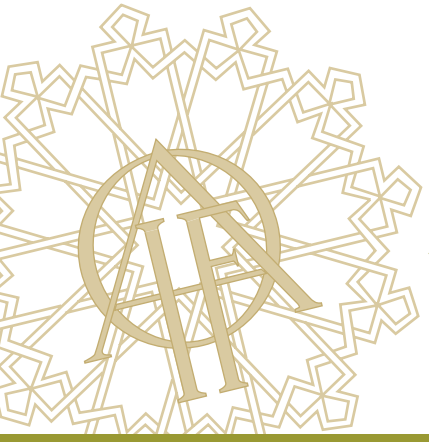
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Maria Isabel Fierro Bello

Andalusian «Fatāwā» on Blasphemy.

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Isabel FIERRO

ANDALUSIAN «FATĀWĀ» ON BLASPHEMY[1]

1. INTRODUCTION.

BLASPHEMY ACCORDING TO THE MĀLIKĪ DOCTRINE.

Punishment for blasphemy, like that for apostasy, is usually (but not without *iḫtilāf*) included among the *ḥudūd* (sing. *ḥadd*)[2]. Both are crimes against religion that can lead to the death penalty[3]. The apostate is granted the opportunity of repentance (*al-istitāba*) for a period of three days and thus the possibility of saving his life[4]. If the apostate does not repent, he is sentenced to death by the sword (*man baddala dīna-hu fa-qtulū-hu*), or more specifically to be beheaded, as stated by the *ḥadīṯ* « *man ġayyara dīna-hu fa-ḍribū ʿunqa-hu* ».

Blasphemy against Allāh and his Prophet (*sabb Allāh, sabb al-rasūl*) is usually dealt with together with apostasy, as the blasphemer (and the magician or *sāḥir*) is considered to have fallen into unbelief (*kufr*)[5]. Nevertheless, the Mālikī school establishes some differences between the apostate and the blasphemer[6] :

— the blasphemer is not given the opportunity of repentance[7];

1. This paper is based on the material collected for some sections of my book *La heterodoxia en al-Andalus durante el período omeya* (Madrid 1987), especially those numbered 5.4. (p. 57-63) and 5.5. (p. 63-70), as well as 5.3. (p. 53-57) and 7.7.0. (p. 121). It was read in the Conference « The Making of a Fatwa », organized by the Social Science Research Council, that took place in the « Escuela de Estudios Arabes — CSIC » in Granada in January 9-13, 1990.

2. See *EI*², s.v. *ḥadd* [B. Carra de Vaux — J. Schacht], Fierro, *Heterodoxia*, p. 180 and especially L. Bercher, « L'apostasie, le blasphème et la rébellion en droit musulman malékite », *Revue Tunisienne* 1923, p. 115-130.

3. See *EI*², s.v. *ḳatl* [J. Schacht].

4. This possibility is denied to the person accused of *zandaqa* : see Fierro, *Heterodoxia*, p. 180-182, and especially the section 2.4. *Zandaqa* is mentioned by Mālik b. Anas in his work *al-Muwaṭṭa'* (*riwāya* by Yaḥyà b. Yaḥyà) in the section devoted to apostasy; for him the *zindīq* is an apostate who hides his apostasy.

5. See for example Ibn ʿAbd al-Barr (d. 463/1070), *Kitāb al-kāfī fī fiqh ahl al-Madīna al-mālikī* (2 vols., Riad 1400/1980), II, 1091. Mālik does not mention blasphemy in his *Muwaṭṭa'*.

6. On Ibn Ḥazm's doctrine, together with his discussion of the doctrines of the other schools, see *al-Muḥallà* (11 vols. en 8, El Cairo 1348/1929), XI, 408-418.

7. He is thus assimilated to the *zindīq* (death penalty without *istitāba*). Cf. however al-Wanšarīsī, *al-Miʿyār al-muʿrib wa-l-ğāmiʿ*

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— the penalty may not be death, but a discretionary punishment (*ta'dīb, adab*), according to the degree of seriousness attached to the words which brought about the accusation of blasphemy;

— the capital punishment is not specified clearly. Although one would assume that the blasphemer is to be killed by the sword or beheaded like the apostate, we shall see one case where the convicted as a blasphemer was crucified and stabbed to death on the cross [8].

The Mālikī doctrine that I have abridged here is to be found in the *Muḫtaṣar* by Ḫalīl b. Isḥāq (d. 776/1374) [9]. His main source is the work by *Qāḍī* ʿIyāḍ (d. 544/1149), *al-Šifā' bi-taʿrīf ḥuqūq al-Muṣṭafà* [10]. ʿIyāḍ, for his part, based his doctrine not only on the material he could find in the Qur'ān, *ḥadīṯ* and the early Mālikī authorities, but also on the precedents established by the *fatāwā* issued in two cases which took place in al-Andalus during the 3rd / 9th century.

2. CASES OF BLASPHEMY IN AL-ANDALUS DURING THE 3rd / 9th CENTURY.

During the reign of ʿAbd al-Raḥmān II (206/822-238/852), the Muslim sources record two accusations of blasphemy against Allāh that led to very different results. Both were made against Muslims. Christian sources record that at the same time a group of Christians and crypto-Christians sought martyrdom and found death by insulting Islam, its God and its prophet.

2.1. *The case of Yaḥyà b. Zakarīyā' al-Ḫaššāb.*

One of the two accusations was made against the nephew of ʿAǧab, the favourite concubine of al-Ḥakam I (the former Umayyad *amīr* and the father of ʿAbd al-Raḥmān II). The nephew was called Yaḥyà b. Zakarīyā' al-Ḫaššāb and nothing is known about his life, except his kinship with ʿAǧab and that he lived in Qurṭuba. One day while it was raining heavily, he said jokingly (*ʿābiṭan, mutaʿabbiṭan*) looking at the sky : « The cobbler has started to water the skins » (*bada'a l-ḫarrāz yaruššu ǧulūda-hu*). This utterance was denounced by witnesses whose number and names are not recorded. It seems that the accusation was made directly to the Umayyad *amīr* and it was ʿAbd al-Raḥman II himself who ordered Yaḥyà's imprisonment. His aunt kept begging for his freedom, but to no avail. The *amīr's* answer to ʿAǧab's supplications was that no decision could be taken before an opinion was given by the *ʿulamā'*. He added that the Banū Marwān (*i.e.* the Umayyads) had always behaved in such a way that God

al-muġrib ʿan fatāwī ahl Ifrīqya wa-l-Andalus wa-l-Maġrib (13 vols., Rabat 1401/1981), II, 362 (al-Qābisī's doctrine).

8. This is the way crucifixion (*ṣalb*) should be done according to the Mālikī doctrine.

9. I have used the Italian translation by D. Santillana, *Il « Muḫtaṣar » o Sommario del Diritto Malichita di Ḫalīl b. Isḥāq* (2 vols., Milan 1919), II, 709-712.

10. (2 vols., Beyrut 1399/1979), II, 270-314.

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could place no blame upon them; their power in al-Andalus and the fear they inspired in their foes were caused, among other virtues, by their strictness in the application of the *ḥudūd*. So, the *'amīr* ordered the *ṣāḥib al-madīna* [11] to assemble the *qāḍī* and the the *fuqahā'*. They were five, among them ʿAbd al-Malik b. Ḥabīb (d. 238/852), the leading Mālikī *faqīh* of the time [12], as well as ʿAbd al-Aʿlà b. Wahb (d. 261/874) [13]. The *ṣāḥib al-madīna* consulted them (*šāwara-hum*) [14] as to the accusation brought against the nephew of ʿAğab. The *qāḍī* and three of the *fuqahā'* decided that the accused had only talked in jest : the death penalty was, therefore, out of the question, a disciplinary punishment (*yakfī fī-hi l-adab*), which is not specified (probably prison and/or flogging) being sufficient. Ibn Ḥabīb and the last *faqīh* resolved, on the contrary, for the death penalty. Ibn Ḥabīb's words were that he accepted the responsibility for Yaḥyà's death (*damu-hu fī ʿunqī*), adding : « The Lord that we worship has been insulted. If we did not defend him, we would be bad servants and should we not be His worshippers? » (*subba/yuštamu rabb ʿabadnā-hu in lam nantaṣir la-hu innā la-ʿabīd sū'/ṭumma lā nantaṣiru la-hu innā idhān la-ʿabīd sū' mā naḥnu la-hu bi-ʿābidīna*). He even wept. The *ṣāḥib al-madīna* asked each of the *fuqahā'* to write down their answers in order to transmit them to the *'amīr*. ʿAbd al-Raḥmān II chose Ibn Ḥabīb's answer and punished in different ways those *fuqahā'* who had decided otherwise : for instance, he dismissed the *qāḍī* Muḥammad b. Ziyād al-Laḫmī from his office; he reminded ʿAbd al-Aʿlà b. Wahb that he had been accused of *zandaqa* and declared that he would not be consulted again. The *'amīr* also ordered that the convicted was to go to the place of execution accompanied by the *ṣāḥib al-madīna* and by the two *fuqahā'* who had sentenced him to capital punishment. Once on the cross, Yaḥyà said to Ibn Ḥabīb : « Oh, Abū Marwān! fear God for shedding my blood. I bear witness that there is no god but God and that Muḥammad is His Messenger ». Ibn Ḥabīb's answer was a Qur'ānic verse (X, 91) : « Now you believe, but before you disobeyed ». Yaḥyà died on the cross, where he was stabbed to death [15].

11. This office does not seem to have existed out of al-Andalus. It has been recently studied by J. Vallvé, « El zalmedina de Córdoba », *Al-Qanṭara* II (1981), p. 277-318, where a description of his functions can be found.

12. On him, see the recent study by J. Aguadé, *El « Ta'rīj » de ʿAbdalmalik b. Ḥabīb*, Madrid (forthcoming).

13. On him see Fierro, *Heterodoxia*, p. 49-53 and 189-192. He was accused of *zandaqa* during the reign of ʿAbd al-Raḥmān II and before the year 234/848. The sources do not record that this accusation led to any harmful consequence and in fact we find him in this case (which took place after 234/848) being consulted by the *'amīr* on a matter of religious doctrine.

14. On the institution of the *šūrā* and the *fuqahā' mušāwarūn* in al-Andalus, see M. Marín, « *Šūrà* et *ahl al-šūrà* dans al-Andalus », *Studia Islamica* LXII (1985), p. 25-51.

15. The sources that record this event are : al-Ḫušanī (d. 361/971), *Kitāb al-quḍāt bi-Qurṭuba* (ed. and trans. by J. Ribera, Madrid 1914), p. 104-105/127-129; ʿIyāḍ (d. 544/1149), *Tartīb al-madārik wa-taqrib al-masālik li-maʿrifat aʿlām maḏhab Mālik* (8 vols., Rabat s.d.), IV, 132-133 and *Šifā'* II, 299-300; al-Nubāhī (d. 792/1390), *Kitāb al-marqaba al-ʿulyā* (ed. E. Lévi-Provençal, Beirut s.d.), p. 55-56; al-Wanšarīsī (d. 914/1508), *Miʿyār*, II, 362; translation by E. Amar (based on the edition Fès 1214-1215) in *Archives Marocaines* XII, p. 322-323. For modern scholars who have paid attention to this case, see Fierro, *Heterodoxia*, p. 57, note 60; to add the study by J. Aguadé mentioned in note 12.

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2.2. *The case of Hārūn b. Ḥabīb.*

Hārūn b. Ḥabīb, the brother of ʿAbd al-Malik, lived in Ilbīra (Elvira, nowadays Granada). He is described as a choleric man who used to speak his mind openly and who was not on good terms with his fellow citizens. His biography is not recorded in the preserved Andalusian biographical dictionaries : this may mean that he did not devote himself to any of the usual branches of knowledge, although he is reported to have been interested in *kalām*. He was denounced to the qāḍī of Ilbīra for two of his outbursts :

a) One man asked him for a ladder in order to repair a mosque. Hārūn's answer was : « I would give it to you if it were to repaire a church (*kanīsa*) ». The man expressed his surprise, reminding Hārūn that the mosque was superior to the church. Hārūn answered : « No, by God. I have realized that he who is devoted to Allāh (i.e. the Muslim) is left in the lurch, whereas he who is devoted to the synagogue and the church (i.e. the Jew and the Christian) is respected and in a good situation ».

b) Two men visited Hārūn, who was sick. Inquiring about his health, they received this answer : « During my illness I have suffered so much that had I killed Abū Bakr and ʿUmar, I would have not deserved such a punishment ».

The *qāḍī* of Ilbīra sent the written declarations of the witnesses (*kitāb al-šahādāt*) to the *amīr* in Qurṭuba. In his turn, ʿAbd al-Raḥmān II sent that *kitāb* to a number of *fuqahā'*, among them the brother of the accused, ʿAbd al-Malik b. Ḥabīb and ʿAbd al-Aʿlà b. Wahb, one of the participants in the previous case who had been opposed to death penalty.

Ibn Ḥabīb's *fatwà* was long and in it he rejected the accusations brought against his brother, concluding that no *ḥadd* or punishment (*ʿuqūba*) should be applied to him. He rejected both accusations in the following way :

a. As regards the first accusation, there was only one witness and in Islamic law such accusations cannot be accepted [16]. Even where a sole witness had all the legal qualifications, his testimony alone could not be used to condemn anybody to prison, flogging or a more severe penalty. Moreover, if a single witness accuses someone of impiety (*kufr*), adultery, theft or drinking wine [17], his testimony can not lead to any punishment. Suppose now that there were two witnesses. In that case, a way should be found to exculpate Hārūn, according to these words of ʿUmar b. al-Ḫaṭṭāb : « If a Muslim hears another Muslim saying something bad, he must force himself to find a way to interpret his words in a good sense » [18]. Hārūn's words, therefore, were to be interpreted in this way : « I have realized that a Muslim is left in the lurch *in this town, as you do not give him credit or acknowledge his truth,* whereas a Christian [19] is

16. See on this point D. Santillana, *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita* (2 vols., Rome 1938), II, 594-613 and I, 132.

17. All these examples correspond to crimes punished by a *ḥadd*.

18. I have not been able to find this *aṯār* in other sources.

19. The Jew is not mentioned in this case.

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respected *in this town* and is in a good situation *among you as if this town were a non-Muslim town* ». Ibn Ḥabīb insisted that this was the real meaning of his brother's words and that by them he was criticising the faults of his age (*fasād al-zamān*), foretold in this *ḥadīṯ* : « There will be a time when the prosperous (*al-ġanī*) among them will be the libertine (*al-fāğir*), whereas nowadays the prosperous among you is the learned and ascetic man » [20]. ʿAbd al-Malik b. Ḥabīb ended his statement saying that if his interpretation were not accepted, then his brother should be condemned to death without flogging, as his words would then have to be interpreted as constituting infidelity (*kufr*).

b. As regards the second accusation, ʿAbd al-Malik b. Ḥabīb started by acknowledging that his brother's words were unbecoming of an intelligent person and were rather expected more from a silly and ignorant one. However, they were of less importance than in the first case, because, when a person is ill, he tends to behave in such an odd way. He suggested that it was advisable merely to scold severely such a person, blaming his behaviour. Nevertheless, punishment could never be that of flogging or imprisonment, as his offence could not be considered *taǧwīr li-llāh* (to accuse God of injust behaviour). He also pointed out that the Prophet had said : « When there is ambiguity, ward off the *ḥudūd* from my community » (*idraʾū l-ḥudūd bi-l- šubuhāt ʿan ummatī*) [21] and he stated that his brother's case fell into that category, not only because of the ambiguous nature of his words, but also because of the witnesses. In fact, he said that the witnesses could easly be rejected as such, although it is not recorded on what grounds [22].

He finally recommended that, were his brother to be punished, Hārūn should be imprisoned in chains for six months.

Among those who agreed with ʿAbd al-Malik b. Ḥabīb was Qurṭuba's, qāḍī at that time, Saʿīd b. Sulaymān al-Ballūṭī. He stressed in his *fatwà* that « the enforceable traditions and the past usage » (*al-āṯār al-muḥkama wa-l-sunna al-māḍiya*) contemplate capital punishment only for the following cases : murder, blasphemy against God and his Prophets, apostasy and brigandage. In his eyes, Hārūn's words did not amount to blasphemy (*šatm*), as they could be interpreted in a good way. Therefore, he should not be condemned to death, but only to long imprisonment and to a severe scolding, this being an adequate punishment for one who had revealed himself as a silly loudmouth.

20. I have not found this *ḥadīṯ* in A.K.Wensinck et altri, *Concordance et Indices de la Tradition musulmane* (8 vols., Leiden 1936-1988), although traditions with similar wording and contents are to be found in almost all the *ḥadīṯ* collections.

21. On this recommendation, see Ḫalīl b. Isḥāq, *op. cit.*, II, 707, note 59.

22. This defence agreed with that of one of the *fuqahāʾ* consulted, Ibrāhīm b. Ḥusayn b. ʿĀṣim. As regards the first accusation, he also stressed that there was only one witness and that Hārūn's words could be attributed a good meaning, following thus the recommendation of ʿUmar b. al-Ḫaṭṭāb. As regards the second accusation, Hārūn's illness provided an excuse for his words : his intention had not been to slander Abū Bakr and ʿUmar, whose merits he acknowledged, nor to apostatize (*lā alḥada fī dīn Allāh*). He also referred to the prophetic tradition on avoiding the *ḥudūd* in the ambiguous cases, recalling that the most severe *ḥadd* was the death penalty and that Hārūn's case was ambiguous.

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Among the *fuqahā'* who considered Hārūn guilty, Ibrāhīm b. Ḥusayn b. Ḫālid also gave a long *fatwà*. He declared death penalty, considering the Hārūn's words should be taken literally, without attempting interpretation, as they were evident enough. He referred to similar cases : that of Ṣabīg (flogged on ʿUmar's orders); the person accused of *zandaqa*; the case of Mālik b. Nuwayra, executed by Ḫālid b. al-Walīd. He insisted that Hārūn's words were an open declaration of his ideas for those who could see, and implicit for those whose eyesight was poor (*taṣrīḥ li-man abṣara wa-taʿrīḍ ʿinda man raqqa baṣaru-hu*). As regards the first accusation, Ibn Ḫālid said that it led clearly to the death penalty, as Hārūn had clearly called God a liar : does not God say in the Qurān (V, 56) « those who take God, his Messenger and the believers as their friends, they are members of God's party, they are the winners ». Regarding the second accusation, Hārūn's reference to Abū Bakr and ʿUmar fell into the category of *taǧwīr li-llāh* (to accuse God of unjust behaviour) and of *taẓallum min-hu* (to lodge a complaint of iniquity against God). Ibn Ḫālid added that it was well known that Hārūn used to show contempt and insolence in talking about God (*al-istiḫfāf bi-llāh wa-l-ǧur'a ʿalay-hi*). The *amīrs'* final decision in this affair should, therefore, safeguard the inviolability of God and his religion against those who ignore or attack it. The prophetic tradition : « When there is ambiguity, ward off the *ḥudūd* from my community », could not be adduced in this case [23]. While it is true that it is not appropriate to report to the *sulṭān* the occasional slip of a honest person, Hārūn could not be included among the « honest ». Ibrāhīm b. Ḥusayn b. Ḫālid in his *fatwà* cursed the Banū Ḥabīb and, foretelling the possibility that the *amīr* would reject the death penalty, recommended as a second best solution to condemn Hārūn to a beating and life imprisonment. He also suggested writing to the East, raising the question of Hārūn's case.

There was a second *fatwà* by ʿAbd al-Malik b. Ḥabīb. In it he not only refuted Ibn Ḫālid, but also attacked the other *fuqahā'* consulted by the *amīr*, among whom were Ibrāhīm b. Ḥusayn b. ʿĀṣim and the *qāḍī* Saʿīd b. Sulaymān, despite of their opposition to the death penalty. ʿAbd al-Malik b. Ḥabīb attacked them all on the grounds that they were his enemies who had schemed to discredit him. He especially attacked the *qāḍī* of Qurṭuba, whom he mentioned had chaged his mind in this *fatwà* [24] and the *qāḍī* of Ilbīra, whom he stated was well known for having a grudge against Hārūn. In short, he attacked not only those who asked for the death penalty, but also those who argued for imprisonment and flogging, repeating that all of them felt bitter about the prestige he had reached and displayed therefore envy and hostility towards him. Ibn Ḥabīb ended this writing with the following request to the *'amīr* : if the /amīr/i were to act according to Ibn Ḥabīb's opinion, he should never again consult the other *fuqahā'*, but were he to act according to their opinion, he should never consult him (Ibn Ḥabīb) again.

23. According to Ibn Ḫālid, that *ḥadīṯ* could not be interpreted in the way proposed by Ibn Ḥabīb, as proved by some sayings of Rabīʿa and ʿUmar b. al-Ḫaṭṭāb.

24. No record of this change of mind is found in the sources.

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The *amīr* chose Ibn Ḥabīb's legal opinion and wrote to him saying that he would immediately order the *ʿāmil* of Ilbīra to release Hārūn. Ibn Ḥabīb answered, asking that Hārūn be sent to Qurṭuba to be imprisoned there as a punishment for his insolence and defiance [25].

2.3. *The case of the Christian blasphemers.*

During the reigns of ʿAbd al-Raḥmān II and his successor Muḥammad (238/852-273/886), the movement of the so-called « voluntary martyrs » occurred. They were Mozarabs (*i.e.* Christians living under Muslim rule) who voluntarily sought martyrdom by insulting the Prophet and his religion in public places. As the Christian religious hierarchy did not fail to point out, there was no persecution which justified martyrdom. These Mozarab blasphemers were brought before the *qāḍī*, who usually attempted to make them retract their words by means of imprisonment or corporal punishment. If the attempt were unsuccessful, the Mozarab was executed by decapitation. The execution was usually followed by the crucifixion of the corpse; sometimes the corpse was burnt or thrown into the river in order to avoid the cult of relics. Among the martyrs there were cases of « crypto-Christians » : some of them were Muslims who secretly believed in the Christian doctrine, having been under the influence of a Christian relative [26]. In their cases, the crime of blasphemy was superseded by that of apostasy and thus they were offered the opportunity of repentance (*al-istitāba*). The Muslim sources have preserved no information of this movement, which is known to us only through Mozarab writings [27].

During the reign of the *amīr* ʿAbd Allāh (275/888-300/912), a Christian [28] woman in Qurṭuba proclaimed the divinity of Jesus, denied the divinity of Allāh and the prophecy of Muḥammad and said that Muḥammad was a liar. The *qāḍī* of Qurṭuba [29]

25. This case is recorded by ʿIyāḍ, *Madārik*, IV, 133-138 (biography of ʿAbd al-Malik b. Ḥabīb) and *Šifāʾ*, II, 271; al-Wanšarīsī, *Miʿyār*, II, 361 (transl. by E. Amar based on the Fes edition in *Archives Marocaines*, XII, 340). Ḫalīl b. Isḥāq in his *Muḫtaṣar* makes a specific reference to this case, on which I shall comment later. On modern works that mention this case, see Fierro *Heterodoxia*, p. 63, note 88; to add Aguade's study mentioned in note 12.

26. Some of them were the offspring of mixed couples, *i.e.*, Muslim father and Christian mother and therefore they were by law Muslims, although the mother had taught them the Christian religion.

27. A list of these sources is to be found in one of the recent studies of the movement : D. Millet-Gérard, *Chrétiens Mozarabes et culture islamique dans l'Espagne des VIII^e-IX^e siècles* (Paris 1984), p. 211. For a general view of the extant bibliography on the voluntary martyrs, see K.B. Wolf, *Christian martyrs in Muslim Spain* (Cambridge 1988).

28. In the text, she is mentioned as a woman who « claimed (*zaʿamat*) to be Christian ». This could be interpreted in the sense that she was an apostate from Islam. However, all the references in the rest of the text point out to the fact that she was a *ḏimmī*.

29. He was Aḥmad b. Muḥammad b. Ziyād, a descendant of the *qāḍī* who took part in the trial of Yaḥyà b. Zakarīyā' al-Ḫaššāb.

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and the leading *fuqahā'* of the time agreed that she should be condemned to death [30]. Her case has been recorded by a Muslim source [31].

3. THE « FATĀWĀ ».

3.1. *The case of Yaḥyà b. Zakarīyā al-Ḥaššāb.*

3.1.1. All the *fuqahā'* consulted (the group which opposed the death penalty and the two who concurred in it) were Mālikīs. There is no evidence that the discrepancy in their decision could be due to each group belonging to a specific branch of the Mālikī *maḏhab*, *i.e.* the Medinese or Egyptian branch, or to the fact that they followed the doctrine of a specific pupil of Malik's [32]. Moreover, the sources are silent as to which authorities, if any, those *fuqahā'* based their decision upon. Unfortunately, the texts of the *fatāwā* issued in the case of Yaḥyà b. Zakarīyā' have not been preserved, in spite of the fact that the sources record that they were written down [33]. So, we only know that those who opposed the death penalty based their decision on the fact that the defendant had spoken in jest, *i.e.* without the intention of insulting God, and thus he was only liable to a mere *ta'dīb*. Those who passed the death penalty seem to have based their decision on the fact that God had been insulted, regardless of the defendant's intention. The nephew of ʿAjab is called *fāsiq* (godless, sinful, dissolute, sinner); no mention is made of him as *murtadd* or *kāfir*.

3.1.2. A point worth stressing is that it was the *amīr* himself who took the final decision, as in Hārūn's case. It would seem that ʿAbd al-Raḥmān II considered of great importance the decision taken in this case : he did not limit himself to accepting Ibn Ḥabīb's decision, but actually punished those *fuqahā'* who had passed a contrary

30. The death penalty is not specified : *fa-llādhī narā-hu an qad waǧaba ʿalay-hā l-qatl wa-taʿǧīlu-hā ilà l-nār al-ḥāmiya ʿalay-hā*. The execution must have been by decapitation according to the accepted legal doctrine and afterwards her corpse was burnt.

31. It is *al-Aḥkām al-kubrà* by the *qāḍī* ʿĪsà b. Sahl (d. 486/1093) and has been published by M. ʿAbd al-Wahhāb Ḫallāf in *Documentos sobre procesos referentes a las comunidades no-musulmanas en la Espana musulmana* (Cairo 1980), p. 70-73. Ibn Sahl is al-Wansharīsī's source : see *Miʿyār* II, 344-345; trans. by E. Amar in *Archives Marocaines* XII (1908), p. 327; see also ʿIyāḍ, *Šifā'* II, 296. On modern scholars who have dealt with this case, see Fierro, *Heterodoxia*, p. 121, note 90.

32. Ibn Ḥabīb seems to have been mainly a follower of Aṣbaġ b. al-Farağ, whereas Aṣbaġ b. Ḫalīl (who supported his *fatwà*) was a staunch follower of Ibn al-Qāsim. The *fuqahā'* of the other group had studied with Mālik's pupils in Medina, Egypt and Qayrawān.

33. According to al-Ḫušanī, the opinions of the *fuqahā' mušāwarūn* were given orally until the year 291/903, when the *qāḍī* of Qurṭuba forced them to write down their *fatāwā* : see E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Leiden 1960), p. 236. However, in both of the cases studied here mention is made of the *fatāwā* being written down. The apparent contradiction could be explained by the fact that in the trials for blasphemy the *fatāwā* were requested by the *amīr*, not by the *qāḍī*.

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judgement. It is difficult to know, however, if he behaved this way for the sake of the case itself or under Ibn Ḥabīb's pressure.

3.1.3. It is generally assumed that this event took place in the year 237/851 (*i.e.*, one year before the deaths of ʿAbd al-Raḥmān II and ʿAbd al-Malik b. Ḥabīb). The *qāḍī* consulted was Muḥammad b. Ziyād who was dismissed from his office by the *amīr* for having opposed the death penalty : his dismissal, according to some sources, took place in 237/851. This information, however, does not fit with other sources, so I think it is safer to assume that Yaḥyà's trial took place between the years 234/848 [34] and 238/852. The question of the dates is of some importance because of the relationship of the case of Yaḥyà b. Zakarīyā' with that of Hārūn b. Ḥabīb.

3.1.4. The nephew of ʿAǧab was crucified alive and stabbed to death, according to the Mālikī doctrine on *ṣalb*. We know of other such cases in al-Andalus where the culprit was crucified alive [35].

3.2. *The case of Hārūn b. Ḥabīb.*

3.2.1. As in Yaḥyà's case, all the *fuqahā'* consulted in Hārūn's case were Mālikīs. However, despite the fact that on that occasion the contents of the *fatāwā* are recorded, *no mention is made of any Mālikī authority*. It is true that the contents seem to be abridged, but even so it is quite surprising that the abridgement should have affected the mention of the Mālikī doctrine. As a matter of fact, *no mention is made of any specific case of blasphemy*, which could constitute a precedent [36]. The cases mentioned by Ibrāhīm b. Ḥusayn b. Ḫālid deal with accusations of *biḍʿa* [37], *zandaqa* and apostasy [38] : apparently, the line between these offences and that of blasphemy was not clearly drawn. Those who asked for death penalty wanted naturally to stress the fact that Hārūn's words were to be taken at their face value [39] and that even if the attack against God was somewhat only hinted at, it should be recalled that in such

34. In that year Yaḥyà C. Yaḥyà al-Layṯī died. He was the leading *faqīh* while alive and he would have been consulted were he not dead.

35. That was, for example, the case of a false prophet condemned also during the reign of ʿAbd al-Raḥman II (see Fierro, *Heterodoxia* 5.6) and of a Christian soldier during the reign of ʿAbd al-Raḥmān III, who was stabbed to death on the cross (*ibid.*, p. 63, note 87).

36. In the way that Hārūn's case is mentioned as a precedent by Ḫalīl b. Isḥāq.

37. It is the case of Ṣabīġ : accused of introducing innovations in Islam because of his interest in *ǧadal* and *kalām*, he was flogged until he repented. See on him Muḥammad b. Waḍḍāḥ al-Qurṭubī (d. 287/900), *Kitāb al-bidaʿ* (ed. and trans. by María I. Fierro, Madrid 1988), p. 62-63 and 322-323.

38. It is the case of Mālik b. Nuwayra, accused of having apostasized after the Prophet's death. Ibn Ḫālid's version of this event corresponds to that in which Mālik refers to the Prophet as *ṣāḥibu-kum* (« your master ») instead of *ṣāḥibu-nā* (« our master »), thus excluding himself from the Muslim community. See on this *EI*^{2}, VI, 251-253 [Ella Landau Tasseron].

39. Ibn Ḥabīb was aware of this danger, when he said that were his brother's words to be taken literally, he should be put to death, as they meant *kufr*.

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accusations an implication is like an open declaration (*al-taʿrīḍ ka-l-taṣrīḥ*). Those who asked for a disciplinary punishment (*i.e.* imprisonment and/or flogging) insisted, on the contrary, on the possibility of interpreting the words in a harmless sense; the mere existence of that possibility was enough to dismiss the death penalty. This was the position also of ʿAbd al-Malik b. Ḥabīb [40].

3.2.2. The *qāḍī* of Ilbīra did not consult the *fuqahā'* of his town : the nature of the offence (blasphemy) forced him to refer the matter to the *amīr* in Qurṭuba. The sources do not mention that in this case ʿAbd al-Raḥmān II made use of the *ṣāḥib al-madīna* [41] or that he assembled the *fuqahā'* as in Yaḥyà's case. The procedure in this case seems to have been all by correspondance.

3.2.3. A confusing issue is the relationship between the *fatāwā* issued in Hārūn's case. The impression one gathers from the account by ʿIyāḍ is that when writing them, the *fuqahā'* consulted knew the contents of Ibn Ḥabīb's *fatwà*. I can think of two possible explanations if this were the case : a) the *amīr* consulted Ibn Ḥabīb in the first place and his answer was made known to the other *fuqahā'*, who were to have it as their point of reference; b) before the *fatāwā* were written down, there was a previous meeting of the *fuqahā' mušāwarūn* (not recorded by the sources), during which the different opinions had been discussed, so that when they were written down they referred to each other. In any case, it is clear in the preserved account that the opinion of each *faqīh* was influenced by that of the rest, in the sense of providing arguments to counteract those put forward by the others and in the sense of introducing nuances in their own positions. It is also worth pointing out the role of the *amīr* : his is the final decision and the *fuqahā'* try to influence him in different ways; ʿAbd al-Malik b. Ḥabīb even resorts to " threatening " him.

3.2.4. It is difficult to establish when Hārūn's trial took place. According to ʿIyāḍ [42], it happened after the case of ʿAğab's nephew. It can be argued against this, however, that one of the *fuqahā'* consulted in Hārūn's case (ʿAbd al-Aʿlà b. Wahb) had been dismissed by the *amīr* as *faqīh mušāwar* after Yaḥyà's case. Furthermore, the information at our disposal on the chronology of ʿAbd al-Raḥmān II's *qāḍī*-s is very confusing. According to some sources, the *qāḍī* Saʿīd b. Sulaymān al-Ballūṭī had two terms of

40. However, the sources differentiate clearly his position from that of the others who opposed death penalty. In my opinion, this points to the fact that the account given by the sources is abridged : Ibn Ḥabīb probably started by not contemplating any punishment for his brother; when he realized that all the other consulted *fuqahā'* saw it necessary to punish him more or less severely, he was forced to include punishment in one of his *fatāwā*. See also 3.2.3.

41. It can be assumed from this fact that the *ṣāḥib al-madīna* of Qurṭuba acted only when the offence took place in his town.

42. He does not mention his source. I have not found any reference to Hārūn's case in earlier sources, as, for example, al-Ḫušanī, who does mention Yaḥyà's case.

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office : the first between 208/823-209/824; the second between 220/835-237/851, the latter being the year of his death. Other sources do not mention this second *qāḍī*ship or record that he was appointed to the office in 234/848. At the same time, Muḥammad b. Ziyād (the *qāḍī* in Yaḥyà's case) is said to have been the last judge of ʿAbd al-Raḥmān II. Some sources, finally, mention Saʿīd b. Sulaymān as the successor of Muḥammad b. Ziyād. To this chronological confusion is to be added the fact that *in no account of the two trials reference is made to the precedent established by the other.* This is rather odd : even having in mind that in Islamic law a legal opinion does not constitute a binding precedent, it is hard to imagine that the *fuqahā'* who disagreed with Ibn Ḥabīb's opinion would have missed such an opportunity to attack his obviously biased reasoning and stress his contradictory attitude.

3.2.5. Hārūn's words deserve further commentary. The first accusation against him was based on his statement that Christians and Jews were in a better position than Muslims. Even if the place is not specified, he was clearly referring to al-Andalus and to Ilbīra more specifically. During the reign of al-Ḥakam I (the father of ʿAbd al-Raḥmān II) a Christian, the *qūmis* Rabīʿ, had been in charge of the tax collection and the *amīr* had given him for this expenses one thousand *dīnār*-s, which came from the province of Ilbīra. At the beginning of ʿAbd al-Raḥmān II's reign, a delegation from Ilbīra asked the new *amīr* to cancel the taxes collected by Rabīʿ [43] and had to fight against the *amīr*-'s troops. There was, therefore, resentment against the *ḏimmī*-s elevated by the *amīr* [44]. Hārūn's words might well have been an echo of such a resentment : if so, they implied criticism against the *amīr* and his policy. It is then surprising the benevolence shown to him by ʿAbd al-Raḥmān II. As regards the words which gave rise to the second accusation, they were seen as an attack against God's justice (« God is responsible for my illness; being ill has made me suffer in such a way that the worst punishment inflicted by men cannot be compared to it; God is responsible for my suffering and that suffering is not even the punishment for a crime ») [45]. We know that Hārūn was interested in *kalām* and among the problems discussed by Muslim theologians, were God's responsibility for evil and God's justice. It was in the reign of ʿAbd al-Raḥmān II that *kalām* started to be introduced in al-Andalus [46].

43. This Christian was finally put to death, according to some sources by al-Ḥakam I at the end of his reign and according to others by ʿAbd al-Raḥmān II at the beginning of his.

44. During the reign of Muḥammad (238/852-273/886), son of ʿAbd al-Raḥmān II, there is some evidence of a reaction against the *ḏimmī*-s who held offices in the court : see Fierro, *Heterodoxia*, apartado 6.1., p. 77-80.

45. They could have also been interpreted as an attack against Abū Bakr and ʿUmar and their right to the caliphate, *i.e.* as prošīʿism. There is some evidence that this interpretation was hinted at, but it does not seem to have attracted much attention. Šīʿism was not a threat to the Umayyads at the time and this might have made useless such an accusation against Hārūn. Later on, when Šīʿite propaganda started to penetrate into al-Andalus and especially when the Fāṭimids proclaimed their caliphate in Ifriqiya, accusations of Šīʿite leanings were brought against different persons or groups considered to be a threat to the State.

46. See Fierro, *Heterodoxia*, p. 49-53.

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3.3. *The case of the Christian blasphemers.*

As regards the voluntary Mozarab « martyrs », I have already pointed out that no Muslim source mentions them and thus we lack any record of the legal procedure applied in their case. We know, however, that they were offered the possibility of repentance, a way out from the death penalty that is not agreed upon in the Mālikī doctrine dealing with the blasphemy of *ḏimmī*-s and Muslims. There is agreement, on the other hand, on the doctrine that the *ḏimmī* accused of blasphemy can escape from capital punishment by converting to Islam [47]. In the case of the « martyrs » who were crypto-Christians, the opportunity of repentance given to them can be explained by the fact that they were also guilty of apostasy and in the Mālikī school the predominant view is that the *istitāba* must be granted to the *murtadd.* In the case of the Christian woman whose trial has been preserved by a Muslim source, she was not granted the possibility of repentance, according to the doctrine of Ibn al-Qāsim [48].

4. CONCLUSIONS.

It has become clear in the previous sections that the information given by the sources is not as complete as one would wish. Within the limits of that information, however, there are some conclusions on the « making » of the *fatāwā* in the cases studied that are worth stressing.

4.1. Dealing with accusations of blasphemy fell under the direct competence of the *amīr* [49], at least in the case of the Muslim blasphemers [50]. The *amīr* ordered Yaḥyà's imprisonment; Hārūn was sent to prison by the *qāḍī* of Ilbīra, but the latter left in the hands of the *amīr* the actual trial of the accused. It is the *amīr* who personally asked for the legal opinions of the *fuqahā'*, including among them the *qāḍī* of Qurṭuba, who acted not as a *qāḍī* but as another *faqīh.* Those *fuqahā'* are *fuqahā' mušāwarūn, i.e.*, jurists selected among their class as worthy of consultation by the *qāḍī* or by the *amīr.* The *fuqahā' mušāwarūn* in the cases studied are undoubtedly named by

47. See A.M. Turki, « Situation du « tributaire » qui insulte l'Islam, au regard de la doctrine et de la jurisprudence musulmanes », *Studia Islamica* XXX (1969), p. 39-72.

48. See Ḫallāf's edition of the text of Ibn Sahl, p. 72.

49. See on the religious character of the *amīr*/caliph and his relationship with the *qāḍī*, E. Tyan, *Institutions du droit public musulman*, t. I *Le Califat* (Beyrouth 1954), p. 462-471; Santillana, *Istituzioni* II, 559-560 and 573. It must be taken into account that the Umayyads of al-Andalus did not recognize the ʿAbbasid caliph and, although they did not proclaim themselves caliphs until the 4th/10th century, they acted as such since the time of the first independent *amīr*, ʿAbd al-Raḥmān I.

50. In the case of the Christian blasphemers, it would seem that there was no such a direct intervention or at least it is not recorded by the sources. For example, we know that in the case of one of the Christian blasphemers the *qāḍī* hesitated in sentencing him to death penalty and the *amīr* had to intervene : see Fierro, *Heterodoxia*, p. 54, note 46.

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the *amīr* himself, not by the *qāḍī*. They are Mālikīs and their *iḫtilāf* does not seem to be determined by any specific tendency within the Mālikī school : it springs out of their personal reasoning and interpretation of a shared body of doctrine. In one of the cases studied, the consultation takes place in a *mağlis*, where the *amīr* is represented by the *ṣāḥib al-madīna*; in both cases, the *amīr* has the *fatāwā* issued in a written form. The *amīr*, on the basis of these *fatāwā*, makes his own choice and takes the decision as to which sentence is to be applied to the accused. This choice is not determined by the fact that a majority of the *fuqahā'* supported the chosen sentence [51]. I shall come back later to the question of the reasons behind the *amīr*'s choice. Here I will only recall that it coincided in both cases with the opinion given by the same *faqīh*, Ibn Ḥabīb. Regarding the suggestion made by Ibrāhīm b. Ḥusayn b. Ḫālid of writing to the East and raising the question of Hārūn's case, such a suggestion implies that the East (*al-mašriq*) was seen by Ibn Ḫālid as a place where authorities higher than those of al-Andalus could be consulted. He must have had in mind Medina or Egypt, where the Andalusian *fuqahā'* received their training and knowledge in that period [52]. It shows, therefore, that during the reign of ʿAbd al-Raḥmān II, the Andalusian *fuqahā'* had not reached complete confidence in their skills. But there is another possible interpretation of Ibn Ḫālid's words. Taking into account that the accusation was of blasphemy and therefore considered to fall within the competence of the *amīr*, could Ibn Ḫālid not be implying that the Umayyad *amīr* (whose legitimacy could be questioned) was not the appropriate authority to handle such a case? If this interpretation is correct, Ibn Ḫālid's suggestion can be considered as a very rare instance of some intellectual activity on the part of the Andalusian *fuqahā'* on the question of the Umayyads' legitimacy to their power in al-Andalus [53].

4.2. In both Yaḥyà's and Hārūn's cases, it is taken for granted that the accusation of blasphemy may lead to the death penalty : a) because the punishment of blasphemy is that of the Muslim who falls into *kufr* (Ibn Ḥabīb); b) because « *al-āṯār al-muḥkama wa-l-sunna al-māḍiya* » contemplate the death penalty for blasphemy together with murder, apostasy and brigandage (Saʿīd b. Sulaymān al-Ballūṭī); c) because the punishment of blasphemy is one of the *ḥudūd* (Ibn Ḥabīb, Ibrāhīm b. Ḥusayn b. Ḫālid). No Mālikī authorities are quoted [54]. For the *fuqahā'* who sought the death penalty, the words of the two accused were to be taken literally : as insults to a God who should be

51. In Yaḥyà's case, three out of the five consulted *fuqahā'*, plus the *qāḍī*, decided against death penalty the punishment chosen by the *amīr* and supported by only two *fuqahā'*. In Hārūn's case, we do not know how many supported Ibn Ḥabīb's *fatwà* against death penalty, the one chosen by the *amīr*.

52. See L. Molina, « Lugares de destino de los viajeros andalusíes en el *Ta'rīj* de Ibn al-Faraḍī », *Estudios onomastico-biográficos de al-Andalus. I* (Madrid 1988), p. 585-610, especially p. 608 (n° I).

53. See my article « Sobre la adopción del título califal por ʿAbd al-Raḥmān III », *Sharq al-Andalus* 6 (1989), p. 33-42.

54. However, they are quoted by Ibn Sahl in the *fiqh* that accompanies his account of the Christian woman accused of blasphemy.

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worshipped and respected; the intention (*nīya*) of the offenders should not be taken into account nor any harmless interpretation be permitted. For the *fuqahā'* who sought only a disciplinary punishment, the questions of *nīya* and of interpretation were crucial. In case the words were judged blasphemous if taken literally, the only way to escape capital punishment was to insist that they should not be considered as evidence of unbelief [55], because a) the intention of the accused had not been to insult God (Yaḥyà was joking; Hārūn was ill and out of his mind); b) the words were ambiguous and therefore not only could but should be interpreted in a harmless way. There is nothing surprising in this. What is really interesting in both cases is that one of the *fuqahā'*, ʿAbd al-Malik b. Ḥabīb, played a different but decisive role in each of them. Moreover, it is very likely that, having put to death Yaḥyà as a blasphemer, he had to save his brother from a fate to which he had previously contributed. It is thus not surprising that his tone is highly emotional in the *fatāwā* he issued in both cases : while condemning Yaḥyà to the cross, he stresses his pain and outrage for God's sake, going so far as to weep; while trying to save his brother, he minimizes the attack against God contained in Hārūn's words; he also complains of being persecuted by his colleagues and accuses them of being jealous of his success and prestige, and he goes so far as to present the *amīr* with the choice of being « with me or against me ». ʿAbd al-Malik b. Ḥabīb cannot have felt secure as to his defence of his brother, especially if we take into account that Hārūn's case is very likely to have taken place after Yaḥyà's. So, he played the card of « intention and interpretation », but he badly needed more cards, having very convincingly dismissed it in Yaḥyà's case. He then claimed that the witnesses did not fulfil the legal requirements; that the behaviour of the *qāḍī* of Ilbīra had been dictated by his hatred of Hārūn; that the *fuqahā'* consulted were all of them driven in giving their *fatāwā* by their envy and jealousy of his prestige... For all his efforts, the impression remains that his position must have been weak and had he not counted beforehand on the *amīr*'s support [56], Hārūn's fate might well have been crucifixion.

4.3. In none of the *fatāwā* issued is there any mention of a previous case of blasphemy dealt with in al-Andalus or elsewhere which could have established a precedent to refer to [57]. Furthermore, we have two cases of blasphemy taking place one after the other probably in the same year (237/851) and there is no mention of the decision taken or the *fatāwā* issued in the first in whatever of the two is the second. It is true that precedents set up by late generations of *fuqahā'* do not necessarily set a doctrine

55. It is worth recalling the existence in Islam of a tendency to leave the judgement of matters of unbelief to God and not to man : see Fierro, *Heterodoxia*, p. 180-181 and 185-186.

56. In this sense, it is worth recalling that brāhīm b. Ḥusayn b. Ḥālid seems to have taken for granted that the *amīr*'s will shows clemency in Hārūn's case.

57. I have already mentioned that the cases quoted are of *zandaqa*, innovation and apostasy and that this seems to point to the lack of a clear line drawn between those offences and that of blasphemy.

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in Islam [58], but they do play some role. And in fact, the two cases studied here were used by the *qāḍī* ʿIyāḍ and by al-Wanšarīsī in their exposé on the legal doctrine on blasphemy. Hārūn's case had even more success : Ḫalīl b. Isḥāq states in his *Muḫtaṣar* that it is uncertain whether the words « During my illness I have suffered so much that even if I had killed Abū Bakr and ʿUmar, I would have not deserved such a punishment » are to be punished by death or by *ta'dīb*, which shows that later generations did not agree on the soundness of the decision taken by the Umayyad *amīr* on the authority of Ibn Ḥabīb's *fatwà* [59].

4.4. The sources do not record cases of accusations of blasphemy against Muslims during the Umayyad period other than the two studied here. E. Lévi-Provençal hinted that Yaḥyà's case (for him, the first of the two) was to be connected with the movement of the Mozarab martyrs, started in 235/850. The whole affair of Yaḥyà's trial (especially the fact that such importance was given to his words as to denounce him to the *amīr* and the fact that the latter chose death penalty) makes more sense if the atmosphere created in Qurṭuba by the Christian blasphemers is taken into account. The « martyrs' » strategy was to insult the God of the Muslims and His Prophet. Their blasphemy must have given rise to a special sensitivity among Muslims regarding any alleged attack against their God, regardless where it came from (the *ḏimmī* community or the Muslims themselves). Maybe it is not too far-fetched to assume the existence of a « lobby » fighting for harsher measures against any alleged blasphemy and Ibn Ḥabīb might well have been their spokesman in Yaḥyà's case. The *amīr*'s support of Ibn Ḥabīb's *fatwā* was then due not only to the influence the latter had on him, but also to the fact that he was under the pressure of that « lobby ». The behaviour of the *fuqahā'* who opposed the death penalty in Yaḥyà's case can be explained in two ways that are not mutually exclusive : they did not bend to the pressures of the moment, but were faithful to the notion that matters of belief are not to be judged by man; they resented Ibn Ḥabīb's influence on the *amīr* and their *fatwà* was a way of expressing that resentment by opposing him, the doctrinal issue involved being of no real importance. That hatred, envy and jealousy existed among the *fuqahā'* of Qurṭuba of the time is clearly shown by the sources [60]. It could easily have led the *fuqahā'* « defeated » in Yaḥyà's case to look or wait for « revenge » against the triumphant Ibn Ḥabīb and Hārūn's accusation must have been considered as too good to be true, especially if the « lobby » that I have proposed existed. In this context, Ibn Ḥabīb's success in saving his brother from death against so many odds gives us the measure of his influence on the *amīr*.

58. See Turki, art. cit. p. 39-40.

59. The suspicions felt about the solution given to the case are also clear in the mention of Hārūn's trial in *Šifā'* and *Miʿyar*. Both sources present the case under the heading : « Whoever insults God and advances as an excuse that it was an outburst must be put to death for his alleged *kufr* ». This was the doctrine of Ibn Abī Zayd al-Qayrawānī (d. 386/996).

60. See for example the case of ʿAbd al-Aʿlà b. Wahb in Fierro, *Heterodoxia*, apendice II.

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