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Delfina Serrano

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Judicial pluralism under the “Berber empires” (last quarter of the 11th century C.E. – first half of the 13th century C.E.)

Delfina Serrano

Abstract: This article deals with judicial pluralism under the rule of the Almoravids and the Almohads. Both dynasties deserve to be considered jointly in a study of the judiciary in the pre-modern Islamic West. Given their close association with Mālikism, the Almoravids created a scenario apt for the Mālikī *fuqahā'* to improve the position of *qāḍī*-s vis-à-vis governmental judges. Conversely, *qāḍī*-s are believed to have been deprived of a significant part of their powers and independence as a consequence of Almohad legal policy, which jeopardized Mālikism’s predominance and control over the judiciary. This article is organized into three parts : (1) a diachronic overview of the specificities of the judiciary in al-Andalus and the Far Maghrib ; (2) the Almoravids’ judicial policy and the jurists’ counter-reaction ; (3) dialectics between rulers and Mālikī *qāḍī*-s in the Almohad period. The aim is to test whether textual evidence and previous research still support the idea that both periods mark a peak and a bottom respectively in the Mālikīs’ position with political power, and therefore, in the balance of forces between *qāḍī*-s and governmental judges.

Keywords : Judicial pluralism, Almoravids, Almohads, Mālikī *fuqahā'*, *qāḍī*-s, governmental judges, al-Andalus, Far Maġrib, Mālikīs.

Résumé : Cet article traite du pluralisme judiciaire sous les Almoravides et les Almohades, deux dynasties de l’Occident musulman prémoderne dont les systèmes judiciaires méritent d’être étudiés ensemble. Compte tenu de leur proximité avec le mālikisme, les Almoravides mirent en place un scénario susceptible d’améliorer la position des cadis vis-à-vis des juges gouvernementaux. À l’inverse, on considère que les cadis furent privés d’une part significative de leurs pouvoirs et de leur indépendance en raison de la politique juridique des Almohades, qui mirent en cause la prédominance des mālikites et leur contrôle de l’appareil judiciaire. L’article s’organise autour de trois axes : (1) un aperçu diachronique des spécificités de la judicature en al-Andalus et au Maġrib al-Aqṣā ; (2) la politique judiciaire des Almoravides et la contre-réaction des juristes ; (3) les rapports dialectiques entre le pouvoir et les cadis mālikites à la période almohade. Il s’agit de vérifier dans quelle mesure les sources et les recherches antérieures confirment l’idée que les deux périodes marquent chacune le zénith et le nadir des

relations entre les mālikites et le pouvoir politique, et donc de l'équilibre des forces entre cadis et juges gouvernementaux.

Mots-clés : Pluralisme judiciaire, Almoravides, Almohades, jurisconsultes mālikites, cadis, juges gouvernementaux, al-Andalus, Maġrib al-Aqṣā, Mālikites.

الملخص : يبحث هذا المقال في التعددية القضائية خلال عهدي المرابطين والموحدين، وهما عهدان يستحقان سوية الدراسة كنموذج للنظام القضائي في الغرب الإسلامي. وبالنظر لقرب المرابطين من المذهب المالكي فقد وضعوا منهجاً يناسب الفقه المالكي لتحسين مكانة القضاة في مواجهة حكام الدولة. وفي المقابل نلاحظ أن القضاة فقدوا جزءاً هاماً من سلطتهم واستقلاليتهم نتيجة للأسلوب القضائي الذي انتهجه الموحدون والذي هدد هيمنة المالكيين وتحكمهم بالجهاز القضائي. ويدور هذا المقال حول ثلاثة محاور: الأول يشكل نظرة تاريخية عامة لميزات السلطة القضائية في الأندلس وفي المغرب الأقصى، والثاني يتطرق إلى السياسة القضائية للموحدين وموقف الفقهاء منها، والثالث يعالج العلاقة الجدلية بين السلطة والقضاة المالكيين خلال عهد الموحدين. وقد كان الهدف هو التأكد فيما إذا كانت المصادر والأبحاث السابقة ما تزال تدعم فكرة أن كلاً من العهدين قد شهد فترة من الأوج والحضيض في العلاقة بين المالكيين والسلطة السياسية وبالتالي في توازن القوى بين القضاة والحكام العاديين التابعين للدولة.

الكلمات المحوريّة : التعددية القضائية، الأندلس، الغرب الإسلامي، المرابطون والموحدون، المذهب المالكي، فقهاء المالكية، القضاة، الحكام العاديون، صلاحيات القضاة.

This paper deals with judicial pluralism under what are known as the "Berber empires", that is to say, the Almoravids and the Almohads who ruled over north Africa and al-Andalus for more than a century and a half (last quarter of the 11th century C.E.-second half of the 13th century C.E.)[1]. Notwithstanding their disparate ethnic base — the former having drawn primarily on Ṣanhāǧa and the latter on Maṣmūda Berbers — and their conflicting legal approaches on such questions as adherence to a given legal school, *taqlīd* (unquestioned following of earlier authorities) and *iḫtilāf* (juristic disagreement), both dynasties deserve to be considered jointly in a study of the judiciary in the pre-modern Islamic West: The Almoravids for having set a scenario apt for the Mālikī *fuqahā'* to take advantage of the new rulers' support of their school, in order to improve the position of *qāḍī*-s with respect to governmental judges. Conversely, *qāḍī*-s are believed to have been deprived of a significant part of their powers and independence as a consequence of Almohad legal and judicial policy. In the pre-modern Islamic West, with the exception of Ifrīqiya, both periods thus appear to mark a peak and a bottom respectively in Mālikī-s' position with political power, and therefore, in the balance of forces between *qāḍī*-s and governmental judges, given the general tendency of legal scholars to emphasize religious justice as represented by and focused on the *qāḍī*, to the detriment of competing jurisdictions. In fact, taken at face value, the above representation contains a core of truth, yet it may be deceitful in a number of points that will be reviewed below.

The paper is divided in three parts. Part one presents in diachronic perspective a general overview of the specificities of the judiciary in al-Andalus and, whenever data are available, in the Far Maġrib. Part two focuses on Almoravid judicial policy and their strategy to balance between the need to keep a check on the rising influence of the *qāḍī*-s and their commitment to implement *sharī῾a* according to the school of Mālik. Subsequently, attention is paid to different examples illustrating the jurists' counter-reaction and their efforts to remind the ruler that he was obliged to abide by the *sharī῾a* and that it was upon them that the task fell to supervise the fulfillment of that duty in their capacity as the supreme interpreters of the sacred law. Part three examines the dialectics between rulers and Mālikī *qāḍī*-s in the Almohad period.

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1. Research to write this paper has been carried out while on a sixth months stay at the Institute of Islamic World Studies of Zayed University (Abu Dhabi), funded by the Spanish Ministry of Education, Culture and Sports, ref. PR-2011-0068. Part 1 and the first section of part 2 re-elaborate materials concerning judicial pluralism in al-Andalus already published (SERRANO RUANO 2011). Section 2.2. has been expanded and a new part (3.) has been added.

The judiciary in al-Andalus

Qāḍī-*s, judges (*ḥukkām*) and rulers in al-Andalus*

In al-Andalus — as elsewhere — *qāḍī*-s had to share the dispensation of justice with other judges who were not *a priori* bound to apply the *sharīʿa* as *qāḍī*-s were, and whose proceedings the ruler retained the capacity to interfere in at any moment. Rulers appointed or dismissed them all at will. Yet in the actual performance of their function and at least in theory, *qāḍī*-s, unlike governmental magistrates, were independent from political interference.[2] Apart from the ruler, provincial governors (*wulāt al-kuwar*) or local chieftains (e.g. *qā'id al-balda*) were, at times, endowed with the capacity to appoint *qāḍī*-s or issue judgments themselves.[3]

The Andalusi chief *qāḍī* differed from his oriental counterpart in that he used to be given the title of *qāḍī l-ǧamāʿa*. As pointed out by Émile Tyan,[4] the expression '*qāḍī l-ǧamāʿa*' defines chief *qāḍī*ship in the sense that the legal and religious authority of its bearer *might extend*[5] beyond the limits of his territorial jurisdiction and reach all the Muslim subjects within the territory governed by the designating authority. Another sign of the *qāḍī l-ǧamāʿa*'s pre-eminence over provincial *qāḍī*-s and other magistrates was his occupying the position of judge for the capital in addition to his special relation with the ruler, for whom he also used to perform as advisor and ambassador. Apart from imparting justice within his territorial jurisdiction, the *qāḍī l-ǧamāʿa* was also in charge of adjudicating legal matters of political relevance. Yet the most distinctive trait of the Andalusi chief *qāḍī* was the frequent combination of judicial activity with leading of the Friday prayer and pronunciation of the *ḫuṭba* in the capital's main mosque.[6] Moreover, the *qāḍī l-ǧamāʿa* took part in the ceremony of swearing allegiance to the new ruler (*bayʿa*) as a witness to the ensuing document in his role as the highest judicial authority in the land. Due to his ties with the main mosque, the *qāḍī l-ǧamāʿa* was also in charge of its administration and the management of its properties and rents. However, he was not inherently entitled to appoint provincial *qāḍī*-s.[7]

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2. See Müller 2000b, p. 186.
3. See Serrano Ruano 2011, p. 218.
4. Tyan 1960, p. 185-191.
5. Emphasis added.
6. The political relevance of the *ḫuṭba* is well known given that it was issued in the name of the ruler who received religious sanction through this procedure so that omission in that regard might amount to a declaration of rebellion or independence.
7. See Serrano Ruano 2011, p. 211-213 and the sources and bibliography cited there. Émile Tyan (*loc. cit.*) presents the latter limitation in contrast to the oriental *qāḍī l-quḍāt*'s inherent capacity to appoint provincial judges. Cfr. Tillier 2009, chapter I, section 5 « Le rôle du grand cadi » where the author shows that the image of the *qāḍī l-quḍāt* as the center of judicial organization is not supported by the sources.

Another special characteristic of the Andalusi judicial organization prior to the 12th century C.E. was the use of the term *ṣāḥib al-sūq* to refer to the market inspector instead of that of *muḥtaṣib* employed in the rest of the Islamic world.[8]

Both the composition of the judiciary and the distribution of competences among its members experienced considerable variation along the lines of the political development of al-Andalus[9] and, more specifically, of the rulers' need to draw legitimation from the religious scholars. Competences were determined by the appointing authority and were thus inherent to the nominee's person and not to the definition of his judicial title as might be found in Islamic legal literature. Consequently, there were chief *qāḍī*-s entitled by the ruler to nominate "regular" *qāḍī*-s, deputies (*nuwwāb*) and non-*qāḍī* judges (*ḥukkām*) within or outside their own territorial jurisdiction, while others were not entitled to do so. Additionally, "regular" *qāḍī*-s might nominate other *qāḍī*-s as well.[10]

We can thus imagine Andalusi *qāḍī*-s standing in hierarchical superiority to the magistrates — whether *nuwwāb*, *ḥukkām* or *quḍāt* — the ruler empowered them to designate. However, as far as the *qāḍī l-ǧamāʿa* is concerned, leaving aside his personal religious and scholarly authority, he did not stand at the head of any centralized judicial body made up of provincial *qāḍī*-s as has already been pointed out. Moreover, during the Taifa period and as a consequence of the fragmentation of Umayyad central authority, there was more than one chief *qāḍī* in office simultaneously. To further complicate analysis, some of the latter magistrates were given the title of *qāḍī l-quḍāt*. The Almoravids maintained this denomination for *qāḍī*-s in large territorial and administrative units, while one *qāḍī l-ǧamāʿa* was appointed for Cordoba,[11] and another for the capital, Marrakech. Whatever the relationship between all these high rank judges, the Almoravids did not institute a magistrate to cover the whole of their empire, ranking higher than the rest.[12]

Under the Almohads, Cordoba appears to have kept its status as seat of supreme *qāḍī*ship in al-Andalus along with the capital, Marrakech.[13] It seems that Almohad authorities interfered in the *qāḍī*-s' competence to supervise the administration of public endowments (*aḥbās* or *awqāf*)[14] — or to appoint an inspector to perform this task in their name. This

8. See MÜLLER 2000a, p. 60.

9. The history of al-Andalus can be roughly divided into the following political periods: emiral (2*th*/8*th*-3*th*/9*th* centuries), caliphal (4*th*/10*th* century), taifa (5*th*/11*th* century), Almoravid (last quarter of the 5*th*/11*th* and first half of the 6*th*/12*th* centuries), Almohad (second half of the 6*th*/12*th* and first decades of the 7*th*/13*th* centuries), second Taifa and Nasrid periods (second quarter of the 7*th*/13*th* to 8*th*/15*th* centuries).

10. For actual examples see SERRANO RUANO 2011, p. 213-214.

11. Under the Almoravids, Cordoba kept its central religious and intellectual position while Granada seems to have taken over as the main political and military base of Almoravid rule in al-Andalus.

12. See LAGARDÈRE 1986, p. 138.

13. This is at least what can be inferred from the appointment of Ibn Rušd al-Ḥafīd (i.e. Averroes) as chief *qāḍī* of Cordoba, and that of Aḥmad b. Yazīd b. Baqī al-Umawī as *qāḍī l-ǧamāʿa* of Marrakech. See, respectively, Ibn al-Abbār, *Takmila*, ed. Codera, p. 269 number 853 and al-Bunnāhī, *Marqaba*, ed. 1983, p. 117. For Cordoba see also CARMONA 1987-1988, p. 120.

14. See BENOUIS 2005, p. 518 who limits the elimination of this competence to the Maġrib.

practice was at odds with previous judicial custom[15] and did not disappear completely with the Nasrid restoration of Mālikism as official legal doctrine.[16]

The seat of the *qāḍī l-ǧamāʿa* during the Nasrid period moved to the new capital, Granada. He was occasionally invested with the authority to appoint provincial *qāḍī*-s or to inspect the activity of judges and jurists.[17]

*Non-*qāḍī *judges and the curtailment of* qāḍī-*s' competences*

Together with *qāḍī*-s and their deputies (*nuwwāb*, sing. *nā'ib*), during the caliphal and the taifa periods (i.e. 10th and 11th centuries C.E.), a series of state agents enjoyed judicial powers, e.g. the market inspector (*sāḥib al-sūq* or *sāḥib al-šurṭa wa-l-sūq*), the magistrate in charge of the city (*sāḥib al-madīna*), the magistrate in charge of repairing certain "injustices" (*sāḥib al-maẓālim*), the magistrate to whom "returned cases", i.e. those that could not be adjudicated in first instance, were sent (*sāḥib al-radd*) and the chief of police (*sāḥib al-šurṭa*). Unravelling how judicial competences were distributed among them is extremely complicated.[18] Drawing on a collection of actual legal cases from the 5th/11th century, Christian Müller[19] has shown that the administration of penal justice, for example, was not the exclusive domain of the *sāḥib al-šurṭa,* but shared between (1) the *sāḥib al-madīna,* who dealt with capital crime within the city, (2) the *sāḥib al-sūq,* to whom the repression of crimes and torts in the space under his jurisdiction was also entrusted, (3) the *qāḍī* and (4) the local governor. The *radd* and *maẓālim* jurisdictions were not instances of judicial review.[20] Most importantly, governmental magistrates and non-*qāḍī* judges followed the rules of *fiqh*, although less literally than *qāḍī*-s did, and used to consult with *muftī*-s and legal experts before issuing their judgments.

The practice of breaking with the unicity of *qāḍī*ship—i.e. appointing more than one *qāḍī* for a single jurisdiction, so that the proceedings involved in a litigation as well as the final judgment had to be approved by all of them — does not seem to have been widespread in al-Andalus. However, one such case is reported in the Šarq al-Andalus by al-Bāǧī (d. 474/1081) who, as could be expected, expresses his frontal opposition to the idea.[21]

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15. See MÜLLER 2000b, p. 181-182. Also see GARCÍA SANJUÁN 2007, p. 348 (quoting Ibn Rušd al-Ǧadd) and p. 354 (quoting Ibn al-Makwī).
16. See CALERO 2000, p. 71, 406. Yet Nasrid Mālikī-s went on stressing the need for the supervisor to secure the *qāḍī*'s permission prior to carrying out any modification in the endowment's conditions. See GARCÍA SANJUÁN 2007, p. 350-351, 357.
17. See CALERO 2000, p. 375, 381.
18. See MÜLLER 1999, p. 203-362.
19. MÜLLER 1999, p. 103-174 and 333-362.
20. The English translation given for these titles follows Müller's proposal on how to understand their holders' competences.
21. See al-Bāǧī, *Kitāb al-muntaqà*, VII, p. 217.

In the Arabic sources that cover the history of the Almoravid period, references to the above mentioned governmental judges become only sporadical.[22] The post of *sāḥib al-šurṭa* disappears almost completely, his tasks being assigned to the *sāḥib al-madīna*.[23] A singular exception to the former remark were judges bearing the title of *ṣāḥib al-aḥkām* whose number had increased greatly by the second quarter of the 6th/12th century,[24] when Almoravid power started to grow weak. The functions of the *sāḥib al-aḥkām* have not been fully clarified. According to Christian Müller,[25] some of the cases heard by this magistrate in 5th/11th century Cordoba were closely connected to the markets. Their role in the Almoravid period will be dealt with later in more detail.

The post survived well into the Almohad period[26] during which there are mentions of the *šurṭa* as well, though some of them suggest that the agents of this body performed as personal guard of the caliphs.[27]

Governmental magistrates (e.g. the *ḥākim* — applied to a non-*qāḍī* judge —, the *ṣāḥib al-aḥkām,* the *ṣāḥib al-radd* and the *ṣāḥib al-maẓālim*) are absent from the sources relevant for study of the Nasrid period, with the exception of the *ṣāḥib al-sūq* and the *ṣāḥib al-šurta*, who at the time appear to have performed functions similar to those assumed by their predecessors of the caliphal and taifa periods.[28]

Almoravids' judicial policy

The commitment to implement the *sharī῾a* according to the school of Mālik — articulated around the need to abolish unlawful taxes and un-Islamic practices, and to wage *ğihād* against the Christians to the north of the Iberian peninsula — was a catalyst for the emergence and expansion of the Almoravid movement coupled with formal allegiance to the ʿAbbāsid caliph,[29] but did not suffice to convince the Andalusi population to accept dominance by an alien power.[30] The support of the Mālikī *fuqahā'* was thus essential in order to overcome this obstacle, but it also exposed the conquerors' extreme dependence on them to fill their gaps in religious and political legitimation. This is an opportunity the jurists were not ready to miss. In fact at that time they are said to have reached an

22. Further details in SERRANO RUANO 2011, p. 215.
23. See BOSCH VILÁ 1988, p. 130; CALERO 2000, p. 410.
24. See EL HOUR 2000-2001, p. 55.
25. MÜLLER 2000a, p. 76.
26. See one example in EL AALAOUI and BURESI 2005, p. 484, note 13 and CARMONA 2004, p. 460.
27. See SERRANO RUANO 2011, p. 217. Almohad judicial policy will be examined in more detail in part 3 below.
28. See CALERO 2000, p. 375, 381, 411-413.
29. See FIERRO 1997, p. 437-442.
30. See FIERRO 2007, p. 116-117.

unprecedented degree of social, economic and political power, especially under the emir ʿAlī b. Yūsuf b. Tāšufīn (r. 500/1106 538/1143).[31]

One of the reasons that may help explain the power and financial prosperity attributed to the Mālikī *fuqahā'* of the period is the ruler's assignment of the collection and subsequent delivery of certain taxes to particular *qāḍī*-s, as did the first Almoravid emir, Yūsuf b. Tāšufīn with the *qāḍī* of Almería, Muḥammad b. Yaḥyā known as Ibn al-Farrā'.[32] In a similar vein, it would be reasonable to understand the above mentioned silence concerning the *ṣāḥib al-radd* and the *ṣāḥib al-maẓālim* in the sources that cover the period as an indication that their jurisdiction was transferred to *qāḍī*-s. Indeed, this assumption is not contradicted by contemporary legal sources showing *qāḍī*-s in action, especially in relation to *fatwā* collections. However, the *qāḍī*-s' involvement in matters that had previously been overseen by the *radd* and the *maẓālim* courts did not necessarily imply direct control over both jurisdictions or the right to appoint the competent magistrate.[33] Rather, the *radd* and the *maẓālim* seem to have mostly reverted to the ruler in first instance who, in turn, used to entrust the petitions and complaints he received to one of his *qāḍī*-s, but on a case by case basis, not as a general delegation of competences.[34]

Another consequence of the collaboration between rulers and jurists is that posts in the Almoravid judicial administration were invariably occupied by the *ʿulamā'*, a correspondence that had formerly not always been guaranteed. There is also evidence attesting to the frequent inclusion of legal scholars in the political decision making process.[35]

Furthermore, Almoravid *qāḍī*-s appear to have performed competences that had been earlier assumed by the market inspector. Ibn ʿAbdūn's (Seville, d. 530/1135) *Kitāb al-qaḍā' wa-l-ḥisba*,[36] joining together both functions in a title for the first time, seems to have intended to provide doctrinal grounding to a process in which the authority to monitorize morals and proper conduct was extended beyond the realm of the market and primarily, but not exclusively, assigned to the *qāḍī*. Additional evidence of this tendency is provided by a collection of *fatwā*-s issued in the Almoravid period and compiled subsequently, already in the Almohad period.[37] Here, a chapter on *nafy al-ḍarar* covering the *qāḍī*-s'

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31. See SERRANO RUANO 2011, p. 219.
32. See al-Wanšarīsī, *al-Miʿyār*, XI, p. 132, quoted by GARCÍA SANJUÁN 2007, p. 38.
33. The case of Ibn Rušd al-Ǧadd who, while being chief *qāḍī* of Cordoba, appointed Muḥammad b. Aṣbaġ al-Azdī *ṣāḥib aḥkam al-maẓālim* (RODRÍGUEZ MEDIANO 1997, p. 180), should better be seen as an exception rather than the rule. Cf. SERRANO RUANO 2011, p. 219.
34. Cf. SERRANO RUANO 2011, p. 219.
35. See for example Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 203-205; Ibn Rušd al-Ǧadd, *Fatāwā*, I, p. 631-649 and II, p. 1021-1027; Ibn ʿIḏārī, *al-Bayān al-muġrib*, IV, p. 69-73; Ibn Ward, *Aǧwiba*, p. 146-164; al-Wanšarīsī, *al-Miʿyār*, II, 215; EL AALAOUI and BURESI 2005, p. 494-495. Also see SERRANO RUANO 2003, p. 467-475; *Idem* 2006b, p. 137-139 and the sources and bibliography cited there.
36. Ibn ʿAbdūn, *Sevilla*.
37. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*.

obligation to avoid "harm" and to safeguard public interest (*maṣlaḥa*), is included.[38] This refers not only to direct exercise of these competences by the *qāḍī* but to the capacity to appoint the magistrate in charge and to supervise his proceedings. Two additional facts appear to be connected, on the one hand, with the emphasis placed on morals and public conduct imposed by the Almoravid movement with its call for a return to the fundamental principles of the sacred law and, on the other, with the "*qāḍī*-alization" of the inspection of morals and proper conduct. Specifically, from the second half of the 5th/11th century, the term *ḥisba* gradually replaced that of *sūq* in the title of the market inspector.[39] By the same time, we can observe the emergence of the figure of the *muḥtasib* referring either to the market inspector previously called *ṣāḥib al-sūq*,[40] to an official appointed by the *qāḍī*, or to a volunteer who reports to the judge about transgressions against morals, proper behaviour and public interest. Further, caution is recommended when using the terms *ḥisba* and *iḥtisāb* interchangeably, since the latter did not necessarily refer to the supervision of the markets and was not restricted to a specific judicial authority.[41] Yet how these — in all likelihood interconnected — factors affected judicial practice is not totally clear to me.

Be that as it may, it is reasonable to conclude that Mālikī-s' support of the Almoravids translated into a reinforcement of *qāḍī*ship. However, as I will show below, the tension between *qāḍī*-s and non-*qāḍī* judges did not disappear. Instead, it was subtly cultivated by the Almoravid authorities in order to prevent *qāḍī*-s from becoming too powerful to pose a challenge to the established political authority,[42] once their strategy to prevent the local elites from monopolizing the post in the main urban centers of al-Andalus by assigning the position to Maġribis or to non-locals, proved unsuccessful.[43]

The Almoravid sāḥib al-aḥkām

As we saw above, the post of *ṣāḥib al-aḥkām* is a particular distinguishing characteristic of the Almoravid judicial administration from both a quantitative[44] and, as we shall observe, a qualitative point of view.

Where the duties of the *ṣāḥib al-aḥkām* are concerned, the assumption that he was in charge of implementing the judgements issued by *qāḍī*-s is not backed by any source.[45] A *fatwā* issued by Ibn Rušd al-Ǧadd indicates that a *ṣāḥib al-aḥkām* appointed by a *qāḍī* might

38. Cf. SERRANO RUANO 2000a and *Idem* 2011, p. 219.

39. See MÜLLER 2000a, p. 72-73.

40. See SERRANO RUANO 2000. As has been pointed out above, in the Nasrid period, the market inspector recovered the title of *ṣāḥib al-sūq*.

41. See MÜLLER 2000a, p. 72-73.

42. See SERRANO RUANO 2011, p. 219, 229.

43. See RODRÍGUEZ MEDIANO 1997, p. 176-179.

44. See actual cases in SERRANO RUANO 2011, p. 215-216.

45. See EL HOUR 2000-2001, p. 51-53. Cf. CARMONA 2004, p. 460.

perform as an arbiter to solve neighbourhood disputes and marital conflicts.[46] These tasks match those that Ibn ʿAbdūn adviced the *qāḍī*-s to entrust to the *ḥākim*. In his already mentioned treatise, he remarked that *qāḍī*-s should designate a *ḥākim* to help them handle legal cases of secondary relevance that arose among the lower classes. *Ḥukkām*, according to Ibn ʿAbdūn,[47] should perform as arbiters rather than as real judges and by no means should they be allowed either to oversee the *awqāf* funds and the properties of orphans or to intervene with regard to state agents and matters of political relevance. However, the emphasis placed on the *ḥākim*'s complete subordination to the *qāḍī* should be considered as a reflection of the ideal judicial administration that Ibn ʿAbdūn sought to promote, rather than a faithful description of actual practice.

They certainly might be appointed by a *qāḍī*,[48] and that included the capacity to supervise their proceedings and to remove them if the *qāḍī* saw fit.[49] However, according to some model forms of appointment dating from the Almoravid period and studied by Rachid El Hour,[50] a non-*qāḍī* judge such as the *ṣāḥib al-aḥkām* might be appointed directly by the emir, or by the local governor. In addition, some of these documents testify to the relevance of this function which is described as *rutba ʿāliyya*.[51] The very fact that the Almoravid chancellery had to produce such special nomination documents demonstrates the *ṣāḥib al-aḥkām*'s importance for the Almoravid judicial administration and the relative novelty of the post.

The documents analyzed by El Hour[52] help to further specify the tasks that used to be assigned to these magistrates, namely the fight against torts and corruption. This adds consistency to Christian Müller's remarks that it is difficult to distinguish between the offices of *ḥākim* and of *muḥtasib* in Andalusi biographical literature and that from the end of the 5th/11th through the 6th/12th century, the term *ḥākim* was increasingly applied to the same people that were called *ṣāḥib al-aḥkām*.[53] The *ṣāḥib al-aḥkām* studied by El Hour[54] was entitled to issue judgments and to implement punishments concerning matters under his jurisdiction. In one of the documents, however, the nominee is instructed to submit serious offences to the *qāḍī* but also to the *ṣāḥib al-madīna*. The Almoravid *ṣāḥib al-aḥkām* might also combine his functions with the *ḫuṭba.*

46. See EL HOUR 2000-2001, p. 60.
47. Ibn ʿAbdūn , *Sevilla*, p. 52-53.
48. See actual cases in SERRANO RUANO 2011, p. 215.
49. See EL HOUR 2000-2001, p. 59.
50. EL HOUR 2000-2001.
51. See EL HOUR 2000-2001, p. 55-64.
52. EL HOUR 2000-2001, p. 57-59.
53. MÜLLER 2000a, p. 67, 70.
54. EL HOUR 2000-2001, p. 57-59.

As to their territorial jurisdiction, the *ḥākim* or *ṣāḥib al-aḥkām* might be attached to a capital in which there was a *qāḍī* as well, to some districts under a *qāḍī*'s jurisdiction, or to a town or area independent from a *qāḍī*'s jurisdiction.[55]

Last, but not least, practically all the scholars who performed as *ṣāḥib al-aḥkām* in al-Andalus and the Maġrib during the Almoravid period were Andalusis.[56]

Mālikī jurists' reaction towards judicial pluralism in the Almoravid empire

Some *fatwā*-s from the Almoravid period show that legal scholars explicitly challenged the practice of entrusting non-*qāḍī* judges with functions that they viewed as exclusive to *qāḍī*-s. Indeed, they also voiced their reluctance to accept judgments issued by provincial governors and local chieftains themselves.[57] In view of the support lent to the ruling dynasty, the Mālikī jurists of Almoravid al-Andalus had sound reasons to believe that posing the old question[58] of the *qāḍī*'s position on the judicial scale and the actual reach of his competences might now succeed in shaping these more in accordance with the theoretical definitions of *qāḍī*ship in the sense of being more stable and less subject to political ups and downs.[59]

It is true that *qāḍī*-s and non-*qāḍī* judges were recruited from among the same pool of legal scholars. In fact, the performance of governmental magistracies not only represented a lucrative way of life but enhanced eligibility for *qāḍī*ship, which appeared to represent the summit in the career of a legal scholar. However, once appointed, *ḥukkām* tried to act as independently as they could from other judicial authorities, including *qāḍī*-s. The Almoravids' designation of these magistrates then emerges as a sophisticated strategy to divest power from the *qāḍī*-s through taking some competences away from them and stirring division among those who hoped to fill the post some day. At the same time, by offering governmental magistracies to the *fuqahā*' and not to lay state officials, the Almoravids implemented the cornerstone postulate of their commitment to fulfil the *šarīʿa*, i.e. putting the administration of justice in the hands of the religious scholars.[60]

The degree of independence initially won by the jurists thanks to the Almoravids' apparent less restrictive conception of the *qāḍī*-s' competences therefore had to be sought through more subtle means, shifting the focus to the need for a proper application of the sacred law. *Fatwā*-s then became an effective means to sanction sensitive political decisions[61] as much as a handy device for questioning Almoravid judicial policy by tightening the

55. See SERRANO RUANO 2011, p. 215-216.
56. See EL HOUR 2000-2001, p. 62-64.
57. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 35-37; 178-180.
58. The question can be first documented in the 5*th*/11*th* century, during the taifa period. See Ibn Sahl, *al-Aḥkām al-kubrā,* p. 27-32.
59. See SERRANO RUANO 2011, p. 218-219.
60. SERRANO RUANO 2011, p. 221-228.
61. See above, note 35.

jurists' hold on the rulers' compromise to fulfil the *šarīʿa* and, by extension, on the scope and limits of executive power. Commentaries in which earlier Mālikī doctrine was clarified, reviewed, completed and adapted to new methodological requirements also figure prominently in that regard.

Šarīʿa: the supreme ruling principle

A *fatwā* issued by Ibn Rušd al-Ǧadd — presumably at the request of the second Almoravid emir ʿAlī b. Yūsuf b. Tāšufīn[62] — and concerning misuse of public property, confiscation or usurpation of private property and unlawful tax levying, gave the *muftī* the opportunity to put forward an articulate body of legal opinions relevant to corruption and abuse of authority by state agents and, *a fortiori*, by the ruler himself.[63] The jurist had to endure serious difficulties as a consequence of the uncompromising position taken in his *fatwā.* Yet its publication allowed him to go a significant step further in his endeavour to provide Mālikī legal doctrine with a constitutional definition of *šarīʿa* aimed at raising the *šarīʿa* to the status of a supreme principle to both claim and secure justice and good governance.[64]

The instrumentalization of Islamic legal doctrine on *ḥudūd*[65]

At the same time that the obligation for the ruler to abide by the *šarīʿa* was being established on sounder grounds, special emphasis was put on the law concerning statutory crimes or *ḥudūd,* given their consideration as markers of *šarīʿa* — compliant governments, as well as their complex procedure, which could be handled aptly only by experts. The level of mastery of the Mālikī law on *ḥudūd* — with its intricacies, exceptions and controversies — that was required to adjudicate relevant cases was only indeed guaranteed by the most learned jurists, the ideal candidates to perform *qāḍī*ship in the ideal Islamic state the Almoravids had promised to bring into being. Therefore, given their presumed lack of the necessary skills, the fact that *ḥudūd* punishments be established on the ground of judgments pronounced by governmental judges, state agents or the ruler himself, instead of the *qāḍī* (or the chief *qāḍī* when the death of the culprit was involved) was hinted at as a disqualification of Almoravid religious legitimation. Some *fatwā*-s suggest that the authorities grasped the message quite well and tried to act accordingly.[66] However, if they

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62. The *fatwā* is in fact an illustrative example of direct assumption of the *maẓālim* justice by the Almoravid prince or any other high state official. Once received, and before taking a decision, the complaint was submitted for consideration to a series of *muftī*-s, among whom Ibn Rušd. Cf. EL AALAOUI and BURESI 2005, p. 495.

63. See Ibn Rušd al-Ǧadd, *Fatāwā*, I, p. 631-649. The full contents of the *fatwā* as well as the historical circumstances that surround it were addressed in my paper "Sharia and rule under the Almoravids", presented at the *International Society for Islamic Legal Studies VII Conference. Islamic Law and State: Doctrine and History* held in Ankara (Turkey) 30 May-1 June 2012.

64. Though not yet with the aim of protecting Mālikism against the contingency of another legal school becoming pre-eminent, as his Egyptian counterpart al-Qarāfī did a century later. See JACKSON 1996.

65. I summarize here SERRANO RUANO 2011, p. 218-229 where Ibn Rušd al-Ǧadd's doctrine concerning stoning to death for *zinā* is analyzed in the context of Almoravid judicial policy.

66. See for example Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 75-77 and SERRANO RUANO 2006a, p. 477.

actually did, it was not at the expense of reducing the number of governmental judges, who existed in large numbers, as has already been pointed out, when the Almoravid state started to disintegrate.

Reviewing the doctrine on the judicial functions of the *sulṭān*

According to Hiroyuki Yanagihashi[67] Muslim jurists rarely dealt with the question of the judicial powers of the *sulṭān* and the nature of the *maẓālim* justice before the emergence of Māwardī's (d. 450/1058) *al-Aḥkām al-sulṭāniyya.* To explain this Yanagihashi suggests that they took for granted that *fiqh* was the only legal system in force and that the administration of justice to Muslims had to lie in the hands of *qāḍī*-s in their capacity as *fiqh* experts.

As to the early Mālikī-s in particular, they stand out from the rest for specifiying that the *sulṭān* takes over from the *qāḍī*-s only when the strict rules of *fiqh* to which the latter are bound prevent the satisfactory resolution of a case.[68] This admission that the *sulṭān* is less constrained by the rules of *fiqh* than *qāḍī*-s, does not mean that this figure is authorized to dispense justice as he wishes, however.[69] Ibn al-Qāsim (d. 191/806) already held in favor of overturning a ruler's judgment when it contradicts the jurists' unanimous opinion and by the middle of the 3rd/9th century, the Mālikī-s had elaborated a discernable theory of judicial review which included the ruler and sanctioned jurists' right to reverse his judgments under certain conditions even if the ruler is a *muğtahid,* and all the more so when he is not.[70]

From the 10th century C.E. onwards, a function primarily assigned to the ruler such as the protection of the rights of those who have neither parents nor relatives as well as of absentees with no appointed agent,[71] was gradually placed under the responsibility of the *qāḍī*[72] and went on to become widespread practice in the Almoravid period, *qāḍī*ship being defined then as the exclusive frame within which this authority could be exerted to the exclusion of non-*qāḍī* judges.[73]

Ibn ʿAbd al-Barr (d. 463/1070) contributed a more sophisticated notion of delegation of competences (*tafwīḍ*) as an essential prerequisite for the validity of a judgment,[74] while al-Bāğī identified the *sulṭān* with someone who has received a delegation of judicial power from a caliph (*imām*), or from a *qāḍī*![75] Listing the different kinds of state agents endowed

67. YANAGIHASHI 1996, p. 41.

68. See YANAGIHASHI 1996, p. 45.

69. See YANAGIHASHI 1996, p. 64.

70. See YANAGIHASHI 1996, p. 65, 67-78.

71. E.g. Ibn Ḥabīb, *Wāḍiḥa*, p. 65 Ar./77 Trans. Apud. GARCÍA SANJUÁN 2007 p. 354, note 40.

72. See YANAGIHASHI 1996, p. 54.

73. See above, note 57 and Ibn ʿAbdūn, *Sevilla*, p. 52-53.

74. The question had already been introduced by Ibn Abī Zamanīn (d. 399/1008), drawing from Ibn Ḥabīb (d. 238/852): *wa-l-qaḍā' lā yakūn illā bi-amr al-ḫulafā'*. See Ibn Ḥabīb, *Wāḍiḥa*, p. 125 Ar./126 Trans. (The parts of the *Wāḍiḥa* edited by María Arcas Campoy consist of excepts drawn from Ibn Abī Zamanīn's *Muntaḫab al-aḥkām*).

75. See YANAGIHASHI 1996, p. 65-66, 70.

with judicial powers, Ibn Sahl (d. 486/1093) places the *qāḍī* above them and hints at the right to supervise and review their judgments as intrinsic to his office.[76]

11th century C.E. jurists such as Ibn ʿAbd al-Barr were also less reluctant to accept that the *qāḍī* might exert a certain degree of discretion in order to circumvent the strictures of *fiqh* and find a practical and satisfactory solution to a case — and hence avoid the need to refer the case to the *sulṭān* — than earlier Mālikī-s.[77] Indeed the collection of *fatwā*-s issued or requested by Qāḍī ʿIyāḍ portrays Almoravid *qāḍī*-s and *muftī*-s implementing principles including *istiḥṣān*, *ḍarūra*, the avoidance of the bigger of two harms, public interest and custom to justify departure from the established *fiqh* ruling, without allowing for the assumption that it might be necessary to refer the case in hand to the ruler or to a governmental judge.[78] Regarding penal justice, a realm traditionally under the jurisdiction of the *sulṭān*, the difficulty of proving *ḥadd* crimes, on the one hand, and the need to prevent impunity, on the other, did not necessarily exclude Almoravid *qāḍī*-s from addressing delinquency and other transgressions against the social and the political order. The possibility that they may establish *taʿzīr* and discretionary punishments (*adab*, *ta'dīb*) instead of statutory sanctions on the grounds of circumstantial evidence and suspicion actually appears to be taken for granted and not subject to discussion.[79] What was open to debate was rather the level of suspicion that was necessary to trigger punishment and the kinds of measures of punishment that were to be applied to varying levels of suspicion.

Ibn Rušd al-Ǧadd[80] defined the term *sulṭān* as "anyone who can issue a judgment or a decision to settle disputes between people". In addition, he included the *qāḍī* in the category of the *sulṭān*, contrary to earlier Mālikī-s who, in Yanagihashi's view, used to understand the term in a narrow sense, that is to say, as exclusive to the ruler. Also, Ibn Rušd took care to specify that certain categories of state agents such as guards are not covered by the appellation.[81] Furthermore, Ibn Rušd makes the point that an authoritative jurist may intervene in the proceedings of a *ḥākim* or any other non-*qāḍī* judge, e.g. sending him a *fatwā* with instructions on how to proceed, even if the latter has not asked for the *muftī*'s advice.[82] In what seems a common strategy to raise the status of the *qāḍī* by creating some ambiguity between the understanding of his authority and that of a *sulṭān*, his disciple Qāḍī ʿIyāḍ b. Musā goes even further. He applies the term *imām* both to a political authority

76. Cf. YANAGIHASHI 1996, p. 70-71.

77. See YANAGIHASHI 1996, p. 54-59.

78. See SERRANO RUANO 2000a; *Idem* 2000b, p. 204-205, 210, 229, 231-232. Also see YANAGIHASHI 1996, p. 59.

79. See SERRANO RUANO 2006a, p. 475-476, 480-491.

80. The fact that he and Qāḍī ʿIyāḍ are so prominent in the Mālikī reaction in the 12*th* century C.E. towards Almoravid judicial policy is certainly due to their scholarly outstanding qualifications. However, the fact that we do not quote other contributions does not mean they do not exist but is due to the present state of research on other Almoravid *fuqahā'* and — though to a lesser extent since this is partly compensated by the publication of Burzulī's *Fatāwā* and Wanšarīsī's *Miʿyār* — to the lack of scientific editions of their works, e.g. the *Nawāzil Ibn al-Ḥāǧǧ*.

81. See YANAGIHASHI 1996, p. 44, drawing from Ibn Rušd's *Bayān*, VI, p. 26.

82. See YANAGIHASHI 1996, p. 68.

entitled to appoint judges and to one who is not entitled to do so; in the execution of testamentary wills, the appointment of a legal guardian, the declaration that a child has reached the age of discretion, disqualification, the distribution of the properties of orphans and guardianship of their interests, as well as of absentees, the sole prerrogative lies with the *qāḍī*-s (*al-quḍāt ḫāṣṣatan*) to the exclusion of governmental judges, regardless or not of whether the latter have been appointed by an *imām* authorized to appoint judges (*wa-in kanū muqaddamīn min qibal al-a'imma wa-ammā man lam yakun muqaddaman min imām wa-huwa fī ṭāʿat imām ġayr mutaʿaḏḏir taqdīma-hu fa-lā yağūz la-hu al-ḥukm fī šay' illā mā tarāḍā bi-hi al-ḫaṣmān bayna yaday-hi wa-ḥakkamā-hu ʿalay-hi mā lam yarğaʿā qabla nufūḏ ḥukmi-hi…*). The same applies to *qāḍī*-s appointed by provincial governors lacking the relevant authorization and whose designation is not ratified by the highest political authority: they can perform only as arbiters as long as the parties do not reject their decision before it is executed.[83]

The conditions to perform *qāḍī*ship

In his article about Mālikī doctrine regarding the conditions for performing *qāḍī*ship, Alfonso Carmona[84] pays special attention to what appears to be an original contribution to the subject made by Ibn Rušd al-Ğadd in his commentary to Saḥnūn's *Mudawwana* known as *al-Muqaddamāt*.[85] Namely, he introduced a tripartite division between (a) the requisites that are essential for the validity of the nomination, (b) those that are essential to perform the post including integrity (*ʿadāla*) among others, and (c) those which, if absent, would lead to a recommendation for removal. According to Ibn Rušd, a *qāḍī* who proves not to be just, must be removed from office by the authority who appointed him, but the judgments he may have pronounced prior to his dismissal must not be cancelled unless they are obviously wrong or unjust. However, in a *fatwā* pressumably issued before writing the aforementioned commentary, our jurist had held in favor of dismissing a *qāḍī* who has committed usurpation and the illicit appropiation of others' properties along with cancelling his judgments.[86] To explain this apparent lack of consistency on the part of Ibn Rušd, Carmona[87] suggests that he may have retracted his former position in consideration of the fact that the systematic cancellation of the judgments of unjust *qāḍī*-s would be detrimental for the parties involved and bring about juridical insecurity. Indeed, if Carmona's assumption is right, it would not be the first or the only occasion on which Ibn Rušd resorted to his *Muqaddamāt* to retract or nuance an opinion issued previously.[88] Yet, the retraction here looks double edged. Certainly, a partial surrender of the ideal of justice promoted by the

83. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 35.

84. CARMONA 2000.

85. Ibn Rušd al-Ğadd, *al-Muqaddamāt al-mumahhadāt*, II, p. 258-259.

86. See CARMONA 2000, p. 147-151, 155.

87. CARMONA 2000, p. 147-151, 155.

88. I refer to Ibn Rušd's *Muqaddamāt*, III, 422-424 where the harsh consequences of the doctrine against usurpation and corruption put forward (*Idem, Fatāwā*, I, p. 631-649) are softened. See also above, note 63.

sacred law was entailed. However, agreement to authorizing the judgments issued by a *qāḍī* prior to being declared unworthy of his dignity only emphasizes the distinction between appointment[89] and performance the jurist strived to establish, since sound appointment is the only legitimate argument for accepting verdicts pronounced under the above mentioned conditions. Furthermore, and inasmuch as accepting the decisions of unjust *qāḍī*-s involves a forced and unpleasant negotiation with reality, an additional burden was put upon the ruler, the emphasis falling on his duty to select the appropriate candidate for *qāḍī*ship and so prevent implementation of *sharīʿa* in the territory under his control — which he was obliged to guarantee — from being compromised.

A recommendation that the *qāḍī* be a native to his place of appointment was also introduced by Ibn Rušd al-Ǧadd.[90] Given that this specific item is missing from earlier Andalusī *adab al-qāḍī* manuals, one migh speculate that Ibn Rušd was trying to react towards the afore-mentioned Almoravid attempts to appoint non-locals to the post.

Likewise, Bāǧī's concern for *qāḍī*al plurality is echoed by Ibn Rušd al-Ǧadd, whose scholarly training and initiation in the legal profession elapsed when Cordoba was still a taifa-state, for he includes the condition of being single (*wāḥid*) among the essential conditions for the validity of a *qāḍī*'s appointment.[91] In the times of his disciple, ʿIyāḍ b. Mūsā, fear that the post of *qāḍī* might lose its traditional unitary configuration appears to be less urgent, for he classifies unicity as a second rank condition.[92] Writing in the Almohad period, Averroes minimizes the possibility that more than one *qāḍī* be appointed for a single judicial seat and states that only Mālik was against this, while the other legal schools established limitations on plurality that in practice prevented the existence of collegial justice in Islam.[93]

Almohads' judicial policy

While the Mālikī school was awarded full official support by the Almoravids, Almohad authorities, in contrast, put the school's methodology into question as well as its adherents' monopoly over the judiciary. Mālikī-s were then accused of focusing exclusively on applied law (*furūʿ al-fiqh*) to the detriment of legal methodology (*uṣūl al-fiqh*); of favoring *taqlīd* (unquestioned following of earlier authorities) over independent legal reasoning; and of indulging too much in the divergence of opinions (*iḫtilāf*). In line with this attitude, works on *furūʿ al-fiqh* were banned and jurists were instructed to give advice and issue legal

89. Appointment being the ruler's prerogative and responsability.
90. See CARMONA 2000, p. 150.
91. See Ibn Rušd al-Ǧadd, *Muqaddamāt*, II, p. 258 quoted by CARMONA 2000, p. 148.
92. Cf. CARMONA 2000, p. 152 quoting ʿIyāḍ's own commentary to the *Mudawwana*, entitled *al-Tanbīhāt* and cited, in its turn, by al-Bunnāhī, *Marqaba*, ed. 1948, p. 4-5, ed. 1983, p. 8.
93. Quoted by CARMONA 2000, p. 153-154.

opinions and judgements only on the grounds of Coran, *ḥadīth, iǧmāʿ and iǧtihād*.[94] As a result of this policy, and as a sign of its effectiveness, no *fatwā* collections from the Almohad period have been preserved. The only exception is Muḥammad b. ʿIyāḍ's *Maḏāhib al-ḥukkām fī nawāzil al-aḥkām*.[95] Certainly the core of the book are *fatwā*-s issued in the Almoravid period by several jurists — including the author's father, Qāḍī ʿIyāḍ b. Mūsā — but these used to be the object of the compiler's commentaries which, in their turn, reflect how Almohad legal policy affected a convinced Mālikī committed to preserving the memory of his father, himself a totem of Maġribī Mālikism. That this work was considered politically incorrect is indicated by the fact that it was necessary to wait for the author's grandson, *qāḍī al-ǧamāʿa* of Granada for the first Nasrid *sulṭān*, to have it published, notwithstanding the advantageous position enjoyed by Muḥammad's son, ʿIyāḍ b. Muḥammad b. ʿIyāḍ, in Almohad society.[96] The Almohad prohibition concerning *furūʿ al-fiqh* does not seem to have affected a series of *ḥisba* treatises,[97] model *šurūṭ* collections[98] and manuals for the instruction of *qāḍī*-s[99] either, although, here again, there is no certainty that these works were actually in circulation while the Almohads were in power.[100]

Be that as it may, their number, variety and availability make it difficult to attribute the dearth of scholarship on legal practice and judicial organization in the Almohad period to the lack of relevant sources. The fact is that those who have dealt with these sources do not appear to have been interested in exploring the political and ideological context further in which to understand their contents. Our main reference to reconstruct Almohad judicial organization are three recent studies drawing on non-legal sources—e.g.

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94. See FIERRO 1997, p. 459-466; *Idem*, 1999. See also CARMONA 1987-1988, p. 121-122, and note 14, and very specially BURESI and EL AALAOUI 2013, p. 386-434. Those appointments in which the judge is allowed to issue judgment following the opinions of past legal authorities correspond to the rule of Ibn Hūd or to the period during which the Almohad dogma was abandoned (p. 190-192, 392, 396, 430).

95. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*.

96. See SERRANO RUANO 1999, specially p. 369.

97. I.e. al-Saqaṭī's *Kitāb fī ādāb al-ḥisba* (see CHALMETA 1976a, 1967b and 1968).

98. I.e. al-Ǧazīrī's *al-Maqṣad al-maḥmūd fī talḫīṣ al-ʿuqūd*; al-Mattīṭī's *al-Nihāya wa-l-tamām fī maʿrifat al-waṯāʾiq wa-l-aḥkām* (see AGUIRRE 2009), Abū Isḥāq al-Ġarnāṭī's *al-Waṯāʾiq al-muḫtaṣara* and Abū ʿUmar Aḥmad b. Hārūn Ibn ʿĀt's *al-Ṭurar ʿalā l-waṯāʾiq al-maǧmūʿa* (see NAVARRO I OLTRA 2009, p. 409).

99. Namely Ibn Hišām al-Azdī's *al-Mufīd li-l-ḥukkām* (see CARMONA 1987-1988) and Ibn al-Munāṣif's *Tanbīh al-ḥukkām* (see VIGUERA 1985). On these as well as the aforementioned sources see also VIGUERA 1997, p. 24.

100. The earliest preserved copy of al-Mattīṭī's *Nihāya* dates from 718/1318 (see AGUIRRE 2009, p. 525) and that of al-Ǧazīrī's *Maqṣad* from 15*th* century C.E. (see Asunción Ferreras in al-Ǧazīrī, *Maqṣad*, p. 13-14 of the "Study"). The present edition of al-Ġarnāṭī's *Waṯāʾiq* relies on two manuscripts, one undated and the other from 1107/1695 (see Nāǧī in al-Ġarnāṭī, *Waṯāʾiq*, p. 5 of the "Introduction"). The extant versions of Ibn Hišām's *Mufīd* were made after the 14 *th* century C.E. (See CARMONA 1987-1988, p. 123). As regards the *Tanbīh* of Ibn al-Munāṣif, the Tunisian copy used for the present edition was finished in the 15*th* century C.E. (see VIGUERA 1985, p. 593-594). The same applies to al-Saqaṭī (see below). *Furūʿ al-fiqh* works written in the Almohad period are not quoted or mentioned by contemporary sources either. The works cited here are those that have survived but biographical dictionaries report on other similar compositions (e.g. those issuing from the pen of Abū Isḥāq al-Ġarnāṭī mentioned by Muḥammad Nāǧī in al-Ġarnāṭī, *Waṯāʾiq*, p. 4 of the "Introduction"; also see the interesting list of unpreserved legal compositions of Abū Muḥammad Hārūn b. Aḥmad Ibn ʿĀt from Šāṭiba (582/1118-19) — the father of the afore-mentioned Abū ʿUmar Aḥmad (d. 609/1212) — in NAVARRO I OLTRA 2009, p. 404-406).

biographical dictionaries, official historical narrative and, very specially, a series of actual documents from the Almohad chancellery among which are letters with instructions on how to administer justice and appointments of *qāḍī*-s.[101] Indeed, these studies allow for a significant improvement in our present knowledge of Almohads' conception of *qāḍī*ship.

Qāḍī*ship under the Almohads*

On these grounds it is possible to establish a primary characterization of Almohad *qāḍī*ship around the emergence of the figure of the *kātib-qāḍī* or judge who combines the functions of both a religious judge and an agent of the Almohad bureaucratic administration. This post must be distinguished from the judicial secretary or *kātib al-qāḍī* who, in turn, might perform as delegate of the *qāḍī*.[102] The Almohad rulers, according to El Aalaoui and Buresi,[103] had at their service a body of bureaucrats (*kuttāb*) specialized in legal, financial and creedal issues who outnumbered the *kuttāb udabā'* or men of letters, experts in the norms of etiquette and rhymed prose who, for the most part, do not seem to have performed religio-legal functions. In fact religio-legal expertise is the most salient feature with which this new class of secretaries is described in the *ṭabaqāt* literature, the Almohad *kuttāb* having frequently performed as *qāḍī*, *ṣāḥib al-mawāriṯ*, *ṣāḥib al-maẓālim, ʿāqid al-šurūṭ*.[104] Unlike their Almoravid predecessors, the Almohad *kuttāb* mentioned in the biographical compendia dedicated to religious scholars, did not use to bear honorific titles (e.g. *wazīr* and *ḏū l-wizāratayn*).[105]

It seems clear, therefore, that the Almohads favored religio-legal training over belles-lettres and that, contrary to their predecessors, they entrusted *qāḍī*-s and jurists with the function of secretary and *vice versa*. This practice, according to El Aalaoui and Buresi,[106] talks of the flexibility of the Almohad administration and of its endeavour to organize *qāḍī*ship into a formal body of state agents which also encompassed governmental judges and which belonged to a larger centralized bureaucratic structure with no precedent in the political history of the Far Maġrib. What the relationship between this group of *kātib-qāḍī*-s and the *ṭalaba* or official scholars in charge of the propagation of Almohad ideology[107] might have been is not clear to me. Some among the most important *ṭalaba* on the grounds of their proximity to the caliph (*ṭalabat al-ḥaḍar*) performed as *qāḍī*-s themselves,[108] as did

101. See Benouis 2005, El Aalaoui and Buresi 2005, p. 478, 484-491 and Buresi and El Aalaoui 2013, p. 103-109, 182-197.

102. This was the case of our al-Mattīṭī, for example (see Aguirre 2009, p. 524). Ibn Hišām al-Azdī, for his part, performed as *ḥākim* — or as *ṣāḥib al-aḥkām* — and as *nā'ib* or delegate of the chief *qāḍī* of Cordoba before being promoted to *qāḍī*ship himself (see Carmona 1987-1988, p. 120; *Idem* 2004, p. 460).

103. El Aalaoui and Buresi 2005, p. 484, and note 12.

104. See El Aalaoui and Buresi 2005, p. 486, 488.

105. See El Aalaoui and Buresi 2005, p. 485.

106. El Aalaoui and Buresi 2005, p. 488-489, 492-499.

107. On this special class of scholars created by the Almohads see Fricaud 2005.

108. See Benouis 2005, p. 507.

others among the "regulars".[109] In view of their occupations,[110] it would be reasonable to conclude that, regardless of their different ranks, they all belonged to one and the same pool of experts in religio-legal sciences and that being an Almohad *ṭālib* did not exclude adherence to Mālikism.

Another significant feature of Almohad judicial organization is the increase in the number of *qaḍā'* seats that can be documented in the bio-biographical literature when compared with those mentioned for the Almoravid period.[111] As to the conception of the *qāḍī*al function, extant Almohad official letters confirm the obligation for *qāḍī*-s but also for provincial governors to refrain from pronouncing death sentences, including those resulting from retaliation for a blood crime, and to report them to the caliph instead;[112] these instructions are said to have been imposed on a rather constant basis under the three first Almohad caliphs.[113] Yet, when the nephew of al-Sulamī — a scholar from Fez who filled the post of *qāḍī* in his hometown as well as in Tlemcen, Agmat and Seville (d. 603/1207) — was accused of having raped a woman, it was the highest Almohad religious authority in Fez (*ḥāfiẓ*) who ordered his detention and had him beheaded the next day before morning prayer, giving his uncle no time to intervene in his favor.[114]

Regardless of the consistency with which the afore-mentioned directive may have been implemented, the implication was that not only death sentences imposed for the contravention of God's rights (*ḥadd*) were considered public, but also retaliation for intentional killing, this being a private or individual claim when relatives of the deceased exist and are ready to secure their rights. This is probably the reason why a contemporary author like Muḥammad b. ʿIyāḍ inserts murder (*qatl*) cases in the chapter on *ḥudūd* or statutory sanctions instead of the chapter on bodily injures (*ǧināyat*) in his compilation of Almoravid *fatwā*-s.[115] The fact that apostasy and blasphemy receive no treatment in Ibn Hišām al-Azdī's *Mufīd al-ḥukkām*[116] might also indicate that the power to pronounce death sentences falls to caliphal authority. It is true that these subjects are also missing from al-Bāǧī's (d. 474/1081) *adab al-qāḍī* treatise (*Fuṣūl al-aḥkām*). However, according to Muḥammad b. ʿIyāḍ's portray of Almoravid *qāḍī*-s, these were competent at least to deal with blasphemy.[117]

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109. See FRICAUD 2005, p. 529.

110. As they are documented by FRICAUD 2005, p. 532-534.

111. See BENOUIS 2005, p. 506.

112. See EL AALAOUI and BURESI 2005, p. 494, 497; BENOUIS 2005, p. 507; FIERRO 2005, p. 912.

113. See BENOUIS 2005, p. 507. The third of these caliphs, Abū Yūsuf Yaʿqūb al-Manṣūr ruled between 1184 and 1199 C.E.

114. See EL-HOUR 2007, p. 529.

115. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 75-87. I confirm here a hypothesis already put forward in SERRANO RUANO 2006a, p. 475-476.

116. See CARMONA 1987-1988, p. 124-130.

117. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 81.

The third Almohad caliph, Abū Yūsuf Yaʿqūb (r. 580/1184-595/1199), is even said to have administered justice personally during some months.[118] Yet it is unclear whether it was the caliph who pronounced the final judgment or asked one of his *qāḍī*-s to proceed to adjudication proper. The above information may also refer generically to a specific judicial competence like the *maẓālim*. Elucidating these latter questions is important since if the answer to them were positive, the caliph's judicial performance would scarcely constitute a novelty with respect to his Almoravid predecessors.

The fact is that the centralization of judicial power implemented by the Almohads must have entailed a decrease in *qāḍī*-s' penal jurisdiction and hence, in their independence. Yet local representatives of power, as has already been mentioned, were also included in the prohibition against issuing death sentences let alone execute them. Moreover, the Almohads cancelled the *niyāba* or the general principle of the delegation of competences[119] that the Almoravids had conferred on their governors. Conversely, some *qāḍī*-s were entrusted with competences much wider than was usual such as the *šurṭa* combined with the *ḥisba*, along with the handling of murder cases — which in theory had become the exclusive prerogative of the caliph — or the distribution of the *zakāt* revenue raised by the tax collectors among the needy.[120] To a certain degree, therefore, Almohad *qāḍī*-s' stronger dependence on central power might have been compensated by the autonomy that is likely to have resulted from the submission of the local aristocracies and local governors to this very same reinforced state authority.[121]

Although they are far more numerous than those preserved from the Almoravid period, the extant Almohad official documents do not report cases of complaints addressed to the caliph concerning abuse and extra-limitation by state agents.[122] Certainly the post of *ṣāḥib al-maẓālim* seems to have reappeared in this period[123] but given the present state of research and the lack of more conclusive data it would be premature to conclude that it was he who used to handle injustices and complaints on behalf of the caliph and that,

118. See FIERRO 1997, 463 quoting Ibn ʿIḏārī al-Marrākušī; *Idem* 1999, 236; Cf. BENOUIS 2005, p. 506.

119. See EL AALAOUI and BURESI 2005, p. 498.

120. See the case mentioned by BENOUIS 2005, p. 507. See also Ibn al-Abbār, *Takmila*, ed. 1998, I, number 291, p. 102-103 specifying that when Aḥmad b. Yazīd b. Baqī al-Umawī was appointed *qāḍī l-ǧamāʿa* of Marrakech, the functions of *ṣāḥib al-maẓālim* and high secretary were added to his charge (*wa-wuliya qaḍāʾ al-ǧamāʿa bi-Marrākuš muḍāfan ḏālika ilā ḫuṭṭatay al-maẓālim wa-l-kitāba al-ʿulyā*). The *maẓālim* and the *ḥisba* were in other instances entrusted to provincial governors, see BURESI and EL AALAOUI 2013, p. 177-181.

121. For a parallel dynamics in the relationship among central power, local governors and *qāḍī*-s in Iraq under ʿAbbāsid rule see TILLIER 2009, chapter VII. The opposite conclusion applies when the state has a limited capacity to control the territory that is nominally under its sovereignty so that *qāḍī*-s' greater autonomy with respect to the central power is matched by an increased dependence on the local aristocracies. See SIMONSOHN 2012, p. 65-66.

122. See EL AALAOUI and BURESI 2005, p. 486; BENOUIS 2005, p. 518.

123. See EL AALAOUI and BURESI 2005, p. 488; CHALMETA 1967a, p. 140 & *Idem*, 1967b, p. 360-361; Ibn al-Abbār, *Takmila*, ed. 1998, I, number 291, p. 102-103.

being primarily addressed to him, traces of these complaints have been lost together with *fatwā*-s and judicial records.[124]

The preserved Almohad letters that deal with the appointment of *qāḍī*-s identify the caliph as appointing authority and establish selection and nomination of professional witnesses and judicial secretaries, designation of the "*qāḍī*-s" of small cities (*musaddadīn*),[125] verification of judicial records and legal documents (*ʿuqūd*), the fulfilment of the principle of enjoining good and forbidding evil, and the fight against innovations and injustices, among the functions that were entrusted to *qāḍī*-s.[126] No letters of appointment of governmental or non-*qāḍī* judges are mentioned. On the other hand, and to judge by Ibn al-Abbār's biography of Muḥammad b. ʿAbd Allāh Ibn Ḥawṭ Allāh al-Ḥāriṯī, some *qāḍī*-s were entitled to appoint a *ṣāḥib al-aḥkām* in their jurisdiction.[127]

As had happened in the Almoravid period, the majority of those who performed *qāḍī*ship for the Almohads were Andalusīs.[128] However, the Almohads, unlike their predecessors, succeeded in imposing them a high level of geographical mobility by installing them in localities other than their home towns[129] probably with the intention of making it more difficult for them to use their posts to enhance their own social and material networks and of neutralizing a potential threat to central authority.[130]

Another aspect of the Almohad judiciary that stands out is the reinforcement of the post of *qāḍī al-manākiḥ* (i.e. entrusted with overseeing marriages). In Mostafa Benouis' opinion,[131] underlying the proliferation of these judges was the attempt to weaken regular *qāḍī*-s. And unless it is discovered that they used to be appointed by a *qāḍī* with general competences, Benouis is probably right for there is an inherent contradiction in restricting the action of a magistrate to marital issues when his legal competences are by definition unlimited. This is all the more so given that it was possible to resort to other denominations

124. No doubt the publication of El-Mostafa Benouis' dissertation on *Le système juridico-judiciaire almohade en al-Andalus et au Maghreb 542/668-1147/1269*, Thèse dactylografiée, Université Lumière-Lyon 2, Lyon 2002 (making use in turn of the results obtained in an earlier and equally unpublished dissertation by Mohammed al-Maghraoui: *Ḫuṭṭat al-qaḍā' bi-l-Maġrib fī l-dawla al-muwaḥḥidiyya 511-668/1121-1269*, Thèse dactylografiée, Faculté des Lettres, Rabat, 1989) will contribute to shedding light on this and other related questions. Also see above note 120.

125. According to the historian Ibn Saʿīd al-Maghribī (d. 1275 or 1286), a *ḥākim* was the *qāḍī* of an important city while that of a small town was called *musaddad.* See SERRANO RUANO 2011, p. 216. These variations in the proper way of naming the judge of an important or medium-size city reflect, in my view, the fact that the stronger control of the provinces and of rural areas that the Almohads managed to exert was partly brought about both through the elevation of judicial seats of secondary relevance, by promoting their judges to *qāḍī*ship, and through the constitution of new judicial seats where none had previously existed. Hence the increase in judicial seats registered for the period as stated by Benouis.

126. See BENOUIS 2005, p. 508, note 10. This does not mean that all the functions were entrusted in all the cases.

127. See RODRIGUEZ MEDIANO 1997, p. 180, quoting Ibn al-Abbār, *Takmila*, ed. 1887-1889, p. 296.

128. In the specific case of the *kātib-qāḍī*-s, the Andalusī provenance, while being the most frequent, was now less systematic than had been the case with the Almoravid *kuttāb* on the one hand and *qāḍī*-s on the other. See EL AALAOUI and BURESI 2005, p. 489, note 23.

129. Normally on the other side of the Straits of Gibraltar. See BENOUIS 2005, p. 508-509, 513.

130. See BENOUIS 2005, p. 514.

131. BENOUIS 2005, p. 517.

in order to mark the difference between general and restricted competences (e.g. *ḥākim*, *nā'ib*, *ḫuṭṭat ʿaqd al-manākiḥ*...[132]).

Mālikī jurists' reaction towards Almohad judicial policy

Despite the Almohads' reluctance to concede to Mālikism the status of official doctrine the school had previously enjoyed in al-Andalus and the Far Maġrib and their questioning of its legal methodology, Mālikī-s managed to prevail over the proponents of other legal alternatives. This was due to their having developed a series of strategies focused on demonstrating that Mālikī legal doctrine derived from a systematic application of *uṣūl al-fiqh* principles to the text of the sacred law embodied by the Qur'an and by Prophetic tradition.[133] Such an ability to accommodate adverse political circumstances leads one to assume that Western Mālikī-s also tried, as their Almoravid predecessors had done, to protect their independence *vis-à-vis* the ruler by enhancing the role of the *qāḍī* and religious justice as administered by jurists in relation to caliphal justice. However, this latter aspect has been paid little, if any, attention.[134] As has already been pointed out, the sources that could help us retrieve some information about this specific point in the activity of Almohad Mālikī-s are scarce, indeed, but it is also true that those that are available have not been exploited with the intention of elucidating how Mālikī-s adapted and reacted to the Almohad court system. Be that as it may, the lack of contemporary *fatwā* collections renders the attempt to reconstruct this specific point of Almohad history rather speculative for if our knowledge about the judiciary and the jurists in the Almoravid period stands on safer ground is due precisely to the exploitation of *fatwā* collections in combination with biographical dictionaries. In this light, the prohibition against compiling legal opinions emerges not only as a measure dictated by ideological consistency but also by sheer censorship, removing from the jurists a tool that had proved extraordinarily efficient for expressing disagreement and criticism against Almoravid rule and religious policy. This was a lesson from their predecessors' experience the Almohads learnt very well and which they were not interested in replicating.

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132. This latter denomination corresponds to the function performed by Maḫlad b. Yazīd b. ʿAbd al-Raḥmān al-Umawī (d. 622/1125) in Cordoba. See Ibn al-Zubayr, *Ṣilat al-ṣila*, p. 76. Cf. RODRÍGUEZ MEDIANO 1997, p. 180. The position of *qāḍī l-manākiḥ* or *al-ankiḥa* remained in Ḥafṣid Tunis and he could be important enough to be consulted by the *sulṭān* along with the *qāḍī l-ǧamāʿa* concerning matters of public security. See al-Wanšarīsī, *al-Miʿyār*, II, 435 and LAGARDÈRE 1995, 32, number 77.

133. These strategies have received a fair amount of attention, specially by Maribel Fierro (1999, p. 233-240; *Idem* 2005).

134. Fierro's study on Averroes' *Bidāyat al-muǧtahid* (1999) describes a jurist producing a legal work conceived to pave the way for the caliph to decide matters of juristic disagreement and to raise as the supreme interpreter of the sacred law. The aim of the book is not presented there as an attempt to protect the jurisprudential activity from the ruler's interference. However, seen from a different angle, nothing in the *Bidāya* prevents that it be used primarily by jurists — as this has actually been the case until our very days — to solve divergence of opinions and so, preempt a hypothetical intenvention by the ruler.

What follows next is drawn from studies dealing either with jurists of the Almohad period or with contemporary legal works which do not focus on Mālikī-s' reaction towards Almohad judicial policy but are likely to yield useful information in that regard.

In most cases, there is a consolidation of tendencies already observed in the Almoravid period. Regarding penal law, Muḥammad b. ʿIyāḍ, for example, uses the occasion of his reporting a case of rape submitted to his father to include a long commentary in which he collects opinions of earlier Mālikī-s — Ibn Sahl being his main source — finding for the evidentiary force of suspicion. Muḥammad's aim is to draw a table of discretionary punishments — from a varying time in prison to an equally varying number of lashes of the whip — proportional to different levels of suspicion which in practice enables *qāḍī*-s to overcome the evidentiary limitations imposed by *fiqh* to deal with crimes and torts, and renders redundant the need to resort to the ruler or to governmental judges in order to prevent impunity.[135] The fact that the capacity to establish *ḥudūd* punishments is listed among the requisites a Muslim must fulfil in order to be a valid candidate for *qāḍī*ship,[136] without distinguishing between sanctions that entail the death of the culprit and those that do not, at a time in which the caliph had retained the exclusive capacity to establish a death sentence on the grounds of a *ḥadd* crime, if not an act of open rebellion, betrays a certain reluctance to acknowledge official directives. Writing in Ḥafṣid Ifrīqiyā where Almohad ideology was still recognized as the official religious doctrine, Ibn ʿAbd al-Rafīʿ (d. 733/1322) goes even further and remarks that the execution of *ḥudūd* punishments "falls under the exclusive jurisdiction of the *qāḍī*".[137]

A parallel conclusion might apply to Ibn Hišām's detailed treatment of the administration of public endowments[138] notwithstanding that in the Almohad period, this task seems to have been mostly entrusted to an administrator appointed directly by the ruler, rather than to the *qāḍī*.[139]

The composition of al-Saqaṭī's treatise on the inspection of the markets, in a period in which works on applied law were banned, might be explained in the centrality for Almohad ideology of the principle of commanding right and forbidding wrong,[140] from which the *ḥisba* is derived.[141] However, as we have seen, a similar tract had been written in the Almoravid period by Ibn ʿAbdūn. More importantly, the last and fifth part of Ibn al-Munāṣif's manual for the instruction of judges is dedicated exclusively to the

135. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 82-84 and SERRANO RUANO 2007, p. 189-195, 201-203.

136. See CARMONA 2000, p. 132, referring to Ibn Hišām al-Azdī and his *Mufīd al-ḥukkām*.

137. See YANAGIHASHI 1996, p. 67, note 117 quoting Ibn ʿAbd al-Rafīʿ's *Muʿīn al-ḥukkām*.

138. See CARMONA 1987-1988, p. 129.

139. See above.

140. On the specific ways in which the *al-ʿamr bi-l-maʿrūf wa-l-nahy ʿan al-munkar* principle relates to the development of Almohad ideology see CORNELL 1987. For the possible link between Ibn Tūmart's activism in practicing the principle and al-Ġazālī's influence see COOK 2000, p. 458-459.

141. See, as a matter of fact, VIGUERA 1985, p. 596, quoting the opening statement of Ibn al-Munāṣif's *Tanbīh al-ḥukkām*.

ḥisba,[142] which is not common in previous examples of the genre and which in fact situates the book somewhere inbetween the *adab al-qāḍī* and the *ḥisba*.[143] Finally, Ibn al-Munāṣif belonged to a Cordoban family of Mālikī-s some of whose members held posts as important as *qāḍī l-ǧamāʿa* of Cordoba, and he himself was appointed *qāḍī* of Valencia and Murcia.[144] Therefore, and until a more thorough study of the contents and context of this book is carried out, there is some reason to think that it follows Ibn ʿAbdūn's path in giving additional doctrinal ground to the claim that both the definition and the limits of the *ḥisba* and the judges in charge of implementing it came under the *qāḍī*'s direct authority. If fact, it seems that when the opportunity to put what he preached into practice arrived for Ibn al-Munāṣif, he did not miss it. After being appointed *qāḍī* of Murcia he conducted himself with such a zeal and severity that he had to be dismissed.[145] Furthermore, the introduction of his treatise testifies to his position favorable to enhancing the position of *qāḍī*-s and to discouraging rulers' interference in judicial activity. There he quotes a series of Qur'anic verses and traditions with the intention of stressing two relevant facts: firstly, that it is advisable for rulers to rely on *qāḍī*-s given that their post demands from them exclusive dedication to politics, and secondly, the importance of coordination between the executive power and the judiciary in order to bring about administrative unity and internal cohesion in the Muslim community (*umma*).[146] Muḥammad b. ʿIyāḍ's inclusion of a chapter on "preventing harm (*nafy al-ḍarar*)" collecting legal cases related with the application of the *ḥisba*,[147] synonymous with the "forbidding wrong (*al-nahy ʿan al-munkar*)" part of the Qur'anic principle, and portraying his father's activity as either a *qāḍī* or a *mufī*, can also be understood as part of the same scheme.[148]

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142. See VIGUERA 1985. Also see COOK 2000, p. 370-373.

143. Ibn ʿAbdūn's title of *al-Qaḍāʾ wa-l-ḥisba* is associated, as I pointed out above, with the plan to put the *ḥisba* under the *qāḍī*'s exclusive responsibility, but from a formal point of view, the book is a rather typical *ḥisba* treatise or, to put it another way, an *adab al-qāḍī* book dedicated exclusively to the *ḥisba*, which is not the case of Ibn al-Munāṣif's *Tanbīh al-ḥukkām*. According to Michael Cook (2000, p. 371-373), the source of part V of the *Tanbīh* is Ġazālī's analysis of the duty to enjoin good and forbid evil in the *Iḥyāʾ ʿulūm al-dīn,* "Yet the Ghazzālian herigate in Ibn al-Munāṣif, though extensive, is heavily eroded". That a Mālikī like Ibn al-Munāṣif drew, however indirectly (see COOK 2000, p. 372-373), from al-Ġazālī is not only credible but could even be seen as a nod to political correctness at a time characterized by the rehabilitation of his figure both as a jurist and as a theologian. Furthermore, the author of the *Tanbīh* is described by his biographers as a *muǧtahid* who had a certain sympathy for the doctrines of al-Šāfiʿī. See RODRÍGUEZ GÓMEZ 2006, p. 253. On the fluidity between Šāfiʿī-s and Mālikī-s concerning the doctrine on *al-ʿamr bi-l-maʿrūf wa-l-nahy ʿan al-munkar* also see COOK 2000, p. 376-377).

144. See VIGUERA 1985, p. 591-593.

145. See RODRÍGUEZ GÓMEZ 2006, p. 254.

146. See RODRÍGUEZ GÓMEZ 2006, p. 258.

147. Including the monitorization of social customs (e.g. playing music), morals and good conduct, urbanism, misappropiation of public property, and public health.

148. See Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 87-100. This is, indeed, one of the longest chapters in the compilation. In some cases, it is not clear whether ʿIyāḍ is involved as a *qāḍī* who is seeking the *muftī*-s' advice before taking a decision or as the most prominent religious and legal, but not necessarily judicial, authority in the area of Ceuta or Granada, where he performed *qāḍī*ship (see Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 90, 92-94). On one occasion, he appears to have been approached by a *ḥākim* (Ibn ʿIyāḍ, *Maḏāhib al-ḥukkām*, p. 90-91).

If I am right in attributing to Ibn al-Munāṣif and to Muḥammad b. ʿIyāḍ an intention to give further support to the tendency — or to the claim — that the *ḥisba* should be under the *qāḍī*'s control, al-Saqaṭī operates with the opposite aim in mind. He was a former *muḥtasib* who wanted to transmit his knowledge about the proper performance of the post to subsequent generations of market inspectors with a view either to making or to keeping the post independent from the *qāḍī*. Yet he seeks this latter purpose following, if not Mālikī *fiqh*, the spirit of *šarīʿa* and prophetic *sunna* more closely than Pedro Chalmeta assumes, misled by the heavy reliance on custom of the practices reported by al-Saqaṭī.[149] While Ibn al-Munāṣif appears to conceive of the magistrate in charge of the *ḥisba* as either a *qāḍī*, or a *ḥākim* under the direct authority of a *qāḍī*, for al-Saqaṭī the competent agent is a *muḥtasib* — not a *ṣāḥib al-sūq/al-ḥisba wa-l-sūq/al-šurṭa wa-l-sūq* anymore — whose post lies half way between the *qāḍī* and the *maẓālim* judge (*ḫuṭṭa... wasīṭa bayna ḫuṭṭat al-qaḍā' wa-l-maẓālim*)[150] and whose jurisdiction does not extend to the port[151] nor consists of investigating people's behaviour within the private realm, unless he has sound reasons to suspect that *zinā* or a blood crime are being committed.[152] The Almohad market inspector described by al-Saqaṭī no longer appears to hold the office (*dukkān*) that had served his predecessors as seat or tribunal, which might *a priori* add to evidence that these agents' competences were limited in the Almohad period. His claim of superiority with respect to the *qāḍī* is shyly stated,[153] which is implicit both in the transmission of an anecdote according to which the Šāfiʿī *muḥtasib* of Bagdad expelled the *qāḍī* from the main mosque for using it as if it were his office[154] and in the obliteration of the *qāḍī* when the question of the *muḥtasib*'s appointment is addressed.[155] That this magistrate is, according to al-Saqaṭī, to be directly designated by the ruler can be presumed but is not openly stated either, in contrast with the strong claim — equally expressed by means of an anecdote — that once appointed, both the ruler and his family were also subject to the *muḥtasib*'s authority.[156] Within the limits of his jurisdiction, the *muḥtasib* is, according to al-Saqaṭī, entitled to apply different levels of punishments ranging from a simple reprimand to ignominious parading.[157]

149. Cf. CHALMETA 1967a, p. 140, 142, 144, 149, 150, 160; *Idem* 1967b, p. 360-361, 369.

150. See al-Saqaṭī, *Un manuel hispanique de ḥisba*, p. 2 and CHALMETA 1967b, p. 360-361. Cf. CHALMETA 1967a, p. 140 who interprets his own literal and correct Spanish translation of al-Saqaṭī's statement in the sense that the *muḥtasib* was superior to the *qāḍī* and inferior to the *ṣāḥib al-maẓālim*.

151. See CHALMETA 1967b, p. 360-361 and *Idem*, 1967a, p. 140.

152. See CHALMETA 1967b, p. 370-371, 375.

153. Cf. CHALMETA 1967a, p. 145.

154. See CHALMETA 1967b, p. 361-362.

155. See CHALMETA 1967a, p. 140.

156. See CHALMETA 1967b, p. 364.

157. See CHALMETA 1967b, p. 376. Despite its strong eschatological symbolism, ignominous parade was considered a *taʿzīr* or discretionary punishment instead of a *ḥadd* and used to be meted out by *muḥtasib*-s in the East (see LANGE 2007, p. 97-98) and, to judge by al-Saqaṭī's testimony, also in the West.

No doubt al-Saqaṭī's work is motivated by the intention to produce a textual basis for the good governance of the *sūq* that reflects the best of actual legal practice. However, on certain occasions, this purpose seems to me to be sacrificed to another impulse, namely to express disappointment with the Almohad political authorities for not breaking with Mālikī-s' monopoly of the judicial organization and dismay at the all-embracing reach of *qāḍī*-s' justice — the justice of the markets being no less Islamic than that imparted outside this particular space.[158] In fact, Chalmeta suspects, with sound reasons, that the book was written in the first quarter of the 13th century C.E. when Almohad rule had started to decay[159] and, consequently, the prohibition against producing works on applied law, and the ruling classes' capacity to enforce it must have been relaxed. Be that as it may, the import of al-Saqaṭī's *Ādāb al-ḥisba* seems to confirm that Ibn al-Munāṣif and Muḥammad b. ʿIyāḍ had solid reasons not to lower their guard in their commitment to stress the link between the *ḥisba* and the *qaḍā*' and to endow *qāḍī*ship with a stronger, more independent position with respect to the ruler and governmental judges.

According to Alfonso Carmona,[160] the space dedicated to marriage and related questions in Ibn Hišām's *Mufīd* is extraordinarily long, an assertion that can be confirmed by comparison with earlier examples of the genre written in the Islamic West like al-Baǧī's *Fuṣūl al-aḥkām*. This development might be due to "contamination" from formularies. Marriage occupies a central position in them and, hence, in the activity of the experts in drafting legal documents, a matter in which Ibn Hišām was considered an expert.[161] However, it is also possible to connect the development with the proliferation of the *quḍāt al-manākiḥ* either to give them support or to react against the very conception of their post, but this impression will be confirmed or rejected only when a more thorough study of the contents of the *Mufīd*, not to mention a full edition of the Arabic text, sees the light.

Conclusion

Alignment with the Mālikī legal school and support with their practitioners was essential to provide internal cohesion to the Almoravid movement and to their rise as the first Berber empire in Islamic political history, covering a highly Islamized and

158. Who exactly Abū ʿAbd Allāh Muḥammad b. Abī Muḥammad al-Saqaṭī al-Mālaqī was is still unknown beyond the certainty that he came from Malaga and performed as *muḥtasib* sometime between 1147 C.E. and 633/1236. Chalmeta (1967a, p. 131-132 and 137) suggests that he might be identified with a certain Abū Muḥammad ʿAbd Allāh al-Mālaqī who was a *faqīh*, *ḫaṭīb*, vizier, chief of the *ṭalaba* of the court and man of trust of the Almohad caliph Abū Yaʿqūb Yūsuf, or with a son of that man; in short, someone apparently closer to the court than to the bulk of the Mālikī *fuqahā'* making up the pool from which *qāḍī*-s were selected. I am not claiming here that our al-Saqaṭī was not a Mālikī, but the fact that he quotes Mālik b. Anas and his *Muwaṭṭa'* must not necessarily lead to the conclusion that he was a faithful adherent to this school either (Cf. CHALMETA 1967a, p. 132-133).

159. CHALMETA 1967a, p. 130-132.

160. CARMONA 1987-1988, p. 128.

161. See CARMONA 2004, p. 460.

urbanized region like al-Andalus. As a result, *qāḍī*-s were empowered to receive some of the competences that had been performed by governmental judges under previous rulers. The idyll, however, was far from being perfect. Almoravids retained their capacity to control legal scholars through the dispensation of appointments, through their direct assumption of the *maẓālim* and *radd* jurisdictions and through establishing the *ṣāḥib al-aḥkām* as a renewed alternative to *qāḍī*-s' justice.

Legal scholars then resorted to *fatwā*-s and to doctrinal elaborations to question their extreme dependence on the ruler in several ways: they articulated further the idea that *šarīʿa* is the supreme ruling principle, stressed the ruler's obligation to abide by it, underpinned the superiority of *qāḍī*-s in the judicial hierarchy and the right of the religious judge to check the dispensation of justice by the ruler and by governmental judges. Simultaneously, they reduced the list of cases the ruler is entitled to adjudicate and expanded the scope of *qāḍī*-s exclusive competences at the expense of governmental judges; finally, they insisted on the need to entrust the dispensation of justice to upright experts in *šarīʿa*, especially when statutory crimes, the faithful and responsible implementation of which is the mark of the "authentic" Islamic state, were involved.

Eventually, the Almoravids' attempts at weakening Andalusi *qāḍī*-s did not succeed. When their power started to collapse by the middle of the 6th/12th century,[162] a number of these *qāḍī*-s, drawing on the social and political capital they had managed to obtain during the previous decades, seized control of their localities, starting a brief independent interval known as the second taifas to which the Almohad invasion of al-Andalus put an end.

The conclusions about judicial pluralism in the Almohad period have to be more tentative. No doubt the availability of vast military and material resources allowed the Almohads to rule the territory under their command with a hand much firmer than their predecessors could ever afford.[163] The constitution of new judicial seats and the elevation

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162. See a brief and sensible explanation of the factors that led to the dissolution of the Almoravid empire in MESSIER 2012, p. 3.

163. For an apt overview on the formation of the Almohad movement and the building of an empire that stretched from the Sus valley and al-Andalus to Lybia, owing to Ibn Tūmart's and his immediate followers' deep insight into the social and power structures of the Berber tribes of the High Atlas whom they managed to convert to their cause, establishing a large tribal confederation and, hence, a huge army, see FROMHERZ 2010, p. 1-17. Though presenting a fresh perspective on the Berber foundations of the Almohad movement and an extremely useful summary of Ibn Tūmart's *Aʿazz mā yuṭlab*, the author is trapped in a biased characterization of the jurists and theologians of the Almoravid period that affects the main sources of his study which, in this particular aspect, he reads somewhat uncritically (e.g. FROMHERZ 2010, p. 166-169, 174 and notes 111 and 126).
The Almohad empire could have hardly emerged and lasted in unfavourable economic conditions. Booty obtained at the moment of the conquest, the solidarity of the tribes that came to embrace the movement and the increase in tax revenue which can be presumed to have resulted from a tighter control and more effective administration of the land, must have contributed significantly to greasing the gears of the Almohad armies and to stimulating loyalty towards central authority. Maritime trade and commercial relationships with the main Mediterranean ports — both Muslim and Christian — are also said to have flourished in this period. However, knowledge is still scant regarding the precise nature of overland trade in this period, especially that using trans-Saharan routes, and concerning access to precious metals.

of the status of those that existed, putting a *qāḍī* at their head instead of a *ḥākim*, must have been instrumental in watching the provinces and the most remote parts of the empire more closely. This was, in principle, good news in the form of new jobs for the religious scholars. Indeed, despite initial Almohad reluctance, most of those who filled these posts were Mālikī-s and the creation of a new class of religious scholars, the *ṭalaba*, did not erase the followers of the school of Medina from the scene, even in a minimal percentage.

Yet the Mālikī-s lost their role as the main providers of religious legitimacy to executive power along with their status as supreme interpreters of the sacred law. Stronger military and financial resources enabled the Almohads to rely rather on the sophisticated ideology developed by the movement's leader, Ibn Tūmart, on the grounds of which he presented himself as the infallible *mahdī*.[164]

Almohads also used their power to carry out some of the judicial policies unsuccessfully set in place by Almoravids to keep the Mālikī-s under control: they managed to imposed on them a high level of territorial mobility and turned them into bureaucrats at the direct service not of the obligation to promote and realize the ideal of the sacred law but of central political authority. A stronger central authority in direct command of the implementation of Islamic justice also made it possible to shift the emphasis from governmental judges to neutralize *qāḍī*-s, introducing within this latter body a level of internal dissenssion—i.e. the appointment of *qāḍī*-s with limited legal competences, which undermined the very definition of *qāḍī*ship *vis-à-vis* the ruler — and trying to blur the distinction between a *ḥākim* and a provincial *qāḍī*. Removal from the administration of public endowments must have represented a hard blow as well. Yet centralized judicial authority — whenever it was enforced — also had the balancing effect of divesting provincial governors of the capacity to appoint *qāḍī*-s or establishing death sentences on the grounds of *ḥudūd* and blood crimes.

What the religious scholars did not lose was their capacity to question caliphal justice, however limited the means at their disposal may have been. Mālikī-s adapted to the requirements of Almohad ideology — superficially if need be —, circumvented it whenever it was possible, and managed to question judicial policy subtly but efficiently enough for the authorities to feel that they had to make concessions: hence the extraordinary powers enjoyed by certain *qāḍī*-s and, again, the fluctuations in the competences assigned to them. When Almohad power collapsed, the Mālikī-s, more or less transformed by decades of imposition of Almohad ideology but still the same in terms of the essentials of their legal methodology and socio-intellectual dynamics, prevailed and took back their role as the main dispensers of legitimacy and supreme interpreters of the sacred law. The ambitious and unprecedented attempt to bureaucratize the legal scholars of the Islamic West carried out by the Almohads would have to wait for the advent of the Ottomans to move forward.

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164. After his death, however, political leadership was based on a direct claim to the caliphal title, the Berber ancestry stressed by Ibn Tūmart giving way to the adoption of an Arab genealogy that connected the Almohads agnatically with the tribe of Qays ʿAylān and cognatically with Qurayš. See FIERRO 2003.

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