Pre-modern governance: the Circle of Justice

The Ottomans, the longest-ruling dynasty in Islam, governed vast territories extending from Arabia to Eastern Europe to North Africa. The history and practices of the Empire are documented in modern scholarship more extensively and better than those of any other Islamic dynasty. As in the foregoing two chapters, here too we will pay special attention to the legal and judicial practices of this Empire, attempting to uncover that which is new and unique to it, while bringing out those practices that represented a continuation of earlier forms of Islamic justice. This focus is all the more important because Ottoman judicial innovations, brought about during the sixteenth and seventeenth centuries, proved to be instrumental to the fundamental modern transformations effected during the nineteenth century and thereafter.

By 1517, the three holiest cities of Islam – Mecca, Medina and Jerusalem – had fallen under Ottoman rule, while at the same time the surviving ‘Abbasid caliph in Egypt had been moved to Istanbul to lend the regime a semblance of legitimacy. In a strictly Shari‘a-minded sense, Ottoman rule had begun with Bayazid I (r. 1389–1401) who, more than any of his predecessors, sponsored the religious elite, especially the jurists. His patronage differed somewhat from that of Nizam al-Mulk and the dozens of Muslim rulers who had come and gone in the interval. For Bayazid invited the legists to assist him and, in effect, to enter into an active ruling partnership with him. As it happened, his venture became an entrenched paradigm of governance for the two centuries after his death, and continued to have a marked, though less significant, influence on the style of Ottoman rule until the end of the Empire.

Engaging the legists in the administration of justice within the body-politic was a model of governance that answered the political exigencies that arose after the decline of the ‘Abbasid caliphate. In the Muslim worldview, kingship represented a morally repugnant form of political governance that Islam had originally come to replace. The Arabic language reserves the terms malik and mulk to designate, respectively, “king” and “kingship,” while retaining their original sense of “possessor” and
“possession.” To be a king is to possess that over which one rules. Yet, the foundational Quranic language and the Shariʿa assign categorical possession exclusively to God who is recognized as, and given the name, Owner of the Universe in both of its spheres, the here and the hereafter. Any human claim to earthly possession must thus be either metaphorical or a plain usurpation of the divine Kingdom. For a man to rule without incriminating himself in the irredeemable sin of usurpation, he must act as the guardian and administrator of the Law, just as the caliphs had done earlier. They claimed to possess nothing of God’s world, and stood as administrators of, and thus beneath, His Law.

This perception of divine sovereignty lay at the foundations of the relationship between the ruling dynasties and the civilian populations they came to rule. As we saw in chapter 4, gaining and holding on to legitimacy was the prime challenge that every ruler and dynasty had to face. The imperative of upholding justice as embodied in the Shariʿa thus had to be reconciled with the demands and expediency of political rule, for it was widely recognized that the latter’s failure would be assured without the backing of the former. Yet, it was equally and fully acknowledged that, without the sovereign’s juridico-political administration (SIYASA SHARʿIYYA), the Shariʿa would also become a hollow system. The Shariʿa thus defined the substance and form of legal norms, while the sovereign ensured their enforcement. Hence the formula – adopted by both the Sunnis and the Shiʿis – that the qadis were appointed and dismissed by the ruler, and their independent judgments enforced by him, but without any interference on his part in the substantive law that was applied.

From the perspective of the rulers, the desideratum of governance was the maintenance of their own sovereignty and its tool, legitimacy. The religious law, long established and impossible to expunge, constituted not only an efficient tool of governance but an effective means through which sovereignty and legitimacy were achieved. It would be a mistake, therefore, to assume that Muslim rulers merely tolerated the Shariʿa and its servants, for the latter, in the absence of a state machinery of bureaucracy and surveillance, were indispensable to any form of political rule.

The notion of the Circle of Justice begins with the idea that no political sovereignty can be attained without the military; yet no military can be sustained without financial resources. These resources furthermore can be raised only through levying taxes, which presupposes continuous economic productivity on the part of the subjects; but to maintain a level of prosperity that can sustain taxable income, justice needs to be ensured, and this in part means controlling the excesses of provincial officials whose vision of justice may be overshadowed by personal power and
rapacity. Thus, to be attained, justice requires public order, all-important social harmony, and control of abusive and greedy government servants. To achieve all this, the Shari’a, clearly the axis of governance, points the way. But the Shari’a cannot be implemented without political sovereignty, and this cannot be attained without the military. Here, the Circle is joined.

From the perspective of the legists, on the other hand, this version of the Circle – while accepted as entirely valid – conceptually begins at the wrong point, since the emphasis is placed on the sovereignty of the ruler and his authoritative and military standing, rather than on the Law. The legists would instead advocate the highest goal to be the attainment of justice through implementation of the Shari’a, which in turn requires public order and social harmony. In their conception, the sovereign’s function is to ensure stability and prevent internal fractiousness at any cost, and to this end he raises legally prescribed taxes to support his regime and implements *siyasa shar‘iyya*, that is, political rule according to the prescriptions of Shari’a.

*Siyasa shar‘iyya* represented the discretionary legal powers of the ruler to enforce the *qadi’s* judgments and to supplement the religious law with administrative regulations that mostly pertained to the regime’s machinery of governance, including powers to limit jurisdiction to certain areas of the law or to particular types of cases, as well as to curb and discipline abuses by government officials. (This latter function came to be identified in both Sunnism and Shi‘ism with the courts of grievances, known as *MAZALIM*.) The dilemma that regimes faced was their inability, due to distance from the center, to control the abuses of provincial governors and their men who often extorted illegal taxes from the population. In addition to tax regulations, *siyasa shar‘iyya* normally dealt with matters related to public order, land use, and at times criminal law and some aspects of public morality that could affect social harmony. The qualification “*shar‘iyya*” in this compound expression was intended to convey the notion that exercise of the powers of *siyasa* was not only permitted, but in fact mandated by Shari’a juristic theory and judicial practice. Such powers not only were consistent with the dictates of religious law, but could in no way constitute an infringement thereof if properly exercised. (Many Muslims nowadays view the modern state as operating within this mandate, thereby missing in this evaluation the crucial fact that, in the functioning of pre-modern *siyasa*, the political regimes were subordinated to independent Shari’a, whereas in modernity the state has come to sit on top of a largely dismantled Shari’a.)

Toward the end of the sixteenth century, the Ottomans introduced an important change to their method of governance – they unified administrative and legal powers within the jurisdiction of the Shari’a judge. The
qadi became the only government official empowered to hear cases and to adjudicate them, and more importantly, to decide on the legality of conduct of the highest provincial officials, including provincial governors. It was the qadi who supervised the transfer of the governor’s office: he was the one who called on the outgoing governor to surrender his documents, weapons, gunpowder, and everything else related to his office; he was the one who confirmed the new governor and his subordinates, such as guards, tax-farmers, canal janitors, etc. In fact, in order to ensure the compliance of the governor, the lines of communication between Istanbul and provincial qadis were kept open, unconstrained by any intermediate official. Obviously, curbing the abusive powers of the provincial governors depended, at the end of the day, on Istanbul’s military might, as evidenced by its failure to control provincial separatism in the late eighteenth century.

The qadi under the Ottomans often overtook many of the MUHTASIB’s functions as well. The muhtasib, a centuries-old institution, heard disputes mainly in three domains: (1) foul play with respect to weights and measures in the marketplace; (2) fraud in the sale and pricing of merchandise; and (3) refusal to pay back debts when the debtor was solvent. But in fewer instances he was also charged with other functions, including bringing government officials to court on charges of corruption or abuse of the powers delegated to them by the sultan, although it was the qadi who alone could pass verdict on such infractions. The muhtasib was also assigned the duty to urge neighborhood residents to attend Friday prayers, and generally to conform to good conduct. Yet, he had the competence neither to pass a judicial decision nor to imprison any person on the charge of non-payment of a debt. And herein lies another difference between the qadi’s and the muhtasib’s duties: the qadi was passive in that he presided in his MAJLIS, awaiting litigants to appear before him, whereas the muhtasib’s function was proactive, in that he could suddenly appear on site, reining in malpractice while it was being committed. Insofar as executive competence was concerned, the muhtasib ranked lower than the qadi, just as the qadi ranked lower than the judge presiding over mazalim tribunals. This ranking, it must be clear, was a matter of normative practice, sanctioned by no formal hierarchy.

That the qadi at times took over the muhtasib’s inspectorial functions in the area of tax collecting underscores a fundamental policy of the Ottomans, namely, that in fulfillment of the philosophy embedded in the Circle of Justice, the power of government officials was to be curbed and checked at every point. Until the very end of the eighteenth century, the system worked, and worked well, because a number of factors combined to produce these curbing effects.
First, the civilian population was subject to the law of the Shari’a, an unwavering standard of justice. The people thus enjoyed immunity from the sovereign’s crude power whether with regard to life or property. The government’s servants, by contrast, were subject to a less merciful code, which may aptly be called sultanic. We have here a unique feature of justice in the lands of Islam, for while no man or woman, Muslim, Christian or Jew, in the civilian population could be punished without a Shari’a court trial – largely independent of the sovereign’s will – the sultanic code was absolute with regard to the sovereign himself and his men.

The sovereign himself was expected to observe not only his own code but, more importantly, the law of the Shari’a. Forbearance, mercy and near infinite forgiveness were expected, standards of governance that, when violated, could result in his dismissal or even assassination, a frequent event in later Ottoman times. For political power to acquire any legitimacy, it had to meet these standards, and conduct itself in a morally and legally responsible way. Even highly unsympathetic European observers of the Islamic legal system felt compelled to acknowledge this feature. For example, the eighteenth-century English scholar Alexander Dow observed that the Shari’a “circumscribed the will of the Prince” who “observed [the law]; and the practice of ages had rendered some ancient usages and edicts so sacred in the eyes of the people, that no prudent monarch would choose to violate either by a wanton act of power.”¹

Therefore, ruling in accordance with siyasa shar’iyya was in no way the unfettered power of political governance but in a fundamental way the exercise of wisdom, forbearance and prudence by a prince in ruling his subjects. In the case of the civilian population, these qualities manifested themselves in the recognition of the qadi as the final judge and as representative of the religious law, for in each and every case referred by the sultan to the qadi, it came with the unwavering sultanic command that the qadi apply the law. While the imperial servants, on the other hand, also frequently benefited from the sultanic virtue of forgiveness – especially upon first or less grave infractions – they were ultimately subject to the sultanic code that was absolute, swift and harsh. The right of summary judgment was reserved for the sultan against his own men and, by extension, their official representatives, all of whom owed complete allegiance to him. For, after all, these men, who were brought up from childhood as the servants of the state, literally belonged to the saltana (sultan-ship). They themselves, and all the wealth that they would accumulate in their

lives, were the property of the saltana; and this property was to revert to whence it came at the discretion of the sultan.

Government employees, including qadis, thus represented the sultan who, as the overlord, was responsible for any commission of injustice by his servants. With the virtual abolition of the mazalim, the Ottomans augmented the powers of the qadi, making him the judge of these servants’ conduct and affirming the supremacy of the Shari’a’s jurisdiction. But the function itself continued at the same time to operate through means that were now more direct than before. Misconduct of government servants and of qadis could be referred directly to the sultan or the Office of Complaints in Istanbul. What is remarkable about this conception and practice of governance is that, far from depending on an ethic of desirable and fair conduct of institutions (or constitutions), it was grounded in a different ethic seen as indispensable for political legitimacy and for the well-being of “state” and society. In other words, it was a culture. For the sultan himself and his Imperial Council and Office of Complaints were all as accessible to the peasant as to the urban elite. It was thus by design that a line of communication was always left open between the tax-paying subjects and the imperial order. The symbiotic existence of government and society fulfilled the requirements of a Shari’a-based political community, without which the aims of the Circle of Justice could not be accomplished.

Second, the imperial officials working on the ground were themselves members of the very communities to whom they were appointed as the ruler’s representatives, or as the representatives of his regional representative, the governor. The local officials were the only administrative staff who knew their environment, since the highly frequent reshuffling of provincial governors – which, in the first place, was intended precisely as insurance against establishing local connections and a power-base – rendered them incapable of intimately understanding, and therefore dealing with, the local population. This is also why the governor’s assembly, which met regularly to discuss local problems, included the qadis, the tax-collectors, the notables, the leading muftis, the neighborhood representatives, and a host of other figures from the populace.

These local officials were therefore subject to intersecting interests whereby the loyalties they may have otherwise shown to the sultan and the Empire would be mitigated and counterbalanced by the local stakes they had in maintaining their own social, economic and moral networks. Indeed, the local qadis, muftis, representatives of neighborhoods and of professional guilds and even tax-farmers sat in the assembly as defenders of their communities’ interests, which latter had justified their appointment to that assembly in the first place.
Third, and hardly dissociated from the two foregoing considerations, the loyalty of government servants to the sovereign was itself enshrined in the imperatives of the Circle of Justice. Yet, in order to realize these imperatives, *siyasa* required that a supplement be made to the Shari’a in what was known as the *Qanun*, the sultan’s edicts and decrees. Often, the *qanun* merely asserted the provisions of religious law in an effort not only to place emphasis on such provisions but also to depict the sultanic will as Shari’a-minded. In these instances, the bid for legitimacy is unmistakable. But the *qanun* did add to the religious law, especially in areas having to do with public order, the bedrock of any successful regime. Among the most important of these areas were highway robbery, theft, bodily injury, homicide, adultery and fornication (and accusation thereof), usury, taxation, land tenure, and categorically all disturbance of order and peace. With a view toward a strict enforcement of these religious and sultanic laws, the *qanun* permitted torture (mainly to extract confession from thieves) and the execution of highway robbers by the sultan’s executive authority.

Legalized usury, extra-judicial taxes and torture were perhaps the most objectionable pieces of legislation in the view of the jurists. The latter, along with several Shaykh al-Islams, often militated against the *qanun*, and particularly, it seems, against the latter two provisions. The jurists’ objections notwithstanding, the *qanun* – in its thin but diverse substance – was mostly seen, and accepted, as an integral part of the legal culture, and as an extra-judicial element that was required – after all – by the *siyasa shar‘iyya* itself.

The Shari’a and the *qanun* had far more in common than they differed upon. True, substantive *qanun* transgressions upon the Shari’a did occur, but they were limited to narrow spheres and the *qadis* and *muftis* ignored them whenever they could. More remarkable, however, were the similarities between the two. The *qanun* and Hanafi law recognized, each in its own sphere but also mutually, a cumulative tradition: the later school texts (and in particular those of the Hanafi school, adopted as the official law of the Ottomans) never abrogated the earlier ones, and the founding fathers’ doctrines continued to be enmeshed in the much later *fatwa* literature and author-jurist compilations. The *qanun* too was a cumulative discourse, each sultan propounding his own decrees while largely maintaining the sultanic laws of his predecessors.

To be sustainable, it was in the nature of these cumulative legal traditions to integrate into their structure the viability and necessity of juridical difference. The concept of individual *ijtihad* in the legal schools constituted an analogue to the individual sultanic will that produced different *qanuns* at different times and places. The internal differences exhibited by
the two traditions were clearly intended to accommodate the local and regional differences throughout the Empire. Just as the Shari’a insisted on local custom as a guiding principle in the application of the law, the qanun, in its various compilations, catered to the needs of particular towns, districts and provinces.

Qanunnames – the written records bearing the qanun – were issued at each of these levels, as well as at the universal level of the Empire. And like the Shari’a law, the qanun developed structural mechanisms to accommodate change and to respond to diachronic and synchronic geographical variations. Finally, and no less importantly, both systems viewed their own laws as a “statement of the limits of the tolerable rather than a set of inflexible rules to be imposed regardless of circumstances.”

What is striking about the qanun, and consistent with the Ottoman policy of allowing the widest scope for Shari’a justice, is the fact that the qadi stood as the exclusive agent of the qanun’s enforcement. On the ground, he was the ultimate administrator and final interpreter of the qanun, which was unwavering in reiterating the decree that no punishment could be meted out without a trial by a qadi; and indeed, evidence from court records overwhelmingly shows that the decision to punish was exclusively the qadi’s, and that the meting out of penalties was normally the province of executive authority.

The qanun’s decrees, frequently restated in the qanunnames of several succeeding sultans, in effect constituted a direct prohibition against conduct by government servants that might lead to injustice being inflicted upon the civilian population. The qanun of Sulayman the Lawgiver (r. 1520–66), for example, states that the “executive officials shall not imprison nor injure any person without the cognizance of the [Shari’a] judge. And they shall collect a fine according to [the nature of] a person’s offense and they shall take no more [than is due]. If they do, the judge shall rule on the amount of the excess and restore it [to the victim].” The qanun therefore upheld the Shari’a by enhancing and supplementing its position and provisions, while the Shari’a, on the other hand, required the intervention of sultanic justice. This complementary duality was endlessly expressed in various decrees and letters in the judicial discourse of the Ottoman authorities, be they sultans, Shaykh al-Islams, viziers or qadis: justice had always to be carried out “according to the Shar’ and qanun.”

2 Leslie Peirce, Morality Tales: Law and Gender in the Ottoman Court of Aintab (Berkeley: University of California Press, 2003), 122.
3 Ibid., 119, 327.
We have already said that one of the central changes effected by the Ottomans was their adoption of the Hanafi school as the official law of the Empire. The other schools never vanished, of course, and they retained followers – albeit decreasingly – in the population as well as in the judiciary. The farther a province lay from Istanbul, and the less strategic it was, the less influenced it was by this policy. But provinces and regions adjacent to the capital were affected significantly. Every major city or provincial capital in the Empire was headed by a Hanafi qadi al-qudat, a chief justice, who appointed deputies in several quarters of the city as well as throughout the province (appointment of such deputy-judges by the chief qadi of the city or region was a common practice). Some of these deputy-judges were non-Hanafis who held court in neighborhoods and large villages whose inhabitants were either Shafiʿi, Hanbali or Maliki. But the official system and government apparatus were Hanafi to the core, and any advancement in a government legal career (under the Ottomans the most prestigious and powerful of all legal arenas) presupposed Hanafi legal education as well as membership in the Hanafi school.

If the chief qadis appointed from Istanbul were all Hanafi, it was because the legists who ran the judiciary were products of the exclusively Hanafi royal madrasas of Istanbul. And in order to rise to the highest levels of judicial and government careers, they had to stay Hanafi through and through. The effects of this policy were clear: the legal profession, law students and legists of non-Hanafi persuasion were encouraged to, and indeed did, migrate to the Hanafi school in search of career opportunities. For instance, in Greater Syria, the majority of the population in general and the population of the legists in particular were Shafiʿis at the time of the Ottoman conquests in 1516–17, whereas by the end of the nineteenth century only a tiny minority of Shafiʿis remained in that region, the rest having become Hanafis.

Such effects constituted the culmination of a deliberate effort to create uniformity in the subject populations, and to streamline the administration of justice throughout the Empire if possible, but certainly throughout each of its main provinces. The age of uniformity had begun, in the Ottoman Empire no less than in Europe. Uniformity, in other words, entailed low costs of governing, management and control, for, after all, economic efficiency in domination was a desideratum of any form of rule.

An indirect effect of adopting Hanafism as the official school of the Empire was the considerable marginalization of legists from the Arabic-speaking provinces, for they had little, if any, role to play in the administrative bureaucracy centered in Istanbul. The same appears to have been true of the Balkans. Not only were the high-ranking administrators in the capital all “Turks” (known as Rum), raised by the Istanbul elites and
educated in the royal madrasas of the same city, but so was virtually every chief qadi appointed to run the judicial affairs of the Arab provinces, including Syria and Egypt. Syrian and Egyptian muftis and qadis received their education locally, particularly in Egypt. These muftis, while enjoying local prestige by virtue of their erudition and religious—social standing, remained outside the pale of officialdom, just as the locally trained qadis could aspire to no higher position than that of deputy-qadi under the “Turkish” chief justice.

Placing the administration of the Empire’s affairs in the hands of “Turks” was not a nationalist act, however. Of distinctly European origin, nationalism was not on the minds of Ottomans before the second half of the nineteenth century. Rather, the Turkification of Ottoman administration aimed at creating a unified and centralized bureaucracy that could efficiently manage a diverse Empire with multiple ethnicities, religious denominations, languages and cultures and an endless variety of subcultures. On the one hand, the “universal” qanuns aimed to create an overarching unity within the Empire as a whole, while those qanuns issued for cities or even specific courts were intended to impose law and order while showing great sensitivity to the cultural uniqueness of the recipients. On the other hand, the provincial qanuns represented a middle stage between the two, striving to balance both the local context of the city and that of the Empire as a whole. Just as the universal qanuns operated in conjunction with the Istanbul-based legal education (both emitting centralized values of “Turkish” administration), the regional–local qanuns and the indigenous deputy-qadis represented Istanbul’s awareness of, and attention to, regional differences and local variety.

Centralized bureaucracy, judicial administration and legal education in the capital were momentous developments that served the Ottomans well during the first three centuries of their rule and they had a considerable effect on the course of events leading to the Empire’s encounter with the modern West. We shall deal with the impact in the next chapter, but here we need only stress the newness and tenacity of Ottoman centralization at all levels of judicial administration.

The Ottomans were the first in Islamic history to commit the court to a particular residence, a courthouse so to speak. Qadis could no longer hold their majlis in the yards of mosques, in madrasas or in their residences. Existing “public” buildings were modified for this purpose, and the number of courts was increased significantly when compared to the pre-Ottoman period. Whereas it was typical before the Ottomans to have in or around the commercial city-center a total of four courts, each representing one of the four schools, the Ottomans had several around the city, usually in large neighborhoods. The Ottomans were also the first, it
seems, to bestow on the court register a public status. The qadis could no longer keep these registers in their private custody, but had to surrender them to a government department.

Fixing the physical site of the court was an administrative act of the first order. The court had become at one and the same time the smallest unit and the core of the Empire’s administration. For it was the court that became the destination of sultanic qanuns, and it was from the court that these decrees were promulgated in the name of the sovereign. The court was also the locus of fiscal administration, where taxes paid and taxes due were recorded and monitored. And in order to commit the provincial court system to a regularized contact with the capital – a centralizing act – the provincial chief justice not only was an Istanbul man and a “Turk,” but also was rotated every one to three years to work in various cities, including the capital. This policy ensured that the top provincial judge was nearly always from Istanbul or, at the very least, thoroughly inculcated in its political and legal culture, and thus loyal to the dynasty that ruled from it. This structured practice was unprecedented, having been made possible by another unusual process, namely, coopting the legal training of the Empire’s judicial servants from the private sphere of the jurists and concentrating it in a permanent, affluent, powerful and ever-growing capital.

Furthermore, the court became, probably for the first time, financially independent and a source of income for the imperial treasury. Whereas pre-Ottoman qadis received salaries from the government, as well as public stipends which they disbursed to the officials who staffed the courts, the Ottoman judges depended on fees that were paid directly by court users, including, probably, litigants. Most probably for the first time in Islamic history, qadis were forbidden from hearing cases that did not involve formal petitioning of the court, the purpose being that fees had first to be paid and a formal record of the case maintained. Also for the first time, at least in Egypt (and almost certainly in most other provinces), all marriages were to be recorded in court, and a fee was to be levied. At work here was a double-pronged policy of introducing writing as a means of control, and of regularly replenishing the central treasury.