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MAẒĀLIM COURTS AND THEIR DEVELOPMENT: A TEST CASE FOR THE PRACTICAL INFLUENCE OF PUBLIC LAW IN ISLAM

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Introduction

It is widely accepted that the maẓālim, the Islamic ruler's medieval court, has served as an influential administrative institution throughout the history of the Islamic world. This article explores various aspects of that important institution in order to demonstrate a wider thesis: public law in Islam was much more influential in daily practice than previously thought by scholars[1] and Islamic public law developed by adopting and legalizing pre-Islamic legal institutions.

The first section of this article outlines the different stages of the development of the institution of the maẓālim. This development will be examined based on pre-Islamic sources, mainly the Sassanids and the Byzantines, through the days of the Prophet, the Umayyad, the 'Abbasids and down to the so-called secular rulers of the Middle Ages. With our focus on law, we shall concentrate mainly on theoretical writings on the maẓālim. We shall illustrate the applicability of our hypothesis through relevant historical examples. The second section of this article will focus on the influence on Islamic rulers of Islamic public law, or on what we call hereafter "theory-practice relations in Islamic law," through the perspective of the ma'ālim institution. In this section we will show that a misunderstanding of those relations resulted from a narrowly scholarly perspective regarding the nature of law and of the practical legal and social sphere. By using the 'law and society' approach to analyze these

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relations we will demonstrate that adoption of Islamic public law in rulers' daily practices were much more significant than previously claimed.

The pre-Islamic sources of the maẓālim

Where did King Solomon, hold the first maẓālim? The Book of Kings tells us about Solomon, the judge, who was willing to hear even the lowest of his subjects, such as the two prostitutes who were in dispute regarding the maternity of a baby.[2] One can assume that if King Solomon heard those lowly women he also heard many other kinds of cases[3] such as administrative matters and cases of abuse of power and other wrong doing by governmental officials.[4]

Centuries later, we find maẓālim courts in the Sassanid governmental tradition where, although the function of the judge belonged mainly to the priesthood ('*Mobedhān*'), the kings still sat to hear their subjects' petitions. For example, where the *Mobedhān* court decided against a high official and the decision could not be enforced, the citizen's only alternative was to apply to the king. This was also true in other cases of abuse by officials. The practical need for frequent hearings of this kind resulted in the establishment of a special bureaucratic institution to deal with those petitions. In fact, this separate bureaucratic institution served as a parallel judicial system to that of the *Mobedhān*.[5] We find a description of that function (parallel to the later maẓālim) in the *Ardāvirāfnāmagi*:[6]

> *And I saw the soul of a man […] I asked: 'whose soul is this, and what sin did he commit? SroS the Just and the god Adur say: This is the soul of that evil man to whom the city was given in [his role as] miyāncīgīhī and who did not do or order that which should have been done and ordered […] and who did not hear complaints from poor people and travelers.*

It is known that the *miyāncīgīhī* was an administrative officer who held judicial authority but was not part of the *Mobedhān*.[7] One can infer from the above paragraph that his judicial role was to hear the oppressed and give them assistance. The similarity to the later maẓālim institution is clear.

Similar phenomena existed in the Byzantine Empire. In Byzantine Egypt, governmental officials held the primary judicial authority,

but we also find an administrative system aimed at directing petitions to the local governor.[8] It is likely that this system was based on the Roman *magister imperium*, where wronged citizens could appeal to the governor for justice. Scholars of Roman law claim that this court system had wide jurisdiction.[9] Another official authorized to hear such petitions and discuss administrative affairs was the *aedilitas*.[10]

Ma'ālim under the Umayyads

When Islam emerged and the Muslims conquered the Middle East and Persia, they found there very stable governmental and administrative systems. For the prophetical state, constituted by the Prophet Muhammad and his 'Four Righteous Successors', constructing an administrative system was not a primary concern.[11] During this formative period, judicial organization did not really exist, and the function of the judge was fulfilled by traditional tribal judges, and later on by Muslim governors, having jurisdiction over Muslims only, while the local idolaters were permitted to continue operating their pre-Islamic judicial systems.[12]

The need for an administrative system in general, and a judicial system in particular, first arose when the Umayyad Empire was established. This immediate need led the Umayyads to adopt many existing administrative institutions. One example is their tax administration, essential to the functioning of government and especially the army. The administration adopted not only the construction of the existing tax authority but also the officials who had worked in it under Byzantium and the Sassanids.[13] For almost three decades the languages of administration were Latin and Persian, but not Arabic.[14] Even the Umayyad judicial system was composed of *Qādīs* and local and regional governors, and the caliph court was based upon both the tribal judicial system and the Sassanid idea of a central judicial system.

Late historical sources point to the fifth Umayyad Caliph, 'Abd al-Malk b. Marwan (r. 685-705) as the first caliph to sit in the maẓālim court. For example, Ibn al-'Arabi writes:[15]

> *... and the first one [of the caliphs] to sit in the ma'ālim was 'Abd al-Malk b. Marwan who distinguished [between the institution of the qādi and*

that of the maẓālim] and appointed Ibn Idrīs as kadāī and [in parallel] 'Umar b. 'Abd al-'Aziz as a maẓālim [judge] to adjudicate in cases of unjust action by the officials of the Umayyad

In *Ahkām al-Sultāniyah* Al-Māwardī claimed that while 'Abd al-Malk b. Marwan was the first caliph to sit in a maẓālim court, but he did not institute it as a distinct judicial system. According to al-Māwardī, the first caliph to do so institute was 'Umar b. 'Abd al-'Azīz (r. 99 – 101 /717 - 720).[16]

However, sources closer in time to the Umayyad period do not mention the existence of the maẓālim as a separate judicial institution. The reason, one can infer from sources dealing directly or indirectly with the Umayyad judicial system, is that the existence of the maẓālim as a distinct judicial institution was unnecessary. Sources closer to that period point out the importance of the caliphs as legislators and judges. In fact, they had two judicial functions: (1) to rule on questions submitted by *qāḍis* and governors from throughout the empire; (2) to sit as *qāḍis* in the court of Damascus.[17] An *Isnād* (chain of authority) of a Syrian tradition refers to a few Umayyad caliphs as *qāḍīs*" And said al-Walīd, he is the *qāḍīs* al-Walīd b. 'Abd al-Malk, who quoted the *qāḍīs* 'Umar b. 'Abd al-'Azīz..."[18] Where the governors[19] and the caliph themselves constituted the judicial system (at least partially) and were approachable by subjects from all over the empire, the machinery of maẓālim functioned as an inherent part of the existing judicial system, and no additional separate institution was required.[20] Although the maẓālim did not exist as a distinct institution under the Umayyads, the latter can still be credited for laying the foundations of that institution within Islamic administration, since subjects had access to the caliph and the governors, and could address their complaints to them.[21] At this stage of development of Islamic law we should not expect to find any doctrinal basis for the activity of the maẓālim.

Maẓālim under the 'Abbasids and the rise of its theoretical foundation

Al-Māwardī indicates the existence of maẓālim under few of the 'Abbasid caliphs: al-Mahdī (r. 158 - 169/775 – 785), al-Hādī (r. 169 – 170/785 - 786), Hārūn al-Rāshid (r. 170 – 193/786 - 809), al-Māmūn (r. 198 – 218/813 - 833) and al-Mahtādī (r. 255 – 256/869 - 870).[22] Other historical sources confirm that maẓālim existed under other 'Abbasid caliphs as well. Al-Dhahābī describes Ibn Sa'ad, the Wāli (governer) of a ma'ālim court in Bacra during the time of Hārūn al-Rāshid, who was orthodox, and his son who served in the same capacity in Baghdād.[23] Shihabītells about 'Amar b. As'ad b. AbīGhaleb, who was a *qāḍī*, jurist and the head of the Mā'alim in Baghdad in around 879/266.[24] Al-Subakī tells about Salem Muhammad b. Haghaj al-Akhshīd, who was a qāḍī and the nā'ar fi al-maẓālim in Egypt and later on in Baghdād, in around 325/936.[25]

Although it is difficult to ascertain exactly who was in charge of the maẓālim (nāẓīr, wālī or saḥīb al-maẓālim) at any point in time during the first two centuries of the Abbasid regime, going by the above examples and other sources, one can safely assume that the ma'ālim was continuously active as a distinct judiciary system in Baghdad as well as in other cities and provinces in the 'Abbasid Empire.

What actually went on in the maẓālim is less clear. Historical and other sources pay little attention to, or are silent on, this question. However, Ibn Qudama's (d. 337/948) short description of activity in the maẓālim may shed some light on the matter. His *Kitāb al-kharājwacanā'ah al-kitābah,* of the mirror for princes genre[26] from the middle of the 10th century, contains a short description of the character and procedure of the maẓālim court:[27]

The origin of this office (*Diwān*) is in religion and faith, and its character is to do justice for and take pity on those who have been abused. In the gathering organized by the caliph every Friday, all those who have petitions (or complaints) will come and submit their petitions to the official responsible for this office. The official will review the petitions, until the committee that was appointed by the caliph convenes in the office. [When the committee arrives] the official [who is in charge of the committee] will call on each petitioner to present his petition orally before the committee. Afterwards the committee will review the petitions, their authenticity and content … and will discuss them. One of the presenting clerks will write the

decision and will send it to [the relevant office such as] the office of the *qāḍīs*, or the office of the caliph, or the official in charge of any other office.

This quite early[28] description of the practice of the maẓālim courts can be considered an authentic account of their procedure under the 'Abbasids. This account teaches us that at this point in time the existence of maẓālim courts was a stable convention and not only the caprice of a caliph with a penchant for justice.[29]

Although there is no doubt that holding maẓālim courts was a widely accepted practice in the Islamic state from the outset, the doctrinal basis for their activity in the legal sources of the time is extremely poor. In fact there is only one important source, the *Kitāb al-kẖrāj*, that deals with the subject and it is therefore important to review it carefully.[30]

In his *Kitāb al-kẖrāj*[31] Abu Yūsuf (d. 798/182),[32] recommends that the caliph constitute a maẓālim so that his wronged subjects will have the opportunity for justice. He writes (emphasis mine):[33]

> *If you seek the favor of God, O commander of the faithful, make it a rule to preside, once in a month or in two months, over the maẓālim tribunal, to hear the complaints of the oppressed and to denounce the wrong-doers, so that you should not be one of those who are uninterested in the needs of the subjects… If you can't hear all the complaints in one day's sitting, hear part of them and postpone the hearing of others to the next sitting. No one should be preferred over another, and he who was first in presenting his complaint should be heard first.*

Abu Yūsuf addresses both the establishment of the court and the details of its procedure.

The context of this text is no less important for us than its content. The *Kitāb al-kẖarāj* was written for Caliph Hārūn al-Rshīd and therefore originates during the last decade of the 9th century when Islamic law was in an early stage of development.[34] It is therefore surprising to find a leading scholar like AbūYūsuf dedicating important parts of his legal work on the *kẖarāj* to public law (the ma'ālim is only one example). AbūYūsuf's concern with such matters is innovative, and his methodology in writing on public law is particularly interesting. *Kitāb al-kẖarāj* uses every kind of legal source

and material available at the time (Koranic verses, traditions and opinions of other scholars).[35] What is most unique is Abu Yūsuf's writing style: in making his point he combines his own words with the various traditions he has assembled. This is in contrast to most legal texts of the time that are, generally, no more then edited collections of traditions.[36] This demonstrates that AbūYūsuf saw public law as part of his legal work.

In the case of the maẓālim, AbūYūsuf bases his doctrine on a caliphal tradition. The tradition tells about Caliph 'Umar, who at the end of the harvest season gathered all his administrators along with petitioners, and addressing those present, said:

> *"I have sent these my administrators to deal with your affairs justly (walātbal-%a3) … now, if anyone of you have any complaint against them (famankānatlahu ma'lama 'indaāḥadminhum), let him speak up…"*

One of the people raised a complaint and the Caliph 'Umar ordered the official involved be punished.[37]

This tradition is most probably[38] the source of AbūYūsuf's doctrine of ma'ālim,[39] but he extended it. Whereas the tradition describes the caliph appealing to the people, in *Kitāb al-kahrāj* they have to appeal to him. And whereas the tradition describes a unique occurence, AbūYūsuf calls for establishing a regular annual gathering for hearing complaints. Indeed it is in *Kitāb al-kahrāj* that we also find for the first time a reference to the ma'ālim as a tribunal that sits to hear complaints (*al-majlūs al-maẓālim*).[40] This development, from the narrow doctrine of maẓālim suggested in the tradition to the wider doctrines that even include procedural details, is a microcosm of the development of public law in Islam. At this stage there was only meager development of public law in Islam. Although public law was not in the mainstream of the creation of *fiḳh* (jurisprudence), it was nevertheless present.[41]

Although there is no direct reference to the theory of maẓālim before al-Māwardī, we can point to an indirect reference in legal writing to the maẓālim technique. As Yanagihashi has showed, according to some early Mālikī scholars, it was possible to refer some legal cases to the *sulṭān*.[42] In these cases the *sulṭān* was expected and

qualified to provide a more efficient or just solution than the *qāḍīs*.[43] Closer examination of the practice found in Yanagihashi's examples shows that it was more akin to Umayyad practices where the governor and caliph acted as legal practitioners than to the institutional practice of the ma'ālim. However, in all examples the maẓālim is never mentioned although it unquestionably existed. Therefore Yanigihashi's cases can be seen either as a remnant of the Umayyad tradition, or as a variation of the maẓālim.

A comparison of AbūYūsuf's text and the much later text of Kudāma will not, of course, shed light upon the doctrinal development of the maẓālim institution since the character of the two texts is completely different (one is a purely legal text whereas the other belongs to the mirrors for princes genre). It will not tell us to what extent AbūYūsuf's doctrine was implemented in practice, but it will give us an indication of the practical development of the institution.

The most remarkable difference between AbūYūsuf's doctrine and the practice described by Kudama is the character of the institution. AbūYūsuf describes the ad hoc *majlūs*(council) of a just caliph who sits every "one or two months," whereas Kudama describes a permanent office (*diwān*) with an official in charge, in a fixed place with a staff of clerks. Another difference is the procedure. Whereas AbūYūsuf's only advice is to hear each petitioner according to their turn in line, Ḳuḍāma describes a quite strict and complicated procedure beginning with the submission of a written rather than an oral petition, which is then seen by the head of the chamber and finally heard by the maẓālim committee. Another important difference is in who constitutes the tribunal. In 3udāma's description the hearing takes place before a committee "appointed by the caliph" who is the source of authority for the maẓālim in general, while the caliph himself is not necessarily present, as suggested by AbūYūsuf. AbūYūsuf does not describe how the process is brought to a conclusion, but the tradition on which he bases his work suggests that it should conclude with a ruling of the caliph. In the later text it is clearer: the caliph or the head of the chamber issues an order to other governmental offices following their decision. However, one might infer that AbūYūsuf's recommendations were applied.

The applicable norm in *ma'ẓālim* courts

Neither text gives us any clue about the applicable norm in the maẓālim courts. An initial answer to this question can be learned from the testimony of Aḥmad b. Kashmīhānī who heard A%mad b. 'Umar al-Wakī'ī, who was a 3ādī and the *Wālī of ma'ālim*and who said:[44]

> *for the entire twelve years when I was wālī al-maẓālim in Merow I always acted according to what was written in the hadith or according (to the principle of) ra'ī, and I never gave a judgment against Allah*

If this quotation represents a practice that occurred where the maẓālim official was also a *qāḍīs* (which was quiteprevalent) it is likely that *shari'a* was, in some form, applicable not only in the *qāḍī's* court but also in other public spheres.

At this point, we can safely state that we have recognized a practice with long pre-Islamic roots that was adopted by most of the caliphs from the very beginning of the Muslim state. This practice won theoretical recognition in the writings of AbūYūsuf, and therefore became a formal doctrine in the public law of Islam. Ma'ālim was Islamized and progressively transformed into part of Muslim administration throughout the three centuries of the formation of Islam. This description is confirmed by a surprising source. Al-Māwardī, the great theorist of the maẓālim, admits that it has foreign roots:[45]

> *This practice had in fact been considered by Persian kings to be one of the basic principles of equitable government, without the observance of which neither welfare nor fair dealing was possible*

However he immediately qualifies his statement and emphasizes that after the prophet had recognized this practice and extolled it, it became a religious duty (*ḥukmā shar'a*) and a device for the realization of justice.[46]

The lack of further information on maẓālim court decisions or other documentation from this period is the main obstacle to reaching

any further conclusions about the influence of the theory of maẓālim in practice.

The theory of al-Māward- and doctrines of ma'ẓlim

Al-Māwardī's theory constituted a significant breakthrough in the theoretical development of the maẓālim (as in public law on the whole).[47] In his *Aḥkām al-Sultāniyah,* he devoted an entire chapter to a discussion of the maẓālim. His writing on the issue paved the way for later scholars who further developed the doctrine of maẓālim.[48] Al-Māwardī's theory of maẓālim[49] is without doubt the basis for all subsequent discussions on the subject. Nielsen even claims that "no later work can claim to have developed it further."[50]

Al-Māwardī's contribution to the theory of maẓālim should be considered within the context of his work as a whole. Apart from the content of al-Māwardī's doctrines, his methodology was an equally important innovation. Whereas in previous works on public law the use of the common *fiḳh*methodology was limited, the *Aḥkām al-Sultāniyah* uses a well developed methodology[51] similar to that used in *fiḳh*books in other fields of law. The examples are numerous.[52]

Now let us delve into al-Māwardī'sma'ālim theory in depth. The mandate of the maẓālim extends beyond solving disputes between unequal sides, such as government officials and simple citizens, to include combating and preventing wrongdoing of all kinds. Therefore, the ideal *naẓir al-maẓālim* should not sit passively in his office and wait for the complainants to come, but should chase down iniquity wherever it may be found. This extended mandate is not actually described in the detailed discussion of the Mazalim's day to day operations. Rather, it can be discerned from the qualities required from the official in charge, the *Naẓir al-maẓālim*:[53]

> *The official concerned must therefore be majestic, authoritative and imposing, as well as manifestly honest, free of avarice and eminently pious. Since his office calls for a combination of the charisma of those in power with the serenity of judges, he must enjoy the qualities of both categories, and show himself by his courtliness capable of commanding the obedience due to both.*

If al-Māwardī's requirements for the position of *Naẓir al-maẓālim* is an indication of the convention in practice, it is not surprising that historically, many judges served as *naẓir al-maẓālim*.[54] But the *naẓir al-maẓālim*is only part of a larger tribunal that constitutes the maẓālim, which includes, in its ideal form, representatives of five groups:[55]

> *First, guards and lieutenants to subdue the strong and chasten the bold; second, judges and administrators to provide information on established rights and how they deal with litigants; third, jurists to be consulted on problematic issues and ask to clear ambiguities and other sources of obscurity; fourth, clerks to record what goes on between opponents and decisions made for and against them; fifth, notories present to witness the decisions taken.*

The representation of such a wide range of officials in the tribunal is considered necessary because of the broad jurisdiction al-Māwardī bestows upon it. The long list below stresses the vital role he intends for that institution within the governmental apparatus of the time. It also serves the higher aim of improving the state of the community (*mṣlaḥa*) and preventing evil. The following cases are under the maẓālim's jurisdiction:[56]

1. Oppression of subjects and abuse of their property, by officials. This is not limited to specific complaints against officials but includes official misbehavior in general, and the replacement of officials if necessary.
2. Fiscal abuse by officials responsible for tax collection. The maẓālim have to ensure that the collection is lawful and that the law is just (judicial review?). In case of unlawful taxation, the ma'ālim was authorized to order a refund.
3. Monitoring registration of all Muslims' income and expenses, by clerks, when mistakes can lead to overcharging and abuse.
4. Complaints of soldiers in cases of delayed payments by the relevant office or by the relevant official.
5. Restoration of usurped property in two cases: a. By officials: Here the maẓālim should return the property to its legitimate owner when informed of the event, even if no complaint was submitted. The maẓālim can decide the case according

to the records of the relevant office; b. By violent means or intimidation: Here the maẓālim will act only when a complaint has been filed, and will decide according to 1) confession 2) the maẓālim official's personal knowledge 3) testimony against the usurper 4) public knowledge.

6. Control of public and private *waḳf* (trust) property: a. In cases of public *waḳf*, the ma'ālim is in charge of reviewing its management in compliance with the conditions of the donor, by examining all governmental officials regarding the *waḳf* concerned. b. In cases of private *waḳf*, the maẓālim will intervene if a complaint is filed and will decide according to the evidence brought by the parties involved.
7. Enforcement of *qāḍīs*' decisions against powerful parties, such as high officials.
8. Enforcement of *muḥḥtsibs*' (supervisor) decisions whether specific (against a powerful individual) or general (wrongdoing the *muḥtāsib* wishes to prevent though he lacks the necessary power of enforcement).
9. Care of public worship, such as mosque prayers.
10. Deciding between litigants in cases under the *qāḍī's* jurisdiction, but without the restrictive procedural rules of the *shari'a*.

Between the *Ḳāḍī's'* court and the maẓālim court

Most of the above-mentioned is based on the deeds of the Prophet and the Four Righteous Caliphs, and is likely to have its origins in traditions al-Māwardī does not specify. Worth mentioning also are the complicated relations between the *shari'a* court and ma'ālim courts. On the one hand, where the *shari'a* court has a jurisdiction the case should be referred to it, but on the other hand, the maẓālim have a jurisdiction even in plain *shari'a* cases.[57] The explanation for this can be found in the differences between the institutions according to al-Māwardī (who actually portrays the maẓālim as being the better choice):[58]

1. The maẓālim have more power then the *qāḍīs* to enforce litigants to end disputes and to stop oppression. 2. Whereas the *qāḍīs* is bound by what is obligated by the *shari'a* in each case, the maẓālim is restricted only by what is forbidden by the *shari'a*. 3. The maẓālim can intimidate the parties to get to the truth. 4. The maẓālim can react efficiently when it meets oppression by setting compensation for the oppressed and chastising the oppressor. 5. The ma'ālim can postpone its decision if its members think that further scrutiny is required, whereas the *qāḍīs* has to decide right away if asked by one of the parties. 6. The ma'ālim can enforce a mediation process on the parties. 7. The ma'ālim can be flexible with the obligations of the parties if required. 8. While the *qāḍīs* is bound by the strict *shari'a* law of evidence, the maẓālim is free to accept any reliable evidence. 9. The maẓālim can put witnesses on oath whenever needed, where the *qāḍīs* can only do so in restricted cases. 10. The maẓālim can invite witnesses on its own initiative whereas in *qādī's* court only the parties are allowed to do so.

A wide range of jurisdiction together with more flexible procedures and greater powers of enforcement makes the maẓālim, at least in theory, a vital institution.The rest of the discussion is focused on the rule of evidence and in the specific weights of different kinds of evidence (present witnesses, absent witnesses, just and unjust witnesses, written evidence with a witness, written testimony of an absent witness and governmental registration) as valid. Most interesting is that in its guidelines it is to give more weight to the evidence of the weaker side who is *a priori* more honest than the strong oppressor. The empathy and objectivity required from the maẓālim is illustrated by an anecdotal story quoted by al-Māwardī: when the Caliph al-Ma'mun left the court of maẓālim, a woman fell at his feet and cried because of the oppression she had been subjected to. Since the noon prayer was due, Al-Ma'mun invited her with the adversary to the maẓālim sitting of the following Sunday. When the day came, the woman showed up alone in the court room. al-Ma'mun asked her why the alleged persecutor had not come and her answer

was: "He is the one standing next to you, your own son al-'Abbās, Prince of the Faithful." Hearing this, al-Ma'mun ordered his *qāḍīs,* Yahḥyā Ibn Aktham to judge between his son and the woman out of his presence, and when it was decided against his son, he favored the decision.[59]

What can *Al-Aḥkām al-Sultānyah* show us about practice"theory relations (the opposite direction of influence to theory"practice), or in other words to what degree did previous ma'ālim court practice influence al-Māwardī's theory? Even if we assume that AbūYūsuf's text is based on a reality he was familiar with, this assumption does not teach us much, other than that the ma'ālim was already in existence in his time. The historical sources are of more interest. Most of the elements of ma'ālim described in these sources are described by al-Māwardī. Prior to al-Māwardī, the presence of *qāḍīs* in the maẓālim, or of a *qāḍīs* acting as the *na'ir al-ma'ālim*, was common practice.[60] ḳudama's description of the maẓālim, written some hundred years before al-Māwardī (and furthermore, ḳudama was most probably writing about a period before his own time), portrays the maẓālim as a governmental chamber, constituted by a few officials (he does not specify which) who make decisions together, usually in the presence of the governor or the caliph. He also describes the existence of quite strict procedural rules. In general, the procedural rules illustrated by al-Māwardī are similar. Furthermore, al-Māwardī himself bases part of his doctrine on historical sources that describe not only the deeds of the Prophet and the Four Righteous Caliphs – a major source for any book of *fiḳh*" but also the deeds of later caliphs, such as in the story mentioned above.[61] Therefore, we can confidently conclude that the influence of maẓālim practices on al-Māwardī's theory was considerable.

Does this mean that al-Māwardi did not consider his own work to be a legally binding book of *fiḳh*? Naturally, he considered his work binding. For one thing, his work includes far more than a summary and legal paraphrasing of the historical circumstances. It is a manual for the ma'ālim, referring in detail to a wide range of elements. Al-Māwardi's writings are, as we have remarked, characterized by classical *fiḳh* methodology, and it is therefore clear

that his book was a work of binding law. Moreover, although historical circumstances had an unquestionable influence on al-Māwardi's theory, this does not detract from the value of *Al-Aḥkām al-Sultānya* as a work of *fiḳh*. A jurist has never acted in a vacuum. Although as a religious jurist his aim is to promote the desired religious ideal and execute divine will, reality still serves as quite an important and influential factor in his work. When he creates or develops a legal doctrine, he takes into account (sometimes unconsciously) the reality in which it will be applied. Islamic law is indeed to a great extent a jurists' law,[62] but that does not mean it is isolated from reality.

Jurists since al-Māwardī have barely developed the ma'ālim theory. Al-Shayzarī who wrote his constitutional treaties for Saladin, refers briefly to the ma'ālim, and points to Nur al-Dīn practice as a good model of ma'ālim.[63] The later Ibn Jamā'a mentions the ma'ālim only indirectly, in his discussion of the principle of justice.

Other texts worth mentioning are those of Ibn Khaldūn and Ni'm al-Mulk. Ibn Khaldūn for the most part summarizes al-Māwardī's theory. Niẓ¡m al-Mulk's text is more interesting. In his classic mirror for princes *Siyasat Nama* he writes:[64]

> *It is necessary that on two days in the week the king should sit for the redress of wrongs, to extract recompense from the oppressor, to give justice and to listen to the words of his subjects with his own ears, without an intermediary. It is fitting that some written petitions should also be submitted if they are also important, and he should give a ruling on each one.*

Four decades after al-Māwardī's death his theory echoes through the ruler's official writing.[65] That is more than a clue to the major influence it had on actual practice.

The attention AbūYūsuf and al-Māwardī give to the maẓālim is one example (among others) to the presence of public law in legal writing in Islam. It is also an example (although a poor one) of the course of its development. Now we shall turn to review theory–practice relations.

Theory – practice relations: the case of maẓālim

Although al-Māwardī wasn't the last jurist who dealt with the theory of ma'ālim, his writings on the subject are the most extensive and

detailed. This factor, together with the period during which they were written make his theory most suitable for exploring theory–practice relations.

The factual materials available to work with are of two kinds: (a) medieval historical sources and historical facts described in jurists' writing and (b) maẓālim documents, like ma'ālim complaints and decisions or decrees.[66]

The most prominent element in al-Māwardī's theory that was applied in later maẓālim courts was the presence of officials at court hearings. As we have seen, Ḳudama points out that there was a committee in the maẓālim courts but he does not specify which officials took part. We know from other sources that the naẓar al-maẓālim was often a judge and in some cases even a scholar. Many sources portray caliphs who sat in the maẓālim. A maẓālim committee including all these kinds of officials was not found before al-Māwardī.[67] In contrast, descriptions of the work of the maẓālim after al-Māwardī show that all or most of the officials that al-Māwardī mentions as part of the maẓālim were indeed present in the court. Al-Ma3rīzī reports on maẓālim hearings in the presence of the sultan; the four chief *qāḍīs*; thetreasurer (*wākilbayt al-mal)*; the vizier; the chief *muḥtasib*; the chamberlain (*ḥājib*) and a few other officials.[68] In another passage, he describes a ma'ālim hearing of the caliph where following the hearing the caliph addresses the *qāḍīs*, the scholar and the vizier present at the hearing, and orders them to take care of the case.[69] A quite similar description is reported by al-ḳalḳashandī, who states that the officials present in the maẓālim are those who are involved in the judicial process, and those who are needed as assistants. The list is much the same.[70] Another report of a later maẓālim session describes the exact composition of the body: the sultan at the head, on his right the four *qāḍīs* – one representing each school of law (*madhhab*) - and on his left other officials such as *katib al-sir, naẓir al-jaysh, wakil bayt al-mal, the muḥtasib* and several other clerks.[71] This demonstrates the influence al-Māwardī's theory had on actual practice. Instead of the caliph and the *qāḍīs*, or the *qāḍīs* alone, and later, an anonymous committee, there was a larger staff of officials, established in accordance with al-Māwardī's theory.[72]

Another remarkable element in al-Māwardī's theory of maẓālim is jurisdiction. Here above all we can assume that al-Māwardī was influenced by the practice he was familiar with. Yet in his writings, he formulated and expanded the list in a way that enables us to follow its de-facto application. We find that the ma'ālim court in Egypt, where most petitions available to us originate, treated most of the types of cases discussed by al-Māwardī:

1. Abuse of power and of subjects' property: a dispute between Sultan Baybars and one of his soldiers about a well (case 22);[73] a petition against Baybars, regarding Mongol land he had conquered and held for himself (case 32); a case in which an official under Baybaras abused power and exploited dhimīs (case 33); a complaint of oppression by the nāẓīr al-Khāc (case 58); misuse of power by the sons of *ḳāḍīs* al-ḳazwinī (case 61); an accusation against a *qāḍīs* regarding theft (case 81); some of the cases from St. Catherine involving governmental mistreatment of the monastery and its monks also belong to this category (cases 4, 6, 7, 8).

2. Restoration of property usurped by officials: illegal confiscation by Sultan al-Mu'iz Aybak and its distribution as fiefs (case 25).

3. Control of public and private waḳf property: A dispute between the heirs of *ḳāḍīs* Bad' al-dīn al-Sinjārī and others about ownership of a *waḳf* (case 31), a ruling granting control of the *waḳf* of Amir Aybak al-Afram to his sons (case 44), complaints against the Ḥanbalite chief *ḳāḍīs* asserting that he sold *waḳf* land illegally (case 78); a ruling granting control of *waḳf* land to the treasury (case 80), a complaint by the chief *ḳāḍīs* that part of the hājīb's fiefs were *waḳf* (case 79).

4. Decisions normally under the jurisdiction of the ḳāḍī yet without the usual procedural limitations imposed in cases heard by the qāḍī: guardianship and inheritance of a soldier's orphan (case 24); sale at an unfair price (case 46); an accusation against ibn Zahara al-Maghribi for contempt of the Koran (case 47); a dispute between $anbalites and Shāfi'ites on matters of dogma (case 49); an accusation that 'Ali b. Kathir cursed Caliph Abu Bakr (case 74); an emir's assertion that his fief was taken by the vizier in Damascus (case 87);

lack of valid notarization of the will of a soldier who died in battle (case 29).

5. Fiscal abuse by the tax collectors: a complaint by the monks of St. Catherine claiming excessive taxation by governmental officials (case 1, 2, 11), a complaint by a Jewish merchant claiming his merchandise was illegally detained by the tax official.[74]

6. General cases of wrongdoing: al-Māwardī defines such cases as the general aim of the institution:all complaints lodge by monks' in connection with Bedouin attacks and Bedouin threats to their security as well as demands for compensation for damage caused by attacks (cases 10, 13, 14, 15, 16, 17, 18, 19), a Christian from al-Shawbak claiming infringements by his Muslim neighbors,[75] the murder of two merchants and theft of their money (in this case the complaint was filed by the father of one of the victims who sought compensation and due punishment of the murderers),[76] complaints against official appointments: the appointment of Jalāl al-DīnMuḥammad b. ʿAbd al-Raḥmān al-Qazwīnī as chief *ḳāḍī* of Syria (case 54); the appointment of A%mad al-ʿAsjudī to a teaching post (case 60); the appointment of al-Kifjārī to a teaching post (case 66); a complaint lodged against the Ḥanbalite chief *ḳāḍī*, accusing him of sedition (case 26, reported by al-Ma3rizī and others).

The third important element addressed in detail by al-Māwardī is the evidence required by the ma'ālim (in contrast to that required by a *qāḍī's* court). In fact, the ma'ālim disregarded all limitations imposed by the *shari'a* regarding the admissibility of evidence (like written evidence or unjust witness) and the head of the court could accept any reliable evidence. Unfortunately, sources on the internal procedure of the maẓālim courts are quite limited. We can safely assume that the *shari'a* rules of evidence were not applicable in these courts, since there are no reports of restrictions on witnesses or written evidence. However the sources available to us do contain descriptions of certain kinds of evidence that were accepted in practice. For example, witnesses were brought and their testimony was accepted (case 72). In yet another case the governmental registry was used as evidence in connection with a complaint submitted by St. Catherine's monks. The petition also contains al-Kāmil's order to

verify their land ownership claim, using the diwān registrations as evidence.[77]

In other cases, the maẓālim acted to clarify unclear points, a practice recommended by al-Māwardī.

Another procedural tool from al-Māwardī's writings implemented by the maẓālim is the oath. In the maẓālim, the oath can be used in any case of doubt, whereas under the *shari'a* there are strict restrictions pertaining to its use. In the available cases we found three examples of the use of the oath. In two cases the ma'ālim accepted the testimony made under oath (case 26, 58) and in the third case the testimony was rejected (case 81).

The above examples demonstrate the institutional character of the maẓālim. Reading al-Māwardī's theory leaves no room for doubt about the desirable character of that institution. The maẓālim is not a religious institution, but its objectives are consistent with basic Islamic beliefs. Furthermore, it is emphasized that although the decisions of the maẓālim, are not required to adhere strictly to the *shari'a*, they may not directly contradict it. In addition, the ma'ālim serves as a back-up system that deals with residual cases not treated by the *ḳāḍī's* system, and therefore should provide a solution to any kind of legal problem, oppression or dispute the *qāḍī* is unable to resolve.

These ideas are well represented in ma'ālim documents and reports on the maẓālim. The wide range of matters dealt by ma'ālim courts indicate the awareness of the governors or officials acting as heads of these courts of their duty to pursue justice. This is also evident in the courts' practice. In many reports on the institution, either the chief *qāḍī* is present at the hearings, or all four chief *qāḍī's* (one representing each *madhhab,* where relevant) are present. Furthermore, during the 12th century and afterwards, it is reported that one of the participants in maẓālim hearings was the *mufti al-maẓālim*, a jurist whose role was to give legal opinions on questions which arose before the maẓālim. These practices serve no function other than as a channel for the will of the chief of the maẓālim, be it the governor or other official, to apply *shari'a* in this system as far as possible.

One mystery remaining unsolved is the substantive law applied in the maẓālim, The documents available to us offer little information on this matter, and for the most part are limited to the result of the petition. No clues are provided about the content of the court hearings themselves or the grounds for the decisions. On the other hand, it will be unreasonable to assume that decisions were made arbitrarily, randomly or with no basis other than the sense of justice of those making the decisions. The presence of *'ulama* (scholars) and *qāḍīs* lend to the conclusion that a more coherent and systematic decision-making process was used. Let us imagine the situation: the court is dealing with a petition. First, the details of the case are discussed, and the facts are reviewed. Then the question of how to make a decision arises. The governor refers to the *qāḍīs* and the *'ulama* for their opinion. The chances are that the jurists, who were well acquainted with the *shari'a* – its details and principles – would import a solution from their intellectual world – religious law. We do not claim that *shari'a* was the exclusive source of substantive law in the court, but we do think that it is safe to assume that *shari'a* principles and even specific doctrines were a major influence on the decisions made by the maẓālim.

Another matter worth mentioning here is the *dar al-'adl*, the 'palace of justice' medieval rulers used to build for their courts. About a hundred years after the *Al-aḥkāmal-sultānyah*was written, the first *dar al-ẓadl* was built by Nur al-Din (r. 1146 – 1174) in Damascus.[78] The establishment of the *dar al-'adl* did not represent achange in the basic practices of the maẓālim. Rather, it should be seen more as an indication of a change in its position relative to other administrative institutions, and the preferential status allocated to it by the regime.[79] It is unlikely that al-Māwardī's theoretical base was the direct cause of the establishment of the *dar al-'adl*, but we can't exclude the possibility that it had an indirect influence. The central position of the ma'ālim in al-Māwardi's theoretical writing on government might have been noticed by a Muslim ruler who was interested in jurists' writing.

In addition, one cannot ignore the moral importance of preventing injustice - *'ulum*, in Islamic thought. This undoubtedly had an influence on the theory and practice of the institution. In Bkharī's collection of traditions we find an entire section devoted to the idea of preventing injustice – *bāb al-ma'ālim.* This section outlines the general concept of combating injustice. In practice, this concept is applied by the ma'ālim court. One of the traditions in this chapter demands that the believer come to the aid of the oppressed. The tradition narrates:[80]

> *Sa'id b. al-Rabi'a – Sha'ba – Ihsas b. Salim - Muawiya bin Suwald: I heard al-Bara' bin 'Azib saying, "The Prophet orders us to do seven things and prohibited us from doing seven other things." Then al-Bara' mentioned the following: … to help the oppressed…*

The tradition does not specify the nature of this help, yet makes a general demand to recognize evil (*naẓir al-maẓālim*) and prevent it.[81] The demand is moral rather than legal. Another tradition narrates a similar idea:[82]

> *Yaḥya b. Bakīr – Layth – 'Akīl – b. Shihab – Salma - 'Abdullah b. Umar: Allah's Apostle said "A Muslim is a brother of another Muslim, so he should not oppress him, nor should he hand him over to an oppressor. Whoever fulfills the needs of his brother, Allah will fulfill his needs; whoever brings his (Muslim) brother out of a discomfort, Allah will bring him out of the discomforts on the Day of Resurrection"*

Bukharī proceeds to transmit traditions that express the same idea – oppression by a Muslim believer is unacceptable and the oppressor will inherit the fire of hell and will be excluded from the Muslim community.

It is hard to define the actual influence of those moral ideas on the day to day practice and theory of ma'ālim, though they surely had some. Since Muslim law is religious law, its aim of arranging all aspects of life stems not only from a need to regulate the day to day worldly behavior of its believers, but also their moral thinking and behavior. Morality is thus an essential part of Islamic law, and has a strong influence on it. This influence is reflected by the jurists' motivation in shaping a law that will lead believers towards the religion's moral ends. Furthermore, when a believer acts to fulfill his duty – whether he be the caliph, the ruler or a government official –

he sees religious morals as an important part of the ideology motivating him. When this moral ideology combines with actual practice – in our case, the actual practice of the maẓālim – it becomes an influential factor in the way that the *za'ir al-maẓālim* functions in fulfilling his duty. Thus, moral ideas become one of the sources of actual practice in the ma'ālim court.

If we take this idea one step further, it can lead us to some surprising conclusions. Traditionally, research on Islamic law in general and public law in particular asserts that in many cases Islamic law remained purely theoretical without any consideration for worldly practice. This assertion stems primarily from the lack of clear historical evidence of the application of legal doctrines in day to day life. It also results from the skeptical attitude of western researchers towards religion and religious behavior. In their attempt to understand the reality of Islamic society and politics during the ancient period, many western researchers are unwilling to accept religious justifications as authentic. When a caliph or a ruler is described as a pious individual who justifies his everyday actions and important decisions with religious reasons, they usually interpret his religious justifications as mere excuses and point out his 'real' secular motivation.[83] Therefore, even when it is reported that a ruler was acting in some matter according to a *shari'a* doctrine, some will try to remove the religious façade of his actions and find out the 'truth' of the matter.[84]

We would like to cautiously suggest a different perspective. Scientific skepticism is an important tool that should not be disregarded. On the other hand, research on Muslim kings, rulers and other members of the Muslim community, should evaluate them as religious individuals motivated primarily by religious ends, from their perspective.[85] This attention to the subjects' perspective should be balanced with some degree of skepticism, in order to help us uncover other motivations, when they are present, as they often are. We should avoid becoming naïve believers ourselves. Cynicism towards religion, faith and religious justifications should be eschewed in favor of a clearer understanding of Muslim reality.

Accordingly, where a legal doctrine exists and is widely acknowledged, we are likely to assume that it was actually followed.

Al-Māwardī's theory of ma'ālim was without doubt well known to other jurists in his time and subsequently. Furthermore, the very same theory was put forward (or copied) by the Ḥanbāli Abu Ya'ala in his *Aḥkām al-sultāniyah*, so we can be quite sure that *na'ir al-ma'ālim* or the *ḳāḍī* that worked in the Mazālim court, and in some cases even the orthodox ruler, were well aware of these doctrines. If so, it seems unlikely that they would simply ignore an existing (religious) legal doctrine in favor of their own innovations. In other words, we think it is more reasonable to assume that al-Māwardī's (or other) legal doctrines were influential than to accept the claim that they were consistently ignored. This, together with reports of actual implementation of doctrines in ma'ālim courts, draws a completely different picture of theory – practice relations in Islamic public law.

Theory – practice relations reconsidered

Over the last two or three decades, the world of legal research has been enriched by several new theories offering a fresh perspective on some of the basic questions of legal research, such as what is law, what shapes it and what are the limits of law. and what kind of relationship obtains between law and the society.[86] One new perspective in legal research is indeed called 'law and society'. In general, this perspective on law views legal phenomena within the context of the society in which the law is applied. Its main thesis is that when we research legal phenomena we cannot understand them properly if we focus solely on the corpus of legal materials, without understanding the social context of the law's application. Therefore, researching the legal corpus outside of its societal context will lead to a misunderstanding and a partial picture of the legal phenomenon. With this hypothesis we try to understand what the real relations and interactions between Islamic law and society are. We take into account the two way influence of society and law. The term 'law and society' encompasses a wide range of research methods and perspectives from various fields. For our purposes, we have chosen the methodology proposed by Professor Menachem Mautner in his article "Law as Culture: Toward a New Research Paradigm."[87] We shall summarize his methodology in a nutshell. Mautner does not

look at the law as a system of rules or norms.[88] In his opinion, law is composed of a much wider range of materials. In addition to legal rules, legal principles, legal norms and moral norms, the law contains materials from various other sources like political thought, philosophy, and literature. The legal solution for a certain factual case is not monolithic. There is no 'right' solution to any legal problem. There are always several possibilities that can be subjective and depend on the judge (or jurist) that deals with the case and his internal cultural world and legal attitude. In this way of looking at law, common sense plays an important role in legal decisions. This common sense contains the empirical and normative information the jurist has gathered in his work, provides him with a better understanding of reality and possibly even influences the decision he makes. Furthermore, when a judge makes a decision or a legislator makes a rule, this decision or rule will always have some influence on the actual world. It can influence the world even before it is implemented, because its very existence itself has an influence on consciousness.[89]

This perspective on modern law can be applied to the religious legal system of Islam. Muslim law can most definitely not be seen as a fixed, closed system of rules with a single 'right' answer for any situation. The abundance of materials in most fields of law and the variety of schools and sub-schools of law, along with the wide range of opinions in each school on almost every matter, make Islamic law even more compatible with this perspective than some modern legal systems. Moreover, common sense (*ra'ī?*) is an important factor in decision making in Islamic law. This is clear from *ḳāḍīs*' decisions, where the solutions are given by applying one of many possible available solutions. Finally, the jurist's writings (and in a way also the *qāḍī's* decisions) have a factual influence on reality, even before they are implemented, because of their influence on the believers' consciousness.

Mautner's next step is to look at the law from a cultural perspective. From this perspective law not only defines what is forbidden or permitted, but it also constructs meanings in the lives of those subject to it. It influences their self-consciousness and self-definition. It constructs relations between members of a certain community, and their status compared to members of other communities. Law therefore influences many aspects of societal life. But does society influence law? According to Gordon, the answer is positive. He describes a circular process whereby law changes society and society changes law.[90]

As a result, Mautner concludes that it is impossible to see law and its subjects as two distinct entities. People are not external to the law and their preferences and decisions are not independent of the law and its content. The law affects their notions about reality and society, and is therefore always relevant for them. Consequently, there is no such thing as law that is purely theoretical. All law has some influence on the actual world, albeit sometimes minimal.[91]

When it comes to religious law it is even easier to understand the influence law has on people's practices and consciousness. In religious society, religious law dictates every aspect of the believer's life. For a religious person, the law represents the pure will of God and fulfilling it is the key to religious perfection and the world to come. It therefore has a distinct influence on what people do, beyond its direct influence on day to day behaviour. Even when the application of a certain norm or doctrine in daily life is not apparent, nevertheless it is not purely theoretical. It has an impact on peoples' notions of what is right and wrong, and directs them towards the ideals they strive for. According to this view of law, partial and nevertheless actual influence is a possible criterion for the effectiveness of the law.

Examining theory-practice relations in Islamic law and Muslim society from this perspective leads us to a different understanding of the law-society relationship in Islam. Let us take the ma'ālim as an example. As we have shown, the ma'ālim existed under different names long before Islam. Muslim society incorporated the maẓālim, and Abu Yūsuf developed an Islamic legal framework for it. In its Islamic incarnation, the ma'ālim continued to develop into a sophisticated governmental institution, a fact that most probably encouraged al-Māwardī and later jurists to further develop its legal theory and doctrines. This more developed theory in turn influenced

ma'ālim practices. None of these influences were absolute, and we have not found a single case where a theory was adopted, one hundred percent, in practice, or vice versa. At the same time, the vast majority of legal theories we have examined have some social influence, and most legal practice was influenced in some way by theoretical writing in the field.

Consequently, treating theory and practice *a priori* as two spheres that do not interact, where the impact of one on the other is recognized only when distinct cases of influence can be clearly pinpointed, misses an important part of the bigger picture. We should instead view law, and the society subject to it, as a continuum where in exceptional cases they influence each other only slightly, whereas in other cases, in ordinary, core parts of the field the influence is greater. Therefore, in some cases the influence will be hard to define whereas in other cases it will be clear.

Conclusions

Through the application of the law and society theoretical approach to our research on Islamic law, together with a discussion of available legal and historical materials, we have tried to demonstrate that public law has had a greater influence on Islamic law than was previously believed. This conclusion is based upon two primary claims. Firstly, inflexible definitions of law are faulty in that they require, in order to prove that theory and practice impact each other, indisputable evidence of such impact. Secondly, since evidence is rarely so clear-cut, especially in the case of law from earlier historical periods, many scholars have reached the mistaken conclusion that such influence does not exist. Our law and society approach to Islamic law enables us to rely on less decisive evidence, using a flexible understanding of law and its place in society. In addition we have followed the development of public law in Islam, through the institution of the maẓālim.

Notes

1. Coulson for example claimed that "For them [the jurists] the Shari'a represented a religious ideal, to be studied for its own sake rather than applied as a practical system of law." Noel J. Coulson, "Doctrine and Practice in Islamic Law: One Aspect of the Problem" in: Ian Edge, ed., *Islamic Law and Legal Theory* (Aldershot: Darmouth, 1996), 434. Snouck-Hurgronje, argued the same regarding public law and its influence on state actions. See: C. H. Bousquet and J Schacht, eds., *Selected Works of C. SnoukHurgronge* (Leiden: Brill, 1957), 265. See also for example: Joseph Schacht, *Introduction to Islamic Law* (Oxford: OUP, 1964), 76; and Noel J. Coulson, *A History of Islamic Law,* Edinburgh: Edinburgh University Press, 1964), 123-24.

   See also: Shuki Friedman, "Public Law in Islam in the Perspective of SiyasaShar'iya," PhD dissertation, Bar-Ilan University, 2008.

2. I Kings, 3:12-28. Solomon himself asks his Lord for "an understanding heart to judge thy people that I may discern between good and evil: for who is able to judge this thy so great a people" (ibid., 3: 9).

3. Contrary to the image of judge-king that can be inferred from the bible, Jewish law argues for a strict separation of powers between judgeship and kingship. In the code *Mishne Torah* Maimonides set out that "The king of Israel is not given a seat on the Sanhedrin" (The Code of Maimonides, The Book of Judges, the law concerning the Sanhedrin, ch. 2, paragraph 4). Although Maimonidesexpresses the mainstream of Jewish law on this issue, R. Nissim of Girondi gives the Jewish king limited jurisdiction. See: *TheR. NissimLectures*, lecture 11.

4. Solomon had an impressive administration, composed of eight ministers and twelve governors who ruled and collected taxes in twelve districts: *Ibid.*, lecture 4.

5. Guidi, M., "Mobadh", EI2, vol. vii, p. 213.

6. *ArdāVirāf*, ed. HoshangjiJamapji Asa, revised by Haug and West, p. 96. Quoted in: ShaulShaked, *From Zoroastrian Iran to Islam*, (Hampshire and Vermont: Variorum, 1995), article iv, 1-2.

7. Ibid.

8. See: Steven Runciman, *Byzantine Administration* (London: Methuen, 1961), 90-92.

9. James Muirhead, *Historical Introduction to the Private Law of Roman* (London: Black, 1916), 197- 98, 334-36.

10. Benjamin R. Foster, "Agoranomos and Mu%tasib," *JESHO* 13 (1970): 128, 130.

11. However, according to Majdalawi, an administrative system existed in the second decade of Islam. See: Farouk S.Majdalawi, *Islamic Administration Under 'Umar Ibn al-Khittab* (Jordan: Majdalawi Enterprise, 2002).
12. Coulson, *History,* 29.
13. M. Sperling, "From Persian to Arabic," *The American Journal of Semitic Languages and Literatures*, vol. 56(2)(1939): 175, 181-82; Lionel Casson, "Tax-Collection Problems in Early Arab Egypt," Transaction and Proceedings of American Philosophical Association, Vol. 69(1938): 274, 280.
14. Arabic was declared the formal language of the administration by 'Abd al-Malik b. Marwān (r. 685-705) only in 687. See: H. I. Bell, "The Administration of Egypt Under the Umayyad's Caliphs," *Byzantinische Zeitschrift*, 28(1928): 279, 280-85.
15. Ibn al-'Arabi, *Aḥkām al-Qur'an*, Vol. IV, 61.
16. al-Māwardī, Ibi al-Ḥasan 'Alī b. Ḥabīb, *Al-aḥkām al-sultāniyah wa al-wlāyāt al-dynyah*, 'Imād Zki al-Bārūdi edition (Cairo: no year), 148. 'Umar b. 'Abd al-'Azīz is considered by later Muslim scholars to be one of the pious among the Umayyad. See Bell, "Admiistration."
17. Joseph Schacht (the late), "Law and Justice", in: P. M. Holt, A. K. S. Lambton, L. Bernard, eds., *The Cambridge History of Islam*, vol. 2b (Cambridge: Cambridge University Press, 1970): 539, 548.
18. Al -Bukhārī, Mu%amad b. Ismā'īl (d. 256/870), *ṢaḥīḥBukḥārī* (Beirut: Dar al-M'arafat, 1407), vol. 1, 309.

18a. See the first and the second appendix in: Patricia Crone, *Slaves on Horses* (Cambridge: Cambridge University Press, 1980).

19. See also Patricia Crone and Martin Hinds, *God's Caliph* (Cambridge: Cambridge University Press, 1986), 25 ff.
20. One of few administrative practices the Umayyads adopted.
21. Al-Māwardī: *al-Aḥkām*, 148.
22. Muḥamad b. Aḥmad al-Dhahābī Abū 'Abd Allah, (d. 748/1348), *Sīr a'lām al-nablā'* (Beirut: Muāsasat al-Risāla, 1413), vol. 9, 115.
23. Abu Bakr b. Aḥmad Shihabī, *labaḳāt al-shāfi'iya* (Beirut: A'lam al-Kitāb, 1407), vol. 2, 143.

24. Taj al-Dīn al-Subakī, (d. 771/1369), *Ṭabaḳāt al-shāfi'iya al-kabrī*, Dr. Maḥmud MaḥmudTanaḥī and Dr. 'Abd al-Fatāḥ Muḥamad al-ḥalu edition, 1413, vol. 3, p. 81.
25. For a review of this genre and its characteristics see: Heck, *Construction*, 6-25.
26. ḳudama b. Ja'afar, *al-Kharāj wa banā'ah al-kitābah*, Dār al-Rashīd, Iraq, no date, 64. On 3udama's book and its wider context see: Paul L. Heck, *The Construction of Knowledge In Islamic Civilization: Qudama b. Ja'far and his Kitab al-Harājwabinā'ah al-Kitābah* (Leiden: Brill, 2002).
27. Heck considers it to be written in the 3rd or 4th decade of the 10th century. Heck, *Construction*, 1; 4.
28. The development of the institution is described in Emile Tyan,*Historie de l'organisationjudiciaireen pays d'Islam* (Paris 1938-43. 2nd ed. Leiden 1960): 87-98.
29. Hiroyuki Yanagihashi, "The Judicial Function of the Sulmān in Civil Cases According to the Mālikīs up to Sixth/Twelfth Century," *Islamic Law and Society*, Vol. 3(1) (1996): 41. Yanagihashi points out the poor sources for Ma'ālim but for some reason ignores AbūYūsuf's text. Yanagihashi's explanation for jurists' ignorance of the Ma'ālim is that jurists did not want to waive the *qāḍī's* monopoly (at least as an ideal) over conflict resolution.
30. *Kitāb al-khrāj* is the title of many books that deal with the land tax, the *kharāj*. Ben-Shemesh counts up to 23 books with this title. Unfortunately, many of them have been lost. See: Aharon Ben-Shemesh, *Taxation in Islam* (Leiden: Brill, 1958): vol. I, 3-7.
31. The attribution of this *Kitāb al-khrāj* to AbūYūsuf is controversial. According to Calder the book is a later work that was written by the Ḥanafi scholar Ḥasāf (d. 253/875): "… the *Kitāb al-Kharāj*is most likely to belong to the middle decade of the third century": Norman Calder, *Studies In Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 146-47. Zaman rejects Calder's points and shows that the book originated in the age of AbūYūsuf and that there is no reason to doubt that he wrote it. See: Muhammad Qasim Zaman, "The Caliphs, The 'Ulamā and The Law: Defining the Role and The Function of The Caliph in The Early 'Abbāsid Period," *ILS* 4 (1997): 1, 14-15; Muhammad Qasim Zaman, *Religion and Politics Under The Early*

'Abbāsids: The Emergence of the Proto-Sunnī Elite (Leiden: Brill, 1997): 91-101; Hossein M.Tabātabā'i, *Kharāj in Islamic Law* (London: Anchor Press, distr. Brill 1983).

32. Y'aḳūb b. Ibrāhīm Abū Yūsuf, *Kitāb al-khrāj* (Cairo: Mumaba'ah al-Salafyah, 1962), 111-112. translation: Ben-Shemesh, *Taxation*, vol. III, 111.

33. The most important written work from this time is Mālik's*Muwma*. On the development of law in this period see: Calder: *Studies*, 20-21; Harald Motzki, *The Origins of Islamic Jurisprudence* (Leiden: Brill, 2002), 17; Wael B. Hallaq, *A History of Islamic Legal Theory* (Cambridge: Cambridge University Press, 1997), ch. 2; Michael Cook, *Early Muslim Dogma* (Cambridge: Cambridge University Press, 1981), 16-20, 153-58.

34. This same wide basis was used by Calder in coming to his conclusions (*Studies*, 32).

35. Unlike later texts, the traditions are brought at the end of each chapter and not as part of AbūYūsuf's original writing: this leaves the exact source of each doctrine quite vague.

36. AbūYūsuf, *Kitāb al-kahrāj*, 115-116.

37. As mentioned above, AbūYūsuf does not indicate the source of each doctrine he deals with.

38. A question should be raised about this tradition, as well as the other tradition in *Kitāb al-Khrāj*, concerning their originality and the date and place of their creation. This question has great importance for the development of public law in Islam, since dating traditions that deal with public law (and there are few hundred traditions of this kind) can teach us a lot about how it developed (the writing on this question is voluminous, see: Ignatz Goldziher, "The Principles of Law in Islam," in *The Historians' History of The World*, vol viii (1904) 294-304; Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford 1950 [1967]); Harald Motzki, *The Origins of Islamic Jurisprudence* (Leiden: Brill, 2002). For a review of the different approaches to this question see: Ze'ev Magen, "Dead Tradition: Joseph Schacht and the Origins of "Popular Practice," *ILS* 10: 276, 277-281.

39. AbūYūsuf, *Kitāb al-kahrāj*, 37.

40. Ma'ālim is only one example. In *Kitāb al-kahrāj* Abū Yūsuf develops other doctrines in public law: the duties of the caliph; appointments of officials; duties of the subjects to the regime; the ethics of the caliph in his position. It is certainly an innovative work in the field in its time. On the periodization of Islamic law see: Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Costume During the Geonic Period* (Cambridge: Harvard University Press, 2003): 250-51; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964): 5.

41. *Sulmān*in this context can be a regional governor or even the governor of a city (Yanagihashi, "Judicial Function," 43-45 n. 30.

42. Yanagihashi gives four categories for such cases: cases in which the *sulmān*plays an instrumental role; cases in which the *sulmān*is called upon to decide on the dispute for a practical reason; cases in which the *sulmān* safeguards a right not protected by the *shari'a*; cases which are not under *shari'a*jurisdiction ("Judicial Function," 45). He brings examples for each category.

43. Al-Dhahābī Abū 'Abd Allah, *SīrA'lām al-nablā'*, Vol. 11, 37.

44. al-Māwardī: *al-Ahkām*,148.

45. Ibid., 150.

46. Al-Māwardī devoted five books to the art of government and public law in Islam. Elsewhere we show that his writing is a microcosm of the development of public law in Islam. His first three books on the subject (*ḳawānīn al-wuzara*; *Taṣhīl al-naẓarwat'ajīl al-ẓafar* and *Naṣīḥat al-mūlūkī*) can be categorized as mirrors of princes, whereas the two books he wrote closer to the end of his career (*Adab al-dūnyawa al-dīn* and *Al-aḥkām al-sultānyahwa al-wlāyāa al-dynyha*) are strictly books of law. See: Friedman, "Public Law," 1).

47. We shall engage with the ma'ālim theory of al-Māwardī only as required to illustrate our wider claims. The first scholar to handle al-Māwardī's theory of ma'ālim was Amendroz (see: H. F. Amendroz, "The Mazalim Jurisdiction in the Aḥkām al-sultāniyya of Mawardi," Journal of the Royal Asiatic Society [1911], 635); the theory is subsequently dealt with by anyone writing on the ma'ālim.

48. The *Al-aḥkām al-sultānyah* of al-Māwardī is surprisingly similar to that of his contemporary AbūY'ala al-Farā' also entitled *Al-aḥkām al-sultānyah*. According to Al-Baghdādi Abū Ya'ala copied major parts of his work from al-Māwardī. In any case, regarding ma'ālim there is no difference worth mentioning. See: Aḥmad Mubarak Al-Baghdādi, "The

Political Thought Of Abū al-Hasan al-Māwardī," Ph.D diss. University of Edinburgh, 1981: 220-223; see also: D. P. Little, "A New Look at *Al-aḥkām al-sultānyahi*," The Muslim World, LXIV(1974):1-15.

49. Jorgen S. Nielsen, *Secular Justice in an Islamic State: Ma'ālim under the BaḥrīMamlūks, 662/1264-798/1384*, Nederland Historisch-ArchaeologschInstituut, Istanbul 1985, p. 17.

50. This is not necessarily true of the other political works of al-Māwardī (Nielsen, *Secular Justice*, 47).

51. To summarize the role of the *na'r al-ma'ālm* as an arbitrator, he quotes a prophetical tradition narrating a story about the prophet acting as an arbitrator in a dispute over water rights. The story ends with the prophet punishing the unjust party, another way to *na'r al-ma'ālim*if you like. (al-Māwardī: *Aḥkām*, p. 146-147. The origin is Bukhārī: *Ṣaḥīḥ* 2359, 2360).

    Since al-Māwardī is almost the first to write on maẓālim, the discussion here is humble in sources and former scholars' opinions than his discussion of other issues. A better example (again, one of many available) is his discussion of the appointment of an imām, a classical issue in Islamic public law: He opens the discussion with a Qur'anic verse on political authority: "O ye who believe. Obey Allah, the messenger and those of you who are in authority" (Qur'an 4:59) to demonstrate the necessity of authority and its source of legitimacy. Then he analyzes the available options for electing the imām: elections by the *ahal al-ḥallwa al-'aḳad* ("Those who permit and bind", sometimes called *ahl al-iḥtiyar* a group of electors who have the authority to appoint an imām. The electors' appointment and their required qualities are discussed at length in various texts (see: *ahal al-ḥallwa al-'aḳad* vol. I, 263-64) along with the possibility of nomination by the previous imām. Then he starts to discuss each option: regarding the option of appointment by elections he brings two different opinions of previous scholars on the minimum number of electors that constitute the *Ahal al-ḥallwa al-'Aḳad*. The number is between three according to Kūfan scholars and a much larger group (five, according to Basal-jamhūr) that should be constituted by electors from all over the country according to others. Each view is based on a tradition that describes (in different ways, of course) the nomination of Abu Bakr as caliph of the prophet, and one tradition that describes the nomination of 'Umar. Al-Māwardī brings the content of each tradition and emphasizes its relevance to each opinion (al-Māwardī: *Aḥkām* 21-22).

52. al-Māwardī: *Aḥkām*, 146.

53. Ibid.,2. Historical sources show that in many periods3ādīs were part of the maẓālim tribunal.

54. al-Māwardī: *Aḥkām*, 150-151.

55. Ibid., 151-56.

56. The best example of the ma'ālim's dual character is the case of *waḳf*. Generally speaking, inspection and jurisdiction of *waḳf* was under the *shari'a* court in theory and practice. Nevertheless, al-Māwardī is willing to let the ma'ālim have jurisdiction over *waḳf*as well. The reason for the parallel authority in cases of *wakf* and actually in every matter that is under *shari'an* court jurisdiction might be the difference in the power of the liberal procedure of the ma'ālim court.

57. Al-Māwardī: *al-Aḥkām*, 156-57.

58. Al-Māwardī: *al-Aḥkām*, 158-195. It should be noticed also that the ḳāḍī was present in the maẓālim court, sitting near the caliph, ready to give his opinion or judgment.

59. Ibid., 2.

60. This is the source of the doctrine regarding cases of conflict of interest between the na'ir al-ma'ālim and the petitioner.

61. As Watson and Abou El Fadel claim (see: Alan Watson & Khaled Abou El Fadel, "Fox Hunting, Pheasant Shooting, and Comparative Law,"*Am. J. Comp. L.* 48: 1).

62. Al-Shayzarī, *Kitāb al-manhaj al-maslūk fī siyāsat al-mulūk* (Cairo, 1326/1908): 96 (in Nielsen: *Secular Justice*, p. 27).

63. Nizam al-Mulk, *Siyāsat al-mulūk*or *siyāsatnama,* foreward and translation: Hubert Darke (Richmond: Curzon, 2002), 13-14.

64. Combined as before with other sources.

65. Our main sources are: S.M. Stern, "Three petitions of the Fāmimid Period" *Oriens* 15(1962): 172; "Petitions from the Ayyubid Period," *BSOAS* 27(1964):1; "Petitons from Mamlūk Period," *BSOAS* 29(1966): 233; Nielsen, *Secular Justice*; H. Ernst, *Die Mamlukischen Sultansurkunden des Sini-Klosters* (Wiesbaden, 1960). We have taken into account the weaknesses in the latter that Stern has drawn attention to in *Mamlūk*, 234.

66. Al-Māwardī himself points out historical occasions where the caliph and *qāḍī* were present in the court, but we should notice that those events are his sources and consider them accordingly.

67. Aḥmad b. ʻAli al-Ma3rīzī (d. 845/1442), *Al-sulūk li ma'arifah duwal al-mulūk*, M. Ziyāda edition (Cairo, 1934), vol. 3, 71. The description relates to Ayyubid Egypt.

68. Aḥmad b. ʻAli Al-Maḳrīzī (d. 1442), *Itiẓā' al-ḥunafā bial-ḵẖbār al-ā'imah al-fāmimyyn al-ḵẖulfā*, vol.1, 406.

69. Aḥmad b. al-3al3ashandī, ʻAlī (d. 821/1418), *bub% al-a'shā fī cnāẓat al-inshā'* (Cairo, 1913), vol. 6, 204 ff.

70. Nasser O. Rabbat, "The Ideological Significance of Dar al-ʻAdlIn the Medieval Islamic Orient," *International Journal of Middle East Studies*, 27(1995)3: 16-17 according to 3al3ashandī and Makrīzī. See also: W. M. Brinner, "Dar al-saʻada and dar al-ʻadl in Mamluk Damascus," in: Myriam Rosen-Ayalon, ed., *Studies in Memory of G. Wiet,* Jerusalem, 1977.

71. It is true that we have no record of a maẓālim decision that refers to al-Māwardī's*al-Aḥkām*, but it is most unlikely that sitting jurists and *ḳāḍīs* were unaware of his prominent book.

72. Case X refers to the list of cases in Nielsen, *Secular Justice*, 140-158; most of them are from the 14th century.

73. Stern: *Fāmimid*, 179-180.

74. Stern: *Mamlūk*, 238.

75. Stern: *Fālmid*, 174-175.

76. Stern: *Ayyubid*, 25-28.

77. On the *dar al-ʻadl*, see: Rabbat: *Dar al-ʻAdl*.

78. George Makdisi, "The Guild of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court," Zeitschrift fur Geschichte der Arabische-IslamischenWissenschaften, Band I(1984): 239.

79. Muḥamad b. Ismā'īlabu ʻAbdallah al-Bukhārī (d. 256/867), *Saḥīḥ al-Bukhārī*, Beirut, 1407/1987, 2313.

80. ʻAbd al-Manʻim, a modern Muslim scholar, refers to this tradition in his review of the sources of the ma'ālim. See: Ḥamdī ʻAbd al-Manʻim, *Dīwān al-maẓlim* (Beirut, 1408/1988), 42. ʻAbd al-Manʻim refers to a few Koranic verses as well (16: 90, 14: 42, 27: 52, 7: 44). From the basic sources he continues to later juristic writing on ma'ālim in its moral meaning, presenting them as the *shari'an* basis of the ma'ālim institution (ibid., 42-45).

81. Ibid., 2310.

82. This attitude is common in historical research (examples could be found in the following work: Crone, *Slaves on Horses*; Hugh Kennedy, *The Prophet and the Age of the Caliphates* (London: Addison-Wesley, 1986).

83. A good example of this attitude, dealing specifically with the maẓālim, is Rabbat's explanation of the building of the firs *dar al-ʻadl* by Nur al-Din. The reason is not ideological or religious of course but rather political and functional: "His building of the first *dar al-ʻadl* at the same time should be regarded as part of the same concern. Like other rulers of the time… building a palace of justice was a magnificent propaganda tool. It was intended as another of their legitimizing acts" (Rabbat: *Dar al-ʻAdl*, p. 21).

84. Some clues to this approach, yet in a quite different field can be found in: S.D. Goitein, ed., *Religion in a Religious age* (Cambridge: Association for Jewish Studies, 1974), 3ff.

85. Rosen and Gerber have also examined the relations of law and society in Islam, yet from a different perspective. Rosen researched this issue using anthropological methods through Moroccan *ḳāḍīs*' decisions from the 19th and 20th centuries. See: Lawrence Rosen, *Anthropology of Justice: Law as Culture in Islam* (Cambridge: Cambridge University Press,1989). Gerber's research takes a different line mixing legal analysis with sociological research methods and applying them to the answers of jurists (*fatwa*) from the 17th to 19th century Ottoman Empire See: Haim Gerber, *Islamic Law and Culture 1600-1840* (Leiden: Brill, 1999). In his introduction Gerber keenly contests Rosen's perspective on Islamic law and tries to construct a more sophisticated image of Islamic law (ibid., 9-14).

86. MenachemMautner, "Law as Culture: Towards a new Research Paradigm," in: M. Mautner, A. Sagi, R. Shamir, eds., *Multiculturalism in a Democratic and Jewish State* (Tel-Aviv: Ramot, 1998), 545-87. see also: Menachem Mautner, "Gadamer and the Law," *Tel Aviv University L. R.* 23 (2000): 367-419. The main sources of Mautner's paradigm are: P. Bourdieu, *Outline of a Theory of Practice*, trans. R. Nice 1972, 1977); P. Bourdieu,

"The Force of Law: Toward Sociology of the Judicial Field," *Hasting L.J.* 38 805 (1987); H. J. Gadamer, *Truth and Method*, trans. J. Weinsheimer and D. G. Marshall, 1993; Clifford Geertz, *The Interpretation of Culture*, 1973; Clifford Geertz, *Local Knowledge*, 1983. Additional sources: Lawrence M. Friedman, "The Law and Society Movement," *Stan L Rev* 38 (1986): 763. In the U.S. a law journal is dedicated to this field: *The Law and Society Review*.

87. Contrary to traditional images of law. For other definitions and perspectives on 'what is law' see: William W. Fisher III, Morton J. Horwitz, Thomas A. Reed, *American Legal Realism* (Oxford:Oxford University Press, 1993), 9; Frank B. Cross and Blake J. Nelson, "Strategic Institutional Effects on Supreme Court Decisionmaking," *Nw U. L. Rev*. 95: 1437, 1439; K. Llewellyn, *A Realistic Jurisprudence: The Next Step,Colum. L. Rev*. 30 (1930): 431; Fuller, "American Legal Realism," *U.PA. L. Rev*. 82 (1934): 429; Kantorowicz, "Some Rationalism about Realism," *Yale L.J.* 43 (1934): 1240; Pound, "The Call for a Realist Jurisprudence," *Harv. L. Rev.* 44 (1931): 697.

88. Mautner: "Law as Culture," 568-70.

89. R. Gordon, "Critical Legal Histories," *Stan. L. Rev*. 36 (1984): 57.

90. Mautner, "Law as Culture," 574-77.