THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

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CHAPTER 8

Law and politics: caliphs, judges and jurists

Between the death of the Prophet and the first quarter of the second century of the Hijra (ca. 632–740 AD), Islam witnessed a major evolution in the relationship between the body politic and the law. Until the 80s/700s, the main representatives of the legal profession were the proto-*qāḍī*s, who, for all intents and purposes, were not only government employees and administrators of sorts but also laymen who – despite their experience in adjudication – had no particular legal training. As we saw in chapter 2, their appointments as *qāḍī*s were most often conjoined with the functions of tax-collectors, provincial secretaries of the treasury, police chiefs or story-tellers. In these capacities, they functioned as the provincial governor's assistants, if not – on rare occasions – as governors-cum-*qāḍī*s. In the near absence of a class of private, legal specialists at this time, these proto-*qāḍī*s constituted the bulk of what may be termed a legal profession, and as such they were an integral part of the ruling machine. During this phase, then, no noticeable distinction can be made between government[1] and law, since both functions resided in the same hands.

Yet, despite the formal inseparability of the proto-*qāḍī*'s office from that of government administration, the government did not always enjoy the prerogative of determining what law was applied. As shown in chapter 2, the proto-*qāḍī*s adjudicated cases on the basis of their *ra'y*, which was based in turn on either a *sunna māḍiya* (past exemplary actions, including those of the Prophet and the caliphs) or commonsense. They also increasingly resorted to the Quran. The caliphate was by no means a distinct or a comprehensive source of law. No edicts regulating law are known to have come down from caliphs, no constitutions, and certainly no legal codes of any kind. Even when no class of legal specialists had yet appeared, neither

[1] Here, I will avoid using the term "state" to refer to the caliphate as a ruling institution, since the term invokes modern connotations associated with the nation-state that is fundamentally different from its predecessors.

the caliphs nor their ministers or provincial governors made any effort to control or appropriate the province of the law. The legal role of the caliph was one of *occasional* legislative intervention, coming into play when called for or when special needs arose. The caliphal legislative role was thus minimal, even failing to match their role as sunnaic exemplars. In this latter role, some – but by no means all – caliphs were seen by the proto- and later *qāḍī*s as providing a good example to follow, but this was not borne out by royal edicts or high-handed policy. The occasional invocation – even application – of a caliph's *sunna* was an entirely private act, a free choice of a *qāḍī* or a scholar. On the other hand, caliphal orders enjoining a judge to issue a particular ruling were a rare occurrence. Thus the proto-*qāḍī* was principally a government administrator who seldom dabbled in law strictly so defined, but acted largely according to his own understanding of how disputes should be resolved – guided, as he was, by the force of social custom, Quranic values and the established ways of the forebears (*sunan māḍiya*).

The caliphs, on the other hand, saw themselves as equally subject to the force of these *sunan* and the then-dominant religious values. True, they were God's and the Messenger's deputies on earth, but they were distinguished from other world leaders by the fact that they acted within the consensual framework of a distinct and largely binding social and political fabric. Like their earlier predecessors – the Arab tribal leaders and even Muḥammad himself – they viewed themselves as a part not only of their communities but also, and primarily, of the social and political customs that had come down to them across the generations and from which they were unable to dissociate themselves, even if they wanted to. The proto-*qāḍī*s' relative judicial independence was therefore due to the fact that social, customary and evolving religious values governed all, and were no more known to, or incumbent upon, the caliph than his judges. If the judges queried the caliphs with regard to difficult cases, it was also true that the caliphs queried the judges. That knowledge of the law – or legal authority – was a two-way street in the early period is abundantly evident, and eloquent testimony to the fact that the caliph of Islam was never an exclusive source of law or even a distinct source at all. Rather, his legal role was minimal and partial, mostly enmeshed – and selectively at that – in the body of exemplary precedent that Muslims came to call *sunan* (but not Sunna, later to become the preserve of the Prophet alone).

The emergence, after the 80s/700s, of a class of private legal specialists signaled a new phase in Islamic history, one characterized by the spreading in Muslim societies of a new religious impulse, accompanied by an ascetic

piety that became the hallmark of the learned religious elite in general and of the jurists (*fuqahā'*) and later mystics in particular. The importance of this piety in Muslim culture cannot be overemphasized, either at this early time or in the centuries to follow. If anything, its increasing force was to contribute significantly to later developments. Yet, even in this early period, ascetic piety took many forms, from dietary abstinence to abhorrence of indulgent lifestyles (with which the middle and later Umayyad caliphs were, with some exceptions, partly associated). Above all, this piety called for justice and equality before God – the very emblem of Islam itself.

By the end of the first century and the beginning of the second, it had become clear that a wedge existed between the ruling elite and the emerging religio-legal class. This wedge was to make itself evident with two concurrent developments, the first of which was the spread of the new religious ethic among the ranks of the legal specialists who increasingly insisted upon ideal human conduct driven by piety. In fact, it is nearly impossible to distinguish this ethic from the social category of legal scholars, since the latter's constitution was, as we have said, entirely defined by this ethic of piety, mild asceticism and knowledge of the law and religion. The second was the increasing power and institutionalization of the ruling elite, who began to depart from the egalitarian forms of tribal leadership the early caliphs had known, and according to which they had conducted themselves. Whereas the caliph 'Umar I, for instance, led a life that many Arabs of his social class enjoyed, and mixed with his fellow believers as one of them, Umayyad caliphs lived in palaces, wielded coercive powers, and gradually but increasingly distanced themselves from the people they ruled. Add to this the intrigue of power relations and the realpolitik of running an empire.

The religious impulse that was permeated with ethical and idealistic values, and that was inspired and enriched by the proliferation of the religious narratives of the story-tellers, *akhbārī*s and traditionists, began to equate government and political power with vice, and as infested with corruption as the religious impulse of the pious was virtuous. This attitude originated sometime around the end of the first century, and was reflected in the multitude of accounts and biographical details speaking of appointment to the office of judgeship. As of this time, and continuing for nearly a millennium thereafter, the theme of judicial appointment as an adversity, even a calamity, for legists who receive it became a topos and a dominating detail of biographical narrative. Jurists are reported to have wept – sometimes together with family members – upon hearing the news of their appointment; others went into hiding, or preferred to be whipped or

tortured rather than accept appointment. Just as Abū Qilāba al-Jarmī (d. 104/722 or 105/723) opted to flee Baṣra when he was appointed to judgeship, Abū Ḥanīfa was imprisoned and flogged for persisting in his refusal to serve in this capacity. Yet others resorted to ingenious arguments to escape the predicament. It is reported that in 106/724 the legist ʿAlī b. ʿAbd Allāh al-Muzanī claimed ignorance of the law when he was instructed by the governor to explain his refusal to accept the post he had been assigned. Realizing that his explanation did not do the trick, he continued to argue that if he turned out to be right, then it would be wrong to appoint an ignorant person to a judgeship; and if it turned out that he had lied as to his legal competence, then it would be no less wrong to appoint a liar to this noble office.[2]

Suspicion of political power and of those associated with it was so pervasive that the traditionists – and probably the story-tellers amongst them – managed to find a number of Prophetic traditions that condemned judges and rulers alike, placing both ranks in diametrical moral and eschatological opposition with the learned, pious jurists. On the Day of Judgment, one tradition pronounces, the judges will be lumped together with the sultans in Hellfire, while the pious jurists will join the prophets in Paradise. A less ominous tradition predicting the horrors of the Hereafter has two out of three judges slaughtered "without a knife," reserving a swifter, more merciful death for the chosen few.[3]

Yet, this profound suspicion of association with the political did not mean that the legists predominantly refused judgeships, or even that they did not desire them. In fact, by and large, they accepted appointment, and many junior legists must have viewed it as an accomplishment in their careers. On the other hand, the ruling elite could not dispense with the jurists, for it had become clear that legal authority, inasmuch as it was epistemically grounded, was largely divorced from political authority. Religion and, by definition, legal knowledge had now become the exclusive domain of the jurist, the private scholar. It is precisely because of this essentially epistemic quality that the ruling elite needed the legists to fulfill the empire's legal needs, despite its profound

[2] Shams al-Dīn al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, ed. B. Maʿrūf and M. H. Sarḥān, 23 vols. (Beirut: Muʾassasat al-Risāla, 1986), IV, 534; Wakīʿ, *Akhbār*, I, 26, III, 25, 37, 130, 143, 146, 147, 153, 177, 184, and *passim*; Muḥammad Ibn Saʿd, *al-Ṭabaqāt al-Kubrā*, 8 vols. (Beirut: Dār Bayrūt lil-Ṭibāʿa wal-Nashr, 1985), VII, 183; Zaman, *Religion and Politics*, 78 ff.; also Ibn Khallikān, *Wafayāt*, II, 18, III, 201, 202.

[3] Al-Shaykh al-Niẓām, et al., *al-Fatāwā al-Hindiyya*, 6 vols. (repr.; Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1400/1980), III, 310; Ibn Khallikān, *Wafayāt*, II, 18.

apprehensions that the legists' loyalties were not to the government but to their law and its requirements, which frequently conflicted with the views of the ruling class. But the fact remained that each side needed the other, and thus both learned how to cooperate – and cooperate they did.

The legists depended on royal and government patronage, the single most important contributor to their financial well-being. They were often paid handsome salaries when appointed to a judgeship, but they also received generous grants as private scholars. By the end of the Umayyad period, an average *qāḍī*'s salary was at least 150 *dirham*s a month, when the monthly income of a well-to-do tailor, for instance, did not reach 100 *dirham*s.[4] Shortly thereafter, and with the ascendancy of the ʿAbbāsids, remunerations for judicial appointments were steadily on the increase. During the late 130s/750s, an Egyptian judge could earn 30 *dīnār*s a month, equivalent to about 300 *dirham*s.[5] When Yaḥyā b. Saʿīd was appointed by the caliph al-Manṣūr (r. 136/754–158/775) as judge of Baghdad, the sources emphasize that his social and economic standing improved drastically.[6] By the end of the second/eighth century, a judge's salary was highly coveted. In 198/813, for instance, the judge of Egypt al-Faḍl b. Ghānim received 168 *dīnār*s a month, and a few years later, Ibn al-Munkadir was paid 4,000 *dirham*s, accompanied by a "starter" gift of 1,000 *dīnār*s.[7] The *qāḍī*s, however, were not alone in benefiting from government subsidy. The leading private scholars were no less dependent on the government's financial favors, and this, as we shall see, was for a good reason. The account relating how the ʿAbbāsid vizier Yaḥyā al-Barmakī bestowed on the distinguished jurist Sufyān al-Thawrī (d. 161/777) 1,000 *dirham*s every month is not untypical;[8] in fact, it accurately represents the benefits that accrued to the leading jurists from government circles.

On the other hand, the government was in dire need of legitimization, which it found in the circles of the legal profession. The legists served the rulers as an effective tool for reaching the masses, from whose ranks they emerged and whom they represented. It was one of the salient features of the pre-modern Islamic body politic (and probably those of Europe and Far Eastern dynasties) that it lacked control over the infrastructures of the

[4] For instance, cf. Kindī, *Akhbār*, 421 with Wakīʿ, *Akhbār*, III, 233.
[5] Wakīʿ, *Akhbār*, III, 235.
[6] Ibid., III, 242.
[7] Kindī, *Akhbār*, 421, 435.
[8] Ibn Khallikān, *Wafayāt*, III, 315.

civil populations it ruled. Jurists and judges emerged as the civic leaders who, though themselves products of the masses, found themselves, by the nature of their profession, involved in the day-to-day running of their affairs. As we saw in chapter 4, the judges were not only justices of the court, but the guardians and protectors of the disadvantaged, the supervisors of charitable trusts, the tax-collectors and the foremen of public works. They resolved disputes, both in the court and outside it, and established themselves as the intercessors between the populace and the rulers. Even outside the courtroom, jurists and judges felt responsibility toward the common man, and on their own often initiated action without any petition being made. For example, upon hearing that a man had been unjustly imprisoned, the famous Abū Ḥanīfa rushed to the authorities, pleading with them for his release, which they granted.[9] Similarly, when the Egyptians heard of the caliphal appointment of the reviled Abū Isḥāq b. al-Rashīd as their governor, their leaders turned to the judge Ibn al-Munkadir and asked him to intercede on their behalf by conveying, in writing, to the caliph their objections to the appointment. It is perhaps illustrative that Ibn al-Munkadir was to pay a heavy price shortly thereafter, for when the caliph, despite the petition, went ahead with the appointment, Ibn al-Rashīd, now governor, exacted revenge by dismissing him from his judgeship.[10]

Hence the religious scholars in general and the legists in particular were often called upon to express the will and aspirations of those belonging to the non-elite classes. They not only interceded on their behalf at the higher reaches of power, but also represented for the masses the ideal of piety, rectitude and fine education. Their very profession as Guardians of Religion, experts in religious law and exemplars of virtuous Muslim lifestyle made them not only the most genuine representatives of the masses but also the true "heirs of the Prophet," as a Prophetic *ḥadīth* came to attest.[11] When the caliph Hārūn al-Rashīd (r. 170/786–193/809) visited al-Raqqa, his trip coincided with the entry into the town of ʿAbd Allāh Ibn al-Mubārak, then one of the most distinguished and illustrious legal scholars of Islam.[12] It is reported that the latter attracted larger crowds than did the caliph, a sight which precipitated the comment – made by the

[9] Ibid., III, 203–04.
[10] Kindī, *Akhbār*, 440.
[11] Abū ʿUmar Yūsuf Ibn ʿAbd al-Barr, *Jāmiʿ Bayān al-ʿIlm wa-Faḍlihi*, 2 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.), I, 34.
[12] Shīrāzī, *Ṭabaqāt*, 94.

caliph's slave-wife who was present[13] – that "true kingship lies in the scholar's hands and hardly with Hārūn who gathers crowds around him by the force of police and palace guards."[14]

This anecdote, whether or not it is authentic, is both illustrative and representative of the locus of legitimacy and religious and moral authority in that era. A pious and erudite man could attract adulation by virtue of his piety and erudition, whereas a caliph could do so only by coercion. Thoroughly familiar with the ways of earlier caliphs, the likes of Abū Bakr, ʿUmar I and ʿUmar II, the later Umayyad and early ʿAbbāsid caliphs realized that brute power could not yield legitimacy, which they were striving to attain. Legitimacy lay in the preserve of religion, erudition, ascetic piety, moral rectitude and, in short, in the *persons* of those men who had profound knowledge of, and fashioned their lives after, the example of the Prophet and the exemplary forefathers.

It did not take long before the caliphs realized that inasmuch as the pious scholars needed their financial resources, they needed the scholars' cooperation, for the latter were the ruler's only means of securing legitimacy in the eyes of the populace. The growth of religious sentiment among the latter, and the enthusiastic support of the religious scholars, left the caliphs no option but to go the same way: namely, to endorse a religious law whose authority depended on the human ability to exercise hermeneutic. Those who perfected this exercise were the jurists, and it was they and their epistemological domain that set restrictions on the absolute powers of the rulers, be they caliphs, provincial governors or their agents. When the Persian secretary Ibn al-Muqaffaʿ (d. ca. 139/756) suggested to the ʿAbbāsid caliph that he, the caliph, should be the supreme legal authority, promulgating laws that would bind his judges, his suggestion was met with complete disregard.[15] For while his proposal insinuated that legal authority could have been appropriated by the caliph, the fact that nothing whatsoever came of it is a strong indication that the jurists' control over the law was, as before, irreversible. The legal specialists and the popular religious movement that had emerged by the 130s/750s were too well entrenched for any political power to expunge or even replace, for it is precisely this

[13] In fact, she was his *umm walad*, meaning a female slave who had borne the caliph's child. Legally and socially, *umm walad*s enjoyed special status, above and beyond that of other slaves. In caliphal courts, they at times were as powerful as the caliphs' immediate family members and advisors.

[14] Ibn Khallikān, *Wafayāt*, II, 16.

[15] A fine analysis of this proposal may be found in Zaman, *Religion and Politics*, 82–85. See also S. D. Goitein, "A Turning Point in the History of the Islamic State," *Islamic Culture*, 23 (1949): 120–35.

movement and its representatives that gave rise to the wedge between political power and religious authority.

Later epistles and treatises written by way of advice to the caliphs confirm the ascendancy of religious law as represented by the jurists and by their social and hermeneutical authority. No longer could anyone propose a caliphal appropriation of legal power. In the letter of ʿAnbarī (d. 168/785) to the caliph al-Mahdī and in Abū Yūsuf's (182/798) treatise to Hārūn al-Rashīd, the subservience of the caliph to the religious law and to the Sunna is a foregone conclusion.[16] The caliph and the entire political hierarchy that he commanded were subject to the law of God, like anyone else. No exceptions could be made.

Yet, ʿAnbarī and Abū Yūsuf did not conceive of themselves as adversaries of the caliphs. Their writings clearly exhibit the cooperation that the jurists were willing to extend to the rulers, for both were financially dependent on the caliphs, although both also hailed from a background entirely defined by religious law and religious morality. This cooperation, coupled with the realization that rulers too, not too long ago, were counted among the ranks of jurists, justified ʿAnbarī and Abū Yūsuf in their decision to treat the caliphs as peers of legists and judges. Their writings call on the caliphs to act as guides to their judges when faced with hard cases, a measure not only of the role that the legal scholars wanted to assign to caliphs as religious leaders but also of the latter's need to portray themselves as legitimate rulers standing in protection of the supreme law of God. It is clear then that in the legal sphere the caliph never acted with, or thought himself to embody, an authority superior to that of the jurists, be they judges appointed by him or private legal scholars. As M. Q. Zaman aptly put it:

> The caliph's participation in resolving legal questions gives him a religious authority akin to that of the [legal] scholars, not one over and above or against theirs; and it is in conjunction with the ʿulamāʾ that the caliph acts, even when he acts only as an *ʿālim*. What emerges . . . is not a struggle over religious authority, with the caliphs and scholars as antagonists, but rather the effort, on the part of the ʿAbbasid caliphs, to lay claim to the sort of competence the ʿulamāʾ were known to possess. This effort was not meant as a challenge to the ʿulamāʾ. It signified rather a recognition of their religious authority and an expression of the caliphal intent to act as patrons themselves. What is more, it signified the assertion of a public commitment to those fundamental sources of authority on which the ʿulamāʾ's expertise, and a slowly evolving Sunnism, were based.[17]

[16] Zaman, *Religion and Politics*, 85–100.
[17] Ibid., 105.

However, like all senior jurists as well as the caliphs themselves, ʿAnbarī and Abū Yūsuf knew very well that the caliphs of their time were not equipped with the legal erudition necessary to discourse on complex matters of law. Hence the added advice – already duly observed in practice – that caliphs should surround themselves with competent jurists who would assist them in addressing such difficult legal matters. This suggestion was the solution to caliphal legitimacy, and the caliphs generally heeded this advice. Thus, while the earliest caliphs could acquire legitimacy by virtue of their own knowledge of the law, it later became necessary to supplement the caliphal office with jurists who made up for the sovereign's comparative ignorance – another way of saying that the jurists constituted the legitimacy that the caliphs desperately needed.

Our sources are replete with references to the effect that caliphs "sat" in the company of distinguished jurists. There they not only discussed with them matters of religion, law and literature, but also listened to their arguments and scholarly disputations.[18] Almost every caliph of the second, third and fourth centuries was known to have befriended the *fuqahāʾ*, from Abū Jaʿfar al-Manṣūr and Hārūn al-Rashīd down to al-Maʾmūn, al-Muʿtazz (r. 252/866–255/868), and the Fāṭimid al-Muʿizz (341/953–365/975).[19] Provincial governors took care to do the same. The biographer and historian Kindī, who wrote sometime between 320/932 and 350/960, speaks of the Egyptian governors' regular practice of holding assemblies (*majālis*) of the jurists, a practice that seems to have continued uninterrupted between the middle of the second/eighth century down to Kindī's time.[20]

The privileges and favors the jurists acquired not only brought them easy access to the royal court and to the circles of the political elite,[21] but also rendered them highly influential in government policy as it affected legal matters, and perhaps in other matters of state. From the middle of the second/eighth century, almost all major judicial appointments were made at the recommendation of the chief justice at the royal court or the assembly of jurists gathered by the caliph, or both. And when the provincial governor wished to find a qualified judge, he too sought the advice of

[18] Later to become a specialized field on its own, generating much writing and theory. See Wael Hallaq, "A Tenth–Eleventh Century Treatise on Juridical Dialectic," *The Muslim World*, 77, 2–3 (1987): 189–227.

[19] Wakīʿ, *Akhbār*, III, 158, 174, 247, 265 and *passim*; Ibn Khallikān, *Wafayāt*, II, 321, 322; III, 204, 206, 247, 258, 389.

[20] Kindī, *Akhbār*, 388.

[21] In addition to the sources cited in nn. 19–20, above, see al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 14 vols. (Cairo: Maṭbaʿat al-Saʿāda, 1931), IX, 66.

jurists. Even Ibn Idrīs al-Shāfiʿī, whose ties to the ruling circles were tenuous, was consulted by Egypt's governor. One of his recommendations to the latter is said to have led to the appointment of Isḥāq b. al-Furāt as judge of Fusṭāṭ.[22]

At times, however, the jurists' influence in legal and political matters was immeasurable, as attested by the career of Yaḥyā b. Aktham b. Ṣayfī (d. 242/856). One biographical account portrays him as a highly learned and reputable scholar and jurist who "made himself equally accessible" to both the common folk and high society. He particularly excelled in knowledge of the law, and was so revered by the caliph al-Maʾmūn that he "dominated the caliph." No one could come closer to al-Maʾmūn than he did, so much so that not only was he appointed chief justice of the empire but also no vizier could act without consulting him first, even – we understand – in political matters. Only one other person, the account continues, was known to influence al-Maʾmūn as deeply, namely, Ibn Abī Dāwūd who, not surprisingly, was another jurist and judge who became well known for presiding over the infamous Miḥna.[23]

Although keeping company with jurists and assigning them positions of power were salient features of the caliphal bid to acquire legitimacy, the involvement of the caliphs in legal and religious life took many other, different forms. When the caliph went on pilgrimage, he did so together with the distinguished legal scholars who staffed his court, and when a leading jurist died, the funeral prayer (*ṣalāt al-janāza*) was performed by the caliph himself. Likewise, it was normally the distinguished jurists who performed this prayer when a caliph died. Moreover, the caliphs continued to display an interest in religious learning in an attempt to maintain the image of erudition for which some early caliphs were known. Thus, they dabbled in legal matters and studied and memorized *ḥadīth* that were usually effective as tools of legitimization when cited in courtly audiences.[24]

That the caliphs strove to acquire legitimacy through religious and juristic channels is therefore abundantly obvious. But this cannot mask the fact that there always remained a point of friction between worldly, secular power and religious law. This relationship between the two was constantly negotiated, and it was never devoid of sporadic challenges mounted by political forces against the law and its representatives. For

[22] Kindī, *Akhbār*, 393.
[23] Ibn Khallikān, *Wafayāt*, III, 277 ff.
[24] Baghdādī, *Tārīkh*, IX, 33, 35–36; Zaman, *Religion and Politics*, 120–27.

instance, in 135/752, a soldier defamed the character of a man who brought his case before the judge of Fusṭāṭ, Khayr b. Nuʿaym. Upon the testimony of a single witness, the judge imprisoned the soldier until the plaintiff produced other witnesses. But the Egyptian governor, ʿAbd Allāh b. Yazīd, released the soldier before the case was resolved, thus interfering in the judicial process. On hearing the news of the soldier's release, Khayr resigned his post in protest and persisted in his refusal to resume his function despite the pleas of the governor. Khayr made the re-arrest of the soldier a condition for his return to the post. The governor refused the condition and soon appointed another judge in lieu of Khayr, apparently absolving the soldier of all liability once and for all.[25] Similarly, in 89/707, the court scribe of Egypt's governor was convicted by the *qāḍī* ʿImrān b. ʿAbd Allāh al-Ḥasanī on a charge of drinking wine. The governor accepted the verdict in principle, but refused to allow the court to mete out punishment. Like Khayr, al-Ḥasanī resigned in protest,[26] and the scribe apparently was left unpunished. A more striking case is one that reportedly occurred sometime during the tenure of the judge Abū Khuzayma al-Ruʿaynī (144/761–154/770), who was asked by the Egyptian governor to divorce a woman on the grounds that her husband was incompatible (*ghayr kafuʾ*)[27] with her status, a request that al-Ruʿaynī rejected. The governor nonetheless went ahead and dissolved the marriage himself without the judge's consent.[28]

Although most such violations seem to have occurred at the provincial and periphery courts, the caliphs themselves also appear, on rare occasions, to have interfered in the judiciary and the judicial process. Fusṭāṭ's judge, ʿAbd al-Raḥmān al-ʿUmarī, was known for his corruption and unjust conduct, which caused a number of the city's learned scholars to travel to Baghdad in order to complain about him to the caliph Hārūn al-Rashīd. Despite the serious accusations, which seem to have been well founded,[29] Hārūn refused to dismiss him, on the ground (or pretext) that ʿUmarī was a descendant of caliph ʿUmar I.[30] Similarly, the animosity that a group of people harbored toward the Baghdadian judge Muḥammad b. ʿAbd Allāh al-Makhzūmī drove them to take action against him. They argued before

[25] Kindī, *Akhbār*, 356; Wakīʿ, *Akhbār*, III, 232.
[26] Kindī, *Akhbār*, 328.
[27] A legal requirement, compatibility (*kafāʾa*) means that there cannot be a significant gap between husband and wife in respect of lineage, religion, freedom or economic status. Thus, a marriage of a tailor to a merchant's daughter may be invalidated on grounds of economic disparity. See Ibn Naqīb al-Miṣrī, *ʿUmdat al-Sālik*, 523–24.
[28] Kindī, *Akhbār*, 367.
[29] For ʿUmarī's eventful career as a corrupt judge, see ibid., 394–411.
[30] Ibid., 410–11.

the caliph al-Maʾmūn that Makhzūmī had fought on the side of his brother al-Amīn when the latter was a contender for the throne against al-Maʾmūn. Although the caliph does not seem to have been convinced of the accusation, and despite his initial, adamant reluctance to remove the judge, he finally bowed to their wishes. In what seems to have been a diplomatic move, the caliph sent an emissary to persuade Makhzūmī to submit his resignation. Makhzūmī obliged the caliph and received a generous monetary reward as recompense.[31]

If these anecdotes illustrate caliphal abuses of the law, they are still exceptions to an overwhelming pattern, displayed in the sources, of caliphal reluctance to overstep their limits in judicial intervention. Thus, when the caliph Abū Jaʿfar al-Manṣūr (r. 136/754–158/775) wrote to his Baṣran judge, Sawwār, with regard to a case, the latter treated the caliph's request (the details of which we do not know) as legally unwarranted and thus dismissed it. Offended by this verdict, Manṣūr resorted to threats, but never acted upon them, for an advisor or a confidant of his is reported to have told him: "O Commander of the Faithful, Sawwār's justice is, after all, an extension of yours."[32] The implication of this statement is that a judge's just and fair decisions are ultimately attributed to the caliph who is deemed the highest authority commanding good and forbidding evil.

That the caliphal office was thought to uphold the highest standards of justice according to the holy law was undeniable, and the caliphs themselves felt such responsibility, generally conducting themselves in accordance with these expectations. Sawwār's career provides an illustration of this principle as well. When Baṣra's chief of police ʿUqba b. Sālim appropriated a pearl belonging to a man, the latter's wife brought a complaint to Sawwār's court. The judge sent a messenger to ʿUqba to enquire into the facts, but the latter, instead of cooperating, insulted the messenger "most severely." After another court assistant met with the same reception, Sawwār sent ʿUqba a letter carrying a stern warning, threatening him with severe punishment if he did not restore the pearl to its lawful owner. The letter apparently was read to ʿUqba in the presence of counselors who advised him to comply immediately with the *qāḍī*'s request. The reason given was that Sawwār was not only a powerful man but also, and perhaps more importantly, because he was "the *qāḍī* of the Commander of the Faithful."[33] In as much as the law in and of itself possessed authority – which

[31] Wakīʿ, *Akhbār*, III, 271–72.
[32] Ibid., II, 60.
[33] Ibid., II, 59.

would only increase after Sawwār's time – the caliph and his office were seen not only as another locus of the holy law, but also as its upholder and enforcer.

The overwhelming body of evidence at our disposal compels us to conclude that, as a rule, the caliphs and their provincial representatives upheld court decisions and normally did not intervene in the judicial process. (This is borne out by the fact that the sources record the unusual, those events worthy of note, because they stood out from the rest. Biographers and historians were not interested in recording the day-to-day routine of the judiciary, and if we know something about this routine, it is because it often creeps into those relatively few accounts of an unusual nature. Thus, whatever caliphal or governmental encroachment on the judiciary happened to be recorded in the historical annals of Islam, they were likely to have been exceptional cases and, therefore, statistically out of proportion to the – probably hundreds of thousands of – cases that went unnoticed due to the fact that they were "usual cases" in which law and the judicial process took their normal course.)

However, when caliphs or their subordinates became involved in the judicial process – however rarely – it was often the case that they did so within the standard, acceptable legal channels. One example must suffice here. In what seems to have been a problematic case of *waqf* in Fusṭāṭ, a number of consecutive judges reversed the rules of their predecessor regarding the entitlement to benefits on the part of the children of the *waqf*-founder's daughters. Early in the third/ninth century, Hārūn b. 'Abd Allāh had ruled against their inclusion as beneficiaries, but his successor, Muḥammad b. Abī al-Layth reversed his ruling. When al-Ḥārith b. Miskīn was appointed as judge in 237/851, he in turn reversed the latter's decision, depriving the daughters' children of any benefits. One of the claimants to these benefits, Isḥāq Ibn al-Sā'iḥ, traveled to Baghdad and presented his case against Ḥārith's ruling to the caliph al-Mutawakkil. Following his habitual practice, the caliph referred the case to his assembly of jurists. Kūfans to a man, and therefore basing themselves on Ḥanafite principles, the jurists ruled that Ḥārith's decision was invalid. Ḥārith, however, had ruled on the case according to Medinan Mālikite principles. On hearing of the reversal of his ruling, Ḥārith – in typical fashion – resigned his post, for he seems to have regarded the reversal as an unjustified judicial intervention (and rightly so, since a *qāḍī*'s decision is irrevocable during his tenure). His successor, Bakkār b. Qutayba, was a Ḥanafite and as such ruled – reportedly with great reluctance – in favor of the daughters' male

line.[34] It is not clear whether or not the caliph had any personal stake in the dispute, but it remains true that his judicial intervention was effected by "legal" means, since, theoretically, the caliph is empowered to determine jurisdiction and can thus specify under which doctrine a judge should decide cases.

Our sources reveal that the caliphs and their subordinates generally did comply with the law, if for no other reason than in order to maintain their political legitimacy. Yet, it appears reasonable to assume that their compliance stemmed from their acceptance of religious law as the supreme regulatory force in both society and empire, coupled with the conviction that they were in no way rivals of the religious legal profession. Instances of judges deciding in favor of persons who litigated against caliphs and governors are well attested in the literature, with the latter accepting and submitting to such verdicts.[35] Illustrative is the case of a debtor who died leaving behind small children during the judgeship of the aforementioned Bakkār b. Qutayba. The creditor was none other than the governor of Egypt, Ibn Ṭūlūn, who deployed his tax-collector to petition the judge for the sale of the debtor's house in order to repay the debt. Bakkār demanded proof of the existence of the debt, a demand that the governor met. When asked again to permit the sale of the house, the judge imposed a second requirement, namely, that Ibn Ṭūlūn had to take the oath that he was entitled to the value of the debt. This Ibn Ṭūlūn did too. Only then did Bakkār decree that the house could be sold.[36] Likewise, when the caliph Hārūn wished to buy a slave-girl from a man who refused to sell her due to a legal predicament in which he found himself, the jurist and judge Abū Yūsuf was asked to intervene. He is reported to have found a way out, and to have convinced the man to sell the slave to the caliph.[37] These accounts suggest that even the highest political and military offices in the land found it necessary to resort to the law and to submit to its (sometimes lengthy) procedures, even when they easily could have accomplished their ends through sheer coercion. That there are nearly as many accounts attesting to this compliance as there are those portraying encroachment by the political authorities is, once again, deceptive, since lack of compliance

[34] Kindī, *Akhbār*, 474–75.
[35] See, e.g., Ibn Khallikān, *Wafayāt*, III, 392; Ibn ʿAbd Rabbih, *al-ʿIqd al-Farīd*, ed. Muḥammad al-ʿAryān, 8 vols. (Cairo: Maṭbaʿat al-Istiqāma, 1953), I, 38–48.
[36] ʿAsqalānī, *Rafʿ al-Iṣr*, printed with Kindī, *Akhbār*, 508.
[37] Ibn Khallikān, *Wafayāt*, III, 392.

was, as we have stated, more worthy of being recorded by historians and biographers than was compliance itself.

The relative infrequency of the rulers' encroachment on the legal sphere appears to follow a particular pattern, namely, that such infringements were usually associated with cases in which the rulers' own interests were involved. Although this in no way means that encroachment occurred whenever such interests were present, it does suggest that whenever rulers staked their interest in the judicial process, they had to weigh their overall gains and losses. To have accomplished their ends through coercion would have meant that their legitimacy had failed the test. On the other hand, total compliance with the law at times meant that their quest for material gain or will to power would be frustrated. It was this equation that they attempted to work out and balance carefully, at times succeeding but at others not. The post-formative centuries of Islamic history suggest that rulers generally preferred to maintain an equation in favor of compliance with the religious law, since compliance was the means by which the ruling elite could garner the sympathies, or at least tacit approval, of the populace.

This tendency toward compliance holds true despite the events of the Miḥna, which in fact increased the level of compliance after its disastrous failure. The Inquisition began in 218/833, toward the end of the caliph al-Ma'mūn's reign, and came to an end in 234/848, some fifteen years later. Its main hallmark was the caliphal will to impose on all religious scholars and employees of the government the Mu'tazilite creed that the Quran was the created word of God, and that it was not coeternal. Many jurists, judges and jurisconsults, among others, were imprisoned, even tortured, for their refusal to subscribe to this creed. Moreover, no one who refused the doctrine of createdness could be deemed a qualified court witness. Yet, it was a judge, Ibn Abī Dāwūd, who carried out the caliphal wish. That there were legists who supported the doctrine and many others who did not suggests that the caliphs of the Miḥna did not intend to challenge the *legal* authority of the religious scholars. In any event, the relatively quick demise of the Miḥna demonstrated not only its extraordinary and exceptional nature, but also the inability of the powers-that-be to manipulate the religious establishment and its traditionalist character. Traditionalism was restored, but now with a greater force. We saw earlier that traditionalism was on the rise, but the Miḥna hastened its upsurge and made it all the more compelling. If the caliphs were not the legists' challengers before the Miḥna, they were even less so after it. Legal authority and power were and remained the lot of the private legal specialists, and the caliphs and

their subordinates remained careful in balancing their will-to-power with the need for legitimacy – and this they could obtain mainly, if not only, through compliance with the religious law and requirements of the jurists. Whereas the jurists, on the whole, never compromised their law (although they had to skate on thin ice when dealing with political power), the caliphs had to account for the law and its demands, observing it more often than not. On balance, if there was any pre-modern legal and political culture that maintained the principle of the rule of law so well, it was the culture of Islam.[38]

[38] For more on this theme and its implications for both the modern and pre-modern periods, see Wael Hallaq, "'Muslim Rage' and Islamic Law," *Hastings Law Journal*, 54 (August 2003): 1–17.