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The Jurisdictional Limits of *Qāḍī* Courts during the Umayyad Period

Steven JUDD

Abstract: This paper examines the function and jurisdiction of the *qāḍī* during the Umayyad period, focusing on the limits of the *qāḍī*'s power and on his relationship to other power holders in Umayyad society. Based on an examination of biographies of more than seventy Umayyad *qāḍī*-s, this paper demonstrates that *qāḍī*-s had unquestioned jurisdiction over marriage, divorce, inheritance, and other "family law". Neither local elites nor political leaders were above the *qāḍī* in such cases. However, the *qāḍī* had no jurisdiction over cases involving rebels and heretics. Nor did they determine the division of spoils. These examples suggest that the jurisdictional limits of *qāḍī* courts were well-established during the Umayyad period.

Keywords: Umayyads, Qadi, Courts, arbiter, Marriage and divorce, Inheritance, Heresy.

Résumé : Cet article examine les fonctions et les compétences du *cadi* à l'époque omeyyade, en s'interrogeant sur les limites de son pouvoir et sur sa relation à d'autres autorités de la société omeyyade. Fondé sur un examen des biographies de plus de soixante-dix *cadis*, l'article démontre que ceux-ci avaient une compétence incontestée sur les affaires de mariage, de divorce, d'héritage et relevant d'autres domaines du « droit de la famille ». Ni les élites locales, ni les dirigeants politiques n'étaient au-dessus du *cadi* dans de tels cas. Toutefois, le *cadi* n'avait pas juridiction sur les cas impliquant les rebelles et les hérétiques. Ils ne pouvaient pas non plus se prononcer sur la division du butin. Ces exemples suggèrent que les limites juridictionnelles des tribunaux de *cadis* étaient bien établies à l'époque omeyyade.

Mots-clés : Omeyyades, *cadi*, tribunaux, arbitre, mariage et divorce, successions, hérésie.

المُلخَص : تعالج هذه المقالة وظيفة القاضي وصلاحياته في العصر الأموي، تركيزاً على حدود سلطة القاضي وعلاقته مع أصحاب السلطة الآخرين في المجتمع الأموي. واعتماداً على دراسة تراجم أكثر من سبعين قاضٍ أموي تظهر هذه المقالة أن القضاة كانوا يتمتعون بصلاحيات معترف بها على كل القضايا التي تخصّ الزواج والطلاق والإرث وغيرها من الأحوال الشخصية. وفي هذه الأمور لم يكن أحد من النخب المحليّة ولا الحكام السياسيون فوق سلطة القاضي. إلا أن محاكمة المتمرّدين والهرطقة لم

تدخل في صلاحيات القضاة، كما أنهم لم يقدرُوا على توزيع الغنائم. فتظهر هذه الأمثال أن حدود صلاحيات محكمة القاضي كانت ثابتة في العصر الأموي.

الكلمات المحوريّة : دولة بني أمية، القضاة، مجلس القضاء، حَكَم، الزواج والطلاق، وراثّة، هرطقة.

The *qāḍī* is one of the few officials in early Islamic administration consistently mentioned in the sources. Medieval chroniclers, such as Ḥalīfa b. Ḥayyāt (d. 240/854) and al-Ṭabarī (d. 310/923) typically list those who served as *qāḍī*-s in important cities during the Umayyad period, along with those who acted as governors and heads of the police (*ṣurṭa*).¹ In the chronicles, the *qāḍī*ship stands as a mark of administrative continuity from the time of the Rāšidūn forward. Despite the longevity of the *qāḍī*ship and its obvious importance both for administrative order and for the articulation of Islamic legal doctrine, little is preserved about the actual functioning of the *qāḍī*ship during the Umayyad period. Archival records have not survived, assuming such records ever existed. Nor are other judicial documents or procedural manuals from the Umayyad period extant. Consequently, analyses of the Umayyad era *qāḍī*ship must rely on later sources, written during or after the ‘Abbāsīd period. These sources bring with them a variety of assumptions about the nature of the *qāḍī*ship, derived from later authors’ understandings of the origins of more formalized ‘Abbāsīd-era institutions. These assumptions have informed, and in some cases distorted, both medieval and modern discussions of the *qāḍī*ship during the Umayyad period. Moreover, later ‘Abbāsīd-era discussions of the jurisdiction of the *qāḍī* courts occurred after the emergence of the *maẓālim* courts, which could offer an alternative legal venue and whose functions could overlap with those of the *qāḍī* courts. As a result, these later treatments of the *qāḍī*ship could project ‘Abbāsīd-era delineations of authority between the two court systems onto the Umayyad period, when only one of the two institutions existed, at least formally.

The discussion that follows will focus narrowly on jurisdictional boundaries, in an effort to delineate the extent of the *qāḍī*’s legal jurisdiction during the Umayyad period. It begins with a summary of traditional views of the *qāḍī*’s function and jurisdiction. Then it turns to a more focused examination of cases described in the sources, offering insights into the extent of the *qāḍī*’s jurisdiction based on cases they purportedly heard. Finally, it will offer a more nuanced understanding of the jurisdictional limits of the *qāḍī*’s authority and demonstrate the real power *qāḍī*-s could wield.

Modern scholarship has produced two divergent, though occasionally overlapping views of the nature and origin of the early Islamic *qāḍī*ship. The first interpretation treats the *qāḍī* as essentially an Islamized version of the tribal *ḥakam*. In Arabian traditional society, *ḥakam*-s served as arbitrators to resolve disputes within their individual tribal communities. They were respected for their wisdom, fairness, and understanding of tribal customs. Perhaps their skills as negotiators were as important as their knowledge of customs, since their authority required the consent of those between whom they judged and they lacked any coercive capacity to impose their decisions. The consequences of defying the *ḥakam*’s judgments are not specific. Presumably, those who reneged on promises to accept arbitration while simultaneously showing disrespect for a prestigious member of the community would suffer damage to their honor and, in extreme cases, might inspire

1. Ḥalīfa b. Ḥayyāt, *Ta’rīḥ*; al-Ṭabarī, *Ta’rīḥ al-rusul wa-l-mulūk*.

retribution from the community at large. However, there was no formal mechanism for enforcement of the *ḥakam*'s rulings or punishment of the recalcitrant.

According to this interpretation, the arrival of Islam meant that these traditional dispute adjudicators were still prestigious members of the community who were considered to be wise and fair, but that they were now appointed, or at least sanctioned, by the caliph or governor. Consequently, the *qāḍī* was ultimately a holdover from earlier Arabian tribal culture, now with an Islamic hue and the additional authority conveyed by caliphal endorsement. This view has been common in modern scholarship on early Islamic law. Joseph Schacht was explicit in asserting that the *qāḍī* "took over the seat and wand of the *ḥakam*".²

The second interpretive approach to the *qāḍī*ship treats the *qāḍī* as an administrative extension of the governor and/or the caliph himself. This understanding of the office of *qāḍī* presumes a more centralized, autocratic approach to legal administration. According to this model, the *qāḍī* serves as an enforcer of caliphal rules and regulations, imposing caliphally-sanctioned uniformity on the community. It is through this enforcement function that the *qāḍī* implements the so-called "Umayyad administrative practice" described by Joseph Schacht.³ The uniformity implied by this understanding of the *qāḍī*ship restricts the *qāḍī*'s independence to a significant extent. No longer is he judging based on the nuances of individual cases and the best interests of the parties, as an arbitrator would. Instead, he is imposing rulings predetermined by the governor or the caliph. His function becomes more administrative under this model.

Another consequence of this interpretation is that the *qāḍī*'s jurisdiction is constrained by the governor's oversight function. As an extension of the governor, the *qāḍī* cannot contradict the governor's will, since his superior can overturn his decisions. Moreover, the governor can choose not to delegate his judicial authority to anyone, retaining the *qāḍī*'s powers for himself. This view has been presented most clearly by Emile Tyan, who envisioned a hierarchy of authority from the caliph to the governor to the *qāḍī*.⁴ Schacht also expressed this view, asserting that, "[d]uring the Umayyad period the administration of justice lay in the hands of the provincial governors and, in so far as special judges were appointed, they were agents of the governors to whom these last delegated part of their functions".⁵ More recently, similar views have been adopted by Mathieu Tillier.⁶ To some extent, Schacht tries to have it both ways, asserting that the *qāḍī* is a *ḥakam*, but that the governor somehow retains "full authority".⁷ More recently, Wael Hallaq has espoused a similar, apparently contradictory view. He asserts on the one hand that the early *qāḍī*

2. SCHACHT 1964, p. 24.

3. SCHACHT 1950, p. 190 ff.

4. TYAN 1960, p. 132 ff.

5. SCHACHT 1950, p. 191.

6. TILLIER 2009, p. 496-504.

7. SCHACHT 1964, p. 25.

was essentially a *ḥakam*, but also describes him as the “commander’s assistant” who was “usually subservient” to the *amīr*.⁸

These divergent views of the origin and function of the *qāḍī*ship derive from two central themes in scholarship on Umayyad-era institutions. On the one hand, modern scholars have tried to find evidence of continuity with the pre-Islamic past by focusing upon similarities between Umayyad-era institutions and earlier Arabian, Byzantine or Sasanian precursors. Hence, the *qāḍī* is merely a *ḥakam* with a new name, a necessary functionary who now cloaks his rulings in Islamic rather than customary garb. On the other hand, modern scholars have tried to fill the documentary void of the Umayyad period by relying on ‘Abbāsīd-era sources and assuming that bureaucratic structures described therein have earlier precedents in the Umayyad era. This approach accepts that the hierarchical structures created by the reforms of several ‘Abbāsīd caliphs, described in detail by Mathieu Tillier, had earlier roots.⁹ This image of Umayyad judicial order also reflects to some extent the idealized vision of the judiciary presented in the various *adab al-qāḍī* sources, which were written long after the Umayyad period.

An examination of other, less idealized sources, especially the biographical literature, offers a different vision of the *qāḍī*ship and its jurisdiction during the Umayyad period. As the discussion below will demonstrate, the *qāḍī* was neither a rebranded *ḥakam* nor an obedient arm of the governor. Instead, the extent of the *qāḍī*’s authority and the boundaries of his jurisdiction were more complicated and, perhaps surprisingly, more clearly defined.

To come to this conclusion, it is necessary to examine the kinds of cases *qāḍī*-s purportedly heard and to note as well the kinds of cases that they were not allowed to adjudicate. Analysis of actual cases allows us to understand both the legal limits of the *qāḍī*’s jurisdiction and the extent of his authority over various classes of people, elite and otherwise. Fortunately, accounts of some, though by no means many, of the cases heard by Umayyad *qāḍī*-s do survive in a variety of sources.

While the *qāḍī* courts of the Umayyad era had nothing resembling archives, reports of a fair number of cases survive in other sources. In particular, the *Aḥbār al-quḍāt* of Wakī (d. 306/918) and the *Aḥbār quḍāt Miṣr* of al-Kindī (d. 350/961) include numerous anecdotes describing *qāḍī*-s’ activities.¹⁰ In addition, entries on individual *qāḍī*-s found in the biographical sources provide important data. Accounts of cases included in these sources do provide useful insights into the extent of the *qāḍī*’s jurisdiction, but their limitations must not be ignored. These are not complete archives, and their compilers did not intend for them to serve such an administrative function. Instead, these sources include only those cases that later compilers found to be important or interesting for a variety of reasons. The bases for their decisions about what to record and what to discard are not explicit. Nor is there any clear indication about the degree of comprehensiveness of the sources

8. HALLAQ 2005, p. 35-37.

9. TILLIER 2009, p. 101-135.

10. Wakī, *Aḥbār al-quḍāt*; al-Kindī, *Aḥbār quḍāt Miṣr*.

from which they drew their materials. Accounts of many of the Umayyad *qāḍī*-s contain no references to specific cases, while others include numerous anecdotes about individual cases. The cases discussed below were culled from an examination of biographical and other accounts of some 75 Umayyad-era *qāḍī*-s. The data represents neither a comprehensive nor a random sampling of these cases. Instead, these examples are included because they offer insights into the structure and functioning of the Umayyad-era *qāḍī*ship and into how the institution's Umayyad roots were perceived in later times.

The *qāḍī*'s areas of jurisdiction

The majority of cases described in these sources involve what modern scholars would call "family law", disputes about marriage, divorce and inheritance. Cases involving marriage and divorce are particularly common. Some of these cases are mundane. For instance, Wakī reports that Sa'īd b. Uṣū'a, the Umayyad *qāḍī* in Kufa from 105-113/724-731, dissolved an improper marriage. Wakī does not name the litigants nor does he offer details about the nature of the impropriety. It is clear, however, that there was no conflict about the *qāḍī*'s authority to judge whether the marriage was valid.¹¹ In Egypt, Yūnus b. 'Aṭīyya, who served as *qāḍī* from 84-86/703-705 gained his position as *qāḍī* by settling a dispute about maintenance payments for a divorced wife. Again, details of the case (and even his opinion) are not included.¹² Tawba b. Namir, the Egyptian *qāḍī* from 115-120/733-738, ordered a divorced man to pay compensation to his ex-wife and then refused to accept the man's future testimony after he defied the *qāḍī*.¹³

Other marriage and divorce cases were more complicated and more interesting. For instance, the Baṣran *qāḍī* Iyās b. Mu'āwiya (served 99-101/717-719) adjudicated a confusing divorce case in which the husband claimed that the divorce was invalid because he was drunk at the time.¹⁴ The two accounts Wakī includes differ over important details, even regarding the identity of the parties. In the first version, both spouses were members of the powerful Muhallabī family. When the wife refused a cup of wine offered by her husband, he proclaimed that he would divorce her if she did not drink (*anti ṭāliq ṭalāṭan in lam taṣrabī-hi*). After her continued refusal (and a smashed wine cup) she claimed that he had divorced her, but he denied that he had actually pronounced the triple repudiation. In this version, Iyās affirmed the divorce based on testimony from unnamed women who were present. In Wakī's second account, the parties are not named. The husband is identified as a member of the Bānū Kirām who was a brother-in-law to the governor, and the wife is simply from al-Ḥuddān. In this version, the ex-wife rebutted his claim of drunkenness through the

11. Wakī, *Aḥbār al-quḍāt*, III, p. 19-20.

12. Al-Kindī, *Aḥbār quḍāt Miṣr*, p. 322-323.

13. Al-Kindī, *Aḥbār quḍāt Miṣr*, p. 344.

14. Wakī, *Aḥbār al-quḍāt*, I, p. 313-316.

testimony of her recently-freed slave, who asserted that the husband was sober. The *qāḍī*'s affirmation of the divorce sparked the ire of the governor, 'Adī b. Arṭāt, and forced Iyās to flee. These anecdotes obviously touch upon a variety of complicated legal questions, including the application of the triple repudiation in a single incident, the effect of drunkenness on one's competence to divorce, and the admissibility of testimony from female witnesses and freed slaves (whose manumission may have been a *quid pro quo*). The demonstration of the power dynamics between influential families, governors and *qāḍī*-s is also important. It is possible to draw a broad range of conclusions about Umayyad jurisprudence from this case alone, assuming that it represents normative practice and is not merely an entertaining story.

In another example, the Medinan *qāḍī* Abū Bakr b. 'Abd al-Raḥmān (c. 114/732) rejected the legitimacy of a marriage that occurred without the consent of the bride's family. Elopements and consequent unhappy families were likely as common in early Islamic times as they are today. What was unusual about this case, however, was that the groom was Ayyūb b. Salama, the caliph Hišām's uncle and the eloping bride was Fāṭima, the granddaughter of al-Ḥasan b. 'Alī b. Abī Ṭālib. Her four brothers objected to the union and brought the matter before the governor who referred the case to the *qāḍī*.¹⁵ The *qāḍī* rejected the marriage, sparking the ire of Ayyūb, who refused to accept the *qāḍī*'s decision and subsequently received a beating for his recalcitrance. Ayyūb then turned to his nephew the caliph, seeking his intervention. Hišām's response was somewhat confusing. He scolded his uncle and threatened to subject him to a worse beating, but then ultimately assisted him. He scolded the governor and ordered him to be beaten as well. However, the caliph also ordered all parties to accept the bride's decision in the matter. Like the previous case, this was no typical marriage case and had significant social and legal implications. The caliph's uncle was condemned for trying to circumvent the *qāḍī*, but the compromise allowed a prestigious woman to marry despite the objections of her family. The caliph also insulated the *qāḍī* from any retaliation for ruling against his kinsman, focusing his ire on the governor instead. This story also has obvious 'Alid-Umayyad undertones, ultimately disempowering the 'Alid men in the story by undermining their control over Fāṭima's marriage. Significantly, the story ends with the simple statement that the two did not produce offspring. Here again, powerful figures in society clashed in a case in which basic legal principles were at stake. In each of these cases, the *qāḍī* survived relatively unscathed, despite passing judgments against the interests of the powerful.

Qāḍī-s also heard a variety of inheritance cases. Many of those reported deal with the mathematical intricacies of the proper division of an estate among different combinations of survivors. Some cases offer more specific legal and societal commentary. For instance, the Egyptian *qāḍī* Ḥayr b. Nu'aym (120-127/737-744) ruled that the son of a *mukātab* (a

15. Wakī, *Aḥbār al-quḍāt*, I, p. 172-174. There is some confusion in the report about whether Abū Bakr or 'Ubayd Allāh b. Ṣafwān was the *qāḍī* who heard the case.

slave given a contract of emancipation) could not inherit.¹⁶ In a related area, al-Kindī also reports examples wherein the *qāḍī* was responsible for arranging the administration of the inheritance of minor orphans.¹⁷ In a more politically charged case, the Medinan *qāḍī* Saʿd b. Ibrahīm (c. 104/722) ruled that Ismāʿīl b. ʿAbd Allāh, the head of Qurayš in Medina, was required to provide funds to a needy kinsman.¹⁸ These examples involving “family law” illustrate the solutions the *qāḍī*-s found to sometimes confusing legal problems, but they also offer insights into the social and political power structure of the community.

Cases involving the *qāḍī*’s evaluation of the admissibility of certain types of witnesses also served multiple functions. While these cases are not numerous in the sources, they are instructive. For instance, the divorce case discussed above illustrates the consequences of a *qāḍī*’s determination of whether women or freed slaves could testify in such cases, offering hints about their social and legal status. In another example, the legendary Kūfan *qāḍī* Šurayḥ b. al-Ḥārīt (c. 22-79/643-698?) refused to hear the testimony of a son to confirm his father’s accusations, due to his inherent conflict of interest. Šurayḥ applied this standard even in a case in which the son in question was al-Ḥasan b. ʿAlī, the heir to the reigning caliph.¹⁹ In this example, the rules of evidence were applied uniformly, despite the prestige of the litigant and witness, neither of whom objected to Šurayḥ’s ruling. The sources record other examples of *qāḍī*-s rejecting testimony for a variety of reasons. For instance, the Egyptian *qāḍī* Tawba b. Namir (115-120/733-738) refused to allow testimony from a man who had defied him in a previous case.²⁰ The Damascene *qāḍī*, Bilāl b. Abī al-Dardāʾ (60-65/678-684) not only refused testimony from dishonest witnesses, but reportedly beat them and, in some cases, tied them to the columns of the mosque to humiliate them publicly.²¹ These reports do not name the alleged liars, but suggest that the *qāḍī* had broad latitude to determine who would be heard in his court and to impose consequences for perjury or defiance. Other reports are less specific, simply noting kinds of testimony particular *qāḍī*-s would admit. For example, the Egyptian *qāḍī* Ḥayr b. Nuʿaym (120-127/738-745) would allow testimony from Christians, Jews and youths in some cases.²² The Medinan *qāḍī* Salama b. ʿAbd Allāh (101-104/719-722) permitted testimony from youths as well.²³ The earlier Medinan *qāḍī* Abū Bakr b. Muḥammad al-Anṣārī (93-96/711-714) accepted the testimony of a son on behalf of his mother, in contrast to Šurayḥ’s rejection of testimony on behalf of one’s parents. Abū Bakr also accepted the testimony of someone

16. Al-Kindī, *Aḥbār quḍāt Miṣr*, p. 350-351.

17. Al-Kindī, *Aḥbār quḍāt Miṣr*, p. 325, 341; al-Mizzī, *Tahḍīb al-kamāl*, XVII, p. 412.

18. Wakī, *Aḥbār al-quḍāt*, I, p. 154-155.

19. Ibn ʿAsākir, *Taʾrīḥ madīnat Dimašq*, XXIII, p. 26.

20. Al-Kindī, *Aḥbār quḍāt Miṣr*, p. 344.

21. Ibn ʿAsākir, *Taʾrīḥ madīnat Dimašq*, X, p. 526; al-Mizzī, *Tahḍīb al-kamāl*, IV, p. 286.

22. Al-Kindī, *Aḥbār quḍāt Miṣr*, p. 350-351.

23. Wakī, *Aḥbār al-quḍāt*, I, p. 148-150.

who had previously made false accusations.²⁴ While these Umayyad-era examples do not yet point to fixed rules about whose testimony is accepted under what circumstances, they do illustrate that the *qāḍī* had a degree of discretion in determining what evidence to accept and that the social status of the litigants was largely irrelevant to the determination of whether their testimony would be admitted.

In addition to these types of cases, the sources preserve a number of reports involving property disputes of various sorts. For example, Saʿd b. Ibrāhīm had to determine ownership of a *wādī* that was disputed between descendents of ʿAlī and Muʿāwīya.²⁵ In another Medinan case, his successor, Saʿīd b. Sulaymān (104-106/722-724) ruled against the governor, ʿAbd al-Wāḥid for extorting money from villagers outside Medina.²⁶ In one of the only Umayyad-era cases recorded that involved a wrongful death, the Egyptian *qāḍī* ʿIyāḍ b. ʿUbayd Allāh (93-100/711-718) determined that a *mawla* who was using a horse (rather than the horse's owner) was required to pay the blood price for a woman whom the horse ran over and killed.²⁷ As in the "family law" examples, the cases that were preserved offered implicit commentary both on legal technicalities and society at large. They offer glimpses of interactions between elites and common people, including unnamed villagers and *mawālī*, in front of the *qāḍī*. The underlying theme of these cases is, again, the *qāḍī*'s extensive authority over litigants from all elements of society.

The consistency of this theme suggests that one of the agendas Wakī, al-Kindī and others pursued was to offer a commentary on the extent of the *qāḍī*'s jurisdiction during the Umayyad period. Clearly, these are not "normal" mundane cases that one would find in a true administrative archive, nor are they random collections of anecdotes. Instead, later compilers found these cases worthy of preservation for two apparent reasons.

First, a number of these and similar cases offer solutions to specific legal problems. Anecdotes in which Umayyad *qāḍī*-s rule on inheritance percentages, the status of particular witnesses, the validity of marriages, and other questions have legal significance. They can provide precedents for later legal practice or, perhaps, criticism of later digressions from ideal practice. Whether these anecdotes are genuine representations of Umayyad judicial practice or apocryphal reports to justify later practice is, of course, still open to debate.

The second apparent purpose for these anecdotes is to offer insights into the nature and function of the *qāḍī*ship and the *qāḍī*'s position in society. Many of the cases preserved by Wakī, al-Kindī and the biographical sources demonstrate the power dynamics in Umayyad society. Many of the cases mentioned above, and others like them, describe the *qāḍī* imposing his will on powerful members of society. For example, Saʿd b. Ibrāhīm resisted the defiant chief of Qurayš, Saʿīd b. Sulaymān passed judgment against the governor who had

24. Wakī, *Aḥbār al-quḍāt*, I, p. 144, 146.

25. Wakī, *Aḥbār al-quḍāt*, I, p. 153-154.

26. Wakī, *Aḥbār al-quḍāt*, I, p. 167-168; al-Mizzī, *Tahḍīb al-kamāl*, X, p. 483.

27. Al-Kindī, *Aḥbār quḍāt Miṣr*, p. 333-334.

appointed him, and Abū Bakr b. ‘Abd al-Raḥmān ruled against the caliph’s own kinsman without suffering repercussions.

These cases may, in part, have served to glorify particular *qāḍī*-s by showing their fearlessness in the face of power. Such demonstrations of independence were perhaps necessary for separating their legacies from their Umayyad masters. The scholars who served as *qāḍī*-s for the Umayyads were typically respected *muḥaddiṭ*-s, whose importance to the enterprise of *ḥadīṭ* transmission outlived them. These scholars were necessary links between later traditionists and earlier generations. However, their service to the Umayyad dynasty, which later ‘Abbāsīd scholars denigrated for its immorality, could tarnish their legacies. Illustrations of their independence could blunt accusations of complicity with their Umayyad employers. Hence, one cannot entirely dismiss the potential polemical importance of these reports.

At the same time, however, these cases also demonstrate important assumptions about the extent of the *qāḍī*’s jurisdiction, which do not appear to support a narrative of underlying resistance to the Umayyad authorities. The examples discussed above indicate that the political and social status of the litigants did not place them outside the *qāḍī*’s jurisdiction or beyond his reach. In these cases, neither tribal connections nor political position tainted the *qāḍī*’s objectivity. In this regard, the case in which Saʿīd b. Sulaymān ruled against the governor of Medina is particularly important. This case clearly demonstrates that the *qāḍī* was not merely the arm of the governor who appointed him, but that the governor himself was subject to the *qāḍī*’s judgment. Put simply, in areas where the *qāḍī* had jurisdiction, exceptions were not made for rank or office. While these cases are not numerous, they are consistent in emphasizing the *qāḍī*’s authority. Moreover, they are not told in a manner that appears to be intent on glorifying the anti-elite escapades of the *qāḍī*, but rather in a manner that underscores the futility of attempting to evade the authority inherent to the *qāḍī*’s position.

Areas outside the jurisdiction of the *qāḍī*

Before turning to areas where the *qāḍī* did not appear to have jurisdiction, it is important to pause to consider an important lacuna in the reports preserved in Wakī and other sources. In the reports associated with some 75 *qāḍī*-s examined in this study, there is a conspicuous absence of cases involving murder, or wrongful death of any sort. In fact, there are no examples of homicide cases heard by Umayyad *qāḍī*-s, or of disputes over the payment of blood prices (*diya*) or the proper amount of such payments. While it is possible that isolated cases may have been overlooked, it is surprising that murder cases do not appear to have attracted the attention of the sources. There are some references to *qāḍī*-s

imposing *ḥadd* punishments, often at the mosque, but the context makes clear that these are beatings rather than amputations or executions.²⁸

This silence about murder has several implications for our understanding of early Islamic society and jurisprudence. If, as suggested above, one of the purposes of the compilers of this material was to record power conflicts among the elites, why are there no murder cases? Surely families and clans of both victims and those accused would try to influence the proceedings in such cases. Powerful elites would be expected to attempt to bend the rules to their advantage in such critical circumstances. Such cases ought to have attracted a certain prurient interest from the public as well. Even in modern times, the drama of a murder trial outshines the most contentious celebrity divorce case or inheritance dispute. Yet, the Umayyad-era accounts are silent about such cases.

Are we to assume that murder cases were so universally mundane and legally insignificant that the sources did not bother to report them? Were there no questions about evidence or the admissibility of witnesses, issues that normally would have fallen to the *qāḍī*? Are we to conclude that the rise of Islam produced such a harmonious society that homicides ceased? Or was there some other forum in which these cases were adjudicated? If so, it is not specifically mentioned in sources for the Umayyad period. These remain open questions for further investigation.

The lack of murder cases in accounts of the *qāḍī*-s has a broader implication for understanding early Islamic society. Traditional narratives, both Islamic and Orientalist, have treated the pre-Islamic period as one of lawlessness, dominated by incessant blood feuds. According to this narrative, Islam contained the blood feud and imposed legal dispute resolution processes instead. One would expect the adjudication of these disputes to be memorialized in accounts of the courts where these disputes ought to have been heard. If they were not heard by the *qāḍī*-s, then who adjudicated such cases and in what forum? The lack of such reports is puzzling and merits more inquiry.

We do find significant examples of other types of cases that were outside the *qāḍī*'s jurisdiction, though this distinction is not described explicitly. *Qāḍī*-s did not adjudicate cases involving the trial and punishment of heretics and rebels, nor did they decide questions regarding the distribution of spoils during conquest. These cases fell under the direct jurisdiction of the caliph or the governor. In the case of spoils division, some authority was delegated to the *amīr* in the field.

Wakī and al-Kindī do not describe Umayyad-era cases involving heretics and rebels. Such cases do, however, appear in the historical sources and in biographical reports of the participants. I have discussed these heresy trials extensively in other contexts and will not revisit these cases individually here. Instead, for the purpose of understanding the limits of the *qāḍī*'s jurisdiction, it is important simply to note that these cases were heard

28. For examples of beatings, see Ibn 'Asākir, *Ta'riḥ madīnat Dimašq*, X, p. 256; XXIX, p. 281; Wakī, *Aḥbār al-quḍāt*, I, p. 157, 173; II, p. 41; III, p. 8. I have found no descriptions of Umayyad *qāḍī*-s imposing amputations or executions.

not by the *qāḍī*, but by the governor or the caliph himself. It is clear that some sort of trial occurred in these instances, but it was not a trial before a *qāḍī*.

For example, most reports indicate that the heretic Maʿbad al-Ġuhanī (d. c. 80/699) was tried and executed by the Iraqi governor al-Ḥaġġāġ b. Yūsuf, or perhaps by the caliph ʿAbd al-Malik himself.²⁹ A few decades later, another celebrated heretic, al-Ġaʿd b. Dirham (d. c. 124/742) was tried and put to death by al-Ḥaġġāġ's successor Ḥālid al-Qasrī, who served as prosecutor, judge and executioner.³⁰ None of the extant reports of these heresy trials mentions any role whatsoever for the *qāḍī*.

Reports on two other heresy cases do mention the participation of scholars who served as *qāḍī*-s. These cases illustrate clearly that judging heretics was outside the parameters of the *qāḍī*'s jurisdiction. Some accounts of the trial and execution of al-Ḥārīt b. Saʿīd al-Kaḍḍāb (d. 80/699) indicate that a prominent *muḥaddith* heard al-Ḥārīt proclaim his outrageous views and promptly reported al-Ḥārīt to Abū Idrīs al-Ḥawlānī, the *qāḍī* in Damascus. The *qāḍī*'s response is instructive. Rather than calling the alleged heretic before his court for questioning, Abū Idrīs informed the caliph of al-Ḥārīt's statements. ʿAbd al-Malik himself then took action against al-Ḥārīt.³¹ The *qāḍī* clearly recognized that al-Ḥārīt's case was beyond his jurisdiction and referred the matter to the caliph. The only other heresy trial in which the *qāḍī* played a role was that of Ġaylān al-Dimašqī, in which al-Awzāʿī (d. 157/774) served as prosecutor rather than as *qāḍī*. The caliph Ḥiṣām (r. 105-125/724-743) passed judgment on Ġaylān and sentenced him after hearing al-Awzāʿī's interrogation of the suspected heretic.³² It is essential, however, to note that, while al-Awzāʿī may have served briefly as a *qāḍī* later, there is no evidence that he served in that capacity during Ḥiṣām's reign. These two cases illustrate clearly that adjudicating heresy cases was beyond the *qāḍī*'s purview. In one, the *qāḍī* merely refers the case. In the other al-Awzāʿī, who was at this time an advisor and possible future *qāḍī*, served as prosecutor rather than judge.

Judging rebels was also beyond the boundaries of the *qāḍī*'s jurisdiction. There are numerous examples of rebels being tried and put to death, but it is always the governor or the caliph who presides over these events. There are no Umayyad-era examples in which the *qāḍī* played any role at all in the adjudication of cases involving open rebellion. It appears that both doctrinal offenses and insurrections were outside the parameters of the *qāḍī*'s authority.

The distribution of spoils was also outside the *qāḍī*'s jurisdiction. There is an extensive literature on the minutia of dividing the spoils of conquest in various *siyar* works.³³ These works discuss in detail what constitutes legitimate spoils and how and when such riches could be divided among the troops. Nowhere in the literature on the Umayyad period is there any mention of a role for the *qāḍī* in the division of spoils. Religious scholars were

29. JUDD 2011, p. 4-6

30. JUDD 2011, p. 8-9

31. Ibn Ḥaġġar, *Lisān al-mizān*, II, p. 151-152; Wakī, *Aḥbār al-quḍāt*, III, p. 202; al-Mizzī, *Tahḍīb al-kamāl*, XXIII, p. 443-447.

32. JUDD 1999, p. 170-172

33. For the most extensive collection of Umayyad-era reports, see al-Fazārī, *Kitāb al-siyar*.

certainly present at the frontier and offered expert opinions on a variety of issues, including a number of truly peculiar but plausible cases. However, they only offered advice and did not adjudicate. The office of *qāḍī l-ʿaskar*, whose function is well-known in later periods, did not yet exist in the Umayyad period.³⁴ Instead, authority over military encounters and their aftermaths rested solidly with the *amīr*.

Conclusion

This examination of actual cases, or the absence of actual cases, can lead us to several conclusions about the extent of the Umayyad *qāḍī*'s jurisdiction. First, it is clear that the *qāḍī* was not merely an extension of the governor. In some areas of jurisdiction, such as rebellion, the governor did not rely on the *qāḍī* at all. In other areas, as several examples demonstrate, the *qāḍī* could rebuke and/or punish even the governor himself.

In general, the *qāḍī* appears to have had exclusive authority over disputes between litigants, in essence tort cases broadly defined to include criminal matters in which a victim suffered damages of some sort. These cases included property disputes, family law and crimes against individual victims (though perhaps not homicides). In these realms, the *qāḍī*'s authority was absolute. Neither social status nor government position could undermine the *qāḍī*'s power. Several of the anecdotes described above illustrate the futility of efforts by elites to evade the *qāḍī*'s judgment. The *qāḍī* did not, however, enjoy absolute autonomy. There are several examples in which the *qāḍī*'s abuse of his office led to dismissal and punishment from the governor. At the same time, within his jurisdictional boundaries, the *qāḍī* generally could not be defied, even by the governor who appointed him.

The *qāḍī*'s jurisdiction did not extend to what we would now describe as crimes against the state. Instances of rebellion, whether military or doctrinal, were outside the realm of the *qāḍī*'s authority. These were not tort cases, or crimes against individuals, but political crimes that were adjudicated by the political leaders of the community. The distribution of spoils was also outside the *qāḍī*'s realm. Here, wealth acquired by the state through its military function was distributed to individual subjects. The military *amīr* held authority over this process. Again, there was no tort-like dispute involved in questions of distribution of spoils. Questions centered instead on how the state should distribute its largesse.

The cases examined here suggest that the *qāḍī*'s authority was more clearly defined than has been assumed. He was not merely an extension of the governor, whom he could defy and even punish in some circumstances. Instead, the *qāḍī* was perhaps closer to the pre-Islamic *ḥakam*, whose principal function was to resolve disputes between individual litigants. However, unlike the *ḥakam*, the *qāḍī* enjoyed a surprising degree of independence within the circumscribed sphere of his authority. He could defy those who appointed him, but only within the established, albeit unspoken, boundaries of his jurisdiction.

34. Regarding the *qāḍī l-ʿaskar* during the early ʿAbbāsīd period, see TILLIER 2009, esp. p. 334 ff.

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