CHAPTER 2

Fatwās to the Far Maghrib: Ibn Rushd's Consultations for the Amīr and Cases of Murder and Stolen Cattle

1 Introduction

In addition to jurists in Marrakesh, Ibn Rushd wrote opinions in response to questions originating from jurists and officials active in other regions of the Far Maghrib. A majority of the opinions were solicited by the chief judge of Ceuta, Qāḍī ʿIyāḍ (who will be discussed in Chapter Three). The remaining opinions were directed at a variety of locations – many unidentified in the text. While disparate and elliptical, taken together, these fatwās complement the picture of legal activity, institutional development, and social change sketched out in the Introduction and Chapter One. They corroborate several points while raising a host of other issues, some involving rural and tribal life and others impacting the intellectual and religio-political life of the Far Maghrib as a whole. Keeping with the theme of religiously sensitive subjects for the Almoravid administration before progressing to more rural matters, the first set of questions results (at least purportedly) from direct correspondence between the Almoravid commander and the muftī Ibn Rushd. In the analysis of these texts, I focus on elucidating the context for questions warranting such high-level correspondence and their relationship to social change in the sixth/twelfth-century Far Maghrib. The questions posed by the Almoravid commander serve to situate these changes in a broader pan-Islamic framework. They illustrate how the Almoravid leadership saw itself within the wider Islamic and Mediterranean worlds.

The fatwās in this chapter include a question of ritual law, comparable to that of the man who refused to remove his turban (even if with a bit less flare). Reading this text reinforces the impression of authorities who were more concerned with defining basic ritual practices and the implementation of orthopraxy than with identifying or combating unorthopraxy or "heretical" variations, perceived or real.[1] A second question seeks elucidation on a

1 As encountered in other regions and periods of the Maghrib, as for example in Qayrawān under Fāṭimid and Zirid rule where ritual law and practice was one of the central areas of contestation and articulation of Fāṭimid and Mālikī identity. For a discussion of this, in the

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particular point of law, but in a criminal framework. The clarification the jurist sought from Ibn Rushd was, again, not unlike that encountered in Chapter One (contradictory testimony relating to divorce), although in a substantially more interesting scenario.

Analysis of a last set of questions provides glimpses of the widespread demographic and structural change that was taking place in the countryside of the Far Maghrib under the Almoravids. Both questions deal directly with legitimating or sanctioning ownership and the transmission of ownership of specific forms of property. As with ritual observance, customary practice conflicted with Mālikī practice, raising difficult questions over the lawful course of action. The cases also reveal the impact of the socio-economic changes ushered in by the new regional order, the advent of which is thought to have coincided with significant redistribution of land and redefinition of land-ownership.

2 Questions from the Almoravid Leadership: On the Permissibility of Ashʿarism and the Exceptionalism of the Islamic Maghrib

The first two fatwās to be discussed in this chapter have been discussed at some lengh by scholars previously, for the topics they deal with are of clear political and theological significance and because the prominence of the *mustaftī* suggests that the questions were of importance to the fortunes of the state. I will not go into detail over the more theoretical aspects of either question, but rather address their significance within the framework of the present inquiry. These texts, first of all, add to our understanding of the relationship between the Far Maghrib and al-Andalus. In a way more perspicuous than with the fatwās on ritual law and apostasy in Chapter One, they shed light on the relationship between Andalusī politico-religious learning and the Almoravid leadership: When ʿAlī b. Yūsuf asked Ibn Rushd about the permissibility of *uṣūlī* theology and the virtue and obligation of jihād, he was asking the Andalusī muftī for counsel on religio-legal issues at the heart of Almoravid identity and of the greatest political importance for the legitimacy of the state.

Perhaps even more compelling, the two questions posed here by the Amīr al-Muslimīn betray an emerging Far Maghribī political identity and thus provide a valuable perspective from which to understand the Far Maghrib's solidification as a political entity with regard to the rest of the Islamic world. The

framework of a study of the life and work if Ibn Abī Zayd al-Qayrawānī (d. 382/996), see Sayeed Sajjadur Rahman, "The Legal and Theological Thought of Ibn Abī Zayd al-Qayrawānī (310–386/922–996)" (Yale, 2009), 8–9, 58–69.

texts display a deepening connection with trends sweeping in from the Islamic East as well as a stronger sense of independence. Both of these forces were prevalent as Almoravid unification was followed by a more forceful articulation of Berber Islamic identity.

On the Permissibility of Studying the Works of Abū al-Ḥasan al-Ashʿarī[2]

Ibn Rushd answered a query, identified once as coming from the city of Fez and a second time as coming from the amīr himself, on the permissibility of studying Ashʿarī works. What we have is the text of two fatwās that are practically identical, except for the introductory lines, identifying the *mustaftī*.[3] The style of the *istiftā'*, with rhymed prose and parallel constructions, betrays a deft secretarial hand and is markedly unlike the other fatwās discussed here.[4] It is plausible that the question was first formulated by scholars in Fez and that ʿAlī b. Yūsuf seconded the question because of its topical relevance, or, alternatively, that it had originally been directed to ʿAlī's own scholars and court before being redirected to Ibn Rushd.

Irrespective of whether the question originated from the amīr or was later taken up by him, his presence as *mustaftī* lent undeniable consequence to the symbolic and political nature of the question. The questioner, addressing Ibn Rushd as "jurist, great judge, one and only *imām*, Abū al-Walīd," asked whether six theologians (*mutakallimūn*), identified by name, may be read and studied without moral endangerment. These theologians were the shaykh Abū al-Ḥasan al-Ashʿarī (d. 330/942), Abū Isḥāq al-Isfaraynī (418/1027), Abū Bakr al-Bāqilānī (403/1013), Abū Bakr b. Fawrak (d. 406/1015), Abū al-Maʿālī (d. 473/1085), and Abū al-Walīd al-Bājī (d. 474/1081). The *mustaftī* asked what should be said to those who "insult and disparage them and revile anyone associated with the school of Ashʿarism, accuse them of unbelief, disclaim any association with them, turn away from them in [holy] righteousness, and believe them to be in error and rushing into ignorance?"[5]

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2 Ibn Rushd, *Fatāwā Ibn Rushd*, 802–05.

3 The first text identifies the *mustaftī* as the Amīr al-Muslimīn, ʿAlī b.Yūsuf. Ibn Rushd, *Fatāwā Ibn Rushd*, 802–05. The second question is identified as "coming from the city of Fez." Ibn Rushd, *Fatāwā Ibn Rushd*, 943–45.

4 Except for a question which is identified as coming from a group of "outstanding students of [Islamic] science from Tangier." Ibn Rushd, *Fatāwā Ibn Rushd*, 1494–505. To be sure, this doesn't mean that our question here necessarily originated with a group of scholars in Fez, but the belletristic formulation and the thoroughly political and prominent nature of the subject matter makes it likely.

5 Ibn Rushd, *Fatāwā Ibn Rushd*, 804.

The tone of the *istiftā'* reveals sympathy with the practitioners of *kalām* and adherents of Ashʿarīsm. The *mustaftī*'s central preoccupation was determining the appropriate response to what appears to have been the vehement reaction against Ashʿarism and *kalām* in the Far Maghrib. Indirectly, he describes the character of this reaction:

> What should be said, done, and believed about them [those who practice *kalām* or adhere to Ashʿarism]? Are they to be left to their own convenience or shall they forbear their excesses? Does this constitute an invalidation in their religion and defect in their faith? Is prayer behind them permissible or not? Clarify for us the value of the aforementioned imāms, their place in the faith, and inform us about the position of those who disparage and turn away from them, as well as the position of those who entrust and befriend them generally.[6]

The opponents of Ashʿarism had thus apparently taken to accusing those associated with Ashʿarīsm of being beyond the pale of acceptable religious practice. However, the *mustaftī*, as mentioned, described them simply as practitioners of dialectical theology (*ʿIlm al-kalām*), people who "speak of the origins of religious beliefs (*uṣūl al-diyānāt*), and write in answer to the people of whim (*ahl al-hawā'*)." This last formulation plainly establishes a link of fellowship between the *mustaftī* – most probably a learned scholar himself – and the *mutakallimūn* against the people of whim. Are these *mutakallimūn*, he asked, "leaders of good sense and divine guidance, or are they leaders (*qāda*) of confusion and blindness?"

In contrast to fiqh (law), *kalām* applied rational interpretation to the foundational religious texts of Islam. One of the predominant ways in which *kalām* came to be conceived of in the East, over the first three centuries of Islam, was as a practice that defended the faith against hostile ideological attack and heresy. Its practice was thus defined as a way of deepening understanding to strengthen knowledge of the truth.[7] Ashʿarism itself is a broad term that came to comprise the traditions of mainstream Sunnī *kalām*. It consisted of the Sunnī interpretive practices that applied rationalist and Muʿtazilite tools and concepts to the epistemology and ontology of Islam while keeping conceptual restraint on certain proscribed questions. It is also seen to constitute a kind of compromise toward the construction of faith, using tools once employed by parties later seen as beyond the pale. Among other things, our ques-

6 Ibn Rushd, *Fatāwā Ibn Rushd*, 804.

7 Gerhard Endress, *An Introduction to Islam* (New York: Columbia University Press, 1988), 47.

tion points to, if not the introduction, definitely a greater dissemination in the Far Maghrib of theological discourse that was current in the greater Islamic world.

The historiography of this particular issue has been inordinately influenced by a report by the Almohad chronicler, al-Marrākushī – resulting in a dramatic skewing of the narrative of the reception of Ashʿarīsm under the Almoravids. It is to al-Marrākushī's chronicle that we owe the long-held notion that the Almoravid amīr, ʿAlī b. Yūsuf, condemned the practice of *kalām*. According to al-Marrākushī's chronicle, ʿAlī fell under the sway of the *fuqahāʾ*, consultation with whom he was said to be "addicted" to for the making of each and every decision. Under the Almoravids, the *fuqahāʾ* gained prominence they had not enjoyed in the early period of the conquest of al-Andalus. As a result of this influence, they reaped considerable material gains and sequestered the amīr from outside influence; only those who knew the science of *furūʿ* (substantive law) according to the school of Mālik were said to have been allowed any access. So pervasive was their influence, al-Marrākushī famously said, that knowledge of the Mālikī rite and its substantive law were favored to the exclusion of "the book of God and the traditions of His messenger." Al-Marrākushī wrote that the insistence of the *fuqahāʾ* that *kalām* was repugnant won over ʿAlī's heart.[8] This led him to order that instructions be sent to all provinces of the empire prohibiting the study of *kalām* and threatening those found with books on the subject (the nature of the threat was left unspecified).

In the same breath, al-Marrākushī discussed the introduction of al-Ghazālī's famous work, *Iḥyāʾ ʿulūm al-dīn*, in the Islamic West, the public burning of which (said to have been ordered by the amīr) he conflated with this opposition to *kalām*: "And when the books of al-Ghazālī penetrated in the West, the amīr ordered that they be burned and threatened those whom were found with some of those [books] even more severely with death and the confiscation of goods. This order was rigorously enforced."[9]

The complex of social currents perceived to be colliding in this passage have, for understandable reasons, produced a rich historiography, one of the unfortunate results of which has been a simplistic understanding of the Almoravid movement as fanatically adherent to Mālikism. The accusation that they cultivated Mālikism to the exclusion of the Qurʾān should raise red flags, however. Few charges in Islamic social discourse could be more charged politi-

8 Implying he was not so inclined by nature.

9 Delfina Serrano, "Los almorávides y la teología ash'arí: ¿Contestación o legitimación de una disciplina marginal?," 465.

cally. Understanding the bias in al-Marrakushī's description has been a first crucial step toward a better understanding of Almoravid history.

A second step is reading the fatwā in question with an awareness of the effect this bias has had on the long historiography of the issue.[10] While a full treatment of the development of *kalām*, Ashʿarism, and the reception of al-Ghazālī in the Far Maghrib falls outside the scope of this study, a few important points about their relevance to the present inquiry can be made here. Firstly, as D. Serrano notes, the fact that Ibn Rushd – himself an *uṣūlī* and sympathizer with *kalām* (as evident in the opinion) – had a privileged relationship with the Almoravid intellectual and political elite indicates that neither ʿAlī nor his *fuqahāʾ* were anti-*kalām*. Texts such as this one, and scrutiny of other sources, suggest that the narrative of an enthusiastic reception and cultivation of *kalām* in the *Taifa* Period followed by its suppression under the Almoravids (for which reason they are so often referred to as fanatical Mālikīs) does not stand up under scrutiny. The debate over *kalām* in this fatwā points to the significant level of intellectual ferment and anxiety over the appearance of multiple new loci of authority – principally the movement of Ibn Tūmart, whose overt hostility to Mālikism, an institution closely associated with the urban revolution and the regime, is strongly suggestive of the dynamic opposition to these new loci. Likewise, the dispute over *kalām* was not merely a matter of entrenched conservatives rejecting rationalism in favor of blind obedience to Mālikī *furūʿ*, as previously understood, but rather a more complex competition between multiple voices within the emerging and interlinking Islamic discursive traditions that characterized the sixth/twelfth-century urban transformation of the Far Maghrib.

The burning of the *Iḥyāʾ* is the embodiment of one such competition. Scholars have shown that, contrary to later characterizations, Almoravid reaction to al-Ghazālī fell on both sides of the debate.[11] Al-Ghazālī (notably absent from

10 These have been analyzed in Vincent Lagardère, "Une théologie dogmatique de la frontière en al-Andalus aux XIe et XIIe siècles: l'aš'arisme," *Anaquel de estudios árabes* 5 (1994): 71–98. And Delfina Serrano, "Los almorávides y la teología ash'arí: ¿Contestación o legitimación de una disciplina marginal?" The latter's work and reading on these particlar fatwās has been particularly influential on my own reading. Other works on the diffusion of Ashʿarism in al-Andalus include J. M. Fórneas, "De la transmisión de algunas obras de tendencia aš'arī en al-Andalus," *Awrāq* 1 (1978): 4–11; ʿIsmat Dandash, "Mawqif al-murābiṭīn min ʿilm al-kalām wa-l-falsafa," in *Aḍwāʾ jadīda ʿalā al-murābiṭīn* (Beirut: 1991); Maribel Fierro, "La Religión," 437–546. For a full list see Delfina Serrano, "Los almorávides y la teología ash'arí: ¿Contestación o legitimación de una disciplina marginal?," 462.

11 Dominique Urvoy, *Pensers d'al-Andalus: la vie intellectuelle à Cordoue et Séville au temps des empires berbères* (*fin XIe siècle-début XIIIe siècle*) (Paris [Toulouse]: Editions du CNRS

the list of thinkers above)[12] and his book, for a variety of reasons, assumed symbolic power that would develop gradually but unswervingly. While the Almoravids attempted to co-opt this symbolic force it eventually and retrospectively came to symbolize opposition to the Almoravids. The *kalām* of al-Marrākushī along with a host of other ideas and figures – notably those associated with the appearance of Ṣūfism in the region – took on symbolic power in the Almohad and post-Almohad telling of the past. Almohad deployment of these symbols closely associated with the success of their movement, along with the foundational role of Almohad historians, such as al-Marrākushī, in the historiography of the Far Maghrib, has led to a very limited understanding of such figures in Almoravid history. The limitations and distortions inherent in this narrative led, in the modern period, to placing excessive emphasis on the questions of why the Almoravids burned the *Iḥyā'*, why they were against *kalām*, and by extension why the were so legalistic and anti-rationalist, instead of to entertaining the more germane and interesting questions of why these issues, symbols, and figures became so urgent and forceful in this period and what was their social significance.[13]

In his opinion on the permissibility of Ashʿarism, Ibn Rushd lent unequivocal support to the *mutakallimūn*. His reason for this was simple: the *mutakallimūn*, he wrote, were cogniscent of the sources of the religion. Ibn Rushd (a Mālikī *faqīh*) defended the practitioners of *kalām* for precisely the reason al-Marrākushī said he should have condemned them: for addressing and knowing the sources. What legitimated the practice was precisely the rootedness of the sources (not the "branches") that al-Marrākushī claims they neglected.

Presses Universitaires du Mirail, 1990), 161–71; Maribel Fierro, "La Religión," 483–95; Kenneth Garden, "Al-Ghazālī's Contested Revival," 144–88; Delfina Serrano, "Why did the scholars of al-Andalus distrust al-Ghazāli? Ibn Rushd al-Jadd's fatwā on Awliyā' Allāh."

12 Serrano speculates that this is because al-Ghazālī was still alive.

13 Al-Marrākushī's description of the *fuqahā'*s success under the Almoravids does, after all, bear some resemblance to the picture of historical development argued for here. Their network and institution developed very significantly during this period. The development of Mālikī institutions in the transforming cities of the Far Maghrib, however, witnessed the rise of religio-political (intellectual/religious) opposition that used the same language as that cultivated by the developing discursive tradition. This opposition in the Far Maghrib – these alternate loci of authority – would be identified with the Ṣūfī movement and, to a lesser extent perhaps, with the *mutakallimūn* (both of which Almoravids and Almohads worked to rally to their cause); Mahdism and anti-Mālikism were, of course, what set the Almohads apart; both elements they eventually suppressed.

> These ʿulamāʾ [Ibn Rushd wrote] are leaders of good and right guidance (*khayr wa-hudan*), and are among those who must be emulated (*mi-man yajib bihim al-iqtidāʾ*), because they advocate the supremacy of the Sharīʿa (*qāmū bi-naṣr al-sharīʿa*) and thwarted the likes of those who sow distortion and error. They clarified ambiguities and made clear to us what beliefs (*muʿtaqidāt*) must be professed. For, with their knowledge of the origins of faiths (*dīyānāt*), they are learned in the Truth, by virtue of their knowledge in God (*li-ʿilmihim bi-llāh*) – lofty and sublime – what is owed Him, what is permissible to Him, and what concerning Him is [to be] refuted (*wa-mā yantafī ʿanhu*). This is because the branches of knowledge become known with knowledge of the origins. It is incumbent, then, that their virtues be acknowledged and their eminence recognized (*sawābiq yuqarru lahum*).[14]

For Ibn Rushd the practice of *kalām* as performed by these *mutakallimūn* was necessary for the defense of the faith or "orthodoxy." He was explicit in his epistemological understanding of the practice. "Right guidance" in religion and knowledge of Truth "becomes known with knowledge of the origins." He supported his position by citing the prophetic hadith: "This knowledge is borne from every back, this honesty is repudiated by the distortion of the extremists, and the arrogation of the liars, and the interpretation." For only an ignorant person, he glossed, or a heretic deviating from the truth would believe them (the *mutakallimūn*) to be in error and ignorance, and only the "wicked (*fāsiq*) reviles and ascribes controversy" to what the *mutakalimūn* believe. He marshaled the Qurʾānic phrase, "Those who traduce believing men and believing women undeservedly shall bear the guilt and slander of grievous sin," to his argument. The ignorant must be enlightened by these *mutakallimūn*, he said, the "unrighteous" disciplined, and the heretic, called to repent from *bidʿa*.

> If he does not repent, he should be beaten relentlessly until he repents [he cited in closing], as ʿUmar al-Khattāb – God be pleased with him – did with Ṣabīgh, whose belief was under suspicion. ʿUmar beat him until Ṣabīgh said to him: "Oh Amīr al-Muʾminīn, if you intend to cure me, you have brought me to illness, and if you intend to kill me, finish me off." Then ʿUmar released him.[15]

14 Ibn Rushd, *Fatāwā Ibn Rushd*, 804–05.

15 Ibn Rushd, *Fatāwā Ibn Rushd*, 805.

Kalām, as described by Ibn Rushd, is the protector of the true knowledge of God from heresy, the hand that safeguards from deviation, and the tools of reason mobilized to defend the religion. His opinion articulates a position that is the polar opposite of that attributed to the Almoravids by al-Marrākushī (and by much modern historiography). Even if in this particular instance ʿAlī b. Yūsuf decided not to heed Ibn Rushd's opinion (of which we have no evidence, other than al-Marrakushī's version of events), preserved in this consultation is his willingness to listen, his high regard for a muftī sympathetic to Ashʿarism and Andalusī *mutakallimūn*, and the muftī's staunch defense of these against their critics.

Concerning the Virtue of Jihād over the Performance of the Ḥajj[16]

This question also features ʿAlī b. Yūsuf as *mustaftī*. It bears an addendum, which consists of a second, related question, and which may have been asked in person. The fatwā thus consists of two questions and two opinions on one important issue: The relative virtue of jihād compared to that of the ḥajj and the attendant obligations incumbent upon Muslims. In the first question, the *mustaftī*, ʿAlī, was concerned with knowing how this issue bore upon the people of al-Andalus, and in the second, how it bore upon the people of al-ʿIdwa ("the bank," referring to the Maghrib, often the Far Maghrib specifically). The text (other than being a communication from the highest authority in the empire on what was, after all, an epoch-defining matter) illustrates the prominent role played by jihād and the Muslim-Christian frontier in the development and identity of the Islamic West in the Almoravid period. While this issue is multifaceted and of profound importance to the region in this period,[17] there is one particular point upon which I will focus here: Contrary to the long-established notion that jihādism arrived in the peninsula with the "Almoravid hordes," it was the presence of the Christian-Muslim frontier that was most influential in shaping regional attitudes (among other things) over jihād; this frontier's movement and militarization affected Iberians and Maghribīs, and even Christians and Muslims, in profoundly similar ways.[18] The centrality of jihād to regional identity should be seen, therefore, not as something that grew in the peninsula with the arrival of Almoravids and Almohads but as a phenomenon

16 Ibn Rushd, *Fatāwā Ibn Rushd*, 1021–27.

17 This fatwā is treated briefly in Vincent Lagardère, "La Haute Judicature à l'Époque Almoraivde en al-Andalus," 154.

18 For further discussion on the effect of the Muslim-Christian frontier on both societies, see Amira K. Bennison, "Liminal States: Morocco and the Iberian Frontier between the Twelfth and Nineteenth Centuries."

arriving in the Maghrib *from* the Iberian peninsula; the escalation of the Muslim-Christian conflict from 478/1085 unified the experience of Iberian and Maghribī Muslims and impacted their cultures in analogous ways.

An introductory passage of the text reports that the Amīr al-Muslimīn, Nāṣir al-Dīn ʿAlī b. Yūsuf, "may God perpetuate his rule and raise his victory," wrote to Ibn Rushd with the following question: "Is the ḥajj more virtuous for the people of al-Andalus or is jihād?" The question was succinct:

> Concerning those of the people of al-Andalus who have not performed the pilgrimage in this, our time: Is the ḥajj or jihād more virtuous? How [does it affect your opinion if the individual] has already performed the obligatory pilgrimage (*qad ḥajja ḥajjat al-farīḍ*)? Go over what you think about this for us – may you be rewarded and granted success, if God so wills.[19]

The main import of the question was to identify the "virtue" derived from waging jihād and determine the nature of the associated obligation incumbent on Muslims (generally understood to be a communal and not individual one). More specifically, ʿAlī wanted to know the effect of performance or non-performance of the ḥajj (an individual duty) upon the obligation of jihād. The subtext of the *istiftā'* is the question of whether a communal duty could trump, or be given priority over, an individual one. More generally, the *mustaftī* sought to resolve the conflict resulting when obligations to God and the community appeared mutually obstructing. It is interesting to note, furthermore, that these two obligations, possibly more than any other in Islam, were most affected by geographical location and by the political status of the community. In his response, Ibn Rushd produced one of the defining formulations these obligations would take in the Islamic West.

The ḥajj is the performance of the pilgrimage to Mecca, incumbent upon all Muslims who are able, as defined by the jurists. Mālikī jurists defined "ability" as having minimal means. A person who is able to walk and eke out an existence by working en route is deemed "able" and thus obligated. Ḥanafī and Shafiʿī jurists, on the other hand, imposed a higher standard and defined "ability" as having means of transport and livelihood, based on the prophetic tradition: "He was asked, 'What is the ability (to perform the pilgrimage)?' He said, 'Food provisions and a riding animal.'"[20] Security, moreover, was widely understood to be a pre-requisite for the ḥajj. There were several opinions concerning

19 Ibn Rushd, *Fatāwā Ibn Rushd*, 1022.

20 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, I: 375.

the concept of delegating the ḥajj. If an individual is physically unable to perform the ḥajj but has the financial resources, might he or she make it possible for someone else to go on ḥajj? In Mālikism this delegation was not obligatory; the performance of the ḥajj by the individual was prioritized. Taking wages (to perform the ḥajj on someone's behalf) was frowned upon.[21]

The question of when the obligation became effective posed a more intractable conceptual problem. Is it obligatory the moment the individual becomes capable (and when the specific time of year arrives)? Or may its performance be postponed to a time that better suits the particular individual? In the *uṣūl* literature, this question was associated with discussions over time, fulfillment, and obligation,[22] which center on the problem of how certain obligations occur in time and must occasionally be deferred, even when the obligation itself is understood to be eternal and ever present and thus immediate (i.e., not deferrable). Some jurists argued that postponement is entirely lawful, based on the example of the prophet, who delayed the performance of his own ḥajj. Others argued (in the vein of the debate in fiqh literature) that the obligation was more akin to prayer. It was thus understood to be an obligation that becomes incumbent during specific and limited periods of time. This made it an unqualified command from God. However, others argued that the fact that a relatively long period elapses between ḥajj seasons, makes the obligation distinctly different from prayer.[23] The fact that each passing year increases the possibility of an individual's death is a further complicating consideration.[24]

The nature and conditions of obligations associated with jihād are both simpler and less defined. Jihād is understood to be a communal and not an individual or universal obligation. This means that so long as a sufficient number of people in the community fulfill the obligation, others may abstain. This concept is based, again, on the example of the Prophet, who was said to never go out to battle without leaving some people behind.[25] Likewise Qur'ān 9: 122 reads, "And the believers should not all go out to fight. Of every troop of them, a party only should go forth, that they (who are left behind) may gain sound knowledge in religion, and that they may warn their folk when they return, so that they may beware." The experience of the early Islamic community was

21 Ibn Rushd al-Ḥafid, *Bidāyat al-Mujtahid*, I: 376.

22 Ibn Rushd al-Ḥafid, *Bidāyat al-Mujtahid*, I: 377.

23 Ibn Rushd al-Ḥafid, *Bidāyat al-Mujtahid*, I: 378.

24 Another point of debate was under what conditions women could perform the ḥajj. Mālik allowed for a woman to travel with her husband, a *dhū maḥram*, or a trustworthy female companion, Ibn Rushd al-Ḥafid, *Bidāyat al-Mujtahid*, 1: 378.

25 Ibn Rushd al-Ḥafid, *Bidāyat al-Mujtahid*, I: 455.

filled with examples of jihād and how and why it should be waged. A comprehensive theory was developed. Generally, it is understood to be incumbent on free men, who are of age (*bāligh*), have the means, and are of sound health.[26] Permission from parents is deemed appropriate, except when circumstances make the need or obligation universal, and except when the parents themselves are unbelievers. The majority of jurists also allow for a man in debt to go to war by leaving something behind as a security "for the satisfaction of his debts."

While Ibn Rushd's answer to ʿAlī b. Yūsuf's question was not original, it set an important precedent in the legal tradition of the Maghrib. "The obligation (*farḍ*) of the ḥajj," he wrote in opening his opinion, "has fallen from the people of al-Andalus in this, our time."[27] This was because, he argued, "ability" is one of the preconditions that God set for the obligation to be effective upon an individual. Ibn Rushd thought this "ability," which he defined as the capacity to arrive safe of body and possessions, was "non-existent today." The inability to fulfill this condition (which he characterized as an *ʿilla*) renders the performance of the ḥajj not only supererogatory, but reprehensible, in view of the accumulation of danger and risk involved (*li-taqaḥḥum al-gharar fīhi*). Under these circumstances, and given that the performance of jihād enjoys "countless merits according to the Qurʾān, *mutawātir* Sunna, the traditions (*āthār*)" – that is, with the backing of the most authoritative sources – waging jihād is more virtuous than performing the ḥajj. "This," Ibn Rushd wrote, "is clear beyond any need for clarification."[28]

However, the crux of the *istiftāʾ* according to Ibn Rushd, is the question of the individual who has already performed the pilgrimage safely. Is pilgrimage for this person more virtuous than waging jihād? He rephrased and amplified the scope of the question. Should a person who has already performed the ḥajj feel compelled to wage jihād, if only to secure more favor with God and not just out of obligation? Ibn Rushd wrote that, in his opinion, jihād is more virtuous for this person "because of the great merit mentioned in its regard."[29] Someone who has performed the ḥajj should, therefore, feel strongly encouraged to wage jihād. Ibn Rushd concluded this first opinion by taking up the problem of time and the performance of the ḥajj. When the individual has not performed the ḥajj, current circumstances precludes (*yatakharraj dhālika ʿalā*)

26 Based on Qurʾān 48:17: "There is no blame for the blind, nor is there blame for the lame, nor is there blame for the sick."

27 Ibn Rushd, *Fatāwā Ibn Rushd*, 1022.

28 Ibn Rushd, *Fatāwā Ibn Rushd*, 1023.

29 Ibn Rushd, *Fatāwā Ibn Rushd*, 1023.

disagreement over the issue of immediate performance or postponement, making it besides the point. This is the case, he said, in communities where it is felt that the obligation of jihād is being fulfilled by a sufficient number of individuals. In cases in which the obligation of jihād is deemed to fall on everyone in the community, he added, waging jihād is more virtuous than fulfilling the duty of pilgrimage. Ibn Rushd's opinion thus construes jihād as a central and foremost obligation to God, for which he felt the need to adduce little textual support.[30] This is the end of the first opinion.

The compiler now informs us that the opinion was further refined and developed in a second query from ʿAlī b.Yūsuf to Ibn Rushd. He tells us the time and place during which this exchange supposedly took place: the beginning of the year 515/1121 in Ceuta. This second *istiftāʾ* asks how the question of jihād versus ḥajj affects the people of al-ʿIdwa, i.e., whether they enjoy the same status in this regard as the people of al-Andalus. Ibn Rushd responded:

> Indeed, aside from the people of al-Andalus, there are the people of al-ʿIdwa [the Far Maghrib], whose route is the same as that of the people of al-Andalus, and they can only travel to (*lā yaṣilūn illā*) Mecca fearing for themselves and their possessions. [Even] when they don't fear for themselves and their possessions in traveling to Mecca, jihād remains for them [an obligation] more virtuous [to fulfill] than hastening the pilgrimage, since it has been said that it may be deferred (*innahu ʿalā al-tarākhī*). This is correct according to the school of Mālik – may God have mercy on him – and to which his *masāʾil* [opinions to questions of Islamic law] point. This concerns one who has been excepted (*ʿadā min*) from performing the duty of jihād. As for one who performs the duty of jihād for the protection (*min ḥimāt*) of the Muslims and their soldiers, jihād is incumbent upon him. Hastening of the pilgrimage is not specified (*lā yataʿayyanu*) as obligatory from [such a person], except for he who has already engaged in battle. This is because the obligation to defer [applies to] a specific situation, when it appears preponderantly likely to the *mukallaf* (one legally capable) that [the opportunity] will slip away by its postponement. The *ḥadd* punishment for this [according] to the words of the Messenger of God – peace and blessings upon him "For the one fighting my Umma between sixty and seventy."[31]

30 A point both conforming with his style and with the regional prominence of jihād in this period.

31 Ibn Rushd, *Fatāwā Ibn Rushd*, 1025–26.

Ibn Rushd concedes that *after* waging jihād an individual may be obliged to hasten the pilgrimage, that is, to perform it the first time he gets a chance, because of diminishing time and opportunity. The thrust of his opinion, however, as can be easily appreciated, is that, for Maghribīs, jihād is a religious duty of the highest virtue, the performance of which is to be prioritized. This is the case even for individuals who are technically "exempted" by the fact that others have met the minimum deemed necessary for the communal obligation to be met. For those deemed obligated to wage jihād to defend the community, Ibn Rushd re-emphasizes the opinion that this obligation trumps the obligation of performing the ḥajj. Jihād being an obligation to God, non-fulfillment involves punishment, the nature of which Ibn Rushd spelled out.[32]

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The Maghrib and al-Andalus were increasingly unified, not only by Almoravid policy, but also by developments in the peninsula. The centrality of jihād to the Almoravid movement and Ibn Rushd's specification of its virtue and obligation for *both* Andalusīs and Maghribīs mirrored these developments marked by the intensification of religiously defined conflict and the southward movement of the Christian-Muslim frontier.[33] The experience of the frontier profoundly affected the religio-political identity of Iberians and Maghribīs. One of the ways in which it did so was by channelling religio-political energy and symbolism in its direction, by religio-political authorities and cultural production with indelible effects for the Muslim community on both sides of the strait.[34] The Almoravids did not bring jihād to al-Andalus, as is often suggested. Rather, the economic and demographic development on both sides of the frontier, in Iberia and in the Maghrib, led to, among other things, the militarization, transformation, and movement of the frontier, which in turn galvanized religio-political identities – a process that would last into the nineteenth century and

32 This would appear to be a rather lax law of defection.

33 This movement, it must be noted, did not stop at the strait (just as al-Andalus and the Maghrib were not categorically divided by this stretch of water, arguably much easier to cross than the High Atlas mountains); it crossed and continued southward, across Ceuta, Malīla, Mogador, and Mazagan, to name but a few of what became the Luso-Hispanic strong-holds and presidios in the Far and Central Maghrib in the early modern period.

34 Likewise and in a remarkably similar fashion, as A. Bennison has persuasively argued, for the Christian community north of the frontier, Amira K. Bennison, "Liminal States: Morocco and the Iberian Frontier between the Twelfth and Nineteenth Centuries." On the development of the concept of jihād into the modern period, see Amira K Bennison, *Jihad and its Interpretations in Pre-Colonial Morocco: State-Society Relations during the French Conquest of Algeria* (London: Routledge Curzon, 2002).

persists in popular culture. The Almoravid movement, the relationship between the Andalusī religio-legal establishment and the Almoravid leadership, and the formulation and justification for a central place for jihād in the movement's identity was an important chapter and example of this regional process as it impacted the Far Maghrib.

3 Two Technical Questions from al-ʿIdwa: Ritual and Murder

The next two fatwās reinforce the notion, introduced in Chapter One, that Ibn Rushd performed the role of expert elucidator of intricate questions of law for Far Maghribī jurists. The first question deals with a symbolically significant detail in ritual law. The second concerns a case of double murder.[35]

The Man who Forgot to Wipe his Head[36]

This question – described by the compiler as coming from al-ʿIdwa – concerns the omission of an action from the sequence of ablutions for prayer and its rectification. The *mustaftī* wrote that a man reportedly performed all five prayers of the day, but that, while performing his dusk prayers, he remembered that he had forgotten to wipe his head when washing to remove an impurity incurred between the morning and noon prayers. While the omission most likely took place during the ablutions for the noon prayer, the man said he was unsure for what specific set of prayer ablutions (noon, afternoon, sunset, or dusk) he forgot to wipe his head. The man was instructed (presumably by a local imām) to wipe his head and repeat all of the prayers. This he did. However (and almost comically), he appears to have repeated his mistake, not wiping his head during ablutions. The *mustaftī*, making no explicit query, wanted to know what course of action should be followed.

Wiping the head is an integral part of the performance of ablutions. There is some disagreement within the Sunnī schools of law over how much of the head must be wiped. Mālik said it was obligatory to wipe the entire head,[37] while other Mālikī jurists said the minimum surface to be wiped is one-third of the head.[38] Historically, Muslim jurists agreed that praying without being in a state of ritual purity – whether intentionally or out of forgetfulness – invalidates a prayer and necessitates its repetition. Naturally, the repeated prayer

35 Unfortunately, generic in presentation of detail, but intriguing nevertheless.

36 Ibn Rushd, *Fatāwā Ibn Rushd*, 175–76.

37 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, 1: 7–10.

38 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, 1: 7–10.

should be performed correctly.[39] In the present case, the key issue was when in the day he had forgotten to wipe his head and, therefore, how many prayers were to be repeated.

Ibn Rushd addressed the question succinctly. He answered that if this man has performed his last prayers of the night, as he was instructed to locally (*qabla ʿan yafʿala mā uftiyā bihi*), but before wiping his head – having forgotten –, then he must repeat the ablutions correctly as well as the last set of prayers. "Prayer is only correct [when performed] in a state of purity," he wrote.[40] The man need only perform the last prayers, however, because when he performs this last set correctly, in a state of ritual purity, "all [preceding prayers] are obtained with complete purity." Ibn Rushd closes by citing precedent from the Mālikī tradition, which underscores what he considered the most relevant point of the question. This is highlighted in the case of a person who prays several sets of prayers, but then realizes that some action was performed incorrectly for one set (as in our case, unspecified because of forgetfulness). Ibn Rushd wrote,

> This is like the case of a man who performs ablutions for one of the day's prayers and prays, and then incurs an impurity and performs ablutions but forgets that he has already prayed and so he prays a second time. When he completes his prayers, however, he remembers that he had already prayed. But then he remembers that he forgot to wipe his head, for one of the two performed ablutions (which one he isn't certain). [In this case] there is no [need for] repeating the [prayer or ablutions, as has been established] by consensus, since one of the two prayers has been correct. And in God is success.[41]

The fact that the example cited by Ibn Rushd from the legal tradition is so similar to the question coming from al-ʿIdwa invites speculation into whether the *istiftā'* was hypothetical, in which case the exchange between the Maghribī jurist and Ibn Rushd would have been more pedagogical than practical in nature.[42] We have no direct indication here that the question was purely hypo-

39 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, vol. 1, 201.

40 Ibn Rushd, *Fatāwā Ibn Rushd*, 176.

41 Ibn Rushd, *Fatāwā Ibn Rushd*, 176.

42 Such general questions from students of jurisprudence are attested. An example of a purely theoretical question from a group of students is Ibn Rushd, *Fatāwā Ibn Rushd*, 1494–507. This is explicitly stated, however, and the construction of the question is, unlike all of the fatwās analyzed here, not problem-based or framed as a situation eliciting a question but outright asks what, in the opinion of Ibn Rushd, are the qualities an

thetical, and thus it remains open to question. While many fatwās are clearly rooted in practical reality, appearing almost inconceivable as hypotheses, the possibility that fatwās also served pedagogical or scholastic purposes should not be discounted. The present question, along with that of the conflicting testimonies over the number of repudiations a couple has accumulated, in Chapter One, are of a scholastic nature. This character, however, does not invalidate the point made here that one of the key functions of the fatwā, and of the correspondence between jurists, was the development of Mālikism through a learning network.

A Question Concerning the Shedding of Blood in a Double Murder[43]

Another question reached Ibn Rushd – also coming from al-ʿIdwa – concerning a double murder and its aftermath. The *mustaftī* reported that a man, somewhere in the Far Maghrib, had been murdered by a group of four men (*bayn arbaʿati nafar*^{in}). There was a single eye-witness – a woman – who could not identify which of the four had perpetrated the crime. Two of the four men exculpated each other and were released. The remaining two then attempted to lay the blame for the crime on each other, offering conflicting versions. The relevant local authority (*al-wālī*) detained both of them under his supervision (*bi-naẓarihi*). Meanwhile, the brother of the victim (*al-maqtūl*) came across one of the men who had been set free (after exculpating each other) and killed him in revenge. Perpetration of this last act – described literally as bloodletting or shedding (*dammā ʿalayhi*) – was confirmed by trustworthy witnesses before the judge; the father of this second murder victim then demanded "the perpetrator's blood," in retaliation. The father of the first victim, however, appealed (*qāma*) to the judge, arguing that his son's blood "was on" the second victim (i.e., had been requited by the death of the second victim). In support of his argument, the father of the first victim brought forth the woman, who was the single witness of the first murder, and swore fifty times, "as is required," in support of his claim. The *mustaftī* wrapped up his *istiftāʾ* with the

individual who acts as muftī should possess. The fatwā's distinctly belletristic style further distinguishes it as an exercise more scholastic than the fatwās treated here. It is however an important text on an important question. Coming from Tangier, it almost falls within the scope of this book. I have chosen to omit it, however, because Tangier, as discussed in the historical background presented in Chapter Three, had close ties to Ceuta and had cultural and institutional ties to al-Andalus pre-dating our period, very much like Ceuta. For a discussion on *futyā* and the qualities and qualifications of muftīs, see N. Calder, "Al-Nawawī's Typology of Muftīs and Its Significance for a General Theory of Islamic Law," *Islamic Law and Society* 3, no. 2 (1996): 137–64.

43 Ibn Rushd, *Fatāwā Ibn Rushd*, 577–78.

basic question: "Do you consider this permissible?"[44] Foremost in his mind, it appears, was the issue of the permissibility and validity of the argument that the father of the first victim put forth and the procedure by which he established his claim.

The law of retaliation or *qiṣāṣ* grants a specific network of relatives of a victim, known as *awliyā' al-dam*, the right to *qiṣāṣ*, that is, the right to extract from their counterparts among the relatives of the perpetrator, a punishment equivalent to what they have suffered. The right of *qiṣāṣ* is limited to death and dismemberment. The issues concerning the application of the laws of *qiṣāṣ*, on which Muslim jurists focused, have included intentionality, the status of the victim in relation to that of the perpetrator, and the nature of rights and obligations once the right of *qiṣāṣ* has been established or granted. The perpetrator and victim must meet certain criteria in order for *qiṣāṣ* to be invoked or granted; there is general agreement among Muslim jurists that the right of *qiṣāṣ* is granted when someone has been murdered intentionally by another person of equal or lesser status. Individuals to whom the right is granted – the *awliyā' al-dam* – then have the option to exact punishment or pardon with compensation – blood money or *diya* – or even without compensation if so desired.[45]

As a rule, establishing with certainty that a crime was committed is paramount for the full punishment to be exacted. On this point the prophetic tradition, "Avert the *ḥudūd* in cases of doubt," was often invoked.[46] Several factors, when present, are deemed to obligate *diya* (monetary compensation) instead of *qiṣāṣ*. Issues concerning intentionality (e.g. who is liable in cases in which the perpetrator has been coerced or under orders) and status (e.g. when a Muslim kills or maims a slave, an unbeliever, or a *dhimmī*) were among the most contentious for Muslim jurists; but they played no role in the present case. It was, rather, a set of two related issues that gave the judge pause: These arise in cases in which an individual responsible for an act liable to *qiṣāṣ* commits the act in association with someone else, and cases in which a group acts against a single individual.

Several jurists, including Abū Ḥanīfa, argued that in the first scenario, both individuals must pay the *diya* but they are not liable to *qiṣāṣ* because of the doubt resulting from their co-participation (i.e., the second individual may have been the perpetrator). Others argued, in the interest of deterrence, that both are liable.[47] The second scenario caused similar disagreement, with a

44 Ibn Rushd, *Fatāwā Ibn Rushd*, 578.

45 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 479–490.

46 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 480.

47 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 480–481.

majority of jurists, including Mālik, maintaining that every member of the group should be liable, again in the public interest (*maṣlaḥa*) of deterring conspiracy and collusion. The argument against this position was based on the perceived imbalance between the crime and the retaliation (i.e., the death of several individuals for one victim), which violates the principle of retaliation, strictly defined.[48] The *mustaftī* in our case, most likely wondered whether the presence of multiple individuals at the scene of the first crime deserved consideration – and was greatly complicated by the retaliation exacted by one of the victim's *awliyā'* (his brother), before guilt had been clearly established, and the ensuing claim that the retaliation had been just.

Ibn Rushd, however, deemed the relevant factors in the case to be altogether different. In his view, the issue of multiple perpetrators and a single victim was moot as long as the testimony to the first homicide remained weak or unsubstantial. That the judge allowed the father of the first victim to swear fifty times as means to move the case forward, Ibn Rushd considered a procedural mistake (*khaṭa' min al-ḥukm*). This was on account of the doubt or uncertainty (*lawth*) introduced by the weak testimony, being based on the word of a single woman who did not identify the individual responsible for the murder.[49] Not being based on the "testimony of a trustworthy witness," therefore, the only way for the procedure to become valid, Ibn Rushd wrote, was by oath-taking of the legal guardians/relatives (*awliyā'*) of the second victim to the effect that the second victim's blood "was on" the brother, who they could then demand executed in retaliation.[50]

The correct course to follow according to the tradition of Ibn al-Qāsim, which considered the testimony of a single woman to be weak (introducing uncertainty, *lawth*), would have been for the father of the first victim to swear fifty times to the relatives of the second victim that he was responsible for the death of their relative (*walī himā*). This would entitle the relatives of the second victim to the blood of the father of the first victim, which would in turn render null the claim of his own relatives for blood or retaliation. Ibn Rushd's point being simply that the father of the first victim did not have grounds to claim the second murder as proper retaliation. What he could do was assume responsibility, but incur liability for *qiṣāṣ* himself.

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48 Ibn Rushd al-Ḥafid, *Bidāyat al-Mujtahid*, II: 484.

49 Along with the fact that the four individuals either exculpated or contradicted each other.

50 Ibn Rushd, *Fatāwā Ibn Rushd*, 578.

Intriguing on a formal level, if both questions are assumed to refer to cases that took place in the southern Far Maghrib, we may speculate that they represent transformations in customary practice, as Mālikism and its ritual practice and criminal law were being adopted; a comparison of the law of retaliation in Mālikism and Berber practice would be in order. But the generic description of the location of the cases, as simply al-ʿIdwā, precludes such speculation. These two fatwās – compounded by the possibility of the first fatwā's academic or non-practical origin – stand, chiefly, as evidence of a correspondence between al-Andalus and the Almoravid Far Maghrib, cultivating the development of Mālikī learning in the latter. This should not lead one to believe that all such correspondence was academic and hypothetical or that it bore little local relevance, as the cases in the following section attest. While also lacking geographic specificity, the detail and character convey a powerful sense of the unique nature of the Far Maghribī context and of its impact and engagement with the process of Mālikī institutional development.

4 The Islamicization of Property: Partitioning and Gifts from Plunder

The following questions arose from a concern over the status, according to the Sharīʿa, of property that has passed hands, whether through inheritance, the expansion of settlements, or usurpation. In both cases below, the moment and precise nature of the transformation of property from one status to another was of chief concern to the *mustaftī*. While the details of the cases are scant, their implications may have been far ranging, as they seem to capture social changes occurring on a broad level: These include the redistribution of land said to have characterized the Almoravid period, the increase in private landholdings and in the buying and selling of land, and the mutual transformation of two different social orders through encounter, represented here by a group of Ṣanhāja tribes (who customarily plundered or usurped cattle from each other) with the local Muslim authority, whose practice included receiving gifts.

On the Privatization of Communal Property[51]

This question – also described as having reached Ibn Rushd from al-ʿIdwa – revolves around the permissibility of partitioning communal property. The *mustaftī* wrote of a group of villages (*qurā*) that had been, over the years, "alternately, abandoned and seized [and passed on in ownership] as inheritance" by their inhabitants, from original owners to their sons "and to the sons of their

51 Ibn Rushd, *Fatāwā Ibn Rushd*, 1155–56.

sons after them."[52] The "villages" are described as having changed hands between different groups – presumably clans or tribes. In these villages there was no custom of giving precedence to certain individuals or clans (even of property owners, *arbāb*) over others in matters of grazing rights over pasture lands (*masāriḥ*) traditionally owned or associated with the villages. The question was triggered when several "property owners" in the villages agreed to partition the lands amongst themselves, decommunalizing them, as it were, on the basis of the idea that since they had inherited the use of the land collectively they likewise could dispose of it collectively. They thus partitioned the lands with the approval of all involved and "according to the calculation of their shares" (*ʿalā ḥisāb ḥiṣaṣihim*). The judge of the region (*balad*), who was present at the partitioning, made it effective, certifying this process, in which the share (*ḥaẓẓ*) of each owner became specified and public. The *mustaftī* wanted to know whether the procedure and action of partitioning was lawful,[53] and whether it was "permissible and legally effective" (*nāfidha*). Whether the action was contested, so prompting the question from the *mustaftī*, is uncertain. It appears most likely that it was the arrangement itself that elicited the question in the mind of the *mustaftī*, who may have been the judge or whomever he consulted.

The legality of the partitioning (*qisma*) of property is accepted and common practice in the Sunnī legal schools. The Qurʾānic sources typically cited in justification of this practice are: "And when kinsfolk and orphans and the needy are present at the division (of the heritage) bestow on them therefrom and speak kindly unto them," and "Whether it be little or much–a legal share."[54] It was generally considered lawful practice to partition inheritable property. The act of partitioning was treated as a sales transaction, yielding similar consequences to a sales contract.[55] While the partitioning of movable objects and benefits presents several complications – over which jurists disagreed – land is, on the whole, deemed partitionable; and most of the conditions and limitations involved were aimed at ensuring equitable results.[56]

Land may be partitioned between a group of people by drawing lots or by consent, after "valuation and equalization (of shares)." The drawing of lots was

52 Ibn Rushd, *Fatāwā Ibn Rushd*, 1155.

53 Engaged in by the inhabitants of the villages, transforming the status of communal grazing land into delimited properties owned by (presumably) specific *arbāb* of the villages – likely the clan leaders.

54 Qurʾān 4: 8 and 4: 7.

55 Not revokable, other than when cheating has occurred, a defect found, or the rights of a third party have been violated. Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 323–324.

56 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, vol. II, 323–324.

considered to aid in producing an equitable outcome. As suggested by the Qur'anic phrases, "And then [he] drew lots and was of those rejected," and, "Thou wast not present with them when they threw their pens (to know) which of them should be the guardian of Mary," cited as support.[57] A finer point of disagreement within the Mālikī school over the drawing of lots revolved around concerns about equity and avoiding public harm, e.g. how to determine equal attributes, value, and utility of the sections resulting from the partition, as well as with the sections having at least a minimum level of utility or value. The relative equality of the sections and the value derived from their use was, therefore, a key point of debate, especially when difficult to establish, as, for example, when the lands (or other immovable property such as buildings) were of different qualities (e.g., orchards, baths, fields). If the drawing of lots resulted in a partitioning that was deemed unfair by the beneficiaries, it could be repeated or adjusted.

The partitioning of land through mutual consent, on the other hand, presents far fewer problems. "Division through agreement, irrespective of whether it is after valuation and adjustment or without it, is permitted in similar and differing properties as it is a kind of sale, but whatever is prohibited in sale is prohibited here."[58] The fact that the lands in the present case were of relatively homogeneous value and utility as grazing lands, meant that the partitioning process was simple. This was how Ibn Rushd understood it to be:

> If it is the case that those pastures, which they partitioned are within their villages, and not outside of them, that they alone graze in them (*yanfaridūn bi-l-sarḥ fīhā*), and that no one but them can graze there other than by entering through their villages, then the partitioning [of these pastures] is permissible and effective, according to what they agreed upon. [This is] because [the pastures] are [the villagers'] property [and] no one of them has cause (*ḥujja*) for criticizing [the partition] since they [have all] approved of it.[59]

In Ibn Rushd's opinion the partitioning of the grazing lands was lawful. In his brief response, he shows little concern for the manner in which the property became inheritable.[60] As always, he leaves room for interpretation; implicit in the opinion is something we detect the *mustaftī* to have been concerned about:

57 Qur'ān 37:141 and 3:44.

58 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 320.

59 Ibn Rushd, *Fatāwā Ibn Rushd*, 1156.

60 That is, how these villages came to own the property.

the existence of a third party with a claim to the property – it not being fully known to the *mustaftī* how grazing rights over these lands came into the possession of the villagers in question. Nevertheless, Ibn Rushd's one criterion is simply that no one else has a claim.

On Purchasing, Giving, and Receiving Gifts Acquired through Plunder or Usurpation[61]

This question investigates the legal status of movable property originally acquired through usurpation (*ghaṣb*) and the consequences of various transactions in which it may be involved. For all practical purposes, the property in question was stolen. However, the *mustaftī* selected a different term to designate its status and contextualize the question. The term *ghaṣb* is usually associated with land and certain types of benefits. The action by which the property in question was acquired was understood here to be distinct from theft (perhaps more akin to seizing booty). Significantly, the choice of term demonstrates a kind of cultural sensitivity capable of parsing what could otherwise be an irreconcilable difference in the encounter of the social practices between the Ṣanhāja and the discursive tradition of Mālikīsm. This is not to say that the *mustaftī* was foreign to this custom (he is identified as Ṣanḥāja), but rather that, whether Berber or Arab, strategies were available for reconciling different legal and ethical values. Such strategies would have borne special import for Almoravid leaders, for whom the conflicting practices or traditions intersected in a visible or public manner.

A man identified by the compiler[62] as one of the "desert *Mulaththamūn*" (veiled or muffled ones) wrote to Ibn Rushd with this question concerning "the usurpation taking place among them" (i.e. the *Mulaththamūn*).[63] He wanted to know what should be done concerning a group of tribes who wintered in the desert and whose custom was to raid each other's cattle, a long-standing custom in the community – practiced by "fathers and grandfathers." This property "usurped from each other" had been inherited and passed on from generation to generation. The Ṣanhāja *mustaftī* posed a series of questions related to the general problem of the Muslim who trades in property the procurement or origin of which is unlawful according to the Sharīʿa. He asked whether a person who "strove for piety" and avoided "compromising" situations could purchase cattle from these tribes. He asked whether the tribes could offer their cattle to the "Amīr al-Muslimīn wa-Nāṣir al-Dīn," and whether a "pious" person, in turn,

61 Ibn Rushd, *Fatāwā Ibn Rushd*, 1017–20.

62 Ibn al-Wazzān (d. 543/1148).

63 Ibn Rushd, *Fatāwā Ibn Rushd*, 1017.

might receive the gift of this cattle from the Amīr al-Muslimīn. May the amīr of the Almoravids reward (*yuthību*) members of these tribes in reciprocation for a gift he has received from them consisting of this cattle? And may he use public money from the "treasury of the Muslims" (*bayt al-māl al-muslimīn*)? He also asked whether it is permissible for a man belonging to one of those tribes who is appointed commander (*amīr*) by the amīr of the Almoravids (and who also has participated in these raids) to receive such gifts of cattle and make or receive them from the Almoravid amīr. The unnamed *Mulaththam mustaftī* ended his *istiftā* with the question of whether the fact that the raiding activity was limited to this community of tribes had any bearing on the ruling (*ḥukm*).[64]

This case was discussed under the rubric of usurpation (*ghaṣb*) rather than theft (*sariqa*) because of the different liability attached to each offense, even when the effect of actions is identical. The terms are thus understood to refer to the liability rather than the offense. As is well known, *sariqa* is subject to the *ḥadd* liability of amputation. "Substantial doubt with respect to ownership," however, "has the effect of waiving this *ḥadd.*"[65] Certain conditions must be met for something to be termed theft, among them: the testimony of two trustworthy (*ʿadl*) witnesses, a confession, and the clear identification of what was stolen and from whom. All of these are absent from the case in question.

Usurpation, defined as the act of acquiring or causing the destruction or loss of property belonging lawfully to someone else, is chiefly subject to the liability of restitution of the usurped property.[66] Generally speaking, when someone is proven to have unlawfully taken possession or caused the destruction of someone else's property, whether intentionally or by mistake, the person is liable for replacing or compensating the owner for the property. Camels and other livestock were considered, across the schools, to be usurpable, i.e., liable for restitution by the usurper. According to Mālik, this restitution should amount to the value of the animals (and nothing beyond this value) on the day of the usurpation. Mālik's source for this opinion was a tradition transmitted on the authority of Abū Hurayra, which reads: "If one sets free a slave in whom he has a share, he is obliged to pay the value of the remainder through fair

64 Ibn Rushd, *Fatāwā Ibn Rushd*, 1018. In other words, can goods which have been procured through un-Islamic practice, even through unlawful means, be "laundered" into lawful property? And can this be done repeatedly and systematically? This is an important, and presumably not unique problem, since so much property lawfully owned inside Dār al-Islam had once resided outside and had at some point been acquired in a way that did not necessarily conform to Islamic practice. It should come as no surprise that a model or concept to legalize such property existed within the Islamic legal tradition.

65 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 543.

66 Usurpation is considered a tort.

valuation." Usurpation of movable goods, such as livestock, was thus understood to necessitate the restitution of value and not necessarily of the property or its identical counterpart.[67] According to an alternate opinion, however, the restitution of the property should be made in identical kind, based on the Qur'ānic verse: "Whoso of you killeth out of set purpose he shall pay its forfeit in the equivalent (*mithl*) of that which he hath killed, of domestic animals."[68] Thus once usurpation was determined to have occurred, there was a great deal of disagreement among jurists – within Mālikism and among the other schools – over the exact nature of the liability, i.e. what was to be restituted. The principle variables around which the debates revolved included the determination of intentionality or accidentality – whether caused by man or God – the nature of the property, and its valuation, including whatever benefits the usurper may have drawn from the property since usurpation. A variety of further possible contingencies were considered and discussed in the legal literature – including what the usurper was liable for when he/she has added value or labor to the usurped property.[69]

In the present case, however, all these considerations turn out to be irrelevant, since no specific party claimed to have lost the property (the stolen camels). What concerned the *mustaftī* was not whether or how to effect restitution, but how property deemed to have been usurped could be lawfully traded or gifted. This concern is addressed in legal manuals under the topic of *hibāt* or gifts. And while the legal dimension of gift-giving revolved mostly around issues of inheritance (such as under what circumstances and with what limitations appertaining to the relevant portion of an individual's wealth could this be given away as gifts) and *ribā* restrictions,[70] proven and lawful ownership was certainly deemed an essential condition for the act to be lawful. Thus, for a gift transaction to occur, the property in question must be rightfully owned by the gift giver, a concern which Ibn Rushd addressed in his opinion.

Ibn Rushd answered this question in a fair amount of detail, acknowledging the significance of the issue and its bearing on the power and behavior of military-political leaders. The gist of his opinion was that the property need not be considered usurped, but rather "found" (*luqṭa*), meaning that the status of the property should be conceived in a wholly different manner from that posited

67 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 384.

68 Qur'ān 5: 95.

69 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 386.

70 Having the effect of a sale, certain *ribā* restrictions apply. Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 401.

by the *mustaftī* in his question.[71] The camels in the possession of this group of tribes, Ibn Rushd wrote, should be considered found instead of usurped, because they were inherited ("from fathers and grandfathers") and because of the great length of time elapsed (*li-qidam al-ʿahd*) since they came into their possession. The original owners of the camels are thus not identifiable. Restitution of the property, "or of any portion of it," to a rightful owner is therefore impossible. If such is the case, Ibn Rushd continued, "let it be judged to be in the [rightful] possession of those who possess it … by inheritance from their fathers and grandfathers" and let the property be deemed, therefore, to have been "found." In support of this opinion Ibn Rushd adduced the tradition in which the Prophet reportedly said to someone who had found something: "Do as you like with it."[72]

It is commendable, Ibn Rushd added, for a person who finds such property to donate it to charity. But this is not obligatory, especially in a case such as this, in which the current animals are the offspring of those that were usurped. He said it is permissible for anyone to purchase such livestock from the present owners and likewise permissible for the Amīr al-Muslimīn to receive and bestow such property as a gift and for the recipient to receive and own it. "He incurs no crime (*ithm*) or sin (*ḥaraj*) through this." It is also lawful for the amīr of the Almoravids to reward the person or tribe who gave him this gift from "the treasury of the Muslims," the *bayt al-māl*.

What is a more sensitive issue, however, is for the holder of an office (*wālī*) who has been appointed by the Amīr al-Muslimīn to receive such a gift.

> For him it is not permissible to accept it from them, due to what has been said [in the Prophetic ḥadīth, which is] that "the gifts of commanders are malicious (*ghalūl*)," unless he reimburses it (*yukāfiʾu ʿalayhā*). If he reimburses with a value equal to it, [by means of] a reward, and he gives some of it [as a gift] to the Amīr al-Muslimīn – may God perpetuate his success and sanction – and [the amīr in turn] gives this to someone, this giving is sound and permissible for him. [This remains so] whether the usurpers of this cattle usurped it from someone who has not usurped from them or from one who has from their fathers before them. Since the tribe has plundered the tribe, each individual does not know that he took specific property [or] to whom particular property has gone.[73]

71 Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid*, II: 369.

72 Ibn Rushd, *Fatāwā Ibn Rushd*, 1018–19.

73 Ibn Rushd, *Fatāwā Ibn Rushd*, 296.

Receipt by the *wālī* of such property without redistribution is thus deemed corrupting. The original source of the property – once the property itself is declared "found" with certainty (meeting certain conditions) – is not relevant. Overall, Ibn Rushd placed great emphasis on the redistributive role and protocol of political authorities with regard to receiving gifts.[74] Naturally, if the conditions above are not met, and the current owners in fact usurped the camels, or they know the owner and can return the property to a specific person or to his/her heirs, they are obliged to return the property. All other transactions excluding this – giving them as gifts, purchasing, or receiving – would be unlawful. Any person receiving usurped property knowingly will be liable for that usurpation.

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In the two cases above, both *mustaftī* and muftī leave many questions unanswered. We do not know how the possession of communal lands by certain villages came to be recognized or even what the result of the partitioning process was – whether they resulted in individual ownership or, more likely, family or clan ownership. Likewise, in the second fatwā, the opinion, while detailed, appears disarmingly simple (they just "found" the camels). We are left wondering how the value of the property was estimated, and more importantly, how its equivalence was estimated for the gift giving process and what role such exchange played in the fiscal economy and in local political relationships.

These texts are but windows onto a greater landscape. They intimate a set of processes of widespread significance for the period: the expansion of land settlement, use, and re-distribution attendant to Almoravid unification; the gradual entry of property into fiscal and commercial systems regulated (if only loosely) by Mālikī practices; and the gradual and adaptive encounter of Mālikī

74 The issue of usurpation and sale of usurped property was not limited to the hinterland of the Far Maghrib but was also contentious in al-Andalus where political instability and change over a century saw a great deal of property changing hands. When the issue of the legality of the sale of such property (which had been usurped or acquired and then sold by *taifa* ruling families or by Almoravid governors themselves acting on behalf of the public treasury) was brought up in Cordoba toward the end or soon after Ibn Rushd's tenure as chief judge there, he appears to have taken the very unpopular position that the legality of such properties and purchases could be questioned – an opinion his opponents believed would lead to chaos. Ibn Rushd and those who supported his opinion were forced to make a public apology. Delfina Serrano, "Ibn Rušd al-Ŷadd," 619. Aḥmad al-Wansharīsī, *al-Miʿyār al-muʿrib wa-l-jāmiʿ al-mughrib ʿan fatāwā ʿulamāʾ Ifrīqiyā wa-l-Andalus wa-l-Maghrib*, 13 vols. (Rabat: Ministry of Culture and Religious Affairs, 1981), 97–102.

discursive traditions with Ṣanḥāja and other Berber and Far Maghribī custom. The existence of extra-Mālikī custom is openly acknowledged and, in a very real way, sanctioned in both of these texts. This process of sanction and synthesis characterized in significant ways the development of social practice during the Almoravid period and ensuing Berber Islamic states. The legacy of this process is visible today across the Far Maghrib, from High Atlas irrigation to dowry practices. It is this process of synthesis on the popular level of daily transaction and conflict resolution that was most influential in the development of Islamic institutions in the Maghrib – more significant than the elite political history or even intellectual history of the 'ulamā' and their legalistic debates, upon which so much of the historiography of the last century has focused. Unfortunately it is one of the most difficult aspects to glean from the textual sources. The text analyzed in the following chapter, affords a rare glimpse into the details of a long case, giving us a bit room to imagine what such processes in daily life may have looked like.