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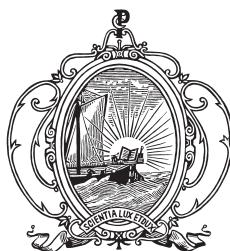
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## CONTACTS AND INTERACTION

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JAAKKO HÄMEEN-ANTTILA, PETTERI KOSKIKALLIO  
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## CONTENTS

Foreword . . . . .	XI
Mari Kristin ARAT – Strasbourg	
Fethullah Gulen’s <i>Hizmet</i> Movement Based on the Teaching of Said Nursi . . . . .	1
Roswitha BADRY – Freiburg	
Rifā'a Rāfi' al-Tahtāwī (1801–1873) as an Early Advocate for Women’s Rights: An Analysis of His <i>Murshid al-amīn</i> <i>li-l-banāt wa-l-banīn</i> . . . . .	17
Carmela BAFFIONI – London	
The Ikhwān al-Ṣafā' and Abū Ya'qūb al-Sijistānī on the Relationships between Intellect–Universal Soul and Universal Soul–Nature . . . . .	31
Cristiana BALDAZZI – Trieste	
A Passage to Italy: Contacts and Interactions between Orient and Occident in the 19th Century . . . . .	43
Ingrid BEJARANO ESCANILLA – Séville	
Les femmes des communautés rurales de l’Euphrate syrien : contact et interaction avec l’environnement naturel (Le présent et la tradition) . . . . .	55
Ana María CABO GONZÁLEZ – Séville	
Les femmes des communautés rurales de l’Euphrate syrien : contact et interaction avec l’environnement naturel (La tradition et le passé) . . . . .	71
Laura BOTTINI – Catania	
The ‘Science of Transmitters’ and the <i>Khulāṣat al-aqwāl fī ma'rifat al-rijāl</i> by al-Hillī . . . . .	83

Ursula BSEES – Wien	
Zwischen „Eifer, ihn zu erfreuen“ und „ich mache dich fertig“: das emotionale Spektrum zweier arabischer Briefe auf Papyrus (P.Vind.inv. A.P. 6452) . . . . .	95
Agostino CILARDO – Naples	
<i>Musnad al-Imām al-Rabi</i> : Preliminary Remarks about Its Authenticity . . . . .	107
Rocio DAGA PORTILLO – Munich	
<i>Fiqh</i> in Its Historical Context: A Question of Blasphemy Law? . . . . .	119
Montse DÍAZ-FAJARDO – Barcelona	
La méthode de calcul utilisée pour configurer tables astrologiques dans un manuscrit de Rabat . . . . .	133
Jean-Charles DUCÈNE – Paris	
Abū Bakr ibn Bahrām al-Dimashqī (m. 1102/1691) et sa <i>Risāla fi-l-jughrāfiyā</i> . . . . .	143
Marek M. DZIEKAN – Łódź	
Der Glaube an den bösen Blick unter den Arabern und Slawen: Eine vergleichende Untersuchung ausgewählter Aspekte . . . . .	159
Jaakko HÄMEEN-ANTTILA – Helsinki	
Ibn al-Muqaffa' and the Middle Persian Book of Kings . . . . .	171
Máté HORVÁTH – Budapest	
The <i>Sijill</i> Documents as Sources for Fatimid History during Badr al-Jamālī's Vizierate (466/1074–487/1094) . . . . .	185
Agnes IMHOF – Göttingen	
'Arīb and Ibrāhīm b. al-Mudabbir: An Intellectual Friendship in Abbasid Times . . . . .	197
Eva-Maria VON KEMNITZ – Lisbon	
Contacts and Interaction: Some Remarks on the Symbol of the Hand in the Shi'i Context . . . . .	209

Hilary KILPATRICK – Lausanne	
The Arabic Culture of Christians in Syria in the 16th and 17th centuries . . . . .	221
Anna Flóra KIS – Budapest	
The Logic of Questions: Interrogatives in Arabic Rhetoric . . .	233
Krzysztof Kościelniak – Cracow	
Elements of Islamic Ideology of <i>jihād</i> in <i>Tactica</i> by Emperor Leo VI (866–912) in the Context of the Arab-Byzantine Struggles in the 7th–10th Centuries . . . . .	245
Magdalena KUBAREK – Toruń	
In Search of an Identity: Modern Islamic Literature as an Ideological Confrontation between the East and West . . . . .	261
István LÁNCZKY – Budapest	
Avicenna on Individuality: Some Considerations on Its Antecedents . . . . .	273
Richard VAN LEEUWEN – Amsterdam	
Utopia and Nomadic Life: Visions of Wāw in al-Kūnī's <i>al-Majūs</i> . . . . .	285
Ilkka LINDSTEDT – Helsinki	
Sources for the Biography of the Historian Ibn A'tham al-Kūfī	299
Miklós MARÓTH – Budapest	
'Alā' al-Dīn al-Ṭūsī on the Scope of Theology and Philosophy	311
Bernadette MARTEL-THOUMIAN – Grenoble	
Portrait du sultan mamlouk Barqūq (784–791/1382–1389 ; 792–801/1390–1399) en chrétien renégat . . . . .	323
Janne MATTILA – Helsinki	
Philosophical Prayer in Early Arabic Philosophy . . . . .	335
Christopher MELCHERT – Oxford	
Why Non-Muslim Subjects Are to Pay the <i>jizya</i> . . . . .	347

Barbara MICHALAK-PIKULSKA – Cracow	
The Concept of <i>shīma</i> on the Basis of the qasida	
<i>Shīma al-‘Anqariyyah</i> . . . . .	357
Katarzyna PACHNIAK – Warsaw	
The Interpretation of Existential Philosophy	
in the Arab Middle East . . . . .	363
Antonino PELLITTERI – Palermo	
The Biography of the Emir ‘Alī b. al-amīr ‘Abd al-Qādir	
al-Jazā’irī: From Damascus to Libya (1911) . . . . .	373
Irmeli PERHO – Helsinki	
An Arabic Manuscript of David’s Psalms	
as Instruments of Magic . . . . .	381
Jan M. F. VAN REETH – Anvers	
Le <i>Vaticinans Puer</i> II: L’enfant Jésus dans le Coran . . . . .	393
Giuseppe SCATTOLIN – Rome	
Western Studies on Ibn al-Fārid’s Sufi Poetry . . . . .	405
Arie SCHIPPERS – Amsterdam	
The <i>Khuṭba</i> (Preface) of the <i>Dīwān</i> of Ibn Khafāja . . . . .	419
Mónika SCHÖNLÉBER – Budapest	
Notes on the Textual Tradition of Ibn A’tham’s <i>Kitāb al-futūh</i>	427
Maria Grazia SCIORTINO – Palermo	
Arabic Literary Biography: Contacts between Maghribi	
and Sudanese ‘ulamā’ in 16th–17th-Century Biographical	
Dictionaries . . . . .	439
Daniele SICARI – Palermo	
‘Ulama’ and Power:	
The Case of al-Manīnī Family in Late-Ottoman Damascus . .	451

Antonella STRAFACE – Naples	
The Duty of Being Charitable in Knowledge: The <i>zakāt</i> in al-Sijistāni's <i>Kitāb al-iftikhār</i>	459
Zoltan SZOMBATHY – Budapest	
Quoting the Quran in Literary Texts: A Fatwa by al-Suyūṭī on <i>Iqtibās</i>	467
Johannes THOMANN – Zurich	
The End of the <i>Arabian Nights</i> in Early MS Tradition	477
Mauro ZONTA – Rome	
Medieval Arabic Philosophical Terminology: New Hypotheses	487
Dora ZSOM – Budapest	
Sobriety and Intoxication in Mystical Sayings from the Cairo Genizah	493

# FIQH IN ITS HISTORICAL CONTEXT: A QUESTION OF BLASPHEMY LAW?

Rocio DAGA PORTILLO

Munich

## Introduction

The aim of this article is to stress the need of understanding legal concepts and terminology of Islamic law in their historical context. When studying the question of “blasphemy law” in relation to the classical sources, the question of how modern terminology of Islamic law corresponds to the original classical sources will also be examined. Some examples and sources of misunderstanding of classical legal concepts are presented in this introduction in order to shed light on the problem of “translating” legal categories of classical Islamic Law.

Sanhūrī claimed:

There is obviously a Muslim public law, but the Muslim jurists do not make the neat distinction between public and private law.<sup>1</sup>

Moreover, individuals and not corporations are the subjects of rights and duties in Islamic law. Consequently, the distinction between duties of individuals and duties of an institution is not clearly defined in classical Islamic law. Classical Islamic law differentiates between *fard ʻayn*, individual duties, and *fard kifāya*, duties to be carried out by institutions. This legal conceptual differentiation is misunderstood today when applied to the institution of *hisba* and the term *jihād*.

Al-Ghazālī<sup>2</sup> says that commanding the good and forbidding the bad (*amr bi-l-ma‘arūf wa-nahā ‘an al-munkar*) is *fard kifāya* and not *fard ʻayn*, referring to the “institution of *hisba*” that Mawārdī in his *Al-ahkām al-sultāniyya* describes.<sup>3</sup> However, *hisba* is also an individual duty,<sup>4</sup> for each person in their own field of responsibility has the duty of commanding the good.

<sup>1</sup> E. HILL, *Sanhuri and Islamic Law*, Cairo, 1987, p. 28.

<sup>2</sup> *Iḥyā‘ ‘Ulūm al-Dīn*, Cairo, s.a., VII, p. 1187.

<sup>3</sup> *Al-ahkām al-sultāniyya wa-l-wilāyat al-dīniyya*, Beirut, 1990, p. 33.

<sup>4</sup> M. FIERRO, *Muhammad b. Waddāh al-Qurtubī (m. 287–900)*, *Kitāb al-Bida‘ (Tratado contra las innovaciones)*, Madrid, 1988, p. 104.

As for the term *jihād*, Ibn Rushd al-Jadd said in his *Muqaddimāt*<sup>5</sup> that *jihād* is *fard kifāya*. Sha‘arānī<sup>6</sup> added that all the Imams have agreed on this. Mawārdī stated that *jihād* is a *wilāya*. Hence, it becomes clear in the classical sources that the authors understand *jihād* to be the duty of the “institution of the arm forces.” *Jihād* is *fard ‘ayn* only in emergency conditions, as it is normative in the armed forces. Since the armed forces were intended to defend the own territory or attack the “foreign nation”. *Jihād* meant to be a war waged against non-Muslims, as religion played the role of “citizenship”. In the same line of reasoning, it can be stated that insulting Muhammad belonged to public law if “translated” in its historical context, because insulting Muhammad used to be a crime associated with rebellion against the state, as religion played the role of “citizenship”.<sup>7</sup>

Religion playing the role of citizenship is not unique to Islamic civilization; it had been a characteristic of the Byzantine Empire<sup>8</sup> and would also be so in Europe in the Middle Ages. Cicero had defined citizenship in Roman law according to the place one was born and citizenship according to the law, “*civitate Romanus habuit alteram loci patriam, alteram iuris*”.<sup>9</sup> Analogically, it was developed a citizenship on the base of religion and religious law. An example of this is that while a Muslim who traveled to another Muslim country was not a foreigner, a non-Muslim living in Islamic territory, a *Dhimmī*, was not a full citizen.<sup>10</sup> The areas of immanence and transcendence remained intermingled in the Islamic state. Consequently, insulting the Prophet meant a rebellion against the state.

However, today the crime cannot be seen as a rebellion against the state. Besides, it is important to note that the term “blasphemy law”<sup>11</sup> is a modern expression with no exact correspondence in classical Islamic law.

<sup>5</sup> *Kitāb al-Muqaddimāt*, Cairo, s.a., pp. 258–259.

<sup>6</sup> *Al-Mīzān al-Kabīr*, Cairo, 1311 AH, p. 128.

<sup>7</sup> The term “citizenship” is used with reserves, but every “translation” is a *traditio*.

<sup>8</sup> With no intention here to deepen the origin of it or researching on the origins of Islamic civilization, it might be seen as an inheritance from the Byzantine Empire to Islam and the West all together. At present religion became a social force, not a “citizenship”, but the role of religion in Islamic civilization has still not been sorted it out. On the Byzantine origin of “citizenship” defined by religion, see R. G. HOYLAND, *In God’s Path*, Oxford, 2015.

<sup>9</sup> *De Legibus*, ed. K. ZIEGLER & W. GÖRLER (Heidelberger Texte. Lateinische Reihe 20), Freiburg, 1979 (3rd edition), II, p. 2, l. 5.

<sup>10</sup> W. HEFFENING, *Das islamische Fremdenrecht*, Hannover, 1925, p. 117.

<sup>11</sup> With no intention here to deepen the origin of it or researching on the origins of Islamic civilization, it might be seen as an inheritance from the Byzantine Empire to Islam and the West all together. At present religion became a social force, not a “citizenship”, but the role of religion in Islamic civilization has still not been sorted it out.

The modern term “blasphemy law” includes two different fields of classical law: apostasy, within the field of religious punishment, *hudūd*, and the law regarding non-Muslims (*dhimmis*) living under Muslim rule, who breach the pact.

Classical authors dealing with the crime of insulting the Prophet referred first of all to Muslims committing apostasy. By analogy, they applied this legal concept to non-Muslim, but *fiqh* books treated it in this case as a secondary issue.

The word “blasphemy” (*qadhf*) did not appear commonly in the earlier texts when referring to insulting the Prophet, because classical jurists kept debating if it belonged to the category of Quranic punishment (*hudūd*).<sup>12</sup> The most frequent terms used in the classical sources were *sabb*, *shatama*, *istikhfāf*, *naqasa*, and *takdhib*, although the latest is seldom found in *fiqh* books due to its specificity. However the word *qadhf* was neither the original term used by the jurists or the standard one.

This paper focuses especially on the term *takdhib* and the related topic of insulting (*sabb*) Muhammad. When trying to demonstrate that this legal subject has been developed under concrete historical situations, it can be observed that the topic acquired a more relevant place in later legal history. An underlying question is whether *takdhib* was considered to be a blasphemy, an insult to the Prophet, and therefore a rebellion against the “state” or whether it was considered a theological statement by the jurists.

## 1. Sources and Their Historical Context

A significant number of sources have been diachronically studied in order to shed light on the development of the subject *takdhib* and *sabb*, insulting Muhammad, in the legal classical literature.

The origin of this research started with an Andalusian document that reached the Orient.<sup>13</sup> Indeed this is the first documented court case on *takdhib* of Muhammad in the *fiqh* sources in al-Andalus. It is a document of *al-Ahkām* of Ibn Ziyād,<sup>14</sup> end of 9th / beginning of the 10th century

<sup>12</sup> *Qadhf* is to be punished with 100 or 80 lashes and not with the death penalty. Qādī Iyād mentions 80 lashes. However, he considers insulting Muhammad to be a different kind of *qadhf* that has to be punished by death penalty. This is his own *ijtihād*. AL-QĀDĪ IYĀD, *Al-Shīfa'* II, Cairo, 1977, p. 1040.

<sup>13</sup> R. DAGA PORTILLO, *Al-Ahkām al-Kubrā li-Ibn Sahl: A court case on a Martyr of Córdoba that reached the Orient*, *Parole de l'Orient* 39 (2014), pp. 361–384.

<sup>14</sup> Ahmad b. Muhammad b. Ziyād al-Lakhmī, known as al-Habīb. IBN AL-FARĀDĪ, *Ta'rikh 'Ulamā' al-Andalus*, Cairo, 1966, n. 81.

AD, that was quoted and commented in *al-Aḥkām al-Kubrā*<sup>15</sup> of Ibn Sahl<sup>16</sup> in the 11th century.

This document was reproduced literally by Qāḍī Iyād (1085–1150) in *al-Shīfā bi-ta’rīf ḥuquq al-Muṣṭafā*, in *al-Mi‘yār*<sup>17</sup> of al-Wansharīsī, 16th century, having reached the Orient by the 14th century. Ibn Taymiyya (d. 1328) in *al-Ṣārim al-Maslūl ‘alā man shatama/sabb al-rasūl*<sup>18</sup> quotes it, as he used *al-Shīfā* as the main source for his book.

### 1.1. Early Works of Islamic Law (*fiqh*)

The earlier works of *fiqh*, like Mālik’s *Muwaṭṭa’* or the *Mudawwana* of Saḥnūn do not mention the crime of insulting God or Muḥammad. In *Risāla* of Ibn Abī Zayd al-Qayrawānī (d. 992) it is not mentioned either. This is something remarkable, for these works are standard works of Mālikī jurisprudence transmitted for teaching purposes along the centuries to the present day.

Nevertheless, al-Qayrawānī treated the subject in a concise but decisive way in *al-Nawādir*,<sup>19</sup> establishing the theoretical principles concerning the issue of insulting God and Muḥammad in the Islamic West. He quoted Mālik saying that any Muslim who insults (*shatama*) the Prophet must be killed, without chance to repentance (*istiāb*). Ibn al-Qāsim in *al-‘Utbīyya* has said regarding the people of the Book, if they insult (*shatama*) the Prophet, they are to be killed unless they repent.<sup>20</sup> The pact is broken.

However, concerning vilifying God, al-Qayrawānī quotes Aṣbagh saying that whatever belongs to the dogmas of their religion, like having a child (*shirk*) companion, is recognized by a pact against the payment of the *jizya*.<sup>21</sup> This text, posterior to the document of Ibn Ziyād, quoted the same authorities and opinions as Ibn Sahl (when he commented the court case of Ibn Ziyād about the Christian woman condemned for *takdhib*); however, al-Qayrawānī did not mention Ibn Ziyād’s case.

Nonetheless, he mentioned a case of *takdhib* suitable for resisting the Fatimid ideology, which was his lifelong task. He mentioned from Saḥnūn

<sup>15</sup> R. b. H. AL-NU‘AYMĪ, *Diwān al-Aḥkām al-Kubrā*, Riyadh, 1997.

<sup>16</sup> Abū-l-Aṣbagh Isā b. Sahl al-Qurṭubī (1022–1093). IBN BASHKUWĀL, *al-Ṣila*, Madrid, 1883, pp. 430–431.

<sup>17</sup> Rabat, 1981.

<sup>18</sup> Cairo, 2007, p. 416.

<sup>19</sup> AL-QAYRAWĀNĪ, *al-Nawādir wa l-Ziyādāt ‘alā mā fī l-Mudawwana*, Beirut, 1999, XIV, pp. 525–531.

<sup>20</sup> Ibn al-Qāsim quoted in *al-Nawādir*, XIV, pp. 525–531.

<sup>21</sup> J. M. SAFRAN, *Defining Boundaries in Al-Andalus*, Ithaca, 2013, p. 97, n. 30.

the case of a Jew<sup>22</sup> who pretended to be a Prophet, a Prophet sent to the Muslims, or claimed that a Prophet will come after Muḥammad. In the same manner, vilifying the first four Caliphs, what the Fatimids did, was condemned with the death penalty.<sup>23</sup>

Al-Qayrawānī relied on the Mālikī School as a weapon against the Fatimids.<sup>24</sup> And it is in the historical context of fighting the advance of the Fatimids in North Africa in the 10th century that we can understand the treatment of the legal subject of insulting Muḥammad. By instilling in the people a respect for the name of the Prophet<sup>25</sup> and dealing with the topic of punishment for insulting Muḥammad, he kept the religio-political boundaries defined.

The treatment of the crime for insulting Muḥammad would develop over time due to socio-political reasons, which is proven by the absence of this subject in earlier legal works. No mention of it is done in the different known versions of Umar Pacts signed with non-Muslims. Although Ibn Taymiyya added the prohibition, supposedly written into the pact, of manifesting unbelief (*la yunzar shirk*).<sup>26</sup>

Abū Yusūf (d. 798) in *K. al-Kharāj*<sup>27</sup> mentions that the non-Muslims should not insult the Muslims (*shatama al-muslimīn*) or beat them. This is to be understood in a context of war, as a protection for the conquering people. The prohibition of insulting the Prophet is not mentioned.

Al-Turṭūshī (d. 1126) in *Sirāj al-Mulūk*<sup>28</sup>, a later and more complete version of 'Umar Pact, does not even mention the prohibition of insulting the Muslims. It only prescribes that Muslim should be respected; if someone vilifies them intentionally the pact is broken. However, al-Turṭūshī<sup>29</sup> publicly expressed his concern about the advance of the Reconquista and military weakness of al-Andalus in his *Sirāj al-Mulūk*.<sup>30</sup>

<sup>22</sup> Also in AL-WANSHARĪSĪ, *K. al-Mi‘yār*, Rabat, 1981, II, p. 356.

<sup>23</sup> AL-QAYRAWĀNĪ, *al-Nauādir*, XIV, pp. 531–532.

<sup>24</sup> H. R. IDRIS, Ibn Abī Zayd al-Qayrawānī, *Encyclopaedia of Islam* III, p. 695.

<sup>25</sup> The role of literature on the Life of Muḥammad as a contrapole to Shi‘ism and mystical trends has been studied by U. RUBIN (*The Eye of the Beholder*, Princeton, 1995).

<sup>26</sup> Either he invented it or the editor of his work did. *Al-Ṣārim*, Cairo, 2007, pp. 25, 170.

<sup>27</sup> Cairo, 1985, p. 298.

<sup>28</sup> Cairo, 1319, pp. 229–320. A. Th. KHOURY, *Christen unterm Halbmond*, Freiburg, 1994, pp. 87–89.

<sup>29</sup> Al-Turṭūshī had left al-Andalus in 1083, two years before the fall of Toledo, taking refuge in Egypt.

<sup>30</sup> Andalusians advanced the ideological reaction against the crusades in Orient. E. SIVAN, *L'Islam et la Croisade*, Paris, 1968, pp. 23–37.

It is not until the above-mentioned court case of Ibn Ziyād that the first case of *takdhib* in the legal Andalusian literature is documented. This document has been dated by studying the biography of the muftis of the *Shūrā* of the High Court in Córdoba.<sup>31</sup> The historical context of 9th-century al-Andalus is that of a deterioration of the central power and civil war (*fitna*) and resistance of assimilation by the different ethnic and religious groups, i.e. Ibn Ḥafṣūn, who fought three Emirs, one after the other, and found allies among Christians and Fatimids.<sup>32</sup>

The situation regarding Ibn Ḥafṣūn became grave, which aroused all the people of al-Andalus [...] Abū Ḥāfiẓ – the Emir – appointed several men as commanders of the army ... but they were not adequate.<sup>33</sup>

Andalusian rulers also fought the Fatimid movement, which had been sending missionaries to al-Andalus since the beginning of the 10th century, threatening with it the Sunni Emirate. M. Fierro points out the relation between the establishment of the Caliphate in al-Andalus by ‘Abd al-Rahmān III and the “Fatimid threat”, not mentioned by the Arabic Andalusian sources.<sup>34</sup> Not only Fatimids, but mystic movements like that of Ibn Masarra (d. 931) with Sufi *Mutazili* tendencies posed a threat to Sunni orthodoxy as well.<sup>35</sup>

In this historical context the court case of the Christian woman convicted for *takdhib* – one epigone of the Martyrs of Córdoba – took place. Christians resisted assimilation and were caught in the middle of strained political conditions and conflicts beyond their own envisages. Hence the central power, on the brink of collapsing, tried at any cost to control the different social forces.<sup>36</sup> The conviction for *takdhib* was, from the perspective of the judge, a case of rebellion against the state, religion playing the role of “citizenship”.

<sup>31</sup> R. DAGA PORTILLO, *Organización jurídica y social en la España musulmana*, Doctoral Thesis, Granada, 1990.

<sup>32</sup> M. FIERRO, *Abderramán III y el califato omeya de Córdoba*, San Sebastián, 2011, pp. 229–232; P. E. WALKER, The identity of one of the Ismailis dā’ī sent by the Fatimids to Ibn Ḥafṣūn, *al-Qantara* 21.2 (2000), pp. 387–388. (I would like to thank M. Fierro for the reference).

<sup>33</sup> D. JAMES, *Early Islamic Spain: The History of Ibn al-Qūṭīya*, London, 2009, p. 133.

<sup>34</sup> It was given as reason the incapacity of the Abbasid Caliphate of responding to the religious and political needs of the Sunni community in al-Andalus. FIERRO, *Abderramán III y el califato*, p. 96; M. FIERRO, La política religiosa de ‘Abd al-Rahmān III (r. 300/912–350/961), *al-Qantara* 25.2 (2004), pp. 119–156.

<sup>35</sup> FIERRO, La política religiosa, pp. 132–133.

<sup>36</sup> R. DAGA PORTILLO, *Al-Aḥkām al-Kubrā li-Ibn Sahl*, pp. 361–384.

### 1.2. *Later fiqh Works*

The case of the Christian woman convicted for *takdhib* has been kept in the work *al-Āḥkām al-Kubrā* of Ibn Sahl, who adds a legal commentary to the court case, using as synonym the terms *takdhib*, *sabb* or *shatama al-rasūl*, while the original text only mentioned the word *takdhib*.

The reasons for this “confusion” are rather of a political character than a legal one, although Ibn Sahl was characterized for taking hard legal positions.<sup>37</sup> The fall of Toledo in 1085 had threatened al-Andalus with extinction. Ibn Sahl as a “hard-liner” concerning legal opinions can be understood in this historical context. Few years later, he would help the Almoravids to enter al-Andalus, in order to put an end to the Taifa Kingdoms and achieve the unity of what had remained of al-Andalus.

The first author, who wrote not in form of a *fatwa* or court case but as a treatise, in line with al-Qayrawānī, was Qādī Iyād, teacher of Averroes and Qādī in Granada under the Almoravids. In *al-Shifā bi-ta’rīf ḥuquq al-Muṣṭafā*, Qādī Iyād devotes two chapters to what is permitted and prohibited to attribute to the Prophet and the judgment against those who insult the Prophet. He includes the document of Ibn Ziyād and Ibn Sahl, of whom he was a successor, in the office of *qādī* in Granada. While Ibn Sahl<sup>38</sup> helped the Almoravids to enter al-Andalus, Qādī Iyād resisted the Almohads who wanted to replace the Almoravids in al-Andalus.

M. Fierro<sup>39</sup> points out the importance of *al-Shifā* significantly more than a link in the large tradition of literature on Muhammad, due to its apologetic against the Almohads, mysticism<sup>40</sup> and heresies in al-Andalus. Qādī Iyād’s concerns were also the danger of the Reconquista and Almohads, a movement ideologically near to the Fatimids, the *Shī‘a*.<sup>41</sup> Other legal sources treated the topic in the form of *fatwas*, like those given by Ibn Rushd (12th century), and those gathered by the great compiler

<sup>37</sup> R. EL HOUR, El cadiazgo en Granada bajo los almoravides: enfrentamiento y negociación, *al-Qantara* 27 (2006), pp. 7–24

<sup>38</sup> R. DAGA PORTILLO, Entre Taifas y Almorávides: Isà b. Sahl, cadi del rey zirí Abd Allah, *Revista del Centro de Estudios Históricos de Granada y su Reino* 5, Granada, 1991, pp. 35–36.

<sup>39</sup> El tratado sobre el profeta del cadi Iyad y el contexto almohade, in R. G. KHOURY, J. P. MONFERRER SALA & M. J. VIGUERAS (eds.), *Legendaria Medievalia en honor de Concepción Castillo Castillo*, Córdoba, 2011, pp. 19–34.

<sup>40</sup> Qādī Iyād was contemporary of Ibn Barrajān, Ibn Arif and the rebel of Algarve Ibn Qāsī, a sufi. See M. FIERRO, El tratado sobre el profeta, p. 26.

<sup>41</sup> M. FIERRO, El tratado sobre el profeta, pp. 24, 25, 31.

of *fatwas* and *ahkām*, al-Wanshārīsī in *al-Mīyār*<sup>42</sup> (16th century), which includes a bigger number of cases than in previous classical works.

But we have to reach to Ibn Taymiyya (d. 1358) in order to find a complete book and theoretical treatment of the crime for insulting the Prophet, i.e. *al-Ṣārim al-Maslūl ‘alā man shatama/sabb al-rasūl*.<sup>43</sup> Ibn Taymiyya is inspired and takes as a main source for his *al-Ṣārim* Qādī ‘Iyād’s work *al-Shīfā*. He follows a similar structure to that of *al-Shīfā* for his book, and includes the court case of Ibn Ziyād and Ibn Sahl in *al-Ṣārim*.

Ibn Taymiyya had to face the threat of the Mongols and the Crusades. He had to fight against Isma‘ilis and Nuṣairids Ḥakimis, who believed in the infallibility of ‘Alī and threaten the Sunni belief in Muhammad. He was aware of the war in the Islamic West (*Ahl al-Magreb*) against Christians, and mentions their predecessor of al-Andalus (*salaf al-andalusīyyūn*). Under these circumstances he wrote the book with the aim of setting boundaries and impending *fitna*, a book aimed for the ruler and ‘ulamā’, not for the general public.

## 2. *Takdhib, Sabb and Shatama* in Ibn Ziyād, Ibn Sahl, Qādī ‘Iyād, Ibn Rushd, al-Wanshārīsī and Ibn Taymiyya: An Inaccurate Transmission?

Ibn Ziyād was the first *qādī* who ordered to register the Court cases of the High Court in Córdoba, for the first time in the legal history of al-Andalus. Ibn Sahl’s commentary of this in the 11th century introduced a new turn by using *takdhib* as a synonym of *sabb* and *shatama*.

Before that, Ibn Abī Zayd al-Qayrawānī (d. 992), without mentioning the case of Ibn Ziyād, quoted the same legal opinions and tried to classify the crime, *sabb*, as the *hadd* of Allāh in an ongoing legal debate. But he affirmed that *sabb* could be forgiven to non-Muslims by repentance and conversion to Islam. He quoted Aṣbagh from *K. Ibn Ḥabīb*, saying that what belongs to the dogma of their religion has been recognized by pact, against the payment of *jizya*.

Qādī ‘Iyād quoted almost literally the document of Ibn Ziyād when treating the crime of the Christian woman, but he did not use the term *takdhib*. The terminology was lost and became interchangeable in the transmission of this document. Moreover, Qādī ‘Iyād introduced the

<sup>42</sup> Rabat, 1981.

<sup>43</sup> Cairo, 2007.

discussion that al-Qayrawānī did not finish, if *qadhf Muḥammad* was *hadd*. In case of being *hadd*, the punishment is not to be commuted if someone is converted. Qāḍī Iyāḍ compared *qadhf Muḥammad* with *qadhf* to another human being – punished by eighty lashes – and he concludes with the words “Reflect upon it!” The answer shows that it was an ongoing legal discussion.<sup>44</sup> Qāḍī Iyāḍ specifies that an insult done due to ignorance, by lack of control or by arrogance, is punished by death penalty. Ibn Rushd, though, made an exception in the case of foolish words, for which a painful punishment would be enough.<sup>45</sup>

Al-Wansharīsī in the 16th century documented the other case of *takdhib* found in the sources studied here. It is the case of the Jew, transmitted by Ashhab, who pretended to be a Prophet or claimed that a Prophet would come after Muḥammad. This case had been quoted extensively in *al-Nawādir* of al-Qayrawānī, from *al-‘Utbīyya*. However something is added here that aggravates the question: The opinion of Muḥammad b. Saḥnūn is quoted as the last authority saying that death penalty is always applied in case of *takdhib*. This statement in relation to *takdhib* is not found in previous sources. On the contrary, al-Qayrawānī quoted Ashhab as well as K. Ibn Saḥnūn and Saḥnūn in *al-‘Utbīyya*, which questions the accuracy of al-Wansharīsī, with the opinion that the Jew must be given the opportunity to repent. If he does not, the death penalty would be applied. This is a further evidence of how the treatment of the subject worsened in the legal literature.

By the time of al-Wansharīsī, the topic had been fully treated and developed. He brought many cases of *sabb Muḥammad*, even the case of Mālik refuting the opinion of Abū Ḥanifa. Caliph Rashīd had asked Mālik about the person who insulted (*shatama*) the Prophet, since the school of Iraq – Hanafis – had given a *fatwa* saying that this crime had to be punished with lashes. Mālik got angry and answered: “What remains of the Umma after his Prophet? The person should be killed.”<sup>46</sup>

Ibn Taymiyya defined the crime of *sabb* as a crime in the category of *hudūd*. According to *ijmā‘ al-ṣaḥāba* and *tabi‘iyyīn*, says Ibn Taymiyya, a Muslim who insults Muḥammad becomes an infidel and must be killed. Regarding the *Dhimmi* there is not *ijmā‘*, because the school of Abū Ḥanifa does not condemn the *Dhimmi* to death: the pact recognizes the unbelief. But Ibn Taymiyya does not relate the crime to the pact. On the contrary,

<sup>44</sup> AL-QĀḌĪ IYĀḌ, *al-Shifā*, Cairo, n.d, II, p. 1040.

<sup>45</sup> AL-WANSHARĪSĪ, K. *al-Mi‘yār* II, p. 353.

<sup>46</sup> AL-WANSHARĪSĪ, K. *al-Mi‘yār* II, pp. 351–358, especially p. 356.

the *hanbali* Qādī Abū Ya'lā b. al-Farrā<sup>47</sup> (990–1066) differentiates *sabb* from *takdhib*, affirming that the pact recognizes *takdhib* *Muhammad*, because it acknowledges unbelief, while it does not recognize *shatama* or *sabb*.<sup>48</sup>

Ibn Taymiyya classified *sabb* as *ḥadd*, as Qādī 'Iyād had done, ignoring the difference with *takdhib*, and used the word *qadhf* in a more extensive and central way than Qādī 'Iyād had done. Consequently, *sabb*, *shatama* and *takdhib* were classified as blasphemy. The term "blasphemy" law can be traced back to Ibn Taymiyya. Still, the modern use of this concept and word is neither accurate nor correspond to classical Islamic law, which referred always to a rebellion against the state.

### 3. *Takdhib*, *Shatama* and *Sabb* in *al-Shifā' li-Qādī 'Iyād*

In the first chapters of *al-Shifā'* Qādī 'Iyād declared the infallibility of *Muhammad* ('iṣma)<sup>49</sup> and the Prophets, for being without sin. Islam is not true Islam without the belief in *Muhammad*, and belief is consent of the heart which corresponds to what is witnessed by words, *taṣdiq al-qalb* and *shahādat al-lisān*.<sup>50</sup>

In this sense, al-Ghazālī dealt with *takdhib* as a theological term, linking the truth of the religion of Islam to the affirmation that *Muhammad* is a prophet, the opposite claim being mere unbelief.<sup>51</sup> Qādī 'Iyād referred to those who confessed by words, but did not believe in their hearts, maybe a reference to *taqīyya* of Shi'a, and concludes that the laws of Islam are only concerned with what is manifest (*izhār*). Islam is concerned with explicit confession of faith (*shahāda min al-islām wa-l-taṣdiq min al-imām*).<sup>52</sup>

The terminology used for insulting *Muhammad* is *sabb*, *tanaqqus* and *istikhfāf*. 'Iyād states that there is consensus (*ijmā'* *al-'ulamā'*) that if the crime is committed by a Muslim, the death penalty, by sword or crucifixion according to the Imam's choice, is to be applied. The widespread opinion of the Mālikī School (*mashhūr bi-l-madhhab*) is that the death penalty is on the basis of *ḥadd*. So in the case of repentance, this repentance is not

<sup>47</sup> H. LAOUST, Abū Ya'lā b. al-Farrā, *Encyclopaedia of Islam* III, Leiden, 1971, pp. 765–766

<sup>48</sup> IBN TAYMIYYA, *al-Ṣārim*, p. 415.

<sup>49</sup> AL-QĀDĪ 'IYĀD, *al-Shifā'* II, p. 694. Similar to what Shi'a do regarding 'Alī.

<sup>50</sup> AL-QĀDĪ 'IYĀD, *al-Shifā'* II, pp. 538–539.

<sup>51</sup> F. GRIFFEL (trans.), *Über Rechtgläubigkeit und Religiöse Toleranz*, Zürich, 1998, pp. 16, 34.

<sup>52</sup> AL-QĀDĪ 'IYĀD, *al-Shifā'* II, p. 540.

accepted and does not commute the death penalty, because *hudūd* are not committed with repentance.

Asbagh is of the opinion that repentance is to be accepted, but 'Iyād says, this is not applied regarding to the rights of Muḥammad and his *Umma* for these rights are not like the right of rest of the people (*sā'ir huquq al-ādamiyyīn*).<sup>53</sup> It becomes evident with this statement that insulting Muḥammad represented a crime against the *Umma*. Following the same logic, the *Dhimmī* was not to be killed if he repented and entered Islam.

The specific chapter on *Dhimmīs* is mostly a paraphrase of the document given by Ibn Sahl's commentary to the case of the Christian woman. He uses the same legal opinions and quotes the Córdoban court case on the Christian woman as a precedent fall.<sup>54</sup> Since Ibn Taymiyya also quoted it from Qādī 'Iyād, following his reasoning, the opinion of the death penalty for the crime of *takdhib* became established as a kind of *ijmā'* between Orient and Occident.

Qādī 'Iyād quoted other cases, like that of a Christian who said that Jesus was the chosen one (*isfā*) purer than Muḥammad or who said that Jesus had created Muḥammad. In both cases, Qādī 'Iyād claimed that the death penalty had to be applied. Qādī 'Iyād used the terms *sabb*, *shatama* and *takdhib* indistinctively as Ibn Sahl had done before, but he was aware that Abū Ḥanifa did not apply the death penalty for this crime, for "shirk is worse than *sabb*". Therefore the crime had to be punished by *ta'azīr* or *ta'dhib*.<sup>55</sup> Later Ibn Taymiyya quoted this from Qādī 'Iyād.

Following a structure that Ibn Taymiyya copied, Qādī 'Iyād brings at the end of the book the crimes of insulting God,<sup>56</sup> the angels, the Quran, God's Prophets and the Prophet's family. The court case of Ibn Ziyād and Ibn Sahl is repeated and given as an example of insult to God (*sabb*) Allah from part of a Christian woman.<sup>57</sup> But the term *takdhib* is not mentioned.

The execution of al-Hallāj, the great Sufi master, was also considered worth mentioning by the Mālikī scholar of al-Andalus. Anyone who claimed to be a Prophet or a Caliph or a God (*rabb*) invested by God, (Allāh) was to be killed. The same happened with those who proclaimed not believing in God, not having a *rabb*.<sup>58</sup>

<sup>53</sup> AL-QĀDĪ 'IYĀD, *al-Shīfā'* II, pp. 1015, 1017.

<sup>54</sup> AL-QĀDĪ 'IYĀD, *al-Shīfā'* II, pp. 1034–1039, especially p. 1038.

<sup>55</sup> AL-QĀDĪ 'IYĀD, *al-Shīfā'* II, p. 1031.

<sup>56</sup> A court case of Ibn Ziyād where Abu Akhī 'Ajab, had insulted God and been convicted to death by the muftis of Córdoba is mentioned in AL-QĀDĪ 'IYĀD, *al-Shīfā'* II, p. 1093.

<sup>57</sup> AL-QĀDĪ 'IYĀD, *al-Shīfā'* II, pp. 1047, 1088.

<sup>58</sup> AL-QĀDĪ 'IYĀD, *al-Shīfā'* II, p. 1091.

Finally, Qādī ‘Iyād mentioned the Jew who pretended to be a Prophet, with the opinion of Ashhab, that he had to repent or be killed. Al-Qayrawānī had also mentioned it; however, it was going to be treated in a stricter way later by al-Wansharīsī in *al-Mi‘yār*.<sup>59</sup>

#### 4. *Takdhib, Shatama, Sabb* in Ibn Taymiyya

Ibn Taymiyya argues in his book against those who threaten the Sunnis, especially *Ahl al-bātin*, the Shi‘is.<sup>60</sup> Ibn Taymiyya quotes extensively Qādī ‘Iyād and brings in the opinions from all of the four schools of law:

- Ibn Ḥanbal: Whoever insults (*shatama*) Muḥammad or diminishes him (*naqṣa*), either Muslim or *kāfir*, should be killed, without *istitāb*.
- Whoever breaks the pact and insults the Prophet should be killed. *Dhimma* pact has not been given under these conditions.
- A widespread opinion among the ‘ulamā’ is that public manifestation of unbelief (*izhār*) has never been recognized in the pact, for it contradicts Quran 9.29. An absolute recognition of their religion has not taken place, say some ‘ulamā’. So if Christians speak about the Trinity, *tathlīt*, the pact is broken.<sup>61</sup>
- *Sabb Muḥammad* is *haqq li-llāh* and *haqq adamī* at the same time. As *haqq adamī* – even if Muḥammad has died – the *Umma* have inherited the responsibility to restore his rights.
- Ibn Taymiyya uses analogy (*qiyās/i‘tibār*) to say that fighting with words is like fighting with the hand: *Qitāl bi-l-lisān ka-qitāl bi-l-yad*.<sup>62</sup>
- Ibn Taymiyya maintained that the reason for punishing it is *sabb* alone, independently if the pact is broken or not.<sup>63</sup> He defines it as *qadhf* and *hadd*, following the ongoing debate of Qādī ‘Iyād.
- Shāfi‘ī writes in the context of organization of the conquest territory, referring to a pact signed after the conquest, saying that the Imam can sign *Sulh*-pact<sup>64</sup> if he desires, but stipulating that if someone says something

<sup>59</sup> *Al-Mi‘yār* II, p. 356.

<sup>60</sup> His ideas would be followed by his disciples, e.g., Ibn Qayyim al-Jawziya (d. 1350) in his *Aḥkām Ahl al-Dhimma*, and Ibn Kathīr (d. 1373).

<sup>61</sup> IBN TAYMIYYA, *al-Ṣārim*, pp. 195, 197.

<sup>62</sup> IBN TAYMIYYA, *al-Ṣārim*, p. 169.

<sup>63</sup> IBN TAYMIYYA, *al-Ṣārim*, p. 140–141.

<sup>64</sup> IBN TAYMIYYA, *al-Ṣārim*, p. 22.

against the Messenger, God's book or his religion, the pact is broken, their blood is legal.<sup>65</sup>

– Abū Ḥanifa al-Nu'mān, the founder of the Hanafi school, is of the opinion that a *Dhimmī* who insults the Prophet should not be killed, because *shirk* is worse than *sabb*. Pact is not breached because of *sabb*. Abū Ḥanifa does not punish the insult to Muḥammad unless it is a threat for the welfare of the community. This is decided by the Imam on the base of welfare, *maṣlaḥat al-Umma*. It is a political issue (*siyāsatān*).

– Mālik: *Dhimmī* must be killed without *istitāb*. But there is divergence of opinion in the school.

The arguments are those of *al-Shīfā'* in addition to a stricter opinion of Muḥammad b. Saḥnūn who says that there is *ijmā'* among the 'ulamā': whoever insults the Prophet (*shatama*) is an infidel. In addition to God's punishment, the sentence (*ḥukm*) given by the *Umma*, is the death penalty.<sup>66</sup> Al-Wansharīsī had quoted Muḥammad Ibn Saḥnūn narrowing his opinion in relation to al-Qayrawānī. Ibn Taymiyya quotes him narrowing the legal opinion even more, because he ends the sentence with the words pretended to be from Ibn Saḥnūn, and if any one doubts that he is an infidel, he himself is an infidel.<sup>67</sup> The term *takdhīb* that appears in al-Wansharīsī is not mentioned anymore by Ibn Taymiyya.

## Conclusion

Ibn Sahl commented a case of *takdhīb* that led to confusion with the terms *sabb* and *shatama*. The distinction between *takdhīb*, *sabb* and *shatama* has been done in the *fiqh* literature by Qādī Abū Ya'lā b. al-Farrā', a Hanbali (990–1066), almost contemporary of Ibn Sahl. Abū Ya'lā said that the manifestation (*iżhār*) of unbelief or dogmas of other religions does not break the pact of *Ahl al-Dhimma*. It is not punishable, for the pact is an implicit recognition of unbelief.

However, Ibn Sahl (d. 1093) did not make that distinction; neither did the other jurists of the Mālikī School until the subject reached Ibn Taymiyya (d. 1328) who narrowed the issue in a substantial way. On the other hand, Abū Ḥanifa and the Hanafi School hold a new line on the argumentation,

<sup>65</sup> This prescription has not been found in *K. al-Umm*, which focuses on the breach of the pact only.

<sup>66</sup> IBN TAYMIYYA, *al-Ṣārim*, p. 18.

<sup>67</sup> IBN TAYMIYYA, *al-Ṣārim*, p. 202.

considering it an issue to be punished by the death penalty, if it affected the common welfare (*maṣlaḥa*). Indeed, the Mālikī School of law manifested an increasingly narrow treatment of the subject due to historico-political conditions, like resisting Fatimids and Almohads, fighting heresies (*fitna*) and the Reconquista. That made the treatment of *sabb* or insulting the Prophet a central subject in the Mālikī legal theory. The issue of *sabb* started to be developed as a treatise especially with Qāḍī Iyāḍ, who developed a topic that had been initiated by Ibn Abī Zayd al-Qayrawānī (d. 992) in order to fight the ideology of Fatimids in North Africa.

Cases of *takdhib* are not very frequent in *fiqh* books. As a matter of fact, only two cases have been found in the selected sources: the court case on the Christian woman and that of the Jew, quoted by Qāḍī Iyāḍ and al-Wansharīsī as a transmission from Ashhab. But we can see that transmissions of legal opinions are not always accurate.

However, the crime of insulting Muḥammad was widely developed by Ibn Taymiyya, and it became a bench mark of legal literature up until now. Ibn Taymiyya classified the crime as *hadd*, and therefore the term *qadhf*, blasphemy, became the common term in his treatise on *sabb*. Ibn Taymiyya developed this concept which he took from Qāḍī Iyāḍ.

It can be concluded in relation to the selected sources that with Ibn Sahl, the word *takdhib* became a synonym of *sabb* and *shatama*, and due to Qāḍī Iyāḍ and Ibn Taymiyya, the words *takdhib*, *sabb* and *shatam* became synonyms meaning “blasphemy”.

Nevertheless, in the classical period of Islam *takdhib*, *sabb* and *shatam* have never meant a private “insult” to the person of Muḥammad, but rather a rebellion against the “state”. Blasphemy law, as applied in some countries today as punishment to individuals who do not represent a threat for the state, does not correspond to the classical doctrine of Islamic law.

In its historical context, religion gave the “legal” status to a community and the person. Belonging to a religion meant “belonging” to a people, a “nation”. *Dhimma* pact was just the pact between two “people” or “nations”. Today, with the philosophical “turn to the subject”, religion plays the role of a social force streaming from a free personal experience. Theological differentiations have been made between *Fides Quae*, religious dogma, and *Fides Qua*, act of believing. Since the concrete act of belief cannot be measured, a theological statement like that of *takdhib* is not to be punished, and least of all, physically punished.