Courts

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COURTS

In Medina, the Prophet Muḥammad acted as an arbiter within the early community (*ummah*). His role was sanctioned by the Qurʾān, which prescribed that he judge according to the divine revelation (5:48–49). After his death in 632, the first caliphs took over his role and dispensed justice in Medina. The date when the first judge (*qāḍī*) was delegated is still the subject of controversy. Reports that the Prophet himself sent judges to Yemen are rejected by modern scholarship. According to Islamic sources, the second caliph, ʿUmar (r. 634–644), appointed *qāḍī*s in conquered territories soon after the beginning of the conquest. Although the status of these first judges and of their legal rulings is unclear, the first Muslim armies certainly needed men appointed by an authority to arbitrate the inevitable conflicts among the soldiers. However, because of the contradictory sources, some scholars dismiss these reports and defer the appearance of the first judiciary system until the reign of Muʿāwiyah (r. 661–680).

The *Sharīʿah* Court

One judge alone dispensed justice in every large Muslim city, except in a capital such as Baghdad, which from the late eighth century was divided into three districts and from the eleventh century on into four districts. In the aftermath of the conquest, only cities with Friday mosques had a *qāḍī*. As an increasing number of conquered peoples converted to Islam, especially from the ninth century on, jurisdictions were created in secondary towns, where the judge was usually a deputy (*nāʾib*) of the *qāḍī* of a larger city. Judgeships were held exclusively by adult Muslim males of unsullied reputation.

The main task of the *qāḍī* was to dispense justice between litigants. During the classical period, he sat in a public place, usually the mosque (some *qāḍī*s preferred holding court in their home), where a plaintiff could come and lodge a complaint against an adversary. If the defendant refused to appear, the judge could summon him and even have him forcibly brought. If the defendant did not confess his guilt, the burden was on the plaintiff to prove his claim by providing at least two honorable witnesses (a process known as *bayyinah*, or testimonial proof). Alternatively, Medinan doctrine would accept one witness if the plaintiff took an oath. If there were no witnesses (or if the witnesses were not reliable), the judge would ask the defendant to swear that he was innocent. Ḥanafīs regarded the defendant's refusal to take an oath as a proof of his culpability. However, according to Mālikīs and Shāfiʿīs, the defendant's decline to swear was no proof and in this situation the judge had to refer the oath to the plaintiff. Some circumstantial evidence could also be taken into consideration in favor of the defendant, on the word of an expert (Johansen, 2002, "Signs as Evidence," p. 174). On the basis of this legal evidence, the judge then issued a written and binding decision, which could only be repealed if there were a serious breach of law. The judge was assisted in his task by one or more clerks and by a body of professional witnesses—these first appeared in Egypt at the turn of the ninth century, and thereafter this custom seems to have spread to other provinces. With the help of other assistants, the *qāḍī* also performed "administrative" tasks, such as the supervision of

endowed foundations (*waqf*s) and the control of the property of orphaned, disabled, or bankrupt people.

Relationships with the Rulers

From the very beginning of Islam, justice was the prerogative of the ruler. He delegated his judicial authority to *qāḍī*s, who were appointed for an indeterminate length of time. At any moment, the ruler could dismiss them and appoint other judges in their place. The *qāḍī* received a salary and was therefore considered a civil servant.

Under the Umayyads (661–750), who ruled from Syria, provincial governors were usually responsible for the appointment of their *qāḍī*s. Although some Umayyad caliphs, such as ʿUmar II (r. 717–720), Yazīd II (r. 720–724), and Hishām b. ʿAbd al-Malik (r. 724–743), attempted to overrule the authority of some governors by appointing provincial *qāḍī*s themselves, centralization of the judgeship under the authority of the caliph was only completed under the ʿAbbāsids. The second ʿAbbāsid caliph, al-Manṣūr (r. 754–775), began to appoint judges in the principal Iraqi cities, and later in the provinces. This reform was part of a larger political agenda that was meant to reinforce central power, the main symbolic expression of which was the foundation of the round city of Madīnat al-Salām (Baghdad) in 762. Provincial governors did not easily accept the undermining of their power, however, and attempts were made to regain control of the judiciary, especially when the central power was at its most vulnerable (as, e.g., during and after the civil war between the caliphs al-Amīn and his brother al-Maʾmūn, in 811–813). On the whole, ʿAbbāsid control of the *qāḍī*s became widely accepted except in territories where the caliph was not recognized, as in al-Andalus (Muslim Spain, where a dynasty of Umayyad governors came to power in 756). The clearest representation of the centralization of the judiciary was the creation of the office of chief judge (*qāḍī al-quḍāt*, literally, judge of judges) in Baghdad around 790, under the caliph Hārūn al-Rashīd (r. 786–809). Although the chief judge rarely appointed other *qāḍī*s himself, he was a close advisor of the caliph, and he had a decisive influence on the selection of judges. In al-Andalus, the judge of Córdoba, who had held the title of *qāḍī al-jamāʿah* (judge of the community) since the beginning of the Umayyad rule, tended to be regarded as the western counterpart of the *qāḍī al-quḍāt*.

From the late ninth century onward, when provinces began to claim political and financial autonomy from the ʿAbbāsid caliphate, asserting centralized authority over local judgeships became a major issue. With the political decline of the ʿAbbāsid caliphate in the early tenth century, the vizier (chief of the central administration) played an increasingly important role in the appointment of judges, but after 945, the Būyid amirs soon extended their authority over the judiciary. They were replaced in 1055 by a Seljuk sultan who claimed the same prerogative over the judgeship, even though the vizier Niẓām al-Mulk (d. 1092) acknowledged that the *qāḍī* was still theoretically a deputy of the caliph.

The selection of *qāḍī*s according to their schools of law (sing. *madhhab*) was also a political issue. The ʿAbbāsids selected their first *qāḍī*s from among the Hejazī jurists, perhaps because promoting Medinan law (which relied on *ʿamal*, the uninterrupted practice of the Medinan community since the death of the Prophet) would reinforce their legitimacy. From the reign of the caliph al-Mahdī (r. 775–785) onward, the ʿAbbāsids

gravitated toward the followers of the Iraqi scholar Abū Ḥanīfah (d. 767), the eponym of the Ḥanafī school of law, whom they appointed as *qāḍī*s in the principal regions of the empire. This policy met resistance by urban communities who were still attached to their local legal traditions. During the ninth century, *qāḍī*s were increasingly selected for their theological beliefs, and the Ḥanafīs lost their hegemony after 871. Thereafter, rulers appointed judges mainly from the Ḥanafī, Mālikī, and Shāfiʿī legal schools (except for the Shiite Fāṭimids, r. 909–1171, who preferred Ismāʿīlī *qāḍī*s), with each dynasty favoring one or another of these schools for the chief judgeship. In 1265 the legal pluralism at play was formalized under the Mamlūks (1250–1517) when Sultan Baybars appointed four chief judges, one for each Sunnī school (Shāfiʿī, Ḥanafī, Mālikī, and Ḥanbalī), first in Cairo and then in Damascus. This reform, which from a legal point of view was quite notable, has also been interpreted as a political act undertaken to weaken the authority of a single chief judge who had been showing annoying signs of independence.

Tension and Judicial Independence

Tension between the ruler and the judiciary existed since the Umayyad period. The *qāḍī* was a mere deputy of the ruler and depended on him for the execution of some of his judgments. For example, judges had no authority over the prisons in which they incarcerated debtors, and local governors or chiefs of police could release prisoners without the judge's consent. Rulers could easily overrule or interfere with the judiciary, whereas the *qāḍī*s, who were hired from among the scholars who were the authors of the Islamic jurisprudence, considered themselves the main judicial authority. The centralization of legal appointments under the caliph al-Manṣūr allowed judges to be free of the authority of local governors, but they were beholden to the caliph, who also interfered in the judicial process.

Under the ʿAbbāsids, *qāḍī*s became a major political tool. The dynasty had seized power by denouncing the impiety and the injustice of the Umayyads. In order to maintain their legitimacy, at a time of intense legal development that led to the birth of the classical schools of law, the first ʿAbbāsid caliphs surrounded themselves with scholars and used *qāḍī*s to embellish the official facade of the state. *Qāḍī*s were used as advisors, witnesses, and emissaries. Caliphs also used them to conduct political trials, or to issue *fatwā*s allowing the execution of political enemies. The political use of *qāḍī*s reached its peak during the *miḥnah* ("examination"), instituted at the end of the caliph al-Maʾmūn's reign and lasting until the beginning of that of al-Mutawakkil (ca. 833–848). In an effort to restore his authority, which was being challenged by the traditionalist movement, the caliph sought to impose his control over the judicial system and through it impose his control over the whole Muslim community. He determined that only *qāḍī*s who adhered to the official theological dogma that the Qurʾān was a part of God's creation were to remain in office, and they had to check that all witnesses (who usually belonged to the social and religious elite) professed the same dogma.

Religious scholars in general and *qāḍī*s in particular argued increasingly against such manipulation of the judiciary. They disseminated prophetic reports (*ḥadīth*s) insisting on the individual responsibility of the judge, who would be held responsible for his actions in the hereafter. They emphasized that the judge's decision relied on scriptural sources—

including the consensus (*ijmāʿ*) of jurists—or on his own assessment (*ijtihād*), and that left no place for caliphal intervention. During the ninth century, Ḥanafī jurists began to question the link between the caliph and his *qāḍī*s. According to the jurist al-Khaṣṣāf (d. 874), the *qāḍī* could issue a judgment against the caliph, despite his being a deputy of the latter. A century later, al-Jaṣṣāṣ (d. 981) asserted that the caliph did not appoint a judge in his own name but that the judge acted as a deputy for the whole community. The *qāḍī* served the Muslims (and not the caliph) on the basis of the law formulated by the legal scholars (*fuqahāʾ*). According to this theory, a *qāḍī* could be appointed by rebels (Khārijites), and even by the community itself in the absence of a ruler. Al-Jaṣṣāṣ's theory was later adopted by other scholars, such as the Mālikī al-Bāqillānī (d. 1013). Although the caliphate recognized a greater independence of the *qāḍī*s after the end of the *miḥnah* and the victory of Sunnism under al-Mutawakkil (r. 847–861), Muslim rulers never ceased in their attempts to manipulate the judiciary.

Shiite Discourse on the Judiciary

Imāmī Shiites, who believe that the only true rulers (imams, in Shiite discourse) were the fourth caliph, ʿAlī ibn Abī Ṭālib (r. 656–661), and eleven of his descendants, regarded the Umayyads and the ʿAbbāsids as illegitimate rulers. According to al-Kulaynī (d. 940), the imam Jaʿfar al-Ṣādiq (d. 765) forbade people to appeal to official *qāḍī*s. Instead, Shiite followers were advised to seek the judgment of a Shiite scholar, who would be considered a deputy of the true imam. The Imāmī doctrine evolved under the Būyid dynasty (945–1055), which was of Shiite persuasion. According to al-Ṭūsī (d. 1067), an Imāmī Shiite appointed *qāḍī* by an illegitimate ruler could dispense justice as long as he remained faithful to his own doctrine and regarded himself as a deputy of the true imam. It was the duty of an Imāmī jurist to accept his appointment, lest an unjust (Sunnī) scholar be appointed *qāḍī* in his place.

Parallel Judicial Institutions

The administration of law was exercised in forums other than the *Sharīʿah* court, which allowed rulers to assert their judicial authority. Himself a source of judicial power, the ruler could preside over the litigations and give binding decisions, or he could appoint deputies who unlike *qāḍī*s were not bound by the rules of the *Sharīʿah* (even if these deputies could be *Sharīʿah* court judges at the same time). Often called "secular" justice because it took place outside the *Sharīʿah* court, it manifested itself in different ways.

The Maẓālim Court

The *maẓālim* (literally, "wrongs") court symbolized the discretionary authority vested in the ruler. It had a broad jurisdiction—it received petitions against officials and abuse of power, and could occasionally serve as court of appeal against the *qāḍī*s' judgments. The judge (theoretically the ruler, but more often his deputy) was usually assisted by jurists and *qāḍī*s, who guaranteed the legitimacy of the decision, as well as by clerks and witnesses. Procedure was not restricted by legal doctrine, however. Whereas the *qāḍī* was bound by the accusatory procedures formulated by the religious law and could not violate the evidentiary rules, the *maẓālim* judge had procedural powers that went beyond those—he

could use the inquisitorial method, order investigations, not wait for a case to be brought, and rely on noncanonical types of proof. The ruler could thus base his decision on principles of equity, or follow the dictates of the state rather than *Sharīʿah* law as such.

Following the Sassanian model, *maẓālim* court sessions were probably organized on a regular basis during the early ʿAbbāsid period. Caliphs al-Mahdī and al-Hādī (r. 785–786) presided in person over a court. Later, the *maẓālim* were mostly supervised by the vizier, until the Shiite Būyids handed them to the Imāmī *naqīb al-ashrāf* (who ran the affairs of ʿAlī's descendants). From the eleventh century on, the *maẓālim* court was characterized by increasing bureaucratization and placed under the responsibility of different officials (sultans, governors, military officers). No specific locale was reserved for these public sessions until Nūr al-Dīn Zankī (r. 1146–1174) established a "house of justice" (*dār al-ʿadl*) in Damascus. A similar structure was built in Cairo under the Mamlūks.

From the early ʿAbbāsid period on, the *maẓālim* competed with the *qāḍī*s' jurisdiction, even though *qāḍī*s were occasionally appointed to head this court. ʿAbbāsid caliphs used the *maẓālim* forum to reinstate their authority when confronted with a *qāḍī*'s excessive autonomy or noncompliance with official ideology, as during the *miḥnah*. Through this institution, provincial governors seeking autonomy from the caliphate could also reinforce their power. In the late ninth century, when local dynasties first appeared in the east, provincial *qāḍī*s were still appointed by the caliph. Governors who sought autonomy had to regain control of the judiciary, but they could not easily dismiss a *qāḍī* dispensing justice in the name of the caliph. Rulers such as Ibn Ṭūlūn (r. 868–884), his son Khumārawayh (r. 884–896), and later the Ikhshīds (935–969) in Egypt therefore regularly used the *maẓālim* court as a way of bypassing the ordinary judicial system. Moreover, during the Mamlūk period, the *maẓālim* tended to encroach on matters regulated by the *Sharīʿah*, which fell under the jurisdiction of the *qāḍī*, such as cases involving pious foundations.

The proliferation of centers of power after the eleventh century increased the importance of justice dispensed by rulers. Other courts, such as the *yarghu* of the Īl-Khān Mongols (1256–1335), which dealt specifically with disputes among Mongols as well as state affairs, were assimilated into the *maẓālim* when the dynasty converted to Islam.

The Police

The *shurṭah* (also called *maʿūnah* from the ninth century onward), was an elite unit of the army that served as a security and police force. It was established under the first caliphs or the early Umayyads to protect cities and villages against riots and banditry and to ensure the night watch. Its chief, the *ṣāḥib al-shurṭah* (also called *shiḥnah* after the end of the ninth century), was appointed by the caliph or the governor, and he was often the head of the ruler's personal bodyguard. In early Islamic Egypt, the *ṣāḥib al-shurṭah* was the second highest official of the province after the governor, and he acted as his deputy when the latter was away. The *shurṭah* could be called upon to maintain order at the *qāḍī*'s court or to carry out his rulings.

The *shurṭah* was not only a military unit with control and security functions. The *ṣāḥib al-shurṭah* also presided over a court where he dispensed criminal justice. Like the *maẓālim*, his court was not bound by the rules of the *Sharīʿah*, and the *ṣāḥib al-shurṭah* operated much more freely than the *qāḍī*. He could conduct investigations and rule on the

grounds of physical evidence. His discretionary powers allowed him to inflict punishments harsher than those prescribed by Islamic law. The *ṣāḥib al-shurṭah* probably judged criminals arrested and brought before him by his troops. He prosecuted on his own authority, without the necessity of a plaintiff.

Finally, the *ṣāḥib al-sūq* or *muḥtasib*, chief of the "market police," also heard complaints and dispensed justice. His principle task was the supervision of moral behavior in public. He intervened on his own accord and passed punitive judgment based on custom (*ʿurf*) against offenders.

Summary

In early Islam, the *qāḍī* was no more than a legal official under the ruler's supreme judicial power. Between the eighth and the tenth centuries, as Islamic law developed into a specific field governed by legal scholars, the *qāḍī*s were increasingly identified with a religious jurisdiction that necessarily had to escape from under the authority of the ruler. Therefore, two sets of judicial institutions developed, which came to complement and sometimes compete with each other. For a ruler who needed to govern according to the public interest, to ensure security beyond the prescriptions of the *Sharīʿah*, or simply to serve state interests, it was necessary to rely on institutions that were not bound by the strict prescriptions of Islamic law and could be monitored more easily. During the Mamlūk period, authors such as Ibn Taymīyah (d. 1328) and Ibn Qayyim al-Jawzīyah (d. 1350) attempted to repair the rupture between the two types of institutions by developing the concept of *siyāsah sharʿīyah* (governance in accordance with the sacred law). According to their theory, many practices of the extra-*Sharīʿah* institutions conformed to the spirit of Islamic law and could be justified on this ground; *Sharīʿah* legitimacy thus extended to actual states. Their theory would strongly influence the Ottoman legal system.

The question of the boundaries between the various courts is still unresolved. Most scholars today think the *qāḍī* had little jurisdiction in penal law, although the *Sharīʿah* holds that the *qāḍī* has authority in criminal cases. As Émile Tyan remarked (Tyan, 1938-1943, II, p. 411-2), procedural law limited the involvement of the *qāḍī* in criminal cases—both a claimant and a defendant were required, and the judge could neither act on his own nor conduct inquiries. Most penal law cases were probably heard by the security forces (especially the police). Only on rare occasions, such as when a crime was witnessed and an accusation could be leveled, did the judge's competence in criminal matters become a reality. As Christian Lange has argued (Lange, 2008, p. 48), the situation may be described as a network of overlapping jurisdictions, subject to variations according to era, place, and specific cases.

[*See also* Ḥisbah; Justice; *and* Sharīʿah.]

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