reporting the case to the parties' natural judges (*al-asāqifa*) and this is, according to ABIA, the most correct course of action[30] since when two Muslims submit their case to a judge, he enforces (*la-nafadha*) his law, i.e. the *sharīʿa*, without considering whether or not he agrees with it, let alone when the parties are from the people of the book (*fa-l-kitābiyūn bi-dhālik awlā*) since the capacity to impart justice to the people **is not a right awarded to the judge but the reverse, i.e. the people (a collective obviously including the *dhimmī*s) have a right to be judged by him!**

Subsequently ABIA addresses **the very question of the status of Christians and Jews living under Muslim rule and identifies the core of the relevant discussion.** In ABIA's words, **ʿĪsà [b. Dīnār]** (d. Toledo 212/827) had it from Ibn al-Qāsim[31] that the [non-Muslims alluded in Qurʾān V 42] were not [yet] people of the covenant (*ahl al-dhimma*) but enemies (*ahl ḥarb*). ABIA sees fit to clarify that when quoting the said dictum from Ibn al-Qāsim, ʿĪsà intended to show his inclination towards (*nazaʿa bi-hi li-mā*) **that which al-Ṭabarī and others** had transmitted about the two adulterers [whose case gave rise to Qurʾān V 42, not

29 Ibn al-Qāsim's point appears to hint at least to two contingencies: 1) that the bishops preferred to 'pin de blame' of applying harsh physical punishments against their coreligionists on their Muslim counterparts, or 2) that sending their coreligionists to the Muslim judge in cases requiring the application of a harsh penalty was a device to exert pressure over Muslim authorities to obtain more means to deal with this kind of crimes internally, i.e. crimes where Islamic jurisdiction was a priori not competent. The second possibility might explain the case of a bishop who refused to apply justice to two coreligionists and sent them to the Muslim judge, transmitted in al-ʿUtbī's Mustakhraja and with which I deal in my 'Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā', section 3.3., even though a claim of fornication, normally presented by a third party and not by the accused themselves, cannot be considered as a litigation proper.

30 This opinion is contrary to Ibn Abī Zayd al-Qayrāwanī's and Ibn Rushd's. See Serrano Ruano, 'Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā', section 3.3.

31 From among the disciples of Mālik, Ibn al-Qāsim's authority is said to have prevailed in al-Andalus whenever divergence of opinions transmitted from these disciples existed. Yet and though in most cases this assertion proves true, it must not be taken for granted, especially as far as legal practice outside Cordoba is concerned. It may also happen that several divergent opinions from Ibn al-Qāsim — or from Mālik himself — regarding a single legal question are transmitted in the sources. The task of specialists in Islamic legal methodology like ABIA consisted precisely in solving such inconsistencies by explaining their reasons, weighing their soundness and deciding between the valid and the unacceptable ones.

to question Qur'ān V 42's status as textual basis of *dhimmī*s' right to resort to Islamic justice]. The transmission in question reads as follows

'They (i.e. the accusers) came from Khaybar or Fadak, therefore, they were fighting against the Messenger of God [and had not still surrendered to him]. The adulterer woman's name was Yusra. This people sent a message to the Jews of Medina requesting from them to ask the Prophet how to handle the matter and instructing them to do the following: if the Prophet advised them to apply something different from stoning, they should take it and accept it from him but if he opted for stoning they were instructed to take his advice with precaution (*ihdhārū-hu*) just in case it was a ruse with which God wanted to put them to the test. However, the ruse did actually took effect (*wa-hathihi fitna arāda Allāh fī-him fa-nufidhat*). Then they addressed the Prophet and asked him about the issue and he told to them: "who is the most learned among you?" And they replied: 'Ibn Suriya'. Then the Prophet told them to bring him from Fadak to his presence. When he appeared Muḥammad conjured him by God and he answered him and assented to [the Prophet's intention to] impose stoning as it has been mentioned above, and he told him: "by God, oh Muḥammad, verily they know [now] that you are God's messenger" but after that, God sealed his heart and he remained an infidel'.

Though according to ABIA, ʿĪsà's attitude was a question of mere inclination rather than of wholehearted support, he strives to refute the potential argumentative force of ʿĪsā's transmission by means of a series of analogies demonstrating that the Prophet's handling of the case of the two Jews accused of fornication relied on the assumption that there existed a covenant (*dhimma*) with their people. ABIA states that were the above described events a correct explanation of the circumstances that led to the revelation of Qur'ān V 42, they would but confirm that the Jews addressed Muḥammad on the basis of a pact and of a temporary permission to enter Islamic territory (*ʿahd*^{an} *wa-amān*^{an}). In order to remove any doubt regarding the due treatment to be given to non-Muslims entering Islamic territory without the intention to fight, he specifies that **even if they had not yet concluded a pact of protection and obtained permission to remain in Islamic territory, the Prophet would have left them in peace and imparted justice to them**. ʿĪsà's transmission is not a legal argument (*lā hujja li-riwāyat ʿĪsā fī dhālika*), the legal argument being rather what God told about them in Qur'ān V 41: '...who listen eagerly to lies and to those who have not even met you...' (... *samma ʿūn li-l-kadhab samma ʿūn li-qawm ākharīn lam ya'tū-ka...*).

Question number five links the subject dealt above with the issue of the spies (*al-jawāsīs*). Given that neither ʿĪsā's opinion nor the issue of the spies are mentioned by the other three commentaries of Qur'ān V 42 and 49 examined in this paper, it is difficult not to see ABIA's association between the two subjects

as a reaction to a context in which 1) ʿĪsā's opinion and Ibn al-Qāsim's authority were being used to argue that *dhimmī*s' judicial autonomy and freedom to opt for Islamic jurisdiction could not be substantiated with Qur'ān V 42 (though following an argumentative thread different from Ibn Ḥazm's) and were therefore not inalienable rights, and 2) the risk that *dhimmī*s engaged in espionage for the Christians or for whatever enemy of the ruling dynasty was being brandished as an aggravated circumstance suggesting the need to take a step further and review the very permanent character of their residence permit.

Question number five starts thus with a reference to Sufyān b. ʿUyayna's resort to the above mentioned excerpt from Qur'ān V 41 to claim that it was specifically addressed at the spies and that the Prophet did not place any obstacle in their way despite his knowing well who they were, since at that time, Islamic law was still not fixed and Islam had still not prevailed. ABIA promises to deal with this topic later on in more detail. For the time **being he warns against adducing** Qur'ān **V 41 as an argument to treat all non-Muslims as spies; were any of them suspect of espionage, commission of the crime should first be established and then treated according to the relevant Islamic rules introduced after the revelation of the verse at stake**.

In the sixth question ABIA recounts that when the Jews asked the Prophet to impart justice to them he did not give them the opportunity to withdraw (*al-rujū* ') [after he had taken his decision] and states that the verse (i.e. Coran V 42) is then the [legal] referent for all those who [voluntarily] ask someone to impart divine justice (*al-dīn*) to them. Mālik told that when someone asks someone else to impart justice to him, the latter's decision is binding (*fa-ḥukmu-hu māḍ*^{in}) but [if he does not agree with the result found by the arbitrator and] elevates his case to an officially invested religious magistrate (*qāḍī*), the latter will have to endorse the [arbitrator's decision] unless it becomes evident that the first judge (or arbitrator) is not a just person (*jawr*). However, according to Saḥnūn, the *qāḍī* is not obliged to endorse the first decision unless he sees it fit. ABIA points out that these opinions only apply to legal issues concerning property and private claims (*al-ḥuqūq allatī takhtaṣṣ bi-l-ṭālib* lit. 'those rights that are exclusive of the claimant'). **As to statutory sanctions (*ḥudūd*) [committed by the *dhimmī*s and submitted to Muslim authorities by the accused or the judicial authorities on whom they depend in first instance], they can only be decided by an invested judicial authority (*al-sulṭān*)** [not by an arbitrator]. What is firmly established (*al-dābiṭ*) is that arbitration is permitted for claims on private rights [only] and that the decision taken by the arbitrator is binding (*wa-nafdh taḥkīm al-muḥakkam bi-hi*), whereby ABIA makes it clear his preference for Mālik's over Saḥnūn's opinion.

The following paragraphs take issue with al-Shāfiʿī and his views on forum shopping. They provide us with an interesting example of inter-*madhhab* polemic in which the Malikis, represented by our commentator, go on the offensive.[32] ABIA's display of self assertion *vis a vis* the Shāfiʿīs leads him to claim for the Malikis the credit of having pioneered the incorporation of the criteria of public interest (*maṣlaḥa*) and the objectives of the *sharīʿa* (*maqāṣid al-sharīʿa*) to Islamic legal methodology in order to accommodate social needs and actual reality. Certainly, the merit, not of discovering but of having first articulated a coherent definition of the principle of *maṣlaḥa* as a valid interpretive method is normally attributed to the well known Shāfiʿī jurist al-Ghāzālī[33] — under whom ABIA had studied during his stay in the East. Yet and however pretentious or unfair towards the Shāfiʿīs ABIA's claim may seem, he was not totally mislead for resort to the principle of *maṣlaḥa* is fairly frequent in the fatwās of those jurists from the Almoravid period who, like ABIA, had been trained in legal methodology (*uṣūl al-fiqh*) and it is certainly not a matter of chance that it were an Andalusi jurist issued from the ranks of the Malikis themselves — al-Shāṭibī (d. Granada 790/1388) — who, two centuries later, managed to integrate those principles into a full-fledged innovative legal theory and methodology.[34]

ABIA says that according to al-Shāfiʿī the decision of the arbitrator has authority but is not binding (*al-taḥkīm jāʾiz wa-huwa ghayr lāzim*), like a legal assessment (*fatwā*). This is on the grounds that the individuals do not per se have the capacity to appoint governors and judges nor can they become rulers by themselves. Shāfiʿī, always according to ABIA, put the following example to illustrate further the issue of arbitration:

'He who is asked to arbitrate a conflict is the creator of a decision and if he says "I have taken a decision" there are two options: either that this happens with no predicate or that it yields a predicate. However it cannot but yield a predicate in which case there are two options: either a complex sentence made up of two predicates separated by a coordinating conjunction, or an addition, like when you say: "I pronounced it and I shortened it" or a complex sentence in which one predicate creates a new one like when you say: "I rode it and I improved it", that is to say, it was you who caused its being ridden and good, the ensuing result being that it was you who made the ruling [i.e. the ruling is predicated from you, not from a third]'.

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32 Malikis had started to react to the criticisms against their legal methodology leveled by al-Shāfiʿī much earlier. As a matter of fact see Sherman Jackson, 'Setting the record straight: Ibn al-Labbād's Refutation of al-Shāfiʿī', Journal of Islamic Studies, 11/2 (2000), pp. 121-46.

33 See Opwis, Felicitas, Maṣlaḥa and the Purpose of the Law. Islamic Discourse on Legal Change from the 4th/10th to the 8th/14th century, Leiden-Boston: Brill, 2010, especially chapter II.

34 On which one of the best bibliographical references continues to be Masud, Muhammad Khalid, Shāṭibī's Philosophy of Islamic Law, Islamabad: The Islamic Research Institute, 1995.

'And this is verified by the fact that imparting justice to the people is their right not the judge's right whereas entrusting someone with the task of adjudicating a litigation opens a hole in the principle underlying political authority (*al-wilāya*) and leads people to revolt in the same way as the consumption of wine. There is no choice but to erect a segregator (*fāṣil*); the sacred law must be enjoined by decree of the ruler in order to cut the basis of sedition, the option to ask someone to adjudicate a litigation being permitted only to alleviate [the ruler's tasks] and the hardships involved in [having to deal with] people's filing suits against each other (*wa-ʿan-hum fī mashaqqat al-tarāfu* ') so that both parties [i.e. the ruler and the litigants] be satisfied'.

Though, as we have seen before, ABIA coincides with al-Shāfiʿī in that imparting justice to the people is the latter's right, not the judge's, ABIA remarks that **neither al- Shāfiʿī nor those who are like him approach the *sharīʿa* as Mālik did, for they do not take into consideration those criteria that are of public interest (*al-masāliḥ*) let alone the objectives [of the sacred law] (*al-maqāṣid*). They just consider the literal expressions (*al-ẓawāhir*) contained in the sacred texts and the rulings they derive from them,** something ABIA declares to have explained in more detail in his treatises on legal methodology and in his commentary to Mālik's *Muwaṭṭa'* entitled the *Qabaṣ*.[35]

ABIA asserts that to the best of his knowledge there is no *ḥadith* relevant to the issue of *taḥkīm* (asking someone to settle or adjudicate a legal dispute) [and to forum shopping] except what an Iraqi *qāḍī* transmitted to him, to wit that a Jew called Hāni' b. Shurayḥ b. Yazīd Ibn al-Miqdām b. Shurayḥ told that whenever the Messenger of God entrusted to him a mission with his people, he listened to what they had to say, so that they started to call him the judge by excellence (*Abū l-Ḥukm*). One day, the Messenger of God summoned him and told him: 'verily God is the ruling (*al-ḥukm*) and the ruling belongs to Him. Why do they call you Abū l-Ḥukm?' And he replied: 'certainly my people, when they disagree about something, approach me and I decide their case to both parties' satisfaction'. And the [Prophet] said: 'What is better than this? Who are your children?' And he replied: 'I have Shurayḥ, ʿAbd Allāh and Muslim'. Then the Prophet said: 'who is the eldest?' He replied: 'Shurayḥ'. Then the Prophet remarked: 'then you are Abū Shurayḥ' and he called him [so] and he invited him and his sons [to adopt this *kunya* instead of that of Abū l-Ḥukm given the theological problem it posed].[36]

35 No reference is made in this connection to another commentary of the Muwaṭṭa' recently published by Dār al-Gharb al-Islāmī with the title al-Masālik, sharḥ Muwaṭṭa' Imām Mālik and also attributed to ABIA. My thanks go to the anonymous scholar who in the stand of Dār al-kutub al-`ilmiyya publishing in the 2014 edition of the Sharjah Book Fair (UAE) warned me about the dubious authorship of the latter work.

36 This ḥadīth appears to contradict another one cited by the Andalusi jurist `Abbād b. Sirḥān al-Shāṭibī (d. 543/1148) and according to which the Prophet is reported to have stated that Muslims should not

In question number seven, ABIA discusses the manner in which the Prophet imparted justice among them [i.e. the Jews having prompted the revelation of the verse]. According to ABIA, scholars disagreed as to the right answer to be given to this question. There were three [main] opinions: the first is that he applied Islamic law and that the people of the book, if they committed *zinā* while being married, became subject to stoning, therefore, the Muslim authority in charge (*imām*) must sentence them to it [if they voluntarily resort to him], professing Islam not being a necessary pre-condition of the *iḥsān* state required for stoning to be applicable to the accused.[37] This opinion was mentioned by al-Shāfiʿī, ABIA remarks omitting the name of Ibn Ḥazm who was also in favor of the latter view. The second opinion is that the Prophet applied to them Moses' sacred law (*sharīʿat Musā ʿalay-hi l-salām*) on the grounds of the declaration of Jewish witnesses, since 'the law of those who preceded us had validity for us (*idh sharʿun man qabla-nā sharʿun la-nā*) until evidence of the contrary was produced (*hattà yaqūm al-dalīl ʿalā tarki-hā*)'. ABIA declares to have dealt with this question in his [works on] legal methodology and earlier in his *Aḥkām* and that, as was stated there, the correct position for the [Maliki] school is that certainty relies on evidence (*al-ḥaqq fī l-dalīl*). **This second opinion was subscribed by ʿĪsà who had it from Ibn al-Qāsim**, a point that seems to be raised by ABIA with the intention to emphasize both scholars' adherence to the validity of the *dhimma* pact and their acknowledgment of Qurʾān V 42 as relevant textual basis. According to the third opinion, the Prophet imparted justice among them because the [Islamic legal doctrine on] statutory sanctions (*al-ḥudūd*) had still not been revealed **for today, the judge does not impart justice according to the Torah, as it is mentioned in the *Kitāb Muḥammad* (i.e. *al-Mawwāziyya* also known as *Kitāb Ibn al-Mawwāz*).**

Question number eight addresses the right to freely opt for (*al-mukhtār*) Islamic jurisdiction. In this connection ABIA remarks that al-Shāfiʿī's opinion (i.e. that the stoning sentence pronounced by the Prophet was based on Islamic law) is not correct since the Jews approached the Prophet of their own accord

address non-Muslims by their kunyas since doing so is a sign of respect. See Fierro, 'A Muslim Land without Jews or Christians', pp. 239-40 referring to a fatwā issued by the said jurist about Ibn Qamnīl, a Jew whom the ruling Almoravids employed as a court physician.

37 Islamic legal doctrine on zinà or illicit sexual intercourse differentiates between the punishment of he/she who has iḥṣān (i.e. muḥṣan, fem. muḥṣana) and he/she who has it not. The punishment of the muḥṣan is stoning to death while that of the non-muḥṣan consists in one hundred lashes of the whip. All Sunni legal schools agree that iḥṣān implies having enjoyed sexual relations within marriage or concubinage before committing the 'crime', a category including the married, the divorced, the widowed and the owners of concubine slaves. Malikis' definition of iḥṣān includes also being Muslim and free whereas the Shāfiʿīs exclude Islam, like Ibn Ḥazm. Indeed, the latter understands iḥṣān in the sense of having enjoyed sexual relationships within marriage or concubinage including the slaves in that category, though he maintains the distinction between the punishment of the slave and the free culprit of zinà. See my '*Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā*', section 6.

(*bi-ikhtiyāri-him*) in which case, thoughtful consideration is needed (*fa-fī hādhā yakūn al-naẓar*), 'all the more so when God — exalted and glorified — told, reporting the truth about it: "but why do they come to you for judgment when they have the Torah with God's judgment, and even still turn away?"' (Qur'ān V 43) that is to say, they approached the Prophet at their own initiative (*min qibāl anfusi-him*) for He told 'And if they come to you' (Qur'ān V 42) and subsequently gave him the option to 'judge between them or decline' (Qur'ān V 42). And immediately afterwards He told to him 'but if you do judge between them, judge justly' (Qur'ān V 42) whereby we reach question number nine.

Question nine focuses on the definition of the qur'ānic term '*qisṭ*' which in ABIA's opinion means justice (*ʿadl*). This justice is best represented by Islamic law(*ḥukm al-islām*) which in its turn implies relying on Muslim upright witnesses (*shuhūd*^{un} *minnā ʿudūl*), since there is no upright witness (*ʿadl*) among the unbelievers (*kuffār*), as has been mentioned before. The Prophet's intention [when he accepted to adjudicate the case of the Jews] was only to raise a legal argument against them (*iqāmat al-ḥujja ʿalay-him*) and to demonstrate the opprobrium of the Jews (*fadīḥat al-yahūd*), as explained earlier in his commentary (see above), something that, in his view, is evident in the context of both the qur'ānic verse and the relevant prophetic traditions. 'Had the Prophet acted according to Islamic law he wouldn't have sent for Ibn Sūriya. However, the circumstances converged towards the convenience of accepting the assignment and judging according to the Torah, which represented the truth until it was abrogated, and on the basis of Jewish witnesses who represented the sacred law (*dīn*) before it was possible to present allegations on the grounds of upright witnesses from us'.

Question number ten discusses the expression 'and the prophets... judged according to it', i.e. the Torah, in Qur'ān V 44. ABIA reports the dictum of Abū Ḥurayra and others according to whom Muḥammad was included among those prophets who judged on the grounds of the truth contained in the Torah. This was subscribed by al-Ḥasan and this is, in ABIA's view, what is implied by the literal expression of the verse, which refers in a general sense [to a sequel of prophets] the last among whom was ʿAbd Allāh b. Salām, i.e. Muḥammad: 'and the prophets who submitted to those who followed God's guidance and the Rabbis and the scholars...'.

The last question in the present section focuses the final part of Qur'ān V 44, **'Those who do not judge according to what God has sent down are unbelievers'** whereby ABIA returns to the problem of the legal status of the *dhimmī*s, adding credit to our impression about the ideological context of the issues discussed in questions number four and five above. According to our commentator, Muslim exegetes disagreed on the interpretation of the verse. Some held that the expressions 'unbelievers', 'unjust' and 'immoral' all referred to the Jews. For

others, 'unbelievers' corresponds to the idolaters,[38] 'unjust' refers to the Jews and 'immoral' to the Christians. This is the distribution to which **ABIA adheres since he finds it to be in harmony with the literal expression of the verse. He adds that this was also the option taken by Ibn ʿAbbās, Jābir b. Zayd, Ibn Abī Zā'ida and Ibn Shubruma. Moreover, he observes that for Ṭāwūs and others, the unbelief (*kufr*) at stake here is not of the kind that throws one out of the religion (*yanqulʿan al-milla*) but of a degree lower than [the well known crime of] *kufr*** (*kufr dūna kufr*). [The verse] may thus be interpreted in two different ways: either as referring to those who follow their personal criteria but giving the [false] impression to be applying what God has sent down (***bi-mā ʿinda-hu ʿalā anna-hu min ʿinda Llāh*) thereby incurring in an imposture that** amounts to infidelity (*fa-huwa tabdīl*^{un} *la-hu yujib al-kufr*) or as targeting those who judge in a capricious and disobedient way. The latter constitutes a transgression (*dhanb*), yes, but **is subject to pardon according to the well established principle among the people of the sunna to pardon transgressors.**

We know skip directly to section sixteen dedicated to Qur'ān V 49 and including three questions. Question number one addresses the circumstances of the revelation of the verse. According to some, the verse is in connection with the above described case [of the two Jews who had committed adultery and who were reported to the Prophet]. Others told that the context was the following: Ibn Sūriya, Sha's b. Qays and Kaʿb b. Asyad appeared before the Prophet asking him for a legal assessment concerning their religious law (*dīn*) and they told him: 'We are Jewish experts, if we submit to you, everybody will trust you. We have a conflict (*khuṣūma*) with certain people; let us sue them before you so that you judge in our favour and against them; in this manner we will [show] that we put our trust in you and will declare that you say the truth'. However the Prophet refused and God revealed Qur'ān V 42 [which includes the sentence] 'If you do judge between them, judge justly', with a single meaning.[39]

In the second question ABIA points that, according to some, Coran V 49 abrogates the capacity to opt between judging, or not doing so (*al-takhyīr*). In his view, this claim is [too] broad since the conditions for abrogation are four, one of them being knowledge of the date that allows for discriminating between the earlier and the latter case. However, as far as the two verses at stake are concerned, this temporal circumstance is ignored. For this reason, it is impossible to declare that one of them abrogates the other and so, the issue must remain as it is.[40]

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38 Idolater (mushrik) is a category different from that of dhimmī. See EI², s.v. 'Dhimma' [Claude Cahen].

39 Compare this explanation with the story transmitted by al-Qurṭubī in Jāmiʿ, VIII, 41.

40 Though both agree that the right to opt between judging or not doing so was not abrogated by Qur'ān V 49, note the difference between Ibn Rushd al-Jadd's and ABIA's argumentation. Also see below Qurṭubī's critique of the chronological argument adduced by ABIA against the doctrine holding for abrogation.

The third question focuses the expression 'And take good care that they do not tempt you away from any of what God has sent down to you' in Qur'ānV 49. ABIA states that according to some, 'from any of what God has sent down to you' means 'from everything which God has sent down to you', so that 'any' refers to 'everything'. They substantiated this claim with a verse from the pre-Islamic Arabian poet Labīd. The correct interpretation, in ABIA's view, is that 'any (*baʿḍ*)' is to be understood as it comes in the verse, that is to say as referring to stoning or to the sentence they wanted him to pronounce rather than as [**a confirmation that] they aimed at tempting [the Prophet] away from the totality [of what God had sent down to him**].

Al-Qurṭubī

The discussion relevant to *dhimmī*s in general and to forum shopping in particular in Qurṭubī's *al-Jāmiʿ li-aḥkām al-Qur'ān* is the subject of Geraldine Jenvrin's doctoral dissertation in progress.[41] For this reason, I am not going to reproduce the whole of Qurṭubī's treatment of Qur'ān V 42 and 49, restricting myself to those questions that help clarify or expand aspects already put forward by the other three commentators.

Something that calls the attention at first glance is al-Qurṭubī's emphasis in his independence from, and critical approach to ABIA's *Aḥkām al-Qur'ān*, which does not exclude recognition that the path to producing an excellent commentary of the sacred text had already been paved by his predecessor. A couple of illustrative examples are going to be examined in what follows.

From Qurṭubī's treatment of forum shopping I would like to stress his nuanced views on non-Muslims' judicial autonomy and the jurisdictional limits of Islamic law over crimes and torts committed by the *dhimmī*s. Besides the well known distinction between *ḥudūd* or statutory sanctions and 'injustices'[42], Qurṭubī provides the rationale behind Islamic law's exclusive jurisdiction over those 'injustices' when committed by the *dhimmī*s, namely that they 'carry the risk of spreading corruption (*al-maẓālim allatī yantashir min-hā l-fasād*) — e.g. murder, the burgling of houses[43] and other things of the like — since it was not on

41 Under the supervision of John Tolan and Alejandro García Sanjuán. Some preliminary results of this work in progress were presented at Round table 1 on 'Le statut juridique des minoritiés religieuses: un statut d'étrangers?' within the Colloque International RELMIN on Minorités et Cohabitations religieuses au Moyen Âge held in Nantes, MSH Ange-Guépin, 20-22 October 2014.

42 On which see my '*Lā yajūz li-ḥukm al-muslimīn an yaḥkum bayna-humā*', section 3.3.

43 The specific crime of burgling people's houses as committed by the Hilālī Arabs that were transferred to al-Andalus by the Almohads is mentioned in a couple of chancellery documents drafted during that period and echoing the concerns raised by the proliferation of the crime. See Ramírez del Río, José, 'Documentos sobre el papel de los árabes hilalíes en al al-Andalus almohade: traducción y análisis,

the grounds of corruption that the pact with them was concluded (*fa-laysa ʿalā l-fasād ʿahadnā-hum*), **while putting an end to their [potential to spread] corruption is absolutely necessary for the benefit of all and for them[very much] in particular since the protection of their properties and of their persons is implied [in first instance]'**. Qurṭubī does not mention the Islamic statutory sanction for theft, however, notwithstanding that according to Ibn Ḥazm, the Malikis dealt with it the Islamic way, regardless of the accused's religion or will. On the other hand, Qurṭubī observes, 'it might happen that their sacred law is permissive towards these crimes so that [were they awarded judicial autonomy in this particular respect as well], they might contribute to spreading corruption among us, the Muslims. This is why they are not allowed to sell wine publicly or to engage in *zinā* or similar abominations ostensibly, for in this way ignorant Muslims are prevented from being corrupted by them'.

Qurṭubī limits the scope of *dhimmī*s' judicial autonomy to divorce, usury and 'other subjects' to hint, as we are going to see, that usury should be rather included in the category of 'injustices'. ***Dhimmī* law, he claims, has distinctive provisions regarding those matters; forcing *dhimmī* judges to rule them according to Islamic law would be harmful for them and would imply an alteration in their confession (*milla*).** Yet the remaining matters related with debts and socio-legal transactions (*al-duyūn wa-l-muʿāmalāt*), he observes, are not of the same kind and 'have aspects that involve the commission of injustices and [thus trigger the need] to prevent corruption', with the obvious implication that they should be exclusively subject to Islamic law. However, and being aware that his position did not correspond to actual legal practice, he ends up by referring the matter to God for 'He knows best'.

Qurṭubī adheres to the doctrine of *takhyīr* meaning that whenever *dhimmī*s request from Muslim authorities to settle their disputes, the latter are free to opt between accepting and rejecting the assignment. In consequence, he does not uphold the abrogation of Qur'ān V 42 by Qur'ān V 49 **though he acknowledges that the majority of Muslim scholars were in favour of the said abrogation.**[44] Next he corrects ABIA's claim that the exact date of the revelation of those verses was not known. Drawing on the authority of Abū Jaʿfar al-Naḥḥās, Qurṭubī asserts that Coran V 49 was actually revealed after Qur'ān V 42. He then proceeds to a grammatical and lexicographical argument of the kind already seen in Ibn Rushd al-Jadd, al-Shāfiʿī and ABIA himself concerning this very same issue. In first place, he states that Qur'ān V 49 should be understood as meaning 'So judge

Al-Qanṭara XXXV 2 (2014), pp. 376-78 and 380-81. The Hilālīs' involvement in such misconducts appears to have resulted from the weakness of central political power subsequent to the defeat of the Almohad troops at the battle of Las Navas de Tolosa.

44 See *Jāmi'*, VII, p. 491.

between them according to what God has sent down *if you want (*in shi'ta*)*'; the 'if you want' part having been removed (*hudhifa*) in consideration that the capacity to opt between judging or not judging had been already implied in Qur'ān V 42 with which Qur'ān V 49 (*ma 'aṭūf 'alay-hi*)[45] is bound, a relationship that renders abrogation impossible. Therefore, the Messenger's capacity to opt [between judging and not judging] is established, not abrogated (*li-anna l-nāsikh la-yakūn murtabiṭ^{an} li-l-mansūkh wa-ma^{ʿ}ṭuf^{ān} ^{ʿ}alay-hi fa-l-takhyīr li-l-nabī -ṣallā Llāh ^{ʿ}alay-hi wa-sallam- fī dhālik muḥkam ghayr mansūkh*). On a different note, illustrative of the manner in which ABIA'S exegetical legacy is treated in the *Jāmi '*, the claim that 'any (*ba^{ʿ}ḍ*)' in Qur'ān V 49 refers to stoning or 'to the sentence they wanted him to pronounce rather than to [a confirmation that] they aimed at tempting [the Prophet] away from the totality [of what God had sent down to him]' is mentioned by Qurṭubī but refusing to lend it full credit, again deferring the right answer to God, because 'He knows best'.

Conclusions

Observing the development of Muslim legal discourses on *dhimmī*s' judicial autonomy and their engaging in forum shopping alongside the deterioration of their living conditions in al-Andalus from the eleventh to the thirteenth centuries CE has proved an extremely fruitful and clarifying approach to reconstruct the ideological underpinnings of the process, its stages and its internal dialectics.

Almohads' breaking of the *dhimma* pact was certainly preceded by an escalation in legal opinions — occasionally accompanied by tougher political and judicial measures — stressing the difference between Muslims and *dhimmī*s (e.g. through dress), the latter's inferiority, the undesirability of mingling with them beyond the strict minimum required and the total proscription of any act involving the risk of religious syncretism.[46] At the discursive and theoretical level, however, opinions vary significantly and may lead to paradoxes (e.g. the extension of rights and protections exclusive to Muslims implied in Ibn Ḥazm's all-inclusive conception of Islamic law or the reinforcement of communal autonomy implied by Ibn Rushd's restrictive approach to forum shopping) that put the overall anti-*dhimmī* narrative into jeopardy.

Variation is not limited to the difference between several individual approaches to the issue of forum-shopping. The example of ABIA shows that sharp contrast may also emerge as several facets of a single scholar's career either as *qāḍī*, *muftī*, commentator trying to adapt old legal views to new realities, exegete striving to

45 See *Jāmi '*, VIII, 40-41.

46 Fear for 'contamination' and syncretism (e.g. drinking wine or celebrating Christian festivities) during the Almoravid period is particularly salient in Qāḍī `Iyāḍ's biography of the Prophet *Kitāb al-Shifā'* on which see Serrano Ruano, '`Iyāḍ b. Mūsā', pp. 425-30, esp. 427-28.

contemporize the universal message of the sacred sources, or *jihād* preacher leading by example, are explored. This circumstance reminds us of the need to test individual discourses against the record of actual behaviour, and *vice versa*, before characterizing a given author or a given period in connection to a given issue.

The Almohad interval notwithstanding, legal practice appears to have remained steady in its respect for *dhimmī*s' judicial independence and right to appeal to Islamic justice. Whatever the reasons for Almohads' policy towards non-Muslims, they are not to be sought in Ibn Ḥazm's view of an all-embracing Islamic jurisdiction. At most, his case shows that religious universalism, advocacy of the unicity of truth and in consequence, disavowal of juristic disagreement must not necessarily end in a breakdown of the *dhimma* pact.[47] Yet the Almohad experience with its marked tendency towards political and administrative centralization on the one hand and religious homogenization on the other, did not leave the Maliki positions on the reach of Islamic legal jurisdiction intact, as the case of al-Qurṭubī illustrates quite well. In this particular instance, the option to resort to Muslim judges was maintained but a broader scope for Islamic jurisdiction was advocated on the grounds of risk for week Muslims to be corrupted by non-Islamic laws.

The concerns in the background of ABIA's commentary of Qur'ān V 42 and 49 tell us about the existence of a fertile ground in which such a radical measure as forcing the *dhimmī*s to convert to Islam might have made sense. An audience of scholars issued from the very ranks of ABIA's legal school is reflected. Availing themselves of the authority of ʿĪsā b. Dīnār, Ibn al-Qāsim and the respected historian and Qur'ān exegete al-Ṭabarī, those Maliki 'dissidents' — people like ʿAbbād b. Sirḥān al-Shāṭibī,[48] for example — would have claimed that Qur'ān V 42 could not be held as the textual basis for *dhimmī*s' right to judicial autonomy and forum shopping. ABIA's considerations also appear to be expressed in the backdrop of a close ideological residue prone to equating non-Muslims with traitors to the Muslim ruler and with infidels (*kuffār*), all the more so in a historical context of internal political fragmentation and war with the Christians. Indeed ABIA's arguments seem to add meaning to the statement of the Damascene historian al-Dhahabī (d. 748/1348) that one of the reasons having moved the first Almohad caliph, ʿAbd al-Mu'min, to oblige the *dhimmī*s of Marrakech either to convert or to leave was that their ancestors had denied the mission of the Prophet and that the Almohads would not allow them to persist in their infidelity.[49] ABIA's

47 Cf. Fierro, 'A Muslim land without Jews or Christians', p. 247.

48 On whom see Fierro 'A Muslim land without Jews or Muslims', pp. 239-40.

49 See Fierro, 'A Muslim land without Jews or Christians', pp. 239-40, drawing on Hopkins. The transliteration of the full excerpt in Arabic was reproduced by Jean Pierre Molénat — drawing from Salomon Munk — in his 'Sur le rôle des almohades dans la fin du christianism local au Maghreb et en al-Andalus', *Al-Qanṭara*, XVIII/2 (1997), pp. 396-97.

commentary to Qur'ān V 42 & 49 gives one the impression that he was reacting against claims of that sort and striving to demonstrate that there was no coranic or Prophetic ground to deprive the *dhimmī*s of their rights. In addition, he transforms the risk of corruption and syncretism that may come with forum shopping into an opportunity to demonstrate, and rejoice at, the superiority of the *sharīʿa* and its strong appeal over non-Muslims.

ABIA's almost exclusive concentration on the Jews responds to the contents of Qur'ān V 42 and 49 and not their being more significant than their Christian counterparts. Yet this protagonism and close association with the textual arguments at stake might have turned symbolic and explain why they were even more negatively affected by Almohad religious policies than the Christians, the unlikelihood that they might pose any serious military threat notwithstanding.

In consequence with their ideology or just to please a certain sector within the local intelligentsia, the Almohads would have taken a step the Almoravids had never dared — or never wished — to take regarding their non-Muslim subjects. Though very different in nature, this case bears a strong parallelism with the theological issue of anthropomorphism (*tajsīm*) or 'assimilationism' (*tashbīḥ*, i.e. comparing God with His creatures), a problem regarding which the Almoravids had limited themselves to promote — rather than impose by force — an Ashʿarī, more rationally interpretive form of the Islamic creed. ABIA's treatment of Qur'ān V 42 & 49 provides another example of how the Almohads, in their attempt to legitimize their own political and religious mission, gave a radical, extreme -and seen from a contemporary perspective, also perverse- twist to ideological and intellectual trends having originated or taken a strong impulse under the rule of their predecessors.[50]

50 One of the most striking examples of the point to which intellectual developments normally attributed to Ibn Tūmart or to his followers find parallels in the activities of the scholars from the Almoravid period is provided by the role attributed to learning and reason in the definition of *taklīf* or the individual believer's responsibility over the contents of his faith and his legal obligations. Ibn Tūmart (d. 1128 CE) is believed to have been the first to introduce the obligation to learn and understand the tenets of Islamic faith in a Western Islamic profession of faith. Yet we find this very same obligation to exercise the intellect to acquire knowledge about God in Ibn Rushd al-Jadd's (d. 1126) definition of *taklīf* (see Ibn Rushd al-Jadd, *al-Muqaddimāt al-mumahhidāt*, ed. Muḥammad Ḥajjī, Beirut: Dār al-Gharb al-Islāmī, 1988, 3 vols, I, pp. 12-61. There is a substantial difference between these two approaches to individual responsibility, however. According to Ibn Rushd, the obligation to acquire intellectual knowledge about God's existence and the need to obey His commands is not absolute, the faith of he who sincerely believes in God but does not understand what He is and how He is being perfectly valid, while for Ibn Tūmart lack of intellectual knowledge about God amounts to *kufr* or infidelity.

RELIGIOUS MINORITIES' IDENTITY AND APPLICATION OF THE LAW: A FIRST APPROXIMATION TO THE LANDS OF MILITARY ORDERS IN CASTILE

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Historian

Introduction

During the twelfth and thirteenth centuries, the Christian kingdom of Castile experienced one of its biggest territorial advancements, stretching its frontiers from the valley of the river Tagus, situated in the middle of the Iberian Peninsula, to that of the Guadiana in the South. At the same time, the growth of military orders in the Holy Land and the expansion of this model of action to defend Christianity took place. In the midst of such developments, great tranches of land between the Central Mountain System and Sierra Morena were granted to military orders to rule and administer. These lands, just as many others previously under Islamic rule, were already populated at the time that they were incorporated to Castile. There has been some discussion about the fate of this Islamic population after the Christian conquest and how the Islamic communities present at the end of the Middle Ages came to be.[2] Independent of the origin

1 This paper is part of the Research Project 'Los mudéjares y moriscos de Castilla (siglos XI-XVI)' (HAR2011-24915) in the National Research and Development Plan (2008-11), under the coordination of Ana Echevarria Arsuaga.

2 Some specialists, such as Jean-Pierre Molénat and Carlos Barquero Goñi, support the idea that the Islamic population left at the time of the conquest and that the majority of Muslim presence in these lands was the result of the late introduction of Islamic individuals and/or the liberation of Islamic slaves. However, others, such as myself, Luis R. Villegas and Pedro J. Ripoll Vivancos, consider that there are enough clues to let us suspect that at least a fraction of the Islamic population, mostly in rural areas, remained under Castilian rule (an overview on this position can be found in Clara Almagro Vidal 'La Orden de Calatrava y la minoría mudéjar', Isabel C. Fernandes (coord.), *As Ordens Militares. Freires, Guerreiros,Cavaleiros. Actas do VI Encontro sobre Ordens Militares*, Vol. 2 (Palmela: Camara Municipal de Palmela, 2012), pp. 617-30). Likewise, it has been said that Muslims from Uclés left and that the *Mudejar* community found at the end of the Middle Ages was the result of immigration and former slaves (Maria Milagros Rivera Garretas, *La encomienda, el priorato y la villa de Uclés en la Edad Media (1174-1310). Formación de un señorío de la Orden de Santiago* (Madrid-Barcelona: CSIC, 1985), p. 70). An overview of this problem can be seen in Ana Echevarria Arsuaga 'La "mayoría" mudéjar en León y Castilla: legislación real y distribución de la población (Siglos XI–XIII)', En la *España Medieval,* 29 (2006), pp. 7–30.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

 10.1484/M.RELMIN-EB.5.109357

of the Muslim populations living in their territories, there is no doubt that their presence had to be regulated and policed. The efforts to do so in these lands seem to run parallel and in concurrence with kingdom-wide initiatives, although the particulars of the legal measures taken by these institutions still pose many questions to researchers.

However, analysing how the coexistence of different religions in lands that belonged to the military orders in medieval Castile was regulated is problematic. This is partly due to the fact that the sources that have reached us do not tend to delve into facets related to coexistence among religions, but also because most of the extant legislation tends to regulate the attitude of the military orders towards said religious minorities, rather than the actions of the religious minorities themselves.[3]

There are, however, exceptions that allow us to hypothesize different facets of how military orders regulated the presence of these communities and individuals, and how those policies affected the said communities. In this respect, rulings and mandates given by the authorities of those military orders constitute very rich sources for understanding how the different orders regulated the life and actions of adherents of other religions living under their rule.

The aim of this paper, thus, is to explore how written sources can be used to learn how these communities were ruled by their Christian lords as shown by the legal texts issued by them, wherever those are available, to present the panorama that they show, and to make a provisional interpretation of the findings. In order to do so, this paper will be centred on three such documents, each belonging to a different military order and a particular point in time, but all of them demonstrating a very suggestive point about facets of the relations created among communities of different religions and their lords.

Belonging to a certain religion in the Middle Ages implied participating in an entire way of life determined by religious rules which were linked to social, economic and ritual traditions. Therefore, religion was an essential part of a community's identity and frame of reference, and had more weight, to a certain extent, than the geopolitical context in which individuals and communities were inserted.

3 For example, the internal ordinances of the military order of Saint James established in 1249, and confirmed at later dates, imposed limitations to who could revenue the master's income, and among those banned to act as collectors were both Jews and Muslims: 'otrosy que nyngund freyre ni pariente nin criado del maestre nin de comendador nin de freyre nin judio nin moro no coxga nin recabe los derechos del maestre mas por mandado del maestre o de aquellos a quien el diere el poder cojan dos omes buenos e raygados que den buena cuenta e verdadera al maestre o a aquellos que por el oviere poder de poner estos cogedores segund dicho es', and that point is reiterated in 1310 (Library of the Hispanic Society of America, catalogue number HC380/434).

In relation to this, the Middle Ages were also a time when secular and religious matters were deeply intertwined. This meant that religion played a strong role in the formulation and content of the laws. This was not a very problematic matter when the person and the state shared one religion, as there would be little to no contradiction between religious rules and secular laws and, in fact, both tended to overlap. However, living under the rule of lords who belonged to a religion different to one's own made matters more complicated. Muslims living under Christian rule — similarly to Jews — were subject to both their own religious laws and to those established by the secular power of the kingdoms in which they lived. In this sense, Muslims living under Castilian rule were obliged to follow not only the rules decreed by their own religion, but also the regulations imposed by their Christian lords.

Location of the case studies (made by Jose Luis Pascual Cabrero)

The three documents on which this paper is constructed, which are presented in chronological order, have a few points in common. On the one hand, all of them were dispatched by the master or another high authority of one of the military

orders settled in Castile. On the other, all of them reflect certain aspects of life and coexistence regarding the presence of members of a religious minority in their lands. Lastly, the regulations and rulings contained in them do not concern individual matters but general ones and, although at times they are a reflection of the general laws of the kingdom, they are also specifically tailored to the problems the authorities encountered at a given moment.

Mandate and Regulations Given to the Town of Alcázar de San Juan

In the General Chapters of the military orders it was common practice that all complaints raised by their subjects and representatives of the town councils in their lands would be heard, and then the Chapter would take decisions in regard to their requests and observations. These documents, of which, to my knowledge, not many have survived, occasionally regulated the coexistence between the three religions in their lands.

One instance of these actions took place in 1308, when the town council of Alcázar de San Juan (Ciudad Real), a small town belonging to the Hospitaller Order, and situated in the so-called *Campo de San Juan*, in the Southern Castilian Plains, raised a number of requests and complaints to the General Chapter of the said military order. Among those petitions, there was one related to the abuse they were suffering at the hands of a 'moor' called Ali, who was, or so we believe, in charge of the administration of one of the order's houses and/or fortresses, situated near that town.[4] Ali, of whom we do not know a last name, is suspected to have been a slave belonging to the military order, albeit one with a certain level of power.[5]

4 This document is dated May 31st of that year and was published first by Philippe Josserand, 'Nuestro moro que tiene a Cervera. Un châtelain musulman au service de l'ordre de l'Hôpital au début du XIV[e] siècle', Stéphane Boissellier, et al. (dir.) *Minorités et régulations sociales en Méditerranée médiévale* (Rennes: Presses universitaires de Rennes, 2010), pp. 175-77, and later by Pedro A. Porras Arboledas, et al. *Documentos medievales del archivo municipal de Alcázar de San Juan (Siglos XII-XV)* (Alcázar de San Juan: Patronato Municipal de Cultura, 2012), pp. 60-62;. There is also a copy of this document inserted in a later one dated the 5th of May, 1490, that has also been published by Juan M. Mendoza Garrido and Luisa Navarro de la Torre 'Unas ordenanzas sobre Alcázar de San Juan a comienzos del siglo XIV', *Cuadernos de Estudios Manchegos*, 21 (1991), pp. 171-91, specially pp. 189-91.

5 Different interpretations have been given on this point. Mendoza Garrido and Navarro de la Torre 'Unas ordenanzas sobre Alcázar de San Juan', on the one hand, sets forward a similar interpretation to the one espoused here, while Carlos Barquero Goñi simply states that he had a place in the organisation of the military order (Carlos Barquero Goñi, 'Mudéjares bajo el señorío de la Orden Militar del Hospital en la España medieval (siglos XII-XV)', Ana Echevarría Arsuaga (ed.), *Biografías mudéjares o la experiencia de ser minoría: biografías islámicas en la España cristiana* (Madrid: CSIC, 2008), pp. 183-99, p. 194). On the other hand, Ph. Josserand, stresses the use of a possessive article in the mention of Ali in the text, reading in that his condition of slave, without dismissing the importance of the position he occupied (Josserand, 'Nuestro moro que tiene a Cervera', p. 166).

This is one of the few known testimonies of the presence of Muslims in the lands belonging to the Hospitallers in Castile,[6] but a very interesting one at that. Not only because it is one of the earliest references to the collaboration of Muslims with military orders in Castile, but also because in this instance, independent of Ali's status as a slave, this Muslim individual had been granted enough power to carry out actions that were detrimental to a Christian free community, showing that legal status on the basis of religion was not necessarily a hindrance for economic dominance or power.[7]

In the same sense, his being Muslim was not considered an obstacle — or at least it was not stated as such in the pronouncement — to being an administrator for the military order, and even after committing acts that were considered by the general chapter as abusive, there is no reference in the text to him being removed from his position.

This legal text regulates the actions of a Muslim individual related to the military order itself, and in this sense any interpretation that can be extracted from the text itself is limited in regards to Muslims as a whole. However, the situation it reflects raises some interesting points for consideration. In the first place, the existence of Muslim slaves associated to these institutions comes to the fore. In itself, this is a quite generally known fact, but one that still deserves further reflection upon its particulars. In this case, there is an apparent dissociation between the legal status of the Muslim individual (slavery), and the level of empowerment that he is awarded by the institution. Considering that in a similar time period free Muslims are associated to other military orders in positions of responsibility,[8] the question stands of whether this level of reliance on a slave rather than a freeman is a particularity of this military order or just chance.

Moreover, this example helps put into perspective regulations established around the same time period both in other military orders, such as that of Saint James, and in the kingdom as a whole, that had as their aim limiting the roles that could be played by members of religious minorities. The apparently loose control towards Ali previous to this mandate seems to be one of many examples of military orders employing Muslims in their service in positions above

6 Barquero Goñi, 'Mudéjares bajo el señorío', p. 188.

7 Furthermore, this is not by any means an isolated case, as recent studies have started to unveil a significant number of Muslims related to military orders and who could be considered part of the local elites or at least with ample economic means (Clara Almagro Vidal, 'Moros al servicio de las órdenes militares en el Reino de Castilla: algunas reflexiones', *XIII Simposio Internacional de Mudejarismo. Teruel, 4-5 septiembre 2014*, in press).

8 They are identified mostly as personal servants, but also potentially in other roles (cf. Almagro Vidal, 'Moros al servicio').

Christians, sometimes going even against the general laws of the kingdom when doing so.[9]

Mandate and Regulations Given to the Town Council of Uclés

In the Middle Ages, Uclés (Cuenca) hosted not only the convent of the military order of Saint James, but also a populous Muslim *aljama*, which has been the object of certain studies,[10] and a community of Jews. The *aljama* seems to have grown under the shadow of the convent, as attested by the service of Muslims at the said convent from an early date,[11] and in the fifteenth century it boasted a significant size and economic progress favoured by the authorities of the military order.[12] However, the leniency shown by this military order seems to have shifted towards a more restrictive policy during the fifteenth century, in parallel and/or conjunction with the increasingly discriminatory attitudes expressed by the general laws of the kingdom,[13] and thus more strict regulations were issued in regards to the prerogatives and ways of life of this Muslim community.

In this context, and similar to what happened with the town council of Alcázar of San Juan, the General Chapter of the military order of Saint James issued a ruling on 14 November 1440 directed to the town council of Uclés (Cuenca), and in response to a number of questions raised by them. In it, the problems related to coexistence among groups of different religions and the regulation thereof takes first position among the problems presented by Uclés' town council to the order's General Chapter. In answer to their complaints, the authorities of the military order dedicated several chapters of their ruling to clarify and adapt the regulations that refer to religious minorities living in this town.

This document, although limited in its content, is of extraordinary interest, as it depicts a vivid portrait of cohabitation among religions and their problems at a very particular time and, more importantly in relation to the topic of the application of the law, on how the said coexistence was regulated.

Different aspects of coexistence are mentioned in the mandate, all in relation to very definite questions or problems raised to the authorities. Some relate both

9 Almagro Vidal 'Moros al servicio'.

10 Mercedes García-Arenal, 'Dos documentos sobre los moros de Uclés en 1501', *Al-Andalus*, 42-1 (1977), pp. 167-81.

11 García-Arenal, 'Dos documentos', p. 167.

12 This point is established by the statement in a document dated to 1501 about taxes issued at the beginning of the sixteenth century that says 'siempre en la horden los moros fueron bien tratados e se venían a beuir a esta villa' (Archivo General de Simancas, Expedientes de Hacienda, leg. 8, doc. 12. Published by García-Arenal, 'Dos documentos', pp. 171-75.

13 This point has been raised also by García-Arenal, 'Dos documentos sobre los moros de Uclés en 1501', p. 169.

to Muslims and Jews; others are particular to the former, and highlight that, although both communities were experiencing a transition as a consequence of the new regulations in Castile, the evolutions in their situations were not always in parallel as their starting points were not identical not solely because of the disimilarities between their cultural patterns and customs.

The first aspect regulated by the decree is related to the religious minorities' economic sphere, as it raises the question of whether Christians could and should work as apprentices or workers either for Jews or Muslims. The answer is sharp: it is to be forbidden, on the grounds that it is a source of sin and contamination for the Christians, as working for a Muslim or a Jew usually implied living in their home with them and, to some extent, sharing their ways of life.[14]

The second aspect raised in this document is related to the call for prayer of the Islamic community of Uclés. According to the text, the custom at the time was that the muezzin called for prayer two times a day, and this was considered an offence against the Christian faith. However, it was then decreed at the behest of the town council that no call for prayer should be held by the *aljama*, arguing that that practice was forbidden in the whole kingdom of Castile, and, furthermore, that Christians were not allowed to ring the bells for prayer in Islamic countries either. It is also said, when deciding on this matter, that this did not mean that Muslims are not allowed to pray, but that they should do so 'in a hidden manner', similar to that of the Jewish community living in that town.[15]

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14 The ruling does not leave much margin for ambiguity in this respect: 'otrosy al otro capytulo contenido en la dicha petición que en esta dicha nuestra villa viven e moran muchos christianos e christianas asy mayores como menores a soldadas con los dichos judíos e moros, los quales por fuerça han de tomar su dotrina e usar con llos (*sic*) asy como ellos usan, lo qual es contra Dios y contra todo derecho, de lo qual dis que es grant difamación e la christiandat e se recreçen e nasçen muchos pecados y que nos pidían por merçet que los [...] fasemos remediar como la nuestra merçet fuese de quisa que los dichos christianos no vivan con los dichos judíos ni moros en sus casas e moradas. A esto por el dicho nuestro capítulo fue ordenado, proveydo e mandado que de aquí adelante no vivan ni moren a soldada ni en otra qualquier manera ningunos christianos ni christianas así mayores como menores con los dichos judíos ni moros en sus casas e moradas en manera que con ellos non ayan ninguna partiçipación en rasón de la dicha vivienda e es nuestra mente e voluntat que se faga e aya lo asy por la vía e formaen el dicho capítulo contenida e porque todos los christianos e moros de la dicha villa lo sepan e non puedan pretender ynorançia mandamos que sea pregonado el dicho capítulo e la provisión a él dada por las plaças e mercados e logares acostunbrados a la daga (*sic*, por dicha) nuestra villa de Uclés e su tierra' (Library of the Hispanic Society of America, New York, catalogue number B1503).

15 'E otrosy a lo que se contiene en otro capítulo contenido en la dicha petición en que disen que en grant vilipendio e injuria de la Cotólica (*sic*) fe christiana los moros desta dicha villa de Uclés en cada un día a la mañana e a la noche tocan públicamente e lo alto son un anafil disiendo que llaman los moros a oración por tal vía que a todos los christianos de la dicha villa es manifiesto a de tal llamamiento e que esto es muy orrible faser lo tal pasar pues que es manifiesta seta mahumtida (*sic*) ser contra la ley de Ihesu Christo la qual por ellos en sus oraçiones es denostada cada un día e por la denostar faser llamamiento tan público abominable cosa es e que nos suplicava que en esto mandasemos proveer segunt que entiendiesemos ser conplidero a serviçio del altísimo sennor Dios mandando de aquí adelante el tal anafil non se toque ni se faga por los dichos moros otro ningún ni algunt son ni llamamiento público para faser la que ellos desen

One last point raised in this document in relation to religious minorities living in the town of Uclés deals with their clothing and physical appearance, as the General Chapter orders that they were to wear the distinctive signs and clothing that by the general laws of the kingdom they were bound to, in order to be easily identified.[16] This ruling contravened a previous one decreed by the Constable some years earlier, as established in the text, which members of said religious minorities had requested and been granted an exception to the general laws of the kingdom in this respect.

The contents of this document, such as they are, paint a very vivid picture in regards to the limitations that those religious minorities' lives held in the fifteenth century and how they were shifting. It deals with two very important facets of Castilian legislation in regards to Muslims and Jews: their segregation in respect to the Christian community, both economic and social, and the regulation of their visibility, both with the intention of silencing them and of making their identification easier to aid the aforementioned segregation. We cannot establish with certainty if these measures were part of a bigger and more comprehensive

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su oraçión e sy osaren faser orasión que la fagan secreta segunt que la fasen los judíos e que en ello faríamos serviçio a Dios e que aríamos tanta desonestidad como e la dicha nuestra villa por los dichos moros son fechas e fasen en lo susodicho lo qual des que non se fase en logar de todo ese regno nin en ninguna tierra de chistianos ni en tierra de moros se consienten a los dichos christianos taner campanas el qual dicho capítulo e todo lo en el contenido fue visto e esaminado en el dicho nuestro capítulo e por él fue ordenado proveydo e mandado e que se devía faser asy por lo qual es nuestra mente e voluntad e mandamos que de aquí adelante los dichos moros de la dicha nuestra villa de Uclés que non toquen ni tengan anafin ni llamen por almoedano ni fagan otro son ni llamamiento público a sus oraçiones ni llamamientos en ningún tienpo ni ora de día ni de noche e que las dicha oraçiones que ovieren de faser que las fagan secretamente segund que las fasen los judíos e porque lo susodicho venga a sus notiçias mandamos a los alcaldes e alguasil e otros ofiçiales qualesquier de la dicha nuestra villa de Uclés aver a los que agora son como a los que serán de aquí adelante e a cada uno o qualquier dellos se los traigan e ayunten a los dichos moros e fagan e guarden e aydan (*sic*) todo lo en esta nuestra carta e capítulo contenido e cada una cosa dello e que lo fagan asy por ganar públicamente segund e por la forma que se contiene en el otro capítulo antes deste' (Library of the Hispanic Society of America, catalogue number B1503).

16 'E otrosí a lo que se contiene en otro capítulo contenido en esta petición que de gran tiempo a esta parte fue fecha ordenança por mi señor e mi primo el rey que los judíos moros troxiesen sennales por donde fuese conosçido el judío por judío e el moro por moro e que los judíos troxiesen sennales bermejas e los moros e moras capuses amarillos e lunas, lo qual dis que se uso açerca de las dichas sennales largo tienpo e que después que nos partimos del regeno los dichos judíos e moros des que ganaron ante del condestable para que no troxiesen las dichas sennales por lo qual dis que se non conosçen que los dichos judíos ni moros ni quales son christianos en lo qual dis que viene mucho danno e perjuysio a los dichos christianos e se fasen muchos malefiçios por lo qual nos pidieron por merçed que proveyesemos en ello mandando traer a cada uno delos las sennales en el dicho ordenamiento contenidas porque cada uno ande en el ábito que deve andar e sea conosçido a esto por el dicho nuestro capítulo fue ordenado proveydo e mandado que los dichos judíos e moros de la dicha nuestra villa de Uclés de aquí adelante trayan las dichas sennales porque sean conosçidos segund que por la vía e forma e so las penas contenidas en el dicho ordenamiento e nos asy lo mandamos e es nuestra merçet que se faga e cumpla e guarde asy por quanto es complidero al serviçio de Dios e nuestro e que sea asy pregonado públicamente' (Library of the Hispanic Society of America, catalogue number B1503).

policy oriented to the social exclusion of religious minorities, but the text itself leads us to think that this was probably so.

Ruling on the Organisation of Pastures in Bolaños de Calatrava

The last case study that will be examined in this paper is related to a small town belonging to the military order of Calatrava. On December 9th 1479, a number of inhabitants from the town of Bolaños de Calatrava (Ciudad Real), asked the authorities of the military order of Calatrava, on which they depended, for clarification on the subject of the conditions in which stubble could be used as pasture. Unfortunately, most of the document that contains the ruling given on this matter, which is today in the Municipal Archive of the said town, has been lost, so we do not know the contents of the ruling itself, but what does remain is significant. The individuals who requested it and who are mentioned by name, and sometimes also by occupation, include both Christians and Muslims, apparently in equal footing,[17] disputing against the town council of Bolaños de Calatrava about the interpretation of one of the pieces of local legislation. That regulation is probably the ordinances issued about pastures months before, also held today in the local archive,[18] in which no special provision for Muslims is given in regard to access to pastures. Despite the apparent silence, the participation, even though it is at an individual level, of members of the Islamic community when clarifications on this regulations were requested, informs us that Mudejars were included and contemplated together with Christians the regulation of these kinds of economic matters even if they are not explicitly mentioned in the resulting pieces of legislation.

Moreover, in this case Muslims are not a passive object of legislation, but rather they show agency by asking the a*lcalde mayor* of the master of Calatrava, that is to say, the highest judicial authority in the *Campo de Calatrava* region in which Bolaños de Calatrava was located, to rule on a topic that was of interest to them. In addition, no distinction is drawn, at least in this case, between Christians and non-Christians, which is an interesting point, considering that this action took place in a period in which the monarchy was making great effort to enhance the distinction between religions in a number of ways.

17 The plaintiffs were 'el dicho Ruy Martínes Carretero en bos e en nombre e commo procurador del dicho conçejo de Bolannos, de la una parte, e de la otra parte Alfón Días Caro e Gonçalo Sánches, fijo de Pero Sánches, e Estevan Péres e Juçaf, cardero, e Juçaf, çapatero, e Hamet, çapatero, vesinos del dicho logar de Bolannos, sennores de ganados' and, on the other side, 'Pero Sánches, alcayde e alcalde del dicho logar Bolannos' (Published by Luis R. Villegas Díaz, *Colección de documentos del Archivo Municipal de Bolaños (1229-1508) y datos para su Historia en la Edad Media* (Ciudad Real: Instituto de Estudios Manchegos, 2008), doc. 23).

18 More exactly on June 27th 1471. Published by Villegas Díaz, *Colección de documentos*, doc. 21.

Moreover, there is one further reading on this testimony, considering that no free Muslim could hold public office, according to Castilian legislation.[19] This, and also the apparent nonexistence of *aljamas* in many small rural communities until very late in the said century,[20] should have implied that these communities with no *alcalde mayor*[21] and no recognised structure lacked an official representative before Christian authorities. However, this document could be an example of how this apparent isolation could have been easily alleviated in a non -official way by the intervention of Muslims at a personal level. The easy access of *Moriscos*, as converted Muslims were called in Spain, to public office posts in town councils such as Bolaños, for example, or Villarrubia de los Ojos, situated 40 kilometres North from Bolaños, leads the researcher to think that the leaders of the Muslim communities played a more important role in the decision processes of town councils, albeit outside of the official channels, than what has previously been thought.

Muslim elites in these two small rural communities in the lands of the military order of Calatrava seem to have been socially well integrated, in general and, on occasion, in a good economic situation, and it is not out of the question that they may have had voice, if not vote, in matters discussed in the town council that affected both them and their interests. Therefore, it could be thought, although not confirmed, that this particular testimony and an earlier request made by cattle lords, both Christian and Muslim, in 1388 for a new public pasture[22] may be interpreted as a sign of their capability to exercize influence and power outside of the official channels.

19 It was so at least since the General Assembly of Castile celebrated in Alcalá de Henares in 1345. Cf. Olatz Villanueva Zubizarreta, 'Regulación de la convivencia con los mudéjares en las ciudades de la cuenca del Duero', Beatriz Arízaga Bolumburu and Jesús A. Solórzano Telechea (eds), *La convivencia en las ciudades medievales. Nájera. Encuentros internacionales del medievo, 2007* (Logroño: Instituto de Estudios Riojanos, 2008), pp. 351-67. p. 358. See also Ana Echevarria Arsuaga, 'Política y religión frente al Islam: la evolución de la legislación real castellana sobre musulmanes en el siglo XV', *Qurtuba*, 4 (1999), pp. 45-72, pp. 48 y 57.

20 Much of the work in this respect is still to be done, but data seems to show that, at least for the military order of Calatrava in Castile, many of the *aljamas* were recognised at a much later date than it had been previously assumed (Clara Almagro Vidal, 'Revisando Cronologías: el proceso de formación de las aljamas en tierras calatravas', in Adela Fábregas and Ana Echevarria (eds), *De la Alquería a la Aljama. Fundamentos de poder y organización social de las comunidades rurales de matriz islámica en Granada y Castilla*, forthcoming 2015).

21 About this leading figure, cf. Ana Echevarria Arsuaga, 'De cadí a alcalde mayor. La élite judicial mudéjar en el siglo XV (I)', *Al-Qantara*, XXIV (2003), pp. 139-68.

22 Published by Villegas Díaz, *Colección de documentos*, doc. 7.

Thoughts and Conclusions

These testimonies raise points in common to all military orders and others that seem to show differences that are very suggestive, especially considering factors known by other sources not contemplated here.

Firstly, Castilian legislation in the Middle Ages tended to separate Muslims from Christians in a myriad of ways. However, how effective that 'social distinction' really was is still open to debate in some cases. New data is unveiling a more nuanced and uneven situation and bringing to the forefront the need to concentrate on the particulars of each case in order to achieve a better understanding of the dynamics surrounding the existence of religious minorities as a whole. While first hand accounts in Uclés might imply that there was a strict separation between communities based on religion at the end of the 15th century,[23] that schism does not seem to have been complete.[24] In this respect, we are told by other sources that the local nobility of the lands of the order of Calatrava at times protected their Muslim neighbours in their houses when times of danger came,[25]

23 Juan López Sobrino, inhabitant of de Uclés and former Muslim, witness to the nobility lawsuit of another resident of Uclés that took place around 1530, stated in his testimony that he did not have much contact with Christians prior to their conversion. As he stated, 'començó a conosçer al dicho Diego Moya (the litigant's father) que dezían que avía sydo vezino de la dicha villa de Uclés e que lo nonbravan muchas personas de la dicha villa que dezían e dizen que lo conosçieron porque en aquel tiempo este testigo e sus parientes no tenían tanta conversación con ellos e con los otros vezinos de la dicha villa como tienen e han tenido después que se convertieron de moros a nuestra santa fee católica' (Lawsuit by Gregorio Gutiérrez, inhabitant of Uclés, about his nobility. Archivo de la Real Chancillería de Granada, catalogue number 04943-018).

24 Lope de Cuenca, boilermaker, inhabitant of Uclés, and former Muslim, witness to the nobility lawsuit of another resident of that town, remembers in his testimony given in 1548 a tradition of certain Muslims that gave presents every year to the most important representatives of Uclés in exchange for protection: 'syendo él mançebo biviendo con Diego de Medina, siendo moro el susodicho e otros moros que vivían en aquel tienpo en la dicha villa de Uclés tenían de costumbre las fiestas prinçipales de enviar a los hijosdalgo e personas valerosas que bivían en la dicha villa de Uclés frutas de rosquillas y megados e otras cosas para tenellos por valedores e ansy este testigo una vez juntamente con un hermano suyo fueron a llevar al dicho Arias de Viana difunto çierta fruta de la susodicha que enviaba el dicho Diego de Medina su amo por ser el dicho Arias de Viana hijodalgo e persona prinçipal en la dicha villa e porque el dicho su amo le tenía por amigo e valedor y el dicho Arias de Viana resçibió la dicha fruta, e dio a su hermano deste testigo un real de aguilando e le enbió a dar las graçias al dicho su amo por aquello que le enbiava' (Lawsuit by Arias de Viana, inhabitant of Uclés, about his nobility. Archivo de la Real Chancillería de Granada, catalogue number 05051-019).

25 A witness in yet another nobility lawsuit in 1531 remembers how the father of the litigant protected Muslims from this town inside his own house at times of conflict between the masters of the orders of Calatrava and Saint James, 'en tiempo de las guerras del maestre Santiago que entró en esta horden vino a esta villa para robar la tierra avrá más de çinquenta años, este testigo vido que por su themor los conversos e christianos nuevos que agora son christianos nuevos, que a la sazón heran moros, llevaron sus bienes e haziendas a las casas del dicho Martín de Sazedo e ellos asy mismo se entraron a valer a casa del dicho Martín de Salcedo porque hera honbre fijodalgo notorio e porque los del maestre de Santiago les catavan mucho onor al dicho Martín de Sazedo por ser honbre hijodalgo' (Nobility lawsuit by Pedro de Salcedo, inhabitant of Villarrubia de los Ojos, Archivo de la Real Chancillería de Granada, catalogue number 04869-004).

openly invited them to their celebrations[26] and, even more, they boasted about doing so fifty years after the forced conversion. Although particular situations may vary, the generalized silence in the sources regarding the military order of Calatrava that have reached us regarding coexistence between Christians and Muslims lead us to consider that, even when general laws of the kingdom were carried out, they may not have necessarily had, in this case at least, the intended consequences sometimes.

The diversity went beyond the geographic variable. For instance, the example of Ali showcases a close relationship between knight commanders and members of the Islamic communities on occasions that have been identified in other examples in Castile.[27] It is doubtless that this close relationship, that goes beyond individuals and filters into whole communities, would also influence how legislation was applied to them. The apparent leniency towards the Muslim community living in Uclés up to 1440, in this respect, would be another sign of the attitude held by at least some of the Castilian military orders toward their Muslim subjects.

In addition to this, although not unrelated, these texts show that the social and economic differentiation between Christian and Muslim communities was not as clear cut as one could have supposed. Along this line, the documents here presented show Muslims in positions of power (although with certain reservations), Muslims in equal standing with Christians, and Muslims (and Jews) who were being slowly marginalized by Castilian law and society. In this respect, although data is still insufficient to draw definite conclusions, it seems that there was representation of religious minorities at different social levels and with different degrees of agency in every case.

On another front, in every case here presented, it is an authority of the order (the master, a representative of his, or the General Chapter of the military order) who rules on the cases that relate to members of the religious minority in question. It is not the monarchy, nor the town council who does it, despite the documents coming, at least in two cases, from local archives belonging to their

26 A number of witnesses from the lawsuit about the nobility of Rodrigo de Taboada, inhabitant of Consuegra, in 1546, remember that on the occasion of the wedding of the nobleman Arias Pérez de Taboada, inhabitant of Alcázar de San Juan and father of the litigant, the bride's family, which came from Villarrubia de los Ojos, organised a great feast and included in it Muslims and Jews as well, even making provisions for their dietary limitations, as they would have had separate pantries: 'porque se aquerda que ovo en ella tres despensas, una para moros e otra para judíos e otra para christianos viejos e hidalgos porque todos tres estados de gentes se hallaron presentes a la comida de las bodas, la quales fueron gran gasto e regozijo e los desposorios se hizieron en Villarrubia donde la dicha Ana de Quintanilla hera de allí natural' (Testimony of Pedro López de Medina, inhabitant from Consuegra. Lawsuit by Rodrigo de Taboada, inhabitant of Consuegra, about his nobility. Archivo de la Real Chancillería de Granada, catalogue number 00051-002). This apparently took place despite the prohibition since 1412 of having celebrations together or appearing in social ceremonies (Ana Echevarria Arsuaga, 'Política y religión', p. 50).

27 Almagro Vidal, 'Moros al servicio'.

respective municipal archives. It is possible that this may be a reflection of the close relationship between this particular human group and the military orders that were their lords, which manifests also in other aspects of their organisation and characteristics.[28]

Moreover, this data brings to the fore the importance of accounting for the particular contexts in which communities belonging to a religious minority integrated themselves within the Christian majority, as situations could vary considerably from one geographic area to another, as well as between different time periods.

We have a good example in the characteristics of the legal texts that regulated the incorporation of conquered lands to the Kingdom of Castile — and with it, its Muslim inhabitants. The town charters or *fueros* given to frontier towns in the twelfth and thirteenth centuries contain mostly regulations about criminal justice and its governance, only mentioning the Muslim neighbours in reference to possible conflicts that may arise from coexistence. In contrast, the treaties of conquest, or *capitulaciones*, reached in the kingdom of Granada at the end of the fifteenth century are highly detailed and are oriented to safeguard the status of the autochthonous populations.[29] In this sense, the *fuero* of Calatrava, dating back to the twelfth century, does not regulate Muslim populations in the same way as the *fuero* of Abanilla, composed in the fifteenth century as a reorganisation of previous legal texts, does.

Even in the same time period, the decentralization of legal codes and the existence of a number of different jurisdictions which could have a diverse orientation probably determined that kingdom-wide legislation would not have the same effect in all the land. It can even be argued that the observance of the law differed from one geographic area to another, or even from one town to the next.[30]

For instance, the town charter or *fuero* given to the Islamic city of Calatrava (from which the homonymous military order took its name) at the time of its

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28 For example, in the military order of Calatrava, the close location of the 'morerias' or moorish quarters in regards to the castle or house of the commandry, as seen in Villarrubia de los Ojos or Daimiel (Clara Almagro Vidal, 'La comunidad mudéjar de Daimiel: algunas noticias', *III Jornadas de Historia de Daimiel*, in press; and Trevor J. Dadson, *Los moriscos de Villarrubia de los Ojos (siglos XV-XVIII). Historia de una minoría asimilada, expulsada y reintegrada*, Madrid — Frankfurt-am-Main, 2007, p. 71). Likewise, the establishement of aljamas or morerias in the towns of Almagro, Aldea del Rey (for Calatrava); Uclés (for the order of Saint James); or Alcántara (for the order of Alcántara) has been linked to the existence of liberated Muslim slaves that would previously have belonged to the centres of power of each military order.

29 Miguel Á. Ladero Quesada, *Los mudéjares de Castilla en tiempos de Isabel I* (Valladolid: Instituto 'Isabel la Católica' de Historia Eclesiástica, 1969), p. 29 y ss.

30 Symptoms of this may have been the particular conditions held by certain Muslim communities when in 1502 they were forced to baptize. For example, the 'five *aljamas* of the Campo de Calatrava', obtained a charter specifying a more lax transition to Christianity. And so did those of Uclés, riding on the privileges granted to the aljama of the neighbouring town of Huete (García-Arenal, 'Dos documentos', pp. 177-81).

conquest in 1147 made no provisions in respect to its Muslim population,[31] nor are there in the land that belonged to this military order other texts regulating the presence of Muslims in their lands. A similar circumstance is found in the lands belonging to the Hospitallers in this area, as far as we know. In contrast, the town of Uclés was awarded in 1179 a *fuero* similar to the *Fuero Latino*, which had the particularity of contemplating the security and protection of Muslims that went to populate it.[32] This offers a very different starting point for each land although later evolutions seem to have brought, to some point, a certain convergence among them in the fifteenth century.

In conclusion, although the general regulations of the kingdom were applied to the lands of military orders,[33] the degree to which those said institutions were committed to such tasks is still to be determined, although provisional analysis shows it to be uneven.

These legal texts, though they do not paint a perfect picture of the situation of religious minorities in lands of military orders, offer very suggestive implications on the day to day life of these communities and the institutional attitudes and policies towards them.

31 Archivo Histórico Nacional, Órdenes Militares, Registro de escrituras de Calatrava I, catalogue number 1341-c, fol. 4.

32 Rivera Garretas, *La encomienda*, p. 70.

33 In the lands of the military order of Calatrava, for example, there is testimony of the separation of quarters for the religious minorities, as has been confirmed at least for the towns of Almagro (Luis R. Villegas Díaz, *Paisaje urbano con figuras. Almagro, Edad Media* (Granada: Grupo Editorial Universitario, 2003), p. 94), Daimiel (Almagro Vidal, 'La comunidad mudéjar de Daimiel', and Villarrubia de los Ojos (Dadson, *Los Moriscos de Villarrubia de los Ojos*, p. 71, and most probably also for other towns such as Pozuelo de Calatrava (Emma Solano Ruiz, *La Orden de Calatrava en el Siglo XV. Los señoríos castellanos de la Orden a fin de la Edad Media* (Sevilla: Universidad de Sevilla, 1978), p. 323).

LA INTERACCIÓN EN EL ESPACIO DE DOS SOCIEDADES DIFERENTES: CONCORDIA ESTABLECIDA ENTRE EL BACHILLER HERNANDO ALONSO Y LA ALJAMA DE MOROS DE TALAVERA[1]

Yolanda Moreno Moreno

UNED

Los pactos y acuerdos han estado presentes continuamente en la vida política y privada de todas las culturas a lo largo del tiempo, debido a la necesidad de encontrar salidas acordadas para garantizar la convivencia de individuos o grupos determinados afectados por intereses de diversa naturaleza. La *carta de concordia* nació ante la conveniencia de plasmar por escrito todo lo tratado y establecido entre las partes implicadas por contiendas o litigios, convirtiéndose, de esta manera, en un instrumento jurídico válido cuyo incumplimiento conllevaría a la intervención judicial de las autoridades competentes.

El archivo de la antigua Colegiata de Santa María la Mayor, situado en la localidad de Talavera de la Reina,[2] conserva una carta de esta índole. Fechada en el año 1471, el documento ofrece información sobre un acuerdo protagonizado por los representantes de la aljama de moros de Talavera y el bachiller Hernando Alonso, administrador del hospital de Puente del Arzobispo y luego fundador de los hospitales de Talavera y Villar del Pedroso.[3] La concordia tuvo lugar en el propio *aljeme*, la mezquita de los mudéjares talaveranos.[4] El cometido de su elaboración consistió en tratar de evitar pleitos que podrían haber sido originados

1 El presente trabajo recoge algunos resultados obtenidos en el transcurso del Proyecto de Investigación 'Los mudéjares y moriscos de Castilla (siglos XI-XVI)' (HAR2011-24915) del Plan Nacional de I+D+i (2008-11), dirigido por Ana Echevarría Arsuaga.

2 En lo sucesivo solo Talavera.

3 AColTa. Caja 271, leg. 2. Ver apéndice documental. Este documento ha sido publicado en algunas ocasiones por los historiadores locales para constatar exclusivamente la existencia de una mezquita mudéjar en la ciudad. El pionero fue Fita, *Datos epigráficos*, pp. 67–69. Para encontrar un análisis más exhaustivo del mismo, aunque en referencia a la ubicación de este edificio religioso Moreno, 'Los mudéjares de Talavera y su casa de oración'.

4 La denominación *aljeme* para la mezquita, procede de la adaptación de la mezquita aljama o del viernes al castellano. Tapia Sánchez, *La comunidad morisca de Ávila*, p. 54. Almaxic o almají es la castellanización del sustantivo árabe *al masŷid* y aparece en otras ciudades castellanas. Ver F. Maíllo Salgado, *Vocabulario básico de historia del Islam*, Madrid, Akal, 1987, p. 111.

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

10.1484/M.RELMIN-EB.5.109358

por la construcción de unos edificios que la dicha aljama mandó alzar sobre las paredes medieras que delimitaban el corral del Hospital de la Misericordia, aún en proceso de edificación, y el propio *aljeme*.

Este documento público se ha constituido en una pieza clave que ha permitido dar a conocer la organización de la aljama, el emplazamiento de sus instalaciones principales y las fricciones que pudieron surgir con las autoridades cristianas por cuestiones de límites y por la ocupación de espacios importantes destinados preferentemente para el uso de los cristianos.

Talavera y sus mudéjares

El valle del Tajo, en la zona de Talavera, ha venido siendo objeto de asentamientos durante varios siglos por parte de comunidades humanas de carácter diverso, debido a la rica y fértil vega que le rodea. Fundada en la época romana altoimperial con el nombre de *Caesaeróbriga*, la actual Talavera fue convertida durante el siglo VIII en dominio islámico bajo la denominación de *Talabīra*.[5] La capitulación de Toledo y su taifa y el consiguiente sometimiento a Alfonso VI a partir del año 1085,[6] provocó un cambio en la configuración socioespacial de la ciudad en los siglos venideros por la llegada escalonada de repobladores procedentes del norte y sur peninsular.[7] La situación estratégica de la villa — Talavera aparece desde un principio como una ciudad — encrucijada situada a medio camino de Toledo y Mérida, en uno de los grandes ejes esteo — este de la Península —, posibilitó la actividad comercial y ganadera de sus pobladores. Así mismo, su puente sobre el río Tajo permitió la continuidad de una de las vías que facilitaban el tránsito de Córdoba hacia el norte del país, reforzando aún más las dos vocaciones, comercial y ganadera, que condicionaron prácticamente casi toda la historia de Talavera.[8]

La ocupación del valle del Tajo también significó el inicio de la constitución de las comunidades mudéjares en Castilla. La falta de referencias documentales sobre los musulmanes de Talavera después de la conquista, impide en la actualidad tener conocimientos sobre el alcance del mudejarismo en sus tierras, al menos hasta el primer cuarto del siglo XIV cuando son citados unos esclavos que fueron donados al cabildo de la Colegiata de Santa María.[9] Algunos historiadores han

5 Ibn Hawqal, *Configuration de la Terre*, p. 62 y *Configuración del Mundo*, p. 15; Ahmad al-Rāzī en Lévi-Provençal, 'La Description de l'Espagne', p. 82.

6 Esta conquista sería concebida por el soberano castellano-leonés como la primera etapa de una expansión sobre toda la Península. De la misma manera, cuando Alfonso VI se apodera de Toledo tras las capitulaciones de mayo de 1085, todos los alrededores de su territorio pasarían también a formar parte de su soberanía: Coria, Talavera, Alarcos, Consuegra, etc. Buresi, *La Frontière entre chrétienté et Islam*, pp. 39-40.

7 Izquierdo Benito, *Reconquista y repoblación de la tierra toledana*, pp. 30–32.

8 Terrasse, 'Talavera hispano-musulmane', p. 79.

9 Moreno, 'Los mudéjares de Talavera y su casa de oración', p. 70.

defendido que los musulmanes, tras la toma de algunas plazas por los cristianos, emigraron en masa hacia espacios dominados por sus propios correligionarios ante la imposibilidad de permanecer en suelo dominado por infieles.[10] Molenat es uno de los investigadores que han apostado por esta solución para el caso de Toledo, basándose en la casi ausencia de musulmanes en las fuentes posteriores a la conquista.[11] Así mismo, este autor sostiene la idea de que la presencia de mudéjares en documentos anteriores al siglo XIV, es debida a la llegada de esclavos que con el paso del tiempo, fueron manumitidos por sus propios señores.[12] De esta manera, el mudejarismo toledano se desarrollaría sobre todo a partir de elementos foráneos y no de los descendientes musulmanes que habitaban la antigua *Tulaytula*.

Un privilegio de donación de la villa otorgado por Enrique II al Arzobispo de Toledo Gómez Manrique, datado el 25 de Junio de 1369, vuelve a referirse a los moros del lugar al ser mencionados en el documento junto al resto de población que residía durante esas fechas en Talavera:

> Damos vos en donaçion pura, para agora e para siempre jamás, para vos e para vuestra eglesia, la nuestra villa de Talauera, con todos los castiellos e fortalezzas d'ella e de sus términos e con todas las rentas e pechos e derechos de la dicha villa e de sus términos e con todos los vasallos, así christianos commo judíos e moros de qualquier ley e estado e condición que sean, que agora son o serán d'aquí adelante en la dicha villa e en sus términos.[13]

La documentación talaverana del siglo XV consistente en cartas de compraventas, censos, etc., ha permitido identificar además los espacios más inherentes de la comunidad islámica dentro de los límites del perímetro urbano. La ubicación de la mezquita, morería, cementerio y tiendas ha posibilitado el conocimiento de la configuración de estos lugares, su andadura a lo largo de un pequeño periodo de tiempo, circunscrito fundamentalmente a la última mitad del siglo XV y los inicios de la siguiente centuria, y la definición de la mayoría de ellos como zonas de pervivencia y reivindicación de una cultura propia relegada a la categoría de minoría. En ocasiones, estas edificaciones han coexistido con otras propiedades del resto de comunidades religiosas presentes en la villa, la cristiana y la judía. Sin

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10 El movimiento de población musulmana hacia otros, o los mismos, lugares de origen como consecuencia de algunas capitulaciones, aún es objeto de un debate historiográfico según Echevarría Arsuaga, 'La "mayoría" mudéjar en León y Castilla', p. 25.

11 Molénat, *Campagnes et monts de Tolède*, pp. 27–30.

12 'Las liberaciones sin conversión, en base a la compra de la libertad o por testamento del propietario o del esclavo, nutren el grupo mudéjar y explican el hecho paradójico de que el grupo de los musulmanes libres esté mejor representado en el siglo XIV y en el XV que en los siglos precedentes'. Molénat, 'Mudéjares, cautivos y libertos', p. 124.

13 El documento de donación se encuentra custodiado en el Archivo de la Catedral de Toledo y ha sido publicado por varios autores. Entre ellos García Luján, 'Expansión del régimen señorial', p. 85.

duda, esta interacción ha generado en algunos momentos tensiones derivadas de esa vecindad[14] por motivos religiosos, o simplemente por cuestiones concernientes a la violación del espacio físico del otro. Las tensiones se dieron fundamentalmente con la comunidad dominante, la cristiana, por la ocupación de áreas principales o simbólicas de la villa en las que se ejercieron algunas actividades peculiares del colectivo islámico, aunque en otras ocasiones, las disensiones tuvieron mucho que ver con la obligación de cumplir órdenes dictadas por la Corona. En el primer caso, moros y judíos tuvieron que quitar las carnicerías cercanas a la Colegiata de Santa María, posiblemente por ser este lugar el centro de poder político y religioso, y donde se llevaron a cabo los principales eventos festivos de Talavera, celebraciones muy acordes con el calendario cristiano. En el apartado siguiente se verá como los mudéjares de la villa tuvieron una carnicería cercana a su mezquita, que en el año 1471 ya formaba parte de los dominios del Hospital de la Misericordia. En el año 1456 a los mudéjares se les ordenó expresamente que no fueran osados de 'degollar vacas ni carnero en la plaça so pena de sesenta maravedis'.[15] Es muy probable que esta acción ejecutada en un lugar tan emblemático para los cristianos como fue la plaza de Santa María, promoviera el traslado de la carnicería de los moros a otro lugar.

Más tardía es la referencia a la carnicería de los judíos. En el año 1490 un documento recoge un censo sobre unas casas en la colación de Santa María que lindaban 'con la carnicería que solía ser de los judíos'.[16] En este caso, el desplazamiento de este establecimiento a otro lugar pudo estar relacionado con la ordenanza dictada por los Reyes Católicos en 1480 que obligaba a judíos y musulmanes a instalarse en espacios delimitados para su propio uso.[17]

Pero hubo otros momentos en que se optó por otro tipo de soluciones menos dramáticas a través de instrumentos que garantizaran la convivencia de gentes de distintas confesiones religiosas. La concordia que a continuación se va a describir, responde a la resolución tomada en su momento por las partes intervinientes en la misma, como medida para poner punto y final al conflicto originado por asuntos relacionados con el aprovechamiento de zonas, en teoría, comunes.

14 Con Alfonso X, los mudéjares fueron hombres libres al estilo de los vasallos del rey o los habitantes de derecho (vecinos) en las ciudades. Ver Bueno y Tolan. 'Une étude en miroir', p. 29. En Talavera, se dio la circunstancia de que no eran denominados vecinos, como en otros lugares, caso de Ávila, sino solo como moradores de la villa. Por lo tanto, al igual que los judíos, carecieron de algunos derechos compartidos por los miembros de la comunidad cristiana.

15 Moreno Moreno, 'Los mudéjares talaveranos y sus actividades', p. 61.

16 Sección Nobleza del Archivo Histórico Nacional, Sig. FRIAS, C.1317, D.4.

17 En el caso de los mudéjares, la morería se ha podido identificar en Barrionuevo gracias a un documento de 1506 custodiado en el Archivo Histórico Provincial de Toledo. También es mencionado en el mismo el 'arco de la morería', construcción especial que delimitaba y configuraba esta barriada. Moreno, 'Los mudéjares talaveranos y sus actividades', p. 58.

La concordia de 1471

Una concordia es un procedimiento de resolución de un conflicto que 'no exige el recurso a instancia (control social público o privado), y que plasma simplemente el acuerdo directo entre las partes'.[18] Representa la disposición a un convenio entre poderes equiparados, posibilitando la convivencia y evitando la entrada en largos y costosos procesos judiciales.

Con este fin, el 8 de noviembre del año 1471 se crea una carta de concordia, un 'contrato de las paredes de entre el ospital de la Misericordia y el aljeme de los moros' según reza la portada del documento. Estos lugares reseñados correspondían a dos espacios destacados cercanos a la plaza principal de la villa, ocupados indistintamente por dos comunidades religiosas, la musulmana y la cristiana, diferenciadas, entre otras cosas, por su situación de desigualdad jurídica. El Hospital de la Misericordia fue fundado en 1475 por uno de los intervinientes en el pacto aquí presentado, Hernando Alonso, bachiller y, posteriormente, canónigo de la Colegiata de Santa María la Mayor. Este personaje, benefactor de algunas parroquias talaveranas y responsable de la institución de otros hospitales en la comarca, fue desde mediados del siglo XV adquiriendo propiedades para después mandar erigir partes del recinto del Hospital de la Misericordia, tal como podrá ser comprobado en este documento y en otros relacionados con la compra de edificaciones anejas para este fin.[19] La institución fue administrada por el cabildo de la 'Colegial' durante un periodo comprendido entre los años 1475 y 1837, año en el que comenzaron a tener efecto en Talavera las medidas derivadas de la desamortización de Mendizábal. El Hospital llegó a convertirse en el principal centro sanitario y asistencial de la ciudad hasta bien entrado el siglo XX.

El *aljeme* es identificado con la mezquita que utilizaron los mudéjares en Talavera, al menos durante el siglo XV. Esta afirmación viene refrendada por la información que la concordia ofrece cuando los propios representantes de la aljama ubican el corral del hospital 'fazia la casa de nuestra oración'. El documento también arroja otros dos datos significativos relacionados con este emplazamiento. Uno de ellos se refiere al *aljeme* como el escenario donde se realizó el acuerdo, por ser el sitio que presentaba las construcciones discordantes a inspeccionar. El otro punto reseñable es la definición de *aljeme* como lugar donde se celebraba el ayuntamiento o asamblea de la comunidad mudéjar.[20]

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18 García Marco, 'Tipología documental e investigación histórica', p. 48.

19 Moreno, 'Los mudéjares de Talavera y su casa', pp. 108–09. Existe otro documento referido a la consagración de la capilla de San Sebastián del hospital a manos de Fray Diego, Obispo de Granada, nominal en la práctica, en 1460 que ha sido tratado entre otros por Pacheco Jiménez, 'Espacios religiosos cristianos en la Talavera medieval', p. 129.

20 Una de las acepciones aplicadas a la palabra ayuntamiento es la del 'acto de reunirse los varios elementos que participan en el gobierno del concejo'. Gibert, *El concejo de Madrid*, p. 139. En un principio,

> Sepan quantos esta carta vieren, como nos, el aljama de los moros de la villa de Talavera, estando en nuestro aljeme que es dentro en el cuerpo de la dicha villa en la collaçion de la iglesia collegial de Santa María, ayuntados en nuestro ayuntamiento.

Las mezquitas poseen, además de la función religiosa ya conocida, un papel social y político esencial, sobre todo las consideradas como mezquitas aljamas o principales. La mezquita aljama se encarga de la oración obligatoria del viernes a mediodía y al mismo tiempo, ostenta labores administrativas, políticas y judiciales. También son consideradas como centros de enseñanzas y espacios donde se debaten asuntos legales. Esta descripción permite incluir al 'ayuntamiento' de los moros en la mezquita por ser el lugar donde se 'ayuntaban' los rectores del grupo musulmán para tratar cuestiones relativas a su comunidad.[21] De esta manera, el *aljeme* concentraría todas las funciones propias de las mezquitas aljamas: casa de oración, lugar de reunión, etc. Hubo comunidades mudéjares más extensas, caso de Ávila,[22] que contaron además con más de una edificación dedicada a las labores de culto. En Talavera, con medio centenar de familias mudéjares, e incluso menos,[23] el número de edificios de esta factura, al menos desde la segunda mitad del siglo XV, sería muy posiblemente de uno solo. Este dato vendría ratificado por otras fuentes posteriores que informan de la existencia de un corral del hospital de la Misericordia que antes fue mezquita.[24] Aún no se ha podido constatar si este emplazamiento dejó de funcionar como tal alrededor de 1480 para levantarse otro igual en la propia morería según requerían las disposiciones de los Reyes

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Castilla contó con asambleas vecinales de cristianos o concejos abiertos encargados de las cuestiones municipales, hasta que Alfonso XI decidió transformarlos en regimientos o concejos cerrados donde intervinieran sólo unos pocos. En Talavera, durante el siglo XV, el 'ayuntamiento' se producía a través de la justicia, el regimiento y otros oficiales como el alcalde, alguacil, procurador y escribano. El lugar escogido por las autoridades locales castellanas para celebrar las reuniones concejiles ha sido recogido en las fuentes documentales también bajo el nombre de 'ayuntamiento'. En el caso de Talavera, se conoce la existencia de este espacio desde el año 1446. Suárez, *La villa de Talavera*, pp. 191–93. La aljama de moros talaverana, al igual que el resto de aljamas peninsulares, presentaba una estructuración similar a la que tenían tanto los concejos cristianos como las aljamas de los judíos. De esta manera, no es de extrañar que se haya establecido un cierto paralelismo entre las casas consistoriales de los cristianos y el 'ayuntamiento' de los moros. En el caso de Portugal, la regulación administrativa y judicial de las comunas musulmanas y judías, también fue modelada en gran medida en base a las que tenían los concejos de las ciudades cristianas, Soyer, *The Persecution of the Jews and Muslims of Portugal King Manuel I and the End of Religious Tolerance (1496-7)*, p. 31.

21 Moreno, 'Los mudéjares de Talavera y su casa', p. 107.

22 Tapia, *La comunidad*, pp. 61–62.

23 Moreno, 'Los mudéjares talaveranos y sus actividades', p. 57.

24 'En una mezquita que fue de los moros que está hoy en un corral del hospital que dicen de la Misericordia'. Paz y C. Viñas, *Relaciones histórico-geográfico-estadísticas de los pueblos de España*, p. 454. En 1516, el cabildo de la Colegiata adquiere las casas del antiguo *aljeme* para ampliar el Hospital. Moreno, 'Los mudéjares de Talavera y su casa', p. 110.

Católicos.[25] No obstante, es posible que la mezquita continuara enclavada en la colación de Santa María hasta el momento de la conversión de los mudéjares al cristianismo, al ser ubicada por varios documentos de principios del siglo XVI[26] en el mismo lugar que ocupó antes de la entrada en vigor de las órdenes dictadas por los Reyes Católicos en las Cortes de Toledo. Hay que tener en cuenta que la morería no fue creada en terreno sin edificar, sino aprovechando casas que fueron otorgadas mayormente por los cristianos en rentas a la comunidad mudéjar, según los testimonios recogidos en los censos que afectaron a propiedades situadas en ella durante los años que siguieron a la promulgación de las medidas segregadoras en las Cortes de 1480.[27] Es posible que la falta de espacio provocara el mantenimiento del primitivo *aljeme* como lugar de culto islámico, aunque también es cierto que pudo levantarse una pequeña y sencilla mezquita en la morería según requería el Ordenamiento que, por su breve uso y falta de monumentalidad, no permaneció en la memoria del colectivo cristiano.

Respecto a las partes intervinientes en el acuerdo, además del ya citado bachiller Hernando Alonso, la concordia identifica a la aljama de los moros de la villa de Talavera, o mejor dicho, a sus representantes, los notables de la comunidad. La palabra 'aljama' designaba a la comunidad de musulmanes o judíos vasallos de una autoridad cristiana, así como al consejo o junta de principales y ancianos encargados de regir los designios de su grupo. La autoridad apelaba a la aljama, sobre todo, cuando quería gestionar a través de ella impuestos generales u otros creados específicamente para minorías. Al mismo tiempo, las aljamas se constituyeron en sedes de las circunscripciones judiciales que habían sobrevivido al periodo islámico, llegando a controlar, en lo que respecta a las aljamas urbanas, los territorios rurales que conocían presencia musulmana.[28] En la concordia, los cargos principales habidos en la aljama talaverana durante ese momento, vienen identificados con el nombre de la persona que los desempeñaba:

> Maestre Alí, alfaquí de la dicha aljama, e con maestre Audalla, alcalde de la dicha aljama, e con maestre Abrahen Rondí, procurador de la dicha aljama, e con maestre Yuçaf Rondí e maestre Audalla Frenero, vehedores de la dicha aljama.

La importancia de este párrafo radica en que su información posibilita el conocimiento de buena parte de la composición de la aljama de moros de Talavera, al

25 'E si en los lugares donde ansí señalaren no tosieren los judíos sinogas e los moros mesquitas, mandamos a las personas que ansí diputaremos para ello, que eso mismo dentro de los tales circydos les señalen'. *Cortes de los antiguos reinos de León y de Castilla*, t. IV, p. 150.

26 Moreno, 'Los mudéjares de Talavera y su casa de oración', pp. 111–12.

27 También hay que tener en cuenta que en la propia morería continuaron residiendo cristianos, así como mudéjares fuera de ella. Moreno, 'Los mudéjares talaveranos y sus actividades', p. 58.

28 Echevarría Arsuaga, 'Las aljamas mudéjares castellanas en el siglo XV', pp. 93–95.

menos para el año 1471. La comunidad mudéjar estaría formada por un alcalde (el maestre Abdalla), un alfaquí (maestre Alí), un procurador (maestre Abrahen Rondí) y dos veedores (maestre Yuçef Rondí y maestre Abdalla Frenero). La categoría de los cargos ejercidos por el grupo rector, es indicativa de que la aljama talaverana podría ser catalogada como 'aljama de tipo medio'. Mientras, otros colectivos más pequeños, solían contar con un consejo reducido comandado en ocasiones por un solo alfaquí. Por contra, en el caso de existir comunidades mudéjares más extensas, las mismas podrían ser regidas por un alcalde mayor, cuatro o cinco jurados o viejos, un zalmedina, un alamín y un alfaquí.[29] El alcalde, también conocido como cadí o juez, sería la autoridad máxima de la aljama.[30] Actualmente, la concordia es la única fuente disponible que hace alusión al puesto de alcalde. Este hecho provoca la dificultad de poder establecer cómo fue el desempeño de esta función, las relaciones del cargo con los dirigentes cristianos, la naturaleza de la elección del mismo o su vigencia a lo largo de la Baja Edad Media para Talavera. El alcalde contaba con el asesoramiento del alfaquí, personaje muy considerado por el grupo por ser el experto en teoría legal islámica. El procurador era el encargado de los pleitos y las cuestiones judiciales que tenía la aljama con otros poderes, y los veedores, cargo electo, asumían la responsabilidad fiscal porque eran los que llevaban a cabo el repartimiento de los pechos que los moros debían pagar a la Hacienda regia.[31]

El detonante que causó las tensiones entre ambas partes radicó en la construcción de unos edificios por parte de la aljama sobre una pared que delimitaba los dos espacios diferenciados, el hospital y el *aljeme*, y que había sido levantada por el bachiller Alonso según reconocen los propios mudéjares intervinientes en el pacto:

> Se esperauan aver pleitos e debates e questiones sobre razón de çiertos hedefiçios que nos la dicha aljama tenemos fechos en las paredes del corral del hospital de la misericordia desta dicha villa, que vos el dicho Ferrand Alonso bachiller fezisteis, que es en linde del dicho aljeme.

Las fricciones se produjeron por la forma de interpretar el derecho que podría tener un individuo o institución para levantar edificaciones sobre una pared lindera no erigida por su propia mano. La aljama argumentaba que 'podimos fazer [...] que las dichas paredes del corral del dicho ospital eran medieras' mientras, el

29 *Ibid*. p. 95.

30 Para conocer más sobre la figura de los alcaldes y alcaldes mayores, véase Torres Fontes, 'El alcalde mayor de las aljamas de moros'; los numerosos de Molénat, entre ellos, 'Une famille de l'élite mudéjare' y 'L'élite mudéjare de Tolède aux XIVe et XVe siècles. y Echevarría Arsuaga, 'De cadí a alcalde mayor'.

31 Ladero Quesada, 'Los mudéjares de Castilla en la Baja Edad Media', p. 350.

bachiller, por boca de los moros, opinaba que 'non pudimos fazer los dichos hedefiçios sobre las dichas paredes por quanto vos fizistes las dichas paredes'.

Estas dos concepciones a la hora de interpretar algunos aspectos relacionados con la ordenación del espacio urbano, han podido ir en consonancia con las creencias que ambas culturas presentaban en materia de organización de la ciudad bajomedieval. En el caso islámico, la configuración de la ciudad musulmana iba sobre todo encaminada, en la esfera privada, a garantizar la protección de la intrusión en la intimidad del hogar así como de evitar el perjuicio a sus moradores derivados de cualquier intervención urbanística. De esta manera, la legislación incidiría en preservar la integridad de la persona, en caso del deterioro de sus estructuras, y su intimidad, regulando al mismo tiempo la apertura de vanos y puertas y tratando de evitar que determinadas partes de un edificio sobrepasaran una altura en concreto. Otra de las características de la ciudad musulmana es el sentido muy fuerte de solidaridad y coherencia social que se daba entre sus pobladores a la hora de tener que compartir los espacios comunes del barrio y también a la hora de tener que llegar a un acuerdo entre vecinos para edificar en la comunidad. Así pues, estos modos de organización social se conciben corno un conjunto de lazos de solidaridad que vinculan a personas conscientes de su comunidad de intereses es decir, el bien común.[32] Esta concepción, ¿influyó en la aljama talaverana y por lo tanto no vio mal utilizar una estructura no costeada por sí misma, o fue quizás un mero oportunismo?

Cuando no se respetaban las reglas y se ponía en juego la convivencia vecinal, intervenía, en el caso islámico, el aparato judicial para restablecer el orden urbano y asegurar el buen funcionamiento del sistema.[33] Uno de los sucesos que requirió la intervención de los jueces, curiosamente guarda relación con una medianería y dos comunidades religiosas diferentes, aunque casi cuatrocientos años antes y en un contexto distinto. El hecho, cuya resolución no se conserva, ocurrió en la Córdoba andalusí de 1072 entre un moro, Hassān, el demandante, y el demandado, Ishāq, su vecino, judío que representaba los bienes habices de la sinagoga. El problema comenzó cuando se cayó una pequeña habitación del musulmán que se interponía entre ambas propiedades, provocando al mismo tiempo la destrucción del muro mediero levantado entre la casa derruida y la del judío. En este caso, lo que a Hassān le interesaba era evitar que Ishāq tuviera la tentación de agrandar su dominio arrebañando el espacio vacío dejado por la cerca y la habitación caída con una nueva edificación costeada por su parte. Es decir, Hassān lo que buscaba era ratificar por escrito su posesión para evitar cualquier intrusión ajena con una nueva construcción que la jurisprudencia islámica podría garantizar si Ishāq

32 Carballeira Debasa 'La ciudad en al-Andalus' p. 84.
33 Mazzoli-Guintard, *Vivre à Cordoue au Moyen Âge*, pp. 178–179.

demostraba con el tiempo un uso ininterrumpido de la misma.[34] La exposición de este suceso sirve para comprender la importancia que tuvo la pared mediera en cuestiones de respeto a la propiedad individual entre vecinos. ¿Levantó Hernando Alonso su pared, aunque fuera sufragada por sí mismo, para preservar las posesiones del nuevo hospital? Probablemente sí, pero esta concordia no se refiere a la usurpación de un terreno ajeno, sino al aprovechamiento de una construcción cuya propiedad podría ser compartida o no según se expondrá a continuación.

Realmente, ¿las leyes cristianas permitían el aprovechamiento de paredes medieras en el caso de no haber intervención en su edificación? La regulación de la medianería se encontraba sometida a reglas inorgánicas, agrupadas en las diversas Ordenanzas Municipales y en la jurisprudencia y en la práctica, hasta que fue regulada sistemáticamente por el moderno Código Civil.[35] No se conservan disposiciones semejantes para Talavera recogidas de forma ordenada para este periodo. Aunque el hecho de contar Toledo con unas Ordenanzas del año 1400 similares a las emitidas para Sevilla y Córdoba,[36] al menos en lo que respecta a los alarifes, hace posible pensar que estas medidas se extendieron a otras ciudades castellanas como es el caso de Talavera.[37] En cuestiones relacionadas con paredes medieras las Ordenanzas Municipales de Toledo de 1400 dictaban:

> Capítulo XXX de las compañías que han los ombres en las paredes. [...] Otrosí, si dos omes ovieren alguna cosa de consuno, e el uno dellos quisiere fazer por medio paret por aver su parte estremada, amos deven dar el logar para el çimiento por medio, e ayan la pared de consuno. E si el uno nos quisiere dar su parte del logar para el çimiento nin fazerla pared, el otro faga la pared en los suyo e sea suya. E si aquel que non quiso fazer la pared arrimare alguna cosa a a quella pared, tómelo todo el dueño que fizo la pared e sea suyo.[38]

Esta normativa contemplaba la plena propiedad del muro de uno de los dos vecinos si solamente uno de ellos se había encargado de satisfacer todos los gastos

34 Este caso judicial pertenece al compendio de un jurista jienense llamado Ibn Sahl. Daga Portillo, 'Aproximación a la obra de Al-Alḥkām al-Kubrā del cadí 'Īsā ibn Sahl', p. 237–249 y Mazzoli-Guintard, *Vivre à Cordoue*, pp. 41–50 e idem, 'Espacios de convivencia en las ciudades de al-Andalus', pp. 86–89. Una fetua emitida por Ibn Rušd ratifica en cambio que no se adquiría la propiedad del área que hay por encima o al lado de una casa vecinal simplemente por el hecho de haber construido el primero. Según Delfina Serrano posiblemente la gente pensaba que al construir en primer lugar se tenía derecho a reclamar con el paso del tiempo la propiedad del terreno implicado. Serrano Ruano, 'Las demandas particulares', p. 33.

35 Benítez de Lugo, 'Los alarifes en las ordenanzas', p. 182.

36 Comez Ramos, 'Ordenanzas urbanas de la construcción en la Baja Edad Media castellana', p. 58.

37 Aunque no existe una normativa municipal compilada para Talavera, los libros de Acuerdos conservan disposiciones en materia de regulación del nombramiento y cometido de los alarifes que son muy similares al que recoge las Ordenanzas de Toledo. Moreno, 'Los mudéjares talaveranos y sus actividades', pp. 66–67. Posiblemente este aspecto no fuera el único que ambas legislaciones compartirían.

38 Morollón Hernández, 'Las ordenanzas municipales antiguas', p. 436.

derivados de la construcción del mismo. De esta manera, el bachiller Hernando Alonso, en base a las disposiciones contempladas por las ordenanzas locales, consolidaba su demanda de tachar de ilegal el procedimiento constructivo llevado a cabo por la aljama, porque él era el único propietario de dicha estructura.

Sin embargo, el administrador del Hospital de la Misericordia decidió avenirse a un acuerdo y renunciar a todo proceso judicial para que todos 'estén en vna concordia por bien de paz, e por nos quitar de pleitos e contiendas e gastos'. También es posible que el bachiller decidiera pactar al no respetar uno de los puntos señalados en las Ordenanzas que obligaba a levantar la pared en los dominios de la persona que quisiera construirla a su costa, aunque la concordia nada dice sobre ello.

Cada parte se comprometió a respetar:

– La aljama:

> Que los hedefiçios que oy están fechos sobre las paredes del corral del dicho hospital, por parte del dicho aljeme, que estén fechos permanezcan para siempre jamas [...]. Podamos fazer e fagamos si quisieremos vn portal a vna agua, que vengan las aguas al dicho aljeme cargando sobre la pared del dicho corral del ospital que esta fazia la casa de nuestra oracion, asi como sobre pared mediera.

– El bachiller:

> Que non podades alçar la dicha pared más de lo que oy esta que esta, de tres tapias[39] en alto con su çimiento [...]. Que podades alçar la casa del ospitalera del dicho hospital que es adonde solía estar por tiempo la carneçeria de los moros egualandola con el otro palaçio que esta junto con la dicha casa, e que lo podades fazer e fagades igualar echando la maytad de las aguas al dicho aljeme.

Estos fragmentos hacen referencia, además del pacto en sí llevado a cabo, a una remodelación que pudo haberse dado durante esas fechas en las dependencias del *aljeme*. El documento señala que esa intervención se acometió en el entorno de la 'casa de oración' o sala de oración, lugar característico e indispensable en una mezquita que limitaba con el corral del hospital. Esta estancia, ¿pudo haber cambiado su ubicación primitiva o simplemente fue ampliada apoyando parte de

39 El tapial es una técnica tradicional de ejecución de fabricación de muros cuyo material utilizado se conforma en el mismo lugar donde se levanta la obra. El material, generalmente tierra, se apisona dentro de un molde que se apoya sobre el mismo muro que se está ejecutando. No existiría, en principio, una limitación a la dimensión mínima de la altura de los tapiales. La longitud de los tapiales depende del número de aros que sujetan los tapiales en su posición. La utilización de tres aros de sujeción resultaría la estructura más eficiente. La distancia entre cada aro, es de unos 75-85 cm, por lo que se puede estimar una altura para el tapial de 150-70 cm, que, junto a otras longitudes precisas para sujetar las tapias precedentes, arroja una medida cercana a los 2 metros. Cuchí i Burgos, 'La técnica tradicional del tapial', pp. 159-61.

su estructura en la pared medianera edificada por Hernando Alonso para intentar preservar la intimidad de la actividad religiosa llevada a cabo en ella? De momento, y según el estado actual de la investigación, sería muy aventurado decantarse por algún tipo de hipótesis referente a esta cuestión. Aunque es posible que la intervención arqueología que se está planteando hacer en un futuro próximo cerca de la zona, pueda resolver los interrogantes aquí reseñados.

Respecto a la casa 'del hospitalera' próxima al *aljeme*, antigua carnicería de los moros, indicar, que el alcance de este acuerdo proporcionó al edificio la garantía de poder seguir su elevación en altura. Esto no significaba que la casa, en teoría, no pudiera hacerlo sin el aval ofrecido por los moros en este pacto, porque en realidad las ordenanzas municipales permitían construir edificios tan altos como los que se encontraban anejos a ellos.[40] El problema radicaba en que uno de los propietarios de los edificios colindantes al hospital, la aljama, sí valoraba la importancia del levantamiento vertical de las paredes, si ello iba en perjuicio de su intimidad. Los musulmanes, muy celosos de su vida privada, y más si existían cohabitando cerca grupos religiosos ajenos a sí mismos, habrían intentado impedir, en la medida que las leyes cristianas les permitían, que los cristianos pudieran violar un espacio tan propio evitando que sus construcciones próximas sobrepasaran el nivel de sus tapias.[41] En este caso, los mudéjares tuvieron que llegar a un acuerdo obviando esta preferencia porque, en un principio, eran ellos los que más tenían que perder si decidían no pactar.

Conclusiones

Entre otras cosas, la Reconquista trajo al panorama hispano toda una serie de pactos y acuerdos habidos entre cristianos y musulmanes en virtud del modo de conquista llevado a cabo y de la realidad socioeconómica dada en cada lugar. Con el paso del tiempo, las prerrogativas otorgadas a los mudéjares fueron modificadas, provocando, en muchos casos, el detrimento de sus privilegios y obligando a cada grupo a adaptarse a las nuevas circunstancias inherentes a las condiciones en que se desenvolvían las sociedades del momento. Si bien, la legislación emanada de la

40 'Capítulo XXII de las casas que pujan unas sobre otras en alteza. Qualquier orne que ha su casa de yuso de otra casa agena, devele fazer el çimiento e la pared fasta que iguale con la casa de suso. E el dueño de la casa de suso, deve fazer todo lo al, e el tejado e fazer como viertan las aguas, en guisa que non faga daño al çimiento...'. *Ibid.* p. 434.

41 La tradición islámica también atiende la elevación de los edificios en altura siempre que no se indicara lo contrario en las condiciones de compra y se preservara la intimidad del hogar. Los juristas se mostraron muy intransigentes respecto al mantenimiento de la moral impidiendo constantemente en sus dictámenes el acceso a espacios desde los que pudieran otearse casas vecinas y la apertura de puertas y ventanas enfrentadas. Serrano, 'Las demandas particulares', p. 31. En este caso esta preferencia no se respetaría si se abrieran ventanas o vanos en dirección al patio del *aljeme*. La concordia no contempla este aspecto.

Corona tuvo un peso decisivo en la andadura de judíos y moros en la Península, también es cierto que las otras autoridades cristianas de las que dependían, con menos poder, pero más cercanas, influían sobremanera en estos pequeños grupos. Talavera formó parte del señorío arzobispal desde 1369. Los mudéjares, por lo tanto, permanecieron más tiempo vinculados al rey que al poder de la mitra toledana. La casi ausencia de fuentes relativas a los moros talaveranos para este periodo, ha provocado que el estudio del mudejarismo talaverano se vea fuertemente condicionado por la presencia de los sucesivos señores venidos desde Toledo. Como ocurrió con otros lugares de señorío, es posible que las comunidades minoritarias en Talavera gozaran de cierta protección garantizada por la autoridad civil y eclesiástica, fundamentalmente por cuestiones económicas. De esta manera, puede explicarse que la villa conociera una concentración de espacios religiosos diferentes en torno al principal núcleo de poder político y religioso, concretamente la plaza que dio nombre la Colegiata de Santa María la Mayor.

En el *aljeme*, mezquita de los mudéjares de Talavera, se realizó durante el año 1471 una concordia cuya vigencia, en teoría, sería para siempre. Este pacto fue realizado entre un poder dominante, la Iglesia, y una minoría religiosa, la musulmana, por lo que, *apriori*, el acuerdo podría suponer un revés para la aljama, y más teniendo en cuenta que el bachiller estaba aún construyendo su complejo hospitalario y podría beneficiarse de espacios pertenecientes al propio *aljeme*, como ya antes había sucedido con la carnicería de los moros en un momento indeterminado. ¿Por qué Hernando Alonso se avino a pactar si en base a las ordenanzas municipales tenía todas las de ganar? ¿Es posible que cometiera alguna irregularidad mientras construía su hospital, que afectara al *aljeme*? ¿Hubo intervención arzobispal a favor de los moros o el arzobispo Carrillo trató de evitar que el concejo se inmiscuyera en asuntos como el aquí descrito por ser precisamente este último el encargado de realizar pesquisas en torno a cuestiones urbanísticas? Quizás la respuesta sea más sencilla y todo tenga que ver con la propia personalidad del bachiller, hombre piadoso proclive, tal vez, a garantizar la convivencia. Bajo este punto de vista, no es de extrañar que decidiera acrecentar los edificios del hospital en altura mediante un pacto y no sobre un derecho que la ley cristiana le otorgaba.

Apéndice documental

1471, noviembre, 8. Talavera

Carta de concordia entre la aljama de los moros y el bachiller Ferrand Alfonso, administrador de los hospitales de la Villafranca de Puente del Arzobispo sobre unos edificios levantados sobre unas paredes del hospital de la Misericordia.

AColTa. Caja 271, leg. 2.

Sepan quantos esta carta vieren, como nos, el aljama de los moros de la villa de talavera, estando en nuestro aljeme, que es dentro en el cuerpo de la dicha villa en la collaçion de la iglesia Collegial de Santa María, ayuntados en nuestro ayuntamiento, en vno, con maestre Alí, alfaquí de la dicha aljama, e con maestre Audalla, alcalde de la dicha aljama, e con maestre Abrahen Rondí, procurador de la dicha aljama, e con maestre Yuçaf Rondí e maestre Audalla Frenoco, vehedores de la dicha aljama, nos, la dicha aljama de la vna parte e yo el bachiller Ferrand Alfonso administrador que soy de los ospitales de Villafranca de la Puente del Arçobispo de Toledo, que es ribera del río de Tajo e vezino de la dicha villa de Talavera de la otra parte. Por razón que entre nos, la dicha aljama e vos el dicho bachiller, se esperauan aver pleitos e debates e questiones sobre razón de çiertos hedefiçios que nos la dicha aljama tenemos fechos en las paredes del corral del Hospital de la Misericordia desta dicha villa, que vos el dicho Ferrand Alfonso, bachiller, fezisteis, que es en linde del dicho aljeme. Los quales, dichos hedefiçios nos, la dicha aljama, dezimos que podimos fazer diziendo que las dichas paredes del corral del dicho ospital eran medieras, e vos, el dicho bachiller, dizides que non pudimos fazer los dichos hedefiçios sobre las dichas paredes por quanto vos fizistes las dichas paredes. Por ende, nos, ambas las dichas partes de vna, estén en vna concordia por bien de paz, e por nos quitar de pleitos e contiendas e gastos que sobre los dichos hedefiçios se podrían seguir e recresçer. A cada vna de nos las dichas partes otorgamos e conosçemos que sobre los dichos hedefiçios somos convenidos e egualados en esta manera e forma que se sigue: que los hedefiçios que oy están fechos sobre las paredes del corral del dicho hospital, por parte del dicho aljeme, que estén fechos permanezcan para siempre jamas, edemás que nos, la dicha aljama, podamos fazer e fagamos si quisieremos, vn portal a vna agua que vengan las aguas al dicho aljeme cargando sobre la pared del dicho corral del ospital que esta fazia la casa de nuestra oración así como sobre pared mediera. E que vos, el dicho bachiller, non podades alçar la dicha pared más de lo que oy está, que está de tres tapias en alto con su çimiento, e que vos el dicho bachiller podades alçar la casa del ospitalera del dicho hospital que es adonde solía estar por tiempo la carneçeria de los moros egualandola con el otro palaçio que esta junto con la dicha casa e que lo podades fazer, e fagades igualar, echando la maytad de las aguas al dicho aljeme. E así, en esta forma e manera nos, ambas las dichas partes, quitemos e nos plaze que sea a fin que todo lo que dicho es e cada vna cosa dello para siempre jamás. E por esta presente carta, nos, ambas las dichas partes e cada vna de nos, nos obligamos de lo ansi tener, guardar, e cumplir, e mantener, e auer por firme para siempre jamás. Todo lo que suso dicho es e cada una cosa e parte dello, e de non yr ni venir contra ello ni contra alguna cosa e parte dello, sopena de diez mill maravedís desta vsual moneda que agora corre, que dos blancas valen vn maravedí e vna blanca faze çinco dineros. Que pechen e paguen en pena la parte

que contra ello fuere o viniere en algund tiempo o por alguna manera a la otra parte que por esta eguala e conueniençia estouiere e la dicha pena pagada o non pagada que todavía sea e fin que firme esta carta e en todo lo en ella contenido. Para lo qual, todo lo que dicho es e cada vna cosa e parte dello en si tener guardar, e conplir, e pagar, e mantener e auer por firme, nos, la dicha aljama, obligamos a ello e para ello a todos los bienes e rentas e propios de la dicha aljama, ansi muebles como raizes auidos e por auer. E yo, el dicho Ferrand Alfonso, bachiller, obligo a ello e para ello a todos los bienes del dicho Ospital de la Misericordia, ansi muebles como rayzes, espirituales e temporales presentes e futuros. E nos, ambas las dichas partes e cada vna de nos, por esta presente carta, rogamos e pedimos e damos poder conplido a qualquier juez o alcalde o corregidor, ansi eclesiástico como seglar u otro qualquier señor o prelado ante quien esta carta paresçiere e della fuere pedido cunplimiento de justicia que la faga, ansi tener guardar e conplir e auer por firme luego en todo e por todo segund que en ella se contiene bien, ansi e tan conplidamente como si antes lo uiesemos contenido en juyzio sobre por todos abtos judiçiales e por el fuese dada sentencia definitiua contra qualquier de nos, las dichas partes. E por nos fuese consentida e non viese apelado della la parte contra quien fuese dada e la sentençia fuese pasada en cosa judgada e dada a entregar. Sobre lo qual, todo e sobre cada vna cosa e parte dello, nos ambas las dichas partes, e cada vna de nos, renunçiamos que non podamos auer ni nos sean dadas ni otro plazo alguno que en esta razón de fuero e de derecho nos deua ser dado e otorgado. E otrosi, renunçiamos e partimos e quitamos de nos e de cada vno de nos e de nuestro fauor e ayuda, todas leyes de fuero e de derecho canónico e çeuil, ansi en general como en especial, e todas razones e defensiones e exepçiones e alegaçiones, e todos vsos e costumbres estilos e fazañas e toda abtentica vsada e non vsada e todo derecho común e priuado, e todas cartas e preuillegios de merçed de rrey e de rreyna, de príncipe, de ynfante, de arçobispo e de obispo e de otro señor o señora quales quier ganadas e por ganar escriptas e por escreuir que contra esta carta sean o contra parte della que nos non valan. E otrosi, renunçiamos a la ley del derecho en que diz en general rrenunçiaçion non vale e todas las otras leyes fueros e derechos e renunçiaciones que contra ella acuerdan que non valan a ninguna de nos, las dichas partes, en juzio ni fuera del. E porque esto sea cierto, e firme e non venga en dubda, nos, ambas las dichas partes, otorgamos dos cartas en un tenor e so vna forma para cada vna de nos las dichas partes la suya. E queremos e mandamos que qualquier dellas que parezca sana vala e fagase en juyzio e fuera del, bien ansi e a cada conplidamente como si ambas a dos partes çiesen que fueron fechas e otorgadas. En la villa de Talauera, dentro, en el aljeme de los moros, estando la dicha aljama ayuntados en su ayuntamiento, ocho días del mes de nouienbre año del nasçimiento de nuestro saluador ihesu christo de mill e quatroçientos e setenta e vn años. Testigos que fueron presentes al otorgamiento

desta carta en vno conmigo, Pedro Ferrandez, escriuano publico en la dicha villa, Pedro de Areualo e Pedro Gonçalez carpentero, vezinos moredores en la dicha villa, e Jorge, criado de maestre Lorenço, entallador, morador en la dicha villa, para estos llamados e especialmente e rrogados. Va emendado sobre raydo o diz pre vala e non le enpresta. E yo Pedro Ferrandez, escriuano público de Talauera e, otrosi, notario público dado por la abtoridat arçobispal en todo el arçobispado prouinçia e dio el de Toledo. Presente fuy al otorgamiento desta carta, en vno con los dichos testigos e de ruego e pedimiento e otorgamiento de la dicha aljama de los moros e del dicho Ferrand Alfonso, administrador dicho, esta carta de eguala e conveniençia escreui e en esta pública forma la torné segund que ante mi pasó. E en testimonio de verdat fize aquí este mio signo.

Pedro Ferrandes escriuano

Fuentes impresas

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WHAT DO LEGAL SOURCES TELL US ABOUT SOCIAL PRACTICE? POSSIBILITIES AND LIMITS

The twelve essays in this volume address different examples of the complex relations between religious and legal theory on the one hand and the legal practice and social interaction on the other. The articles examine Mediterranean Societies, from Syria and Egypt to the Iberian Peninsula, between the seventh and fifteenth centuries. The focus has been on legal texts: both those issued by the majority (Muslim or Christian) authorities attempting to circumscribe, limit or restrict the place of minorities in their midst, and those coming from the minority communities themselves, attempting to regulate their relationships with the majority society. Despite the great diversity of texts and contexts addressed here, several common themes emerge. I will focus on three of them: building and policing confessional borders, convergence and borrowing across those borders, and the anxiety of influence.

We examined a number of cases in which jurists engaged in the building or maintenance of barriers between majority and minority communities: prohibitions or restrictions of Christian participation in Muslim funerals, festivals, etc.; restrictions on marriage; restrictions on 'infidels' bathing with the faithful in public baths (Marisa Bueno). Language use could also help minority communities express and consolidate legal traditions and institutions: as David Wasserstein shows, Jewish communities in the Muslim world had more success doing this (through the use of Hebrew & Aramaic) than did Christian communities (who tended to adopt Arabic as a liturgical language, although languages such as Armenian and Syriac continued to be used in some communities).

Yet such legal barriers between religiously-defined communities were far from impermeable. While many legal documents show a will to separate and distinguish along religious divides, others show attempts to incorporate members of other faith groups into legal systems. For Mark Cohen, *dhimmī* legal systems in twelfth-century Egypt are an integral part of overarching Muslim legal system; one could almost say that Maimonides serves as a Jewish mufti. While *sharīʿa* in theory prohibited *dhimmīs* from appearing as accusers or witnesses in Muslim courts, various Maliki jurists strive to find appropriate and specific ways for *dhimmīs* to swear oaths and more generally to participate in the legal system (Camilla Adang; Delfina Serrano). And Ana Echevarria examines the parallel integration of mudejar legal system into Castilian legal system. Moreover, the legal institutions and practices of the dominant culture often have a profound

Law and Religious Minorities in Medieval Societies: Between Theory and Praxis, ed. by Ana Echevarria, Juan Pedro Monferrer-Sala and John Tolan, RELMIN 9 (Turnhout Brepols, 2016), pp. @@–@@

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impact on the minority legal systems: Johannes Pahlitzsch examines the adoption & adaptation of the *waqf* system into Melkite law.

The transgression or blurring of confessional boundaries was a source of unease for various jurists, in both majority and minority communities: one might call it the Anxiety of influence. Food raises all sorts of issues, involving issues of which food is licit to eat and with whom (and in what circumstances) one may eat it. Should a good Muslim eat food (in particular meat) bought from or prepared by *dhimmīs*? Maria Arcas Campoy shows how various Malikite jurists, while acknowledging that it is permitted to eat meat purchased from *dhimmīs,* urge that good Muslims avoid doing so, as the meat is potentially impure from its possible association with non-Muslim religious rites. The porousness of barriers between legal systems created some anxieties, as well. Minority judges risked losing jurisdiction to the majority justice system. Castilian Mudejars, for example, might prefer taking their cases to Castilian judges (as Ana Echevarria shows): the *Breviario çunní* attests to the struggle to maintain Muslim legal practice and communal identity within larger Hispanic Christian culture. And the majority system was sometimes perceived to be threatened as well: Delfina Serrano shows how for some jurists the acceptance of *dhimmīs* as witnesses in Muslim courts — illegal in theory but necessary in practice — provoked anxiety and criticism on the part of some jurists.

Finally, various hints in our documents suggest that the written record is only the emerged tip of the iceberg. David Wasserstein reminds us that in legal proceedings documents carried limited weight compared to oral testimony (which is rarely transcribed). So clearly we are often led astray by the surviving documents. Moreover, litigants (or potential litigants) often choose to seek agreement outside the legal system through negotiation, arbitration, etc. Yolanda Moreno examines the example of the concord between the aljama of Talavera and the Bachiller Hernando Alonso: while here we have a written account of an extrajudicial agreement, presumably such negotiations often left little or no traces in the written record. Johannes Pahlitzsch reminds us that judges giving decisions often do not see themselves bound by the written laws, but by broad principles of justice. All of these elements counsel caution and modesty in making generalizations about social and legal practice based on the surviving written record.

This volume is part of a wider reflection, as the ninth volume of the collection 'Religion and law in Medieval Christian and Muslim Societies' on social and legal status of religious minorities in the Medieval world. The first volume, *The Legal Status of Ḏimmī-s in the Islamic West*, published in 2013, examined the laws regarding Christian and Jews living in Islamic societies of Europe and the Maghreb and the extent to which such legal theory translate into concrete measures regulating interreligious relations. The second volume in this series (published in 2014),

under the direction of Nicholas de Lange, Laurence Foschia, Capucine Nemo-Pekelman and John Tolan, was devoted to *Jews in Early Christian Law: Byzantium and the Latin West, 6th-11th centuries*. Three volumes have been published over the course of 2015: *Religious cohabitation in European towns (10th-15th centuries)*, edited by Stéphane Boisselier and John Tolan (RELMIN 3); Clara Maillard's *Les papes et le Maghreb aux XIIIème et XIVème siècles,* which examines pontifical letters dealing with Christian communities in the Maghreb (RELMIN 4); *Religious and Ethnic Identities in the Process of Expulsion and Diaspora Formation* (RELMIN 5, edited by John Tolan). Finally, four volumes have been published in 2016, including this one and *Jews and Christians in Medieval Europe: the historiographical legacy of Bernhard Blumenkranz* (RELMIN 6, edited by Philippe Buc, Martha Keil and John Tolan)*;* and *Religious Minorities, Integration and the State* (RELMIN 7, edited by John Tolan, Ivan Jablonka, Nikolas Jaspert and Jean-Philippe Schreiber); and *Medieval Minorities: Law and Multiconfessional Societies in the Middle Ages* (RELMIN 9, edited by John Tolan, Nora Berend, Jerzy Mazur, Youna Masset, and Capucine Nemo-Pekelman). And the RELMIN database continues to make available online key legal sources of the Middle Ages concerning religious minorities.[1]

John Tolan

1 http://www.cn-telma.fr/relmin/index/?langue=eng

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