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# Judicial Authority and *Qādīs*' Autonomy under the Abbasids

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*Abstract:* As Joseph Schacht argued in the 1950s, the office of *qādī* began in the Umayyad period as that of a “legal secretary” to provincial governors. Documentary evidence from Egypt confirms that governors were indeed regarded as being the highest judicial authority in early Islam, and that their legal powers far surpassed that of any other judge. In large cities, governors appointed and dismissed *qādīs* at their will; decisions taken by *qādīs*' were could be swiftly overruled by political authorities.

Although the Abbasids reformed and centralised the judiciary in the second half of eighth century AD, *qādīs* were still subordinate to reigning rulers and unable to impose judgements that displeased the caliph or his main representatives. The increasing political and social influence of scholars and the development of classical schools of law eventually changed this situation. Relying on a body of both narrative and legal literature, this paper addresses the *qādīs*' attempts to resist political rulers' interference with the judiciary by asserting themselves as true representatives of the shari'a. It argues that Ḥanafī legal literature, dating from the ninth and tenth centuries AD, gradually elaborated a theory on the relationship between the *qādī* and the ruler; this theory was instrumental in doing away with political infringement on the judicial prerogative. This theory was soon incorporated into *adab* literature, whose stories of rulers entirely subjugated to the rule of law became a new political model.

*Keywords:* qādi; sharia; justice; caliphate; *fiqh*.

## Introduction

The history of *qādīs* is mainly known through biographical dictionaries, written after the 240s/850s, that attempt to reconstruct the lives of judges from the 1<sup>st</sup> century AH/9<sup>th</sup> century AD. Modern historians usually assume that individuals already held judicial responsibilities within the societies that developed following the first Islamic conquests, from the mid-10s/630s onwards.<sup>1</sup> The status of early *qādīs* remains obscure, however, and it is doubtful whether we will ever find enough evidence to obtain a clear picture of their actual position and responsibilities. Principal biographers of *qādīs* – Wakī' (d. 306/918) for Arabia and Iraq and al-Kindī (d. 350/961) for Egypt – wrote in the late ninth or in the tenth century, drawing from dry and scattered traditions. Such accounts were very similar in nature to ancient, non-prophetic *ḥadīth* as recorded in early *Muṣannafs* of 'Abd al-Razzāq al-Ṣan'ānī (d. 211/827) or Ibn Abī Shayba (d. 235/849). These traditions were not designed to describe early judges' lives or practices, but rather to record *exempla* within a broader context of the early formation of Islamic law. Systematic reconstruction of *qādīs*' biographies only began in the second Abbasid period in the second half of the ninth century after new political and religious order was reached following the end of the *miḥna*. Relationships between scholars and rulers had

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<sup>1</sup> See for example Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), pp. 34ff.

been subjected to tremendous ordeal, in which *qāḍīs* had played a major part. Following the caliph's instruction, they had been the main instruments in the imposition of the doctrine of the created Qur'an. The cessation of the *miḥna* under caliph al-Mutawakkil (r. 232-247/847-861) marked the victory of traditionalist scholars, who imposed themselves, at the expense of the caliph, as the only true religious authorities. The process leading to this new order had to be explained, understood and justified. While scholars like al-Ṭabarī (d. 310/923) reformulated the whole of Islamic political history, others concentrated on key institutions like the judiciary, which stood at a junction between the political and legal domains. These historians did not look at the past in a neutral way. Although they did not hesitate to confront and report different versions of the same event, their whole enterprise was oriented toward a justification of the present. Notwithstanding the inherently subjective nature of these accounts which conveniently selected one fact over another, they still provide a coherent image which reveals actual historical tendencies. One of the main themes in historiographical literature dedicated to *qāḍīs* is their relationships with rulers. As is typical in Islamic historiography, sources describe all relationships in terms of personal connections; in reality such relations reveal deeper, structural patterns of interactions between institutions.

One prominent underlying question concerning Islamic sources from the ninth and tenth centuries AD is that of judicial authority. Who holds this authority? Is it the caliph? Is it one of his direct representatives? Is it the judge? From the early Umayyads onward – or from even earlier periods – justice was dispensed by delegation: *qāḍīs* were appointed by political or military rulers. What did such delegation mean? To what extent did rulers reserve their right to monitor the judicial practice of their appointees? While Islam first developed as a military movement in which authority was vested in military rulers, the first three centuries of Islam witnessed the progressive affirmation of scholarly authority that challenged this initial order. How did the *qāḍīs*, who increasingly belonged to the class of such scholars, react to these changes? To what extent did they exercise sufficient authority to shape the society as they envisaged?

In what follows, I shall try to highlight the main evolution of the relationship between *qāḍīs* and political rulers from the late Umayyad period until the tenth century AD. I will draw on both narrative and legal sources in order to show how a new notion of political and legal order was progressively promoted by Muslim scholars.

## 1. The limited authority of *qāḍīs* under the Umayyads and early Abbasids

### 1.1. *Qāḍīs and governors*

According to sources, during the Umayyad period a large majority of *qāḍīs* was appointed by provincial or city governors. There are some exceptions, of course. Between 99/717 and 114/733, three Umayyad caliphs are reported to have directly appointed *qāḍīs*.<sup>2</sup> Yet these

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<sup>2</sup> R.G. Khoury, *ʿAbd Allāh Ibn Lahīʿa (97-174/715-790): Juge et grand maître de l'école égyptienne* (Wiesbaden: Otto Harrassowitz, 1986), 15; *id.*, "Zur Ernennung von Richtern im Islam vom Anfang bis zum Aufkommen der Abbasiden," in *Studien zur Geschichte und Kultur des vorderen Orients. Festschrift für Bertold Spuler zum siebzigsten Geburtstag*, ed. H.R. Roemer and A. Noth (Leiden: E.J. Brill, 1981), 198ff; B. Johansen, "Wahrheit und Geltungsanspruch: zur Begründung und Begrenzung der Autorität des Qadi-Urteils im islamischen Recht," in *La Giustizia nell'alto medioevo (secoli IX-XI)*, ed. O. Capitani *et alii* (Spoleto: Centro italiano di studi sull'alto medioevo, 1997), pp. 985, 992.

exceptions are rare and such instances have only been reported in Egypt. Judges in Baṣra, Kūfa and Madīna were still duly appointed by local governors.<sup>3</sup> The governors' role in appointing *qāḍīs* led Joseph Schacht to present them as being "legal secretaries" of governors.<sup>4</sup> The latter "retained [...] the power of reserving for his own decision any lawsuit he wished".<sup>5</sup> Papyrological evidence suggests that the Egyptian governor was considered as the highest judicial authority in his province, and that some litigants filed their complaints with him directly.<sup>6</sup> What would happen, then, when litigants referred their cases to a *qāḍī*? To what extent could the *qāḍī* deliver and implement decisions free from the influence of the governor?

Steven Judd has recently argued that "[t]he general image of the Umayyad judicial system presented in the sources is one of judicial autonomy and independence."<sup>7</sup> His conclusions rely on narratives depicting a *qāḍī* defying a governor, or a governor obeying a *qāḍī*'s decision.<sup>8</sup> These narratives, however, are only an image of the past, reshaped by their authors' or compilers' interpretations. The story of Shurayḥ refusing to release a prisoner on the governor's request, cited by Judd,<sup>9</sup> is actually more than equivocal, as we have shown elsewhere. Other reports suggest that the same *qāḍī*, confronted to identical situations, could not seriously oppose the political authority.<sup>10</sup> It is necessary to remember that the image of judicial independence that occasionally appears in sources about the Umayyad period was shaped during the Abbasid period, by authors whose agenda, as we shall see later, was to offer models of ideal relationships between the government and the judiciary.

Judd's conclusions about *qāḍīs*' independence contradict his own vision of a judiciary used as a political and theological tool in the hands of the Umayyads.<sup>11</sup> Furthermore, a *qāḍī*'s liberty was intrinsically limited by his hierarchical connection to the governor. His justice was that of a delegate, and he only held his position on a temporary basis. The governor could revoke his appointment at any time. The office of *qāḍī* was therefore characterised by its structural instability. Should a *qāḍī*'s judgement or attitude displease the delegating authority, the former could be immediately dismissed, without need for any justification. Moreover, *qāḍīs* received a salary which eventually grew to become quite a comfortable sum under the last Umayyad caliphs, and even more so under the early Abbasids. They enjoyed a standard of living comparable to that of other high-ranking civil servants. The assumption therefore is that those judges who did not have other sources of high income would be tempted to preserve

<sup>3</sup> See D. Sourdel, "Les cadis de Baṣra d'après Wakī'," *Arabica*, 2 (1955), 112-114; Wakī', *Aḥbār al-quḍāt*, éd. 'Abd al-'Azīz Muṣṭafā al-Marāḡī (Cairo: Maṭba'at al-sa'āda, 1947-1950), I, pp. 124-200; II, pp. 406-413; III, pp. 3-36.

<sup>4</sup> J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), p. 25.

<sup>5</sup> *Ibid.*

<sup>6</sup> M. Tillier, "Du pagarque au cadi : ruptures et continuités dans l'administration judiciaire de la Haute-Égypte (I<sup>er</sup>-III<sup>e</sup>/VII<sup>e</sup>-IX<sup>e</sup> siècle)," *Médiévales*, 64 (2013), 23-5.

<sup>7</sup> S.C. Judd, *Religious Scholars and the Umayyads. Piety-Minded Supporters of the Marwānid Caliphate* (Abingdon: Routledge, 2014), p.102.

<sup>8</sup> *Ibid.*, pp. 100-1.

<sup>9</sup> *Ibid.* Judd cites Ibn 'Asākir, *Ta'rīkh Madīnat Dimashq* (Beirut: Dār al-fīkr, 1995-2000), 23: 26. The reference should however be corrected as 23: 30.

<sup>10</sup> M. Tillier, *Les cadis d'Iraq et l'État abbasside (132/750-334/945)* (Damascus: Presses de l'Ifpo, 2009), pp. 499-500.

<sup>11</sup> Judd, *Religious Scholars*, pp. 98-9. Judd also admits that in some cities (especially Baṣra, but also Madīna), governors were more likely to interfere with judicial practice, and that *qāḍīs* had to seek the support of the caliph against recalcitrant governors. *Ibid.*, pp. 112-3, 124.

their position at all costs. Scholars who reflected on the judiciary were well aware of this tendency and suggested that no *qāḍī* should be paid for a task that should be regarded first and foremost as a religious duty.<sup>12</sup>

Narratives depicting *qāḍīs*' resistance to governors mainly illustrate the fact that political authorities did not recognise the independence of the judiciary. More generally, literary sources report numerous cases of governors' interventions in *qāḍīs*' judicial activities. The historical significance of such reports has been challenged by Wael Hallaq, who regards encroachments on the judiciary as exceptional cases that were "statistically out of proportion" from the norm.<sup>13</sup> This statement somehow misses the value of narrative sources. Arab Muslim authors did not intend to focus on exceptional events or to provide an exhaustive tool for use by modern historians to perform statistical analysis; their intention was rather to exemplify certain relevant and significant situations. Authors like Wakī' and al-Kindī wrote at a time when relationships between rulers and the judiciary were reaching a new equilibrium which benefited the scholars,<sup>14</sup> and they therefore had good reasons to highlight (or even re-elaborate) ancient examples of "orthodox" relationships between judges and rulers. Nevertheless, their writings reveal tensions which would not have been recorded but for their historical relevance. Governors intervened in the judicial process and could undermine the *qāḍīs*' decisions. One of the best documented instances of such interference is the release of prisoners by governors although they had been detained by *qāḍīs*.

During the late Umayyad and early Abbasid period, *qāḍīs* did not have a dedicated prison for "their" prisoners – such prisoners were litigants they had placed in preventive or administrative detention or incarcerated as discretionary punishment (*ta'zīr*).<sup>15</sup> *Qāḍīs* were obliged to turn to governors who allowed them use of their prison and their jailers. This put the *qāḍī* in an awkward position of having his prisoners detained in a structure belonging to the governor's authority.<sup>16</sup> Theoretically, an institution with the power to imprison someone should also have sole responsibility for his release. In practice, however, as prisons were controlled by governors, they could free prisoners whenever they wished. Wakī' relates an incident which probably occurred in 126/744, in the reign of caliph Yazīd b. al-Walīd (r. 126/744). 'Āmir b. 'Ubayda al-Bāhilī, the *qāḍī* of Baṣra for the governor 'Abd Allāh b. Abī 'Uṭmān,<sup>17</sup> imprisoned a litigant at the request of his adversary, presumably for a debt he could not or would not repay. However, as the governor had personal ties to the prisoner, he released the prisoner almost immediately. Imprisonment being the principal means of compelling a debtor to repay his creditor, the adversary notified the *qāḍī* of the prisoner's release. The *qāḍī* regarded this release as unjust infringement upon his judicial practice and quitted his court and, as a means of exerting pressure against the governor, he remained at

<sup>12</sup> See Tillier, *Les cadis d'Iraq et l'État abbasside*, pp. 270-2.

<sup>13</sup> Hallaq, *The Origins and Evolution*, p. 190. See also Judd, *Religious Scholars*, p. 133.

<sup>14</sup> See *infra*.

<sup>15</sup> On the different types of imprisonment in classical Islam, see I. Schneider, "Imprisonment in Pre-Classical and Classical Islamic Law," *Islamic Law and Society*, 2 (1995), p. 156-168.

<sup>16</sup> See M. Tillier, "Prisons et autorités urbaines," *Arabica*, 55 (2008), p. 392-7.

<sup>17</sup> 'Abd Allāh b. Abī 'Uṭmān was briefly governor of Baṣra in 126/744. See Khalīfa b. Khayyāt, *Ta'rīḥ*, ed. Muṣṭafā Najīb Fawwāz and Hikmat Kashlī Fawwāz (Beirut: Dār al-kutub al-'ilmiyya, 1995), p. 241; Ch. Pellat, *Le Milieu baṣrien et la formation de Ḡāhīz* (Paris: Adrien-Maisonneuve, 1953), p. 280. 'Āmir b. 'Ubayda had been appointed in 120/738 by governor al-Qāsim b. Muḥammad al-Thaqafī. See al-Ṭabarī, *Ta'rīḥ al-rusul wa-l-mulūk*, ed. Muḥammad Abū l-Faḍl Ibrāhīm (Cairo: Dār al-ma'ārif, 1967), VII, pp. 159, 179, 299.

home for several days. The governor, not appreciating such an example of pre-modern industrial action, ordered the *qāḍī* to resume his judicial duties, but the *qāḍī* persisted in his refusal. The governor did not allow the prisoner to be incarcerated once again, eventually dismissing ‘Amir b. ‘Ubayda and appointing another *qāḍī* in his place.<sup>18</sup>

Similar situations are reported from the early Abbasid period, at a time when governors still appointed their *qāḍīs*, in places such as Fustāt<sup>19</sup>, Baṣra<sup>20</sup> and Kūfa<sup>21</sup>. In early Abbasid cases, a new pattern emerges whereby governors commonly yield to the *qāḍīs*’ pressure and send their prisoners back to jail. It is likely, however, that the Umayyad *qāḍīs* lacked effective means to impose their own independent judicial authority. They had either to comply with the governors’ will or relinquish their positions.<sup>22</sup> Thus the judicial system rested upon a fundamental ambiguity. On the one hand, governors regarded themselves as sole proprietors of judicial authority. *Qāḍīs* were their subordinates and they could therefore intervene in their lawsuits and decisions as they saw fit. On the other hand, governors accepted to delegate their authority and asked judges to act in their place. As soon as *qāḍīs* claimed an authority of their own, arising from their religious knowledge, this ambiguity gave rise to competition. If narratives reflect actual historical reality, *qāḍīs* regarded their decisions as binding to the effect that governors had to respect them despite being their direct superiors. These two visions of judicial authority could not be reconciled.

## 1.2. *Qāḍīs and caliphs*

The judiciary was not immediately affected by the Abbasid revolution. For many years, under al-Saffāh (r. 132-136/749-754) and his brother al-Manṣūr (r. 136-158/754-775), provincial and city governors kept their judicial prerogatives by continuing to appoint *qāḍīs*. During the second part of his reign, however, al-Manṣūr began a major administrative reform of the judiciary. Around the time he founded Madīnat al-Salām and transferred the Abbasid capital to Baghdad, al-Manṣūr undertook an unprecedented centralisation of the judiciary—centralisation which would only be completed under his successors. Henceforth, caliphs would directly appoint *qāḍīs* of the empire. By taking away the power of appointment of *qāḍīs* from governors, al-Manṣūr may have intentionally weakened the latter’s authority (too strong governors would become potential rebels) in order to increase the caliph’s grasp on the state. Moreover, in appointing *qāḍīs* within the empire he probably wanted the new dynasty to appear as guarantor of justice and equity throughout the provinces, thereby enhancing its legitimacy. As a consequence of this reform, allusions to rivalry between *qāḍīs* and governors almost disappear from sources dealing with later periods.

This shift in the power of appointment from the governor to the caliph however still failed to resolve lingering questions over judicial authority. The caliph in fact now considered

<sup>18</sup> Wakī‘, *Akhbār al-quḍāt*, ed. ‘Abd al-‘Azīz Muṣṭafā al-Marāghī (Cairo: Maṭba‘at al-sa‘āda, 1947-1950), II, pp. 43-44.

<sup>19</sup> *Ibid.*, III, p. 232; al-Kindī, *Akhbār quḍāt Miṣr*, in *The Governors and Judges of Egypt*, ed. R. Guest (Leyden: Brill, 1912), p. 356.

<sup>20</sup> Wakī‘, *Akhbār al-quḍāt*, II, pp. 69-70; cf. Ibn al-Jawzī, *al-Muntaẓam fī tawārīkh al-mulūk wa-l-umam*, ed. Suhayl Zakkār (Beirut: Dār al-fikr, 1995), VI, p. 527. About these cases, see Tillier, *Les cadis d’Iraq*, pp. 499-503.

<sup>21</sup> Wakī‘, *Akhbār al-quḍāt*, III, p. 151-52.

<sup>22</sup> See Tillier, *Les cadis d’Iraq*, p. 500.

himself to be the actual holder of judicial authority he had delegated to the *qādīs*. In certain circumstances, caliphs behaved like governors of the previous period, and tried to impose their judicial authority against the will of their *qādīs*. Among diverse examples reported by narrative literature, that of ‘Ubayd Allāh b. al-Ḥasan al-‘Anbarī (*qādī* from 156/773 to 166/782-83)<sup>23</sup> is probably the most significant.

‘Ubayd Allāh b. al-Ḥasan al-‘Anbarī was a *qādī* of Baṣra at a time when major issues were raised about the status of fertile lands in southern Iraq (the *sawād*). Caliph al-Mahdī (r. 158-169/775-785) tried to use ‘Ubayd Allāh b. al-Ḥasan to implement a reform of the fiscal status of lands surrounding Baṣra by extending the area submitted to *kharāj*. However, ‘Ubayd Allāh defended the interests of the local people and actively resisted the caliph’s orders.<sup>24</sup> On a judicial level, changes of properties in the aftermath of the Abbasid revolution caused major conflicts in Baṣra. The caliph Abū l-‘Abbās al-Saffāh had for instance offered land to a man called Sulaymān b. ‘Ubayd Allāh. Members of another local family, the Banū ‘Abd al-Malik, claimed ownership of that land. They asserted that it had belonged to their ancestor after the conquest of Iraq, and that it had been unjustly confiscated by the caliph Sulaymān b. ‘Abd al-Malik (r. 96-99/715-717). The conflict led to a lawsuit before ‘Ubayd Allāh b. al-Ḥasan resulting in a major stand-off between the *qādī* and the caliph.

The caliph al-Mahdī intervened twice in the lawsuit, in two different ways. He was first solicited by the claimants, the Banū ‘Abd al-Malik, whose claim the *qādī* was reported to favour. The *qādī* had suggested that the claimants should file a complaint directly to the caliph in Baghdad, and one can assume that the suggestion was made with the intention of lending more weight to his decision. The claimants did so by presenting the caliph or his administration with a petition (or so we think), including the identity of their adversary and an outline of the issue being litigated. In return, the caliph wrote a letter to the *qādī*, in which he ordered him to hear the case and to render a judgment according to evidence provided by the litigants.<sup>25</sup> This procedure “by rescript” was a legacy from the Umayyad period, during which litigants would commonly present a complaint before a ruler (the caliph or, more often, a governor) who would then issue instructions to the judge.<sup>26</sup> In this instance, the intervention of the caliph in judicial proceedings was encouraged by the *qādī* and could not therefore be regarded as an infringement of the judge’s prerogatives. It was simply part of accepted procedure – even though evidence of this type of procedure eventually disappeared from subsequent sources.

The caliph’s second intervention, however, was of different nature. According to Wakī‘, the *qādī* ‘Ubayd Allāh b. al-Ḥasan ignored the caliph’s order to listen to evidences presented by the defendant (Muḥammad b. Sulaymān b. ‘Ubayd Allāh) and condemned him instead. In doing so, the *qādī* may have been respecting the law of evidence widely acknowledged by

<sup>23</sup> Wakī‘, *Akhbār al-quḍāt*, II, p. 109. On this *qādī*, see M. Tillier, “Un traité politique du II<sup>e</sup>/VIII<sup>e</sup> siècle. L’épître de ‘Ubayd Allāh b. al-Ḥasan al-‘Anbarī au calife al-Mahdī,” *Annales Islamologiques*, 40 (2006), pp. 140-5; J. van Ess, “La liberté du juge dans le milieu basrien du VIII<sup>e</sup> siècle,” in *La notion de liberté au Moyen Age : Islam, Byzance, Occident* (Paris: Les Belles Lettres, 1985), pp. 28-9; *id.*, *Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra* (Berlin-New York, Walter de Gruyter, 1991), II, pp. 155-64.

<sup>24</sup> Tillier, “Un traité politique,” pp. 142-3, 148.

<sup>25</sup> Wakī‘, *Akhbār al-quḍāt*, II, p. 193.

<sup>26</sup> See M. Tillier, “Dispensing Justice in a Minority Context: the Judicial Administration of Upper Egypt under Muslim Rule (Early Eighth Century CE),” in Robert Hoyland (ed.), *Minorities in Late Antiquity and Early Islam: legal, cultural and economic perspectives* (Princeton: The Darwin Press, forthcoming).

scholars of his day which states that “the burden of the proof lies upon the claimant”. According to this rule, a judge had to decide in favour of a claimant if he succeeded in producing reliable testimonial evidence, and should not take the defendant’s evidence into consideration.<sup>27</sup> The caliph, however, would not accept the *qāḍī*’s disobedience, especially since the defendant had received the disputed land from the first Abbasid caliph. The *qāḍī*’s decision was therefore perceived to challenge both the honour and judicial authority of the Abbasid caliphs. Al-Mahdī wrote a new letter to the *qāḍī* ordering him to make a public confession about the injustice of his judgment and to issue a fresh decision in favour of the defendant. If the *qāḍī* refused to comply, the caliph would order to have him decapitated. The *qāḍī* had no choice but to revise his judgement.<sup>28</sup> Here the caliph did not act as an appeal institution. He did not revise the judgement nor issue a new verdict, but rather forced the *qāḍī* to do so. He interfered with ‘Ubayd Allāh’s practice and his threatening order meant he considered the judge to be a subordinate who had to comply with his superior’s will.

## 2. When *qāḍīs* and jurists claimed autonomous judgeship

### 2.1. Resistance to caliphal interventions

‘Ubayd Allāh b. al-Ḥasan al-‘Anbarī’s case reflects a new conception of justice in the early Abbasid period. Procedural rules had been extensively discussed by jurists during the last Umayyads and, despite secondary disagreements (*ikhtilāf*), Muslim jurists had now achieved an almost unified vision of the judicial process. If early *qāḍīs* had sometimes been chosen amongst individuals whom later biographical literature would not recognise as scholars, respected jurists were now commonly appointed as *qāḍīs*. ‘Ubayd Allāh was himself a prominent scholar of the ancient Baṣran legal trend. This new generation of *qāḍīs* regarded itself as expert in laws and procedures, and was increasingly intolerant of interventions by caliphs in legal matters. ‘Ubayd Allāh b. al-Ḥasan repeatedly resisted al-Mahdī’s instructions, and according to the later narrative of al-Khaṭīb al-Baghdādī, he was eventually dismissed because of his disobedience of the caliph’s orders.<sup>29</sup>

Narrative literature contains similar instances of resistance to caliphs’ interventions in the legal arena. Ḥammād b. Dalīl, *qāḍī* of al-Madā’in (the old Seleucia-Ctesiphon), resisted the orders of Hārūn al-Rashīd (r. 170-193/786-809) and fled to Makka to escape punishment.<sup>30</sup> A *qāḍī* of Khurāsān refused likewise to obey the instructions of al-Ma’mūn (r. 198-218/813-833) concerning a lawsuit.<sup>31</sup> After the *miḥna*, interventions of caliphs in judicial practice seem to disappear, and tensions between rulers and *qāḍīs* tend henceforward to focus on the judiciary’s administrative tasks – especially the pious foundations (*waqfs*) whose revenues were prone to appropriation by many rulers.<sup>32</sup>

<sup>27</sup> In a shorter version of this story reported by al-Khaṭīb, the *qāḍī* explained to the caliph that he had rejected his letter “because it was full of mistakes (*malḥūn*)” and therefore did not appear to be actually written by the caliph (al-Khaṭīb al-Baghdādī, *Ta’rīkh Madīnat al-salām*, ed. Bashshār ‘Awwād Ma’rūf (Beirut: Dār al-gharb al-islāmī, 2001) 12: 10). It is possible that these “mistakes” are allusions to an error in the procedure.

<sup>28</sup> Wakī‘, *Akhbār al-quḍāt*, II, pp. 94-5.

<sup>29</sup> Al-Khaṭīb also mentions a lawsuit between a merchant and an officer, in which al-Mahdī ordered the *qāḍī* to issue a verdict in favour of the officer. Al-Khaṭīb, *Ta’rīkh Madīnat al-salām*, XII, pp. 10-1.

<sup>30</sup> Wakī‘, *Akhbār al-quḍāt*, III, p. 304.

<sup>31</sup> Al-Jahshiyārī, *Kitāb al-wuzarā’ wa-l-kuttāb* (Beirut: Dār al-fikr al-ḥadīth, 1988), p. 205.

<sup>32</sup> See Tillier, *Les cadis d’Iraq*, pp. 645, 648.



It took some time before jurists could impose the idea that *qādīs* should dispense justice without any interference from rulers. The first jurist who began to theorize this idea was ‘Ubayd Allāh b. al-Ḥasan al-‘Anbarī himself. It is no coincidence that literary sources remembered this *qādī* as being actively disobeying caliphal instructions. He is indeed the author of an important epistle to the caliph al-Mahdī, in which he addressed four domains of state administration: management of frontiers, administration of justice, and two different kinds of tax revenues (*fay’* and *ṣadaqa*).<sup>33</sup> Patricia Crone and Martin Hinds were the first to highlight the provocative nature of this epistle, in which *al-a’immat al-fuqahā’* (the imams-jurists) are the scholars, not the caliph.<sup>34</sup> As Muhammad Qasim Zaman noticed, ‘Ubayd Allāh b. al-Ḥasan does not deny the legal role of the caliph in certain issues where other sources of law are silent.<sup>35</sup> However, the role of the caliph is much more limited in the four domains that ‘Ubayd Allāh addresses in detail. In the epistle by ‘Ubayd Allāh there is no mention of caliphs’ instructions as being the source of judge’s decisions, and it is clear that he does not expect justice to be an area where caliphal instructions should be expected.<sup>36</sup>

‘Ubayd Allāh is one of the earliest authors whose positive definition of sources of law has been preserved. In the part of his epistle dedicated to judgeship, he states that every judge should rely on the Qur’ān, the *sunna* of the Prophet (without any positive definition of the term *sunna*),<sup>37</sup> the consensus (*ijmā’*) of leading jurists (*a’immat al-fuqahā’*) and finally his own individual reasoning (*ijtihād al-ḥākim*) in consultation with other knowledgeable scholars.<sup>38</sup> The right to rely on *ijtihād* belongs first and foremost to the caliph. However, ‘Ubayd Allāh considers that the delegation of judicial authority by the caliph to the judge usually indicates the delegation of the right to rely on *ijtihād*.<sup>39</sup> Results of the judge’s own reflexions are therefore fully legitimate, not to be overruled by the caliph’s own conclusions. By defending the idea that “any *mujtahid* is right” (*kull mujtahid muṣīb*) and applying it to the *qādī*,<sup>40</sup> ‘Ubayd Allāh b. al-Ḥasan planted the seeds of an explicit theory on judicial independence.

## 2.2. Legal developments of *qādīs’* autonomy

‘Ubayd Allāh b. al-Ḥasan al-‘Anbarī wrote his epistle at a time when Islamic law was entering its “literary” stage. It is not until the end of the eighth century AD that we see the development of a more “fixed” body of legal writings, with the diffusion of authored epistles and handbooks.<sup>41</sup> The support enjoyed by Abū Ḥanīfa’s followers from the reign of al-Mahdī onwards eventually led to the formation of a large Ḥanafī school which absorbed other Iraqi

<sup>33</sup> Wakī‘, *Aḥbār al-quḍāt*, III, p. 97-107 (French translation in Tillier, “Un traité politique,” p. 155-67). About this epistle, see also P. Crone and M. Hinds, *God’s Caliph. Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1986), p. 98; M.Q. Zaman, “The Caliphs, the ‘Ulamā’, and the Law: Defining the Role and Function of the Caliph in the Early ‘Abbāsīd Period,” *Islamic Law and Society*, 4 (1997), p. 12.

<sup>34</sup> Crone and Hinds, *God’s Caliph*, p. 98.

<sup>35</sup> Wakī‘, *Aḥbār al-quḍāt*, II, p. 105. See Zaman, “The Caliphs, the ‘Ulamā’, and the Law,” p. 11.

<sup>36</sup> Wakī‘, *Aḥbār al-quḍāt*, II, p. 105.

<sup>37</sup> Cf. Tillier, “Un traité politique,” pp. 145-7.

<sup>38</sup> Wakī‘, *Aḥbār al-quḍāt*, II, p. 101.

<sup>39</sup> *Ibid.*

<sup>40</sup> Tillier, “Un traité politique,” p. 153.

<sup>41</sup> On the notion of “fixed” text, see G. Schoeler, *The Oral and the Written in Early Islam* (Abingdon: Routledge, 2006), pp. 33-5.

legal trends (Ibn Abī Laylā's, a part of Baṣra's trend, among others).<sup>42</sup> Ḥanafī jurists were authors of books which soon became, according to al-Jāhīz (d. 255/868), standard literature in training to become a judge.<sup>43</sup> The most famous among such literature were Ḥanafī treatises of legal formulas (*shurūṭ*).<sup>44</sup> The formation of other legal *madhhabs* and the constitution of a wider, fixed corpus of Islamic jurisprudence, conceived at the very latest by the early ninth century AD, transformed the relationship between Muslims and law.<sup>45</sup> Previous legal literature was "organic" in nature in that it was redacted by successive scholars from their master's teaching. Such literature was prone to amendments and modifications over time. Unlike organic literature, fixed texts and legal handbooks constituted a framework of reference that could not easily be manipulated or altered.

It is likely that these changes had important consequences for the judiciary. From the ninth-century onwards, *qāḍīs* could justify their decisions on grounds of a widely accepted body of rules and norms. *Fiqh* elaborated by private jurists did not only theorise what was lawful and unlawful, or what penalty should be applied, but also fixed judicial procedures.<sup>46</sup> It therefore became increasingly difficult for political rulers to justify their encroachments upon the judiciary. If we consider how caliphal infringements upon the judiciary were described in literary sources, we can see significant changes taking place between the late eighth and the late ninth centuries AD. Whereas *qāḍīs* who resisted caliphal instructions in the eighth-century were typically sanctioned, a new pattern emerged during the ninth century, where *qāḍīs* could impose their views upon rulers. In fact, the status of *qāḍīs* improved to such an extent that they were recognised as authentic defenders of the legal order. The legitimacy conferred upon their decisions as a result of their enhanced legal standing allowed *qāḍīs* to reject approaches by caliphs or viziers who intervened to protect their preferred litigants or tried to appropriate *waqfs* or orphans' properties.<sup>47</sup> Literary sources reflect a new pattern in which *qāḍīs* had more room to manoeuvre and impose their voices.

On a theoretical level, during the third/ninth century, Ḥanafī jurists began to question the link between the caliph and his *qāḍīs*.<sup>48</sup> According to the jurist al-Khaṣṣāf (d. 261/874), the *qāḍī* could issue a judgement against the caliph, despite the former being a deputy of the latter.<sup>49</sup> There was, however, a paradox in this statement: if judicial authority derived from the appointment of a judge by the caliph, why would the latter have to submit to the judgement of his own delegate? How could the caliph be at the same time the ultimate source of judicial

<sup>42</sup> See N. Tsafir, *The History of an Islamic School of Law. The Early Spread of Hanafism* (Cambridge: Harvard University Press, 2004), pp. 116-8.

<sup>43</sup> Al-Jāhīz, *Kitāb al-Ḥayawān*, ed. 'Abd al-Salām Muḥammad Hārūn (Cairo: Maktabat Muṣṭafā al-Bābī al-Ḥalabī, 1938-45), I, p. 87.

<sup>44</sup> J. Wakin, *The Function of Documents in Islamic Law. The Chapters on Sales from Ṭaḥāwī's Kitāb al-shurūṭ al-kabīr* (Albany: State University of New York Press, 1972), p. 16.

<sup>45</sup> For the emergence of fixed books in the Mālikī school, see J.E. Brockopp, *Early Mālikī Law. Ibn 'Abd al-Hakam and his Major Compendium of Jurisprudence* (Leiden: Brill, 2000), pp. 72, 111-112.

<sup>46</sup> Tillier, *Les cadis d'Iraq*, 47-9.

<sup>47</sup> *Ibid.*, 646-8.

<sup>48</sup> Ḥanafī jurists had been supported by the caliphate since the second half of the eighth century AD, and a majority of *qāḍīs* were still chosen among them. Their discussion of the *qāḍī's* autonomy, which (to the best of my knowledge) has no early parallel in other *madhhabs*, was probably motivated by their long experience of ruler-judge relationships.

<sup>49</sup> Al-Khaṣṣāf, *Kitāb Adab al-qāḍī*, ed. Farḥāt Ziyāda (Cairo: The American University in Cairo Press, 1978), p. 405.

power and yet be a simple litigant?

Later jurists and scholars tried their best to solve this paradox by minimising the caliph's role in judicial organisation. Although the caliph formally appointed *qāḍīs*, he was not the ultimate source of judicial authority. In his introduction to *Akhbār al-quḍāt*, Wakī' alluded to the fact that all judicial authority came from God and that caliphs were forced to submit to judicial control as they would submit to God.<sup>50</sup> According to literary sources, several *qāḍīs* used the same argument to reject caliphal instructions.<sup>51</sup> However, placing the caliph as an intermediary between God and the Muslims was a dangerous idea. It could pave the way for a claim that the caliph was the deputy of God on earth, inviting even more trouble for *qāḍīs* trying to impose their legal decisions. Another solution was to place the *qāḍī* under the authority of another entity. A century after al-Khaṣṣāf, al-Jaṣṣāṣ (d. 370/980) eventually found a solution. Using a newly developed concept, that of *farḍ kifāya*,<sup>52</sup> this Ḥanafī jurist stated that the *qāḍī* did not dispense justice on behalf of the caliph, but rather on behalf of the Muslim community. How then, could he explain the fact that the *qāḍī* was still appointed by the caliph? Al-Jaṣṣāṣ replied that the *qāḍī* was indeed a representative (*wakīl*) of the caliph, but that the latter was himself a representative (*wakīl*) of the community.<sup>53</sup> According to Ḥanafī law, the *wakīl* of another *wakīl* did not act on behalf of the person who appointed him, but rather on behalf of the individual who stood at the top of the pyramid of delegations.<sup>54</sup> Although he was appointed by the caliph, the *qāḍī* was therefore actually a representative of the Muslims. The *qāḍī* served the Muslim community, not the caliph, on the basis of laws formulated by the legal scholars (*fuqahā'*). According to this theory, a *qāḍī* could be appointed by rebels (Khārijites), and even by the community itself in the absence of a ruler.<sup>55</sup> In theory at least, any relationship of authority that previously existed between the caliph and the *qāḍī* was now dissolved and the caliph could no longer justify his interventions in the daily practice of his judges.

### 2.3. A new model of judicial autonomy: the example of *adab* literature

Al-Jaṣṣāṣ developed his theory in the context of a weakened Abbasid caliphate. From 334/945 onwards, the Būyids became the actual rulers and most of the caliph's state prerogatives were transferred to the *amīr al-umarā'*, at times even including the appointment of *qāḍīs*.<sup>56</sup> Because of their political position, caliphs could no longer claim any actual control over daily administration of the judiciary. In this context, proclaiming theoretical independence of *qāḍīs vis-à-vis* the caliphate was an easier task for the jurists than it had been in the late second/eighth century.

This theory paved the way for the development of a political model that was soon embraced by *adab* literature. Narratives about *qāḍīs* who disobeyed the caliph's orders, or of rulers who eventually admitted the rightfulness of their judge, were already part of the

<sup>50</sup> Wakī', *Akhbār al-quḍāt*, I, 1.

<sup>51</sup> See Tillier, *Les cadis d'Iraq*, pp. 633-4.

<sup>52</sup> See E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Leiden: Brill, 1960), p. 113; Th.W. Juynboll, « Farḍ », *EF*, II, 790.

<sup>53</sup> Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Kitāb Adab al-qāḍī*, pp. 355-6, 363-4.

<sup>54</sup> Al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-ma'rifa, 1406 H.), XIX, p. 159.

<sup>55</sup> Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Kitāb Adab al-qāḍī*, pp. 30-1.

<sup>56</sup> Tillier, *Les cadis d'Iraq*, pp. 130-1.

biographical works of the early tenth century AD. It is only in the late tenth century, however, that books exclusively dedicated to the relationships between the judiciary and the state began to appear. In what follows, I will draw on a short *adab* book by the famous author Abū Hilāl al-‘Askarī (d. c. 400/1010), entitled *Kitāb mā ihtakama bi-hi al-khulafā’ ilā l-quḍāt* (*The Book of Cases Submitted by Caliphs to Judges*).<sup>57</sup> Abū Hilāl lived in Khūzistān under the Būyid dynasty only two or three decades after al-Jaṣṣāṣ, and belongs to this generation of scholars who took advantage of the new political situation to develop models that had been mere sketches until then.

The core of Abū Hilāl’s book is a series of *akhbār* all built on a similar pattern: a caliph is in conflict with someone (usually a commoner) and accepts to submit his case to an arbiter or a judge. Eventually, the arbiter or the judge decides against the caliph and the latter accepts his condemnation. The author provides a series of examples, from the time of the so-called Rāshidūn caliphs until the reign of al-Muhtadī (r. 255-256/869-870). Although there is no direct link between this little book and the legal theory developed by al-Jaṣṣāṣ, they both draw upon the same idea: that of autonomous judgeship.

In Abū Hilāl’s “theory” of government – as it appears through his narratives – the just ruler must submit to law and to the judgment of its representatives, especially the *qāḍīs*. Abū Hilāl was not a jurist, though, and he does not provide any legal justification for this pattern. As an *adīb*, he finds justification in the exemplary behaviour of ancient rulers, especially those of the Persian tradition. The first models of such just rulers are the Sassanian kings who, as pseudo-Jāḥiẓ developed in his *Kitāb al-Tāj*, submitted willingly to the justice of the *mōbedān mōbed* once a year.<sup>58</sup> According to Abū Hilāl, the Prophet agreed to submit a litigation opposing him to his wife ‘Ā’isha to an arbiter.<sup>59</sup> So did the first caliphs, like ‘Umar b. al-Khaṭṭāb when a conflict arose between him and Ubayy b. Ka‘b. ‘Umar is depicted as model of a just ruler, who not only agrees to appear before an arbiter, but who also wants to be treated as a common human being regardless of his office or high rank. When the arbiter (Zayd b. Thābit) suggests that the caliph sit next to him – which would symbolically put him on a higher level than his adversary – ‘Umar refuses and asks to sit next to his adversary on an equal footing with the latter.<sup>60</sup> Until the appearance of al-Muhtadī as the last incarnation of justice, the Umayyad<sup>61</sup> and Abbasid caliphs<sup>62</sup> exemplify the willingness of rulers to submit to the strict rules of judicial procedure and accept decisions rendered against them or their close relatives.<sup>63</sup> Even though he cannot conceal al-Mahdī’s wrath due to ‘Ubayd Allāh b. al-Ḥasan al-‘Anbarī’s famous resistance to his will, Abū Hilāl portrays the caliph as being ready, at first, to submit to his adjudication. Whereas Wakī‘ reports that the caliph *ordered* the *qāḍī* to levy the *kharāj* on a large part of Baṣra’s territory, Abū Hilāl states that the caliph asked

<sup>57</sup> Abū Hilāl al-‘Askarī, *Le Livre des califes qui s’en remirent au jugement d’un cadī*, ed. M. Tillier (Cairo: Institut Français d’Archéologie Orientale, 2011).

<sup>58</sup> *Ibid.*, p. 3/trans. p. 18. Cf. Pseudo-Jāḥiẓ, *Kitāb al-tāj fī akhlāq al-mulūk*, ed. Ahmed Zēki Pacha (Cairo: Imprimerie Nationale, 1914), pp. 159-63.

<sup>59</sup> Abū Hilāl al-‘Askarī, *Le Livre des califes*, p. 8/trans. p. 24.

<sup>60</sup> *Ibid.*, p. 10/trans. pp. 27-8.

<sup>61</sup> *Ibid.*, p. 11/trans. pp. 28-9.

<sup>62</sup> *Ibid.*, p. 11-8/trans. pp. 29-37.

<sup>63</sup> See also M. Tillier, “La société abbasside au miroir du tribunal. Égalité juridique et hiérarchie sociale,” *Annales Islamologiques*, 42 (2008), pp. 160-1.

‘Ubayd Allāh to *adjudicate* his dispute with the inhabitants of Baṣra on that matter.<sup>64</sup> Abū Hilāl goes so far as to claim that al-Manṣūr threatened to dismiss the *qāḍī* of Madīna if the latter showed him any sign of respect during the hearing of a dispute which opposed him to camel drivers.<sup>65</sup> This is an odd reversal of situation if we compare this version to Wakī’s or al-Kindī’s biographies, in which *qāḍīs* are more often dismissed for having disobeyed a caliphal order.

In the late-tenth century, owing to new political and religious situation of the empire, certain scholars were able to freely express a view of the caliphate that others had refrained from expressing for over two centuries. According to their vision, the caliph was no more than a normal human being who had to submit to the law. The true representative of God and of His law should be the *qāḍī*. The caliph is still regarded as a model for his subjects in Abū Hilāl’s book. However, this pattern is turned upside down: if the caliph wants to become a model, he must behave as a normal human being. And if he wishes to not only become a just ruler, but also to reach the level of being an authentic upholder of the law, he must imitate a higher model, that of the *qāḍī*.

### Conclusion

Justice is a major expression of the ruler’s sovereignty. However, the development of Islam as a “religion of law” required the submission of all human beings – even their political leaders – to the *sharī’a*. Tensions between the judiciary and political rulers over judicial authority were inevitable, and were accountable for some of the major evolutions in Islamic institutions during the first four centuries AH/seventh to tenth century AD.

Umayyad caliphs considered themselves as representatives of God on earth and many Muslims accepted them as the best embodiment or interpreters of the *sharī’a*. In difficult cases, both *qāḍīs* and governors turned towards them and sought their rulings.<sup>66</sup> In practice, however, the Umayyad empire was quite decentralised. Provincial governors exercised more control over judicial practices than caliphs, and thus were able to impose their views on their *qāḍīs*.

Although the centralisation of *qāḍīs*’ appointments under al-Manṣūr and his successors eliminated such judicial authority being exercised by governors, *qāḍīs* still had to confront judicial interference from caliphs. Contemporaneous developments in Islamic law within new *madhhabs* however divorced the legal system from political institutions. Private scholars, some of them recruited as *qāḍīs*, claimed that they alone possessed the ability to define right from wrong, and rejected the caliph’s role as a legal source. Their scholarly writings provided *qāḍīs* with a major tool for legitimising their decisions and for asserting their autonomy *vis-à-vis* the caliphate. *Qāḍīs* became increasingly their own masters in the legal field. In practice, *qāḍīs* were still part of social and political networks and could therefore rarely obtain actual independence. In theory, however, jurists and other scholars developed a highly sophisticated discourse proving that *qāḍīs* were magistrates whose authority could not be abolished by

<sup>64</sup> Abū Hilāl al-‘Askarī, *Le Livre des califes*, pp. 13-14/trans. pp. 32-3. Cf. Wakī, *Aḥbār al-quḍāt*, II, pp. 92, 96-7.

<sup>65</sup> *Ibid.*, pp. 12-3/trans. p. 31.

<sup>66</sup> See M. Tillier, “Califes, émirs et cadis : le droit califal et l’articulation de l’autorité judiciaire à l’époque umayyade,” *Bulletin d’Études Orientales*, 63 (2014), forthcoming.

rulers. This theory reflected a political model which was the exact opposite of the so-called “oriental despotism”. The model was no less than what is now called the “rule of law”. Such developments do not mean that political rulers relinquished their judicial authority. However they had to find a new theoretical framework which is still to be explored.