PATERNITY AND FILIATION ACCORDING TO THE JURISTS OF AL-ANDALUS: LEGAL DOCTRINES ON TRANSGRESSION OF THE ISLAMIC SOCIAL ORDER

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Abstract

This article aims to broaden our knowledge of Muslims' approaches to the idea of paternity, paying attention to the legal doctrine relating to situations in which the established social order is transgressed or put at risk, circumstances that tend to be dealt with at length in chapters concerning *zinà* (fornication or non-legal sexual relation) in works of Islamic jurisprudence. To this end, a specific chronological and geographical context has been selected, that of al-Andalus, the study of which constitutes a model for analysis that is applicable, both as a model and in its results, to other Islamic societies in the same period. Most Muslim jurists in al-Andalus belonged to the Maliki school, one of the four Sunni or orthodox juridical schools. The doctrine of the minority, i.e. the Zahiri legal school, is also taken into account[1].

Key Words

Paternity, Filiation, Islamic Law, al-Andalus, Malikis, Zahiris, Ibn Hazm.

Capitalia Verba

Dignitas patris, Filiatio, Mahumedanae leges, Hispania Arabica, *Malikis*, *Zahiris*, Ibn Hazm.

1. Research for this paper has been carried out within the research project "Sexual taboos and family structures: *sharia* and sexual ethics in the pre-modern Islamic world (IIIth/IXth-VIIth/XIIIth centuries)", directed by Dr. Cristina de la Puente and financed by the Spanish Ministry of Science and Innovation (FF12010-16314).

1. Paternity

Pre-modern Islamic social order rests upon the dual premise of male domination and the patrilineal transmission of genealogy, and its main organisational structure is the family. This order is expressed around the principle of *al-walad li-l-firash* (lit. "the child belongs to the bridal bed") according to which only children born within marriage or concubinage are legitimate[2]. Children born within marriage are always attributed to the mother's husband. In concubinage, however, the offspring have to receive the tacit or explicit recognition of the progenitor in order to enjoy legitimacy, thereby limiting the universality of the above principle. It is thus fundamental to study the concept of paternity to establish the family structures and nature of the Islamic social order, and hence the choice of the theme this work is devoted to[3].

There are various avenues —both thematic and disciplinary— whereby the concept of paternity in Islam can be approached[4]. This article aims to broaden our knowledge of Muslims' approaches to the idea of paternity, paying attention to the legal doctrine relating to situations in which the established social order is transgressed or put at risk, circumstances that tend to be dealt with at length in chapters concerning *zinà* (fornication or non-legal sexual relation) in works of Islamic jurisprudence. To this end, a specific chronological and geographical context has been selected, that of al-Andalus, the study of which constitutes a model for analysis that is applicable, both as a model and in its results, to other Islamic societies in the same period.

Most Muslim jurists in al-Andalus belonged to the Maliki school, one of the four Sunni or orthodox juridical schools, along with the Hanafi, Shafi`i and Hanbali schools. The doctrine of this school, whose founder is considered to be the jurist and traditionist from Medina Malik b. Anas (d. 179/795)[5], held official status in al-Andalus and its doctrine was exclusively applied there as against the rest of the schools[6]. This trait differentiates Andalusi juridical practice from that of other

2. On this principle and the purposes it came to serve see: Landau-Tasseron, Ella. "Adoption, acknowledgement of paternity and false genealogical claims in Arabian and Islamic societies". *Bulletin of the School of Oriental and African Studies*, 66 (2003): 169-192, especially, 176-180.

3. Which does not amount to holding that maternity is irrelevant. On conceptions about maternity prevalent in Islamic societies and their representation through Arabic literary texts see the contribution by Isabel Toral in this same issue. For the case of al-Andalus see: Marín, Manuela. "Maternidad y relaciones materno-filiales", *Mujeres en al-Andalus. Estudios Onomástico-Biográficos de al-Andalus*. Madrid: Consejo Superior de Investigaciones Científicas, 2000: IX, 504-538; Marín, Manuela. "El parentesco materno", *Mujeres en al-Andalus...*: IX, 504-538.

4. For the state of research on family structures and social organisation in al-Andalus see the contribution by Cristina de la Puente, focussed on the type of family that arises from the relation between a free Muslim male and his concubines, in this same issue.

5. Regarding his biography, the Maliki school and bibliography of relevance in this connection, see: Serrano, Delfina. "Malik b. Anas", *Medieval Islamic Civilization: An Encyclopedia*, 2 vols., Josef Meri, ed. New York: Routledge, 2006: II, 468; Serrano, Delfina. "Malikism", *Medieval Islamic Civilization...*: II, 469.

6. Except for the Almohad period when Malikism lost its exclusivity, though not its support base or its power to adapt to changing circumstances, establishing itself once more as the preponderantly official school after the Nasrid restoration. See: Fierro, Maribel. "La religión", *El retroceso territorial de al-Andalus.*

regions in the Islamic world where, although one school might enjoy the sovereign's favour, those of his subjects who followed any of the other three had the right to be guided by it in their private affairs, which meant that, in addition to the Qadis of the dominant school, there were also Qadis representing the others. Although to a degree that varies depending on each country, Maliki doctrine today continues to be applied in Morocco, Mauritania, Lybia, Nigeria, Sudan, Egypt and United Arab Emirates. Likewise, laws of Maliki origin are applied in isolated form in Tunisia, Kuwait, Pakistan, and even in the Hanbali-Wahhabi stronghold of Saudi Arabia[7].

The legal norm sanctioned by the government of the day or —in the case of pre-modern Islamic legal systems— by experts in Islamic jurisprudence favoured by those governments, does not, however, cover all that a particular society considers as normative. Inclusion of the doctrine of the Zahiri legal school is expected to broaden and specify our perception thereof in quite a significant manner, in spite of the fact that Zahirism had far fewer followers in al-Andalus than Malikism and unlike the latter never came to be considered a part of Islamic orthodoxy. Indeed, the important intellectual contribution of its principal representative —jurist, traditionist, theologian and man of letters Ibn Hazm (d. 456/1064) of Cordoba[8]—, and the renewed echo that his legal opinions have set off in some sectors of modernism and of contemporary Islamic feminism[9], highlight the desirability of including his perspective in any study of Andalusi Islamic jurisprudence that aspires to be minimally representative. In doing so, we nonetheless do no more than

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Almorávides y almohades, Siglos XI al XIII, María Jesús Viguera, ed. Madrid: Espasa Calpe, 1997: VIII-2, 437-550; Fierro, Maribel. "Doctrina y práctica jurídicas bajo los almohades", *Los Almohades: problemas y perspectivas*, 2 vols., Patrice Cressier, Maribel Fierro, Luis Molina, eds. Madrid: Consejo Superior de Investigaciones Científicas, 2005: II, 895-935; Adang, Camilla. "The spread of Ẓāhirism in post-caliphal al-Andalus: the Evidence from the Biographical Dictionaries", *Ideas, Images, and Methods of Portrayal. Insights into Classical Arabic Literature and Islam*, Sebastian Günther, ed. Leiden: Brill, 2005: 297-346; Calero, Maria Isabel. "La justicia, cadíes y otros magistrados", *El reino nazarí de Granada (1232-1492). Sociedad, vida y cultura*, Maria Jesús Viguera, ed. Madrid: Espasa Calpe, 2000: VIII-3, 375-381.

7. Considering, for example, that pregnancy is proof of having committed fornication contrary to the doctrine of the official school. See: Peters, Rudolph. *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge (UK): Cambridge University Press, 2005: 150; Serrano, Delfina. "'Muslim Feminists' Discourse on *zinà*: New Paradigms in Sight?", *Liebe, Sexualität, Ehe und Partnerschaft-Paradigmen im Wandel*, Roswitha Badry, Maria Rohrer, Karin Steiner, eds. Freiburg: Fördergemeinschaft wissenschaftlicher Publikationen von Frauen, 2009: 105-125, on page 112, note 21.

8. For his biography see: Arnáldez, Roger. "Ibn Hazm", *Encyclopaedia of Islam*, Peri Bearman, Thierry Bianquis, Clifford Edmund Bosworth, Emeri van Donzel, Wohlfart P. Heinrichs, eds. Leiden: Brill, 1986: III. See an interesting assessment of studies devoted to his work in: Sabra, Adam. "Ibn Hazm's Literalism: A critique of Islamic Legal Theory (I)". *Al-Qantara*, 28/1 (2007): 7-40 especially, 7-11.

9. Sabra, Adam. "Ibn Hazm's Literalism...": 7-9; "Zina, Rape, and Islamic Law: an Islamic Legal Analysis of the Rape Laws of Pakistan, a position paper by Karamah". *Muslim women Lawyers for Human Rights*, 7-15 (2012). Online in: <www.karamah.org/docs/Zina_article_Final.pdf>, last accessed on January, 19th 2012. This article has undergone significant modifications since the first time I consulted it (28 August 2006) and cited it in: Serrano, Delfina. "Rape in Maliki legal doctrine and practice (8th-15th century c.e.)". *Hawwa*, 5/2-3 (2007): 166-207. The current version dedicates more space than those that preceded it to the doctrines of Ibn Hazm concerning *zinà* and rape and presents them as a possible source of inspiration for the reform of laws governing these questions that are applied today in Pakistan, the present enforcement of which Karamah activists consider to be highly problematic.

alleviate the difficulties we are up against when shaping an approximate picture of what Andalusi Muslims considered to be compulsory or proper behaviour[10] beyond the material and written record, given the impossibility of filling the gaps that these sources leave via direct observation of the way individuals or groups within that society conduct themselves.

Since I have, in previous works, addressed ideas about filiation and paternity that were in force among Maliki jurists[11], I am now going to focus on the way in which Ibn Hazm defines this concept in the chapter on fornication (*zinà*) and false accusation of fornication (*qadhf*) from one of his most important works of jurisprudence and the main compendium of Zahiri doctrine: *al-Muhallà* . This approach has the dual advantage of contributing a little known point of view to discussion on the issue and of allowing us to form a more accurate idea of the relation between legal doctrines associated with paternity and the surrounding social reality through a comparison of different tendencies. Internal or external comparison of legal doctrines is usually a fairly effective method for exploring the practical dimension of such doctrines within a context, that of pre-Ottoman Islamic societies, where the task is hampered by the scarcity of the kinds of sources which historians of other types of societies (medieval Christian, for example) tend to use for the same purpose (archive and documentary sources, for instance). Furthermore, Ibn Hazm furnishes information about his principal adversaries, the Malikis, which does not always explicitly appear in the texts written by the latter.

2. Malikis and Zahiris of al-Andalus on paternity and filiation

According to Moroccan sociologist Fatima Mernissi, marriage and concubinage as exclusive frameworks for licit sexual relations and legitimate offspring, the prohibition of *zinà* and the enshrining of male domination and of the patrilineal transmission of progeny, arose in order to reinforce the institution of the family. These new regulations played an essential role in the move from a tribal society to a social structure based on the family; or, to put it another way, from a family in which women enjoyed some degree of sexual self-determination and in which the child did not necessarily belong to the biological father, to a male-dominated family in which it was fundamental to guarantee biological paternity leaving the women to bear the brunt of the maintenance of the system by their chastity. This change was

10. Of course it is always possible to resort to other, non legal, sources and to the work carried out by their students. On the use of literary —in the sense of having a primary aesthetic goal— sources to reconstruct past people's perceptions and emotions, see Isabel Toral's contribution to this same issue.

11. Serrano, Delfina. "La lapidación como castigo de las relaciones sexuales no legales (*zinà*) en el seno de la escuela malikí: Doctrina, práctica legal y actitudes individuales frente al delito (ss. XI y XII)". *Al-Qantara*, 26 (2005): 449-473; Serrano, Delfina. "Rape in Maliki legal doctrine and practice..."; Serrano, Delfina. "'Muslim Feminists' Discourse on *zinà*...".

considered by the Prophet Muhammad to be indispensable for the establishment of- Islam.[12]

Malikis and Zahiris coincide in subscribing the centrality of the principle of *al-walad li-l-firash* for the preservation of the Islamic social order[13], which, as has been indicated, is deemed fundamental for the very preservation of Islam. Similarly, they agree on the development of the mechanisms required for promoting that order, to wit:

1. Imposition of severe punishments for its contravention, which tends to be alluded to with the previously mentioned term *zinà* (fornication, adultery)[14]. *Zinà* constitutes not only a serious crime of public order (*hadd,* pl. *hudud* or crime against the "rights of God") but also a mortal sin from which a Muslim can only be freed after receiving the corresponding punishment, if he repents[15].
2. Limitation of the possibilities for integration in society of children born out of wedlock through restriction of their rights to be linked with the progenitor's lineage, to inherit from him and obtain the status of probity (*`adala*) necessary for the exercise of particular legal-religious functions. Illegitimate progeny is consequently legally inferior to legitimate offspring.
3. It is important to point out that Muslim jurists consider the commission of *zinà* to be almost as disturbing for the established social order as the publicity the act itself generates after denunciation. Accordingly, they establish a punishment consisting of eighty lashes for slander or false denunciation of fornication (*qadhf*). Slander not only involves punishment but disqualifies the accused from giving testimony, as he is categorised as a corrupt person (*fasiq*), unless he repents[16]. Meanwhile, they impose requirements for proving the crime that are very hard to meet and, at any rate, more exacting than those needed to demonstrate other legal circumstances, namely that the accused admits having committed the offence or that four upright males declare that they have witnessed the act, including even the most intimate details[17].

   Malikis and Zahiris also concur in accepting the existence of a series of mechanisms to compensate for the harshness or, also if you like, for the injustice that application of the relevant doctrines might entail:

12. Mernissi, Fatima. *Beyond the Veil: Male-Female Dynamics in Modern Muslim World*. London: Saqi Books, 2003: 64; Mernissi, Fatima. *Sexe, Ideologie, Islam*. Paris: Éditions Tierce, 1983: 59-60. See also: Ahmed, Lelia. *Women and Gender in Islam. Historical Roots of a Modern Debate*. New Haven-London: Yale University Press, 1992: 44-47.

13. For the position of Ibn Hazm in this regard see: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 229 (question (*mas'ala*) 2201).

14. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 449-450.

15. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 227 (question 2200).

16. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 268-269 (question 2225).

17. To establish patrimonial rights and obligations, for instance, testimony is sought from two upright male witnesses, or from one upright male and two women, or from one upright male accompanied by the party's oath, although there is disagreement on this last point.

4. A free Muslim man can reject the paternity of his wife's child if he feels it is not his, through the procedure known as *li`an* or imprecatory oath. This is an oath whereby the husband can accuse his wife of *zinà* and, in consequence, deny paternity of her child without incurring in slander, even though he does not present the required four witnesses. If the wife denies the accusation via the same procedure, she is protected from the consequences of the accusation of *zinà*. The marriage is definitively dissolved and the child is not attributed to the mother's husband[18].
5. The doctrine of the sleeping foetus establishes that pregnancy can last between six months and two years. In theory, therefore, it would be possible to attribute to the mother's husband a child conceived from a union subsequent to the period that the marriage is in effect[19]. This doctrine was in force in Morocco until very recent times[20].

3. Divergences

Malikis and Zahiris differ regarding:

1. Punishment for *zinà*. For Malikis the punishment consists of a) a hundred lashes for the non-*muhsan*[21] (there is disagreement as to whether a year's exile also has to be applied or not, depending on gender and status), b) stoning to death for the *muhsan*, c) fifty lashes and six months of exile for slaves in all cases[22]. The Zahiris impose: a) one hundred lashes and a year's exile for the non-*muhsan*, always, b) a hundred lashes plus stoning for the *muhsan*, c) fifty lashes and six months of exile for slaves. On this point, Ibn Hazm feels the need to specify that the punishment is always the same, both if the slave is *muhsan* or non-*muhsan*, woman or man, which the Malikis consider unnecessary given that slaves are by definition "non-*muhsan*" since for them the *ihsan* or condition of *muhsan* implies freedom. The penalty for slaves who have agreed a contract for their liberation

18. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 459.

19. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 450-451.

20. See: Fischer, Nils. "Schlafende Schwangerschaft in islamischen Gesellschaften. Entstehung und soziale Implikationen einer weiblichen Fiktion". *Die Welt des Islams*, 48/2 (2008): 245-247, where it is shown that although the doctrine is no longer legally in force in Morocco, it still serves to protect women who become pregnant in the absence of their husbands, or after widowing, from social exclusion. In Libya, however, we are aware that the attempt of a woman to attribute to her ex-husband the paternity of a child born 29 months after their divorce, under the doctrine of the sleeping foetus, was rejected by the court which judged her for illicit sex on the grounds of a medical report that denied such a possibility. See: Benomran, Fawzi A. "Sleeping foetus? Medicolegal consideration of an incredibly prolonged gestational period". *Medicine, Science and the Law*, 35/1 (1995): 75-78. The bibliography on this doctrine, myth or belief is relatively abundant and can be fairly easily located by entering *enfant endormi*, or "sleeping fetus/foetus" as search terms. Concerning the validity of this doctrine in al-Andalus, see a case that occurred in Cordoba in the 10th century, cited by: Marín, Manuela. *Mujeres en al-Andalus...*: 294.

21. For the definition of this term, see *infra*.

22. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 449.

with their owners once a specific time period has transpired and in exchange for defined provisions (*mukatab*), is calculated on the basis of that applicable to the non-*muhsan* and in proportion to what they have paid for their liberation. For Malikis, the penalty is the same for all kinds of slaves[23].

2. Malikis and Zahiris disagree then as to the definition of *ihsan*: for Malikis *muhsan* is a free Muslim who has maintained previous sexual relations within a lawful union, that is to say, within marriage or concubinage. The category of *muhsan* may therefore cover the legal owner of a female slave, as well as married, divorced or widowed, free male or female Muslims. So a non-*muhsan* is either a slave or a free Muslim who has not been married or who has no concubines[24]. Zahiris basically understand *ihsan* in the sense of "having maintained sexual relations within a lawful union", at the present moment or in the past. Consequently, in this category they also include slaves and non-Muslims. However, for slaves they maintain half the penalty for *zinà* established for free Muslims, stoning being an indivisible penalty, they take as the basis for calculation the punishment of free non-*muhsan* Muslims.[25] Ibn Hazm informs us of the existence of an important discrepancy between the theoretical conception of *ihsan* entertained by Sunni jurists —amongst whom Malikis are included— and their action in practice. He affirms that Sunni jurists considered the *muhsana* to be a free repudiated[26] Muslim woman, which excludes women who are married, widowed or who have lost trace of an absent husband. This position restricts, therefore, the scope of stoning to death. Conversely, it seems to reflect the social stigma that weighed upon the repudiated woman and her weakness,[27] adding to the arguments to refute the claim frequently made by those in favour of the validity of the punishment for *zinà* according to which relevant Islamic jurisprudence treats men and women equally. As Kecia Ali already noted, although the punishment is the same for men and for women, a man may have up to four wives and as many concubines as he is able to afford, whilst the woman is only lawful for one man and may not have relations with a number of men at the same time. Moreover, women are more vulnerable to the accusation of *zinà* than are men, inasmuch as pregnancy is considered to be proof of the crime[28].
3. As has been mentioned, for Malikis and Zahiris the offence of *zinà* is proven through a statement by four male witnesses of unquestionable probity (*`adala*), or through the confession of the accused. Unlike Zahiris and the jurists of the

23. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 229-242 (questions 2202-2205).

24. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 449 (note 3).

25. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 237.

26. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 237.

27. The veracity of Ibn Hazm's testimony can be confirmed through sources external to Zahirism. See: Ibn Rushd, al-Jadd. *Fatawà Ibn Rushd al-Jadd*, 3 vols., ed. al-Mukhtan b. al-Tahir al-Talili. Beirut: Dar al-Gharb al-Islami, 1394-1395, 1399; Serrano, Delfina. "La lapidación como castigo de las relaciones...": 458-459.

28. See: Ali, Kecia. *Sexual ethics and Islam: feminist reflection on Qur'an, hadith, and jurisprudence*. Oxford: Oneworld Publications, 2006: 68-69. On pregnancy as proof of *zinà* see *infra*.

Sunni legal schools, Malikis include pregnancy as one of the complete proofs of *zinà*. Nonetheless, they temper this measure via a prolongation of the admitted time period for pregnancy of up to five years[29]. Malikis do not tend to concern themselves with the matter of whether it is or is not possible to refute the statement made by four upright witnesses who state they have witnessed the act down to its most intimate details without fissures or contradictions. They only stipulate that when one of the witnesses subsequently withdraws his declaration, he incurs in the crime of slander and, should the penalty already have been applied against the accused on the grounds of such false testimony, is obliged to pay the corresponding blood price to the latter's family[30]. Ibn Hazm, however, asserts that the testimony of *zinà* presented by four upright witnesses can be overturned if four women certify that the woman accused is a virgin[31]. Given his position against punishing the witness to *zinà* when the proof cannot be properly completed, evidence to the contrary from these women, if accepted[32], would not lead to the male witnesses being punished for slander either. The general rule according to which women's testimony does not suffice to impose a statutory sanction is preserved, but its preventive capacity is recognised. This capacity of women to influence the final result of an accusation relating to the offence of *zinà* also exists in the Maliki school, though with different effects[33]. Whatever the case, these considerations put into question the frequently raised claim that women's testimony was not accepted where statutory sanctions were concerned[34].

4. The differences are multiplied when it comes to defining the crime of slander (*qadhf*). For Malikis, *qadhf* is any unproven accusation of *zinà* (viz. without four eyewitnesses being brought forward or when the accused does not admit the accusation) presented against a Muslim, both explicitly (*sarh*) and implicitly (*ta`rid*), the latter being considered comparable to the former. In the explicit accusation is included the denial of someone's genealogy, sodomy and hermaphroditism, but not bestiality. For Zahiris *qadhf* is an unproven accusation of *zinà*, but only when it is directed against a *muhsan* person, a category that, as has been seen, also includes married non-Muslims and slaves, and concubines. The accusation of sodomy, lesbianism or hermaphroditism is not *zinà* slander because, in Zahiri jurisprudence, these sexual practices do not amount to *zinà*, nor anal sex between a man and a woman. Malikis are also in agreement on

29. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 450.

30. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 451.

31. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 263-264 (question 2220).

32. See *infra*, point 5, on the subjects of punishment for slander.

33. Serrano, Delfina. "Rape in Maliki legal doctrine and practice...": 178-179 and 188.

34. See: Serrano, Delfina. "Legal practice in an Andalusi-Maghribi source from the twelfth century CE: *The Madhahib al-hukkam fi nawazil al-ahkam*". *Islamic Law and Society*, 7/2 (2000): 187-234, on 201. Further on women's expertise in the intimate parts of the female body and its evidentiary force in: Shaham, Ron. "Women as expert witnesses in pre-modern Islamic courts", *Law, Custom, and Statute in the Muslim World. Studies in Honor of Aaron Layish*, Ron Shaham, ed. Leiden: Brill, 2007: 41-66.

this last point. Another important difference is that for Zahiris the insinuation is not *qadhf* and, in consequence, cannot be punished with the accompanying eighty lashes, nor can the defendant be obliged to swear an oath regarding the intention of his words[35]. For Ibn Hazm, the assertion that a woman has lost her virginity due to an accident is not slander, as such a circumstance, should it be true, would not constitute *zinà* either[36]. An insult (*shatm*) is not usually liable to statutory sanction, but can be settled with a corrective if the judge deems it suitable to preserve the social peace, and if it is directed towards a descendent of the Prophet the latter may be equated with the Prophet himself, for which the punishment is the death penalty[37].

5. For Malikis, punishment falls upon whoever accuses without bringing forward four upright witnesses provided the defendant does not admit the accusation. It also falls upon any of the witnesses who come forward to give testimony of *zinà* if their number does not reach four, if any one of the four is not upright, or else if their declarations contradict each other[38]. Ibn Hazm alludes to the difference between accuser and witness, indicating that the former cannot act at the same time as witness, unless he forms part of the *shurta* or police. Here, a considerable limitation of the dissuasive nature of the restrictions imposed by Malikis and Sunni jurists to evidence of *zinà* is entailed, because, in Ibn Hazm's opinion, only the accuser who cannot provide proof is subject to the eighty lashes, not the witness. In fact, the person who claims to have witnessed the offence can in his view never be punished for slander, if he does it alone and even if he is not considered to be upright[39]. When it is the husband who reports his wife for *zinà*, he cannot be punished if he comes forward as an eyewitness but does not succeed in completing the proof. In this case, he is not required to pronounce the *li`an* to avoid punishment for slander either, unless he wishes to deny paternity of his wife's child[40]. This implies that the marriage does not necessarily have to be dissolved and that, in the eventuality of his wife's decease, he will be able to inherit from her. Both schools, in fact, admit that when it is the husband who is able to prove the crime against his wife, if he does not previously divorce her, he may inherit from her after the sentence of stoning has been carried out against her[41]. But if he presents himself as the accuser, does not provide witnesses and

35. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 265-268 and 276-281 (questions 2223 to 2224 and question 2231). Ibn Hazm's doctrine on homosexuality and his divergences with the Sunni schools have been studied by: Adang, Camilla. "Ibn Hazm on Homosexuality. A case-study of Zāhirī legal Methodology". *Al-Qantara*, 24 (2003): 5-31.

36. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 275-276 (question 2230).

37. See: Serrano, Delfina. "Twelve Court Cases on the Application of Penal Law under the Almoravids", *Dispensing Justice in Islam. Qadis and their Judgements*, Muhammad Khalid Masud, Rudolph Peters, David Powers, eds. Leiden: Brill, 2006: 473-492 at page 486.

38. Serrano, Delfina. "La lapidación como castigo de las relaciones sexuales...": 464-466.

39. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 259-261 (question 2218).

40. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 261-263 (question 2219).

41. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 299-300 (question 2250).

refuses to pronounce the *li`an*, apart from receiving punishment for slander, the paternity of his wife's child[42] will be attributed to him. Malikis and Zahiris also concur in that accusations of *zinà* among members of the same family (*ḏu l-qurba*, viz. father against his son, or the mother of his son, or the mother of his slave, or the concubine mother (*umm walad*) of his son) lead to the corresponding punishment[43]. For Ibn Hazm, a person who has previously committed *zinà* and has been punished for the crime is protected by laws covering slander[44]. To the best of my knowledge, Malikis do not show any special concern for this confluence of circumstances.

6. Pardon for the crime of slander. For Malikis, slander is a partly private, partly public offence, which is why they admit that the slandered party may pardon the slanderer before the matter comes to the knowledge of the authorities, and even afterwards, if the slandered party so wishes in order to avoid being embroiled in a public scandal[45]. For Zahiris, however, slander is a public offence where there is no room for the maligned person to forgive the offender at any time[46].
7. "Avoid the application of statutory punishments (*hudud*) whenever you can" (*idra'u l-hudud bi-l-shubuhat*). This principle is explicitly affirmed by the Malikis[47] but the Zahiris deny it, as they do the principle "avoid Coranic sanctions whenever you can (*ma amkanat-kum*)"[48]. Nevertheless, they state that while presumption of innocence should not prevent application of the punishment, a statutory sanction cannot be imposed either, due to mere presumption of guilt, as happens in the case of pregnancy, which, at the end of the day, leads them to the same conclusion as the Malikis: punishment cannot be imposed when there is no certainty that the crime has been committed. Moreover Ibn Hazm does explicitly hold the principle that one must not be excessive in applying *hudud* because "God does not like those who overstep their bounds"[49].
8. Legal filiation or attribution of paternity (*lihaq*). As pointed out above, Malikis and Zahiris agree that legal filiation derives from marriage and concubinage and does not apply in cases of *zinà*. They exhibit numerous interesting differences, however, with regard to the broad spectrum of unions that would be included

42. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 297 (question 2245).

43. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 295-297 (question 2243).

44. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 297 (question 2245).

45. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 468-469.

46. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 287-290 (question 2239).

47. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 463. On the principle in itself see: Rowson, Eweret K. "Shubha", *Encyclopaedia of Islam*... Reference. Centro de Ciencias Humanas y Sociales-Consejo Superior de Investigaciones Científicas. 18 September 2013 <http://www.encquran.brill.nl/entries/encyclopaedia-of-islam-2/shubha-SIM_6974>; Fierro, Maribel. "*Idra'ū l-hudūd bi-l-shubuhāt*: When Lawful Violence Meets Doubt". *Hawwa*, 5/2-3 (2007): 208-238.

48. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 287-290 (question 2239).

49. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 268 (question 2224).

in the category of void (*batil*) and invalid (*fasid*)[50] marriages and, in general, of relations that cannot be categorised either as legitimate or illegitimate.

8.1. Should a couple be caught *in flagranti* and both of them claim to be married or say they are master and slave, Malikis, according to Ibn Hazm, demand the presentation of marriage witnesses. And, if this is not done, consider punishment for *zinà* to be obligatory and exclude the filiation of any possible offspring[51]. Nonetheless, these situations, when they occur, might be subjected to the principle "avoid Coranic sanctions in case of doubt", and become legal *a posteriori*; it is reasonable to think that this happened in practice[52], except when the members of the couple did not belong to the same religion, in which circumstance it appears that the statutory rules were applied in all their force.[53] Zahiris, meanwhile, favour giving credit to the assertions of those who have been caught *in flagranti*, so long as the veracity of the allegation is not impossible to believe and no witness is presented to the contrary. The resulting decision is that the progeny is attributed to the male[54]. However, Malikis and Zahiris concur that when the allegation of marriage is made by the brother or father of the woman and neither of them is deemed upright, the *hadd* is imposed; it is to be assumed that this is to prevent the legalisation of prostitution, unless the accused can provide other proof of the existence of marriage. When *hadd* for *zinà* is imposed, the child born from that union is not attributed to the male[55].

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50. Jurists of the Sunni schools differ among themselves with regard to the conditions that cause a marriage to be invalid or void. In principle, if the marriage is classified as invalid, its dissolution is enforced but the progeny is legitimated provided that the woman receives her dowry and observes the prescriptive legal period of waiting before marrying again. Void marriage excludes filiation. Typical cases of void marriage are those of a Muslim woman with a non-Muslim man or with a Muslim apostate *(murtadd)*; of a female slave with a free Muslim if she comes to be the property of her husband; and, always, of a free Muslim woman and a slave, whether he is hers or owned by another. See: Schacht, Joseph. *Introduction au droit musulman*. Paris: Maisonneuve et Larose, 1983: 138.

51. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 242-244 (question 2206).

52. See *infra*, subsection 8.2.4.

53. For the Islamic East see reference to a stoning carried out in Cairo against a couple accused of *zinà* in: Ibn Taghri Birdi. *al-Nujum al-zahira fi muluk Misr wa-l-Qahira*, al-Qāhira: al-mu'assasah al-miṣriyyah al-ʿāmah li-l taʾlīf wa-al-ṭabāʿah wa-al-nashr, 1963-1971: 385 and 1619 of the online edition of <www.alwaraq.com>. Another implementation of the same kind against a Jew and a Muslim woman in Istanbul is mentioned by: Peters, Rudolph. *Crime and Punishment in Islamic Law...*: 92-93. For the case of the Iberian Peninsula see: Niremberg, David. *Comunidades de violencia. La persecución de las minorías en la Edad Media*. Barcelona: Ediciones Península, 2001: 183-236; Segura, Félix. "Los mudéjares navarros y la justicia regia: cuestiones penales y peculiaridades delictivas en el siglo XIV". *Anaquel de Estudios Árabes*, 14 (2003): 250-252; Roy, María José. "Aportación al estudio del delito sexual: el caso de los *moros* de Zaragoza en el siglo XIV", *Actas del VIII Simposio Internacional de Mudejarismo. De mudéjares a moriscos: una conversión forzada (Teruel 15-17 de septiembre de 1999)*. Teruel: Centro de Estudios Mudéjares, 2002: 195-210. From all these cases, one infers that the mixing of communities was considered far more dangerous than adultery or fornication between individuals of the same religion.

54. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 242-244 (question 2206).

55. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 244 (question 2207).

8.2 Void and invalid marriages. These are considered to be:

8.2.1. Those that are concluded during the woman's legal waiting period due to a previous marriage (*`idda*).

8.2.2. When a woman has been definitively repudiated by her previous spouse but they resume their relationship without a lawful marriage between the woman and another man having previously taken place[56].

8.2.3. When a fifth wife is taken, as the legal maximum is four

8.2.4. Bigamy, which takes place when the woman whose husband is absent does not wait for him to be declared dead or disappeared before getting married again. In principle, such unions constitute *zinà* both for Malikis and for Zahiris when they take place despite the parties' awareness that they are prohibited. Ignorance, however, makes the woman exempt from the corresponding punishment and makes it possible for the progeny to be attributed to the mother's partner. What is not explained in any circumstance is what happens with the filiation when one party acts in ignorance and the other acts knowingly[57].

8.2.5. When marriage is concluded with one's own mother, sister or any other prohibited female relative (*maharim*)[58] such as the father's wife, it constitutes *zinà* for Zahiris and consequently excludes the paternal filiation of the offspring, unless ignorance can be argued, in which case there is no punishment and filiation applies. The Malikis, on the contrary, do not consider unions with blood relatives (mother, sisters, aunts) to be *zinà*. As to unions with prohibited non-blood relatives (e.g. the wet nurse, foster sister, sister of one of his wives, father's wife) they are considered to be *zinà*, with the exception of those cases where a marriage contract was concluded, since these latter generate filiation and are punished with a discretionary penalty, not with *hadd*. The Zahiris consider union with the wife of the father a particularly serious case for which the death penalty is established, both if the accused is or is not *muhsan*, if a marriage contract was or was not struck, and if, the former being the case, either of the two marriage contracts had not been consummated. In addition, they exclude filiation. Likewise, they contend that after the death of the accused a fifth of the individual's properties must be taken for the Public Treasury. At this point, Ibn Hazm states that had the accused indulged in apostasy along with the above described type of *zinà*, all his property would end up in the Public Treasury[59]. Thereby he implies that marriage with the wife of one's father is an aggravated form of *zinà* close to apostasy and that the one used to lead to the other.

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56. See *infra*, subsection 8.2.7.

57. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 246-248 (questions 2209-2210).

58. On the degrees of kinship that prevent marriage see: Schacht, Joseph. *Introduction au droit musulman...*: 137-138.

59. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá...*: XI, 252-257 (question 2215). The punishment for the apostate (*murtadd*) is death, separation from his wife and progeny and confiscation of all his properties.

8.2.6. If the woman should marry her slave, in the knowledge that it is forbidden, it is *zinà* and does not create filiation, unless she pleads ignorance[60].

8.2.7. Marriages ended on condition that the husband immediately repudiate the wife so that she may be lawful for her previous husband after he has repudiated her for the third and definitive time. Both schools consider that this constitutes *zinà* and, therefore, imposes the *hadd* for the man who has acted knowingly, filiation with the last husband being excluded, even though the progeny can be attributed to the first husband provided that the pregnancy fall within the admitted time periods. The person acting through ignorance is exempt from punishment but this does not serve to impose on him payment of dowry to the woman[61].

9. Prostitution that is occasional or exercised as a profession is *zinà* and imposes the corresponding punishment and absence of filiation. Unlike the Malikis, Ibn Hazm does not accept that prostituting oneself due to hunger, or prostituting someone due to hunger creates *shubha* or presumption of innocence[62].
10. If a couple perpetrate *zinà* and then marry, or the man buys the female slave with whom he previously committed *zinà*, the marriage does not exempt him from the *hadd* but creates filiation in the event of her falling pregnant[63].

Someone who slanders a woman, then marries her and pronounces the *li`an* in order to deny paternity of the child, avoids the *hadd* for slander and remains free of filiation[64].

11. If someone allows another to cohabit with his slave, he is due a discretionary punishment, unless he is unaware that this is prohibited. However, the beneficiary of the loan is liable to punishment for *zinà* if he acts knowingly, and under no circumstance may a child born from this union be attributed to him[65].

We are not aware, from the sources consulted, that Ibn Hazm expressed himself regarding the doctrine of the sleeping foetus and the maximum duration of pregnancy admitted by Malikis. We must conclude then that he was not against this, because he does not usually waste any opportunity to refute the positions of those who were his most immediate opponents.

The question arises as to what is contributed by an examination of the doctrines that precede our knowledge about the social status of children who, for the reasons we have set out, could not be attributed to their biological parents. For a start, we can say that the information they provide in this connection is really thin on the ground and that the search should be extended to other kind of sources. We know that in al-Andalus and in areas under the influence of the Maliki school in the North of Africa, it was possible to establish filiation between the child born of an illicit

60. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 248-249 (question 2211).

61. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 249-250 (question 2212).

62. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 250-252 (question 2213). On the Malikí position see: Serrano, Delfina. "La lapidación como castigo de las relaciones...": 463.

63. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 252 (question 2214).

64. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 252 (question 2214).

65. See: ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: XI, 257-259 (questions 2216-2217).

union and the family of the mother and that the procedure involved the mother recognising that the newborn was hers. The child thereby remained legally bound to its mother and to her male relatives —including other children that the woman gave birth to as a result of licit and illicit relations— to all intents and purposes (capacity to inherit[66], penal solidarity and matrimonial guardianship) and was, therefore, not necessarily destined to social exclusion. Having said that, we know very little about the way in which individual or collective awareness that someone had no recognised father influenced the life conditions of that person and his or her family and social relations[67]. Islamic legal doctrine does not permit adoption but does accept the paternity claim (*al-istilhaq*), that is to say, that someone claims he is the father of someone else or that someone claims he is someone's son, although the possibilities of such status being recognised were very limited[68]. Collections of fatwas and of legal cases, nonetheless, refer to claims of this kind which can open up a window for observing the behaviour of a relative recognised a posteriori or who aspires for that to happen, and his relation with the rest of his progenitor's relatives[69].

Whatever the case, the strict norms on slander already highlight Sunni jurists' reluctance to impose the Islamic social order by publicly stigmatising all who did not fit in with their ideal theoretical definition. Rather, they appear to have concentrated on preventively dissuading people from transgression and, conversely, from making transgression public. When this could no longer be avoided, fictions of legality were devised, or at least, tolerated. The Malikis, for instance, grant protection to children born from illegitimate unions insofar as they consider it forbidden (*haram*) to disclose or remind them of their condition. Ibn Hazm, however, shows little concern to enforce this trend. When it comes to mentioning that someone has committed *zinà*, or that he is illegitimate because his forebears committed *zinà*, our Zahiri distinguishes between whether the only purpose of such a reminder is to

66. On the possibility of siblings "of *zinà*" inheriting from one another see: al-Sha`bi. *al-Ahkam*, ed. al-Sadiq al-Halawi. Beirut: Dar al-Gharb al-Islami, 1992: 414.

67. Be that as it may, it is plausible that the circumstances experienced by Muslim children born out of wedlock in al-Andalus were not very different from those of their counterparts in our days. By way of illustration see: Suad, Joseph, ed. *Encyclopedia of Women & Islamic Cultures. Family, Law and Politics*. Leiden: Brill, 2005: II, 2 and 404. On infanticide as a means to get rid of illegitimate offspring see: Giladi, Avner. "Some Observations on Infanticide in Medieval Muslim Society". *International Journal of Middle East Studies*, 22 (1990): 185-200. On the legal consequences of killing one's children according to the Andalusi scholar Ibn Rushd al-Jadd see: Serrano, Delfina. "La lapidación como castigo de las relaciones...": 454-455 and 459-460.

68. In fact, it is not permitted to claim the paternity of a child born out of wedlock. See: Landau-Tasseron, Ella. "Adoption, acknowledgement of paternity and false genealogical...": 176. This would amount to acknowledgement or confession to *zinà*. Also see: Mir-Hosseini, Ziba. "Paternity, Patriarchy and Matrifocality in the Sharia and Social Practice: the Cases of Morocco and Iran". *Cambridge Anthropology*, 2 (1993): 22-40; Mir-Hosseini, Ziba. *Marriage on Trial: A Study of Islamic Family Law. Iran and Morocco Compared*. London-New York: Tauris, 1993: 137 (note 1).

69. See: Landau-Tasseron, Ella. "Adoption, acknowledgement of paternity and false genealogical...". Also see: Powers, David S. "*Kadijustiz* or Qadi-Justice? A Paternity Dispute from Fourteenth-Century Morocco", *Law, Society, and Culture in the Maghrib, 1300-1500*. Cambridge (UK): Cambridge University Press, 2002: 23-52.

harm the individual concerned —in which case it must be forbidden but without requiring punishment— and whether it is done as a well-intentioned piece of advice, this latter assumption posing no problem provided the advice is given in private. Mere statements of reality, in their turn (viz. that someone is the child of a woman who conceived him because a man had relations with her without her realising because she was asleep, drunk, or blind, or because she was ignorant), are neither blameworthy nor punishable. Indeed, Ibn Hazm considers that the action of one who publicly points someone else out because he has no father is not only sinless but forms part of the obligation to fulfil the principle of "enjoining good and forbidding wrong (*al-amr bi-l-ma`ruf wa-l-nahy `an al-munkar*)". He trusts then in the ability of jurists to determine the deep intentions of individuals and in their capacity to take justice into their own hands on the basis of their own appreciations of what is just and unjust. Malikis, in the meantime, are in favour of restricting the application of the aforementioned principle to those who have been officially entrusted with being in charge of such matters (v. gr. the morality police)[70] and are reluctant to countenance individual voluntary execution of the principle.

Although it is hard to stop the actions of the morality police eventually being guided by arbitrariness, given that their members have to be accountable to the highest authority and that the final legal consequences of their investigations depend on the judge, we find the position of the Malikis, *a priori*, more sensible than that of Ibn Hazm, whose doctrine has practically never been applied by Islamic courts, at least explicitly[71].

4. Conclusion

The validity of the principle of *al-walad li-l-firash* is universal, but the measures for imposing it present numerous exceptions through which it is possible to slip, or remain within the social order when the legal requisites for belonging to it are not met, without the actual system being questioned. It would be tempting to establish a contrast between Andalusi jurists in terms of their adherence to one school or another, classifying the attitude of some as more rigorous and of others as more tolerant toward these exceptions. Nevertheless, a close examination of the doctrines drawn up in both schools warns against reaching such a conclusion, as both of them developed mechanisms of "autoimmunity" through which it was possible to neutralise or circumvent these doctrines' actual effect. It is true that Malikis show more concern about protecting reputation, even at the risk of considering

70. A function that some jurists such as Ibn Rushd al-Jadd regard with suspicion. See: Serrano, Delfina. "La lapidación como castigo de las relaciones...": 464-466.

71. No apology for the institution of the morality police is intended with this remark. As to Ibn Hazm's doctrine, the distinctive moralistic character of his doctrine compared to that of the Sunni schools, has been stressed by: Abou El Fadl, Khaled. *Rebellion and Violence in Islamic Law*. Cambridge (Mass.): Cambridge University Press, 2001: 208-217.

slander a well-founded charge. This may favour stability but can also have negative consequences, as when rape victims do not manage to provide sufficient proof of the crime and are then forced into facing an accusation of slander from the accused, along with another of implicit acknowledgement of *zinà*. Ibn Hazm's conception of the crime of slander has the advantage of liberating a rape victim from punishment for slander if she does not succeed in proving her allegation. His position, however, leaves many matters unresolved and proves to be contradictory in some points. He differentiates between factual truth and legal truth and thinks that true intention can be known but does not specify how. He argues, for example, that if the judge is convinced (*yatayaqqan*) that a man who accuses his wife of *zinà* is lying, he should not be allowed to pronounce the imprecatory oath to avoid punishment for slander and ought to be assigned the paternity of his wife's child. This, he asserts, will prevent the man from falling into perjury[72]. However, he does not explain through what procedures the judge will be aware of this lie, whilst, as we have seen, he is against making the accuser swear as to the true intention of his words in case of doubt. His concern for ethics and for the factual truth against what might be established by the means of proof envisaged by Islamic jurisprudence (viz. the confession of an offence or admission of an obligation, the testimony of witnesses and the oath) does not seem to take really full account of the limits of human capacity for establishing that truth with the technical means available at that time[73]. Nevertheless, it might have been effective as a strategy for navigating a route among the different proposals for interpreting the *shari`a* that have survived until the modern day, during a period (the 5th/11th century) in which admission of new schools within Islamic orthodoxy was ruled out[74]. Nor are the Malikis, whose doctrines have undergone the experience of practical application, foreign to subjectivity, since, along with the Zahiris, they assume the possibility of distinguishing between those who act knowingly and those who are unaware that they are committing a crime, although here the distinction seems to concern the need for the scales to tip in the direction of ignorance, thereby preventing punishment and preserving filiation. But how this doctrine is interpreted and implemented by modern nation-states with Islamic majorities that arose after decolonisation is another matter, and it is necessary to bear in mind that this interpretation is sometimes radically different from what Muslim jurists from the pre-modern period did. In fact they often come across as more advanced and more flexible than the authorities that claim to apply the *shari`a* or Islamic sacred law in our days. In face of the high percentage of convictions for *zinà* registered in countries like Saudi Arabia or Iran, for example, the student of classical Islamic jurisprudence wonders how it is possible for complainants to gather the required evidence with such great ease. Certainly, it is one thing to surprise a couple in a compromising position and another altogether for four people to

72. ʿAlī ibn Aḥmad Ibn Ḥazm. *al-Muhallá*...: 299-300 (question 2250).

73. I refer, for instance, to the impossibility of carrying out DNA tests.

74. This should not be interpreted, as it often is, in the sense that there has been no evolution in the doctrine of the Sunni juridical schools.

observe at one and the same time the actual act of penetration, this latter being a *sine qua non* condition for the testimony to be accepted. The former, in its turn, does not amount to *zinà* and is not liable to the corresponding punishment but rather, if it comes to it, a discretionary penalty.[75] Discretionary penalties, on the other hand, must not be harsher than the related statutory sanction (*hadd*). Not that contemporary jurists are radically different from their predecessors but the drastic changes in the distribution of legislative and executive competences as well as the extensive reorganisation of the judiciary undergone by most of these countries have completely altered the pre-modern framework of elaboration and implementation of Islamic legal doctrine[76].

The Muslim jurists of the women's association Karamah, meanwhile, consider that Ibn Hazm's doctrine concerning the crime of rape "is closer to the concept of Islamic *'adalah* than that of Imam Malik [the founder of the Maliki school]. It is at once, balanced, just, and compassionate, without showing favoritism". They are aware of its possible adverse effects as well insomuch as this doctrine "errs on the side of caution... and thus does not victimize any one", including the rapist, but for these jurists the positive aspects have more weight and they conclude that "Ibn Hazm understood the grave mistake other jurists make when they fail to distinguish between reporting an injustice, and accusing others falsely (*qadhf*). In their failure, other jurists turned a divine law that was meant to protect women into a weapon against them. Ibn Hazm's reasoning takes into consideration the Islamic ideal of justice and equity, and brings the laws relating to *zina* and rape into conformity with divine law, without losing sight of the rights of both parties involved in such cases"[77]. We may or may not agree with the advisability of extending the considerations relating to the allegation of rape to the entirety of the doctrine of Ibn Hazm on *zinà*, particularly if we think of how punishment for the crime is conceived by him. In our view, as a strategy for achieving a reform of the laws on *zinà* that are applied in Pakistan, Karamah's assessments might turn out to be a two-edged sword. Nevertheless, the last word belongs to the people who are subject to such laws as Muslims and citizens of a state that has decided to apply them, with all the problems that entails. Providing legal advice to these people so that they can utilise the numerous mechanisms of defence and protection envisioned by the actual doctrine against an accusation of *zinà* and rape is, of course, a laudable undertaking and the best way of rejecting interpretations of *sharì`a* that lead to rules that are unjust, cruel and contrary to the human dignity.

75. Serrano, Delfina. "La lapidación como castigo de las relaciones...": 450 and 465.

76. For a concise and clear exposition of key issues involved in the contemporary implementation of the *sharì`a* see: Peters, Rudolph. "'From jurists' law to statute law or what happens when the sharì`a is codified". *Mediterranean Politics*, 7/3 (2002), special issue on: Roberson, Barbara A., ed. *Shaping the Current Islamic Reformation*. London:-Portland: Frank Cass, 2003: 82-95.

77. "Zina, Rape, and Islamic Law: an Islamic Legal Analysis of the Rape Laws of Pakistan...": 14.