CHAPTER FOUR

QĀDI, MUFTĪ AND RULER: THEIR ROLES IN THE DEVELOPMENT OF ISLAMIC LAW

Miriam Hoexter

The notion, reiterated in traditional literature, that Islamic law remained stagnant from its crystallization, around the tenth century, and until the reforms of the twentieth century has occupied scholars in recent decades. In their studies, many called into question this undifferentiated notion. They showed that, challenged by new problems, Islamic law did in fact develop in the course of centuries, providing innovative and original solutions. The solutions, and therefore the development of Islamic law, were usually attributed to muftīs—jurisconsults who composed fatāwā: responsa, learned opinions on points of law (e.g., Hallaq 1994; idem 1996; Calder 1996; Johansen 1993; Powers 1993, esp. 105–6).¹ Scholars debate whether muftīs and their fatāwā collections or author-jurists who composed the collections of substantive law—furū’, shurūḥ—should be credited with the preeminent role in the process of development, or which of the two influenced the other (Hallaq 1994; idem 1996, 128–30; Calder 1996, esp. 143, 163–64. See also Johansen 1993, 31–6).² What they do all seem to agree on, however, either explicitly or by default, is that qādīs (judges), and certainly rulers, played no role whatsoever, or at best a very minor and insignificant one, in the development of Islamic law.³

² Both Hallaq (1996, 129) and Calder (1996, 142) are aware of the fact that the muftī and the author of the furū‘ collection might in practice be the same person.
³ For the important role of muftīs compared to qādīs in the doctrinal development of law from the early ‘Abbāsid period onwards, see Schacht 1964, 74–5. Hallaq (1994, 55) explicitly states that, “After the second/eighth century, the contribution of judges appears to have been halted, and the elaboration of law seems to have become almost exclusively the province of the muftī.” Johansen (1993, 33–5) assigns to the fatwā-literature a much more important contribution to the formation of new legal doctrines than to the qādī’s judgments, basing his argument on the uncertainty as to the actual application of their judgments. In other discussions
Indeed, by the time the classical doctrine was formulated, qādīs and rulers were deprived of much of their initial authority in doctrinal matters. Qādīs played an important role in the development of Islamic law in the Umayyad period (661–750). In this early period, qādīs were responsible for the elaboration of the incipient law. For this purpose they relied on a combination of independent reasoning (ra‘y), ethical norms based on the Qur‘ān, customary practices and various elements adopted from legal systems of their geographical environment. However, the qādīs lost this role in the course of the eighth century, and certainly with the crystallization of the Islamic legal doctrine and the four Sunni schools of law, at the beginning of the tenth century. Interpretation of the law was henceforth to follow the hermeneutic methodology laid down in the literature of usūl al-fiqh (roots, sources of law). Since the doctrine did not recognize legal precedents as a source of law, judicial decisions delivered by qādīs had no authority beyond the particular case they adjudicated. Thus, after the crystallization of the four schools of law, the fuqahā’—scholars of the legal doctrine and the science of law—that is, the muftīs rather than the judges, became the interpreters of the doctrine and its exponents.

The role of rulers in legal issues, like that of the qādīs, underwent changes in the course of the first centuries of Islam. During the ‘Abbāsid period and certainly after the miḥna (inquisition, 218/833 to 234/848), a kind of modus vivendi was reached between the fuqahā’ and the ruler: the former were recognized as the bearers of the norms and basic values of the sharī‘a and its authoritative interpreters; the rulers, for their part, were made responsible for implementing the sharī‘a in the territories under their control.

of the subject, the possibility that qādīs or rulers played a role in the development of the law is not even considered.


5 On the Mālikī ‘amal, see p. 71 below and n. 13. See also n. 43.

6 See Hallaq 1994, 55 and n. 122, based on Ghazālī as quoted by Hāji Khalīfa: “ilm al-fatwā was often equated, and at times was used synonymously with fiqh.”

7 Crone and Hinds 1986, esp. 80–97, 109–10; Hurvitz 2002; Hoechter 2002. See also Coulson’s formulation: “Abbāsid policy had endorsed the idea that the Caliph was the servant of the law, not its master; legal authority was vested in the scholar-jurists and not in the political leader” (Coulson 1964, 52). On the period before the miḥna, see also Zaman (1997), who argues that the miḥna did not change