Justice and Leadership in Early Islamic Courts

Edited by Intisar A. Rabb and Abigail Krasner Balbale

Published by the
Islamic Legal Studies Program, Harvard Law School
Distributed by Harvard University Press
Cambridge, Massachusetts
2017

Library of Congress Control Number:
2017948414

Printed in the United States of America
ISBN 9780674984219

Chapter Two

Circumstantial Evidence in the Administration of Islamic Justice

Hossein Modarressi
Princeton University

In a decree that the ʿAbbāsid caliph al-Ṭāʾiʿ li-Allāh (r. 974–991) issued for the position of *ṣāḥib al-maẓālim*, an office in the Islamic judicial system with the authority to use executive power that was set up to investigate complaints of injustice where the intervention of the executive power was deemed necessary,[1] it is stated:

> The jurisdictions of the judge and the officer in charge of the *maẓālim* are the same, except that the judge is bound by solid and plain evidence, while the officer in charge of the *maẓālim* looks for types of evidence that are obscure and concealed.[2]

In a similar way, the mid-eleventh-century chief judge of the ʿAbbāsid caliphate Abū al-Ḥasan al-Māwardī (d. 450/1058) explains in his manual of Islamic administrative practice that:

> The officer in charge of the *maẓālim* uses extra [means of] intimidation and looks for clues through indications and circumstantial evidence (*al-amārāt al-dālla wa-shawāhid al-aḥwāl*)—means that are not available to judges.[3]

These statements accurately, even if briefly, define a main difference between the two juridical institutions: Ordinary courts acted strictly on the

1 The office could also investigate complaints of unfair treatment by branches of the administration, similar to Star Chamber in the English justice system from the late 15th to mid-17th centuries (with many thanks to Intisar Rabb for bringing this parallel to my attention).

2 Aḥmad b. ʿAlī al-Qalqashandī (d. 821/1418), *Ṣubḥ al-aʿshā* (Cairo: Dār al-Kutub al-Khidīwiyya, 1913-1922), 10:252.

3 Abū al-Ḥasan al-Māwardī (d. 450/1058), *al-Aḥkām al-sulṭāniyya waʾl-wilāyāt al-dīniyya* (Cairo: al-Maktaba al-Tawfīqiyya, 1978), 93.

basis of oral testimony (including voluntary confession) and oath, and were not supposed to use any other evidence. However, *maẓālim* courts would examine a case in its proper context and seriously consider all internal and external indications for resolving that case, including circumstantial evidence.

Ignoring the internal and external evidence pertaining to a case in traditional Islamic courts would, at times, impose major costs on the judiciary, as the system often could not function with oral testimony alone.[4] Examples of such situations are abundantly cited in pre-modern Islamic sources. Jalāl al-Dīn al-Dawānī's description of how the court functioned in his time should suffice as a case in point.[5] He writes:

> As a matter of fact, the absence of *maẓālim* courts caused many rights of Muslims to be wasted, and allowed the wicked and deceitful to dominate and seize people's property. (In cases like this) when the victim goes to court, first the ʿ*udūl* (that is, close aides to the judge who function like court clerks) dally and scruple as to how to draft the petition. This process could take considerable time, and could delay the presentation of the petition for a long period by employing various kinds of tricks deliberately used to postpone [a decision].
>
> Next, when the petition is submitted and the witnesses give their testimony, the ʿ*udūl* start finding fault with the wording that the witnesses used in their statements, and go around and ask the jurists whether that specific wording can be valid, and thus delay the [operation of] procedural due process in the case for an even longer period.
>
> Next comes the stage [in which the judge is] to review the trustworthiness of the witnesses through character witnesses who will be asked to certify that they know the [testimonial] witnesses to be righteous and reliable. This will take considerably more time, especially as the ʿ*udūl* continue to scruple as to the wording of the certifications of the character witnesses to make sure that they satisfy the rules.

4 For reports of an eyewitness to examples of this phenomenon, see Jalāl al-Dīn al-Dawānī (d. 908/1502-3), *Dīwān-i Maẓālim*, ed. Hossein Modarressi in *Farhang-i Irānzamīn* 27 (1987), 98–119.

5 Jalāl al-Dīn al-Dawānī was a respected late-9th/15th century Iranian philosopher and author of a celebrated work on ethics called *Akhlāq-i Jalālī*. He served as the chief judge of the southern Iranian province of Fars during one period of his life. See Ann K.S. Lambton, "al-Dawānī," *EI*^{2}, 2:174; and Andrew J. Newman, "Davānī, Jalāl al-Dīn Moḥammad," *Encyclopaedia Iranica*, 7:132–33.

> Then comes the turn of the other party to contest the reliability of the witnesses by presenting affidavits of parallel character witnesses to certify the untrustworthiness of the witnesses for the petitioner. This process, in turn, has to go through the scrutiny of the religious character of the character witnesses who contest the reliability of the witnesses, and so on and so forth.
>
> At times, a small petition lingers around in court for such a long time that the parties get fed up with the process. And when the case is a criminal case, the purpose is completely lost.[6]

Nevertheless, traditional Islamic legal procedures did not permit judges to go beyond the use of testimony and oaths as evidence, and would not allow any modification or reform.

There were two exceptions to that general rule: First, an old opinion among some Sunnī[7] and Shīʿī[8] jurists allowed judges to act according to their own *personal knowledge*. The concept of knowledge in this context was conventionally[9] understood to refer to instances in which the judge had personally witnessed an event, such as the murder of the victim by the killer or the utterance of the formula of divorce by the husband.[10] Among those who allowed judges to use their personal knowledge, there were considerable differences of opinion, often along the lines of differences between various schools and scholars. That is, some allowed the judges to use their personal knowledge, with certain constraints surrounding the context in which this knowledge could be obtained and the context to which

6 Dawānī, *Dīwān-i Maẓālim*, in *Farhang-i Irānzamīn* 27:115.

7 These Sunnī jurists included most of the Ḥanafīs, as well as Ibn Ḥazm (d. 456/1064) of the Ẓāhirī school. See Ibn Ḥazm, *al-Muḥallā* (Cairo: Idārat al-Ṭibāʿa al-Munīriyya, 1929-1934), 9:370. The early Shāfiʿīs agreed with this opinion in principle, but ruled against its application in practice in order to hold judges accountable for their decisions. They did so "because of the corruption of the court in their times." See Muwaffaq al-Dīn Ibn Qudāma (d. 620/1223), *al-Mughnī* (Cairo: Dār Hajar, 1986-1990), 14:31. See also ʿAbd al-Karīm Zaydān, *Niẓām al-qaḍāʾ fī al-sharīʿa al-Islāmiyya* (Baghdad: Maṭbaʿat al-ʿĀnī, 1984), 211–15 and the sources cited therein.

8 See their opinions as quoted in Muḥammad Jawād b. Muḥammad al-ʿĀmilī (d. 1226/1811), *Miftāḥ al-karāma fī sharḥ Qawāʿid al-ʿAllāma* (Qum: Muʾassasat al-Nashr al-Islāmī, 1999), 25:94 and the sources quoted in the footnotes. Two of the earliest examples are al-Sharīf al-Murtaḍā (d. 436/1044), *al-Intiṣār* (Najaf: Manshūrāt al-Maṭbaʿa al-Ḥaydariyya, 1971), 237; and Shaykh al-Ṭāʾifa Muḥammad b. al-Ḥasan al-Ṭūsī (d. 460/1067), *Kitāb al-Khilāf* (Qum: Muʾassasat al-Nashr al-Islāmī, 1987–1996), 6:242. One of the most recent is Ayatollah Khomeini, *Taḥrīr al-Wasīla* (Najaf: Maṭbaʿat al-Ādāb, 1387/1967), 2:539.

9 There are other definitions as well. Some authors make a distinction between knowledge acquired by the senses (*ʿilm ḥissī*) and knowledge acquired by "guessing" (*ʿilm ḥadsī*), the latter further defined as knowledge obtained through all types of indications, including circumstantial evidence.

10 See, for instance, Abū al-Ḥasan al-Māwardī, *Adab al-qāḍī* (Baghdad: Dīwān al-Awqāf, 1972) 2:375.

it could be applied.[11] Nevertheless, the opinion permitting decisions based on the personal knowledge of the judge had the potential to substantially expand the jurisdiction of a judge and his ability to go beyond the traditional framework of an Islamic court.[12]

Second, a number of prominent medieval Sunnī jurists from various schools,[13] some of whom served as judges in different parts of the Muslim world, required the judge to consider all kinds of internal and external evidence, including circumstantial evidence (*qarāʾin*) in his decision-making. The most outspoken among these jurists was Ibn Qayyim al-Jawziyya (d. 751/1350), or Ibn al-Qayyim as he is commonly known, who wrote a special book dedicated to arguing for the importance of judges using all kinds of evidence in their process of adjudication.[14] Both in this book and in his other works, he advocated for the position that limiting legal evidence to verbal testimony and oaths, while ignoring other internal and external types of evidence,

> has caused many rights to be wasted and laws to be stalled; has emboldened the vicious and depicted the *sharīʿa* as a system that cannot function; and has deprived judges of so many essential means by which to distinguish truth from falsehood. Ignoring this host of evidence has, in fact, made the Islamic court non-functional. Everyone knows for certain that these types of evidence are right and essential, but most think that their use is against the accepted canon. This assumption, a major fault in understanding the *sharīʿa*, persuaded the rulers to take matters into their own hands and create administrative rules to bring the situation under some kind of control. The combination of the fault

11 A major point of disagreement was whether the judge could rule according to his personal knowledge only in civil suits (*ḥuqūq*, *ḥuqūq al-nās*), as advocated by most Sunnī and Shīʿī jurists who allowed the judge to use his personal knowledge, or whether he could use it in criminal justice (*ḥudūd*, *ḥuqūq Allāh*) as well.

12 In practice, however, it seems that this potential was never actualized. As a contemporary writer on the topic concluded, "whoever does thorough research on this topic will become certain that the personal knowledge of the judge was never used in an Islamic court as an acceptable basis for adjudicating legal disputes." See Maḥmūd al-Hāshimī, "Ḥukm al-qāḍī bi-ʿilmih," *Fiqh Ahl al-Bayt* 16 (1420/2000), 11–84.

13 They included such prominent scholars as the Shāfiʿīs Ibn Abī al-Dam (d. 642/1244), judge of Hama in west-central Syria, and al-ʿIzz b. ʿAbd al-Salām (d. 660/1262), who later in life served as the judge of Cairo; the Ḥanbalī Ibn Qayyim al-Jawziyya (d. 751/1350); the Mālikīs Ibn Juzayy (d. 741/1340) of Granada and Ibn Farḥūn (d. 799/1397), judge of Medina; and the Ḥanafīs ʿAlāʾ al-Dīn al-Ṭarābulusī (d. 844/1440), judge of Jerusalem, Ibn al-Ghars (d. 894/1489), Ibn Nujaym (d. 970/1563), and more recently Ibn ʿĀbidīn (d. 1252/1836). For the viewpoints of these jurists, see ʿAbd Allāh al-ʿAjlān, *al-Qaḍāʾ biʾl-qarāʾin al-muʿāṣira* (Riyadh: Jāmiʿat al-Imām Muḥammad b. Saʿūd al-Islāmiyya, 2006), 1:31–32 and the sources cited therein.

14 Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya fī al-siyāsa al-sharʿiyya*, ed. Nāyif b. Aḥmad al-Ḥamad (Mecca: Dār ʿĀlam al-Fawāʾid, 2007). This work is available in a number of other editions.

> which prevented Islamic courts from functioning and the introduction of these man-made rules and institutions led to persistent evil and widespread corruption, to the extent that matters have gotten out of hand.[15]

To support his argument, Ibn al-Qayyim relied on a passage from the Qurʾān stating that God sent His messengers and scriptures to establish the rule of justice.[16] The logical conclusion is that when one clearly observes the signs of fairness or justice, *that* is the law of God and His religion, regardless of how one reaches that observation. God did not strictly define the indications and signs of fairness or justice. So, to limit them to a couple of types of evidence, while leaving out similar or stronger types of evidence, is incoherent. After all, God made clear that his purpose was the establishment of the rule of justice and, as such, whatever can fulfill that purpose is what the religion requires.[17]

Furthermore, Ibn al-Qayyim maintained that judges and other early Muslim authorities never limited themselves to verbal testimony and oaths for distinguishing right from wrong in legal cases,[18] and that the validity of all kinds of evidence and indications is the basis for many rules in various chapters of Islamic law.[19] He argues these points by means of stories quoted in biographical sources and anthologies in which judges in different parts of the Muslim world and in various periods of Islamic history went well beyond the traditional bipartite procedures that Islamic law formally recognized, and used all sorts of techniques to discover the truth.[20]

Most of those examples are, however, anecdotal, representing the legal wit and wisdom of the judges[21] in cases where they smelled a rat, so

15 Ibn al-Qayyim, *Badāʾiʿ al-fawāʾid* (Mecca: Dār ʿĀlam al-Fawāʾid, 2004), 3:1088–89.

16 Q. 57:25.

17 Ibn al-Qayyim, *Badāʾiʿ al-fawāʾid*, 3:1089.

18 Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 1:10–48.

19 Ibid., 1:48–64 and passim.

20 Ibid., 1:65–67.

21 Ibn al-Qayyim suggests that this wisdom was sanctioned by the caliph ʿUmar in his alleged letter to the judge whom he assigned to Basra, Abū Mūsā al-Ashʿarī, a letter in which he urged judges to be savvy (*al-fahm! al-fahm!*). See Ibn al-Qayyim, *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿĀlamīn* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1991), 1:69. The text of this letter is included at pages 67–68,

to speak, and suspected that something was wrong.[22] The judges thus tried various means by which to find indications that one or the other party to a conflict was being dishonest in his or her claim. In most of these instances, the case would abruptly terminate due to a confession on the part of the culprit. As such—that is to say, because the conclusion of these cases depended on a type of oral testimony—these instances should not actually be considered exceptions to the traditional procedures that Islamic law advocated.

There were certainly examples in which the judge decided the merits of the case on the basis of a piece of evidence that showed the falsity of the petitioner or defendant's claim, but in these cases too the decision would occur before the official procedural due process began. Here is an example: A petitioner once brought a charge to a judge claiming that he trusted someone and left his money with him, but that the trustee now denied having accepted that trusteeship. The judge asked *where* the petitioner had entrusted the other man with the money. The petitioner named a mosque far away from the town, and the defendant pretended not to know where that mosque was. The judge then asked the petitioner to go to the mosque immediately and to bring back a copy of the Qurʾān so that the judge could make the defendant take the oath with the Qurʾān from that specific mosque. The man left to retrieve the Qurʾān, while the judge held the defendant in the court, keeping himself busy with other cases. After some time had passed, the judge, complaining about how much time bringing a copy of the Qurʾān should require, turned to the defendant and asked if he thought that

and can also be found in many early collections of Sunnī *ḥadīth*. Ibn Ḥazm identifies this text as fake, and most of its chains of transmission do not meet the required standards for authenticated documents. See Ibn Ḥazm, *al-Muḥallā*, 1:590; and his *al-Iḥkām fī uṣūl al-aḥkām* (Cairo: Dār al-Ḥadīth, 1984), 2:443. However, Ibn al-Qayyim and others accept its authority as "a historical document which has received acceptance from many of the scholars of the previous generations," a genre of religious reports known in the Shīʿī tradition as "widely accepted reports" (*maqbūla*). Using the terminology of the science of *ḥadīth*, later Sunnī scholars defined the document in question as a reliable text received by *wijāda*—a term used when a written text is found with no dependable chain of transmission. See Ibn Kathīr (d. 774/1373), *Musnad al-Fārūq* (Manṣūra: Dār al-Wafāʾ, 1991), 2:546–48; and Muḥammad Nāṣir al-Dīn al-Albānī, *Irwāʾ al-ghalīl*, 2nd ed. (Beirut: al-Maktab al-Islāmī, 1985), 8:241.

22 Iyās b. Muʿāwiya, the judge of Basra in the early 2nd/8th century, was clearly referring to this ability of a judge to guess that something is amiss when he stated that "judgment is nothing to be taught; it is rather an acumen" in response to a request to teach someone the art of judgment. See Ibn ʿAsākir (d. 571/1176), *Taʾrīkh madīnat Dimashq* (Beirut: Dār al-Fikr, 1995), 10:30. See also al-Khaṭīb al-Baghdādī (d. 463/1071), *Taʾrīkh Madīnat al-Salām wa-akhbār muḥaddithīhā = Taʾrīkh Baghdād* (Beirut: Dār al-Gharb al-Islāmī, 2001), 12:242–43 (whence Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 1:70–72), where Abū Khāzim al-Qāḍī speaks about his own experience with this acumen. This man, Abū Khāzim ʿAbd al-Ḥamīd b. ʿAbd al-ʿAzīz al-Baṣrī al-Ḥanafī (d. 292/905), was a former judge of Syria and Kūfa who was appointed in 283/896 by the ʿAbbāsid caliph al-Muʿtaḍid (r. 279-89/892-902) as judge of the eastern section of Baghdad, a position that he held until the end of his life.

the petitioner might have already reached the mosque. The man, who had originally pretended not to know where the mosque was, answered "not yet." That was enough evidence for the judge to decide that the defendant was deceitful and charge him with paying the money back to the petitioner.[23]

23 Ibn al-Jawzī (d. 597/1201), *al-Adhkiyā'* (Beirut: al-Maktab al-Tijārī, 1966), 66–67 (whence Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 1:70). Ibn al-Jawzī quotes other witty stories of the early judges. Here is an example reported by a mid-4th/10th century jurist: A person commonly known as reliable used to frequent the court of the judge of Hamadān. It happened that, one day, the judge summoned him to the court to give testimony, but when he arrived and gave his testimony, the judge rejected it. When asked why, he answered that he had discovered that the man was a hypocrite (murā'ī), saying: "I counted his steps everyday from the moment he arrived at the court to the point when he sat down close to me. This time when I called him to come and give testimony, it took him three or four more steps to reach the same point, indicating that he walked slower to feign dignity. I therefore decided that he was a hypocrite." See Ibn al-Jawzī, *al-Adhkiyā'*, 68–69, (whence Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 1:72–73).