THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

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CHAPTER 4

The judiciary coming of age

1. DELEGATION AND THE CREATION OF JUDICIAL HIERARCHY

The period between the third and eighth decades of the second century (ca. 740–800 AD) witnessed the maturation of both the judiciary and legal doctrine, as all essential features of these two spheres acquired a final shape, only to be refined during the succeeding century or two. With the increasing specialization of the judge's office as a legal institution, and with the evolution of centralization policies of the government, came a gradual change in the source of judicial appointments. During this phase, especially with the rise of the 'Abbāsids, investiture gradually shifted from the hands of the provincial governor to those of the caliph himself. This move toward judicial centralization, furthermore, seems to have been precipitated by the steady emergence of a professional legal elite whose interests were better served by direct caliphal supervision than by the perceived whims and arbitrariness of provincial military governors. As we shall see below in chapter 8, the perception of the caliphate as a religious and moral office – possessing the semblance of legality and capable of distributive justice – promised a better chance at equity and fairness than any military governor could have offered. It thus should not be surprising that, while promoting their own interests, the legists also pushed for caliphal supervision, as evidenced in juristic writings addressed to the caliphs.[1]

The shift to caliphal appointments, which started sporadically around 100/715 and became an established practice fifty years later, signaled an evolution in the concept of judicial delegation according to which judges were appointed as representatives of the power that invested them, although the ultimate source of authority remained the caliph himself. The signal development that sanctioned this concept was the appointment

[1] See Muḥammad Qasim Zaman, *Religion and Politics under the Early 'Abbāsids* (Leiden: Brill, 1997), 85–88, and chapter 8, below.

by the ʿAbbāsid caliph Hārūn al-Rashīd of the distinguished Kūfan jurist and judge Abū Yūsuf (d. 182/798) as chief justice (*qāḍī al-quḍāt*) shortly after 170/786. But this newly created title was no innovation in terms of jurisdiction or competence, for it accorded no additional powers to the recipient beyond those the typical provincial judge had usually enjoyed. Rather, the title merely signified the final step in political centralization, for henceforth it was the chief justice who appointed the provincial judges, although the appointment itself formally came directly from the caliph's office and person. Thus, it became the practice that provincial judges received a letter of appointment (known as *kitāb*, and later *ʿahd*) directly from the caliph. Between roughly 140 and 270 (ca. 760 and 880 AD), it was sufficient for the appointee to receive and read the letter in order for the investiture to take effect, but immediately thereafter the letter had to be read in the grand mosque of the city in which the appointment was made, for the investiture to be valid.[2]

Just as the caliph delegated to the chief justice the authority to appoint provincial *qāḍī*s, these *qāḍī*s held the authority to appoint deputies or district judges who came to be known as *khalīfa*s or *nāʾib*s. The judicial powers delegated at this level were frequently limited in jurisdiction. Some *nāʾib*s were given powers to hear certain types of disputes, while others had full jurisdiction but were limited in territorial terms. Thus, some judges were charged with administering criminal justice (*masāʾil al-dimāʾ*), while others were entrusted with settling estates. The chief justice in Baghdad, who also functioned as judge of that city, often appointed two deputies, one to the east side of the city and the other to the west side. Furthermore, he, like all other judges of large cities, appointed deputy judges who heard cases in the major villages surrounding the metropolis. In the ʿAbbāsid capital, some judges or deputy judges were appointed exclusively to hear disputes in the army,[3] a function that later acquired the title *qāḍī ʿaskar*.[4] At

[2] Kindī, *Akhbār*, 492, 494, 495, 497.

[3] Wakīʿ, *Akhbār*, III, 252, 269.

[4] Tyan has rightly pointed out that the office of *qāḍī ʿaskar* did not appear in the early stages of Muslim history because the

> Arab-Muslim communities were nothing more than the body of the conquering forces, and the ordinary *qāḍī* appointed for these communities were precisely the same magistrate who was appointed by the conquerors. The *qāḍā*ʾ *ʿaskar* took on the aspect of an autonomous institution only when a distinction was actually made between the civil communities established in the conquered territories and the armies which carried on the task of war and conquest.

Emile Tyan, "Judicial Organization," in M. Khadduri and H. Liebesny, eds., *Law in the Middle East* (Washington, D.C.: The Middle East Institute, 1955), 236–78, at 270.

times, however, it was the city *qāḍī* who would travel to the villages to hear disputes, as was the case with Khurāsān's judge ʿAbd Allāh b. Burayda.[5]

Dividing jurisdiction between or among *qāḍī*s was never a permanent arrangement. Thus, a city or a jurisdiction might have two judges at one point in time, but only a single judge at another. We are told that al-Hādī (r. 169/785–70/86) was the first caliph to divide the jurisdiction of the ʿAbbāsid capital into two, appointing Aḥmad b. ʿĪsā al-Burnī to the east side and Ismāʿīl b. Isḥāq to the west. But when Burnī was dispatched to adjudicate disputes in Nahrawān, Ismāʿīl was left in charge of the jurisdiction of the entire city until his death.[6] Later, however, Baghdad was again split into the two jurisdictions, each with a different judge, until 301/913, when the jurisdiction of the entire city was unified under Muḥammad b. Yūsuf.[7]

Nor was the appointment of judges from the capital city a permanent feature, although nominally the caliph as titular religious head was always presumed to be the highest authority sanctioning investiture. Egyptian judges, for instance, seem to have been regularly appointed by caliphal decree from Baghdad during the first century or more of ʿAbbāsid rule. However, under the Ikhshīdids, it was often – but by no means always – the case that the decision as to who was appointed was made by the local emirs. At times, the choice of candidate was made by the local religious elite and sanctioned, on behalf of the caliph, by the local military ruler. In 348/959, for instance, the religious leaders in Egypt convinced Kāfūr, the Ikhshīdid ruler, that Abū Ṭāhir Muḥammad b. Aḥmad should be appointed as judge, in which case Kāfūr issued a decree confirming their request.[8] It must be said, however, that appointments by what may be termed popular demand were rare, and that the great majority of judicial appointments were made by the caliph or the local governor, usually after consultation with the senior jurists frequenting the ruler's court.

The least permanent of all appointments, and the one that proved to be a fruitless experiment, was the appointment of two judges to the same position or jurisdiction, in what may be termed a shared appointment. In 137/754, during al-Manṣūr's reign, two judges were appointed to Baṣra, ʿUmar b. ʿĀmir al-Sulamī and the celebrated Sawwār b. ʿAbd Allāh. Soon, however, disagreements between the two over decisions and handling of

[5] Wakīʿ, *Akhbār*, III, 306.
[6] Ibid., III, 254, 281–82.
[7] Ibid., III, 282.
[8] Kindī, *Akhbār*, 493.

cases were so serious that Sawwār was finally dismissed, leaving Sulamī with exclusive jurisdiction.[9] Some two decades later, al-Mahdī (r. 158/775–169/785) appointed two judges to "sit" in the Grand Mosque of Baghdad, each presiding over his own court, and each with apparently unqualified jurisdiction.[10] We know that some competition ensued between the two, but nothing is said in the sources of how they fared in the long run. However, it is safe to say that such appointments, especially of two judges to the same court, never succeeded and we hear of no such cases during later periods. One of the distinguishing characteristics of the Islamic court in the long term remained its single-judge constitution.

The concept of delegation also meant that the judge was accountable to the power appointing him, the principal. The latter, conversely, was responsible for the former's conduct, and had the final say in his dismissal. Even if the caliph wished a deputy judge removed, the removal as a formal act had to emanate from the appointing agency, usually the chief judge of the city. Similarly, once a principal was dismissed, his deputies were automatically dismissed with him, for with the principal's dismissal their judicial power became null and void.

Delegation by way of appointing deputies always implied that the appointing authority had the power to substitute himself for the appointee. Thus, any litigant could address himself to the principal while circumventing the *nā'ib* or even the *qāḍī* or chief justice himself. This explains why in some cases litigants took their disputes to the caliph himself, bypassing the deputy judge, the appointing judge and even the chief justice. Such an act, however, always presumed that the case had not yet been tried before any judge's court, for once such a process had been initiated, the litigant was obliged to complete the proceedings within the jurisdictional purview of the presiding judge and to comply with his decision. Nor could any higher authority interfere in the process or alter the decision itself during the tenure of the presiding judge. In 135/752, for instance, on the testimony of a single witness, the Egyptian judge Khayr b. Nuʿaym placed in temporary custody a soldier who had been accused of defamation of character. In the meantime, to complete filing the evidence against the accused, the plaintiff was to present to the court a second witness. But before the proceedings were finalized, the governor of Egypt, ʿAbd Allāh b. Yazīd, released the soldier, an action that left Khayr with no option other than to resign. The latter made his return to office conditional upon the re-arrest of the soldier,

[9] Wakīʿ, *Akhbār*, II, 55.
[10] Ibid., III, 251.

a condition vehemently rejected by the governor, who soon appointed another judge in Khayr's place.[11]

This incident, unquestionably authentic, nicely illustrates the considerable independence of the early (and indeed later) judiciary in Islam, and accurately characterizes the stark contrast between the power of those who came to appoint and to dismiss, and that of the judge himself over his own jurisdiction. The judicial independence of the *qāḍī* must therefore be seen to stand outside the vertical process of delegation. Each *qāḍī*, from the lowest rung of the legal profession up to the chief justice, was judicially independent irrespective of the powers of the appointing agency. This independence began at appointment and ended with dismissal.

Beginning with the early years of the second century H., if not before, judicial independence became the hallmark of the Islamic legal tradition. As a rule, no authority could redirect cases (from one jurisdiction to another) or interfere in the process of adjudication. However low-ranking the judge might be, his court, his hearings and his decisions were sacrosanct, in both theory and practice, since evidence of interference in the process is rare in our sources. Furthermore, judicial independence was bolstered by the absence from the Islamic legal tradition of any system of appeal. Once a decision was rendered, it was considered final and irrevocable within the tenure of the presiding *qāḍī*. The system did, however, allow what might be termed successor judicial review within the same court. Accordingly, a newly appointed judge might reevaluate the decisions of his predecessor and revoke or reverse some of them. In 194/809, the Egyptian judge Hāshim al-Bakrī reversed two decisions rendered by his predecessor ʿAbd Allāh al-ʿUmarī.[12] Some three decades later, also in Fusṭāṭ, Ibn Abī al-Layth overturned a decision rendered by his predecessor, Hārūn b. ʿAbd Allāh. The same decision was reversed a few years later by al-Ḥārith b. Miskīn, who succeeded Ibn Abī al-Layth and affirmed Hārūn's verdict.[13]

It remains true, however, that the caliph, governor or their representatives possessed full authority to appoint and dismiss judges, an authority that encompassed the power to appoint a candidate without the latter's consent – or at least, such appointment was never conditional upon the candidate's willingness to serve in the capacity of a *qāḍī*. The literature is

[11] Ibid., III, 232; Kindī, *Akhbār*, 356.
[12] Kindī, *Akhbār*, 403, 404.
[13] Ibid., 474–75; for a similar case, see Ibn Ḥajar al-ʿAsqalānī, *Rafʿ al-Iṣr ʿan Quḍāt Miṣr* (printed with Kindī, *Akhbār*), 506.

replete with accounts of judges refusing to serve or politely excusing themselves from such a service, offering such pretexts as physical ailment or ignorance of the law. In chapter 8, we will have occasion to discuss the moral and religious predicaments that a career in the judgeship entailed for the Sharīʿa-minded, but for now it suffices to state that, at least theoretically, the candidate's wishes or readiness to take on the office were deliberately ignored. The rationale behind this practice stems from the assumption that a judge who has no personal interest in the office is less likely to be motivated by considerations of power and wealth, and hence more immune to corruption. Investiture therefore had to be – or to have the semblance of being – derived from the very act of appointment. The reasoning underlying this conception was also at the foundation of the power of dismissal.

At its core, the near-limitless power of the delegating office ultimately represented the legal authority of the caliphs – and later those who practically and theoretically acted on their behalf – to administer justice. As the deputies of God on Earth and of Muḥammad as Prophet, the caliphs were an integral part of the legal profession as it had developed by the first quarter of the second century (750 AD). But they also stood at the top of a hierarchy, themselves being rulers, judges and – in many cases – even jurists of some sort. We have seen that, in matters of substantive law, they advised judges but also received counsel from them. However, in administering law through judicial appointment, they reserved for themselves the prerogative to act as they wished, although even here they did not always do so without seeking counsel. The literature abundantly attests to the fact that they frequently sought the opinions of jurists and other men of learning about the best candidate for a specific post; and there is no doubt that such opinions mattered and were taken into serious consideration. It remains a fact, however, that the final decision rested in the hands of the political sovereign, be it the caliph or his (pretending) representative.

The same principle of delegation obtained under the early ʿAbbāsid caliphs, who acted on the assumption that they were administering the law of God, an assumption strengthened by the fact that the process of Islamicization came to a zenith in that era. Toward the end of the third/ninth century, however, the caliphs increasingly began to lose their supremacy to military commanders and powerful local dynasties who took over the responsibility of appointing judges in the lands under their dominion. But, as we have earlier mentioned, such appointments remained nominally caliphal, although at later times the caliph often had nothing whatsoever to

do with such acts. In other words, the principle of delegation continued to be assumed even when the reality was quite otherwise.

2. THE COMPOSITION OF THE *QĀḌĪ*'S COURT

By the close of the second century (ca. 800–815 AD), the structure and make-up of the court had taken final shape.[14] All the basic personnel and logistical features had been introduced, and any enlargement or diminution of these elements were merely a function of the nature and needs of the *qāḍī*'s jurisdiction. Thus a *qāḍī* might have had one, two or more scribes depending on the size of his court and the demands placed on it, but the scribe's function itself was integral to the proceedings, whatever their magnitude. The same went for all other court officials and functions.

In terms of personnel, the court consisted of a judge and any number of assistants (*aʿwān*) who performed a variety of tasks. We have spoken of the *jilwāz* and the court chamberlain whose function it was to maintain order in the court, including supervising the queue of litigants and calling upon various persons to appear before the judge. Some courts whose jurisdiction included regions inhabited by various ethnic and linguistic groups were also staffed by an interpreter or a dragoman.

By the 130s/750s, if not earlier, witness examiners (*aṣḥāb al-masāʾil*) appear in our sources as a fully established institution even to the point of being taken for granted.[15] The basic elements of this institution must have been in operation since the middle of the first century (ca. 670 A.H.), when the proto-*qāḍī*s, who worked to resolve criminal, pecuniary and other disputes, called upon witnesses to attest to the truthfulness of claims and events. In this context, it must also have been the practice that, out of logical necessity, the proto-*qāḍī* had often to inquire into the rectitude of these witnesses or ask someone who did. The institution must therefore have taken shape prior to the 110s (730s AD) or thereabouts, which explains why it is such an established feature in historical accounts dating from the late 120s and 130s.

[14] For a general account of the workings of the *qāḍī*'s court during the post-formative period, see David Powers, *Organizing Justice in the Muslim World, 1250–1750*, Themes in Islamic Law, edited by Wael B. Hallaq, no. 2 (Cambridge: Cambridge University Press, in progress).

[15] In the courts of Ibn Shubruma (d. 144/761) and Ibn Abī Laylā (d. 148/765), the *aṣḥāb al-masāʾil* were apparently as permanent a feature as the *qāḍī* himself. See, e.g., Wakiʿ, *Akhbār*, III, 106, 138. It is to be noted that the function of the *muzakkī* (lit., he who establishes the integrity of witnesses) derived from the office of *aṣḥāb al-masāʾil* and appears to have been a later appellation for roughly the same function.

This dating is consistent with an account in which it is reported that the Egyptian judge Ghawth b. Sulaymān, who served during the first years of the ʿAbbāsids (and probably under the last Umayyads), insisted, more than any of his predecessors, upon a thorough examination of character witnesses in his court. The account explains that Ghawth's actions were precipitated by careless appointments of witnesses, which resulted in what had become a widespread practice of giving false testimony.[16] Ghawth is said to have conducted a confidential investigation of all the court's witnesses,[17] although it is not clear whether in this case he performed the task himself or delegated it to the witness inspectors. By 170/786 or thereabouts, the names of court witnesses investigated and certified by the *ṣāḥib al-masāʾil* were entered into the court records, thereby creating a list that became a permanent feature of the *qāḍī*'s register.[18]

By the last years of Umayyad rule, then, it was clear to everyone that the *aṣḥāb al-masāʾil* were part of every city's court, trusted by the judge to enquire into the integrity of character witnesses whose function it was in turn to attest to legal records, contracts and all sorts of transactions passing through the court. Inasmuch as they were the judge's assistants (*aʿwān*), they were also his *umanāʾ* – literally, trustees. They "asked around" about potential witnesses and, once they determined their rectitude to be unblemished, they recommended them to the judge who would then approve the *aṣḥāb*s' recommendation. At times the recommendation was rejected, but on other occasions, the judge would approve the witnesses after he had done his share of investigating. Around 212/827, the judge ʿĪsā b. al-Munkadir is reported to have acted upon the recommendation of his *ṣāḥib al-masāʾil*, ʿAbd Allāh b. ʿAbd al-Ḥakam, only after he himself had personally investigated the witnesses the former had proposed. ʿĪsā was said to have been in the habit of "walking at night in the streets with a [type of a] headgear masking his face, asking about the witnesses."[19]

Once recommendations of the *ṣāḥib* al-*masāʾil* were accepted, the judge appointed the witnesses to the court, an appointment that came to be known as *al-rasm bil-shahāda*.[20] That this expression had become common in the legal profession no later than 190/805 suggests an earlier origin extending back, perhaps, to the middle of the second century (ca. 770

[16] Kindī, *Akhbār*, 361.
[17] Ibid.
[18] Ibid., 386, 394, 395.
[19] Ibid., 437.
[20] Ibid., 422 (read *marsūmūn* not *mawsūmūn*), 494.

AD), if not earlier; for this highly technical usage could not have come into existence unless a practice had preceded it by a relatively long stretch of time.

Be this as it may, the work of the *ṣāḥib al-masāʾil* did not end with finding and recommending trustworthy witnesses. It was often the case that the character of appointed witnesses was periodically examined in order to ensure their continuing ability to perform in that capacity. It is reported that when Lahīʿa b. ʿĪsā was appointed as a judge in 199/814, he designated Saʿīd b. Talīd as his *ṣāḥib al-masāʾil* and ordered him to investigate the court's witnesses every six months. The latter is said to have received the former's approval to appoint thirty such witnesses.[21] Anyone found in the meantime to have engaged in behavior that would disqualify him was dismissed and his name removed from the list of witnesses. One such witness was disqualified and dismissed on the grounds that he was a Qadarite,[22] i.e., a member of a theological school associated with the rationalist Muʿtazila.

Our sources are less clear on the exact status and role of witnesses in the early period. It is fairly safe to say that by the middle of the second century (ca. 770 AD), evidential testimony was still somewhat undetermined. By this time, we learn, judges would occasionally accept the testimony of a single witness in situations where two would have been demanded at a later period. The Kūfan judge Ibn Shubruma, who served during the 130s (747 AD et seq.), even accepted the testimony of a wife in favor of her husband against a third party,[23] a practice totally at odds with later normative doctrine. Similarly, Ibn Shubruma's contemporary and colleague Ibn Abī Laylā accepted other judges' written instruments sent to him without the attestation of witnesses,[24] a practice likewise rejected during later periods.[25] However, toward the end of the second century H (beginning of the ninth century AD), the institution of witnesses became well established, allowing for little subsequent variation. Oral testimony became the linchpin of the system of evidence, rivaling in strength written attestation which in and of itself was insufficient as evidentiary proof. By the end of the second century, if not sometime before, it had become a universal doctrine that

[21] Ibid., 422.
[22] Ibid.
[23] Wakiʿ, *Akhbār*, III, 80.
[24] Ibid., III, 133, 137, although on p. 134, this report is contradicted by another to the effect that Ibn Abī Laylā did accept, and in fact insisted on, such an attestation.
[25] On the much later changes in the Andalusian Mālikite law of procedure concerning the judges' written communications to each other, see Wael B. Hallaq, "*Qāḍī*s Communicating," at 453 ff.

all documents, in order to be deemed valid, had to be attested by at least two witnesses. It is very likely that by this time too the judge's decisions also had to be attested and signed by the court's witnesses, the *shuhūd ʿadl*. These witnesses also sat in court, and their presence, procedural in nature, was intended to confirm the lawful conduct of all concerned.

Historical reports also make it clear that by the middle of the second century (ca. 770 AD), witnesses, however they were used, became not only a fixture of the court but also paid employees of the *qāḍī*, who always controlled the budget of the court. In the early 140s/late 750s, the Baṣran judge Sawwār b. ʿAbd Allāh is reported to have allotted regular salaries for assistants and witnesses.[26] That such an item was thought worthy of being noted in historical and biographical works suggests the novelty of the practice. Sawwār comes down in historical narratives as a judge who endeavored to enhance the standing of the court in the public eye by giving it prestige and credibility.[27] But this should in no way imply that the social standing of court witnesses suffered in any form or manner. The sources permit us to conclude that the witnesses came mostly from the upper classes, whose social prestige intermeshed with the judicial valuation of rectitude. In fact, generally speaking, they seem to have belonged to a social stratum higher than that of the typical judge. When in 212 or thereabouts (ca. 827 AD) Ibn ʿAbd al-Ḥakam chose, in his capacity as *ṣāḥib al-masāʾil*, a number of witnesses for the court of the judge ʿĪsā b. al-Munkadir, he exposed himself – together with the judge he was serving – to the severe charge of "dishonoring the institution of testimony" because he "allowed into the House of Justice people who do not belong to it, people who possess neither social standing nor property, such as tailors, grocers, etc."[28]

The court's prestige and authority was also enhanced by the presence in it of men learned in the law. These were the legal specialists (*fuqahāʾ*, *muftīs*) who, mostly out of piety, made the study and understanding (lit. "fiqh") of religious law their primary private concern, and it was this knowledge that lent them what I have elsewhere called epistemic authority.[29] The sources are frequently unclear as to whether or not these specialists were always physically present in the court, but we know that from the beginning of the second century (ca. 720 AD) judges were encouraged to seek the counsel of these learned men and that, by the

[26] Wakīʿ, *Akhbār*, II, 58.
[27] Ibid.
[28] Kindī, *Akhbār*, 436.
[29] Hallaq, *Authority*, ix, 166–235.

120s/740s, they often did.[30] From an abundance of later writings on this issue, one can assert with some confidence that the legal specialists were regularly consulted on difficult cases and points of law, although evidence of their *permanent* physical presence in the court is meager (which is not to say that absence of this evidence necessarily means that they did not frequent the courts). However, it is likely that they attended the court often, frequently accompanied by students or apprentices aspiring to a career in the judiciary. What is certain is that from the very beginning, even while Islamic law was still forming during the first century, the proto-*qāḍī*s and *qāḍī*s were in the habit of asking "people who know" about difficult cases they faced[31] – a practice highly encouraged by the Quran itself. In other words, the legal specialists were and remained for many centuries a fixture of the court even when they were not physically present in it. When they were not attending hearings, it was common practice for judges to write to them asking their opinion with regard to matters of law that they found abstruse. And although the judges were not legally bound by the expert opinions of these jurists, in reality they conformed to them nearly always.

This practice was therefore normative, without any official sanction by recognized authority, or at least this was the case in the east. In Andalusia, on the other hand, soliciting the opinions of legal specialists – properly called *mushāwar*s – was mandatory. There it became something of a formal matter, insisted upon by both the legal profession and the political sovereign. Thus, generally speaking, an Andalusian judge's decision was considered invalid without the prior approval of the *mushāwar*s.

The practice may have begun before the middle of the second/eighth century, when the Umayyads established their rule in Andalusia after their defeat by the ʿAbbāsids in the east; but there is no doubt that the obligatory character of the *mushāwar* institution had been fairly established by the beginning of the third/ninth century. During this latter century and the next, the number of *mushāwar*s for each judge seems to have varied according to time and place, although soon thereafter two *mushāwar*s became standard for each court. As in the east, the *mushāwar*s were *muftī*s, chosen by the judge for their mastery of the law. (This fact explains why the greatest bulk of the surviving *fatwā* literature consists mainly of opinions issued by *muftī*s for the benefit of judges.)

[30] Wakīʿ, *Akhbār*, II, 423; III, 86.
[31] See chapter 3, section 1, above.

Together with the witnesses, bailiffs, chamberlains, and often the legal specialists, the courts of the second/eighth century also included a number of other functionaries, also generally known as the *qāḍī*'s assistants (*aʿwān*). Among these were men whose function it was to search out and apprehend persons charged with a felony or to bring in defendants against whom plaintiffs had presented the court with claims. They were also sent out by the judge to look for witnesses who might have seen, for example, an illegal act being committed. It is possible that at times these functions were discharged in part by *ṣāḥib al-masāʾil* himself, although we have reason to believe that, in larger courts dealing with a considerable volume of cases, there would have been other officials assigned specifically to perform such tasks. Some of these assistants specialized in "public calling," thus acquiring the technical title *munādī*s. These *munādī*s usually went to the markets and public spaces and spoke out loud on court-related matters. They "called" on certain individuals, sought either as witnesses or as defendants, to appear before the judge. Occasionally, they were used as a means of communicating the judge's messages to the public. Thus, in 226/840, immediately upon receiving appointment to the office, Fusṭāṭ's judge, Muḥammad b. al-Layth, dispatched his *munādī* to announce in public that anyone in possession of property belonging to an orphan or absentee should, to avoid the penalty of the law, immediately surrender it to the court. Our source reports that this announcement was effective, in that it resulted in many people surrendering such properties to the Treasury.[32] A decade later, another judge in the same city sent his *munādī* to the Grand Mosque to invite people who might have knowledge of a case of embezzlement to come forth to testify to this effect before him. This call was also effective, for it resulted in many individuals appearing before the *qāḍī* to act as witnesses. [33] It was also the practice for the *munādī*s to be dispatched by a judge merely to announce that the court was in session and that it was open for those who needed to bring a claim before the court.[34] They similarly acted in the same capacity as the chamberlain or *jilwāz*, calling plaintiffs and defendants present in the vicinity of the court to stand before the judge when their turn came.[35] Thus, by the middle of the second century (ca. 770 AD), "calling" in public spaces had become an established practice. To what extent this practice continued beyond the third/ninth century we do not know.

[32] Kindī, *Akhbār*, 450.
[33] Ibid., 462–63. See also Wakīʿ, *Akhbār*, II, 20.
[34] Kindī, *Akhbār*, 76; Wakīʿ, *Akhbār*, II, 52.
[35] Wakīʿ, *Akhbār*, III, 168.

The judge's assistants also included a number of *umanā' al-ḥukm* (lit., trustees of the court) whose tasks involved the safekeeping of confidential information, property and even cash. One category of these officials was responsible for the court's treasury, known as the *tābūt al-quḍāt* (the judge's security chest). The judge who is associated with first establishing such a chest was ʿAbd Allāh al-ʿUmarī who, sometime in the 180s (ca. 800 AD), ordered its construction at the cost of four *dīnār*s. Its location was in the state Treasury but the key to it remained with the judge and/or his trustee placed in charge of it. We know that all sorts of monies were kept in it, especially those belonging to heirless deceased persons, to orphans and to absentees.[36] It is in no way clear how or where such monies had been kept before that time, but we may surmise that the judge himself may have safeguarded them, either on his person or in the state Treasury, without this involving any separate arrangement. At any rate, it was the judge who ultimately was responsible for the *tābūt*'s contents as well as for the conduct of his trustee. For instance, the judge Hārūn b. ʿAbd Allāh was jailed by his successor, Muḥammad b. Abī al-Layth, on the charge that Hārūn's trustee had embezzled large amounts of money from the *tābūt* during his tenure.[37]

Another type of trustee was the *qassām*, who was responsible for dividing cash and property among heirs or disputed objects among litigants. This official was usually hired for his technical skills and knowledge of arithmetic. We are not certain, however, as to the origins of this court institution, although it is fairly safe to say that the function itself may have started during the second half of the first century at the latest (between 670 and 715 AD), this being a reasonable estimate because the division of inherited property was one of the earliest functions assigned to proto-*qāḍī*s, when they still were dealing with estates left by soldiers who had participated in the early conquests. Nonetheless, it is uncertain when judges began to delegate this function to their trustees. As late as the 160s (ca. 780 AD), Sharīk b. ʿAbd Allāh, the judge of Kūfa, was assigned this function himself by the caliph al-Mahdī, although whether it was understood that the duty would automatically be handed over to trustees is hard to say. [38]

Last, but by no means least, a major official of the court was the judge's scribe, of whom we spoke in the previous chapter. By the early portion of

[36] Kindī, *Akhbār*, 405.
[37] Ibid., 450.
[38] Wakiʿ, *Akhbār*, III, 158.

the second/eighth century, his function had become an established feature in all courts. He usually sat immediately to the right or left of the judge, recorded the statements, rebuttals and depositions of the litigants, and, moreover, drew up legal documents on the basis of court records for those who needed the attestation of the judge to one matter or another. His appointment to the court appears to have been the first to be made when a new judge assumed office, and he was required to be of just character, to know the law and to be skilled in the art of writing.[39]

The scribe's function as a court notary must be distinguished from the private notary (*muwaththiq* or *shurūṭī*), who operated outside the court and who drafted legal documents for private parties entering into contracts. This notarial function seems to have become standard legal practice around the middle of the second/eighth century, a good half century after the scribe's function had become fairly established. But its rudimentary origins – in the sense that some proto-experts wrote down legal or quasi-legal documents for the benefit of people – extend back perhaps to the middle of the first century (if not even before, as it must have been an ancient Near Eastern practice). We have seen, for example, that Khārija b. Zayd, who flourished during the last three decades of the first century, was acknowledged to have been expert in the field.

Be that as it may, the *shurūṭī* did not sit in the court; his function was private, not public, unlike that of the court scribe. In contrast to the latter, whose activity was limited to writing in, and copying from, the *qāḍī*'s register, and whose salary the *qāḍī* himself paid, the *shurūṭī* wrote contracts and legal documents of all types and forms, and was retained, for a fee, as a legal expert for this specific purpose by individuals transacting outside the purview of the court.

Thus, the scribe's function was established at an early date, and it did not take long for the institution of the *dīwān* to follow suit and to attain its full form by the third quarter of the second century or immediately thereafter (780 AD et seq.). The *dīwān* represented the totality of the records (*sijillāt*) kept by a judge, and these were normally filed in a bookcase termed a *qimaṭr*.[40] The first judge associated with the notion of a consistent and perhaps systematic keeping of court records was the Baṣran judge Sawwār

[39] Hallaq, "*Qāḍī*'s *Dīwān*," 423.

[40] Wakī', *Akhbār*, II, 159. The word *qimaṭr* seems to have acquired a variety of meanings, depending on time and place. It may have been "that in which books are preserved," and in a more specifically legal context "the register (*zimām*) in which documents are recorded." See, e.g., Muḥammad al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 6 vols. (Ṭarāblus, Libya:

b. ʿAbd Allāh, who was appointed to office in the 140s/760s. In an effort to enhance the authority and prestige of the court, he initiated a series of reforms that included a fairly elaborate keeping of records pertaining to court business.[41] But his *dīwān* does not seem to have been sufficiently inclusive. His near-contemporary Ibn Shubruma is reported to have begun the practice of writing down the claims of the litigants, including a summary of all evidence relevant to the case.[42] The sixth-/twelfth-century jurist al-Ḥusām al-Shahīd b. Māza observed that prior to Ibn Shubruma, judges were not in the habit of reducing to writing the claims of parties to the suit, but instead depended on their memory of who said what. With the benefit of hindsight, Ibn Māza was able to state that the practice initiated by Ibn Shubruma had been imitated by judges ever since.[43] Still, there was room for yet further expansion. It is reported that the practice of *systematic* recording of court affairs was initiated by al-Mufaḍḍal b. Faḍāla, the judge of Fusṭāṭ in around 168/784. He is said to have expanded, as never before, the contents of the *dīwān* so as to include in it records of inheritance, bequests, debts, and much else.[44]

Thus, it is safe to say that before the second/eighth century came to a close, the *qāḍī*'s *dīwān* included the following documentation:

(1) The *maḥāḍir* and *sijillāt*. The former term referred to records of actions and claims made by two parties in the presence of the judge, who usually signed them before witnesses in order for them to be complete and confirmed. It also referred to records of statements made by witnesses to the effect that a certain action, such as sale or a pledge, had taken place. The practice of writing down such testimonies appears to have been in place prior to the middle of the second/eighth century, and is associated with the name of the Kūfan judge and jurist Ibn Abī Laylā, among others.[45] It was on the basis of these *maḥāḍir* that the judge's decision was based. The term *sijillāt*, on the other hand, referred to witnessed records of the contents of *maḥāḍir* together with the judge's decision on each case. The *maḥāḍir* were therefore the basis

Maktabat al-Najāḥ, 1969), VI, 116. It may also be defined as "the sealed register in which cases are recorded." See Taqī al-Dīn Ibn al-Najjār, *Muntahā al-Irādāt*, ed. ʿAbd al-Mughnī ʿAbd al-Khāliq, 2 vols. (Cairo: Maktabat Dār al-ʿUrūba, 1381/1962), II, 582.

[41] Wakiʿ, *Akhbār*, II, 58.

[42] Ibn Māza al-Ḥusām al-Shahīd, *Sharḥ Adab al-Qāḍī lil-Khaṣṣāf* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 486.

[43] Ibid., 487.

[44] Kindī, *Akhbār*, 379; Wakīʿ, *Akhbār*, III, 237.

[45] Wakīʿ, *Akhbār*, III, 136, 137.

from which the *sijillāt* were constructed.[46] The scribe of the Egyptian judge Ibrāhīm b. al-Jarrāḥ (ca. 205/820) is reported to have described the process of preparing the *sijillāt*. He would prepare the *maḥḍar* and read it to Ibrāhīm who would examine, and then comment on, it. When a decision was required, Ibrāhīm would ask him to "construct a *sijill* on the basis of it." The scribe would usually find inscribed on the back of the sheet statements by Ibrāhīm such as "Abū Ḥanīfa held such-and-such opinion" and on the second line "Ibn Abī Laylā opined such-and-such" and, on yet another line, "Mālik said such-and-such." One of the opinions recorded would be underlined, signaling to the scribe the opinion on the basis of which the case was to be decided. The *sijill* would be composed accordingly.[47]

(2) A list of court witnesses whose just character was confirmed by the *ṣāḥib al-masā'il* and/or the judge, along with the date of confirmation and the name(s) of the *ṣāḥib al-masā'il*. The recording of such dates was important because, as we have seen, judges required a review of the character of these witnesses periodically. Six months seems to have been the commonly accepted period between reviews, an interval confirmed by second-/eighth-century accounts as well as by numerous later ones.[48]

(3) A register of trustees over *waqf* properties, orphan's affairs and divorcées' alimonies. Also included here were lists of *waqf* properties, their budgets and the names and salaries of those who worked to maintain them.[49]

(4) A register of bequests.[50]

(5) *Ṣukūk*, which included contracts, pledges, acknowledgments, gifts, donations, written obligations as well as other written instruments.[51]

(6) Copies of letters sent to, and received from, other judges (*kitāb al-qāḍī ilā al-qāḍī*), including any relevant legal documents attached to such letters.[52]

[46] Al-Ḥusām al-Shahīd, *Sharḥ*, 372; Hallaq, "*Qāḍī*'s *Dīwān*," 420.

[47] Kindī, *Akhbār*, 432.

[48] Ibid., 394, 422; Abū Naṣr al-Samarqandī, *Rusūm al-Quḍāt*, ed. M. Jāsim al-Ḥadīthī (Baghdad: Dār al-Ḥurriyya lil-Ṭibā'a, 1985), 39 ff.

[49] Kindī, *Akhbār*, 355, 424, 444, 450; Abū al-Qāsim al-Simnānī, *Rawḍat al-Quḍāt*, ed. Ṣalāḥ al-Dīn Nāhī, 4 vols. (Beirut and Amman: Mu'assasat al-Risāla, 1404/1984), I, 112.

[50] Kindī, *Akhbār*, 379; Aḥmad b. 'Alī al-Qalqashandī, *Ṣubḥ al-A'shā fī Ṣinā'at al-Inshā*, 14 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1987), X, 284.

[51] Waki', *Akhbār*, II, 136; Kindī, *Akhbār*, 319, 379; al-Ḥusām al-Shahīd, *Sharḥ*, 57–62; on written obligations, see Michael Thung, "Written Obligations from the 2nd/8th to the 4th Century," *Islamic Law and Society*, 3, 1 (1996): 1–12.

[52] Kindī, *Akhbār*, 410; Samarqandī, *Rusūm al-Quḍāt*, 46.

In addition to these items, the *qāḍī*'s *dīwān* may have contained several other types of registers, such as: a record of prisoners' names and the terms of their imprisonment; a list of guarantors (*kufalā'*), those who had been guaranteed and the objects or matters in question; and/or a list of legally empowered agents (*wukalā'*), those who had bestowed on them such powers of representation, the terms of each agency and the lawsuits involved, and the dates of cases involving such representation.[53] These registers are abundantly attested in later works and their entry into the *qāḍī*s' *dīwān*s may have in part been a later development. However, despite the silence of the early sources, it is conceivable that they may well have crept into the *qāḍī*s' *dīwān*s during the second/eighth century or, almost certainly, immediately thereafter.[54]

The *dīwān* was acknowledged to be the backbone of legal transactions and the means by which the judge could review his decisions as well as all cases and transactions passing through his court. It therefore embodied the complete record of the judge's work in the court, and represented the chief tool by which judicial practice preserved its continuity. By the middle of the second/eighth century, it had become the established practice of outgoing judges to deliver their *dīwān*s over to the newly appointed *qāḍī*s succeeding them, a practice that was to undergo gradual change thereafter when, beginning with the last decade of the second century (805–815 AD) or thereabouts, the new judge began by having his predecessor's *dīwān* copied by his own scribe. This transfer or copying is said to have been the second step taken by judges upon receiving investiture, the first being his appointment of a scribe. In 140/757, Ghawth b. Sulaymān took over the post of Yazīd b. Bilāl (who had just died), and when the *dīwān* failed to be delivered to him, he went to Yazīd's residence and received it there (presumably from one of his relatives).[55] Some three decades later, however, the mode of transferring the *dīwān* began to change. Khālid b. Ḥusayn al-Ḥārithī, who served as a judge sometime between 158/774 and 169/785, was reportedly one of the first, if not the first, to insist on retaining the original copy of his *dīwān*, and on having the incoming judge make two copies of it, both attested by witnesses.[56] But Ḥārithī's action does not seem immediately to have become the norm. At about the same time, the judge ʿĀfiya

[53] Qalqashandī, *Ṣubḥ al-Aʿshā*, X, 274, 291–92; Samarqandī, *Rusūm al-Quḍāt*, 34, 39 ff.; Hallaq, "*Qāḍī*'s *Dīwān*," 421, 428–29.
[54] Hallaq, "*Qāḍī*'s *Dīwān*," 433.
[55] Kindī, *Akhbār*, 360.
[56] Wakiʿ, *Akhbār*, II, 125.

submitted his resignation to the caliph al-Mahdī, and to finalize this process he gave up his *qimaṭr*, the bookcase containing his *dīwān*.[57] Even during the early part of the fourth/tenth century, some *dīwān*s were surrendered to the new judge, presumably without having been copied.[58] This practice, however, was to change soon, when transcribing the predecessor's *dīwān* became the rule.

Whatever the means of transferring the *dīwān*, access to predecessors' records was essential not only for continuing the new judge's work in protracted cases but also for reviewing the work of earlier judges, especially the immediate predecessor. Such a review was usually prompted either by complaints against the outgoing judge or by reasonable suspicion on the part of the new judge of abuse, corruption or one form or another of miscarriage of justice that might be associated with his predecessor. It was access to the *dīwān*s that allowed judicial review in Islam to take on a meaningful role, a role that was, to some limited extent, equivalent to appeal in western judicial systems.

Finally, we turn to the judge himself, who was the backbone of the court. In the course of chapters 2 and 3, we had more than one occasion to discuss the evolution of his office and function. There, we saw that by the very end of the first/seventh century, the judge's office had undergone a degree of specialization whereby it became increasingly confined to legal matters and dissociated from strictly administrative, policing and fiscal tasks. With this development, the judges began to represent a distinct sphere of governance, a class of professionals largely associated with the growing independence of a province of law. I say largely, because the *Islamic* non-judicial functions were not completely and irrevocably removed from the judge's sphere of duties until the middle of the third/ninth century, if not later. In the 150s/770s, Sawwār was appointed by the caliph al-Manṣūr as the judge of Baṣra, and also its prayer-imam as well as its chief of police.[59] As late as 204/819, Ibrāhīm b. Isḥāq was appointed as both judge and story-teller of Fusṭāṭ.[60] Nonetheless, as a general rule, by the middle of the second/eighth century the function of *qaḍā'* became increasingly restricted to duties that, for many centuries thereafter, were to be regarded as appropriate to a judge. This was not only a matter of specialization but also a register of growing

[57] ʿAlī b. al-Muḥassin al-Tanūkhī, *Nishwār al-Muḥāḍara*, 8 vols. (n.p., n.p., 1971–), VIII, 151; al-Ḥusām al-Shahīd, *Sharḥ*, 86.

[58] Ibn Ḥajar al-ʿAsqalānī, *Rafʿ al-Iṣr ʿan Quḍāt Miṣr,* ed. Ḥāmid ʿAbd al-Majīd, 2 vols. (Cairo: al-Hayʾa al-ʿĀmma li-Shuʾūn al-Maṭābiʿ al-Amīriyya, 1966), II, 269.

[59] Wakīʿ, *Akhbār*, II, 60.

[60] Kindī, *Akhbār*, 427.

professionalization, further marked by increasing attention that the government paid to the judges' hierarchies, appointments and dismissals. But a no less important indicator of this evolving phenomenon was the investment by the government in their salaries.

Before the middle of the second/eighth century, judges were mostly part-time officials of the government, even if they served it in other, non-judicial capacities. The occasional references in the sources allow us to conclude that a great many – if not most – of them had other jobs, apparently more often manual than clerical. The *nisba*s that formed part of their names point to the manual and other non-judicial professions they practiced.[61] The Egyptian judge Khuzayma b. Ibrāhīm, for example, was otherwise a maker of halters, and the sources confirm that he continued to practice this profession during his tenure as judge (ca. 135/752). In fact, a man is said to have approached him during a court session and to have asked him if he could buy a halter from him. Khuzayma got up, went home (which must have been within a short distance), came back with a halter, sold it to the man, and immediately resumed his court business.[62] However, as time went on, there was a tendency among those who served (or wished to serve) as judges to adopt professions more akin to legal practice, the most notable of these being teaching (the Quran and other subjects) or, more often, copying books and manuscripts. In the middle of the second/eighth century or sometime thereafter, the Kūfan judge Sharīk b. ʿAbd Allāh reportedly was in the business of copying books, teaching the Quran and selling yogurt![63] Similarly, Muḥammad al-Khuwārizmī was a copyist working in Iraq before he was assigned to the judgeship of Fusṭāṭ in 205/820.[64]

The changes in the *qāḍīs*' salaries functioned as both cause and effect in their growing professionalization: they gradually abandoned other concurrent professions and engaged themselves exclusively in judicial work. It appears that even as late as the ninth decade of the first century, judges were still receiving military–administrative stipends (*ʿaṭā'*) – to be sharply distinguished from judicial salaries, referred to by the common expression "*ujriya ʿalayhi*" (roughly: "he was paid"). Under the caliph al-Walīd (r. 86/703–96/714), the judge of Damascus was receiving an *ʿaṭā'* in the handsome

[61] Hayyim Cohen, "The Economic Background and the Secular Occupations of Muslim Jurisprudents and Traditionists in the Classical Period of Islam (Until the Middle of the Eleventh Century)," *Journal of the Economic and Social History of the Orient*, 13 (1970): 16–61.
[62] Wakiʿ, *Akhbār*, III, 233, 234.
[63] Ibid., III, 150, 151.
[64] Kindī, *Akhbār*, 449.

amount of 200 *dīnār*s a month.[65] This was an extraordinarily high stipend, unique in our sources, and it can perhaps be explained by the fact that the appointee was the judge of the imperial capital. By contrast, the average salary of Egyptian *qāḍī*s ca. 140/757, a much later date, was close to 30 *dīnār*s a month, although smaller salaries are documented from the same period.[66] Still, such an income was far better than the average salary of an artisan or a craftsman. The monthly income of a tailor or an embroiderer during this period does not seem to have exceeded 10 *dīnār*s a month,[67] and a family would have needed some 60 *dīnār*s a year in order to maintain a modest standard of living at this time.[68] By the end of the second/eighth century, the judges' salaries seem to have increased dramatically, an indication that the process of professionalization of the judiciary had reached a certain point of culmination. The salary of Fusṭāṭ's judge, al-Faḍl b. Ghānim, was 168 *dīnār*s a month in 198/813,[69] a generous income considering that this was a provincial appointment. The sources make it clear that this pay was unprecedented for an Egyptian judge,[70] but that it became more or less the standard for later appointments. Thus, we might well take it as an index of the growing specialization and professionalization of the office of *qaḍā'* which, by the end of the third/ninth century, became much coveted and as such developed into a possible source of corruption and competition among the learned hierarchy.

The specialization-cum-professionalization of the *qāḍī*'s office meant that by the beginning of the third/ninth century, and certainly by the middle of it, the judge's functions were defined once and for all. Story-telling, policing and tax collection were, as a rule, removed from his purview, while litigation in all its aspects became his major concern. For in addition to arbitrating disputes, deciding cases and executing verdicts,[71] he supervised the performance of all his assistants – the scribe, the witness examiner, the chamberlain, the trustees and the *munādī*. His functions, however, did not exclude other normative duties performed by *qāḍī*s in earlier periods. Thus, directly or indirectly, he (1) supervised charitable trusts (*awqāf*), their material condition, their maintenance and the performance of those who managed them;[72]

[65] Wakī', *Akhbār*, III, 202.
[66] Ibid., III, 233, 235.
[67] Ibid., III, 169.
[68] Ibid., III, 246.
[69] Kindī, *Akhbār*, 421. For other salaries, see ibid., 435 and Wakī', *Akhbār*, III, 187, 242.
[70] Kindī, *Akhbār*, 421.
[71] Wakī', *Akhbār*, II, 415; III, 89, 135.
[72] Kindī, *Akhbār*, 383, 424, 444, 450.

(2) acted as guardian for orphans, administering their financial affairs and caring for their general wellbeing;[73] (3) took care of the property of absentees, as well as that of anyone who died heirless;[74] (4) heard petitions for conversion from other religions to Islam, and signed witnessed documents to this effect for the benefit of the new Muslims;[75] (5) attended to public works; and (6) often led Friday prayers and prayers at funerals, and announced the rising of the moon, signaling the end of the fast of Ramadan.

3. EXTRA-JUDICIAL TRIBUNALS

Roughly around the time that the ʿAbbāsids created a centralized judicial hierarchy, there appeared a new set of tribunals that stood at the margins of the Sharīʿa courts. These were the *maẓālim* tribunals (lit. "boards of grievances"), generally instated by governors and viziers, theoretically on behalf of the caliph, and presumably for the purpose of correcting wrongs committed by state officials. Theoretically, too, they were sanctioned by the powers assigned to the ruler to establish justice and equity according to the religious law (*siyāsa sharʿiyya*). In reality, however, they at times represented his absolutist governance and interference in the Sharīʿa, however marginal this may have been. Marginal, because the jurisdiction of these tribunals was both limited and sporadic: they were neither permanent nor could they be sustained in the manner the Sharīʿa courts were.

It must be noted, however, that the precise nature of these tribunals is not clear, especially during the formative period. The sources say little about the qualifications of the judges who presided over them, and even less about the procedures and rules they applied. Generally speaking, they tended to apply a wide range of procedural laws – wider, at any rate, than those procedures adopted by the Sharīʿa court judges. They seem to have adopted a far less stringent procedure – admitting, for instance, coercion and summary judgments. Their penalties, furthermore, exceeded the prescribed laws of the Sharīʿa. They thus applied penal sanctions in civil cases, or combined civil and criminal punishments in the same case.

By all indications, the *maẓālim* tribunals functioned less as an encroachment on the Sharīʿa courts than as a supplement to their jurisdiction. Characterized as courts of equity, where the sovereign showed himself to

[73] Wakīʿ, *Akhbār*, II, 58; Kindī, *Akhbār*, 444.
[74] Wakīʿ, *Akhbār*, II, 58; Kindī, *Akhbār*, 444.
[75] Wakīʿ, *Akhbār*, II, 65.

be conducting justice, the *maẓālim* tribunals operated within four main spheres: (1) they prosecuted injustices committed in the performance of public services, such as unfair or oppressive collection of taxes, or non-payment of salaries by government agencies; (2) they dealt with claims against government employees who transgressed the boundaries of their duties and who committed wrongs against the public, such as unlawful appropriation of private property; (3) they heard complaints against Sharīʿa judges that dealt mainly with questions of conduct, including abuses of office and corruption (the *maẓālim* tribunals did not arrogate to themselves the power to hear appeals against Sharīʿa court decisions, which as we have seen were to all intents and purposes final);[76] and (4) they enforced Sharīʿa court decisions that the *qāḍī* was unable to carry out.

References to the *maẓālim* tribunals are rare in our sources. It seems certain that they began to appear after the middle of the second/eighth century, especially during the reign of the caliph al-Mahdī (158/775–169/785). Their function may have been to adjudicate extra-judicial matters, but our sources portray these tribunals as a sort of temporary substitute for the Sharīʿa courts, specifically during periods when a city or a region was left without a Sharīʿa *qāḍī* to sit on the bench. For example, the first reference – to the best of my knowledge – to *maẓālim* in the province of Egypt appears for the year 211/826. In that year, the judge Ibrāhīm b. al-Jarrāḥ died, leaving the bench empty. Unable to find a *qāḍī*, ʿAbd Allāh b. Ṭāhir, then governor of Egypt, appointed ʿAṭṭāf b. Ghazwān as a *maẓālim* magistrate. But once the *qāḍī* ʿĪsā b. al-Munkadir was found willing to serve in Egypt, ʿAṭṭāf was immediately dismissed, having served for less than a year. Again, when ʿĪsā was himself dismissed in 215/830, it was said that Egypt had no *qāḍī*, and Muḥammad b. ʿAbbād was appointed as a *maẓālim* magistrate for about a year, until Hārūn b. ʿAbd Allāh assumed office as Sharīʿa judge. In fact, later on – between 270/883 and 277/890, and between 280/893 and 292/904 – Egypt was exclusively under *maẓālim* jurisdiction, apparently because no *qāḍī* could be found (at least no *qāḍī* who would accept the office).[77]

Judging from the Egyptian experience in the third/ninth century, there appears to have been a great deal of overlap between the *maẓālim* tribunals and the Sharīʿa courts. First of all, during this period, the *maẓālim* tribunals were instituted not in addition to, but instead of, the Sharīʿa courts,

[76] For a general discussion of successor review, see David Powers, "On Judicial Review in Islamic Law," *Law and Society Review*, 26 (1992): 315–41.

[77] Kindī, *Akhbār*, 432–33, 441, 479–81.

and the reason for this substitution was (by all indications) not judicial interference on the part of the sovereign but rather the absence of men qualified or willing to serve as Sharīʿa judges. If this substitution was meant to bridge the gap left by the absence of a functioning Sharīʿa court, then it is plausible to assume that these tribunals dealt with the same issues that normally came before the Sharīʿa court. Second, some *maẓālim* tribunals were staffed by Sharīʿa judges, no less. In 270/883, Muḥammad b. ʿAbdah was appointed to the *maẓālim* court for seven years, but in 292/904, he was recalled to serve in the joint appointment of a *maẓālim*-cum-Sharīʿa *qāḍī*.[78] Such appointments, and more so, appointments of Sharīʿa judges to *maẓālim* tribunals, were a common phenomenon throughout Islamic history. Third, at least in the Egyptian experience under discussion – and offering an excellent example of jurisdictional overlap – a Sharīʿa judge had the power to rescind decisions of the *maẓālim* magistrate. When Hārūn was appointed as a *qāḍī* in 216/831, he reviewed the decisions of the *maẓālim* magistrate Muḥammad b. ʿAbbād and "revoked many of them."[79] This judicial review may have been sparked by Ibn ʿAbbād's judicial incompetence, but it is more likely that it was a reaction to the extraordinarily wide discretion of the *maẓālim* procedures and the nature of the penalties its tribunals imposed. Be that as it may, during the entire formative period and long thereafter, the standard and dominant law court was the *qāḍī*'s Sharīʿa court. The *maẓālim* tribunals were both sporadic and ephemeral.

[78] Ibid., 480–81.
[79] Ibid., 441.