Al-Qantara, vol. 20, nº 2 (1999)

PROCEDURAL LAW BETWEEN TRADITIONISTS, JURISTS AND JUDGES: THE PROBLEM OF *YAMĪN MA' AL-SHĀHID**

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The significance of the study of the procedural law in Islam cannot be overstressed. There have been continuous influential debates about procedural laws among the traditionists, jurists and judges throughout Islamic history. In the pre-modern period, Ibn Qayyim (d. 751/1350) wrote a critical review of Islamic procedural laws in his book *al-Ṭuruq al-Ḥukmiyya*, meaning procedural laws. He argued, among other things, that circumstantial evidence (*qarīna* and *firāsa*) and written documents should also be counted as evidence.[1] Recently the Federal Shari'at Court in Pakistan held reference sessions on the subject of *shahāda* (witness as evidence) in 1980s. In a 1995 legislation in Malaysia, *bayyina*, *shahāda* and *qarīna* were redefined to allow modes of evidence, other than witness.[2] The continuity of these debates about procedural law illustrates the perennial interaction between judicial practice and written Islamic law.

Modern critical studies of Islamic law have also underscored the influence of the judicial practice on the theory of Islamic law in its formative period and of the continuing changes in the procedural law in later periods. Émile Tyan[3] observed that *qāḍī*s had more free hand regarding witness and method of proof in the early period.[4] He notes that the changes began to take place in the second half of the seventh century[5] when *maẓālim* courts were established beside the *qāḍī* courts and a distinction was made between *Sharī'a* and *siyāsa*

* An earlier version of this paper was presented at the «II Joseph Schacht Conference on Theory and Practice in Islamic law: the role of Qāḍīs in Islamic law: Theory and Practice», Granada, 16-20 December 1997.

[1] Ibn Qayyim, *Al-Firāsa* (also titled as *Al-Ṭuruq al-Ḥukmiyya*), edited by Ṣalāḥ Aḥmad al-Samarrā'ī (Baghdad: Maktabat al-Quds, N.d.), 190 ff., and *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn* (Cairo: Maktabat Kulliyat al-Azhar, 1973), vol. 1, 90-106. *Al-Ṭuruq al-Ḥukmiyya* is specifically devoted to procedural laws while the *I'lam* deals with the institution of *iftā'* and discusses also the problems relating evidence.

[2] *Kelantan Evidence Enactment of the Syariah Court 1991, Enactment 2 of 1991* (As at 10th March 1995) (Kuala Lumpur: International Law Book Services, 1995).

[3] Tyan, E., *Histoire de l'organisation judiciaire en pays d' Islam* (Leiden, 1960); and «ḳāḍī», *The Encyclopedia of Islam*. New Edition. Vol. IV (Leiden: Brill, 1978).

[4] Tyan, 238.

[5] Tyan, 47.

as two methods of procedure used by these courts respectively. While *Sharī'a* court procedure was fixed and restrictive, the *siyāsa* was free and discretionary.[6] N. J. Coulson[7] places this change in the eleventh century[8]. He adds that *Sharī'a* procedure was rigidly formalistic and mechanical, restricted to two witnesses; one witness was accepted only in exceptional cases.[9]

These are quite insightful observations about the changing procedural law of Islam, but they are very general remarks and lack focus on details. As a matter of fact, contrary to Coulson's observation, *qāḍī*s accepted one witness quite frequently, and the doctrine of *yamīn ma' al-shāhid* (oath with one witness) has been one of the most debated problems among the traditionists, judges and the jurists.

Joseph Schacht,[10] P. G. Dannhauer[11] and Patricia Crone[12] have gone into some details of the doctrine of *yamīn ma' al-shāhid* although they remain more concerned with its foreign origins.

Schacht and Dannhauer both find this doctrine growing in Egypt as a local judicial practice that influenced the theory of Islamic law in Medina and Hijaz. They argue that the Egyptian Qāḍī Tawba b. Nimr's (115-120/733-738) judgement based on the procedure of *yamīn ma' al-shāhid*, developed into the Medinese tradition against the Iraqi tradition, and was later projected as a Sunna of the Prophet. According to Dannhauer, the doctrine was also attributed to Iraqi authorities to prove its universal practice.[13] Although Dannhauer's critical analysis of some of the reports attributing the doctrine to Medina shows the transmitters' connection with Egypt, yet unlike Schacht, he does not dismiss contrary reports.[14]

Schacht does not say clearly that the doctrine originated with Qāḍī Tawba. Kīndī, to whom Schacht refers on this point, does not say so either. In fact Kīndī's statement that the *qāḍī*, i.e. Tawba, applied this procedure «even to

[6] Tyan, 443 and 572.

[7] Coulson, N. J., *A History of Islamic Law* (Edinburgh, 1964), 126ff; and «Doctrine and Practice of Islamic Law», *BSOAS,* XVIII (1956), 211-226.

[8] Coulson, 127.

[9] Coulson, 124.

[10] Schacht, J., *Origins of Mohammedan Jurisprudence* (Oxford: Clarendon, 1950).

[11] Dannhauer, P. G., *Untersuchugen zur frühen Geschichte des Q-Amtes.* Inaugural-Dissertation zur Erlangung der Doktorwürde der Philosophischen. Bonn: Fakultät der Rheinischen Friedrich-Wilhelms-Universität, 1975.

[12] Crone, P., «Jāhilī and Jewish Law: The qasāmah», *Jerusalem Studies in Arabic and Islam,* 4 (1984), 153-201.

[13] Dannhauer, 80.

[14] Dannhauer (78-79) disagrees with Schacht regarding Darāwardī and Rabī'a being responsible for the circulation of the false reports about the doctrine.

smaller things»[15] implies that the practice already existed and the *qāḍī* extended it to matters to which the other judges did not.

Comparing the Jahili law of *qasāma* with Islamic and Jewish law, Patricia Crone suggests that the doctrine in question was a fusion of Jewish and Jahili laws. She disagrees with W. Heffening[16] who suggested that the Muslim jurists turned to Jahili tradition to develop an alternate legal tradition to the Umayyad system. She finds the Islamic law of *qasāma* directly influenced by Jewish law.

We believe that the quest for foreign origins and extraneous elements in Islamic law does not help to understand the nature of Islamic legal system properly, because such traces cannot characterize Islamic law as a continuity of Roman or of Jewish legal tradition. Second, procedural law, especially relating to oath, as observed by Lawrence Rosen,[17] has a special social meaning for the people who negotiate their relations, disputes and rights in that framework. The foreign influence is, therefore, immaterial in these cases. Third, Crone has relied on *fiqh* and *ḥadīth* literature more than on the judicial practice. In our view, it is the latter that may properly reflect whether a tradition was Iraqi or Medinese.

Besides, none of the above mentioned three scholars explain why the doctrine appeared in Egypt in that particular period, nor do they refer to any specific historical setting that gave rise to this doctrine. In order to explore possible foreign influence on Islamic law, they do not refer to Egypt either. They instead focus on Iraq where they find different possible influences at work. But since none of them describes this doctrine as an Iraqi tradition, the question about its historical background remains unanswered. One cannot assume that the doctrine grew suddenly. Also the serious and widespread debates about the doctrine that continued through the fifteenth century point to its deep social and political implications.[18]

[15] Kindī, *Kitāb al-wulāt wa'l-quḍāt fi Miṣr* (Bayrūt, 1908), 345.

[16] Heffening, W., *Das islamische Fremdenrecht* (Hanover, 1925).

[17] Rosen, L., *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989).

[18] Most of the *ḥadīth* books carry a specific chapter on this problem. See for example: Muslim, *Ṣaḥīḥ* (Bayrūt: Dār Iḥyā al-turāth, N.d.), vol. 1, 124 ff.; Tirmidhī, *Jāmi'* (Medina: Salafiyya, N.d.), vol. 3, 400 ff.; *Musnad Aḥmad b. Ḥanbal*; Abū Dā'ūd, *Sunan* (Bayrūt: al-Maktab al-Islamī, 1989), 690 ff. Among the jurists the following are sufficient to illustrate our point: Mālik, *Al-Muwaṭṭa'* (Cairo: al-Bābī, 1951), vol. 2, 721 ff.; Shāfi'ī *Kitāb al-Umm* (Bayrūt: Dār al-Ma'rifa, N.d.), vol. 4, 3 ff.; vol. 6, 254 ff.; vol. 7, 7 ff.; Ibn Ḥazm, *Al-Muḥallā* (Cairo: Munīriyya, 1351 H), vol. 9, 404 ff.; Ibn Qudāma, *Al-Mughnī* (Cairo: Hijr, 1992), vol. 14, 123 ff. and 281 ff.; Sarakhsī, *Al-Mabsūṭ* (Bayrūt: Dār al-Ma'rifa, N.d.), vol. 16, 111 ff., and vol. 17, 28 ff.; Khaṣṣāf, *Adab al-Qāḍī* (Baghdad: Irshād, 1977), vol. 1, 105 ff.; al-Māwardī, *Adab al-Qāḍī* (Baghdad: al-'Ānī, 1972), vol. 2, 163 ff.

In our view, the problem of *yamīn ma' al-shāhid* seems to have arisen in the wake of Civil War (656-661) between 'Alī (d. 661) and Mu'āwiya (d. 681) on the question of the *qiṣāṣ* for the murder of 'Uthmān, better known as the issue of *taḥkīm* (appointment of *ḥakam*, arbitrator). The open-ended and arbitrary *ḥakam* procedural law failed quite obviously in this period. Mu'āwiya felt the need for a comparatively strict procedure for the *qāḍī*.

This paper first reviews briefly the events of the Civil War to examine why and how the institution of *ḥakam* failed. Next, it studies how Mu'āwiya responded to this issue. For the latter part of our inquiry we rely on Wakī''s (d. 306/918) *Akhbār al-Quḍāt*.[19]

We have chosen *Akhbār al-Quḍāt* primarily because a *qāḍī* wrote it when Islamic procedural law was still in its formative stages. Second, the book was designed to report judicial practice and is certainly preferable to the *fiqh* texts and the *Adab al-Qāḍī* books, which focus on theory rather than on practice. As a matter of fact Tyan had warned against relying on jurists and their *Adab al-Qāḍī* genre of literature for a study of judicial organization in Islam, as they would describe the ideals rather than the actual judicial practice. Furthermore, the *Akhbār al-Quḍāt* is a source earlier than Kindī's (d.362/972) *Kitāb al-wulāt* on which Tyan and Schacht had relied. While Kindī limited himself to Egypt, Wakī' deals with the *qāḍī*s all over the Muslim world until his period. Wakī' is also not influenced by jurists or their doctrines as he is not known for adherence to any school of law. Nor do the traditionists influence him as he narrates the events on the authority of his own sources. Historians like Ibn Qutayba al-Dīnawarī[20] have relied on Wakī''s books.[21]

The foremost reason for the choice of *Akhbār al-Quḍāt* is that it refers to actual judgements of the *qāḍī*s more than any other source in our knowledge. Noting this feature of the book, Schacht characterized *Akhbār al-Quḍāt* as «a main source for the study of this period». «This book», he added, «tells us about another phenomenon of legal activity, that is the development of law in judicial practice».[22]

We have found in *Akhbār al-Quḍāt* twenty-five cases specifically related with the questions of procedural laws, 18 cases are reported with details of facts and

[19] *Cf.* Muhammad Khalid Masud, «A Study of Wakī''s (d. 306/917) *Akhbār al-Quḍāt*», an unpublished paper presented at the Joseph Schacht Conference on Theory and Practice of Islamic Law, Leiden, October 6-10, 1994.

[20] Ibn Qutayba is reported to have written *Al-Ma'ārif* on the pattern of Wakī''s *Al-Sharīf*. He refers to Wakī' frequently in his *'Uyūn al-Akhbār*.

[21] Rosenthal, F., *A History of Muslim Historiography* (Leiden, 1952), 340.

[22] Schacht, J., «Thalāth muḥāḍarāt fī tārīkh al-fiqh al-islāmī», in Ṣalāḥ al-Dīn al-Munajjid (Ed.), *Al-muntaqā min dirāsāt al-mustashriqīn* (Cairo: Lajnat al-Tālif, 1952), 97.

seven without describing such details. There are also several general statements by the author about certain *qāḍī*s who decided cases according to this doctrine. Since these statements do not identify parties or the subject of the dispute, we have not counted them in our data. A summary and analysis of these cases have been appended to the paper as Annexes number 1 and 2. We shall return to it after a brief review of the Civil War and the events related to the issue of *taḥkīm*.[23]

TAḤKĪM

Literally, *taḥkīm* means appointment of a *ḥakam*, an arbitrator. In Islamic history, the term refers to the arbitration about the dispute between 'Alī and Mu'āwiya on the issue of *qiṣāṣ* for the murder of 'Uthmān (d. 656), the third caliph. Caliph 'Alī succeeded 'Uthmān in 656, elected by the group who had revolted against 'Uthmān. Mu'āwiya claimed to be 'Uthmān's *walī al-dam* (next of kin qualified to demand *qiṣāṣ*), and demanded 'Alī for retaliation according to law. 'Alī refused and asked Mu'āwiya first to take oath of allegiance. The dispute finally led to the battle of Ṣiffīn (657) between 'Alī and Mu'āwiya.

Modern scholarship has raised several questions about the civil war and the *taḥkīm*. Mostly these studies explain the Civil War as a struggle for power between various groups. Caliph 'Alī's allies were further divided into *qurrā'*, *ridda* tribes and groups of people from Kūfa, Baṣra, Mecca, Medina and Egypt.[24] The divisions ranged from between early and late converts to Islam, between city elite and tribes, between religious and other groups. Hawting considers some of these explanations exaggerated.[25] For instance, it is an

[23] For a comprehensive analysis, historical as well historiographical, of the Civil War, see Petersen, Erling Ladewig, *'Uthman and Mu'awiyah in Early Arabic Tradition* (Copenhagen: Munksgaard, 1964), and Hinds, M., «The Ṣiffīn Arbitration Agreement», *JSS*, 17 (1972), 93-94.

[24] For instance see Wellhausen, J., *The Arab Kingdom and its Fall* [Translation of *Arabische Reich und seinem Sturz* by Margaret Graham Weir] (Beirut: Khayat, 1963), 75-112; Gibb, H. A. R., *Studies on the Civilization of Islam* (Boston: Beacon, 1962), 7-9; Shabban, M. A., *Islamic History AD 600-750 (A.H. 132), New Interpretation* (Cambridge, 1971), 60-78; Hawting, G. R., «The Significance of the Slogan *lā ḥukma illā lillāh* and the reference to the *ḥudūd* in the Traditions about Fitna and the Murder of 'Uthmān», *BSOAS,* 48 (1978), 453-463; Donner, F. M., *The Early Islamic Conquests* (Princeton 1981); Hinds, M., «Kufan Political Alignments and their background in the mid-seventh Century AD», *IJMES* 2 (1971), 346-67; «The Murder of the Caliph 'Uthmān», *IJMES* 3 (1972), 450-69.

[25] Hawting, G. R., *The First Dynasty of Islam: The Umayyad Caliphate AD 661-750* (London: Croom-Helm, 1986), pp. 24-32. For instance Hawting observes that all those opposed to 'Alī were not late converts; 'Uthmān an early convert, was an Umayyad, Ṭalḥa, Zubayr and 'Ā'isha were neither late converts nor tribal leaders.

exaggeration to say that all the Umayyad were late converts, 'Uthmān was not. It is similarly an exaggeration to say that it was a conflict between Syrians and Iraqis, or between Banū Umayya and Banū Hāshim. These studies have sought to simplify a complex phenomenon by analyzing the tribal alliance patterns. These attempts are certainly commendable, but in the process they tend to minimize the significance of the issue of *taḥkīm* and *qiṣāṣ*. Hawting remarks that the arbitration had little significance for the Civil War.[26]

We cannot accept this conclusion because, first, *qiṣāṣ* and the institution of *ḥakam* were of central significance in the Arab society. Several scholars have spoken about the centrality of the institution of *ḥakam* and *tha'r* (retaliation) in Arab society[27]. The Qur'ān also confirmed this pre-Islamic institution saying, «There is life for you in *qiṣāṣ*» (2:179). Second, murder of a caliph was not a small matter. Earlier, caliph 'Umar's murder had been avenged in due process. 'Uthmān's murder had turned into a blind murder and hence needed to be decided by a *ḥakam*. Third, the fact that the *taḥkīm* agreement was written down also shows the extraordinary significance of the issue of *taḥkīm* and *qiṣāṣ*. The text of the agreement, with some variations, has been reported in almost all the early accounts of the Civil war.[28] Martin Hinds has studied the agreement in detail and found that essentially there are two versions of the text. The later version gives more details and introduces certain anachronistic elements such as the term *sunnat al-Nabī*.

The document goes into minute details about the time, place, security of the arbiters and the method and sources of the arbitration. We may divide the document into six parts. The first part mentions the two parties, the second mentions the terms of reference for the arbitration and the agreement of the parties to abide by them. The third section names the arbitrators, the sources of

[26] *Ibid.*, 29.

[27] See on this point Donner, F. M., *The Early Islamic Conquests*, *op. cit.*, 40 ff. Donner also refers to the following studies on the institution of *tha'r*: Chelhod, J., *Le Droit dans la société bedouine* (Paris: Marcel Rivière, 1971), 265 ff.; Patton, W. M., «Blood-revenge in Arabia and Israel», *American Journal of Theology* 5 (1901), 703-731 and Hardy, M. J. L., *Blood Feuds and the Payment of Blood Money in the Middle East* (Leiden, Brill, 1963).

[28] Hinds, Martin («The Siffin Arbitration Agreement», *JSS*, XVII (1972), 93-129) refers to the following sources for the text of the agreement. We have cited the editions available to us: al-Balādhurī, *Ansāb al-Ashrāf*, Ms. vol. 1, 597-598; al-Ṭabarī, *Tārīkh al-umam wa'l-mulūk* (Beirūt: Dār al-kutub al-'ilmiyya, 1997, vol. 1, 103-104; Naṣr b. Muzāḥim al-Minqarī, *Waq'at al-Ṣiffīn*, Ed. A. M. Hārūn, (Cairo: 1962), 480-481; al-Jāḥiẓ, *Risāla fi'l ḥakamayn wa taṣwīb amīr al-mu'minīn 'Alī*, Ed. Ch. Pellat in *al-Mashriq*, 52 année (1958), 451-452; Ibn Qutayba, *Al-Imāma wa'l-siyāsa* (Cairo: al-Maktaba al-Azhariyya, 1330 H), 197-198; Ibn A'tham al-Kūfī, *Futūḥ* [Persian translation by Aḥmad b. Muḥammad Muṣṭafawī al-Hirawī] (Bombay: Mirzā Ismā'īl Shīrāzī 1300 H), 293.

arbitration and its method. The fourth spells the safety of the arbitrators. The fifth fixes the place and time for arbitration. The sixth gives names of the persons who witnessed the agreement.

Hinds does not find the subject of arbitration mentioned in this document. One finds it hard to believe that a document, which deals with minute details, would not mention the subject of the agreement. In fact, despite variations, all versions of the documents including the texts that Hinds analyzed, mention variably the phrase «to let live whom the Qur'ān allows to live and to cause to die whom the Qur'ān causes to die».[29] Obviously, it refers to the term of reference for the arbiters. Certainly, it is not a figurative speech. It refers to the issue of the *qiṣāṣ* and that it was to be decided according to the Book.

Earlier, Prophet's wife 'Ā'isha's demand for the *qiṣāṣ* of 'Uthmān had also led to a war, the battle of the Camel. Caliph 'Alī defeated her[30] but the question of 'Uthmān's *qiṣāṣ* had remained unsettled. During the battle of Ṣiffīn, when Mu'āwiya's forces were on the verge of defeat, his supporters raised the Qur'ān on spears appealing to accept the Book as *ḥakam* between the warring factions. Appeal to the Qur'ān as *ḥakam* seems to be a familiar method in those days. Resort to this method was also made in the battle of the Camel.[31] In the battle of Ṣiffīn, after some hesitation on the part of Caliph 'Alī, both parties finally agreed to appoint two *ḥakam*s, one from each side: Abū Mūsā al-Ash'arī, 'Alī's *ḥakam*, and 'Amr b. al-'Āṣ, Mu'āwiya's *ḥakam*.

Appointment of two, instead of one *ḥakam*, was justified with reference to two Qur'ānic injunctions where two *ḥakam*s are prescribed in case of the offence of prohibited game in the vicinity of the sanctity of Mecca (*ḥaram*) during pilgrimage (5: 95), and for reconciliation between a husband and a wife (4:34).[32]

Montgomery Watt notes that the *ḥakam*s in Ṣiffīn had two meetings.[33] In the first meeting both *ḥakam*s agreed that 'Uthmān was killed unjustly and that Mu'āwiya was the rightful claimant for his *qiṣāṣ*. Apparently the main task of arbitration was completed in this meeting. The second meeting was to deal with the implementation of *qiṣāṣ* itself. It appears that in this discussion, the

[29] Ibn Qutayba, *op. cit.*, 128, Ibn A'tham al-Kūfī, *Futūḥ*, 293, and other texts cited above in note 28.

[30] Ṭabarī, *Annales*, Ed. de Goeje (Leiden: Brill, 1964), vol. 6, 3111 (references in this paper are to this edition).

[31] Some reports attribute the raising of the Qur'ān in the battle of the Camel to 'Alī and some to 'Ā'isha. See these varying versions in Ṭabarī, vol. 6, and 3189-3191.

[32] Al-Ṭabarī, *op. cit.*, 3351. Al-Kāmil (*Al-Mubarrad*, Bayrūt: Mu'assasat al-risāla, 1986, vol. 3, 1079-1080) attributes this justification to Ibn 'Abbās who refers to 'Abd al-Raḥmān b. 'Awf.

[33] Watt, W. M., *Islam and the Integration of Society* (London: Routledge, 1961), 98.

question turned into the dispute as to who should be the caliph. Probably the issue was raised because a caliph was required to authorize *qiṣāṣ*. The details of that aspect are beyond the scope of this paper. What is important is the fact that the *ḥakam*s could not reach an agreeable judgement. It became immediately controversial. Even one of the *ḥakam*s, Abū Mūsā al-Ash'arī, came out disputing the outcome of *taḥkīm*.

Caliph 'Alī and his supporters rejected the judgement. One group among 'Alī's followers, later to be known as Khawārij, questioned the validity of *taḥkīm*, calling it *kufr*, because, according to them, God alone was the *ḥakam*.[34]

The later Islamic historians have slighted the centrality of the real issue of *qiṣāṣ* in the *taḥkīm* event because of their theological and political focus. The document of the agreement does not support their view. The arbitrators were not asked to choose between 'Alī and Mu'āwiya or to appoint a new caliph. In fact, neither 'Alī nor Mu'āwiya abided by the outcome of the *taḥkīm*, namely the selection of Mu'āwiya as caliph. While 'Alī protested that the arbitrators had violated their terms, Mu'āwiya also did not declare himself Caliph in the presence of 'Alī. It shows that the real issue for the *ḥakam*s was *qiṣāṣ* of 'Uthmān, not the selection of a caliph.

Appeal to the Qur'ān as *ḥakam* also meant different things to different people. Earlier, Ṭalḥa[35] recited the following verse of the Qur'ān during the battle of the Camel: «Have you not seen how those who have received the Scripture invoke the Scripture of Allāh that it may judge (*yaḥkuma*) between them; then a faction of them turn away, being opposed? (3:23)». Mu'āwiya's supporters recited the same verse when 'Alī and his party rejected the outcome of arbitration.[36]

One faction among 'Alī's supporters argued that 'Uthmān's murder was destined by God and, therefore, he was justly killed.[37] They blamed 'Alī for appointing human beings to judge what God had decided.[38] In this argument, apparently, the *ḥukm* of God did not necessarily refer to the Scripture, but rather to an event of history as a decision of God. Another interpretation was to contrast the injunctions of the Qur'ān with personal desires. Condemning both *ḥakam*s for deciding on the basis of *hawā* (personal motive), Ḥasan and 'Abd Allāh b. 'Abbās recited the following verse from the Qur'ān: «So judge between them by that which Allah has revealed, and follow not their desires

[34] Watt, 98.

[35] Ṭabarī, 3119.

[36] Ibn Qutayba, *Al-Imāma wa'l-siyāsa* (Cairo: Muṣṭafā Muḥammad, N.d.), 112.

[37] Muḥammad b. Abī Bakr was one of the accused for 'Uthmān's murder. For his justification of this murder see Ṭabarī, *op. cit.*, 3.391.

[38] Ibn Qutayba, 137.

(*hawā*)» (5: 49).[39] In a letter to his *ḥakam*, Abū Mūsā al-Ash'arī, 'Alī wrote, «You are a person betrayed by personal desires».[40]

The Qur'ān is clear about the laws of *qiṣāṣ* (retaliation) and *diya* (blood money), but it does not prescribe any clear procedure for decision in such cases. That is probably why the agreement mentions *sunna jāmi'a ghayr mufarriqa*, beside the Qur'ān, apparently referring to the common custom, and not to the custom of a particular tribe.[41]

When the *ḥakam*s failed to settle the dispute of *qiṣāṣ*, Mu'āwiya waited until he was in a position to avenge 'Uthmān's blood. He pursued all those who had participated in the murder and got them killed one by one.[42]

It seems that other people also resorted to this method. Life and property were not safe in the period of Civil War and after. Pre-Islamic practices came to gain strength. The period of Civil War ended with Caliph 'Alī's murder by a Khārijī. Mu'āwiya negotiated with 'Alī's successor and declared himself caliph. He also assumed the title *khalīfat Allāh*, God's deputy, probably to institutionalize his authority as Allāh's *ḥakam* and to define the authority of the other offices as delegated.

Patricia Crone and Hinds[43] explain that the title of *khalīfat Allāh* signified Mu'āwiya's assumption of the *qaḍā'*, as he himself sat in judgement as God's deputy. The point of real significance is not that Mu'āwiya acted as *qāḍī*, earlier caliphs had also acted as *qāḍī*s. The significant perhaps is the fact that he made the *qāḍī*s answerable to himself or to his governors. It was a real departure from the independent and arbitrary institution of *ḥakam*. The institution of *qāḍī* now became subordinate to the caliph and its jurisdiction as well as powers were fixed. This institutional development is reflected in the debate in the Islamic tradition about whether Mu'āwiya was the first Muslim ruler to appoint *qāḍī*s.

[39] Ibn Qutayba, 133, 134.

[40] Ibn Qutayba, 135.

[41] The later versions of the agreement understand the phrase to refer to the Sunna of the Prophet. The fact is that, as we discuss subsequently in the paper, the Sunna of the Prophet was also not clear on this particular point. The phrase therefore must refer to the tribal practice. See also Hinds, *The Ṣiffīn Agreement, op. cit.*, 100-102 and Sergeant, R. B., «The Sunnā Jāmi'a, Pacts with the Yathrib Jews, and the *Taḥrīm* of Yathrib: An Analysis and Translation of the Documents Comprised in the So-called "Constitution of Medina"», *BSOAS,* LXI (1978), 1-42.

[42] Kindī, *Kitāb al-Wulāt*, 18, 31 and 38.

[43] See Crone, P., and Hinds, M., *God's Caliph, Religious Authority in the First Century of Islam* (Cambridge, 1986).

MU'ĀWIYA AND THE INSTITUTION OF *QĀḌĪ*

On the authority of Mālik b. Anas and al-Zuhrī, Wakī' argues that Mu'āwiya b. Abī Sufyān was the first caliph to appoint *qāḍī*s. The caliphs before him dealt with public affairs directly themselves.[44] Other scholars have generally disagreed with Mālik on this point. Ibn 'Abd al-Barr and Ibn Rushd find Mālik's statement contrary to the well known facts that *qāḍī*s were indeed appointed by the Prophet and by the four caliphs. They explain that Mālik meant to say that Mu'āwiya was the first caliph to appoint *qāḍī*s in the capital (*ḥaḍra*).[45] This does not, however, explain Wakī''s view. Wakī' says that Qatāda's statement naming six Companions of the Prophet as *qāḍī*s was debatable. He refers to al-Zuhrī saying: «Abū Bakr and 'Umar had no *qāḍī*s until the *fitna* (Civil war). Thence Mu'āwiya appointed *qāḍī*s.»[46] Referring to caliph 'Uthmān, he observes that it was not definitely known that 'Uthmān appointed *qāḍī*s in Medina till he was killed in Dhū'l-Ḥijja in the year 35.[47]

These remarks may appear to contradict Wakī''s other statements where he mentions the names of the *qāḍī*s in the days of the preceding caliphs. It must, however, be noted that Wakī''s statement is concerned more with the change in the institution introduced by Mu'āwiya than whether there were *qāḍī*s in the earlier period.

Wakī' clarified that *qāḍī*s in earlier period were *muftīs* and *ḥakam*s rather than *qāḍī*s. He describes Ibn 'Abbās in 'Alī's period as *muftī* and *ḥakam*.[48] About 'Alī's *qāḍī* Abū'l-Aswad al-Du'lī, he remarks: «He was in fact a *muftī*. *qāḍī*s in those days were called *muftī*. This state of affairs continued until 'Alī was killed in the year 40.»[49] He further describes how the institution of *qāḍī* became totally subordinate to the caliphs and governors, who appointed them as they pleased,[50] dismissed them summarily[51] and sometimes overruled their judgements.[52] During the 'Abbāsid period, the caliphs used the *qāḍī*s to punish their opponents.[53]

[44] Wakī', vol. 1, 110.
[45] See editor's footnote, Wakī', vol. 1, 110-111.
[46] *Idem*, vol. 1, 105.
[47] *Idem*, vol. 1, 110.
[48] *Idem*, vol. 1, 288.
[49] *Idem*, vol. 1, 288.
[50] *Idem*, vol. 1, 184.
[51] *Idem*, vol. 1, 204, 291.
[52] *Idem*, vol. 1, 266.
[53] *Idem*, vol. 3, 294 ff.

Caliph Mu'āwiya not only subordinated the institution of *qāḍī* to caliphal authority, but also introduced some changes in the rules of procedure. In order to ascertain clear and early decisions, he directed *qāḍī*s to oblige the plaintiff to swear solemnly that his or her claim was not false. Ibn Wahb reports, on the authority of Ibn Abī al-Zanād, that Mu'āwiya asked Sa'īd b. al-'Āṣ, his governor in Medina, to administer required oaths against an accused and deliver the killer to the caliph for punishment.[54] Al-Zuhrī, as reported by Ibn Ḥazm, says that this innovation (*bid'a*) [i.e. the procedure of oath and witness combined in one person] was introduced by Mu'āwiya.[55] A Ḥanafī jurist, 'Abd al-'Azīz al-Bukhārī, also states that Mu'āwiya was the first to introduce oath and witness.[56] Ibn Ḥazm and 'Abd al-'Azīz al-Bukhārī have not provided further details. Wakī' names several *qāḍī*s of Mu'āwiya who used this procedure. Wakī' reports one such case decided by Mu'āwiya to which we shall return shortly.

Why did Mu'āwiya modify the procedure? One may argue that the insecurity during and after the Civil War and the increased number of blind murders might have led him to modify the procedure. The normal procedure requiring two witnesses and acquittal of the accused or defendant after the oath would only increase unsolved murders. It was necessary to amend the procedure to control the situation. Before we move further to analyze the judicial practice on this point, let us first briefly overview the institution of *yamīn* (oath).

YAMĪN, BETWEEN TRADITION AND JURISPRUDENCE

Pre-islamic tradition

Yamīn played a very significant role in daily transactions in pre-Islamic Arabia.[57] It meant an oath as well as a vow. It was also used to stress the significance of the truth of a statement. It was sometimes invoked as a curse to invite the wrath of God or super-natural calamity if the statement was false. It was, therefore, often used as a form of ordeal by the *ḥakam*s.[58]

The following verse by Zuhayr b. Salmā (d. 627) reflects the significance of *yamīn* in the pre-Islamic laws:

[54] Al-Bayhaqī, *Al-Sunan al-kubrā* (Hyderabad, India, 1354 H), vol. 8, 127.
[55] Ibn Ḥazm, *Al-Muḥallā* (Cairo: al-Munīriyya, 1351 H), vol. 9, 403.
[56] See editor's note, Wakī', vol. 1, 140.
[57] See Abū Isḥāq Ibrāhīm b. 'Abd Allāh al-Nujayrimī, *Aymān al-'Arab fī'l-jāhiliyya*, ed. Muḥibb al-Dīn al-Khaṭīb (Cairo: Maṭba' Salafiyya, 1382 H).
[58] 'Uthmān, Jawād, *Al-Mufaṣṣal fī tārīkh al-'Arab qabl al-islām*, vol. 5, 509.

> Three things are decisive in [matters of] right (*ḥaqq*)
> *yamīn*, *nifār* (award of possession), and *jilā'* (expulsion).[59]

Adab

The *adab* tradition mentions «The burden of proof is on the plaintiff and the oath is for the defendant» as a proverb or maxim and attributes it to Quss b. Sā'ida.[60] Quss b. Sā'ida is not a stranger to *ḥadīth* tradition. He is remembered as the wisest Arab orator whose speeches at 'Ukāẓ were repeated admiringly by the Prophet.[61] It is not, therefore, impossible that this maxim was remembered by the Prophet at some occasion and became a part of *ḥadīth*.

Qur'ān

The Qur'ān recognized the value of *yamīn*, but it discouraged its excessive and thoughtless use (2: 225, 5: 92). It did not deny the binding nature of *yamīn* (16: 91-94) but prescribed lesser punishment of expiation in case of breach (5: 92). The Qur'ān, however, allowed the testatory use of oath by the witnesses, even a counter oath by the adversary witnesses (5: 111). The use of oath in place of a witness is not found in the Qur'ān.

The Qur'ān requires normally two witnesses as evidence (2:282). It is usually difficult to find two eyewitnesses for a murder. In case of blind murder the pre-Islamic tribal practice was *qasāma*, i.e. to ask the inhabitants of the place where the murdered body was found, to take fifty collective oaths to clear themselves, swearing that they did not kill and had no knowledge of the killer. The Qur'ān is silent on *qasāma*. There is, however, a mention of the repetition or shifting of oaths in the Qur'ān in the following verse:

> «O you who believe! Let there be witnesses (*shahāda*) between you when death draws near to one of you, at the time of bequest —two witnesses, just men from among you, or two others from other tribe, in case you are campaigning in the land and the calamity of death befall you. You shall empanel them both after

[59] *Ibid.*, 509.

[60] See Abu'l-Faḍl al-Maydānī, *Majma' al-amthāl* (Cairo: Maṭba ' al-Sa'āda, 1959), vol. 1, 111.

[61] Jalāl al-Dīn al-Suyūṭī, *Al-Lu'āli al-maṣnū'a fī'l-aḥādīth al-mawḍū'a* (Cairo: Ḥusayniyya, N.d.), vol. 1, 183-192; and Ibn Qutayba, *Al-Ma'ārif* (Cairo: Dār al-kutub, 1960), 61.

the prayer, and, if you doubt, they shall be made to swear (*yuqsimān*) by Allāh, saying: We will not take a bribe, even though it were (on behalf of) a near kinsman nor will we hide the testimony (*shahāda*) of Allāh, for then indeed we shall be sinful.

»But then, if it is afterwards ascertained that both of them merit (the suspicion of) sin, let two others take their place of those nearly concerned, and let them swear (*yuqsimān*) by Allāh, saying: Verily your testimony is truer than their testimony and we have not transgressed, for then indeed we should be of the evil doers.

»Thus it is more likely that they will bear true witness or fear that after their oath the oath of others will be taken (*turadda aymānun*)» (Qur'ān 5: 106-108).

Although the verse refers to the subject of property, not to murder or *qasāma*, yet the fact that in case of suspicion the oaths are shifted to two other jurors indicates the existence of the practice. We will deal with the question of shifting of oath during our analysis of the judicial practice.

Ḥadīth

The Ḥanafī jurists[62] refer to "The burden of proof is on the plaintiff and the oath is for the defendant" as a Prophetic *ḥadīth*. Most *ḥadīth* collections report it as a saying of the Prophet.[63] Ibn Qayyim, however, finds this *ḥadīth* weaker than the *aḥādīth* supporting oath and witness (*yamīn ma' al-shāhid*). He adds, «Besides, none of the six collections of *ḥadīth* report this *ḥadīth*».[64] 'Ārif al-Nakidī, a modern jurist, has remarked that it was a pre-Islamic Arabian maxim and the *ḥadīth* only states it as a current practice in those days.[65]

The *ḥadīth* literature reports frequently the statements by the Companions of the Prophet or by the later generation that the Prophet decided cases on the basis of one witness and oath.[66] Shāfi'ī jurist al-Muzanī refers to ten *aḥādīth*, all of them statements by the first or second generation of early Muslims saying

[62] Al-Sarakhsī, *op. cit., loc. cit.*

[63] Al-Sarakhsī, vol. 17, 28.

[64] Ibn Qayyim, *Firāsa*, *op. cit.*, 69.

[65] 'Ārif al-Nakidī, *Al-Qaḍā fi'l-Islām* (Damascus [?]: Maṭba ' Taraqqī, 1922), 6.

[66] See for instance, Ibn Māja, *Sunan* (Cairo: 'Īsā al-Bābī, 1954?), vol. 2, 793, *Aḥkām*, 31, Muslim, *Ṣaḥīḥ* (Cairo: 'Īsā al-Bābī, 1955), vol. 3, 1337 H), *Aqḍiya*, 3, Abū Dā'ūd, *Sunan* (Riyāḍ: Maktab li tarbiyat al-'Arabī, 1989), vol. 2, 688, *Aqḍiya*, 21, Tirmidhī, *Al-Jāmi` al-Ṣaḥīḥ* (Madīna: Muḥsin, N.d.), vol. 2, 399, *Aḥkām*, 13, *Muwaṭṭa'* (Cairo: 'Īsā al-Bābī, 1951), vol. 2, 725-26, *Aqḍiya*, 5, 6, 7.

that the Prophet decided cases on the basis of one witness and oath.[67] Most of these *ḥadīth* are reported by Medinese narrators. It is, however, difficult to conclude from this fact alone that it was a Medinese tradition. Mālik narrates the *ḥadīth* «The burden of proof is on the plaintiff and the oath is for the defendant», adding an exception: «except in case of *qasāma*».[68] Mālik refers to the Medinese practice, distinguishing *qasāma* from other cases. It appears that according to the practice in Medina, it was the defendant who was asked to take oath. It did not differ from the so-called Iraqi practice. The practice differed in case of homicide. In *qasāma*, Mālik explains, the accusers were asked to take oath first. He uses phrases like the following to describe this practice: «the agreed view among us», «the view on which the old and new leaders (of opinion) agree», «this is the practice (*sunna*) on which there is no difference of opinion among us», and « the continuous practice has been to begin oath with the plaintiff (*ahl al-dam*)».[69]

The *Sunna* of the Prophet in case of *qasāma* is recorded in the *ḥadīth* literature with reference to an Anṣārī found murdered in a Jewish quarter in Khaybar. According to al-Bukhārī some Anṣārīs went to Khaybar for business. In Khaybar they disbursed into the town. On their return they found one of them murdered. They came to the Prophet claiming that the Jews had murdered their kin. The Prophet asked if they had any evidence. They replied in negative. The Prophet said that in that case the Jews would be asked to take oath. The Anṣārīs objected that they could not trust the Jews. The Prophet then asked them if they were ready to take fifty oaths swearing that the Jews had killed their relative and receive the blood money. They declined that they could not do so because they did not witness the murder. The Prophet dismissed the case but paid them the blood money because he did not want the blood go unavenged.[70] In another version the Jews were asked but they denied that they had killed the Anṣārī.

Jurisprudence

Modern Islamic legal scholarship interprets the difference in the *ḥadīth* literature as different local traditions appearing in the form of *ḥadīth*. They consider the *ḥadīth*: «The burden of proof is on the plaintiff and the oath is for

[67] Al-Muzanī, *Mukhtaṣar al-Muzanī* (Bayrūt: Dār al-Ma'rifa, N.d.), 389.

[68] *Vid.* al-Sarakhsī, *op. cit.*, 109. We could not find this *ḥadīth* in Mālik, *Al-Muwaṭṭa'* (Cairo: 'Īsā al-Bābī, 1951), vol. 2, *qasāma* or *aqḍiya*.

[69] *Al-Muwaṭṭa'*, 877.

[70] Al-Bukhārī, *Ṣaḥīḥ* (Bayrūt, 1987), vol. 6, 2.528

the defendant» as an Iraqi tradition, probably because the Iraqi Ḥanafī jurists rely on it as a *ḥadīth*. They regard the *aḥādīth* about *yamīn ma' al-shāhid* as Medinese tradition. We have referred to Mālik's view that refers to both *aḥādīth* as Medinese practice. According to him the practice on the first *ḥadīth* was limited to cases related to property while the practice in criminal cases allowed the plaintiff to take oath. He particularly refers to *qasāma* cases where it was allowed to begin oaths with the accusers.

Regarding the Iraqi tradition, it is interesting to note that al-Sarakhsī refers to the *ḥadīth* of Oath almost as an apology for the Ḥanafī position. He opens his discussion on evidence with reference to the Qur'ānic verse requiring two witnesses and to a *ḥadīth* emphasizing that a person must testify only when he had himself witnessed the event as clearly as the sun.[71] He finds it difficult to rationalize oath as evidence, but accepts it because the rule is derived from a *ḥadīth* of the Prophet. This is why he restricts it to only a negative role. He confines its application within its literal meaning, not allowing its use for the plaintiff. The Ḥanafīs are emphatic in their rejection of the doctrine of *yamīn ma' al-shāhid*, which, as we have seen, they consider a *bid'a*, an addition, introduced by Mu'āwiya.

The doctrine of *yamīn ma' al-shāhid* has been a subject of debate among the jurists and traditionists. While Ḥanafī jurists find it contrary to the Prophet's *ḥadīth* about *yamīn* belonging only to the defendant, the traditionists argue that the doctrine was based on the Sunna of the Prophet.

Al-Shāfi'ī cites a number of *ḥadīths* to prove that it was a *Sunna* of the Prophet.[72] Ibn Ḥazm is convinced that it was a widely accepted practice based on *sunna* and *athār*.[73] However, reports about this *ḥadīth* cited in the *ḥadīth* literature and those mentioned by al-Shāfi'ī, Ibn Ḥazm and Ibn Qudāma[74] do not refer to concrete cases. Other references that mention concrete examples do not belong to this procedure. For example, in the oft-quoted *ḥadīth* on this point, dispute on land between a Ḥaḍramī and a Kindī was in fact decided on the basis of defendant's oath in the absence of any evidence from the plaintiff.[75]

It is significant to note that the jurists do not derive their rules from the actual practice of the Prophet, but rather deduce them from the presumptions in the narrative of the *aḥādīth*. For instance with reference to the *qasāma* case

[71] Al-Sarakhsī, vol. 16, 112.
[72] Al-Shāfi'ī, *Kitāb al-umm*, vol. 6, 254 ff.
[73] Ibn Ḥazm, *Al-Muḥallā*, vol. 9, 405 ff.
[74] Ibn Qudāma, *Al-Mughnī*, vol. 14, 123 ff.
[75] Muslim, *Ṣaḥīḥ* (Bayrut: Dār Iḥyā al-turāth al-'Arabī, N.d.), vol. 1, 124.

mentioned above, the facts are that neither the Anṣārīs nor the Jews took oaths, accusative or the purgatory. The *diya* was not paid by the Jews, but by the Prophet. Yet the traditionists as well as the jurists conclude that the Jews were obliged to pay the *diya*[76] and the accusers were asked to take oaths. It is in fact casuistry method of deriving rules that the jurists employed. The method does not deduce rules from the actual practice but from the implication or presumption of the rules. For instance the Prophet's offer to the Anṣārīs: «You take oaths and you will receive *diya*» becomes the basis of deduction, even though the Anṣārīs did not take oath and the judgement was not based on their oath. The traditionists and the jurists deduce the rule from the implication that the sentence allowed the accusers to take oath and that *diya* was to be paid on its basis. Al-Sarakhsī, while refuting the rule, does not question the method. Rather he says that the sentence might have been wrongly reported.[77]

JUDICIAL PRACTICE

We now turn to Wakī' for an overview of the judicial practice and procedural laws. As said earlier, we have found 25 cases related to our question in Wakī''s *Akhbār al-Quḍāt*. It appears that the *qāḍīs* adopted five procedures in these cases (See details in Annex. 2). A brief analysis of these cases is given in order to understand the judicial practices.

• *Procedure One*: The *qāḍī* demands two witnesses from the *mudda'ī* (plaintiff) and decides the case in his favour. According to this procedure only two witnesses constitute evidence. Wakī' mentions three cases (cases 7,8 and 17, Annex. 1) in which the *qāḍīs* insisted on the production of two witnesses and refused to accept oath by the plaintiff with no witness (case no. 7), or with one witness (cases number 8 and 17). The three cases belong to Iraq, two (numbers 7 and 8) to Kūfa and one (number 17) to Baṣra. None of these cases belong to caliph Mu'āwiya's *qāḍīs*.

• *Procedure Two*: The *mudda'ī* has no witness. The *mudda'ī 'alayh* (defendant) takes oath of denial. The *qāḍī* decides in favour of the defendant.

Six cases (cases 1, 3, 9, 11, 12 and 18, Annex no.1) were decided according to this procedure. Among them two (cases 3 and 12) belong to Kūfa, three

[76] Al-Zuhrī (*vid.* al-Sarakhsī, *Al-Mabsūṭ*, vol. 26, 107) says «Fa alzama rasūlullāh al-yahūda al-diyāt wa'l-qasāma».

[77] Al-Sarakhsī, *Al-Mabsūṭ*, *op. cit.* 109.

(cases number 9, 11, 18) belong to Baṣra, one (case number 1) to Medina. Only one case (number 3) belongs to *qāḍī* Shurayḥ in Caliph Mu'āwiya's period.

In two similar cases (numbers 3 and 12) defendants take the oath saying that they had no knowledge of the defect in the merchandise (slave girls in both cases) at the time of the sale. In case number 3, the defendant also names the person from whom he had purchased the slave girl. His statement thus makes him also a plaintiff. The *qāḍī* treats his oath as an accusative oath against the third person to which the slave girl is returned, apparently canceling the two deals of sale. In case number 12, the defendant offered to accept plaintiff's charges if he stated them under oath. The *qāḍī* al-Ḥusayn al-Kindī, in Walīd II's reign, observed that the defendant, apparently a cunning merchant, returned the oath knowing that the plaintiff would hesitate to do so. The *qāḍī*, therefore, insisted that defendant must take oath.

• *Procedure Three*: The plaintiff has one witness and offers to take oath in addition to witness. The *qāḍī* decides in favour of the plaintiff. We have discussed this procedure above as the doctrine of *yamīn ma' al-shāhid.*

Most of the cases in our sample were decided according to this procedure. Out of ten, Wakī' reports three cases with details of facts and seven without facts. Among these ten cases, three (numbers 4, 19, 20) belong to Caliph Mu'āwiya's period (661-680), three (numbers 21, 22, and 23) to Caliph 'Umar II's (717-720), two (numbers 13, 15) to Caliph al-Manṣūr's (754-775) and one each to those of Hārūn (786-809) and al-Mā'mūn (813-833). Mu'āwiya's *qāḍī*s who decided according to this procedure were Shurayḥ (d. 699), Zurāra b. Awfā and Abū Salma b. 'Abd al-Raḥmān b. 'Awf, respectively in Kūfa, Baṣra and Medina.

Schacht and Dannhauer regard references of this doctrine to these *qāḍī*s as attempts by Medinese jurists to show that the practice was widespread even in Iraq. Looking at the cases reported by Wakī', we find that only two cases belong to Medina and one to Mecca. Even if we include Egypt, only four cases belong to the Medinese tradition. Six cases belong to other regions, five of them to Iraq. It is, therefore, difficult to say to which juristic tradition the Iraqi *qāḍī*s belonged: Iraqi or Medinese? It is perhaps more meaningful to say that *qāḍī*s were not dependent on either of these traditions. It is also too early to categorize *qāḍī*s in Mu'āwiya's period according to these traditions which developed later.

• *Procedure Four*: The plaintiff has no witness. He offers to take oath. The *qāḍī* decides in favour of the plaintiff.

Wakī' refers to five cases (numbers 5, 6, 10 and 14 and 16) in which this procedure was employed. Apparently this procedure is not logically justified.

Most probably the plaintiff's oath was required after the defendant's refusal to do so. Wakī' does not provide details in cases 5, 10 and 14, but the information in case 6 supports our supposition.

In case six, one litigant accused another of an injury inflicted on him. He had no witnesses. The *qāḍī* asked the accused to take oath to deny the charges. He refused. The *qāḍī* consulted Ibn 'Abbās who advised him to ask the plaintiff to take oath and decide in his favour after he took the oath.

Only one case (number 5), decided by *qāḍī* Nawfil in Medina, belongs to Caliph Mu'āwiya's period. As a matter of fact, this procedure can be counted along with procedure three and thus the number of cases decided on the basis of witness and oath by the plaintiff comes to 15, four of them in Mu'āwiya's period. Out of these five cases, three (numbers 10, 14 and 16) belong to Iraq and two (numbers 5, 6) belong to Medina and Ṭā'if. Again, it is difficult to characterize the practice as exclusively Iraqi or Medinese.

• *Procedure Five*: The plaintiff has no witness. The defendant refuses to take oath of denial. The *qāḍī* decides in favour of the plaintiff.

Wakī' refers to only one case (number 2, re. 'Abd Allāh b. Zubayr) employing this procedure. This case was decided by Mu'āwiya in Damascus.

'Abd Allāh b. Zubayr came to Mu'āwiya demanding *qiṣāṣ* for his brother Ismā'īl b. Habbār who was killed during the uprising against the Caliph 'Uthmān. He named Muṣ'ab b. 'Abd al-Raḥmān b. 'Awf,[78] Mu'ādh b. 'Abd Allāh al-Taymī and Ibn Ja'ūna al-Laythī[79] as suspects. Ibn Habbār was travelling with them and was later found slain in a place where the four had met. 'Abd al-Raḥmān Ibn al-Azhar appeared before Mu'āwiya to defend his kin Muṣ'ab. The Caliph asked Ibn Zubayr to swear that the three, who he had identified by names, had actually killed Ibn Habbār. If he swore, the accused would be delivered to him for *qawad* (*qiṣāṣ*, retaliation). Ibn Zubayr declined because he only knew that the body was found in the place where the accused had gone with the victim. The Caliph then asked Ibn Azhar to swear that Muṣ'ab had not killed Ibn Habbār. He also declined, saying that he had no definite knowledge. The Caliph found the situation frustrating. After some hesitation, he obliged the three accused to take fifty oaths and pay the *diya* (blood money).[80]

[78] 'Abd al-Raḥmān was appointed later a *qāḍī* in Medina during Mu'āwiya's caliphate. He was also in charge of the police. He took strict measures in law and order situation in Medina that had deteriorated considerably. See Abū 'Abd Allāh al-Zubayrī, *Kitāb Nasab Quraysh*, edited by E. Lévi-Provençal (Cairo: Dār al-Ma'ārif, 1953), 267.

[79] Wakī' gives his name as Abū Ja'fawayh. We have relied on *Nasab Quraysh* for this correction.

[80] Wakī', vol. 1, 121.

We have not found this case reported in any other source. We cannot doubt Wakī''s report as Abū 'Abd Allāh al-Zubayrī (d. 236/850), an expert on Quraysh families, also mentions that Muṣ'ab was accused of a murder and acquitted.[81] He adds further that the three accused were imprisoned until they agreed to take oath. There are, however, some puzzling questions. First, why did Ibn Zubayr and Ibn Azhar hesitate to take oath? Second, why did the accused hesitate to take oath? In an above mentioned case of a murder in Khaybar in the days of the Prophet, the accusers and the accused both similarly hesitated to take oath. It shows that they did not take oath slightly, even though it weakened their claim. The more crucial question, however, is why Mu'āwiya hesitated to ask the accused to swear? Why did he feel frustrated? If *qasāma* was in practice and if it required the accused to take fifty oath why Mu'āwiya found himself in an impasse? His frustration means either that the *qasāma* was not a regular practice or that the current practice required the accusers to take oath. When the accusers declined to do so, Mu'āwiya did not know what to do. He finally did something new, namely, he shifted the responsibility of oath to the accused. That is how Wakī' explains Mu'āwiya's action.

Wakī' characterizes Caliph Mu'āwiya's method of judgement as the procedure of *radd al-aymān* (shifting of oaths). He remarks that Mu'āwiya was first to do that, explaining that «He returned (*radd*) them [i.e. 50 oaths], one-third each to the three [accused]. Mu'āwiya was the first to return the oaths (*radd al-aymān*). It never happened before. If there was one person less than fifty, the others took additional oaths to complete the number. If there was one person less, *diya* was imposed...».[82] Wakī' seems to be referring to the current Arab tribal procedure of *qasāma*.

It appears that normally, the defendant took purgatory oath to deny the claim of the plaintiff. If he declined to take oath, the case was generally decided for the plaintiff. Sometimes the plaintiff was asked to take accusative oath when the defendant had declined to do so. This procedure was called *radd al-aymān* because the oath was shifted to the plaintiff.

In case of murder, the procedure differed. According to Mālik, as we have said above, the practice in Medina was to ask the accusers to take oath. That probably explains why Mu'āwiya felt frustrated when the accuser declined to take oath. The only way out for him was to shift the oaths to the accused.

According to Wakī', Mu'āwiya was the first to do that. In the frequently cited precedent[83] of murder in Khaybar in the Prophet's period, when the

[81] Al-Zubayrī, *Nasab Quraysh*, 267.
[82] Wakī', vol. 1, 122.
[83] See n. 70 above.

plaintiff Anṣārīs and the accused Jews both declined to take oaths, the Prophet did not oblige either party to take oath and decided for the payment of *diya*, which he paid himself.

One may question Wakī''s statement and its implications that Mu'āwiya set aside the Medinese practice or that he introduced a new practice which later became Iraqi tradition. These questions need further investigation. Presently we are concerned with a more significant matter, i.e. Wakī''s method of inference from this precedent. It differs from that of the traditionists and jurists. While he calls it a precedent for *radd al-aymān*, the traditionists and jurists describe it a case of *qawad fi'l-qasāma*.

As we have pointed out above, the jurists and traditionists tend to deduce rules also from the implications of the statements made in the precedent. A critical note by 'Abd al-'Azīz al-Marāghī,[84] the editor of *Akhbār al-Quḍāt*, illustrates this point.

In a long footnote, disagreeing with Wakī', al-Marāghī contends that this was a case of *qawad*, not *radd al-aymān*. In his support, he refers to al-Sarakhsī, al-Bayhaqī, Ibn Baṭṭāl and others who state that Mu'āwiya was the first to decide on the basis of *qawad* in Islam. Al-Marāghī says that it was a common practice to shift the oath to the plaintiff. Only the Ḥanafīs disallowed it. It would be, therefore, meaningless to say that Mu'āwiya was the first to do something, which was a common practice.

It may be observed that al-Marāghī's remarks reflect the casuistic method of the jurists because he relies for his support on the arguments developed by some Ḥanafī jurists. In fact, no *qawad* was imposed in this case. Apparently this conclusion is drawn from the implication of the application of *qawad* in Mu'āwiya's offer to Ibn Zubayr that he would be entitled to *qawad* if he took the oath. Had Ibn Zubayr taken oath the *qawad* would have been applicable. The fact, nevertheless, is that Muṣ'ab was acquitted after taking the oaths and no *qawad* was applied.

In his support, al-Marāghī refers to some Ḥanafī jurists who argued that Mu'āwiya practiced *al-qawad fi'l-qasāma* and that he was the first to do that. Let us see how the Ḥanafī jurists come to this conclusion.

Al-Sarakhsī,[85] Ibn Baṭṭāl[86] and al-Bayhaqī[87] argue that Mu'āwiya introduced *qawad* in Islam. Al-Sarakhsī makes this statement in a specific context. In order

[84] Wakī', vol. 1, 122.
[85] Al-Sarakhsī, *op. cit.*, vol. 26, 109.
[86] 'Aynī, *'Umdat al-qārī* (Istanbul: Amira, N.d.), vol. 11, 213.
[87] Al-Bayhaqī, *op. cit., loc. cit.*

to refute the traditionists' claim that the Prophet and the first two caliphs practiced *al-qawad fi'l-qasāma*, al-Sarakhsī argues that it was Mu'āwiya who introduced the practice.

Al-Sarakhsī explains that the Umawī caliphs practiced *qawad* and *qasāma*. 'Umar b. 'Abd al-'Azīz inquired some scholars who told him that it was the practice of the Prophet and the early Caliphs. The Caliph asked Abū Qulāba. He refuted that the Prophet or the Caliphs ever applied *qawad* on the basis of *qasāma*. Abū Qulāba gave examples from the actual practice of the Prophet. Apparently, Abū Qulāba distinguished the actual practice of the Prophet from the inferences from the *sunna* to which Caliph's jurists referred. Al-Sarakhsī cites Abū Qulāba's remarks approvingly but he does not cite any case from the actual practice of Mu'āwiya to prove that he introduced *qawad* and *qasāma*. He cites al-Zuhrī saying that Mu'āwiya was the first to apply *qawad* on the basis of *qasāma*. We have already referred to al-Zuhrī's statement that Mu'āwiya was the first to employ the method of *yamīn ma' al-shāhid*. It appears both statements refer to the cases where *qawad* was offered to the accusers if they took oaths. Since the Ḥanafī jurists require the accused to take oath to clear themselves they would not call the procedure of asking the accused to take oath as that of shifting the oath.

It is evident from the special chapters in the *ḥadīth* books on the question whom should the *qāḍī* ask to begin taking oath that it was a crucial issue of procedural law in those days. Naturally, therefore, shifting of oath to the other party must be an extraordinary practice. Contrary to al-Marāghī's argument, therefore, Wakī''s remarks are quite significant in this context.

CONCLUSION

With reference to the doctrine of *yamīn ma' al-shāhid*, we have seen that its growth against the historical setting of the Civil War period is quite understandable. This was a period when the whole Muslim society seems to be engaged in the questions relating *qiṣāṣ*, *qawad*, *qasāma* and *ḥakam*. These discussions were taking place with reference to the role of the Qur'ān and the common *sunna*. The rules of procedure were also part of the debate. The need for changes regarding the institution of *ḥakam* and modifications in the rules of procedure was quite obvious. The scattered statements of scholars close to that period supported by Wakī''s remarks reinforce this view that Mu'āwiya attended to this need. Secondly we also find that this particular doctrine appears to have

been introduced to respond to this need. Viewing the judicial practice of this doctrine we find it difficult to describe it as a Medinese practice because *qāḍī*s used it more in other areas than in Medina. Its characterization as a Medinese tradition is possible only if we confine to the writings of jurists and traditionists.

We therefore find it quite meaningful to study the judicial practice to understand the growth of Islamic law. It gives us a better understanding of the nature of Islamic law. Tyan had already warned against the use of jurists' writings about *qāḍī*s to appreciate the role of *qāḍī*s. In our view there is a greater need to follow Tyan's advice to write a critical history of the Islamic law on the basis of judicial practice.

ANNEX NUMBER 1

Table of Cases

[Relating to the procedure of witness and oath as reported by Wakī' (1947)]

1. *Ubayy b. Ka'b/'Umar b. al-Khaṭṭāb.* Qāḍī Zayd b. Thābit (55/674) appointed by 'Umar b. al-Khaṭṭāb (13-23/634-644). Medina. Dispute about a wall. The plaintiff had no evidence. The Qāḍī asked the defendant to take oath. 'Umar swore as follows: «I swear by Allāh except whom there is no god that Ubayy has no right in my land» [Wakī', I/108-109].

2. *'Abd Allāh b. Zubayr for the murder of Ibn Habbār/'Abd al-Raḥmān b. Azhar for Muṣ'ab b. 'Abd al-Raḥmān b. 'Awf, the accused.* Qāḍī Mu'āwiya b. Abī Sufyān (41-60/661-680). Damascus. Case of *qiṣāṣ* of Ibn Habbār (of Banū Asad). Killed during the uprising against 'Uthmān (35/656). Muṣ'ab b. 'Abd al-Raḥmān b. 'Awf, Mu'ādh b. 'Ubayd Allāh al-Taymī and Ibn Ja'ūna b. Sha'ūb al-Laythī accused. Mu'āwiya asked Ibn Zubayr to name the accused under 50 oaths. Ibn Zubayr declined to take the oaths, as he only knew that Ibn Habbār's body was found in the place where the three had gathered together. Mu'āwiya asked Ibn Azhar to declare under 50 oaths that the accusations against his client Muṣ'ab were false. He also declined to swear, as he also did not know definitely. Mu'āwiya faced an impasse and finally decided: «The only way for me is to refer the fifty oaths back to the three accused, and then they pay the blood money». He shifted the oaths to the three.

3. *Unnamed litigants.* Qāḍī Shurayḥ (d. 76-80/699). Appointed by 'Umar (24/644, served until the period of 'Abd al-Malik (65-86/685-705), including the period under Mu'āwiya (41-60/661-680). Kūfa. Dispute about the sale of a slave girl

with a defect. Plaintiff [(A), apparently, the second buyer,] claimed that the slave girl had a physical defect. The defendant [(B), apparently, the first buyer] explained that he had purchased the girl from so and so [(C), the original seller]. The Qāḍī asked the defendant to take oath that he did not know the defect at the time of sale, and he did not conceal it. After the oath the slave girl was returned to the original seller [(C)], because he had sold her with the defect. [Wakī', II/334].

4. *Unnamed litigants.* Qāḍī Shurayḥ (d.80/699). Kūfa. No detail about the dispute. The Qāḍī decided the case on the basis of one witness and oath. [Wakī', II/310].

5. *Unnamed litigants.* Qāḍī 'Abd Allāh b. Ḥārith b. Nawfil (84/703). Medina. Appointed by Mu'āwiya (41-60/661-680). No details about the dispute. The case decided on plaintiff's oath. [Wakī', I/113].

6. *Two Unnamed women.* Qāḍī Ibn Abī Mulayka (117/735). Ṭā'if. Appointed by 'Abd Allāh b. Zubayr (74/693). A case of injury. No proof against the accused. The accused was asked to take oath, refused. The Qāḍī consulted Ibn 'Abbās. Judgement in favour of plaintiff on oath. [Wakī', I/262].

7. *Two Unnamed litigants.* Qāḍī Qāsim b. 'Abd al-Raḥmān. Kūfa. Qāḍī of 'Umar b. 'Abd al-'Azīz (99-101/717-720). No details about the dispute. The Qāḍī demanded evidence from the plaintiff. He requested the defendant to take oath. The Qāḍī insisted on evidence, rejecting oath. [Wakī', III/8].

8. *'Īsā b. Nu'aym/ unnamed defendant.* Qāḍī Sha'bī (d. 103/721). Kūfa. Appointed by 'Umar b. 'Abd al-'Azīz (99-101/717-720). No details about the dispute. The plaintiff had only one witness and offered to take oath. The Qāḍī refused, demanding two witnesses. [Wakī', I/340, II/427-428].

9. *Ḥafṣa, wife (plaintiff)/ Abu'l-Ḥajjāj, husband.* Qāḍī Ḥasan al-Baṣrī (d.110/728). Appointed under Caliph 'Umar b. 'Abd al-'Azīz (99-101/717-720). Baṣra. The wife complained that the husband had divorced her, but then he denied that he did so. The Qāḍī asked the husband to take oath and decided in his favour. [Wakī', II/10].

10. *Unnamed litigants.* Qāḍī Iyās b. Mu'āwiya (122/739). Baṣra. Appointed by 'Umar b. 'Abd al-'Azīz (99-101/717-720). Served also under Caliph Walīd II (125-126/743). Baṣra. No details of the case. The Qāḍī asked the plaintiff (*ṭālib*) to take oath. [Wakī', I/340].

11. *The wife of the Qāḍī (plaintiff)/Unnamed defendant.* Qāḍī Thumāma b. 'Abd Allāh. Appointed in 106/724, under Caliph Hishām (105-125/724-743). Baṣra. No detail about the dispute. No proof with the plaintiff. The Qāḍī asked the defendant to take oath. The plaintiff protested that the defendant was a wicked person, he would not hesitate to take oath. His neighbour instead might be asked to take oath. The Qāḍī asked the neighbour to take oath. No further details. [Wakī', II/21].

12. *Unnamed litigants.* Qāḍī al-Ḥusayn b. Ḥasan al-Kindī. Kūfa. Succeeded Qāsim b. 'Abd al-Raḥmān, appointed by Khālid b. 'Abd Allāh al-Qasrī (d. 126/743), during Caliph Walīd II (125-126/743). Dispute about the sale of a slave girl. Plaintiff complained that the slave girl was a lunatic. The Qāḍī demanded witnesses. He had no witnesses. The defendant said that she was not lunatic at the time of sale. The defendant said that he returned the oath to the plaintiff. The Qāḍī asked the plaintiff to take oath that she was lunatic when he purchased her. The plaintiff hesitated to take oath. The Qāḍī observed that the defendant might have referred the oath back to the plaintiff because he knew that he was a pious person and would hesitate. The Qāḍī asked the defendant to swear that she was not lunatic when he sold her. All the people disliked this [imposition of] oath. They stood up and disputed the decision. [Wakī', III/10].

13. *Unnamed litigants.* Qāḍī Ibn Shubruma (144/761). Kūfa. Under Caliph Abū Ja'far al-Manṣūr (136-158/754-775). No details about the dispute. Petition based on witness and oath. The Qāḍī continued delaying until he asked the plaintiff to take oath. [Wakī', III/87].

14. *Unnamed litigants.* Qāḍī Ibn Abī Laylā (148/765). Kūfa. Under Caliph Abū Ja'far al-Manṣūr (136-158/754-775). No details about the dispute. The Qāḍī asked the plaintiff to take oath. No further details. [Wakī', III/117].

15. *Ibn 'Awn/Unnamed defendant.* Qāḍī Mu'āwiya b. 'Amr b. Ghallāb. Under Caliph Abū Ja'far al-Manṣūr (136-158/754-775). Baṣra. Case of the ownership of a slave. The plaintiff presented evidence [witnesses] to establish his title. The Qāḍī asked the plaintiff to take oath to endorse the evidence of the witnesses. The plaintiff refused. The Qāḍī referred the case to the Qāḍī in Mawṣil who did not demand oath and decided in plaintiff's favour. [Wakī', II/50].

16. *Unnamed litigants.* Qāḍī Abd Allāh b. Muḥammad b. Ṣafwān al-Jumaḥī. Baghdad. Appointed by Abū Ja'far al-Manṣūr (158/775) and al-Mahdī (159/776). No details

about the dispute. The defendant was asked three times to take oath. He refused. Qāḍī decided in favour of the plaintiff. [Wakī', III/250].

17. *'Amr b. Abī Zā'ida/ Unnamed defendant.* Qāḍī Sawwār (245/860). Under Caliph al-Mutawakkil (232-247/847-861). Baṣra. Dispute not mentioned. The plaintiff had only one witness. He offered to take oath. The Qāḍī refused and insisted on *bayyina*, proof. [Wakī', II/87].

18. *Unnamed plaintiff. Wife/ Unnamed husband.* Qāḍī Sawwār (245/860). Baṣra. The wife claimed that her husband had divorced her and then denied. The Qāḍī asked the husband to take oath and decided in his favour. [Wakī', II/63].

Names of the Qāḍīs who decided cases on the basis of one witness and oath by the plaintiff

[Facts of the cases not mentioned by Wakī' in detail]

19. Zurāra b. Awfā, Qāḍī of Baṣra during Mu'āwiya b. Abī Sufyān's period. [Wakī', I/293].

20. Abū Salmā b. 'Abd al-Raḥmān b. 'Awf, Mu'āwiya's Qāḍī in Medina. [Wakī', I/118].

21. Tawba b. Nimr (120/737), appointed by 'Umar II in Egypt [Wakī', III/230].

22. Abū Bakr b. Ḥazm, Qāḍī of 'Umar II in Medina. [Wakī', I/139].

23. Sulaymān b. Ḥabīb al-Muḥāribī (120/737), Damascus. Appointed by 'Umar b. 'Abd al-'Azīz. [Wakī', III/210].

24. Yaḥyā b Ya'mar, Khurāsān [Hārūn al-Rashīd's period (170-193/786-809?]. [Wakī', III/305].

25. Sulaymān b. Ḥarb al-Wāshijī (d. 224/838), Qāḍī in Mecca 214-219/828-833. Appointed by 'Abd Allāh b. 'Abd Allāh b. al-'Abbās b. Muḥammad. Caliph al-Ma'mūn and al-Rashīd's period (198-218/813-833). [Wakī', I/268].

ANNEX NUMBER 2

Procedures adopted by the qāḍīs in deciding the cases

(The numbers in parenthesis refer to the five procedures explained in pp. 406-408.)

CITIES/CALIPHS	(1)	(2)	(3)	(4)	(5)	TOTAL
Kūfa	7,8	3,12	4,13	14		7
Baṣra	17	9,11,18	15,19	10		7
Medina		1	20,22	5		4
Damascus			23		2	3
Ṭā'if				6		1
Mecca			25			1
Baghdad				16		1
Egypt			21			1
Khurāsān			24			1
Total	**3**	**6**	**10**	**5**	**2**	**25**
'Umar I (634-644)		1				1
Mu'āwiya (661-680)		3	4,19,20	5	2	6
Ibn Zubayr (693)				6		1
'Umar II (717-720)	7,8	9	21,22,23	10		7
Hishām (724-743)		11				1
Walīd II (743)		12				1
al-Manṣūr (754-775)			13,15	14,16		4
Hārūn (786-809)			24			1
al-Ma'mūn (813-833)			25			1
al-Mutawakkil (847-861)	17	18				2
Total	**3**	**6**	**10**	**5**	**2**	**25**

ABSTRACT

Modern critical studies of Islamic law have noted the need for the study of the procedural law in Islam and the role of the judicial practice in its formation. Generally, it is believed that *qāḍī*s had freer hand regarding witness and method of proof in the early period, but gradually it became more restrictive and rigid. Scholars have suggested various dates ranging from the second half of the seventh century (Tyan) to the eighth (Schacht, Dannhauer), to the eleventh century (Coulson) for this development. These scholars have treated the doctrine of *yamīn ma' al-shāhid* (oath with one witness) as an exception to the Shariah procedure which, according to them, strictly and mechanically adhered to the doctrine of two witnesses. According to them, this doctrine emerged under local [Schacht (Egypt) and Dannhauer (Madina)] or Jewish (Patricia Crone) influence.

The present paper argues that the doctrine must have grown against the historical setting of the Civil War (*Taḥkīm* period) when the questions relating *qiṣāṣ*, *qawad*, *qasāma* and *ḥakam* were discussed frequently with reference to the role of the Qur'ān and the common *sunna* and the need for reforming the institution of *ḥakam* was felt. On the basis of scattered statements of scholars close to that period supported by Wakī''s remarks and we conclude that Mu'āwiya introduced this method to reform the institution of *ḥakam*. The judicial practice of this doctrine also confirms that it was too widespread to call it a Medinese or local practice as claimed by the classical jurists, traditionists and some modern scholars.

RESUMEN

Los estudios modernos sobre derecho islámico han puesto de relieve la necesidad de estudiar los procedimientos jurídicos en el Islam y el papel desempeñado por la práctica judicial en su formación. Se considera en general que, en el período temprano, los cadíes disponían de mayor libertad en lo relativo a testigos y métodos para establecer pruebas. Posteriormente y de forma gradual el sistema se volvió más rígido y restrictivo. En relación a este desarrollo, los investigadores han propuesto distintas fechas, que van desde la segunda mitad del siglo VII (Tyan) hasta el siglo VIII (Schacht, Dannhauer) e incluso hasta el siglo XI (Coulson). Estos investigadores han tratado la doctrina de *al-yamīn ma' al-šāhid* (juramento con un testigo) como una excepción dentro del procedimiento establecido por la *šarī'a* que, según ellos, se basaba estricta y mecánicamente en la doctrina de los dos testigos. Para dichos investigadores, la doctrina de *al-yamīn ma' al-šāhid* surgió bajo la influencia de determinadas localidades (Egipto según Schacht o Medina según Dannhauer) o bien por influencia judía (P. Crone).

Este artículo propone que esa doctrina debió de surgir en el contexto del período de la guerra civil (o período del *taḥkīm*), cuando las cuestiones sobre *qiṣāṣ*, *qawad*, *qasāma*

y *ḥakam* fueron discutidas con frecuencia en relación con el Corán y la *sunna* común y cuando se sintió la necesidad de reformar la institución del *ḥakam*. Sobre la base de afirmaciones dispersas de ulemas que vivieron en fechas cercanas a ese período, afirmaciones que se ven confirmadas por los comentarios de Wakī', se concluye que Mu'āwiya fue quien introdujo ese método para reformar la institución del *ḥakam*. La práctica judicial de esta doctrina también confirma que estaba demasiado difundida como para poder considerarla una práctica medinense o una práctica local, tal y como pretenden algunos juristas clásicos, los tradicionistas y algunos investigadores modernos.