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The “first” *quḍāt* of Fustāṭ and the dynamics of judicial innovation (750-850 CE)

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The paper I am presenting today is part of a wider project about regionalism in early Islamic judicial practices. This project examines the differences between the judicial practices in several oriental provinces of the Umayyad and early Abbasid caliphates. As part of the project, I am currently editing a special issue of the *Annales Islamologiques*, in collaboration with Annliese Nef, which concentrates on “Polycentrism in early Islam: the regional dynamics of innovation”. Today I would like to present the results of my research for an article of this issue ¹.

The question that Annliese Nef and I ask is what were the dynamics of the relationships between the different centres of the *dār al-islām*? We would like to know to what extent secondary cities or provinces were important centres. We are focusing especially on their role in the dynamics of administrative and legal innovation. Historians have generally regarded innovation as a one-way process: that is, the centre influences the provinces, like new fashions coming from the Orient and spreading in the Islamic West. We believe that the dynamics of innovation is a more complex process, and this is what I would like to show through an analysis of judicial innovation (that is, introduction of new practices in the courts) under the early Abbasids, between 750 and 850.

I will focus on the judiciary in Egypt, which is quite well known thanks to the Egyptian historian al-Kindī (d. 961). His *Akḥbār quḍāt Miṣr*, a chronicle of the Egyptian judiciary from the Conquest until the arrival of Ibn Ṭūlūn, offers a very good insight into judicial innovation. Al-Kindī meticulously mentions the introduction of new practices by saying “such a *qāḍī* was the first (*awwal*) to do so and so”. In this respect, al-Kindī’s book adopts the same attitude towards new legal practices as the books of “*awā’il*” that were written at the same time, and

¹ The article was published in 2011: M. Tillier, « Les “premiers” cadis de Fustāṭ et les dynamiques régionales de l’innovation judiciaire (750-833) », *Annales Islamologiques*, 45 (2011), p. 214-242.

which systematically record who was the first to do something in Pre-Islamic and Islamic history.

I will begin by outlining the legal and judicial context in Egypt at the beginning of the Abbasid period (around 750). Then I will try to evaluate the influence of the Abbasid judicial policy on the Egyptian judgeship. And finally, I will show that despite a strong pattern of Iraqi influence on Fustāṭ (and maybe precisely because of this), in the early 9th century, Egypt became a major centre for invention of judicial practices, which had wide-spread and long-term consequences on judicial organisation.

1. Regional interactions under the early Abbasids

1.1. The Egyptian legal milieu

At the beginning of the Abbasid period, under the caliphs al-Saffāḥ and al-Manṣūr, the *quḍāt* of Fustāṭ were still appointed by the local governor from amongst the local élite (the *wujūh*).

As for the legal situation, it is usually assumed that no regional school developed in Egypt (unlike in Syria, Iraq and the Ḥijāz). Joseph Schacht believes that the legal milieu of Fustāṭ was a branch of the Medinan school of law. This assumption is true, but only to a certain extent. If we look at judicial practice, for example, the *quḍāt* of Fustāṭ resorted to the procedure called “*al-yamīn ma‘a l-shāhid*”, that is, the ability of the judge to base his verdict on one single witness and the oath of the claimant, instead of two witnesses as was usually required. Such a procedure was quite common under the early Umayyads, but by the early Abbasid period it had disappeared in Iraq and it was now regarded as the ‘*amal* (“good practice”) of Medina. Up until the end of the 8th century, the *qāḍī*-s of Fustāṭ were still using this “Medinan” procedure and differentiated themselves from Iraqi practices.

From a doctrinal point of view, however, the legal affiliation of Egypt is more complex. The principal Egyptian jurist in the second half of the 8th century is al-Layth b. Sa‘d. The only writing of his that has survived is a letter he wrote to Mālik b. Anas, which has been preserved by Yaḥyā b. Ma‘īn and al-Fasawī. In this letter, he proclaims his theoretical affiliation to the Medinan methodology and recognizes the value of the ‘*amal*. Nevertheless, he distances himself from the Medinan School by opposing a series of Medinan legal views. He maintains that the common practice in other cities is also valuable, and thus implicitly defends the Egyptians’ adherence to their own local tradition. Thus, it appears

that, in the 8th century, even though it didn't develop into a formal school of law, there was a specific Egyptian legal milieu distinct of the Medinan School.

1.2. *The Egyptian influence under the early Abbasids*

Let's consider now the legal policy of the first Abbasid caliphs, al-Saffāh and al-Manṣūr. When the new dynasty settled in Iraq in 750, it didn't bring in any new legal tradition. The first caliphs had grown up and lived all their life in Syria, but they couldn't use Syrian jurists because they had been too closely associated with the Umayyads. The core of the Abbasid supporters came from Khurāsān, which had apparently no specific legal traditions. Therefore the caliphs had to choose between Iraqi, Egyptian or Ḥijāzī scholars. For a few decades, they neglected the Iraqi scholars and relied mainly on Ḥijāzī scholars, whom they attracted to the court, and to whom they offered judicial positions. We may suggest that this decision was taken because they needed to establish their legitimacy, and thus the Abbasids were looking for jurists whom their supporters would consider representative of the authentic “*sunna*” of the Prophet. The Medinans claimed that their *'amal* was the best embodiment of the *sunna*, because it came directly from the Prophet, and I believe this was a strong argument, and that the first Abbasids adopted this stance because it would strengthen their legitimacy.

Because the Egyptians followed to a certain extent the Medinan doctrine, it is likely that Egyptian scholars were attracted to the Abbasid capital. Al-Layth b. Sa'd visited Baghdad several times and he had a substantial influence on the caliphs al-Mahdī and al-Rashīd. The Egyptian *qāḍī* Ghawth b. Sulaymān also stayed some time in Baghdad, and al-Kindī states that he arbitrated on the matrimonial conflict between the caliph al-Manṣūr and his wife Umm Mūsā, who didn't want to file a complaint before anyone else. This episode is very significant and I've spent many hours trying to understand its background. The question at stake is whether the Egyptian *qāḍī* was asked to arbitrate the conflict just because he was in Iraq, or whether he was chosen precisely because he was Egyptian.

According to what we can understand from the texts of al-Kindī and Ibn Ḥajar al-ʿAsqalānī, the caliph had agreed, in his marriage contract, not to take a second wife or a slave concubine. In this kind of contract, an important part of the dowry (*ṣadāq*) was withheld (*mu'ajjal*) for an indeterminate time: this part of the dowry could then be claimed by the wife if her husband took a second wife despite the marriage contract. We know from Ibn Ḥajar that al-Manṣūr wanted

to take other wives and concubines, and it is probable that Umm Mūsā tried to prevent him by demanding he give her the withheld portion of her *ṣadāq*. In such a situation, Medinan and Egyptian jurists held different opinions: whereas the Medinans forbade the wife to claim any kind of financial compensation, the Egyptian practice allowed the wife to ask for the payment of her entire dowry. Thus, it becomes clear that Umm Mūsā chose Ghawth b. Sulaymān because of his distinct Egyptian position on the matter, and we may have here an interesting case of “forum shopping” in the middle of the 8th century. This case also demonstrates that the Egyptian “school” was regarded as a possible legal alternative to the Medinan School in Baghdad.

2. Caliphal authority and Iraqi influence in Egypt

2.1. A “boomerang” effect

The invitation of prominent Egyptian scholars to Baghdad had repercussions on the Egyptian judiciary. Ghawth b. Sulaymān eventually came back to Fuṣṭāṭ and resumed his position as a judge. His stay in Iraq had apparently altered his way of dispensing justice, and he introduced at least one major new judicial practice: he is reportedly the first *qāḍī* to establish the practice of carrying out secret investigations on witnesses in Egypt. Until his time, judges had relied simply on the public reputation of the witness. The covert investigations introduced by Ghawth b. Sulaymān meant that the *qāḍī* didn’t only have to rely on the apparent reputation of the witness, but he could order a specific legal auxiliary to ask the neighbours discreetly about the witness – about his integrity and his reliability. We know from Wakī’ (the author of another book focusing on *qāḍī*-s) that such covert investigations were first carried out in Kūfa at the end of the Umayyad period. Therefore, we can suggest that Ghawth b. Sulaymān learnt about this procedure while he was in Iraq and then introduced it into Egypt.

What is interesting is that this case reveals the two-way dynamics of innovation: first, we can see that the “Iraqi” or “Baghdadi” centrality is, in itself, the result of a “melting-pot” of different schools of thought. Second, it appears that the scholars who took part in the development of the “centrality” eventually went back to where they originally came from with new practices.

2.2. Assertion of caliphal centralism

Ghawth b. Sulaymān was appointed by the Egyptian governor, not by the caliph; therefore, his new legal practices appear to be the result of his own initiative, and not the result of imperial policy.

The situation changed in the 770s. A few years before his death, al-Manṣūr decided to appoint himself the *qāḍī*-s of Fuṣṭāṭ, and on the whole, from that time onwards, *qāḍī*-s were appointed from Baghdad, and the caliphs sent them legal instruction regarding the rules that they had to enforce. Initially, the *qāḍī*-s appointed by the central power were still native Egyptians and belonged to the traditional *wujūh* of Fuṣṭāṭ; but soon the caliphate began to send *qāḍī*-s from outside the province, usually from Iraq. A high number of these *qāḍī*-s belonged to the Ḥanafī madhhab.

The appointment of “strangers” or “foreigners” had long-term effects on the judiciary. In the late 8th and early 9th century, most of the *qāḍī*-s coming from outside the province are known for their new practices:

- For example, Ismā‘īl b. Alīsa‘ tried to alter the rules concerning the pious foundations (*aḥbās*) in Fuṣṭāṭ. As a follower of Abū Ḥanīfa, he considered that, in the case of a familial foundation, only the descendants of the founder who were already procreated by the time the founder died were entitled to a share in the revenue of the foundation. For Abū Ḥanīfa, this rule was the only way one could ensure a strict implementation of inheritance law. Obviously, the material wealth of the élite of Fuṣṭāṭ relied, to a large extent, on evasion from the inheritance law by means of pious foundations, and the *qāḍī*’s opinion was so unpopular in Fuṣṭāṭ that he was dismissed before he could implement the Ḥanafī ruling.

- In 793, another Iraqi *qāḍī* was sent to Fuṣṭāṭ: Muḥammad b. Masrūq al-Kindī. He was also a Ḥanafī and he introduced several modifications in the judicial procedure:

- first, he changed the way the lawcourt archives were kept. Previously, the court documents had been kept in a *mindīl*, probably a kind of bag. Muḥammad b. Masrūq introduced the use of the *qimaṭr*, a kind of book-case which had been used to store the judicial archives in Iraq since the early Abbasid period. Gaudfroy-Demombynes argues that the *qimaṭr* was probably a legacy from the Byzantine judicial system, since the word *qimaṭr* originally comes from the Greek. Since it was first used for judicial purposes in Iraq, and only introduced into Egypt in the late 8th century, it is probable that the word *qimaṭr* doesn’t

relate directly to the Greek, but rather from the Syriac *qamṭriyā* (coming itself from the Greek).

- Muḥammad b. Masrūq is also known for having ordered the litigants not to approach him during a court case.

- Another *qāḍī* sent from Iraq in the early 830s was Hārūn b. ‘Abd Allāh al-Zuhrī. He was originally from the Ḥijāz but, for some considerable time, he had lived in Baghdad, where he had held judicial positions. Much like Muḥammad b. Masrūq, he reorganised the lawcourt in order to keep litigants and judicial auxiliaries away from him while he was supervising a case.

Initially, this new practice seems a little strange. Why did these two *qāḍī*-s tried to make the litigants stay away from them? The only parallel I could find is in the *Adab al-qāḍī* of al-Khaṣṣāf, an Iraqī and Ḥanafī jurist who wrote a bit later, around the middle of the 9th century. According to him, the crowd of litigants waiting to file a complaint before the *qāḍī* had to stay away from him, lest they should hear the oral exchanges between the *qāḍī* and the litigants whose case was under examination. Hārūn b. ‘Abd Allāh was not a Ḥanafī, but he had been a *qāḍī* in Iraq and Syria for several years before going to Fustāt. Therefore, we can probably conclude that on arriving in Fustāt, he adopted the same court organisation which was in use in the East at that time.

At the first sight, some of these new practices could appear simply as a result of the introduction of the Ḥanafī *madhhab* in Egypt. The last example (that is, the restructuring of the court by Hārūn al-Zuhrī) shows that in matters of judicial organization, innovation was less a question of *madhhab* than a question of regional practice. Indeed, Hārūn al-Zuhrī was not a Ḥanafī but a Mālikī: this suggests that the organization of the court that he promoted in Fustāt was not specifically a Ḥanafī point of view, but rather an Iraqī practice which was later theorized by the Ḥanafīs.

3. The limits of the central model and the local dynamics of innovation

New practices did not just come from Iraq, however, and it is possible to identify new practices which first developed in Egypt. Just as with earlier legal innovations, these practices still largely related to the centralization of the caliphate. But above all, these new local practices were possible because the *qāḍī*-s were now strangers in Egypt. I propose to call this phenomenon the “freedom of the stranger”.

3.1. *The freedom of the stranger*

To summarize this phenomenon: in the late 8th and early 9th centuries, *qāḍī*-s were more and more likely to be “outsiders”. They usually arrived in Egypt after they had been appointed as *qāḍī*-s, and they didn’t know anything or anyone in the country. Moreover, these *qāḍī*-s had been directly appointed by the caliph (who resided far away) and their position no longer depended on their having good relationships with the local authorities.

This situation, to a large extent, untied the hands of the *qāḍī*-s. It became possible for them to claim a greater independence from the Egyptian authorities. This can be seen clearly in a series of reports which illustrate the deterioration of the relationship between the *qāḍī*-s and the *ṣāhib al-barīd*, the chief of the local intelligence service. For example, one of the *qāḍī*-s of this period refused to let the *ṣāhib al-barīd* attend the debates at his court.

The relationship between the *qāḍī*-s and the governors also deteriorated. Right up until the last decade of the 8th century, incoming *qāḍī*-s were still supposed to visit the governor when they arrived in Fustāṭ. These visits were largely symbolic: they represented the symbolic submission of the judge to the ruler and to the political order. This practice stopped abruptly when Muḥammad b. Masrūq arrived as a *qāḍī*, but refused to comply with this custom. All this suggests that *qāḍī*-s were using their new position to enhance their autonomy, and to develop a specific judicial field distinct from the local authorities.

On the other hand, these outsider *qāḍī*-s had new concerns: precisely because they were “outsiders”, they could no longer rely on the traditional social networks. Yet, they couldn’t do their job without the collaboration of the Egyptian people. They had, therefore, to invent new ways of dealing with the people. I suggest that this is the main reason for one of the most important innovations of the period: the invention of professional witnesses, that is the restriction of witnesses to a limited group of people officially accepted by the *qāḍī*.

3.2. *Judicial innovation in Egypt*

It is usually assumed that the development of professional witnesses occurred simultaneously in several provinces in the early 9th century. Nevertheless, Claude Cahen remarks that a province as central as Iraq kept no record of professional witnesses. In the course of my research on the Iraqi judgeship, I have been unable to find evidence of any professional witnesses before the 10th century, that is more than a century after the institution developed in Egypt.

Let's consider briefly the reform of taking testimony in Fustāt:

- Ghawth b. Sulaymān, in the late 8th century, represents the first step in the invention of professional witnesses. He is the one who introduced from Iraq the concept of making covert enquiries about witnesses.

- Another step is the introduction of the position of “*ṣāhib al-masā'il*” by the Egyptian al-Mufaḍḍal b. Faḍāla in about 790. From then on, this official investigator was responsible for the covert inquiries being made about witnesses. It is possible that this position had existed in Iraq previously, since a *qāḍī* from Kūfa in the late Umayyad period reportedly had such an assistant.

- The same al-Mufaḍḍal b. Faḍāla, moreover, established a group of ten witnesses who were ordered to assist him at court. Other people could still testify, however; but, this new practice was considered strange enough to unsettle the Egyptian people.

- The last step was to limit witnesses to a small number of individuals: in 793, the *qāḍī* Muḥammad b. Masrūq set this up and, a few years later, the *qāḍī* al-'Umarī confirmed this reform by registering an official list of witnesses.

According to Baber Johansen, this reform was carried out as a part of Abbasid centralization, in order to make the *qāḍī* and his administration exclusive representatives of the caliphs. This explanation would be convincing if each *qāḍī* had brought with him (from outside) his own team of witnesses. However, a closer examination of the professional witnesses reveals that they usually came from amongst local Egyptian people. It is possible to propose an alternative explanation for this reform: I would suggest that the reform intended to develop a new kind of judicial network, in order to replace the old social network on which previous *qāḍī*-s had relied. Incoming *qāḍī*-s didn't know the local networks nor the reliability of the indigenous people, and because of their general ignorance of local issues, they were probably more vulnerable to the pressure of local groups. So the *qāḍī*-s – instead of having each one integrate himself into the local network whenever they were appointed – preferred to develop their own limited network, independent from the ‘real’ local society, which their successor could then inherit from them, thus saving them from the long process of building up their own network.

If I am not mistaken, the fact that *qāḍī*-s were sent from outside also encouraged completely new local practices. And it worked: one of the striking features of al-Kindī's book is the deep resentment the Egyptian *wujūh* held against these “foreign” *qāḍī*-s who, with their reforms, undermined the social

position of the élites and eventually destroyed the networks on which their socio-political domination relied.

Conclusion

In conclusion, I would like to underline two things:

- First, this example of new judicial practices clearly illustrates the complex dynamics of innovations. Some would certainly argue that the Iraqi influence on Egypt was stronger than the Egyptian influence on Iraq. This is true, in a way, but since we can clearly see ideas flowing both ways, I'd rather talk of "interaction" between the provinces. The paradox is that the process of centralization could also give the first impulse for local innovations.

- Second, what these cases can tell us about the way Muslims regarded innovation is very interesting. Most of the new practices introduced in Fustāṭ at the turn of the 9th century were rejected by many people, if not by the majority. The *qāḍī*-s responsible for these changes were quite or very unpopular. There is little doubt, therefore, that their innovations were regarded as *bid'a*-s by their contemporaries, that is, bad innovation. However, a century and a half later, when al-Kindī was writing, these practices had been totally accepted. They were no longer seen as *bid'a*-s, but rather as *awā'il* ("first" occurrence of a phenomenon): the very term used to describe them no longer had any negative connotation.