Islam and Appeal

Martin Shapiro

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38QM9T

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Islam and Appeal*

Martin Shapiro†

Appeal is a legal phenomenon that Westerners tend to accept without question. The orthodox view is that appeal serves to correct trial errors and thus protect individual rights. Uniformity of law is also commonly advanced as a purpose of appeal. Yet appeal is encountered even in autocratic and totalitarian regimes that have no particular regard for due process or the rights of individuals. Moreover, in such regimes appeal is typically employed to allow the highest political authorities to dispense “personal” justice, or, in other words, to give special and nonuniform treatment to those favored by those in authority.

It is the hypothesis of this Article that the basic explanation for the almost universal adoption of appeal by various legal systems lies not in a commitment to individual rights and legal uniformity as general values, but rather in the benefits that appeal mechanisms provide to centralizing regimes engaged in the solicitation of political loyalty and the facilitation of hierarchical control. It is contended that political hierarchy is the wellspring of appellate processes. This hypothesis will be applied to the legal system of Islam, which stands alone among major legal cultures in its failure to employ appellate mechanisms.

After a brief survey of the primary political implications of appellate processes in general, various explanations for the absence of appeal in Islamic law will be critically examined. It will be argued that the cultural peculiarities of Islam alone do not explain the absence of appeal in Islamic legal cultures, since such mechanisms have developed in similar societies. In addition, this Article will explore the institutional factors that may better explain the absence of appeal, including the existence of dual judicial structures and the weak hierarchy of Islamic political and religious organizations. Finally, in a focused analysis of the Ottoman Empire’s legal system it will be asserted that appellate procedures flourished as political power became concentrated and, conversely, waned as that power was dispersed.

* This Article will appear in slightly different form as a chapter of Martin Shapiro’s forthcoming book, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS, to be published by the University of Chicago Press. It is printed here by permission of the Press.

† Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1955, University of California, Los Angeles; Ph.D. 1961, Harvard University.
I

POLITICAL IMPLICATIONS OF THE APPELLATE PROCESS

There appears to be a strong historical affinity between the supreme authority in any given political system and appellate jurisdiction, whether the sovereign be personal autocrat or tripartite constitutional government. Wherever ultimate political authority lies there also tends to lie the ultimate forum for appeals. Contemporary Western societies have tended to approach appeals from the bottom up in terms of opportunities available to the loser at trial. Most political regimes are likely to have looked at the matter from the top down, however, in terms of what appeal could do for the rulers. It is a bit difficult for contemporary Americans to adopt this perspective because we assume a separation of powers in which the highest appeals court is somehow independent of the governing “political” institutions, so that the political power of the rulers does not seem to be enhanced by appeal. A legislature which allocates funding for a supreme court is seen to be increasing someone else’s political power, not its own. Leaving aside the political naiveté of this vision, it need only be said here that appellate processes were invented and became nearly universal long before separation of powers lines were initially employed. The proposition that the origins of appeal lie in the exercise of authority by unified sovereigns—chiefs, kings, emperors, or even the “people” acting as a whole—provides a useful framework for an analysis of how rulers benefit from appeal.

First of all, appeal to a supreme political authority tends to recruit political loyalty to the regime. It focuses the attention of the people scattered over the countryside upon their ruler in the capital. It provides a framework in which persons may ask the ruler for something and in which he may grant their requests. In England, for instance, distinct appellate mechanisms were slow to develop precisely because the trial courts were themselves the King’s courts, centralized in the King’s capital of Westminster. This had the effect of casting the fate of the litigants with the central regime even at trial stage. Every king and emperor was careful to preserve his own ultimate power to “correct” the trial courts, just as he was careful to preserve many other means of reminding his people that those who were loyal to him could look to him for benefits.

The second advantage of appeal for the central government is rooted in the fact that judging and administration have historically been merged rather than separated activities in most political regimes. Most empires employ district officers or provincial governors or

proconsuls who are committed to keeping the territorial region assigned them functioning in the interests of the Empire. The Roman governor, the British district officer in Africa, as well as the Imperial Chinese magistrate collect the taxes, keep the peace, mend the roads, and adjudicate legal disputes. In this setting, appeal becomes one of many modes of hierarchical control over scattered administrative subordinates. Just as the central political authority requires its local officials to send in many reports of their activities and dispatches inspector generals into the field to review the performance of the local officials, it also provides an appeals channel. When a central regime hears appeals, it essentially is reviewing the administrative performance of its local subordinates. In this context appeal involves error correction in the interest of the central regime rather than in the interest of the loser at trial. In both Imperial China and Tokugawa Japan, where central regimes were anxious to exercise very detailed control over their local subordinates, every serious case was reviewed by higher authorities whether either of the parties wished to appeal or not. Thus the most rigorous and complete systems of appeal in history were conducted with little or no thought to the welfare of the individual litigant and every concern for assuming central government control over local administrative performance.

Appeal at the instance of the parties becomes an especially attractive device for regimes that cannot afford the very high levels of surveillance over administrative subordinates' practices employed by the Chinese and Japanese. If one cannot inspect every unit produced, an obvious alternative strategy for achieving quality control is to pull samples from the production line and inspect them. To avoid the possibility of the production workers presenting only their best work for inspection, the sampling should be either random or managed so that the least polished product will be available for inspection. Appeal is such a sampling process, insofar as the appellate authorities inspect some but not all of the decisions reached by local administrators. They do so not through the medium of review of a summary report prepared by the administrator himself which may be designed to hide his shortcomings, but rather through a particular case of a subject dissatisfied with the administrator's performance. Consisting of whatever cases litigants—as opposed to local administrators—choose to remit for inspection by higher authorities, the sample is essentially random. Alternatively, it is biased toward poor administrative performance, insofar as cases are less likely to be appealed when the local judge has produced a commendable judgment. When a central regime hears an

appeal, it effectively has scrutinized a particular slice of countryside life to see how well its local government has performed in that specific situation.

Similar points could be made about legal uniformity. Where appeal is employed to achieve uniform local application of law, central regimes may be far more concerned with the increment to their political power that is derived from the uniform transmission and enforcement of their commands than they are with any abstract devotion to legal uniformity as a due process value.

While these propositions about appeal are extremely general, one mode of testing them is an examination of the one major legal system which does not employ formal appeals procedures. If the propositions offered here present an adequate explanation for the absence of appeal in Islam, their validity will be somewhat enhanced. On the other hand, if Islamic regimes exhibit strong centralizing tendencies and nonetheless do not develop appeal processes, then the adequacy of essentially political explanations of appeal will be correspondingly impaired.

II

THE LEGAL CULTURE OF ISLAM

Two basic explanations—one cultural, the other political or institutional—can be advanced to explain the unique absence of appellate procedures in Islamic law. This section will explore possible cultural

---

3. An initial caveat is necessary. Western perceptions of Islamic courts were seriously distorted when Max Weber, in his seminal work on legal systems, employed what has become a famous construct: "kadi justice." MAX WEBER ON LAW IN ECONOMY AND SOCIETY 213 (M. Rheinstein ed. 1954). The term evoked the image of a somewhat scruffy Moslem holy man sitting under a tree and deciding cases on a purely ad hoc basis as the morality or equities of the conflict struck him. Kadi justice was to be contrasted with justice dispensed by a Western judge deciding cases according to fixed, general legal rules. Like so many of his constructs, "kadi justice" was for Weber an "ideal type," whose value lay in its analytical utility rather than its correspondence to the actual behavior of any particular set of people in any particular society. Weber was not summarizing empirical findings about the actual behavior of real kads, but rather was seizing upon a colorful figure of speech in order to dramatize the contrast between rational-legal judicial decisionmaking and highly particularized decisionmaking based on religious inspiration.

The figure of speech was memorable, however, precisely because it appealed to a set of Western prejudices, and particularly central European ones. In Weber's day, Europeans' general vision of the Islamic world had been shaped by their contact with the Ottoman Empire in its final stages of decay in the turn-of-the-century Balkans. Because Weber has been so powerful in shaping subsequent thinking about law, his figure of speech has more or less accidentally transformed the popular prejudices of his day into a pervasive image which most Western students of law and courts retain about Islamic judicial institutions.

Weber's picture of the kadi has its roots in three aspects of Islamic law. First, Islamic law is often highly particularized. It does not treat of contract in general, for instance, but has one provision for contracts of sale for dates and quite another for sale of houses. Second, Islamic law treats not only of what is legally right or wrong but also of what is morally good, better, and best. The kadi may punish any act that seems to him to merit punishment. Third, since Islamic law
reasons for this phenomenon.⁴

A. Absence of Legislation

A brief sketch of the evolution of Islamic law (the Shari'a) provides the necessary backdrop for an appreciation of the cultural explanation. In Islam, the words of the Prophet as recorded in the Koran and in the sayings ascribed to Mohammed by certain authenticated traditions are the sole body of legislation. While the interrelation between secular and religious authority is complex, and has fluctuated over the course of Moslem history, in theory at least, the Caliphs, who were the highest authorities of Islam, were merely protectors of the faithful and not sovereigns. In the early years of the Abbasid Caliphate (following A.D. 750), there were proposals for codification and legislation, but they were conclusively rejected. Thus, aside from the Prophet and his words, legislators or legislation are foreign to Islam.

This rejection of legislation either causes, or at least is an integral part of, a number of distinct characteristics of Moslem law. Most bodies of law show a distinct disinclination to change. Deprived of the opportunity consciously and openly to make new law, Islamic law has been especially conservative. Perhaps more important, as a system of law it has never had to respond to the kind of single, central direction and unification that would flow from a sovereign wielding acknowledged lawmaker power.⁵ Deeply embedded in Islamic legal and theological thought is the notion that what is true in law and religion is determined by the consensus of the faithful rather than the command does not generally recognize appeal, the judgment of the kadi is usually final. These three factors, taken together and seen through the eyes of an outsider, tend to create a picture of the kadi as deciding each case on an ad hoc basis without the need to rationalize his decision on the basis of any general body of law. This stereotype is inapplicable to the ideas presented in this Article.

4. The survey of the Islamic legal system that follows is drawn largely from N. Coulson, History of Islamic Law (1964) [hereinafter cited as Coulson]; D. MacDonald, Moslem Theology, Jurisprudence, and Constitutional Theory (1913); J. Schacht, Introduction to Islamic Law (1964) [hereinafter cited as Schacht]; E. Tynan, Histoire de l'Organisation Judiciaire en Pays d'Islam (1944). See also N. Coulson, Conflict and Tensions in Islamic Jurisprudence (1969); Ahmed Bin Mohammed Ibrahim, Sources and Development of Moslem Law (1965); M. Khadduri & H. Liebsey, Law in the Middle East (1955); D. Lev, Islamic Courts in Indonesia (1972); J. Schacht, The Origins of Muhammedan Jurisprudence (1950).

The proper English spelling of Arabic and Turkish words presents linguistic difficulties. I have employed common English spellings in the singular and added "s" for plurals (e.g., "beys" instead of the more proper "beylār").

5. The well-known "codification" efforts of the Ottoman Sultans were basically collections of the administrative regulations (kanuns) that they issued. In all but name many of these were laws, but they were denied the official status of law and so did not enter the Shari'a. While they were administered by a partnership of a kadi and a military official, they were actually a part of the secular legal system described in text accompanying notes 22-27. I S. Shaw, History of the Ottoman Empire and Modern Turkey 62, 83, 88, 100-03, 139 (1976).
of any living being. The Moslem treats such a consensus as a blessing, but a rare one. The absence of a sovereign other than Mohammed himself is part of a deeper cultural acceptance of great diversity of opinion within the overall consensus of the community of the faithful. For the Moslem it is neither particularly strange nor particularly offensive that two or three or six different versions of the law of the Prophet should exist side by side.

The absence of legislation subsequent to the words of the Prophet also has resulted in a highly particularized body of law. While Mohammed did attempt some relatively systematic and general comments on some legal topics, most of his law consists of highly specific utterances on the day-to-day disputes brought to him for settlement by his immediate followers. Thus there are no general statutes on tort or contracts, for example, but only a body of particular sayings of the Prophet.

The absence of legislation does not mean, however, that Islamic law confines itself to the bare words of the Koran. Indeed, the legal pronouncements in the Koran are so sporadic, particularized, and incomplete that they could not serve as the body of law even for a relatively simple village society. The first great body of supplementary law consists of the authenticated "traditions" of the Prophet. After the death of the Prophet, his followers treasured memories of his sayings and actions and passed them on to their descendants. An enormous body of traditions thus arose, many no doubt invented to be employed in the sectarian conflicts that constantly racked the Moslem world. The elaboration of traditions, and selection among them, were methods of filling out and clarifying the fragmentary legal materials of the Koran itself. For several hundred years this was the principal task of legal commentators. The development of a more or less complete body of law through the "discovery" and "authentication" of traditions was enthusiastically pursued. It even was held that where conflict or uncertainty existed, the traditions were to be considered more authoritative than the words of the Koran itself.

B. The Schools

Shortly after the death of Mohammed, Islamic legal commentary began to proliferate at a dramatic rate. Hundreds of commentaries appeared on the words of the Prophet found in the Koran. The search for the true traditions of the Prophet resulted in an enormous amount of

---

6. For instance, Mohammed denounces ribā, transactions in which the amounts of gold, silver, wheat, barley, dates, or raisins exchanged are unequal or delivery is delayed. But the Koran states no general rule as to what kinds of commodities are subject to ribā prohibitions or even an explanation of what these particular six commodities have in common.
quasi-historical and pseudohistorical authentication and elaboration. This work usually sought to trace the traditions from their most recent advocates through an unbroken chain of earlier authorities and holy men to the Prophet himself. These commentaries on the Koran and the traditions were produced not by judges but by jurisconsults, who were independent scholars learned in the law.

As a result of early dynastic quarrels among the heirs and successors of the Prophet, Islam has almost from its first triumphs been divided into two major (the Sunni and the Shi'ite) and numerous minor sects. The vast Moslem empire and sphere of influence once stretched from the Philippines in a broad belt through India, Persia, the Arab lands, and across North Africa, with offshoots into East Africa and Spain. Different regions were dominated by different sects although, in some, members of various sects lived side by side. The Shi'ites and a number of the minor sects each had their own school of legal commentators. The main or orthodox body of believers (the Sunni Moslems) recognizes four major schools of legal commentary. By the second half of the eighth century, six or more schools had established firm control of the law. The four major Sunni schools were each identified with the name of a single great commentator (Hanifa, Malik, Ash Shafi'i, and Hanbal). But it was the collective writings of all the commentators belonging to a given tradition, not a single synthetic work by a single author, that constituted the law of any given school. Just as the consensus of all the faithful, when it could be found, defined religious and legal truth, so the consensus of the commentators of a given school constituted the legal truth of that school. When one scholar is identified as the leading member of a school and his work cited as authoritative, it is because his writings are seen as representing the mean or consensual position within his school. The diversity of opinion within a given school was often great, and opinion was often graded as “dominant,” “preferable” in certain circumstances, or “weak.” While in theory the kadi would follow the dominant opinion of his own school, in practice he might follow the preferable or weak opinion in order to do justice in a particular case.

A lack of consensus between schools on a particular legal point was regarded by the faithful as a blessing from God. Each school might continue to assert its own differing legal holding. Every Moslem fell under the legal authority of one—but no more than one—

7. There were in addition a number of others that did not quite achieve full status, although at least one, the Zabirite, lasted for centuries. D. MacDonalld, supra note 4, at 110.

8. Indeed, the continuing diversity of the schools is sometimes described as a tree whose beautiful network of branches and twigs all spring from the same trunk and roots. See generally Coulson, supra note 4; Schacht, supra note 4.
school. In some areas adherents of various schools lived side by side, each under their own law. Where there was no consensus on a point of law, each school might continue to assert its own position.

The four major schools differ on many specific points of law, but it is not easy to generalize about their differences. The school of Abu Hanifa arose in Kufa, one of the new barracks or garrison cities created by and for the warriors of Islam as they conducted the conquest that shaped a vast empire in the course of a hundred years. The school of Malik flourished in Medina, a holy city associated with the Prophet and a settled commercial community with its own legal traditions pre-dating the birth of Mohammed. Hanifa jurisprudence tended therefore to be more militant and in some senses more purely Moslem. Maliki jurisprudence borrowed heavily from the pre-Moslem customs and usages of Medina, particularly in its receptiveness to commercial practices which might, under the most rigid interpretations of the words of the Prophet, be considered illegal.

Ash-Shafi’i was a later figure, one of the great synthesizers of Moslem law, who sought to settle the quarrels between literalists and those commentators inclined toward more speculative and creative jurisprudence. He was a skilled casuist who typically saved the letter of the Koran by demonstrating that the letter could be interpreted to meet practical exigencies. Ash-Shafi’i stressed the agreement of the faithful as a test of legal correctness. The school of Ash-Shafi’i is the most complex, subtle, and synthetic of the schools. To a certain extent it is the dominant school in the sense that the others have tended to accept its general methodology of cross-comparison and integration of the Koran, the traditions of the Prophet, and the agreement of the faithful. All of the major schools also seem to accept the method of analogy widely practiced by the Shafi’ites to expand their limited initial materials into a fuller body of law.

The Hanbali school shuns the synthetic sophistication of Ash-Shafi’i. Ahman ibn Hanbal was a fundamentalist theologian who taught that there should be no human commentary on the words of the Prophet. A martyr to his beliefs and a hero to the street mobs of Baghdad, his legal commentary consists simply of a massive collection of the traditions of the Prophet.

C. Lawmaking and the Schools

The vast body of legal scholarship created by the schools became the operative law of Islam. It elaborated and proliferated the skeletal

9. Shafi’i’s great work, the Risala, is translated into English with an instructive introduction in M. Khadduri, Islamic Jurisprudence (1961).
legal pronouncements of the Koran. Although a few of the traditions of the Prophet collected in the writings of the schools may actually be traceable to Mohammed himself, most of them must be new law made by the schools and legitimated by ascription to the Prophet. Furthermore, at the earliest stages a great deal of local custom (urf) was undoubtedly incorporated into the commentaries. The Hanafi school, which relied on the traditions of bedouin warriors, and the Maliki, with their tendency to legitimate Medinan commercial practice, were particularly prone to this process. Although later the schools came formally to reject custom as a source of law, it clearly was important initially. Shafi'ite reliance on analogy (gias) is common to most of the schools. Analogy is an extremely powerful lawmaking method in legal systems, such as Islam, where the original corpus is a series of highly particular and incomplete legal pronouncements.\footnote{10}

Beyond tradition and analogy, most Islamic schools, with the notable exception of the Hanbali, engaged in various lawmaking practices labelled opinion (ra'y), preference (istihsan), consensus (ijma), and public interest (istislah). Schools differ on the legal authority of these techniques. In general, however, their existence is tacit acknowledgment that the koranic and traditional materials are incomplete and often contradictory, as are the subsequent commentaries. Thus, the latest commentator on occasion must choose between various applicable—but incomplete or conflicting—preexisting rules. In doing so, he may be guided by his own preference, tempered by his perception of the views most consistent with the general teachings of Islam and his school. He may seek to discover the consensus of the faithful or of his own school and declare it to be the law. Alternatively, he may choose the one of two conflicting or potential rules that appears to best satisfy the needs of the community, particularly as expressed in their own customary practices.\footnote{11} Thus in Islam there is a mixture of rational, legalistic, democratic, and utilitarian bases for supplementary lawmaking by commentators.

Finally, Islamic law, like most other legal systems, employs a set of special technical usages to allow the legal profession to modify some legal rules in order to meet unforeseen circumstances or to ease the burdens of legal administration. In the West, legal fictions or presumptions are frequently designed for these purposes. In Islam, the strict letter of the Shari'a, for example, contains prohibitions on interest, and

\footnote{10. Ribâ again provides a good example. An endless series of analogies were drawn between other commodities and the original six. Those that were held to be like gold, silver, wheat, etc., fell under the prohibition against uneven or delayed exchange. Those that were held to be unlike them did not.}

\footnote{11. See A. Ibn' Abd al-Hallim, Ibn Taimiyah on Public and Private Law in Islam, or Public Policy in Islamic Jurisprudence (1968).}
derivatively on any uncertain or speculative elements in contracts, as well as several other doctrines that would render commercial activity impossible. Devices (hiyal) are designed to circumvent these doctrines.12

The schools obviously engaged in lawmaking, although the opportunities for commentators to make law were limited very early. The schools also did a certain amount of synthesizing, at least when great scholars like Malik or Ash-Shafi‘i sought to integrate various sources and methods of lawfinding and harmonize conflicting interpretations. But the schools did not systematize, generalize, or codify Islamic law. For the most part the scholars commented upon secondary Koran commentaries and the early collections of traditions of the Prophet. The commentators engaged in detailed exegesis on a particular saying of the Prophet, usually by posing an imaginary fact situation that approximated the one for which the Prophet first shaped his pronouncements. The books of commentaries show only rudimentary attempts at systematic arrangement by subject matter, and little or no attempt to frame general rules or categories. In typical form the Prophetic text is announced, together with the particular situation in which it arose, such as the exchange of dried figs by weight. The commentator indicates how other commentators of his school have interpreted this saying and extended it to other very similar fact situations. Then he provides his own applications. Each book of commentaries is a long series of such exegetical commentaries on discrete rules and their attendant fact situations. There is no assurance that all of these discrete discussions add up to a complete code of law, nor any assurance that the rules for various specific fact situations are in harmony with one another.

Moreover, by approximately the tenth century, the basic collections of traditions (hadith) had been frozen. At about that same time, the “closing of the gate” of legal theorizing (Ijihad) occurred.13 After that time the orthodox consensus of the various schools was fixed and little scope for further innovation remained. This development appears to be largely the result of the work of Ash-Shafi‘i. He emphasized that the traditions (sunna) of the Prophet must dominate the orthodox consensus (sunna) of each individual school. He also placed great emphasis on the consensus (ijma) of the whole community of the faithful. This dual emphasis may have been designated to unify Islamic law. In actuality, however, each school managed to identify its own particular

12. Consider the loan by double sale. A purchases an object from B at a lower price on date 1. B would at the same time agree to buy the same object back from A on date 2, at a higher price. A’s purchase price is a loan. B’s purchase price is repayment. The difference between the two prices is the interest. COULSON, supra note 4, at 139-40.

13. After the “closing of the gate” legal scholars were no longer permitted to advance new interpretations or doctrines. Id. at 80-81. See K. FARUKI, ISLAMIC JURISPRUDENCE 27-29 (1962).
teachings with the traditions of the Prophet and to preserve many interschool differences above and beyond the points of interschool agreement (ijma). The end result was that the law of Islam was frozen in the tenth century through its identification with the unchangeable sunna of the Prophet and unchallengeable ijma of the scholars. The divided legal teachings of the schools were some of the central features that became fixed. After that point the schools continued to produce new manuals for the guidance of judges and students, but their compilers ceased to employ the lawmaking techniques used by earlier commentators. The medieval manuals remained the basic corpus of Islamic law until various reform movements of the twentieth century. Until recently, Islamic commentators were committed to the doctrine of strict adherence to the teachings of their school as expressed in its medieval manuals (taglid). Given that even the compilers of those medieval manuals had themselves already forsworn the conscious use of such methods as preference and opinion, basic Islamic law retained its tenth-century substance and structure.

The jurisconsults (muftis) continued to offer opinions (fatwas) on disputed points of law, both to private litigants who went into court armed with as many fatwas as they cared to purchase, and to the kadis themselves. Indeed, official muftis were attached to many courts, but their opinions had no official sanctions, and the kadi were not required to accept them. Nevertheless, particularly in the nineteenth century, compilations of fatwas acquired some authority as legal texts complementary to the medieval manuals. They undoubtedly contained a good deal of covert lawmaking.

D. The Inadequacy of Cultural Explanations

In Western legal systems, uniformity of law is typically achieved through the announcement of general legal definitions, concepts, and doctrines by the highest courts. These pronouncements provide guidance for future decisions of lower courts. But the legal environment of the kadi was far removed from these Western principles. The kadi functioned in a world of highly particularized legal rules rather than general legal concepts. His job was to find which among hundreds of specific and detailed rules most closely fitted the particular facts before him. In doing so he was removed from the original wording of the Koran, Islamic traditions, and the great scholarly texts. Instead, he referred only to the frozen medieval manuals of his school. He was for-

---

14. The Ottoman Empire was officially Hanafi and its law was defined by The Pearls and The Confluence of the Seas, works produced in the fifteenth and sixteenth centuries respectively. H. Gibb & H. Bowen, Islamic Society and the West 22-23 (1957) [hereinafter cited as Gibb & Bowen].
bidden to work by preference, public interest, or any kind of independent legal theorizing (ijtihat). He was limited instead to the most narrow kind of analogy in the interstices of already highly detailed and particularized rules. The work of Ash-Shafi'i and others had, by the tenth century, clearly identified the legitimate sources (usul) of law to be the Koran, traditions, consensus of the schools, and analogy. Thus, no legal authority beyond the immediate case could attach to the pronouncements of any legal tribunal.

In such a system, appeals courts would be deprived of many of their major functions. They could not announce uniform legal rules or doctrines, which could only occur through the words of the Prophet or the consensus of the community of the faithful. In other words, in a legal culture that rejects all lawmaking, appellate lawmaking is not feasible. Moreover, since Islamic legal culture rejects generalization, the license for broad conceptualization and direct reinterpretation of basic law accorded Western appellate courts is lacking under Islam. In such a culture, even the most difficult case turns upon a rather arbitrary choice among numerous highly concrete and particularized rules. Since there is little opportunity to rationalize this choice, there is no reason to believe that a second choice by an appellate court would be more just than the initial one made by the trial kadi.

Islam would also deprive appellate courts of their ultimate weapon in the struggle for institutional legitimacy. In Western legal systems it is theoretically unacceptable for two trial courts applying the same statute to arrive at contradictory interpretations of the applicable law. Because appeal is the major insurance against such nonuniformity, Westerners are generally committed to the principle of appellate jurisprudence regardless of how much they are opposed to the policies being pursued by the appellate judiciary at any given time.

In Islam, however, uniformity of law is not a central value. The multiple sects and schools are, of course, the most dramatic evidence of Islamic toleration of diversity. More fundamentally, however, Islamic culture regards both consensus and diversity among the faithful as gifts from God. This belief is echoed in the recurring metaphor of diversity as branches springing from the great tree of Islam. Even the Islamic notion of consensus is generally one of spontaneous and evolving agreement rather than imposition of uniformity. Thus, appellate

15. The Hanbali tradition is the extreme statement of rejection of broad reasoning upon the words of the Prophet, but that rejection runs deeply through all of Islam.

16. Of course, sectarianism may exist in religious traditions that show little or no tolerance for diversity, as for example in Western Christianity. But unlike Islam, each Christian sect has historically tended to deny that the others are sharers in the true faith.
courts need not be available to reconcile nonuniform law since legal nonuniformity is accepted by this legal system.

The absence of appeal in Islamic law can therefore be traced to three basic cultural peculiarities: the particularization of legal rules, the rejection of institutional lawmaking beyond the words of the Prophet, and the notion of consensus as the mode of discovering the Prophet's true words. Explanations of the absence of appeal in Moslem courts based on the legal culture, however, are not entirely satisfactory for a number of reasons. First, Imperial China had a comparably particularized legal code equally adverse to the formation of general legal concepts or doctrines. It also functioned by small step analogies from particularized and fixed legal provisions. Despite these similarities to Islamic legal culture, Imperial China had a highly elaborate system of appeal.

Second, there is no satisfactory explanation for the failure of appellate processes to develop before the body of law became immutably fixed in the tenth century. While the existence of the schools during even the earliest period might have precluded a single system of appeal, why was there not a highest appeals court for the kadis of each school? The fact that the enunciation and development of law during the early period was the responsibility of jurisconsults rather than the kadis themselves would not have precluded the formation of appellate courts advised by leading jurisconsults in the same way that trial kadis were advised by such jurisconsults. In short, during the formative period of Islamic law, when independent legal theorizing (ijtihad) was very much in evidence, appellate court lawmaking would have been appropriate to the contemporary legal culture. Its absence cannot be explained by reference to the historical phenomenon.

Third, even after the closing of the gate of ijtihad, a number of factors might have combined to encourage judicial lawmaking. Legal rules were particular and incomplete. Analogizing retained currency as a judicial technique, and a large body of commentary literature was in existence. These factors might have left room for considerable appellate judicial lawmaking, at least within each of the schools. Certainly many other legal cultures, most notably the Anglo-American, have witnessed the considerable growth of appellate lawmaking despite a theoretical commitment to reasoning by analogy in the judicial lawmaking process.

Fourth, even if the formal doctrines of each of the schools were theoretically fixed, each kadi still had to "apply" this large body of formal rules to the cases before him, many of which could not be liter-

17. See D. Bodde & C. Morris, Law in Imperial China 113-31 (1967).
ally accommodated by the highly particularized rules. This is a classic breeding ground for judicial lawmaking and, by extension, for appellate procedures to correct trial courts which have chosen the "wrong" rule or made the "wrong" analogy. Here again the Imperial Chinese practice is revealing. Indeed, in the Maghreb, the western island of Islam running across North Africa, the practice of court decisions (annual) assuming an independent legal force was prevalent.

Finally, the notion of the consensus of the community or the consensus of the jurisconsults is deeply embedded in many legal cultures. The German "reception" of Roman law is one example of this principle. Yet, substantial lawmaking at appellate court levels occurs in many such cultures. The appellate judge or the jurisconsult simply announces himself as the spokesman for the consensus of the community. The requirement of popular consensus need not be a bar to the announcement of law by a single high source. Instead, the cultural need for consensus may become one of the values supporting an appellate court that announces uniform rules in the form of "discovering" the consensus latent in the community. This need for consensus might have served as a strong weapon of appellate court discipline against the tolerance of diversity that characterizes Islamic culture.

In summary, then, the presence of one or more of the same features in other societies with appellate procedures suggests that the cultural peculiarities of Islam do not adequately explain the absence of appeal in Islamic law. Institutional factors may provide a more convincing explanation for the absence of appeal in the Islamic legal system.

III

INSTITUTIONAL EXPLANATIONS FOR THE ABSENCE OF APPEAL IN ISLAM

A sketch of the growth of Islamic legal, political, and religious institutions reveals two basic institutional factors that are relevant to the absence of appeal in Islam. The first is the simultaneous existence of both a secular and a religious judicial system. The second is the weakness or absence of hierarchical structures in the political and religious organization of Islam.

A. Religious and Secular Courts

The law of Islam (Shari'a) cannot simply be called either a purely religious law or a universal law governing both secular and religious

18. Id.
19. COULSON, supra note 4, at 145-47.
affairs. The Shari'a is the path to righteousness. It guides the faithful to an ideally pure existence rather than prescribing minimums of acceptable conduct. It is concerned with the believers' duties to God, and most of it is concerned with what Westerners would call religious obligations such as prayer, pilgrimage, and various kinds of abstinence. Substantial portions concern marriage, divorce, and inheritance, which were initially considered in the West to be essentially within religious jurisdiction. In this sense the Shari'a is religious rather than secular law. But the Shari'a also contains prohibitions against a number of major forms of crime, stipulations about the validity of various kinds of commercial transactions and agreements, and provisions about the holding and transfer of various kinds of personal and real property. In that sense it had the potential for governing a wide range of social interactions that Western cultures would label secular.

1. The Umayyads

Islam did not actually develop a single, unified body of law or court system, however, but instead created two parallel legal systems. One of these legal systems can be labeled religious, and the other secular. The first Islamic dynasty, the Umayyads (A.D. 661-750), who controlled a rapidly expanding empire, evidenced an institutional pattern that is typical of imperial rule. Both judicial and administrative power were vested in the Caliph. His judicial powers were then delegated to the host of subordinates who exercised territorial or functional administrative control, such as provincial governors, army commanders, treasury officials, market inspectors, and water supply officials. Provincial governors were the principal judicial officers, but they left actual dispute settlement to the kadis. At this point, however, the kadi was simply the legal secretary to the governor, appointed by him and exercising his delegated authority. Decisions by the kadi were reviewable by the governor. The kadi replaced the hakan, the triadic figure whom Arabs engaged in a dispute had selected by mutual consent to mediate their differences. Thus at first the kadi handled only "private" disputes voluntarily brought to him by both parties. This is a typical pattern of a new central political regime supplanting purely private triadic dispute settlers with public officials. The police (shurta) were in complete control of investigation, arrest, trial, and punishment in criminal matters.

Before the end of the Umayyad Caliphate, however, the kadi ceased to be simply an administrative officer offering dispute settlement services on behalf of the territorial governor. By about 715, the custom

of appointing kdis only from among the scholar specialists in the Koran was in evidence.21 Thus, the kadi began to become a religious expert rather than simply an administrative subordinate.

2. The Abbasids

This tendency, begun under the Umayyads, was rapidly carried to its extreme under the next dynasty, the Abbasids. The Abbasids represented a militant religious reaction to the incipient secularism of the Umayyads. Abbasid policy emphasized the central role of the faith in the new Arab empire. One wing of that policy involved the formation of the kdis as a separate profession of religious scholars. The kdis ceased to be administrative subordinates of the governor and became specialized judges confining themselves entirely to the Shari'ā. In this sense the kadi increasingly became an independent religious judge rather than the kind of secular subordinate administrator he had initially been.

It must be remembered, however, that the Caliph's regime itself was not a secular one in the Western sense. The Abbasid emphasis on Islam was at the same time an elevation of Islam and an elevation of the Caliph, who as defender of the faithful wielded both religious and secular authority. While nominally supervised by a chief kadi, the kdis actually served at the pleasure of the political authorities. In practice that political authority generally still was the Caliph's territorial governor.

3. The Secular Courts

At the same time that the kadi's religious aspects were emphasized, and indeed partly because of this emphasis, a second body of law and courts arose. The trial jurisdiction of the shurta was far more extensive than the police court jurisdiction for minor offenses that are encountered in many legal systems. The caliphate took over from the Byzantines the institution of "inspector of the market" (muhtasib), a local official responsible not only for maintaining the orderly operation of the marketplace but also for settling commercial disputes according to the local customs of the market.22 In Islam, as in Medieval Europe, the inspectors could play a particularly important role because religious objections to profit and interest on loans were deeply embedded in the general law. This is not to say that the inspectors of the market were totally isolated from Shari'ā and employed a totally distinct body of

21. Schacht, supra note 4, at 24-27.
22. We also encounter this pattern of special merchants courts applying customary commercial law in the English pie powder courts. See S W. Holdsworth, History of English Law 106-14 (1924).
law. As with most older institutions taken over by the faithful, this one was Islamicized. The muhtasib was generally regarded as an inferior of, if not a subordinate to, the kadi. On the other hand, a great many of the “devices” of Islamic law are designed to reach a compromise between the Shari'a and customary commercial practices. Thus, although the inspector of the market jurisdiction was not a repository of antireligious law, the inspector was not a kadi and his decisions were not pronouncements of the Shari'a.

From the earliest times the administrative side of the caliphate employed an official in charge of complaints (Sahib al Mazālim). Mazālim jurisdiction included complaints against government officials, land law, and any other matters the government chose to define as a complaint. Mazālim courts could and did announce doctrines of substantive law additional and supplemental to the Shari'a in the form of administrative regulations or policies of the government. The relation between this mazālim court system and the kadis varied greatly in various situations. It is clear that the Sahib al Mazālim was totally independent of the court of the kadi and indeed could hear complaints against the kadi as against all other government officials. But in some instances kadis held both Shari'a and mazālim jurisdiction and many mazālim courts had a Shari'a jurisconsult in attendance. On the other hand, particularly in active military zones, the mazālim courts might take on almost complete jurisdiction.

The authority of the mazālim courts was derived from that of the Caliph. The caliphate expanded its own lawmaking powers, and thus the powers of the mazālim and the police courts, in two ways. First, under the name “siyāsa” (which roughly means administration or public policy), the Caliphs did in fact legislate, particularly in the areas of police, taxation, and criminal justice. The Shari'a condemned only a few offenses, for which it specified particularly severe punishments (haad). Prosecutions for other offenses, and even for Shari'a offenses when the authorities wanted something less than haad punishments, were brought in the secular courts. The Caliph defined both the substantive and procedural aspects of the non-haad criminal law. Moreover, the Caliph might impose whatever punishments (ta'zir) he thought were necessary to serve as a deterrent to bad conduct even in noncriminal disputes.

23. COULSON, supra note 4, at 131.
24. E. TYNAN, supra note 4, presents the most complete account of the non-Shari'a courts available in a Western language. A second edition of his work was published in one volume in Leiden by E. J. Brill in 1960.
25. SCHACHT, supra note 4, at 53-54. Siyasa is the Arabic term. The Ottoman Sultans exercised their siyasa authority by issuing Kanuns. See note 5 supra.
26. COULSON, supra note 4, at 132-33.
Land and tax litigation were normally brought before the Master of the Treasury. The Shari‘a had little or nothing to say about such matters. The seizure and reassignment to the faithful of great tracts of conquered land was a key feature of the Islamic political economy of conquest. Since the Caliphs assigned this land, major land disputes ended up in the mazālim courts rather than before the kadi because they were essentially problems of military administration rather than ownership. The scope of the Caliph’s administrative powers was therefore very substantial.

Moreover, as Defenders of the Faithful, the Caliphs attributed to themselves the status of religious scholars. They could announce their personal interpretations of the Shari‘a in the same manner as any other legal scholar. Thus, the vast administrative discretion of the caliphate could be given a gloss of Shari‘a legitimacy by the Caliphs themselves.

It is inaccurate to make a sharp distinction between secular and religious authorities or jurisdictions in analyses of traditional Islam. Until the fall of the Ottoman Empire after the First World War, the Islamic world knew no purely secular governments, except in countries such as India and Indonesia, where Moslems were conquered and reduced to the status of a protected religious minority. Nevertheless, a large body of law and courts, basically involved in the secular administrative sector of the caliphate’s vast authority, were apparently operating separately and parallel to the courts of the kadis. These courts conceived of themselves as applying the rules and policies of the Caliph and other territorial rulers rather than confining themselves to the Shari‘a. In this sense a secular legal system exists side by side with the religious law of the kadi.\textsuperscript{27}

The growth of an alternative system of law and courts was encouraged by two aspects of the Shari‘a. The first was its incompleteness, which has been discussed above.\textsuperscript{28} The second was its strict and demanding rules of evidence.\textsuperscript{29} These evidentiary problems were so severe that they spawned a special official (sahib ar-rodd) whose function was to hear cases rejected by the kadi because the claimant could.

\textsuperscript{27} Gibb & Bowen, \textit{supra} note 14, at 79, 115. The Ottoman Sultans officially proclaimed this distinction by codifying a body of kanun, see note 5 supra, separate from the Shari‘a. While for reasons that will be discussed later the kadi enforced both the Shari‘a and the kanun, a clear distinction was maintained between the two, and by the eighteenth century the kadi had entirely lost their secular “law and order” jurisdiction to the police authorities. \textit{Id.} at 87.

\textsuperscript{28} See text accompanying note 6 supra.

\textsuperscript{29} Under Shari‘a procedure it is almost always both necessary and sufficient that two male adult Moslems testify orally to the truth of the claimant’s (muddai) position. If two such witnesses cannot be produced, the defendant (mudda‘ alayhi) wins by taking an oath of denial. If two such witnesses do appear, about the only option open to the defendant is to attack their moral and religious character. There is no cross-examination, and kadis do not normally weigh opposing evidence.
not meet Shari'a standards of proof, although he appeared to be justified in his claim. The police courts and the wali al-jarā' (official in charge of crimes) heard evidence from dubious witnesses, cross-examined, extracted confessions, and heard and weighed circumstantial evidence. The mazālim courts used discretionary procedures outside the Shari'a. Thus the Islamic institutional structure appears to have been composed of two judicial systems: one which was essentially secular and linked directly to the political and administrative authorities, and another which was religious and linked directly to the Shari'a tradition as embodied in the teachings of the schools of jurisconsults.

B. Appeal as Hierarchical Control

Because two distinct judicial systems existed in Islam, some of the uses of appeal are not relevant to the Shari'a courts of the kadis. Appeal as a sampling of administrative performance was irrelevant because the kadis were not in the main line of administration. Appeal as a means of hierarchical control and coordination was irrelevant for the same reason. To the extent that the Caliphs and subsequently the Ottoman Sultans did exercise control over their domains, it was through a chain of territorial administrators and tributory monarchs to which the kadis were only loosely connected. Appeal as an instrument of hierarchical control was, therefore, far more relevant to the secular side of Islamic institutions than to its system of religious courts.

Although relations between church and state have been extremely complex throughout the history of Islam, it has nevertheless always been apparent that the law of Shari'a pertained to the religious aspirations of the faithful, while the police and administrative law and courts of the Caliphs and Sultans were the principal governors of the more mundane aspects of public policy. Yet to label the Shari'a religious is not in itself a satisfactory explanation for the absence of appeal as a form of hierarchical control. In the ecclesiastical law and courts of the European Roman Catholic Church, where far clearer lines are drawn between religious and secular law than in Islam, an elaborate system of appeals heavily freighted with the function of maintaining papal control over widely dispersed subordinates is much in evidence. It is the nature of Islam as a religious community, rather than the fact that kadi courts are religious, that explains the absence of appeal.

The Islamic religious community, unlike that of Roman Catholi-

30. It is true that in the declining days of Islamic empire the kadis took on more and more of the duties of local government, but that was precisely because the hierarchical chain of government administrators was disintegrating.

31. The Ottoman Sultans, who were the successors to the authority of the Abbasid Caliphs, are discussed in Part V infra.
cism, has only the weakest hierarchical structure. The Caliph is in theory both the successor of Mohammed and the chosen of the people, but in practice he is considered only Defender of the Faithful and not proclaimer of the faith. There are no equivalents of Apostolic succession, dogma or papal infallibility, or of canon law made by the church as subsidiary to divine law. The Caliph or Imam may make no law on the central questions of religion. At best he is one among the many jurisconsults.

In some of the Islamic sects, a particular religious leader achieved the status of prophet or even a kind of god. This development led to absolutist regimes, combining full religious and secular powers, such as the Fatimids in Egypt and the Persian monarchy. But in the Sunnite mainstream no such dominant religious authority emerges. Islam has no ultimate human provider of religious law, nor any hierarchical organization of priests and bishops culminating in such a supreme source of law.\(^\text{32}\) For a religious community that lacks both the doctrine of a single, central, dominant human source of religious truth and a hierarchical structure of priests and religious institutions, one of the principal attractions of appeal—its hierarchical control dimension—is missing.

The Shari'a courts did not need to be mustered in a hierarchical fashion to achieve the secular tasks of territorial rules, since those rulers enjoyed a second legal and administrative system for such purposes. Moreover, they did not need to be hierarchically organized to support the hierarchical structure of the religious community because no such structure existed in the religious community.

The religious fragmentation of Islam is a part of its more general fragmentation. Although political institutions such as the caliphate and the Ottoman Empire often claimed centralized authority, in practice Islam was usually divided into a large number of independent territorial states. Even within areas that acknowledged the nominal rule of a single Caliph, Imam, Sultan, or Emperor, there were typically a series of city-states or praetorian provinces with few lines of authority running from local to central authorities. Because kadis were appointed by the government authorities, Shari'a judicial organization reflected the general lapses in hierarchy of the political regime. In practice, unified corps of kadis or any single central appointing authority rarely existed.

The kadi's law was a segment of a universal religion. The kadis were officials appointed by city or state secular regimes, but as purveyors of the universals of Islam, they could not be totally incorporated into the existing local political hierarchy. On the other hand, the kadi

\(^{32}\) Gibb & Bowen, supra note 14, at 74, 117.
was also not incorporated into any universal religious hierarchy since such a hierarchy is nonexistent in Islam. Although governing authori-
ties did sometimes try to discipline kadis, these attempts were rela-
tively rare and usually unsuccessful. Since the kadi was usually
appointed by local authority, and his duty was to one of the schools of
a religious law in which neither the school nor the religion had a single
central authority, the kadi lived in an essentially nonhierarchical world
where the absence of appeal is hardly surprising.

IV

Elements of Appeal in Islam

This close linkage between the vicissitudes of Islamic political and
religious hierarchy and the absence of appeal can be further demon-
strated through an examination of the elements of appeal actually in
existence in Islam. Those elements are in fact substantial. Initially, no
distinct appeal mechanism was necessary in Islam because of a consti-
tutional theory of delegation apparently inherited by the Arabs from
the Byzantines. All political, legal, and religious authority adhered to
the Caliph. He might delegate portions of that authority to subordi-
nates. They in turn might redelegate it. But the delegator retained full
and complete jurisdiction and authority over all matters delegated.
Thus, the Caliph and his governors retained full judicial authority even
when delegating judicial tasks to the kadi. The notion of a level of
appeals courts superior to the kadi did not develop due to the fact that
a litigant dissatisfied with the kadi's decision or initially reluctant to
seek a kadi's judgment could place his case directly before the highest
political authority. A system of appeal by trial de novo conducted by
the delegating authority therefore implicitly existed. There are scat-
tered recorded instances of Caliphs reversing the decisions of a kadi or
sending a case back to him with new instructions. Because initially the
political authorities retained such complete judicial jurisdiction, they
had no need for special appellate courts. Subsequently, two interacting
forces intervened to disrupt this appellate system. First, as the kadi
came to be seen as servants of the Shari'a—experts in a religious law
rather than simple legal subordinates of Caliph and governor—they be-
came increasingly independent of short term control by the political
authorities. Second, as the central political, military, and religious au-
thority of Caliphs and their governors decayed, rulers tended to relin-
quish personal exercise of their judicial authority.

33. There are instances in which regimes attempted to apply test oaths and purge the ranks
of the kadi in order to achieve religious uniformity or compliance to the regime's policies. D.
MacDonald, supra note 4, at 153-58.
A paradox is therefore apparent. Precisely because the Caliphs were initially the repositories of such enormous religious and secular judicial authority, they needed no special appellate institutions. As a result, once the powers of the central authorities waned, Islam ended up with no appellate institutions at all.

Closely connected to their personal judicial powers to try cases, the Caliphs, Sultans, and governors also exercised the authority of complaints (mazālim). As previously discussed,34 mazālim jurisdiction was part of the second and “secular” line of Islamic courts. Three elements of the mazālim jurisdiction coalesced to form, in practice, an appellate procedure from kadi jurisdiction. First, the mazālim is a court of complaints against all government officials, including the kadi. Second, it is a kind of equity court designated to do substantial justice where the kadi have failed to that end.35 Third, the mazālim jurisdiction is peculiarly connected to the head of the regime. It is a device for correcting the misconduct of his own lesser officials. It is also a device for bringing the full power of authority to bear against powerful individuals who resist the jurisdiction and judgments of the kadi’s courts. Mazālim jurisdiction inheres in the Caliph, Sultan, or governor, as does the general power to hold court. The two powers are often not distinguished, or are seen as additive or supplementary to one another. The mazālim jurisdiction, therefore, empowers the head of the regime to hear and remedy complaints against a kadi brought by those who have lost cases in the kadi’s court or otherwise suffered from his conduct.36

Whenever a Caliph, Sultan, territorial governor, or wazir (prime minister, mayor of the palace) was in the ascendancy, concentrating political power in himself, he tended actively and personally to exercise mazālim jurisdiction. It is significant that in such instances mazālim jurisdiction tended to expand so far that it not only supervised but sometimes also displaced the kadi’s jurisdiction. Whenever central government was in disarray, however, the governing authority ceased to personally exercise mazālim jurisdiction and instead delegated it to a special corps of subordinate judges. When mazālim jurisdiction was exercised by such subordinates, appeals from the kadi’s courts were usually specifically proscribed. Moreover, in the weakest periods of central authority, the kadi themselves often were granted the mazālim jurisdiction.37 In short, a survey of the major appeals institutions of

34. See text accompanying note 24 supra.
35. Typically this incapacity arose because the procedural or substantive rules of the Shari’a were too rigid or narrow to remedy the injury. Sometimes the transgressor was a person so powerful that the kadi was unable to reach him. The failure of the kadi to reach a correct legal decision, however, was also viewed as an incapacity remedial by the mazālim court.
36. COULSON, supra note 4, at 120-24.
37. 2 E. TYNAN, supra note 4, at 141-281.
Islam over time reveals that appeal tended to flourish as political power became concentrated and wane as political authority was dispersed.

V

THE OTTOMAN EMPIRE: A CASE STUDY IN ISLAM, HIERARCHY, AND APPEAL

If the absence of appeal in Islamic law is indeed related to the absence of centralization rather than to the lack of concern for the loser at trial, appeal should have been introduced where Islamic institutions did become centralized. The Ottoman Empire, which dominated much of the Moslem world from the fourteenth through the nineteenth centuries,38 witnessed the greatest incidence of centralizing tendencies under Islam. With the exceptions of Persia and the interior of Saudi Arabia, the Ottomans either directly or indirectly ruled the entire Islamic faith. The Sultan was both the emperor and caliph,39 and the religious capital as well as the secular capital of most of Islam was Istanbul (Constantinople).

The Ottoman Empire only temporarily achieved its ideal of complete centralization of authority in the Sultan. This centralization gradually disappeared over the centuries. Nevertheless, the ideal of centralization did exist during the reigns of some of the great early Sultans. The ideal of centralization was reflected in the judicial institutions of the Empire. The kadi held the Sultan’s commission. They enforced both the Shari’a and the secular laws enacted by the Sultan (kanun). The kadi played a major role in territorial administration, not only in the levying of criminal penalties, but also in supervision of the tax system and in the management of the large religious trust funds that were an important feature of Moslem life. The kadi and local governors (beys) shared authority as conveyors and enforcers of the

38. The discussion of the Ottoman Empire that follows is drawn largely from GIBB & BOWEN, supra note 14; H. INALCIK, THE OTTOMAN EMPIRE (1973); A. LYBYER, THE GOVERNMENT OF THE OTTOMAN EMPIRE (1966); S. SHAW, supra note 5.

The Ottomans were originally nomadic Turkic tribesmen from central Asia who settled in what is now the western portion of Turkey. From that base they gradually built their empire at the cost of both the European Christian lands to their west and north and the Moslem lands to their east and south. At its zenith, the Empire swept from the Balkans and Greece into the Caucasus, through Turkey, and subsequently along the eastern and southern shores of the Mediterranean all the way to Algeria and Tunisia.

39. The caliphate is a complex and often uncertain concept and institution, particularly subsequent to the early period when the Abbasid Caliphs held both political and religious authority. See T. ARNOLD, THE CALIPHATE (1924). The capacity of the Caliph to proclaim authoritative religious doctrine was usually referred to yet another title or office, that of Imam. Secular Moslem rulers often assumed the title Caliph as an honorific, usually on the event of some great military victory, but subsequently they might or might not actually claim religious authority as Imam. The Sultans proclaimed themselves to be Caliphs but rarely sought to exercise the dominant religious-doctrinal role implied by the title Imam. See GIBB & BOWEN, supra note 14, at 26-38.
commands of the Sultan.\textsuperscript{40}

The judicial personnel system was centralized and hierarchical. Under the ultimate authority of the Sultan, the two military *kadis* (*kaziasker*), one for the European and the other for the Near Eastern sectors of the Empire, appointed all the *kadis* for their respective territories. Later, some of the authority of the *kaziaskers* was partially lost to the new office of *seyhulislam* (chief of Islam), or Grand Mufti. This *mufti* not only appointed and supervised lesser *mufti* and the general body of the *ulema* (the learned men of the faith) but also appointed the more important *kadis*. *Kadi* positions were hierarchical in nature, with appropriately graded salaries, honors, and approximately five hundred territorial jurisdictions in the eighteenth century. In short, the corps of *kadis* exhibited the standard pyramidal organization extending from rank and file local *kadis* through the *kaziaskers* and the *seyhulislam* who were appointed by and responsible to the Sultan. Moreover, the *kadis*, like other imperial officers, were subject to the scrutiny of the roving inspectors periodically dispatched by the Sultans. The Sultan and his high officers could and did summarily remove local *kadis* from office.

\textbf{A. Appeal in the Ottoman Empire}

Appellate institutions and procedures did begin to surface in the wake of the imperial thrust toward centralization and hierarchical organization of judicial personnel in the Ottoman Empire. Specialized appellate institutions, however, were noticeably absent. This absence was perhaps due in part to the fact that when Islamic law was taken over by the Ottomans such institutions were already formally proscribed. However, as in the development of English law,\textsuperscript{41} appeal was stunted essentially because another mode of judicial centralization—centralized trial courts—was currently being employed. Like many sovereigns close to their tribal origins, the Sultans personally were the supreme font of justice. The Sultan held court wherever he was, as did the Grand Vizier, highest officer of the Sultan and the delegate of his authority. The Divan or Council of the Sultan and the Divan of the Grand Vizier, like the Privy Council or Star Chamber, were both administrative cabinets coordinating the business of government and important courts. Since all of these persons and groups reflected the personal and complete justice of the Sultan, each could hold trials at their discretion.

In the Ottoman Empire every court was a court of first instance for

\begin{footnotesize}
\textsuperscript{40} See U. Heyd, \textit{Studies in Old Ottoman Criminal Law} (1973).
\textsuperscript{41} See Shapiro, \textit{supra} note 1, at 595-96.
\end{footnotesize}
those cases appropriate to its level of prestige. The two Divans were in
a sense supreme courts, but they served as courts of first instance for
cases important enough to attract their attention. The Grand Vizier
personally decided those cases he wished to hear with the advice of the
kadis who attended the Divan if the case involved the Shari’a. Other
Shari’a cases were turned over to these kadis for trial. The Defterdar
(Head of the Financial Office) had a court of his own to deal with all
monetary disputes between the government and individuals. The Ad-
miral heard all cases involving the fleet. Most important, the kazias-
kers had trial jurisdiction over all cases of inheritance, marriage, and
emancipation in which soldiers (askeris) were involved, and had direct
personal jurisdiction over all members of the standing military forces.
Given the basically military character of the Empire, nearly everyone
above the rank of peasant and artisan and outside the ulema (the body
of religious scholars) was an askeri. Moreover, because most of the
land of the Empire was held as military fiefs (timar), almost all land
disputes arose between persons who technically were members of the
standing military forces. As a result, the courts of the two kazias-
kers heard nearly all major real property cases and a substantial share of all
cases involving the political and social elite of the Empire. Elaborate
appeal mechanisms were therefore unnecessary as a device for centrali-
ization since the most important cases were likely to be heard directly
by the central government itself.

While technically forbidden by Islamic law, a party dissatisfied
with the judgment of one kadi could try another. Traditionally, the
kadis summarily made their decisions without lengthy written or oral
opinions. Given these two practices, an appeal was not necessarily dif-
ferrntiated in any way because it was an appeal. No special procedures
or courts were necessary when a litigant, dissatisfied by the decision of
a local kadi, went to a regional or provincial kadi, and then, still dissat-
isfied, proceeded to one of the highest courts of the realm sitting in the
capital, or indeed to the Sultan himself. For each of the courts in-
volved, the trial was a trial de novo rather than a “review” of what had
been adjudicated below.

In spite of the absence of special appeals mechanisms, numerous
authorities testify to the existence of appeal and to the fact that the
Sultan, the Grand Vizier, and their respective Divans, stood at the apex
of appeals.42 After sessions of the Divan itself, the high officials who
attended it customarily split up, each to hear further business of partic-
ular concern to him. Cases would also be heard at these sessions. The

42. A. Heidborn, Manuel de Droit Public et Administratif de l’Empire Ottoman
389 (1909); H. Inalcik, supra note 38, at 74-75, 89-97; A. Lybyer, supra note 38, at 41-42, 219-21
(citing 16th-century Western sources); S. Shaw, supra note 5, at 26, 136, 139.
two Divans sat both as trial courts in regular lawsuits and as administrative superiors hearing complaints against their subordinates, including the kadi. Appeal took the form either of a trial de novo or a complaint against the corrupt or unjust acts of a lower kadi. This was yet another reason why appeal does not appear distinctly in the Empire. It was often merged with the general complaints jurisdiction of various mixed judicial and administrative bodies. The kaziasker, for instance, heard appeals not only in the Divan but also from decisions of the military governors of towns and provinces concerning the affairs of their subordinate government officials.\[43\]

**B. The Scope of Sultanic Power**

Although in practice it is probable that the decisions of the local kadi were very rarely reversed, nevertheless the hierarchical ambitions and surface accomplishments of the Ottoman Sultans suggest a more explicit and institutionally distinct role for appeal than that which actually developed. The Ottoman constitution presents several clues concerning why such a role never evolved in the Ottoman Empire.

The Ottoman Sultans claimed absolute political authority and constructed a system of government to wield that authority. At the capital, the Sultans built a large, functionally specialized, hierarchical bureaucracy that culminated in the Divan of the Sultan which was an almost daily meeting of the highest officers of the realm. The Divan was dominated either by the Sultan or his Grand Vizier, the highest political officer of the realm.\[44\] The Divan not only sought to coordinate, announce, and enforce the policies of the central government, but also served as a high court both of first instance and appeal. The kaziasters sat in the Divan. With their participation, the Divan became the highest court of the Shari'a.

The hierarchical and centralized administration of the capital was mirrored by a comparable territorial organization. With exceptions resulting from the conquest of certain of its parts, this organization was fairly uniform. The land was divided into basic units called timars, each of which was supervised by and supported an armed and equipped cavalryman (sipahi) and his horse. The holders of the larger timars were also responsible for providing one or more cavalrymen in addition to themselves. There were intermediate ranks, roughly de-
fined, of captain (subashi) and colonel (alay bey) who served in wartime as commanders of small and intermediate size units and in peace-time as territorial police officials. They held even larger timars (zeamets). The sipahis and their subashis and alay beys were grouped territorially under sanjac beys, each of whom had his seat in a town and governed his district, as well as serving as general of the cavalry division composed of his sipahis. Above them were the beylerbeys, or beys of beys, who were governors of their provinces and commanders of the major wings of the army under the direct command of the Sultan and Grand Vizier.

This neat structure of centralized empire looks rather like that of the Chinese Empire and might be expected to exhibit comparable judicial structures. Indeed, since there was a kadi in nearly every town, a provincial kadi of higher rank in each provincial capital, and a kaziasker to match each of the two most important beylerbeys, the judicial corps followed the territorial pattern of the general government and culminated like it in the Divan. At the height of sultanic powers in the fifteenth and sixteenth centuries, great emphasis was placed on the kadis as appointees of the Sultan administering the Sultan’s kanun, rather than as entities drawing their authority solely and directly from the Shari’a.

It is apparent that the Ottoman Sultans nevertheless failed to achieve the political centralization of the Chinese emperors. One commentator concludes that “it was only in the nineteenth century, as the result of Western influence, that Ottoman government in fact secured the kind of autocracy and centralized power that Europe traditionally assumed it had.” The Ottoman state was confronted with so many obstacles to centralization that each merits individual scrutiny.

First, much of the neat hierarchy of the Ottoman government was actually a military structure that became quiescent during most of the year. Indeed, in Islam the title “Sultan” means military leader. In the tribal, Turkish traditions of central Asia from which the Ottoman Sultans emerged, a military leader (bey) was simply what that title suggests. In peace the Turkic tribes had no chiefs. It is apparent that the Ottoman Sultans never escaped these traditions. They wielded absolute authority only over a campaigning army. This is one of the basic reasons that the Sultans undertook a campaign nearly every summer. The vast bulk of the population (raia) was exempt from military service. It remained almost totally immune to the Sultan’s authority as long as it paid its taxes. The neat territorial organization that ran from timar holder up to a beylerbey actually only operated when the army

46. S. Shaw, supra note 5, at 165.
gathered for its summer campaigns. For the rest of the year each *timar* holder administered his own lands as an almost entirely independent feudal fief. Each *bey* or *subashi* reverted to ruling his own headquarters town as if it were his *timar*, which in many respects it was.

Second, the Ottoman Sultans had come to power as tribal *beys* who were only first among equals. Their coequals were their Turkic lieutenants, who were fellow nomadic horsemen and fellow Moslems. Turkish Moslem notables continued to be an important independent power in the empire. To counter them the Sultans developed a unique feature of the Ottoman Empire known as the slave family of the Sultan. From the families of his conquered European Christian subjects, the Sultan drafted young boys, who were then rigorously educated in Islam and trained as servants and soldiers of the Sultan. A professional army and mandarinate of governing officials therefore grew up alongside the old Turkish Moslem elite of notables. Each was composed of men who were European and Christian in origin and remained throughout their lives the personal slaves of the Sultan. These slaves of the Sultan were mingled with the old Moslem notables at many points. For instance, many of the *timar* holders and *beys* were the Sultan’s slaves, but old Moslem notables held many governorships and their retainers held many *timars*. Some civil servants of the capital were old Moslems and some were slaves.

The central political arm of the capital, however, was recruited almost exclusively from the Sultan’s slaves. It consisted of the palace staff of the Sultan, the Grand Vizier and his immediate staff, and the central professional core of the army (the *Janissaries*). Much of what appeared to be absolute government, therefore, was in effect only absolute control by the Sultan over his slave family. As the sultanate declined, of course, even this absolutism often proved illusory. During these periods the Grand Vizier or the *Janissaries* often controlled the Sultan rather than vice versa. It is apparent, nevertheless, that absolute and arbitrary sultanic power existed largely within the slave family, which was totally dependent upon the Sultan and isolated from the tribal and Moslem roots of Ottoman society. In contrast, the Sultan’s authority in reference to the old Turks and the old Moslems was limited. Although it may be an overstatement to depict the Ottoman ruling institution as neatly split into two parts—the ex-Christian slave family of the Sultan, living at his pleasure, and the Moslem warriors and learned men living under the *Shari’a* and custom—in practice it

---

47. Both weather and unavailability of food limited most campaigns to the summer months. The soldiers returned home between campaigns.
appears that much of Ottoman centralization was really only a family affair.

Third, the centralizing and hierarchical tendencies of the empire were tempered by a vague constitutional balancing of powers. The three highest advisors to the Sultan were the Grand Vizier (military-political matters), the nizami (chief scribe on administrative matters), and the seyhulislam and kaziasker (religious matters). The balancing function was most explicit in territorial administration. The kadis were responsible for both the Shari'a and the administrative regulations of the Sultan (kanun). The beys could therefore not act in many matters without the legal authorization of the kadis. On the other hand, the kadi had no sword to enforce his judgment and relied on the beys for such enforcement.48

More generally, the ruling establishment of the Empire consisted of two parts. One was military and political and centered on the Sultan's slave family. The other was religious and cultural and centered on the body of Moslem religious and legal scholars (ulema). In theory they both met at the pinnacle in the person of the Sultan-Caliph. The sultanate was, however, essentially a military-political institution, and the ulema was seen as a counterbalance to the secular authority of the Sultan. The Ottoman Sultans actually only began to insist on their status as Caliph in the waning days of the empire in an attempt to bolster their sliding political authority.

Finally, the seemingly absolute power of the Sultan was both limited and superficially dramatized by the Ottoman view of personal responsibility. Within the strict boundaries of the role or status that society had prescribed for him, each individual was supposed to be personally autonomous and responsible for his own acts. The kind of supervision that entailed issuing continuous corrections of a subordinate's errors ran counter to this cultural ideal. Thus, Ottoman administrative control was directed largely into personnel measures. A subordinate was to be left alone to do his job. If he failed, he was to be dismissed, or executed and replaced by someone else who would be left alone until he failed. Under a strong Sultan it was said that a hundred heads of those who had failed sometimes arrived for his viewing pleasure on a single day. The Ottoman government thus was characterized by dramatic hiring and firing policies but evidenced little detailed control

48. The basic governmental territorial unit below the sanjaç was the kada, or judicial district, presided over by a kadi. Each kada had a subashi, whose dual role as military and police official has been explained earlier. The kadi depended on the subashi for enforcement of his judgments. In theory, the subashi could not punish without authorization from the kadi. In practice, he often did.
over day-to-day administration.49

C. The Sultan and the Kadis

The kadis were concerned primarily with civil and religious affairs and were deeply rooted in the culture of the old Moslem Middle Eastern notables. The ulema maintained its separate authority. At times of crisis a Sultan or Grand Vizier might overwhelm it by sheer force or threat of force. On a day-to-day basis, however, it maintained its independent tradition of learning and law. It provided the muftis and kadis who followed that tradition with a special reserve of authority against whatever pretentions to absolute authority the Sultan might have.

Given the Ottoman penchant for supervising administration by personnel policies rather than by direct daily supervision, the appointment process for kadis was crucial. The early and strong Ottoman Sultans sought in this instance to centralize the appointing power. In Islam the holder of political power traditionally had the right to appoint the kadis. As noted above,50 the Ottoman Sultans established a carefully graded, hierarchical personnel system for kadis in which higher kadis appointed and dismissed their subordinates while the highest kadis, the kazaskers, and later the seyhulislam, appointed and dismissed the principal territorial kadis. The Sultan himself appointed and dismissed the highest kadis and the seyhulislam and so in theory controlled the whole corps.

As in other aspects of Ottoman administration, it was this hierarchical control of appointment and dismissal rather than detailed daily supervision and correction of the errors of subordinates that was emphasized. Because appeal is part of a system of detailed supervision and correction of errors, a regime which does not choose to engage in detailed control of the performance of its judges does not need appeal. In familiar Western terms, the Ottoman political regime preferred to control its judicial product by reducing the independence of its judiciary rather than instituting a thoroughgoing system of appeal. The trial judge was held in check not by the fear of reversal on appeal but by the fear of loss of his job or even his head.

Ultimately, however, the personnel tactic of the Sultans failed precisely because the kadis were necessarily embedded in a traditional Moslem community that was at the periphery of his authority. The Sultan was not in a position to challenge the proposition that the kadis

49. It is noteworthy that, in spite of elaborate financial and accounting staffs and procedures, the Ottomans had no overall budget and exercised almost no supervision over the spending of individual government officials. S. Shaw, supra note 5, at 264.

50. See text accompanying note 45 supra.
must be men learned in the wisdom of traditional Islam. As a result, the ulema continued to dominate the education and the appointment of the kadis. The Sultan could in some sense ultimately appoint, but he could appoint only those whom the ulema had proposed on the basis of their demonstrated allegiance, not to the Sultan, but to the Islamic religious community.

In short, while the kadis played an extremely important role in the Ottoman constitution, they were far removed from the central channels of the Sultan's authority, which consisted of the army and the slave family. They were deeply embedded in that portion of Ottoman society most insulated from the Sultan's absolutist pretensions, the traditional Islamic community of notables and learned men. Although the Sultans did, nonetheless, seek to impose their control over the kadis by both a hierarchical personnel system and an appeals system culminating in the person of the Sultan, these devices were relatively ineffective precisely because they operated at the farthest and weakest reaches of sultanic power.

In summary, then, despite the absence of appeal from the central Islamic juristic tradition which the Ottomans absorbed, there was an appellate process in the Empire, closely associated with the institutions through which the Sultan sought to centralize political authority. While this appellate process has been somewhat obscured by the use of trial de novo on appeal and the intermingling of litigation and complaint jurisdiction, the fact remains that appeal existed in Islamic cultures where Islamic law and hierarchical government intersected in a relatively stable and enduring manner. The appeals process is attenuated and obscured, however, primarily because it operated in the sphere in which the government's claims to hierarchical authority were weakest.

51. The essentially religious character of the kadis of the Ottoman Empire is somewhat obscured by the strategy of the early Sultans. Essentially, that strategy was to recognize and reinforce the fundamental split between government and religion and to balance one against the other under his own ultimate authority. In the provinces the kadi was given authority over both the Shari'a and the kanun and officers of the civil-military government were forbidden to punish without his approval. The kadis were also encouraged to report the misconduct of government officials to the capital. Thus, the kadi was to serve as a check on the Sultan's government. In the capital, no Grand Vizier could hope to survive without the cooperation of the seyhulislam and fatwas from the ulema legitimating his policies. At the same time, the kadis were set to watch the civil governors and, as holders of government offices, they were used as intermediaries between the Sultan's government and the ulema. Indeed, among the more orthodox the office of kadi was disesteemed because it involved compromise with the civil authorities. This policy of exploiting the dual nature of the kadi as religious man and government official to increase sultanic control over both the civil and religious establishment was more or less successful at various times, but it was neither intended to, nor did it in practice, result in the conversion of an essentially religious judge into a secular administrator. See Gibb & Bowen, supra note 14, at 149, 153-55, 201; 2 id. at 79-80, 86-87, 115, 117, 119-21.
CONCLUSION

Legal rules and a commitment to procedural justice are not absent from the Islamic legal tradition. To the contrary, Islamic law is marked by a multitude of rules, a desire to apply them uniformly, and a strong antipathy to arbitrary judgment. If appeal is a minor element of Islamic justice it is not because the society was indifferent to whether trial courts did justice under law. Rather, the simplest explanation for the absence of appeal in Islamic law is that the *Shari'a* and the courts of the *kadis* are essentially religious, and that Islam as a religion was not organized hierarchically. Without hierarchical organization much of both the opportunity and incentive for appeal is absent. And most of the pressure for appeal as a lawmaking device was absent because adjustments in law to meet new circumstances could be accomplished by the secular wing of Moslem legal institutions. More generally, the Moslem world experienced great difficulty in establishing or maintaining any kind of unity or hierarchy over its vast domains. Where, as for instance in the efforts of the Abbasid Caliphs and the early Ottoman emperors, we do encounter attempts at centralization of authority, we do encounter appeal.

In the final analysis the *kadis* escaped appeals supervision for the same reasons they escaped all hierarchical supervision. Their special identification with the *Shari'a* insulated them from the central political authorities. Their religious dimension provided a shield from the hierarchical authority that normally would have been exerted over them as local legal officials of a central regime. That religious dimension did not in turn lead to their subordination to a central religious hierarchy because such a hierarchy was lacking. Indeed, in the recurrent collapse of central authority in the Islamic world, the local mosque and its *kadi* became the only constant and ever-present receptacle of the religious and political authority of the faith. More often than not the local *kadis* extracted various degrees of political, economic, religious, and administrative authority from the central regime. Quite apart from their judicial functions, they seemed to be the only officials with sufficient stability to wield that authority successfully. Where local authorities flourish on the confusion of central regimes, and the local authorities happen to be judges, it could hardly be expected that institutions of appeal would flourish. In Islam a peculiar institutional combination of dual legal systems and absence of hierarchy accounts for the absence of the institution of appeal present in almost all other legal systems. The Islamic experience suggests, therefore, that concern for political control rather than justice under law is the basic motivation for the implementation of appellate institutions.