

## The Qadis' Justice according to Papyrological Sources (Seventh–Tenth centuries C.E.)

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### Introduction

Narrative sources provide a vivid and colorful picture of the history of the judiciary. Since the edition of al-Kindī's *Akhbār al-quḍāt* in the early twentieth century (al-Kindī 1912)<sup>1</sup> followed forty years later by the publication of Wakī's *Akhbār al-quḍāt* (Wakī 1947-1950), historians have relied almost exclusively on this type of biographical literature to reconstruct the history of early Islamic judgeship. Documentary evidence was not taken into account by either Émile Tyan in his seminal study of judicial organization in Islam (Tyan 1960) nor Wael Hallaq half a century later (Hallaq 2005). Documentary sources are indeed lacking for most of the Islamic empire in its formative period, and narrative sources are undeniably useful to recreate the image of the judiciary as it was seen by Muslim scholars of the ninth and tenth centuries C.E. Furthermore, this image contains real evidence about the early period. As Fred Donner argued, Muslims appear to have kept early records of their officials and administrators, including qadis (Donner 1998: 167-8). The genealogy of al-Kindī's book confirms that his chronicle of Egyptian judgeship is basically an expansion of a list which formed the bulk of a chapter on qadis in Ibn 'Abd al-Ḥakam's *Futūḥ Miṣr* (Tillier 2012: 10). Problems in the interpretation of these narrative sources have long been raised, however, especially for the seventh century. Apparent contradictions in Wakī's text led historians to disqualify his reports concerning the pre-Umayyad period (Tillier 2009: 68-9). Moreover, al-Kindī himself is unsure of the chronology of early Egyptian judgeship, and provides two different versions of its history before 60 A.H. (679-80 C.E.) (al-Kindī 1912: 300-311). The exact duties of the first "qadis" are usually omitted from literary sources, and it is uncertain whether they were actual judges who adjudicated and issued binding decisions, or rather some kind of religious advisers and mediators (Hallaq 2005: 34ff; Tillier 2009: 74-5).

The way in which ninth- and tenth-century authors managed their lack of confirmed knowledge about the early period is linked to a wider problem, which is that their narratives constitute a literary discourse on the judiciary. Narratives about the Umayyad qadis were not designed to describe judges' lives or practices, but rather to record *exempla* within the broader context of the early formation of Islamic law. One of the main materials they drew upon was non-prophetic hadith recording authoritative deeds or opinions of the generations of the

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<sup>1</sup> The edition we refer to is that of Rhuvon Guest. Another edition had been proposed a few years earlier by Richard J. H. Gottheil: *The History of the Egyptian Cadis as Compiled by Abū Omar Muḥammad ibn Yūsuf ibn Ya'qūb al-Kindī/Kitāb al-quḍāt alladhīna walū qaḍā' Miṣr*. Paris-Madīnat al-Rūmiyya al-'uzmā [Istanbul]: Paul Geuthner, 1908. Guest's edition has since then been regarded as the standard one.

Companions and the Successors. Therefore, the content and scope of early biographies of qadis do not fundamentally differ from non-canonical hadith collections such as the *Muṣannaḥs* by ‘Abd al-Razzāq al-Ṣan‘ānī (d. 211/827) and Ibn Abī Shayba (d. 235/849). The quest for authoritative judicial precedents explains why a biography such as Shurayḥ’s, in Wakī‘’s *Akhbār al-quḍāt*, is nearly two hundred pages, and contains repetitions and contradictory statements (Wakī‘ 1947-1950, 2: 189-400). Furthermore, one of the obvious purposes of this biographical literature is to show the continuity of Islamic judgeship since the early conquest, as well as to provide a historical basis for its relationship with the government and the law. The reconstruction of qadis’ history in the form it reached us dates from the second Abbasid period, after a new political and religious order was established following the end of the *miḥna*, the inquisition through which the caliphate tried to impose the doctrine of the created Qur’an on scholars (between 218/833 and 234/848 or 237/852). Relationships between scholars (including qadis) and rulers had been subjected to tremendous ordeal, and the process leading to this new order had to be explained, understood and justified.<sup>2</sup>

Documentary sources directly relating to Islamic judgeship are scarce, and biographical dictionaries will certainly remain essential. It is nevertheless necessary to compare the picture they provide with the scattered documentary evidence of Arabic papyri that have come to light especially (but not only) in Egypt. This documentation only provides a partial image of the judiciary. Its availability depends on accidental discoveries, and covers only a few areas, mainly in Upper Egypt.<sup>3</sup> As a matter of fact, narrative and documentary evidence appear to mirror different realities. Whereas biographies of qadis depict (retrospectively, and to a certain extent only) the judicial situation in a large city like Fustat, papyri usually provide an account of day-to-day reality in small Egyptian towns.

In this paper, I shall attempt to piece together what information can be gathered about the institution of the qadi in Egyptian papyri until the tenth century C.E. Due to the scattered and fragmented nature of these papyri, the picture reconstructed from such evidence should complement—rather than replace—narrative sources. However, these Egyptian papyri offer a vision of the judiciary that may reveal historical tendencies not always apparent in literary sources.

## 1. The qadi, absent from Umayyad papyri?

Judicial institutions represented in the Umayyad papyri are different from the qadis’ courts as described by the literary sources. During the Sufyānid period (41-64/661-684), Greek papyri found in Edfu (the so-called dossier of Papas) show that justice in the Thebaid district was still being dispensed by either the Christian *dux* (Ar. *amīr*) residing in Antioe or his representative, the *topoteretes*. At a local level, Christian pagarchs (Ar. *ṣāḥib al-kūra*, head of a rural district or *kūra*) were the main judicial authority (Tillier 2013: 21). During the Marwānid period (64-132/684-750), the main judicial officials attested in the papyri are local pagarchs and governors

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<sup>2</sup> On this issue, see Tillier 2017: 157-159.

<sup>3</sup> More generally, see Bagnall 1995: 8-11; Sijpesteijn 2013: 2.

of Fustāt as documented by the famous dossier of Qurra b. Sharīk (r. 90-96/709-714).<sup>4</sup> Until the last two decades of the Umayyad period, pagarchs mentioned in judicial documentation are all Christians and therefore cannot be assimilated to qadis. From the 720s C.E. onwards, Muslim pagarchs begin to appear in Coptic papyri, having the same legal responsibilities as their Christian predecessors.<sup>5</sup> At the level of a village like Jēme, in Upper Egypt, litigants more often solicited their representative (Muslims as well) for adjudication of their disputes. Both the pagarch and his representative bear the title of *amīr* in Coptic sources, however, and that of *qāḍī* is never attested (see *P.KRU* 42, in MacCoull 2009:128; Schiller 1953: 344, 345). Likewise in Palestine, the only local judge who appears to be a Muslim, in the late seventh century C.E., is an official from Khirbet el-Mird called 'Umar b. 'Ubayd Allāh (*P.Mird* 18). His title does not appear in the papyrus, however, and his assimilation to a qadi would be speculative (Tillier 2017: 81-83).

No qadi appears nominally in the Umayyad papyri, and no document dating from this period can be identified as having been issued by a qadi's court. Is this absence of mention of any qadi in Umayyad documents purely accidental? Or could we suppose that documents issued by/for qadis have been kept less diligently than those issued by governors and pagarchs? Should we believe that literary sources, which consider the office of qadi as a creation of the Medinese caliphate—or, for the most critical traditions, of the caliph Mu'āwiya (r. 41-60/661-680) (see Tillier 2009: 68-9)—, projected on the early period an institution that actually developed later?

This last hypothesis was recently favored by Fred Donner. Drawing on the absence of any occurrence of the term *qāḍī* in first/seventh-century papyri, Donner argues that its emergence is typical of a wider “*qur'anization*” of the politico-religious terminology which occurred in the second/eighth century. “The ruler seems to have initiated a new position or office, designated by the term *qāḍī*, to handle judicial procedures that heretofore had been part of the duties of a governor” (Donner 2011: 86). In other words, the qadi was an institutional innovation from the eighth century C.E. Donner is certainly correct when he argues that the title of *qāḍī* reflects *qur'anic* rhetoric, and we may doubt that the term was adopted as early as literary sources claim. However, it should be noticed that early Arabic papyri were reluctant to use official titles, and individuals were usually called by their names only. Arabic letters from Qurra b. Sharīk never mention that the sender is the provincial governor, and his official title is only given in Greek and Coptic papyri.<sup>6</sup> Furthermore, would the (relatively) late invention of this title rule out the possibility that the *function* of qadi existed previously?

No papyrus or any literary source refers to a qadi in Upper Egypt before the Abbasid period; presumably no qadi was appointed in secondary towns of the Egyptian landscape under the Umayyads, which could be related to the absence of large groups of Muslims. What was the situation in Umayyad main cities? Should we imagine that dispensing justice was a prerogative of the sole governor? Or should we abide by later literary sources which claim that the judiciary was already partly delegated to lower judges (whether they were referred to as qadis, as mentioned above, is another question) in the second half of the seventh century? Literary

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<sup>4</sup> On Qurra b. Sharīk, see al-Kindī 1912: 63-66; C.E. Bosworth, “Qurra b. Sharīk”, in *The Encyclopaedia of Islam, Second edition*, 5: 500; Lammens 1908: 99-115; Abbott 1938: 66ff; Abū Šafiya 2004: 27-57.

<sup>5</sup> See for example Wilfong 2002, 127.

<sup>6</sup> See *P.Lond.* IV. I am thankful to Petra Sijpesteijn, who first drew my attention to this phenomenon. On the titles of early Islamic provincial governors, see Morelli 2010.

sources state that qadis were operating in Fustāṭ since 23/643 (Tillier 2012: 24) and in Alexandria since the end of the seventh century C.E. (Tillier 2012: 23). However, edited documents are still silent about this issue. None of them bear any mention of “qadis” in both cities during the Umayyad period. The significance of this absence should not be overestimated, for two reasons. Firstly, very few papyri discovered in Fustāṭ have been edited to date.<sup>7</sup> Secondly, the absence of judiciary documents issued by Fustāṭ's court does not mean that no such court existed, and this is the reason why we must look at what literary sources tell about the use of documents by Fustāṭ's qadis.

In his *Akhbār quḍāt Miṣr*, al-Kindī (d. 350/961) says little about the qadis' use of written documents during the Umayyad period. However he systematically mentions the names of scribes (*kuttāb*) working at Fustāṭ's court when he happens to know them. The earliest scribe he names was employed by qadi Tawba b. Namir al-Ḥaḍramī (in office 115-120/733-738) (Kindī 1912: 343). Later, Ibn Ḥajar al-ʿAsqalānī (d. 852/1449), who probably had access to other sources, finds mention of earlier scribes. The earliest, ʿAbd al-Malik b. Abī l-ʿAwwām, served qadi ʿAbd al-Rahmān b. Ḥujayra al-Khawlānī (in office 97-98/716-717) (Ibn Ḥajar 1998: 215). Al-Kindī heard also about Yaḥyā b. Maymūn al-Ḥaḍramī's scribes (105-114/724-732), who had been the subject of complaints (al-Kindī 1912: 340), but he does not mention their names. No single scribe is named during the period between 98/717 and 114/732 (see Tillier 2011: 373-9). No scribe has been attested in Fustāṭ before 97/716, and literary evidence suggests that this legal profession did not develop systematically before the 720s, or even the 730s.

Could the absence of judicial staff specializing in preparing documents until a relatively later period—at least later than Qurra b. Sharīk—explain why no qadi is ever mentioned in the Umayyad papyri? This hypothesis deserves closer examination. If the qadis of Fustāṭ did not feel the need for scribes during the Sufyānid and early Marwānid periods, could it be because the amount of documents issued by them did not require any assistance from scribes? The first qadi's *dīwān* (a word that should probably be understood as “archives”, see Hallaq 1998) known from literary sources was founded in 118/736 in order to administrate pious foundations (al-Kindī 1912: 346). According to al-Kindī, the turning-point in the qadis' use of documents should be placed not before the end of the eighth century C.E. Faithful to the *awā'il* tradition (see Nef and Tillier 2011: 9-10), al-Kindī follows the “inventors” of new practices, and here is what he remarks about qadi al-Mufaḍḍal b. Faḍāla (in office 168-169/785-786, then 174-177/790-793):

Al-Mufaḍḍal b. Faḍāla is the first qadi who extended the registers (*sijillāt*), and copied in them parchments (*kutub al-siḥā'*)<sup>8</sup>, testaments (*waṣāyā*) and [acknowledgements of] debts (*duyūn*). Before him it did not happen that way. (Al-Kindī 1912: 379).

Of course individuals had been recording their transactions or wills well before that date (Sijpesteijn 2009: 125). They certainly presented them in court—even though written

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<sup>7</sup> About 500 papyri, among which a few ones can be dated to the Umayyad period, were discovered during the excavations of Iṣṭabl ʿAntar carried on by Roland-Pierre Gayraud in the 1980s and the 1990s. Their edition is currently prepared by Sobhi Bouderbala at IFAO.

<sup>8</sup> “The documents of the pious foundations (*kutub al-aḥbās*)” in Ibn Ḥajar 1998: 438.

documents were not considered as evidence in theory—and the tribunal's scribes probably issued written decisions. According to this extract, however, *administrative* use and record keeping of written documents was limited. Qadis did not systematically register documents that were submitted by litigants. It is likely that the use of written documents developed progressively in Fustāt's court. Only under the Abbasids did the qadi's court achieve its transformation into a judicial organization founded upon written practices. This does not mean that qadis did not play a significant role before that. The qadi's decisions could be binding without multiplying documents, and even without written judgments. However, it shows that the Umayyad qadis of Fustāt—whatever their original title and their actual prerogatives—were at the head of a modest judicial structure which could not be compared with the much more developed administration of the governor.

## 2. The documentary birth of the qadi

### 2.1. First documentary traces of the qadi

The first known occurrence of the word *qādī* in a papyrus supposedly dates from the end of the Umayyad period. A letter regarding a debt, written in the 730s or 740s and edited by Petra Sijpesteijn, apparently mentions a *qādī* (*sic*) (*P.MuslimState* 26).<sup>9</sup> According to this letter, he is involved in a commercial network and does not seem to play any judicial role regarding the debt (Sijpesteijn 2013: 204). Despite numerous spelling “mistakes”<sup>10</sup> which give an air of uncertainty about the reading and interpretation of the papyrus, it might indeed be a qadi who held office in Fustāt (Sijpesteijn 2013: 403). This papyrus is one potential source containing the use of the title *qādī* at the end of the Umayyad period. However, it does not allow us to draw any other conclusion than the simple existence of commercial relationships between a qadi of Fustāt and a private individual in the Fayyūm.

Apart from this single mention, the interpretation of which is difficult, the appearance of the term *qādī* in papyri dates only from the Abbasid period. Several papyri give account of growing scriptural activities of Fustāt's qadis. A short summons, issued by Ghawth b. Sulaymān, refers to a qadi of the same name (in office 135-144/753-761, then 167-168/783-785; see al-Kindī 1912: 356ff) (Tillier 2014: 414). Ghawth b. Sulaymān is also mentioned in an official letter, written by governor Mūsā b. Kaʿb (r. 141/758-9), which also attests to the historical existence of the *baqt*, an early treaty between Egypt and Nubia (Hinds and Sakkout 1981: 222).<sup>11</sup> Another document registers a testimony presented before his immediate successor, al-Mufaḍḍal b. Faḍāla (Tillier 2014: 423)—this is precisely the same qadi whom al-Kindī regards as being responsible for the development of scriptural administration in Fustāt (see above). Finally, a document, found in an early ninth-century stratum during the excavations of Iṣṭabl ʿAntar in Fustāt, mentions twice the “[*qādī*] ʿĪsā b. al-Munkadir” (in office 212-214/827-829).<sup>12</sup>

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<sup>9</sup> I am grateful to Petra Sijpesteijn for sending me her thesis before its final publication.

<sup>10</sup> It is also necessary to mention that in the context of a debt issue, the root *q.d.y.* could mean “settle” the debt.

<sup>11</sup> See also Plumley 1975: 246. However Plumley reads by mistake “ʿAwn b. Sulaymān”.

<sup>12</sup> This is *P.Fustat* n° 4182. Sobhi Bouderbala, who was so kind to show me this papyrus, is currently editing it.

## 2.2. *Fuṣṭāṭ* versus *Upper Egypt*

As we have already seen, during the Marwānid period (i.e. end of the seventh–first half of the eighth century), justice in Upper Egypt was mainly in the hands of pagarchs. However, Qurra b. Sharīk's papyri reveal that in a number of cases, especially in litigations with high financial stakes, litigants brought their complaints directly to the governor of Fuṣṭāṭ, who in turn sent a judicial rescript to the litigants' pagarchs including conditional judgments. Even far away in his capital, the governor appeared to non-Muslim litigants as holding higher judicial authority than the pagarch—an opinion the governor himself would not have refuted (Tillier 2015). Rare documentary evidence from the early Abbasid period suggests that the situation was not very different in Fuṣṭāṭ.

The relationship between the governor of Fuṣṭāṭ and his qadi appears through Mūsā b. Ka' b's letter mentioning Ghawth b. Sulaymān (see above). It reveals a judicial structure in which the governor continues to appear as the highest authority within the province, with the qadi as his assistant. Let us examine more closely the context and content of this letter. A complaint was lodged before the sub-governor (*'āmil*) of Aswan, Salm b. Sulaymān, accusing the king of Nubia of imprisoning and mistreating two Muslim merchants (one of whom, at least, was of servile status). Salm b. Sulaymān asked Muḥammad b. Zayd—one of the captive merchants' masters—to produce testimonial evidence (*bayyina*) to prove his case. The claimant brought to the sub-governor's court several honorable Muslims (*'udūl*) who testified that the merchant had come to Nubia where he had been abused. The sub-governor of Aswan wrote then to the governor of Fuṣṭāṭ to inform him about the case, and sent him the claimant, Muḥammad b. Zayd. In his letter, the governor Mūsā b. Ka' b explains that he summoned Muḥammad b. Zayd at his arrival in Fuṣṭāṭ and heard him together with the king of Nubia's emissary, a man called Biṭreh (Peter). The governor did not judge the case himself, however. He states that he ordered the “qadi of Miṣr's inhabitants” (*qādī ahl Miṣr*), Ghawth b. Sulaymān, to consider the case (*an yanzura fī amri-him*), and that the latter rendered a judgment. The qadi ordered Biṭrehto release the merchant and his goods were he still alive, and if he was not, to pay a financial compensation (*diya*) of one thousand dinars (Hinds and Sakkout 1981: 222).

This letter dating from the beginning of caliph al-Manṣūr's reign reveals some of the characteristics of legal administration in Upper Egypt and in Fuṣṭāṭ. In Upper Egypt, the claimant does not lodge his complaint before a qadi but before a sub-governor who bears the title of *'āmil*. The latter gathers evidence provided by the claimant before writing to the governor of Fuṣṭāṭ. There was apparently no qadi in Aswan at that time, and as during the Umayyad period, sub-governors were responsible for dispensing justice in their districts. The main difference is that such sub-governors no longer assumed the title of *ṣāhib al-kūra* (the term in use in Qurra b. Sharīk's letters to designate the pagarch).<sup>13</sup> The governor of Fuṣṭāṭ was still regarded as the highest judicial authority of the province. Owing to the political nature of the case involving the king of Nubia, the *'āmil* of Aswan informs the governor and the latter decides to proceed with the case at a higher level. Although the governor begins by hearing the litigants, he subsequently decides to delegate the case to his qadi. According to al-Kindī, Ghawth b. Sulaymān had been appointed by the Egyptian governor Abū 'Awn (r. 133-136/751-

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<sup>13</sup> Petra Sijpesteijn noticed that the title of *'āmil* could already designate a “pagarch” at the end of the Umayyad period. Sijpesteijn 2013: 117, 120.

753) (al-Kindī 1912: 356).<sup>14</sup> The qadi of Fustāṭ was not yet considered a prominent figure appointed by the Abbasid caliph as a legal equivalent to the governor. He appears here as a mere assistant to the governor—what Schacht called a “legal secretary” when speaking about the Umayyad period (Schacht 1982: 25).

The “*baqf*” papyrus reveals a dichotomy between Upper Egypt, where justice was in the hands of ‘*ummāl*, and Fustāṭ where the qadi was probably dealing with daily legal affairs—and occasionally with more exceptional ones normally heard by the governor. As the same papyrus clearly shows, however, these different institutions were related to one another. Furthermore, a papyrus dating from the same period suggests that the office of provincial ‘*āmil* and that of the qadi were closer than one might think. This trilingual Greek-Coptic-Arabic papyrus, which dates from the early Abbasid period,<sup>15</sup> mentions a sub-governor of Ikhmīm and Ṭaḥṭā called Yazīd b. ‘Abd Allāh (unfortunately his official title has disappeared from both the Arabic and the Coptic versions of the document).<sup>16</sup> Among his tasks, this Yazīd b. ‘Abd Allāh was apparently in charge of dispensing justice, and the papyrus states that he heard a complaint against a tax collector (*P. Cair. Arab.* III 167).<sup>17</sup> According to al-Kindī, Yazīd b. ‘Abd Allāh held the position of sub-governor (*wālī*) of Ikhmīm in the 132/750s.<sup>18</sup> He subsequently became the scribe (Ibn Yūnus 2000, 1: 392), then the deputy (*khalīfa*) of qadi Ghawth b. Sulaymān in 140/757. Ghawth b. Sulaymān had to leave for a military campaign, and Yazīd b. ‘Abd Allāh took over his role as qadi of Fustāṭ until his death four months after his appointment (al-Kindī 1912: 360). Owing to his judicial experience, a provincial ‘*āmil* could occasionally attain the position of the qadi of Fustāṭ.

### 3. The spread of qadis’ courts in Upper Egypt

#### 3.1. Documents issued by courts: an Islamic jurisdiction in the Christian landscape

The development of the legal administrative structure and the increasing use of written documents and archives had an important impact on the historical documentation from the beginning of the ninth century C.E. onwards. After that date, the number of preserved private legal documents (intended to support a claim) increases rapidly, which also testifies to a stronger presence of Muslims in the Egyptian countryside (Sijpesteijn 2013: 111). Likewise,

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<sup>14</sup> Note that according to Ibn Ḥajar, he had been appointed by caliph al-Manṣūr (Ibn Ḥajar 1998: 300). But Ibn Ḥajar, who wrote much later than al-Kindī, is probably mistaken.

<sup>15</sup> According to Jelle Bruning, possible datings would be 132/late 749, 138/755 or 139/756 (Bruning 2014: 146–7).

<sup>16</sup> If Grohmann’s reading is correct, Yazīd b. ‘Abd Allāh is described as *ḥāfiẓ* [of the governor]. However this noun is not attested elsewhere as an official title. It is likely that it characterizes the office otherwise known as that of pagarch or ‘*āmil*. Jelle Bruning, who considers the word *ḥāfiẓ* as an official title, hypothesizes that Yazīd b. ‘Abd Allāh could have been appointed twice in Ikhmīm, first as *ḥāfiẓ*, and later as *wālī* or *qādī* (Bruning 2014: 147–8). However, this interpretation may ascribe too much weight to an otherwise fluid terminology. I am grateful to Arietta Papaconstantinou, who helped me with the Coptic version of the document.

Ikhmīm, about 300 km south of Fustāṭ, was the administrative center of a pagarchy (*kūra*) in early Islam. See G. Wiet, « Akhmīm », *EP*, I: 330. Ṭaḥṭā is about 35 km north of Ikhmīm.

<sup>17</sup> The Arabic version of this trilingual papyrus was first edited in Guest 1923.

<sup>18</sup> Ibn Yūnus, as quoted by Ibn Ḥajar in the fifteenth century, states that Yazīd b. ‘Abd Allāh was *qādī* of Ikhmīm (Ibn Yūnus 2000, 1: 392; Ibn Ḥajar 1998: 467). This title, which would be the only attestation of a qadi in a small town of the Egyptian landscape at this period, is doubtful. Whatever his duties, it is likely that al-Kindī is closer to historical truth when he speaks of him as a *wālī*. About this issue, see Tillier 2012: 24.

documents clearly issued by Muslim courts begin to appear. A lacunar papyrus dated *Sha' bān* 195/April–May 811 looks like the registration of a judgment concerning a succession. It is written at the order of a qadi named 'Amr b. Abī Bakr and ends with a list of witnesses (*P.Cair.Arab.* I 51).<sup>19</sup> Another unedited fragmentary document from the ninth century may also have been issued by a Muslim court—perhaps a judgment or a court report (*maḥḍar*)—if we consider the few readable expressions such as *wa-shahida la-hu* (“he testified in his favor”) or *wa-aqarra bi-hi* (“he confessed that”) (*P.Khalili* II 149). Documents also begin to refer to judicial practices. In a letter from the ninth century, the author asks the addressee to inform a man called Abū l-Ḥasan that his name should not be cited in the *maḥḍar*, the report of an event that could result in a legal procedure, or the report of a qadi's hearing (Sijpesteijn 2007: 180).

The best documented judicial papyri are not fragments of qadi's archives, however, but rather summonses sent to litigants, most of whom were discovered in al-Ushmūnayn in Upper Egypt (*Chrest.Khoury* I 79; *Chrest.Khoury* II 31 = *P.Vindob.Arab.* III 77; *Chrest.Khoury* II 32 = *P.Vindob.Arab.* III 76; *Chrest.Khoury* II 33 = *P.Vindob.Arab.* III 75).<sup>20</sup> The earliest papyrus of the series dates from the third/ninth or fourth/tenth century according to Raif G. Khoury's estimation:

In the name of God, the Merciful, the Compassionate. Praise be to the one God!

Thiyudir b. Kayl and Fenūfe b. Abrāse, residing in Abū Qolte, shall come before the court (*majlis al-ḥukm*) of al-Ushmūnayn, in order to submit to justice's requirements, God willing. (*Chrest.Khoury* I 78)

This kind of summons has no apparent signature and does not mention any qadi, but the phrasing makes it clear that it was issued by a Muslim court. If we consider legal literature that theorized the functioning of the qadi's court during the same period, similar notes could be replaced by clay seals (*tīna*) authenticating the provenance of the summonses, at least in Iraq (al-Khaṣṣāf 1978: 238, 245. Cf. al-Simnānī 1984, 1: 170, 173). At any rate, this series of summonses attests to the presence of a Muslim court in al-Ushmūnayn in the fourth/tenth century, and perhaps already in the third/ninth century.

The presence of a Muslim court did not mean that al-Ushmūnayn now had a majority of Muslim inhabitants. In papyrus *Chrest.Khoury* I 78, translated above, litigants who are summoned bear Coptic names. If procedural rules developed by *fiqh* were active in Upper Egypt, non-Muslims had to answer to the Muslim court, especially when facing a Muslim adversary. This is what happens in a later papyrus (dated fourth/tenth century according to Khoury, but perhaps later—Fatimid?—judging by some of its expressions), in which Christian litigants (Qufrā b. al-Qommoṣ, Fawāris b. Faḥr and Ibn Samāwīl) are summoned before the “sublime court” (*majlis al-ḥukm al-'azīz*) where they shall be brought face to face with the intendant (*khawlī*) Sulaymān al-Qolobbī, most probably a Muslim. The litigation shall be

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<sup>19</sup> No Egyptian qadi is known to bear the name of 'Amr b. Abī Bakr. It is noteworthy, however, that a qadi of Damascus bore this name at the time the document was written, between 183/799–800 and 194 or 195/809–811. See Ibn 'Asākir 1995, 43:547–51, and Ibn Ṭūlūn 1956: 14. As a hypothesis, the document could be a letter written to another qadi by the judge of Damascus rather than a judgement issued by an Egyptian qadi. On this letter-based procedure, see Hallaq 1999; Tillier 2010.

<sup>20</sup> For other summonses, see Tillier 2014: 419 (footnote 35).



decided according to “the noble Islamic law” (*al-shar‘ al-sharīf*) (*Chrest.Khoury* I 79). Although other documents from the fourth/tenth and fifth/eleventh centuries mention an increasing number of Muslim litigants, Christians do not disappear completely. In a fifth/eleventh century papyrus, a man called Dāniyāl is summoned before al-Ushmūnayn’s court to be brought face to face with his adversary, Balbeh (*Chrest.Khoury* II 33). Both of them appear to be Egyptian Christians.

It is thus possible to conclude that a Muslim court—most probably a qadi’s court—was established in al-Ushmūnayn in the third/ninth or the fourth/tenth century, when the town’s population was still largely non-Muslim. At that time al-Ushmūnayn had become one of the main Muslim garrisons of Upper Egypt. Al-Kindī mentions a *wālī l-ḥarb* (military governor) residing in this town when talking about events that occurred in 335/946, under the Ikhshīdids (al-Kindī 1912: 295). Since al-Kindī manifests little interest in the Egyptian landscape outside Fustāt, it is probable that the garrison existed before that date, and this permanent Muslim settlement may have justified the establishment of a qadi’s court. Al-Kindī also mentions merchants (*tujjār*) who complained about the *wālī* of al-Ushmūnayn (al-Kindī 1912: 295). We can speculate that the garrison attracted civil Muslim people, Arabs and converts,<sup>21</sup> and that it necessitated the installation of a legal system conforming to the now firmly established model of qadis’ courts.<sup>22</sup> This Islamic institution could still attract Christian litigants too, even when they were not confronted by Muslim adversaries—as shown by *Chrest.Khoury* II 33.<sup>23</sup> Incidentally, the fact that summonses sent to Christian litigants were written in Arabic, perhaps as early as the third/ninth century, suggests that an important arabicization of al-Ushmūnayn and its surrounding had already occurred.<sup>24</sup> When receiving such summons the addressee was supposedly able to read it or to find someone who was able to translate it. The judiciary system the Egyptian Christians had to submit to from time to time was not only Islamic but also Arabic.

### 3.2. Adab al-qāḍī in practice

The earliest court documents available from Upper Egypt are contemporary to the development of texts describing the rules regarding the organization and the procedures of the qadi’s court—a part of *fiqh* called *adab al-qāḍī*. The first preserved books containing detailed prescriptions about procedures are Ḥanafī works written by Iraqi scholars (Tillier 2009: 48). At the same period, prominent Egyptian scholars also composed chapters about procedural law, yet these were less detailed in respect to court organization than their Iraqi counterparts.<sup>25</sup> Practices reflected by judicial papyri cannot, therefore, be systematically compared to legal theory elaborated in the Egyptian province. However, judicial papyri echo some of the rules

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<sup>21</sup> Conversions to Islam in the Egyptian countryside are attested from the second/eighth century (see Sijpesteijn 2009: 128). They certainly increased in the third/ninth century. Various hypotheses have been considered for the rapidity of Islamization in Egypt, most of whom regard the third/ninth century as crucial. Lev 2012: 304–6.

<sup>22</sup> It is noticeable that Ibn Ḥawqal describes several towns of the Delta having a Muslim judge in the fourth/tenth century. See Lev 2012: 333–4.

<sup>23</sup> About the reasons why non-Muslims went to Muslim courts during the first centuries of Islam, see Simonsohn 2011: 178–91.

<sup>24</sup> According to Sophia Björnesjö, a few eighth-century letters show that some Christians understood Arabic in Upper Egypt as that time. Björnesjö 1996: §6.

<sup>25</sup> See for example al-Muzanī (d. 264/878) 1998: 393ff, and the *Mukhtaṣar* of al-Ṭahāwī (Ḥanafī, d. 321/933) n.d.: 325ff.

that we find in Iraqi legal literature. We have just seen that Egyptian summonses dating from the third/ninth or fourth/tenth century do not fundamentally differ from al-Khaṣṣāf's prescriptions. Other parallels between Egyptian practices and legal theory are noteworthy, some of them showing a high degree of standardization of Islamic procedures throughout the caliphate.

The series of summonses issued by al-Ushmūnayn's tribunal provide indications concerning the extent of the courts' constituency. Several defendants' places of residence are mentioned in these papyri: Abū Qolte (*Chrest.Khoury* I 78), Itlīdim (*Chrest.Khoury* II 31) and al-Rayramūn (*Chrest.Khoury* I 79). As for one of the claimants, Sulaymān al-Qolobbī, he was probably from a locality pertaining to Mellawī's district (*Chrest.Khoury* I 79). These villages were respectively at a distance of 10, 13, 5 and 8 km from al-Ushmūnayn (see map bellow). This indicates that the qadi of al-Ushmūnayn's jurisdiction extended to the neighboring villages. In Iraq, the Ḥanafī jurist al-Khaṣṣāf considered that a qadi's district encompassed all the territories that were within walking distance of half a day, i.e. about a distance of 20 km (Tillier 2009: 297-8). The theory elaborated by Iraqi jurists appears to correspond to actual judicial practices in Upper Egypt.

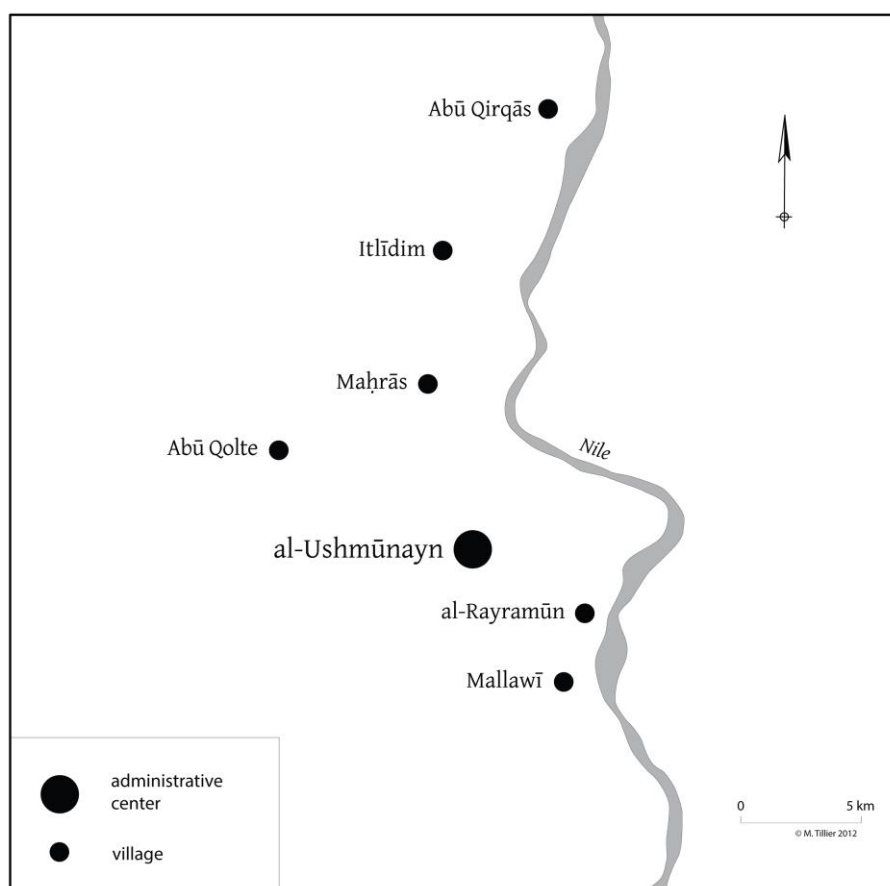


FIGURE 2.1. *Al-Ushmūnayn and its area, ninth-tenth centuries C.E.*

Another document suggests that rules applied in Fuṣṭāṭ regarding the reception of litigants in court also applied to those in Upper Egypt. In a petition of unknown origin, approximately dating from the second/eighth century or later according to Werner Diem, a claimant addresses

an anonymous *qāḍī* to lodge a complaint against one of his sisters. After the death of their mother, he argues, his sister seized rental incomes which should have been divided between the legal heirs. It is possible that the claimant had already complained before the qadi and produced witnesses who had testified in his favor. For some unknown reason, the qadi has not yet rendered his judgment, and the petitioner urges him to give “everyone his due” ([...] *kull dhī ḥaqq ḥaqqā-hu*) (CPR XVI 3). In later literary sources, similar petitions are usually called *qiṣṣa-s* or *ruq‘a-s*. Wakī‘ mentions the use of such petitions in Iraq (Baṣra) from the 140s/757s onwards (Wakī‘ 1947-50, 2: 58, 70).<sup>26</sup> In Egypt, the first mention of such petitions by al-Kindī relates to the 790s, under qadi al-Mufaḍḍal b. Faḍāla (al-Kindī 1912: 379)—the same qadi who is known for having developed the use of written documents in Fuṣṭāṭ’s court (see above).<sup>27</sup> According to al-Kindī, litigants brought their petitions to the court and submitted them to the qadi (al-Kindī 1912: 379). Later legal theory recommends that such petitions be collected by the qadi’s scribe at the beginning of every hearing (al-Khaṣṣāf 1978: 53, 123). Another fourth/tenth-century paper could well be a petition. The anonymous author appeals to a *qāḍī*, apparently requesting an interview in order to “inform him about his need”. The note is partially damaged, however. Rather than representing a claim against an adversary, this petition could concern another of the qadi’s duties, like management of properties (*Chrest.Khoury* I 81).

Other documents testify that qadis’ courts in Upper Egypt became the center of notarial practices. From the fourth/tenth century onwards, some private legal documents bear certification marks, like *ṣahḥa* or *ṣahḥa dhālika* (“it is authentic”), written by a qadi or his scribe. Such marks certified the authenticity of the document and its legal value, enabling their production as evidence in later litigations (CPR XXVI 10, 40).<sup>28</sup> From then on, it seems that not only Muslims, but also Christians came to the qadi’s court to have their documents authenticated and have Muslim witnesses (perhaps attached to the tribunal) testify to the content of their deeds (CPR XXVI 10). Unlike other practices mentioned previously, such certification marks are not discussed in Iraqi Ḥanafī law. On the contrary, a tenth-century jurist like al-Jaṣṣāṣ (d. 370/980) expresses some reluctance to the view that qadis could act as notaries and register evidence in anticipation of further litigations. For example, a qadi should refuse to write in advance a letter in which he would register testimonies about an agreement in case litigations occurred in the future (al-Jaṣṣāṣ, in al-Khaṣṣāf 1978: 428). Whether this refusal applies also to certification marks is unclear, but neither he nor al-Khaṣṣāf ever mentions such a practice. We can therefore wonder whether registration of legal documents did not begin as a specifically Egyptian practice.<sup>29</sup>

The development of the classical judicial system in Upper Egypt appears finally through documents that reflect the way courts were now part of a wider legal system led by the ‘*ulamā*’.

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<sup>26</sup> As for Kūfa, the same author relates that the much earlier qadi Shurayḥ (late seventh century) did not accept such written petitions. Wakī‘ 1947-1950, 2: 307.

<sup>27</sup> Later, Ibn Ḥajar mentions a *ruq‘a* under qadi Khayr b. Nu‘aym (in office 133-135/751-753). However this is not the same kind of petition. In the anecdote reported by Ibn Ḥajar, a defendant is unable to counter his adversary’s claim and appeals to the qadi’s pity on a note that he gives him during the hearing (Ibn Hajar 1998: 155).

<sup>28</sup> On this practice, see Grohmann 1924: 19; Grohmann 1954: 122-3.

<sup>29</sup> The question of the origins of this practice is still unanswered. Apparently no Greek nor Coptic document is known for bearing such registration marks by a court, neither before nor after the Islamic conquest of Egypt. I am grateful to Alain Delattre, whose expertise I solicited on that matter.

A fourth/tenth-century paper of unknown origin appears as the draft of a demand for a fatwa regarding a judicial case.<sup>30</sup> The addressee (a “*shaykh*”, probably a *faqīh*) is asked about a man who lodged a complaint against his aunt in court (*majlis al-ḥukm*), accusing her of selling wheat he had left in her care as deposit. The aunt confessed (*i'tarafat*) and the judge (*ḥākim*) condemned her and wrote a judgment in favor of the claimant. However, the aunt died before she repaid her debt. In his demand, the author asks the mufti whether according to the law (literally “knowledge”, *ilm*) the judge must demand her heir to reimburse the wheat in cash or in kind (*Chrest.Khoury* I 82-83). *Ḥākim* is regularly used in legal literature as a generic term for “judge”. As the author of the demand asks both a general and theoretical question, it is likely that a qadi is meant here. It is possible that this demand for legal opinion was issued by the judiciary itself, and that its author was no other than a qadi (perhaps with the help of his scribes) concerned about dispensing the correct decision.

### Conclusion

So far, no firm documentary evidence attests to the existence of qadis in Egypt during the Umayyad period. In this respect, papyri offer a picture of the early judiciary quite different from that given by literary sources for the main Egyptian cities. The absence of documents mentioning qadis in Fustāṭ does not however imply that this institution did not exist there, and it is possible that future research on Fustāṭ's papyri will change this picture. In the meantime, literary evidence suggests that under the Umayyads, the qadi's court in Fustāṭ had a weak administrative structure which gradually developed its use of written documents and archival practices. Outside Fustāṭ—and perhaps a major city like Alexandria—it is likely that the qadi's court did not yet exist in Egypt.

The situation changes with the early Abbasids. Arabic papyri mentioning qadis of Fustāṭ appear in the 750s. The multiplication of references to qadis in subsequent documents, which we consider significant, probably reflects an increase in the production of documents by and for Fustāṭ's court, and could also testify to a reinforcement of the qadi's position. Mūsā b. Ka'b's letter, dating from 141/758, suggests that the qadi of Fustāṭ was now regarded as an important judicial institution. It also shows, however, that the qadi was still an assistant of the provincial governor, and that justice was first and foremost a prerogative linked to political institutions.

In Upper Egypt, the nature of legal administration also changed toward the end of the Umayyad or the early Abbasid period. Justice was no longer dispensed by pagarchs, but by Muslim administrators who replaced them. These administrators were now called  $\alpha\mu\pi\rho\alpha$  or *āmil*—in Coptic and Arabic papyri; *wālī* according to literary sources—, a title that reflects the complete integration of these administrators within a Muslim administrative structure. Since justice was rendered by these sub-governors—whose legal skills could eventually lead to an appointment as qadi in Fustāṭ—judicial administration still appeared as an expression of political authorities, that of the governor and his delegates.

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<sup>30</sup> The paper presents two versions of the same text on the recto and the verso, almost identical although written by two different hands. This suggests that the claimant prepared two versions of the text that he eventually sent to the mufti.

Qadis and their tribunals are only mentioned later in Upper Egypt, in the third/ninth century at the earliest. Henceforth, series of documents issued by local courts testify to the establishment of qadis who operated according to rules similar to those simultaneously written down by *fuqahā'*. Whether these courts were completely autonomous from political institutions is difficult to tell. What is obvious, however, is that they followed legal models shaped by private Muslim scholars and were no longer subjugated to administrative roles of sub-governors. Three or four centuries after the conquest of Egypt, the model of Islamic judiciary promoted by narrative sources was now spreading into the Egyptian countryside.

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