



Mawara An-Nahr Judiciary System and Its Characteristics

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Abstract: This article analyzes the development of the judicial system in the Mawara an-Nahr region and its key aspects related to the existing qadi system. It demonstrates how government structures and judicial practices evolved under the influence of the Hanafi school of thought, as well as the strengthening of the qadi system during the Abbasid period and its impact on the judicial system in Mawara an-Nahr. The article provides a detailed description of the reforms carried out during the Abbasid period, the formation of the judicial system, and the establishment of new judicial positions and practices related to civil courts.

Keywords: Mawara An-Nahr, Hanafi School, Qadi System, Abbasids, Hanafi Fiqh, Qadi Al-Qudat, Government Reforms, Judicial Practices, Fiqh Reforms, Judicial Positions

Introduction

From ancient times many states had been established in the territory of Mawara-an-nahr. Therefore the experience in terms of statehood was well developed in this territory. Yet, the traditions have changed after Arab invasion due to the fact that Arabic governing system would certainly have had its influence on local governing system.

As Hanafi madhab was dominant in this territory, all the qadies (judges) made decisions in accordance with Hanafi madhab. Due to this, Mawara an-nahr qadi system was almost the same as in Abbasid period. In fact, the Hanafi madhab is based on the philosophy developed during the Abbasids period in Iraq. All sources on jurisprudence state that the views of this madhab's founders (Abu Hanifa, Muhammad ibn Hasan ash-Shaibani) are particularly based on *zahir ar-riwaya*, and then *nawadir*.

Methodology

The first person to write a work on Hanafi jurisprudence was Abu Yusuf (died in 182 A.H./798 C.E.) who edited the work "*Adab al-qadi*" and his apprentice Bishr ibn al-Walid al-Marisi (VII century) copied it into paper. Later, such scholars as Muhammad ibn Sammo'a (died in 233 A.H./929 C.E.), and Abu Ja'far Ahmad ibn Iskhag al-Anbari an-Nahawi (died in 317 A.H./929 C.E.) wrote works in this topic.

Hassof's (181-261 A.H./757-875 C.E.) work "*Adab al-qadi*" was acknowledged by scholars as a prominent work on Hanafi jurisprudence. In fact, the scholars have never been so motivated to write a commentary to the works ever written before, and only Hassof's work gave a high stimulus for writing a commentary. For example, Iraqi scholars Abu Bakr Ahmad ibn 'Ali at-Tahowi (died in 370 A.H./981 C.E.) and Abu al-Hussein Ahmad ibn Muhammad al-Quduri (died in 438 A.H./1047 C.E.), the scholar from Khorasan Abu Ja'far Muhammad ibn Abdullah al-Hinduwni (died in 362 A.H./ 973 C.E.) wrote commentaries to the work "*Adab al-qadi*". Most scientifically valuable commentaries have been written in Mawara-an-nahr. The list of authors who wrote such commentaries include 'Ali ibn al-Hussein as-Sugdi (died in 461 A.H./1069 C.E.), 'Abd al-'Aziz ibn Ahmad al-Halwani (died in 456 A.H./1064 C.E.), Muhammad ibn Ahmad as-Sarahsi (died in 483 A.H./1090 C.E.), Hoharzoda Abu Bakr Muhammad (died in 483 A.H./1090 C.E.), Husom ad-din as-Sadr ash-Shahid (died in 536 A.H./1142 C.E.), Qazihan Hasan ibn Mansur al-Uzjandi (died in 529 A.H./1196 C.E.) and others.

In addition, "*al-Hidaya*", "*Badai' as-Sanai*", "*Fatawa al-Bazzazia*" and other works written in this region basically referred to this work.

According to many works related to fiqh created in Medieval Mawara-an-nahr, the period of early development of Islamic qadi system starts from the period of Prophet Muhammad (S.A.W) (610-632 C.E.). Then it kept developing during the period of al-Khulafa al-Rashidun (632-661 C.E.) (one of the Rightly-Guided Caliphs), the Umayyad period (661-750 C.E.), and the Abbasid period (750-1258 C.E.).

Legal issues in Islam have always depended on the degree of state progress and easy or complicated social relations. Thus, qadi system has developed in accordance with the degree of this or that period.

In Prophet Muhammad's period Medina state-city had just started developing, consequently the issues in jurisprudence in this period had been solved simply and easily. Even the procedure of suing and the court processes had not been set up. This type of court procedure can be regarded as nowadays court with a judge.

All jurisdiction including judgeship, legislation, execution, and state government was exclusively in Prophet Muhammad's hands. After the territories have been widened, the appointed ruler *wali* (والى) of the regions and big cities had both executive and judicial power.

It's known that qadi system of al-Khulafa al-Rashidun's period had been more developed than during Prophet Muhammad's period. During Caliph Abu Bakr's period (332-334 C.E.) to the position of qadi was not given the status of an authoritative special position. Mainly faqih *sahabas* dealt with these issues. Caliph also personally could decide on appeals in Medina city. In some cases by the order of caliph 'Umar ibn Hattab was in charge of doing this task. In the regions, *walis* were in charge of solving judiciary issues.

Special attention was paid to the position of qadi starting from Caliph 'Umar's (13-23 A.H./634-644 C.E.) period, and a special person was appointed to this position. In Caliph 'Umar's period the people who were appointed to this position were the followings: Zayd ibn Sabit and 'Abu ad-Dardo in Medina, Abdullah ibn Mas'ud, Shuraikh ibn Haris al-Kindi and 'Ubayda as-Salmani in Kufa, 'Uboda ibn as-Samit in Hims and Qansarin. The judiciary branch was separated from executive branch in the period of Caliph 'Umar.

In Caliph 'Usmon ibn 'Affon's (23-35 A.H./644-656 C.E.) period qadi affairs have been accomplished both independently and jointly with wali activities. Ya'lo ibn 'Umayya San'o was appointed both as qadi and as wali. When Ka'b ibn Suur was dismissed from his post of Qadi of Basra, this post was given to wali of Basra.

In Caliph 'Ali ibn 'Abi Talib's (35-40 A.H./656-661 C.E.) period the duties of qadi in the capital city Kufa was made by caliph personally. The qadis of the regions were appointed by the walis of the regions.

In fact, the Umayyad dynasty is characterized as more close to world science than previous dynasties in the Islamic history. This certainly is vividly seen in the Umayyads' attempt to stay detached from religious concerns in state affairs during al-Khulafa al-Rashidun's period. To compare, in al-Khulafa al-Rashidun's period a state ruler was either elected or recommended by someone, whereas, in the Umayyad's period the ruler inherited the throne like in old times. In al-Khulafa al-Rashidun's period religious-legal issues were discussed in state level. However, in the Umayyad's period the faqihs dealt with these issues, and the caliphs were not expected to solve them at all. Consequently, as the caliphs were not enough knowledgeable in religious-legal affairs, well-educated people like qadis have always surrounded them and it brought caliphs to ask for a religious approval of their deeds. The government acted as it wished, whereas, religious-legal affairs have been developed by faqihs and scholars.

By the Umayyad's period the judiciary branch has started being developed as a separate state branch. Now, governors and caliphs had no right to decide on and influence upon the judiciary issues. They could interfere to this sphere only to appoint qadis (mainly the qadi of capital city Damascus), to observe the qadis' activities and decisions, to fix their salary, to dismiss from the post and to review complains against the person in charge.

The first documents intended for recording the court cases have been worked out in the period of Umayyad dynasty. The person to do this was qadi of Egypt Suleim ibn 'Itir at-Tajibi who lived in Mu'awiya ibn 'Abi Sufyan's (41- 60 A.H./661-680 C.E.) period. The reason for making this was endless argument for inheritance between two unsatisfied sides who appealed twice after the court decision. In fact, they wanted to get another court decision by deceiving the judge. After this event, Suleim gave an order to his secretary to record all cases.

A special *Court of Mazalim* (مظالم), which reviewed illegal activities of the chairmen, was set up in Umayyad's period. This court mainly reviewed complains on decisions of qadis and executive chairmen. The person to establish this court was caliph of the Umayyad dynasty 'Abd al-Malik ibn Marwan (ruled in 65-86 A.H./685-705 C.E.). As Mowardi states, he personally appointed a certain day for listening to people's complains. If he hesitated in a particular issue or wanted to solve more properly, he handed over this case to his personal qadi 'Abu 'Idris al-Azdi.

By this way, it can be observed the establishment of two degrees of jurisdiction in the history of judgeship. They are *court of qadi* – the court below, and *court of mazolim* – the court above.

For the first time in Umayyad's period the crimes deserving capital punishment have started being reviewed by qadis. The first such case was reviewed by qadi of Egypt by the order of Suleim ibn 'Itir Mu'awiya.

There had been set up the Court Martial which was intended to review the crimes among soldiers of the enlarged army. The most famous judges of the Court Martial of the Umayyad's period were the followings: Ziyod ibn Abi Laylo al-Goniy, Kulsum ibn 'Abdullah al-Hikami and Muhammad ibn al-Asalami.

Basically, the Abbasid dynasty (ruled in 750-1258 C.E.) paid great attention to state reforms as well as strengthening the state machinery which had weakened during the Umayyads. The reforms in the court sphere were one of these state reforms that had been carried out in this period.

Abu Ja'far Mansur (132-136 A.H./750-754 C.E.) stated that judges can be appointed by caliph only, and took the governors' privilege of appointing judges; the *Court of Mazolim* was developed and a separate building was specified to the *Court of Mazolim*.

So, appointing a qadi has become under jurisdiction of the caliph. But later, in times of Haroon al-Rasheed (170-193 A.H./786-808 C.E.), *Qadi al-qudat* (قاضى القضاة) had the right to recommend the candidates for the position of qadi, and the caliph personally appointed the qadi. Further, the right of appointing a qadi has been fully given to Qadi al-qudat. At last, the judiciary system has eventually become totally independent.

Result and Discussion

As the result of the Abbasid reforms in judiciary system, a position of *Qadi al-qudat* has been established for the first time in the period of Haroon al-Rasheed. The first person to be appointed to this position was Abu Yusuf, one of the founders of the Hanafi madhab.

Qadi al-qudat was given the right of controlling the judiciary system. According to Ibn Hallikon, Abu Yusuf was the first to order a special uniform to qadis and scholars. This uniform consisted of black turban and teilasan (a long and loose dress put over the clothes).

Along with the qadi, some other people of different positions worked as well.

- *Naib al-qadi* (نائب القاضى) was a deputy judge who replaced qadi in case if qadi was absent. In the sources such case was called *istihlaf* (استخلاف). In the Abbasids period, when the position of *qadi al-qudat* was established, none of the qadis could make *istihlaf* without permission of *qadi al-qudat*.
- *Katib al-mahkama* (كاتب المحكمة) was the position which existed from the times of al-Khulafa al-Rashidun. Responsibility of this position has increased much in the period of Abbasids due to expanded state territories, and various enmity and crime that have increased over time. If previously this post had required note taking of what was said by two opposing sides, witnesses and qadi, further, in the Abbasids times, this person was responsible for such duties as handing over the claims of waiting plaintiffs to qadi, reading these claims, bringing the urgent claims and the claims of foreigners directly to qadi, compiling the executed court decisions into archive.
- *Munadi* (منادي) was the position just like in the period of Umayyads. The duties of this position included informing about the qadi's arrival, and calling the plaintiffs to the court.
- *Hajib* (حاجب), *jilwaz* (جلواز), and *shurta* (شرطة) – the guards who were the deputies (*muovin*) responsible for establishing discipline of people who come to the office of qadi. They mainly established discipline in such situations as entering to the court room and taking

places before the court proceedings start. Besides, they were expected to do the tasks assigned by qadi which are not related to the court.

- *Sahib al-masail* (صاحب المسائل) was the position set up during the period of Abbasids. The main task of *sahib al-masail* was to find information concerning the court case which a qadi should know. The most important information was the data about the witnesses because it was of crucial importance whether a witness is credible and trustworthy or not. This position was also mentioned as *muzakkiri* (مزكي). 'Abd ar-Rahman ibn 'Abi Leila (VII-VIII centuries) was the first to use such service.
- *Qassam* (قسّام) was the position the main task of which was to divide the property of the sides, divide the land, etc. In some sources this post was mentioned as *hassab* (حساب).
- *Amiin* (أمين) were the responsible people who were obliged to keep the custody. These people were appointed by qadi. They were obliged to keep property and inheritance of orphans, dependants and missing people.
- "*Hazin dewan al-hukm*" was the position the task of which was to hold the court archive and documents. This person was mainly responsible for keeping the qadi's documents safely.

In addition to these posts, a qadi could also employ the translators due to multinational population of the state.

Hisba (حسبة) institution, which occurred in the period of caliph Umar, has been developed. Although *hisba* of the Abbasids period was mainly an organization of human rights protection, in the researches it was referred to judiciary system.

The research outcomes show that *hisba* doesn't belong to judiciary system. Although *hisba* started from the period of caliph 'Umar, this name evolved in the period of Mahdiy (ruled in 775-786) of the Abbasids dynasty. The person who dealt with *hisba* should have been *muhtasib*, and mainly he was to order people do good deeds and to hold back from bad actions. By this way he ensured the practice and performance of shariah norms. Additionally, he was empowered for maintaining courtesy, virtue and custody; regulating market, scales, and prices; dealing with the sanitation, resurfacing the roads, controlling the goods loading to the ship. His main tasks were to ensure the performance of shariah norms and prevention of crime.

The madhabs had already been formulated by Abbasids' period, and later, as a result, each madhab had its own qadis. If in Abu Yusuf's times all qadis have been appointed from the Hanafi madhab, later on, taking into consideration other madhab spread all around the territories, each madhab had its own qadis.

The reforms in judiciary system of this period resulted in formation of judiciary system in other countries because the judiciary systems of other countries have been formed on the basis of teachings of a particular madhab. Main teachings of the madhabs have been developed during the Abbasids, and these teachings have served as a model for further followers. Therefore, it can be concluded that the judiciary system of Abbasids period had served as a basis for Mawara an-nahr court procedure regulations and structure.

Moreover, it is known that role of Iraqi faqihs, particularly Hassof's place, was great in the development of Mawara an-nahr judiciary system. Statehood experience of Mawara

an-nahr and endless endeavours of faqihs to advance resulted in establishing new settings in judicature which do not exist in Iraq judiciary system. It was surely done in pursuing simplified appealing of people to the court and uncomplicated ways the truth be proved.

In addition to *katib* there also could be an assistant *musa'id* (مساعد) in court procedure regulations. In initiating of a case, first of all, *Katib* or *musa'id* had to make a document which contains the date of coming to the qadi's office in order to make a claim. This document *ruqo'* (رقاع) was to be brought to the court on appointed day. Just in case, the names of people who should meet with qadi were written in a particular notebook called *tazkira* (تذكرة) in order to make sure who was to enter, on which day and after whom. *Tazkira* was kept in a special place for documents – *qimtar*. A pile of documents kept was called *** (خريطة القاضى)[34].

Before Hassof, the claimants could appeal to the court according to their considerations. However, as time passed, number of claimants has increased and Hassof proposed identifying the order of who can appeal to qadi on what day – by *qur'a* (casing lots) (قرعة). Scholars of Mawara an-nahr, including Shams al-Ai'imma as-Sarahsi, were in favour of turn-taking by putting oneself down on a waiting list in order to meet with a qadi, though they saw some kind of order in lots, as well.

Like other statesmen, qadis of Mawara an-nahr could also have a certain day-off a week. In early Abbasids period Saturday, and later, Monday or Tuesday was a day-off of statesmen (عمال السلطان). Likewise, in Mawara an-nahr the statesmen, particularly, qadis could have a rest on Tuesdays. Actually, qadis could set their day-off by their wish. Nevertheless, officially, in Medieval Mawara an-nahr Tuesday was declared as day-off.

In Mawara an-nahr, as well as in Umayyads and Abbasids, the qadis were paid salary by the state. Even the payment to day-off of a qadi was a topic for hot discussions among prominent state lawyers. As scholars of Balh were not concerned with this issue, they proposed not to pay; whereas, scholars of Mawara an-nahr considered that day-off is closely related to work and therefore they suggested payment of day-off. The relation they find in the condition that a day-off helps qadi to study the case attentively and come to the right verdict.

In Mawara an-nahr a qadi was appointed by *Khan*, *Emir* or other governors. A candidate for being a qadi should have certainly been a faqih. However, the scholars of Iraq and Mawara an-nahr admitted that a person can become a qadi even without a scholarly potential. But, in this case there was a condition on which it was possible. A person may become a qadi on condition that a mufti should assist him or he must consult with faqihs before announcing each verdict.

Accordingly, assignment of such condition brings to the conclusion that Mawara an-nahr courts of qadi had muftis whose task was to give legal consultation.

The judiciary system in Mawara an-nahr was established as a hierarchy. While studying *mahzar* and *sijjils* it was found that two degrees of court jurisdiction are mentioned in Mawara an-nahr court documents: regional courts – *kura*, and district courts – *nahiya courts*. Judge of a regional court was called *qadi*, and judge of a district court was called *hakim*. *Hakim* of the district was appointed by *qadi* of the region. Main tasks of *hakim* of the

district were the followings: attempting to reconcile the disputing sides, announcing a verdict which satisfies both sides, recording the marriages, appointing managers (*mutawalli*) to waqf properties, and appointing trustees. If the case becomes problematical, it was sent to the regional court.

Accordingly, the claims from districts have not always been reviewed by a qadi; however, these cases have been reviewed by the *hakim* of a district. In order to reach the regional court, the case should have been impossible to solve by the *hakim* of a district. Taking into account the state's division into regions, it can be claimed that Mawara an-nahr judiciary system consisted of three degrees. They are district court, regional court, and superior court. The district court was managed by *hakim* (حاكم), regional court was managed by *qadi* (قاضي), and superior court was managed by *qadi al-qudat* (قاضي القضاة).

Conclusion

The procedure of checking the witnesses was established well in the judiciary system of Mawara an-nahr as well as in the period of Abbasids. As each region consisted of several districts, the people responsible for checking the witnesses were chosen from the districts. While working with the documents, it was identified that each qadi typically appointed a district's *muzakki* who was responsible for checking the credibility of the witnesses. From this point, it's obvious that the judiciary system of Mawara an-nahr functioned as a hierarchy.

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