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.

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. 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 observed that *qādis* had more free hand regarding witness and method of proof in the early period. He notes that the changes began to take place in the second half of the seventh century when *māzālim* courts were established beside the *qādi* courts and a distinction was made between *Sharī'a* and *siyāsa*.
as two methods of procedure used by these courts respectively. While Shari'a court procedure was fixed and restrictive, the siyāsa was free and discretionary. N. J. Coulson places this change in the eleventh century. He adds that Shari'a procedure was rigidly formalistic and mechanical, restricted to two witnesses; one witness was accepted only in exceptional cases.

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, qādis accepted one witness quite frequently, and the doctrine of yamin ma' al-shāhid (oath with one witness) has been one of the most debated problems among the traditionists, judges and the jurists.

Joseph Schacht, P. G. Dannhauer and Patricia Crone have gone into some details of the doctrine of yamin 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 Qādi Tawba b. Nimr's (115-120/733-738) judgement based on the procedure of yamin 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. 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.

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

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5 Tyun, 443 and 572.
7 Coulson, 127.
8 Coulson, 124.
9 Coulson, 124.
13 Dannhauer, 80.
14 Dannhauer (78-79) disagrees with Schacht regarding Darāwardī and Rabi'a being responsible for the circulation of the false reports about the doctrine.
smaller things\textsuperscript{15} implies that the practice already existed and the q\={a}d\={i} extended it to matters to which the other judges did not.

Comparing the Jahili law of qas\={a}ma 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\textsuperscript{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 qas\={a}ma 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,\textsuperscript{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 hadith 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.\textsuperscript{18}

\textsuperscript{15} Kind\={i}, Kit\={a}b al-wul\={a}t wa'l-qud\={a}af fi M\={i}r (Bayr\={u}t, 1908), 345.

\textsuperscript{16} Heffening, W., Das islamische Fremdenrecht (Hanover, 1925).


\textsuperscript{18} Most of the hadith books carry a specific chapter on this problem. See for example: Muslim, Sah\={i}b (Bayr\={u}t: D\={a}r Ihy\={a} al-tur\={a}th, N.d.), vol. 1, 124 ff.; Tirmidhi, J\={a}mi\={i} (Medina: Salafisyya, N.d.), vol. 3, 400 ff.; Musnad Ahmad b. Hanbal; Ab\={u} D\={a}’ud, Sunan (Bayr\={u}t: al-Maktab al-Islami, 1989), 690 ff. Among the jurists the following are sufficient to illustrate our point: Malik, Al-Muwatta\' (Cairo: al-B\={a}b\={i}, 1951), vol. 2, 721 ff.; Sh\={a}fi’i Kit\={a}b al-Umm (Bayr\={u}t: D\={a}r al-Ma’\={r}ifa, N.d.), vol. 4, 3 ff.; vol. 6, 254 ff.; vol. 7, 7 ff.; Ibn Hazm, Al-Muhall\={a}b (Cairo: Munifiyya, 1351 H), vol. 9, 404 ff.; Ibn Qud\={a}ma, Al-Maghribi (Cairo: Hijr, 1992), vol. 14, 123 ff. and 281 ff.; Sarakhsi, Al-Ma\={h}s\={u}b (Bayr\={u}t: D\={a}r al-Ma’\={r}ifa, N.d.), vol. 16, 111 ff., and vol. 17, 28 ff.; Kh\={a}y\={u}t, Adab al-Q\={a}d\={i} (Baghdad: Irshid, 1977), vol. 1, 105 ff.; al-M\={u}wardi, Adab al-Q\={a}d\={i} (Baghdad: al-‘\={A}n\={i}, 1972), vol. 2, 163 ff.
In our view, the problem of yamin ma’ al-shàhid seems to have arisen in the wake of Civil War (656-661) between ‘Alì (d. 661) and Mu’áwiya (d. 681) on the question of the qisàs for the murder of ‘Uthmân, better known as the issue of taḥkim (appointment of ḥakam, arbitrator). The open-ended and arbitrary ḥakam procedural law failed quite obviously in this period. Mu’áwiya felt the need for a comparatively strict procedure for the qàdi.

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’áwiya responded to this issue. For the latter part of our inquiry we rely on Wakì’’s (d. 306/918) Akhbàr al-Quðàt. 19

We have chosen Akhbàr al-Quðàt primarily because a qàdi 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-Qàdi 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-Qàdi 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 Akhbàr al-Quðàt is a source earlier than Kindí’s (d.362/972) Kitàb al-wulàt on which Tyan and Schacht had relied. While Kindí limited himself to Egypt, Wakì’ deals with the qàdis all over the Muslim world until his period. Wakì’ 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-Dinawayr20 have relied on Wakì’’s books.21

The foremost reason for the choice of Akhbàr al-Quðàt is that it refers to actual judgements of the qàdis more than any other source in our knowledge. Noting this feature of the book, Schacht characterized Akhbàr al-Quðàt 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 Akhbàr al-Quðàt twenty-five cases specifically related with the questions of procedural laws, 18 cases are reported with details of facts and


20 Ibn Qutayba is reported to have written Al-Ma’ārif on the pattern of Wakì’’s Al-Sharìf. He refers to Wakì’ frequently in his ‘Uyûn al-Akhbàr.


seven without describing such details. There are also several general statements by the author about certain qaḍīs 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 taḥkim.23

TAḤKIM

Literally, taḥkim means appointment of a ḫakam, 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 wali 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 Šiffīn (657) between ‘Alī and Mu‘āwiya.

Modern scholarship has raised several questions about the civil war and the taḥkim. 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 Kūfā, 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‘awiyyah in Early Arabic Tradition (Copenhagen: Munksgaard, 1964), and Hinds, M., ‘The Šiffīn Arbitration Agreement’, JSS, 17 (1972), 93-94.


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, Šalḥa, Zubayr and ‘A‘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 taḥkim 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 taḥkim agreement was written down also shows the extraordinary significance of the issue of taḥkim 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-Nabi.

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.


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'an allows to live and to cause to die whom the Qur'an causes to die».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 *qisas* and that it was to be decided according to the Book.

Earlier, Prophet's wife 'A'isha's demand for the *qisas* of 'Uthmân had also led to a war, the battle of the Camel. Caliph 'Alî defeated her39 but the question of 'Uthmân's *qisas* had remained unsettled. During the battle of Şiffin, when Mu'âwiya's forces were on the verge of defeat, his supporters raised the Qur'an on spears appealing to accept the Book as *hakam* between the warring factions. Appeal to the Qur'an as *hakam* 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 Şiffin, after some hesitation on the part of Caliph 'Alî, both parties finally agreed to appoint two *hakams*, one from each side: Abû Mûsâ al-Ash'ârî, 'Alî's *hakam*, and 'Amr b. al-'Às, Mu'âwiya's *hakam*.

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

Montgomery Watt notes that the *hakams* in Şiffin had two meetings.33 In the first meeting both *hakams* agreed that 'Uthmân was killed unjustly and that Mu'âwiya was the rightful claimant for his *qisas*. Apparently the main task of arbitration was completed in this meeting. The second meeting was to deal with the implementation of *qisas* itself. It appears that in this discussion, the

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30 Tabari, *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'an in the battle of the Camel to 'A'isha. See these varying versions in Tabari, vol. 6, and 3189-3191.
question turned into the dispute as to who should be the caliph. Probably the issue was raised because a caliph was required to authorize qīṣāṣ. The details of that aspect are beyond the scope of this paper. What is important is the fact that the ḥakams could not reach an agreeable judgement. It became immediately controversial. Even one of the ḥakams, Abū Mūsā al-Ash‘arî, came out disputing the outcome of taḥkîm.

Caliph ‘Ālî and his supporters rejected the judgement. One group among ‘Ālî’s followers, later to be known as Khawārīj, questioned the validity of taḥkîm, 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 qīṣāṣ in the taḥkîm 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 ‘Ālî and Mu‘āwiya or to appoint a new caliph. In fact, neither ‘Ālî nor Mu‘āwiya abided by the outcome of the taḥkîm, namely the selection of Mu‘āwiya as caliph. While ‘Ālî protested that the arbitrators had violated their terms, Mu‘āwiya also did not declare himself Caliph in the presence of ‘Ālî. It shows that the real issue for the ḥakams was qīṣāṣ of ‘Uthmān, not the selection of a caliph.

Appeal to the Qur’ān as ḥakam also meant different things to different people. Earlier, Ṭalḥa35 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 Allah that it may judge (yahkuma) between them; then a faction of them turn away, being opposed? (3:23)». Mu‘āwiya’s supporters recited the same verse when ‘Ālî and his party rejected the outcome of arbitration.36

One faction among ‘Ālî’s supporters argued that ‘Uthmān’s murder was destined by God and, therefore, he was justly killed.37 They blamed ‘Ālî 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 ḥakams 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 Ṭabarî, 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 Ṭabarî, op. cit., 3.391.
38 Ibn Qutayba, 137.
The Qur’ân is clear about the laws of qisâs (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 jàmi’a ghayr mufarriqa, beside the Qur’ân, apparently referring to the common custom, and not to the custom of a particular tribe.

When the hakams failed to settle the dispute of qisâs, Mu’âwiya waited until he was in a position to avenge ‘Uthmân’s blood. He pursued all those who had participated in the murder and got them killed one by one.

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 ‘Ali’s murder by a Khârijî. Mu’âwiya negotiated with ‘Ali’s successor and declared himself caliph. He also assumed the title khalifat Allah, God’s deputy, probably to institutionalize his authority as Allâh’s hakam and to define the authority of the other offices as delegated.

Patricia Crone and Hinds explain that the title of khalifat Allah signified Mu’âwiya’s assumption of the qadâ ’ as he himself sat in judgement as God’s deputy. The point of real significance is not that Mu’âwiya acted as qâdi, earlier caliphs had also acted as qâdis. The significant perhaps is the fact that he made the qâdis answerable to himself or to his governors. It was a real departure from the independent and arbitrary institution of hakam. The institution of qâdi 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’âwiya was the first Muslim ruler to appoint qâdis.

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 Siffin Agreement, op. cit., 100-102 and Sergeant, R. B., «The Sunnâ Jâmi’a, Pacts with the Yathrib Jews, and the Tahrim of Yathrib: An Analysis and Translation of the Documents Comprised in the So-called “Constitution of Medina”», BSOAS, LXI (1978), 1-42.
42 Kindî, Kitâb al-Wulâr, 18, 31 and 38.
MUʿĀWIYA AND THE INSTITUTION OF QĀDI

On the authority of Mālik b. Anas and al-Zuhrī, Wākī argues that Muʿāwiya b. Abī Sufyān was the first caliph to appoint qādis. The caliphs before him dealt with public affairs directly themselves. Other scholars have generally disagreed with Mālik on this point. Ibn ʿAbd al-Barr and Ibn Rushd find Mālik’s statement contrary to the well known facts that qādis were indeed appointed by the Prophet and by the four caliphs. They explain that Mālik meant to say that Muʿāwiya was the first caliph to appoint qādis in the capital (ḥadra). This does not, however, explain Wākī’s view. Wākī says that Qatāda’s statement naming six Companions of the Prophet as qādis was debatable. He refers to al-Zuhrī saying: «Abū Bakr and ʿUmar had no qādis until the fitna (Civil war). Thence Muʿāwiya appointed qādis.» Referring to caliph ʿUthmān, he observes that it was not definitely known that ʿUthmān appointed qādis in Medina till he was killed in Dhūʾl-Ḥijja in the year 35.

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

Wākī clarified that qādis in earlier period were muftis and ḥakams rather than qādis. He describes Ibn ʿAbbās in ʿAlī’s period as mufti and ḥakam. About ʿAlī’s qādi Abūʾl-Aswad al-Duʿlī, he remarks: «He was in fact a mufti. qādis in those days were called mufti. This state of affairs continued until ʿAlī was killed in the year 40.» He further describes how the institution of qādi became totally subordinate to the caliphs and governors, who appointed them as they pleased, dismissed them summarily and sometimes overruled their judgements. During the ʿAbbāsid period, the caliphs used the qādis to punish their opponents.

44 Wākī, vol. 1, 110.
45 See editor’s footnote, Wākī, vol. 1, 110-111.
50 Idem, vol. 1, 184.
51 Idem, vol. 1, 294, 291.
52 Idem, vol. 1, 266.
Caliph Mu‘awiya not only subordinated the institution of qādī to caliphal authority, but also introduced some changes in the rules of procedure. In order to ascertain clear and early decisions, he directed qādis to oblige the plaintiff to swear solemnly that his or her claim was not false. Ibn Wahb reports, on the authority of Ibn Abi al-Zanād, that Mu‘awiya 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. 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‘awiya. A Ḥanafī jurist, ‘Abd al-‘Azīz al-Bukhārī, also states that Mu‘awiya was the first to introduce oath and witness. Ibn Ḥazm and ‘Abd al-‘Azīz al-Bukhārī have not provided further details. Waki’ names several qādis of Mu‘awiya who used this procedure. Waki’ reports one such case decided by Mu‘awiya to which we shall return shortly.

Why did Mu‘awiya 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 yamin (oath).

YAMÎN, BETWEEN TRADITION AND JURISPRUDENCE

Pre-islamic tradition

Yamin played a very significant role in daily transactions in pre-Islamic Arabia. 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 hakams.

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

54 Al-Bayhaqî, Al-Sunan al-kubrâ (Hyderabad, India, 1354 H), vol. 8, 127.
55 Ibn Ḥazm, Al-Muhallâ (Cairo: al-Munîriyya, 1351 H), vol. 9, 403.
56 See editor’s note, Waki’, vol. 1, 140.
Three things are decisive in matters of right (*haqq*)
*yamîn*, *nîfâr* (award of possession), and *jîlā‘* (expulsion).  

**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. Sâ’îda. Quss b. Sâ’îda is not a stranger to *hadîth* tradition. He is remembered as the wisest Arab orator whose speeches at ‘Ukâz were repeated admiringly by the Prophet. It is not, therefore, impossible that this maxim was remembered by the Prophet at some occasion and became a part of *hadîth*.

**Qur’ân**

The Qur’ân recognized the value of *yamîn*, but it discouraged its excessive and thoughtless use (2: 225, 5: 92). It did not deny the binding nature of *yamîn* (16: 91-94) but prescribed lesser punishment of expiation in case of breach (5: 92). The Qur’ân, 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’ân.

The Qur’ân 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 *qasā‘ma*, 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’ân is silent on *qasā‘ma*. There is, however, a mention of the repetition or shifting of oaths in the Qur’ân in the following verse:

«O you who believe! Let there be witnesses (*shahâda*) 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

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the prayer, and, if you doubt, they shall be made to swear (yuqsimân) by Allah, saying: We will not take a bribe, even though it were (on behalf of) a near kinsman nor will we hide the testimony (shahàdà) of Allah, 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 (yuqsimân) by Allah, 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 aymânun)» (Qur’ân 5: 106-108).

Although the verse refers to the subject of property, not to murder or qasàma, 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.

Hadith

The Hanafí jurists\textsuperscript{62} refer to “The burden of proof is on the plaintiff and the oath is for the defendant” as a Prophetic hadith. Most hadith collections report it as a saying of the Prophet.\textsuperscript{63} Ibn Qayyim, however, finds this hadith weaker than the ahàdith supporting oath and witness (yamin ma’ al-shàhid). He adds, «Besides, none of the six collections of hadith report this hadith».\textsuperscript{64} ‘Ārif al-Nakîdi, a modern jurist, has remarked that it was a pre-Islamic Arabian maxim and the hadith only states it as a current practice in those days.\textsuperscript{65}

The hadith 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.\textsuperscript{66} Shàfi’î jurist al-Muzam\textsuperscript{67} refers to ten ahàdith, all of them statements by the first or second generation of early Muslims saying

\textsuperscript{62} Al-Sarakhsî, \textit{op. cit.}, loc. cit.
\textsuperscript{63} Al-Sarakhsî, vol. 17, 28.
\textsuperscript{64} Ibn Qayyim, \textit{Firàsa, op. cit.}, 69.
\textsuperscript{65} ‘Ārif al-Nakîdi, \textit{Al-Qudà fi'l-Islàm} (Damascus [?]: Maṭba ’ Tarâqqî, 1922), 6.
\textit{Aqdiya}, 21, Tirmidhî, \textit{Al-Jàmi^ al-Sahîh} (Madîna: Muhsîn, N.d.), vol. 2, 399, 
\textit{Ahkàm}, 13, \textit{Muwatp’} (Cairo: ‘Isâ al-Bâbî, 1951), vol. 2, 725-26, 
\textit{Aqdiya}, 5, 6, 7.
that the Prophet decided cases on the basis of one witness and oath.\(^{67}\) Most of these *hadith* are reported by Medinese narrators. It is, however, difficult to conclude from this fact alone that it was a Medinese tradition. Mālik narrates the *hadith* «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 *hadith* literature with reference to an Ānṣārī found murdered in a Jewish quarter in Khaybar. According to al-Bukhārī some Ānṣārīs 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 Ānṣārīs 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 Ānṣārī.

**Jurisprudence**

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


\(^{68}\) *Vid.* al-Sarakhsî, *op. cit.*, 109. We could not find this *hadith* in Mālik, *Al-Muwatta* (Cairo: 1ṣā al-Bābî, 1951), vol. 2, *qasāma* or *aqīqa*.

\(^{69}\) *Al-Muwatta*, 877.

\(^{70}\) Al-Bukhārī, *Ṣaḥīh* (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 *ahādīth* about *yāmīn maʿ al-ṣāḥīh* as Medinese tradition. We have referred to Mālik’s view that refers to both *ahādīth* 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-Sarakhsi 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 *yāmīn maʿ al-ṣāḥīh*, which, as we have seen, they consider a *bidʿa*, an addition, introduced by Muʿāwiya.

The doctrine of *yāmīn maʿ al-ṣāḥīh* has been a subject of debate among the jurists and traditionists. While Ḥanafī jurists find it contrary to the Prophet’s *ḥadīth* about *yāmīn* belonging only to the defendant, the traditionists argue that the doctrine was based on the Sunna of the Prophet. Al-Shāfiʿī 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-Shāfiʿī, Ibn Ḥazm and Ibn Qudāma⁷⁴ 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 Ḥadramī 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 *ahādīth*. For instance with reference to the *qasāma* case

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⁷¹ Al-Sarakhsi, vol. 16, 112.
⁷² Al-Shāfiʿī, *Kitāb al-umm*, vol. 6, 254 ff.
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-Sarakhsi, 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 qādis 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 qādi 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 qādis 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 Basra. None of these cases belong to caliph Mu‘āwiya’s qādis.

- **Procedure Two:** The mudda’ī has no witness. The mudda’ī ‘alayh (defendant) takes oath of denial. The qādi 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-Zuhri (vid. al-Sarakhsi, Al-Mabsūt, vol. 26, 107) says «Fa alzama rasūlullāh al-yahūda al-diyyāt wa’l-qasāma».

\(^{77}\) Al-Sarakhsi, Al-Mabsūt, 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‘awiya’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 yamin 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‘awiya’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‘awiya’s qāḍīs who decided according to this procedure were Shurayḥ (d. 699), Zurāra b. Awfā and Abū Salma b. ‘Abd al- Раḥmān b. ‘Awf, respectively in Kūfah, Baṣra and Medina.

Schacht and Dannhauer regard references of this doctrine to these qāḍīs 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 qāḍīs belonged: Iraqi or Medinese? It is perhaps more meaningful to say that qāḍīs were not dependent on either of these traditions. It is also too early to categorize qāḍīs in Mu‘awiya’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. Waki’ 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 qādi asked the accused to take oath to deny the charges. He refused. The qādi 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 qādi 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 Tā’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 qādi decides in favour of the plaintiff.

Waki’ 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‘āb b. ‘Abd al-Rahmān b. ‘Awf,78 Mu‘ādh b. ‘Abd Allāh al-Taymī and Ibn Ja‘ūna al-Laythī79 as suspects. Ibn Habbār was travelling with them and was later found slain in a place where the four had met. ‘Abd al-Rahmān Ibn al-Azhār appeared before Mu‘āwiya to defend his kin Muṣ‘āb. 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 Azhār to swear that Muṣ‘āb 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-Rahmān was appointed later a qādi 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 Waki’ gives his name as Abū Ja‘fawayh. We have relied on Nasab Quraysh for this correction.

80 Waki’, vol. 1, 121.
We have not found this case reported in any other source. We cannot doubt Waki’s report as Abū ‘Abd Allāh al-Zubayrī (d. 236/850), an expert on Quraysh families, also mentions that Mus’ab was accused of a murder and acquitted. 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‘awiya 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‘awiya 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‘awiya did not know what to do. He finally did something new, namely, he shifted the responsibility of oath to the accused. That is how Waki explains Mu‘awiya’s action.

Waki characterizes Caliph Mu‘awiya’s method of judgement as the procedure of *radd al-aymān* (shifting of oaths). He remarks that Mu‘awiya was first to do that, explaining that «He returned (radd) them [i.e. 50 oaths], one-third each to the three [accused]. Mu‘awiya 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...». Waki 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‘awiya 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 Waki, Mu‘awiya was the first to do that. In the frequently cited precedent of murder in Khaybar in the Prophet’s period, when the

81 Al-Zubayrī, Nasab Quraysh, 267.
82 Waki, 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 Wakî’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. Wakî’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-‘Azîz al-Marâghî, the editor of Akhbâr al-Qudât, illustrates this point.

In a long footnote, disagreeing with Waki’, al-Marâghî contends that this was a case of qawad, not radd al-aymān. In his support, he refers to al-Sarakhsî, al-Bayhaqî, Ibn Batţâl and others who state that Mu‘āwiya was the first to decide on the basis of qawad in Islam. Al-Marâghî says that it was a common practice to shift the oath to the plaintiff. Only the Hanafîs 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-Marâghî’s remarks reflect the casuistic method of the jurists because he relies for his support on the arguments developed by some Hanafî 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-Marâghî refers to some Hanafî 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 Hanafî jurists come to this conclusion.

Al-Sarakhsî, Ibn Batţâl and al-Bayhaqî argue that Mu‘āwiya introduced qawad in Islam. Al-Sarakhsî makes this statement in a specific context. In order

84 Waki’, vol. 1, 122.
86 ʻAbînî, Ṭarîqah al-ṣafâ (Istanbul: Amîrât, N.d.), vol. 11, 213.
to refute the traditionists’ claim that the Prophet and the first two caliphs practiced al-qawad fi’l-qasâma, al-Sarakhsî argues that it was Mu‘awiyâ who introduced the practice.

Al-Sarakhsî explains that the Umayyad caliphs practiced qawad and qasâma. ‘Umar b. ‘Abd al-‘Azîz inquired some scholars who told him that it was the practice of the Prophet and the early Caliphs. The Caliph asked Abû Quîbâ. He refuted that the Prophet or the Caliphs ever applied qawad on the basis of qasâma. Abû Quîbâ gave examples from the actual practice of the Prophet. Apparently, Abû Quîbâ distinguished the actual practice of the Prophet from the inferences from the sunna to which Caliph’s jurists referred. Al-Sarakhsî cites Abû Quîbâ’s remarks approvingly but he does not cite any case from the actual practice of Mu‘awiyâ to prove that he introduced qawad and qasâma. He cites al-Zuhri saying that Mu‘awiyâ was the first to apply qawad on the basis of qasâma. We have already referred to al-Zuhri’s statement that Mu‘awiyâ was the first to employ the method of yamin ma’ al-shâhid. It appears both statements refer to the cases where qawad was offered to the accusers if they took oaths. Since the Hanafî 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 hadith books on the question whom should the qâdi 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-Marâghi’s argument, therefore, Wâki’s remarks are quite significant in this context.

CONCLUSION

With reference to the doctrine of yamin ma’ al-shâhid, 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 qisâs, qawad, qasâma and hakam. These discussions were taking place with reference to the role of the Qur’ân and the common sunna. The rules of procedure were also part of the debate. The need for changes regarding the institution of hakam and modifications in the rules of procedure was quite obvious. The scattered statements of scholars close to that period supported by Wâki’s remarks reinforce this view that Mu‘awiyâ 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 qādis 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 qādis to appreciate the role of qādis. 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 Waki’ (1947)]


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. Qādī Mu’āwiyah b. Abī Sufyān (41-60/661-680). Damascus. Case of qisṣā 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. Ubayy Allāh al-Taymi and Ibn Ja‘ūna b. Sha‘ūb al-Laythi accused. Mu’āwiyah 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’āwiyah 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’āwiyah 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.

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 Qādī 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. [Wāki’, II/334].

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


9. **Haʃa, wife (plaintiff)/ Abūl-Ḥajjāj, husband.** Qādī Hasan al-Baṣrī (d.110/728). Appointed under Caliph ‘Umar b. ‘Abd al-‘Azīz (99-101/717-720). Baṣrā. The wife complained that the husband had divorced her, but then he denied that he did so. The Qādī asked the husband to take oath and decided in his favour. [Wāki’, II/10].

11. **The wife of the Qādi (plaintiff)/Unnamed defendant.** Qādi Thumâma b. ‘Abd Allâh. Appointed in 106/724, under Caliph Hishâm (105-125/724-743). Başra. No detail about the dispute. No proof with the plaintiff. The Qādi 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 Qādi asked the neighbour to take oath. No further details. [Wāki', II/21].

12. **Unnamed litigants.** Qādi al-Husayn b. Hasan al-Kindî. Küfa. Succeeded Qāsim b. ‘Abd al-Rahmân, appointed by Khâlid b. ‘Abd Allah al-Qasrî (d. 126/743), during Caliph Wâlid II (125-126/743). Dispute about the sale of a slave girl. Plaintiff complained that the slave girl was a lunatic. The Qādi 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 Qādi asked the plaintiff to take oath that she was lunatic when he purchased her. The plaintiff hesitated to take oath. The Qādi 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 Qādi 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. [Wāki', III/10].


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


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. [Wākī', 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 Wākī' in detail]


22. Abû Bakr b. Ḥazm, Qāḍī of ‘Umar II in Medina. [Wākī’, I/139].


### Annex Number 2

*Procedures adopted by the qadis in deciding the cases*

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

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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 qādīs 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 yamin ma’ al-shàhid (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 (Tahkîm period) when the questions relating qisṣâṣ, qawad, qasāma and hakam were discussed frequently with reference to the role of the Qur’an 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 WaM’s remarks and we conclude that Mu‘âwiya 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 vni (Schacht, Dannhauer) e incluso hasta el siglo xi (Coulson). Estos investigadores han tratado la doctrina de al-yamín ma’ al-ṣâhid (juramento con un testigo) como una excepción dentro del procedimiento establecido por la šari’a que, según ellos, se basaba estricta y mecánicamente en la doctrina de los dos testigos. Para dichos investigadores, la doctrina de al-yamín ma’ al-ṣâhid 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 tabkîm), cuando las cuestiones sobre qisṣâṣ, qawad, qasâma
y hakam fueron discutidas con frecuencia en relación con el Corán y la sunna común y cuando se sintió la necesidad de reformar la institución del hakam. 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 Waki', se concluye que Mu'áwiya fue quien introdujo ese método para reformar la institución del hakam. 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.