

# Justice and Islamic Law

Mazalim Courts and Legal Reform



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2010 film adaptation of *Murder on the Orient Express* (star-studded and far outshining the novel), Poirot discovers that the train's passengers had planned and carried out the execution of a man who had murdered a child but whom the court had somehow failed to convict. Poirot's esteem for the rule of law is passionate. "No, it is medieval!" he says of their actions. "The rule of law, it must be held high, and if it falls you pick it up and hold it even higher!" But, as much as he hates it and as much as it leaves him shaken, he cannot deny that they did substantive justice. He lets them go but also drops his rosary beads in the snow.<sup>11</sup> It is as if his faith, in the law or in something higher, has been toppled.

#### THE ARGUMENT OF THIS BOOK

The tension between the rule of law and justice is this book's point of departure. Like many people of faith in the modern and postmodern world, Muslims live with the mental pangs caused by moments of mismatch between their scripture's dictates and the learned justice voiced by their conscience. They take a breath of deeper resolve when a scholar tells them, as al-Saqqāf did, "Well, this is what God and the Prophet command," hoping their faith can stand another straw laid on its back. Or they breathe easier when they hear a preacher resolve such a mismatch, as Shaltūt did ("No, that's not what that verse means..."). Though they hope the scholar offering this resolution has emerged from some desert oasis untainted by Western sensibilities, and thus that they are hearing a voice speaking authentically for Islam, all voices in the modern are compromised. To truly know that a meaning, interpretation, or belief is a coherent expression of God's revealed message to Muhammad it must predate modernity's rupture of our prior *épistémè*, Foucault's notion of that regnant paradigm or worldview against which sense is made. An *épistémè* is the collection of all our unquestioned assumptions. It is the background of our minds that "determines the conditions of the possibility of all knowledge."<sup>12</sup> In the last century a great swath of the world's citizens have lived in the shadow of one epistemological

rupture: the replacement of a divine-centered *épistémè* with a rationalist, secularized, “disenchanted” modern one.<sup>13</sup> But Muslims live with a second rupture as well: the replacement of a politically-autonomous, Arabo-Quranic-centered caliphate with an *épistémè* of Western colonialism, Global-Western cultural domination, and the nation state.

This book began in a moment of seeking to transcend these epistemological ruptures. I was speaking to one of my PhD students just after he had successfully defended his dissertation on nineteenth-century Islamic legal reforms. In the 1860s, I asked, how had Ottoman Muslim scholars justified legal reforms that required treating Muslim and non-Muslim witnesses equally when Islamic courts had historically not allowed non-Muslims to act as witnesses against Muslims? The newly minted doctor replied that the architect of these legal reforms, a scholar and administrator named Ahmet Cevdet Paşa (d. 1312/1895), had relied on a treatise called *Risāla fī dīwān al-mazālim* by a Persian cleric named Jalāl al-Dīn Davānī (d. 908/1502).<sup>14</sup>

With the help of some Turkish graduate students, I found Cevdet Paşa’s writings on this topic and located the unpublished manuscripts of Davānī’s treatise on which he had relied. Looking further into Cevdet’s work, I found that he had translated Davānī’s treatise from Persian into Ottoman Turkish to defend the new Ottoman court system. He quoted the treatise to argue that Muslim rulers had always had the duty to protect the God-given rights of their subjects, who were first and foremost ‘the servants of God.’ As Davānī had shown, the Shariah contained in its rich heritage an institution that allowed the ruler more flexibility than ordinary Shariah courts to achieve this task in times of crisis or rapid change. This tool was the *mazālim* tribunal, of which the new Ottoman court system was merely the most recent manifestation.

Beyond Cevdet’s concerns and context, however, I found that Davānī himself had penned his treatise to provide a solution for a crisis he faced during his own time in late fifteenth-century Persia. While Cevdet’s Ottoman Empire was struggling to modernize in the face of novel and powerful administrative technologies coming from the West, foreign encroachment and new ideas of what states should

be, Davānī's political world had been torn apart by the tumult of warring dynasties. Davānī was the greatest scholar of his day in the Persianate world that stretched from Istanbul to Delhi. But his particular corner of southwest Persia had fallen into political chaos. He wrote his treatise as a plea for local rulers to ensure the 'rights of the servants of God,' which were threatened by, on the one hand, the legal system's inability to address violent crime and, on the other, litigants deadlocking that system by abusing its procedural niceties. The *mazālim* tribunal was the solution, Davānī had argued.

Just as Cevdet Paşa was resting his argument for reform on the precedent of a great name from the past, Davānī had justified his own argument by building on the work of an eleventh-century Baghdad jurist who, Davānī noted, "had been the leading scholar (*imām*) of his age." Abū al-Ḥasan al-Māwardī (d. 450/1058) had written his *Ordinances of Government* (*al-Aḥkām al-sultāniyya*) to address crises he felt loomed in his own time. The Abbasid caliphate of his day had lapsed from holding the reins of both real temporal and symbolic legal authority to acting as an Islamic figurehead for Persian or Turkic warlords. Al-Māwardī's book, which included the most extensive known elaboration of how a *mazālim* tribunal should work, was an effort to reconcile the political and legal, making sure that the true holders of power understood and carried out their duties to the Shariah and God's servants while also ensuring that Shariah institutions fulfilled core political roles, such as the provision of law and order.

Taken as a discursive institution that transcends these three texts, their authors and their contexts, what is it that makes the *mazālim* tribunal such a useful and adaptable tool in times of institutional crisis? First and foremost, it is that, while the *mazālim* falls within the sphere of God's law, it does not operate under the same checks as the normal judge's courts. In the majority tradition of Islamic legal practice, the judge is a highly constrained figure, hemmed in with evidentiary procedures designed to protect the innocent from abuse. The *mazālim* magistrate, by contrast, can move between the various Islamic schools of law and their varied constraints. While Islamic legal procedure has often been

formalistic and hostile to circumstantial evidence, a *mazālim* magistrate could act on the strains of legal procedure that were more open to such evidence. While a judge obliged to follow a particular school of law might be limited in accepting documentary evidence, the *mazālim* magistrate could take from a school of law that was more permissive with documents. While a judge from one school might not be able to inquire into a party's ownership of some property without a complaint, the *mazālim* magistrate could act according to a school that would allow him.

In his advocacy for the *mazālim* tribunal, however, Davānī alludes to a serious critique. The point of his treatise, he concludes, is “to show that the judgment of the *mazālim* tribunal is the judgment of the Sacred Law... and anyone who says ‘This type of legal authority is not legitimate,’ has said something illegitimate.” In fact, they may have even lapsed into disbelief. In an era that greatly predated the twin epistemic ruptures of the modern Muslim world, Davānī's curt retort seems to respond to a skepticism that is jarringly modern. If the judge's court applies God's law, then is the *mazālim* inside or outside the Shariah? Furthermore, if the *mazālim* tribunal was so well established, why would anyone question its Islamic legitimacy?

In great part, these questions originate from an implied but fundamental inconsistency: if the details of Islamic law are ultimately drawn from God's perfect revelation to Muhammad, how could such law fail to provide justice? Studying Muslim legal discourse around the *mazālim*, the Shariah and its boundaries, the answer becomes evident: law deals with generalities, and procedures set to protect the weak and deflect false accusations will, in some specific instances, prevent justice from being done for those who *have* been wronged. The *mazālim* tribunal provides equity in these cases that have fallen through the cracks of law's generalities.

In another sense, the accusation of Shariah illegitimacy acknowledged by Davānī was a self-inflicted wound by Muslim scholars. Since it lay under the aegis of Muslim rulers' executive authority (*siyāsa*) and not within the bookish circles of Islam's more independent juristic class, the *mazālim* tribunal suffered collaterally from the suspicion with which Muslim scholars viewed political involvement in

Islamic law. Though the ruler's role in upholding God's law was clear from the Quran and undisputed among Muslim jurists, this learned corps was perennially anxious about rulers overstepping their authority and veering either into misuse of God's law or blatant abuse of God's subjects. This led to an ambiguity regarding the legitimacy of the *mazālim* tribunal, which has intensified in periods of anxiety over intentions or foreign encroachment, particularly in modernity.

Chapter One of this book takes the three texts of Cevdet Paşa, Davānī, and al-Māwardī as vistas onto the lengthy and far-reaching history of the *mazālim* in Islamic civilization. The *mazālim* as an institution emerged in the early Abbasid caliphate as a self-conscious expression of the Near Eastern tradition that the ruler must ultimately guarantee justice for their subjects. It served mainly as a forum for petitioning against government wrongs, though appeals against private wrongs were also heard. Soon the tribunal was housed in its own facility. *Mazālim* tribunals multiplied in Baghdad and in the Abbasid provinces, where they became means of asserting authority for both the central Abbasid government and its increasingly autonomous regional vassals. This phenomenon was mirrored in the Islamic west of Al-Andalus. As the Abbasid caliphate itself came under the 'protectorate' of powerful Muslim warlords, these also took up the mantle of holding *mazālim* sessions. Particularly in Iraq and Iran, the *mazālim* came increasingly to resemble another exceptional expression of state discretionary power, namely the crimes tribunal. Under the Fatimids in Egypt, the *mazālim* became a more bureaucratically ornate institution. This trend continued under successor dynasties in the eastern Mediterranean, particularly the powerful Mamluk state. Under the Mamluks' lengthy rule, other forums of royal justice like military tribunals and the chamberlain's court at times reduced the *mazālim* to a more limited forum for disputing government wrongs. At other points under Mamluk rule, however, the *mazālim* expanded and absorbed subject matter usually heard in judges' courts. In the parts of Islamic civilization that came under Mongol domination, including South Asia, the *mazālim* tribunal often appeared as an amorphous setting for exercising royal justice, at times engulfing the crimes tribunal function. For such

states, trumpeting *mazālim* sessions could function as a demonstration of loyalty to the Shariah. In the Ottoman Empire, where the Turko-Mongol legacy was effectively bureaucratized, the appellate and some criminal functions of the *mazālim* were absorbed into the provincial and imperial councils.

Beyond its core function as a grievance and appellate tribunal, four trends characterized the *mazālim* throughout its long history. First, its form often shifted between, on the one hand, the more concrete and ornate institutional and, on the other, more rudimentary and personal access to royal justice. Second, as an expression of state authority (*siyāsa*), the *mazālim*'s functions could blend into, overlap with, or absorb the functions of other legal forums, whether crimes tribunals or judges' courts. Third, the idea and institution of the *mazālim* contained adaptive potential that more than once has proven useful in times of crisis or dramatic legal change, as it did for Davānī and Cevdet Paşa. Finally, the consistent and essential presence of Muslim jurists, scholars and judges in *mazālim* tribunals casts serious doubt on the contention, inspired by some Muslim voices and taken up as fact by many Western scholars, that the *mazālim* existed in tension with or even outside the Shariah.

In Chapters Two and Three, this book focuses on the three texts and contexts of al-Māwardī, Davānī, and Cevdet Paşa and then offers an annotated translation of Davānī's treatise on the *mazālim* as the hinge of this study (a translation of al-Māwardī's chapter on the *mazālim* can be found in Appendix II). Chapters Four and Five explore the fascinating legal, constitutional, and theological questions opened up by Davānī's treatise, its use of the Māwardian past and its use in Cevdet's modernity. Chapter Four focuses on the questions of exactly how the *mazālim* tribunal could and did differ from judges' courts in terms of what substantive law it applied, how its procedures differed, and what powers its magistrates enjoyed. It demonstrates that the *mazālim* tribunal did not apply some separate body of law or transcend the Shariah. Particularly in the use of documentary evidence and the employment of judicial intimidation and torture, the *mazālim* magistrate's power came from his ability to pick strategically among the rules of evidence

and judicial procedure offered by the established Islamic schools of law.

Finally, Chapter Five engages what is, for me, the most meaningful question raised both by Davānī's treatise and of Muslims wrestling with tensions around law and justice: what do Muslims do when their rule of law and their expectations of justice do not accord? How is this made sense of theoretically (if God's law is just and God defines justice, how could Muslims even feel any dissonance to begin with?), and how is this addressed institutionally? This chapter charts the different responses Muslim jurists have offered, from a fideistic formalism that denies Islamic law can be unjust to a purposivist commitment that justice must be done for law to be divine, from a reliance on divinely sanctioned dispensations to bypass normal rules in times of necessity to, finally, the institutional solution of the *mazālim* court. This exceptional tribunal, with its more flexible rules of evidence and with the expanded discretion of opening up the entirety of the Shariah tradition to draw on, steps in to provide substantive justice when procedural justice has failed.

## INTRODUCTION TO THE SHARIAH TRADITION

Tracing the history of Islamic law and Islamic intellectual history or, indeed, Islamic history overall is to follow in the pathways cut by the ulama, 'those possessed of knowledge,' as the scholarly elite of Islamic civilization have been known. It is they who not only elaborated the edifice of the Shariah and the other learned traditions of Islamic civilization but also served as its first historians. As the late Roy Mottahedeh intimated, it is most often on them that all later historians have relied to study the world they shaped.<sup>15</sup>

Like many other interpretive traditions of law and scripture, the Islamic tradition is what Talal Asad has described as a *discursive tradition*: an extended conversation between the past and the present that unfolds over time and communicates via a language that evolves but always binds the new and the old.<sup>16</sup> From this perspective, there is not one essential Islam that can be pointed to without objection. But