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The sign on the cover, designed by Anwārī al Ḥusaynī, symbolizes a scale.

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Islamic Law in Literature: The Pull of Procedure in Tanūkhī's *al-Faraj ba ʿda l-shidda*

Intisar A. Rabb and Bilal Orfali

Introduction

What is the role of Islamic law in literature and, reflexively, the role of literature in Islamic law? We set about to answer this intriguing question, often asked in other interpretive communities of law and literature, with reference to one of the most acclaimed storytellers in early Islamic history.[1] Abū ʿAlī al-Muḥassin al-Tanūkhī (d. 384/994) was a scholar of Arabic-Islamic literature who doubled as a judge, and had something to say about both law and literature, though not necessarily in ways one might expect. His were not stories about the *literary themes of law*. They were not like dramatizations of fictional cases, after the style of, say, Harper Lee's *To Kill a Mockingbird*[2] — a classic American novel that featured the brave (if subsequently questionable) lawyerly protagonist Atticus Fitch addressing fundamental questions of criminal justice.[3] Rather, Tanūkhī's stories featured something more mundane, having to do with *legal themes in literature*: quarrelsome traders, greedy litigants, and jealousy in the judicial and royal courts. These stories delivered a moral for his place and times, as fiction often does. The literary form used to impart moral lessons in medieval Baghdad was narrative, and Tanūkhī excelled at presenting such lessons in his literary anthologies. But these stories also delivered important lessons about the law, or popular perceptions of it, through the *incidental* presentation of judicial procedure. Because his descriptions of courtroom procedure are incidental to his narratives, historians can confidently use such descriptions to supplement the relatively abbreviated and prescriptive accounts of judicial procedure in more conventional sources for early Islamic law.

Scholars in medieval Arabic-Islamic societies regularly compiled literary anthologies as a practice dedicated to cultivating *adab* — a term only loosely translated as "literature."[4]

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1 For one particularly insightful author on the theme in medieval English history, see, e.g., Kamali, "Felonia Felonice Facta: Felony and Intentionality in Medieval England," 397–421, esp. 410–413; Kamali, "Trial by Ordeal by Jury in Medieval England, or Saints and Sinners in Literature and Law", 49–70.

2 Lee, *To Kill a Mockingbird.*

3 Lee, *Go Set a Watchman.* On the fictional protagonist's perceived fidelity to due process in the earlier-written but subsequently published work and their relevance to real-life legal proceedings, see Kennedy, "Harper Lee's 'Go Set a Watchman,'" pointing to law professor Monroe Freedman's 1992 article decrying the positive reception of the procedure-focused literary protagonist as a model for actual lawyers. See also Kakutani, "Harper Lee's 'Go Set a Watchman' Gives Atticus Finch a Dark Side"; Garber, "My Atticus."

4 For *adab*, see Orfali, *The Anthologist's Art*, Chapter one and the sources listed therein. Further, Jakko Hämeen-Anttila notes: "In its ethical, professional, and literary meanings, *adab* is a term that refers not only to literature but also to an ideal of behaviour and the will and ability to put into practice the theoretical wisdom found in *adab* books. In literary *adab*, this refers to a civilised person's ability to

Adab works percolated in informal or semi-formal literate networks that functioned largely alongside the formal school systems of *madrasa*s and *kuttāb*. An *adīb*, the cultural adept who produced or fluently engaged works of *adab*, often drew on various fields of scholarship as wide-ranging as poetry and grammar, history and prosopography, theology and philosophy, mysticism and Qur'ānic sciences, and — though less appreciated among scholars of literature today — law. The result is a written corpus of social commentary on a complex nexus between intellectual and religious ideas (or ideals), as well as social and political relations in early Islamic societies. For each, the *adīb* acted as both scribe and critic.

Some of these religious ideas and institutional relations concern the social function of Islamic law and procedure, and of the judges who helped produce both. In fact, though understudied, that focus is the subject of separate genres of judge-oriented legal literature. Compilations of judicial biographies called *akhbār al-quḍāt* and of judicial manuals called *adab al-qāḍī* books, for example, often recorded applications of judicial procedure and outlined courtroom etiquette that judges were advised to observe even as they helped devise them.[5]

One should be careful to note that, despite the commonality of the term *adab* between works of literature and of judicial etiquette, the two genres today are regarded as wholly distinct.[6] Yet, in the *adab* of Tanūkhī, the two concepts are not as disconnected as they may otherwise seem.

Adab works can provide windows onto some aspects of everyday life in Islam's earliest periods, for which records are otherwise often sparse. Historians of law and literature alike commonly want to know how everyday Muslims experienced life in markets and mosques, as well as in the core sites for mediating conflicts — the royal and judicial courts. Literature provides insight into that world in a form of verisimilitude, even if not verifiable "truth."[7] That is, literature provides access to the extraordinary, as a lens through which to view the ideals of the ordinary. Even where it is self-consciously stylized narrative that depicts the most sensational episodes worth preserving, we start with the premise that literature cannot help but reflect ordinary outlooks on often extraordinary disputes.

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quote the material appropriately. The social context and the appropriate use of *adab* makes a person an *adīb*." See Hämeen-Anttila, "*Adab*, Arabic, early developments," *EI*^{3}.

5 These works include the *adab al-qāḍī* genre often found both in early *fiqh* works and as stand-alone works, *akhbār al-quḍāt* collections of early Islamic judicial biographies and other prosopographical works recording historical episodes attributed to Muslim judges, *amālī* records of prophetic and imāmic statements often related to Muslim judges and to legal questions (particularly in the Shī'ī literature), *ta'rīkh* historical chronicles that often include reports about major cases and controversies involving judges or appeared in courts, and — last but not least — literary works reporting on the lives and cases of judges, such as those of Tanūkhī in this brief study. Although modern scholarship on these genres is sparse, for two samples presenting preliminary studies of sources for judges in early Islamic legal history, see Masud, "A Study of Wakī''s (d. 306/917) *Akhbār al-quḍāt*"; Tillier and Bianquis, "Les Réseaux judiciaires en Iraq à l'époque abbasside." For two major studies of these works and the judges within them, see Tillier, *L'invention du cadi. Les Justice des musulmans, des juifs et les chrétiens aux premiers siècles d'el Islam*; and Tillier, *Les Cadis d'iraq et l'etat abbasside (132/750–334/945)*.

6 See Masud, "Adab al-qāḍī," *EI*^{3}.

7 On the use of verisimilitude in Islamic history and historiography, see Mottahedeh, *Loyalty and Leadership*.

In this article, we examine some features of Islamic law and procedure that appear incidentally in a set of *adab* works penned by Tanūkhī as someone standing at the intersection of law and literature in one early Islamic society. Specifically, we will examine cases from his fourth/tenth century literary anthology from Baghdad, *al-Faraj baʿda l-shidda*.

Our main contention is that these sources record outlooks that often, rather *incidentally*, shed light on prevailing notions of judicial process and procedure. Moreover, the value of the incidental mentions of procedure to the courtly audiences regaled with these stories then is perhaps directly inverse to its value for mapping procedure for law-minded audiences today. Certain procedures were insignificant, ambient, and well-established enough to bear only passing mention then. It is precisely those qualities that make these literary sources a useful supplement to other more conventional sources for early Islamic legal history now, particularly for anyone interested in understanding Islamic judicial procedure and its relationship to the construction, function, and evolution of early Islamic law.[8]

In what follows, we introduce Tanūkhī and his work more expansively, then recount a sampling of episodes from his recollections of cases from fourth/tenth-century Baghdad. We then analyze each case for the procedure within it, and end by offering conclusions about the central role of procedure as it appeared incidentally in literary works for a window onto early Islamic law.

I. Judge Tanūkhī and His Work

In addition to producing literary works, Abū ʿAlī al-Muḥassin al-Tanūkhī (d. 384/994) was a prominent judge (*qāḍī*) in ʿAbbāsid Baghdad. Hailing from a well-known family of Muʿtazilī-rationalist judges, he was himself also a proponent of Muʿtazilī-rationalist theology.[9] His theology was reflected in his writings. As works of literature closely associated with the identity and ideals of their compiler, Tanūkhī's writings deliberately include certain religious and ethical themes.[10] Julia Bray, for example, has identified themes relating to Muʿtazilī beliefs present in his works.[11] Similarly, Florian Sobieroj has examined some of Tanūkhī's anti-mystical anecdotes related to the Sufis of Baghdad and elsewhere.[12] However, his works have anthological origins and influences that give it a

8 This is the project to which we aim to contribute. For a recent volume collecting scholars writing to similar ends, see Rabb and Balbale, *Justice and Leadership in Early Islamic Courts*. The scholar who has written most extensively about early Muslim judges in Iraq is Mathieu Tillier. See especially his *L'invention du cadi* (cited above); Tillier, *Les Cadis d'iraq* (cited above); "Un espace judiciaire entre public et privé. Audiences de cadis à l'époque ʿabbāside;" "Qāḍīs and the Political Use of the *Maẓālim* Jurisdiction," 49; "Women before the Qāḍī under the Abbasids;" "L'identification en justice à l'époque abbasside." Tillier has also written about judges in Egypt. See, for instance, his "Scribes et enquêteurs: Note sur le personnel judiciaire en Égypte aux quatre premiers siècles de l'hégire;" and "The Qāḍīs of Fusṭāṭ–Miṣr under the Ṭūlūnids and the Ikhshīdids: The Judiciary and Egyptian Autonomy."

9 On the Tanūkhī family and for an analysis of Tanūkhī's *isnāds*, see Bray, "Place and Self-Image: The Buhlūlids and Tanūḫids and their Family Traditions;" see also Bray, "Isnāds and Models of Heroes: Abū Zubayd al-Ṭāʾī, Tanūkhī's sundered lovers and Abū ʾl-ʿAnbas al-Ṣaymarī."

10 See the recent book by Khalifa, *Hardship and Deliverance in the Islamic Tradition: Theology and Spirituality in the Works of al-Tanūkhī*.

11 Bray, "Practical Muʿtazilism: The Case of al-Tanūkhī."

12 See Sobieroj, "The Muʿtazila and Sufism," especially 77ff. Specifically, he reviews the stories of

more general tone.[13] Thus, rather than composing explicitly theological or legal works, his written legacy presents him chiefly as an *adīb*, a literary scribe and critic,[14] who provides rich insight into the laws and procedures of his times.

Tanūkhī is best known for two literary works: *Nishwār al-muḥāḍara* and *al-Faraj baʿda l-shidda*. *Nishwār al-muḥāḍara*, part of which has been translated as *The Table Talk of a Mesopotamian Judge*, is a collection of anecdotes about upper-class officials.[15] According to the author, the work was compiled by collecting oral accounts from contemporary informants. Unfortunately only four of its eleven chapters survive.[16]

Al-Faraj baʿda l-shidda is arranged into chapters according to thematic subjects, and it collects stories that reflect a then-common literary trope after which the book is titled: "relief after adversity."[17] Tanūkhī was not the first to tackle this theme in book form. The first known author of this genre was Ibn Abī l-Dunyā (d. 281/894), over a century before.[18] Moreover, as Julia Bray, following Francesco Gabrieli, rightly observes, Tanūkhī is the *editor* of the *Faraj*, rather than its author, as many of his stories can be traced to earlier sources, such as the *Kitāb al-Aghanī* by Abū l-Faraj al-Iṣbahānī.[19] He is also an influencer of later texts. In ways typical for early Arabic anthologies, many of the anecdotes in Tanūkhī's *Faraj* influenced later texts, such as the *Maqāmāt* of Hamadhanī.[20] These other works notwithstanding, Tanūkhī's compilation of the *Faraj* is the most well-known in the genre and the most expansive. It draws on considerably more sources than the earlier works and — significantly for our purposes — includes considerably more stories about judges, officials, and others of Tanūkhī's acquaintances that circulated in the royal and judicial courts of his time.

Notably, Tanūkhī's work displays not only the literary and ethical concerns of its compiler, but also of his life and times with respect to judicial and other themes. That much is evident in the growing scholarship on Tanūkhī that uses his stories to round out the social and political history of fourth/tenth-century Baghdad. Arie Schippers draws attention to the "urban" stories of Tanūkhī's *Faraj* by focusing on the power of caliphs, the social position of women, the descriptions of places, and on other aspects of city life in early Islamic Iraq.[21] Hartmut Fähndrich emphasizes and extracts a significant amount of historical, political, and administrative data about the working of the royal courts and related themes

famous Ṣūfīs of Shiraz (Ibn Khafīf) and Baghdad (Shiblī and Ḥallāj), and concludes that Tanūkhī – consistent with his own religious inclinations and those of *ḥadīth*-minded Baghdad at the time – depicts Ṣūfīs in both the *Faraj* and the *Nishwār* as insincere, ignorant, and irrational.

13 Recent scholarship on literary anthologies emphasize that "the gathered and included material serves primarily to substantiate a vision that is the compiler's own." Orfali, "A Sketch Map of Arabic Poetry Anthologies up to the Fall of Baghdad," 32.

14 For a full bibliography of works by and attributed to Tanūkhī, see Seidensticker, "al-Tanūkhī."

15 Margoliouth, *Table Talk of a Mesopotamian Judge*.

16 See Tanūkhī, *Nishwār al-muḥāḍāra wa-akhbār al-mudhākara*.

17 See Tanūkhī, *al-Faraj baʿda l-shidda*.

18 See Ibn Abī al-Dunyā, *al-Faraj baʿda l-shidda*. On Ibn Abī al-Dunyā's biography, see Librande, "Ibn Abī al-Dunyā: Certainty and Morality."

19 See Bray, "al-Tanūkhī's *al-Faraj baʿd al-shidda* as a Literary Source," esp. 115.

20 See for example, Hämeen-Anttila, *Maqama: A History of a Genre*, 80–82, 101–105.

21 Schippers, "Changing Narrativity in a Changing Society: The Dichotomy between the 'Early' and the 'Later' Stories in Tanūkhī's Relief after Adversity."

from the *Nishwār*.[22] Similarly, Francesco Gabrieli stresses the historical value of the *Faraj* when reconstructing economic life, institutions, and customs of the times.[23] Nadia El Cheikh identifies in Tanūkhī's *Nishwār* and *Faraj* several perspectives on women's lives relating to morality, family life, literacy, economic activity, and political power.[24] And Julia Bray reflects on the medical outlooks on illnesses of his time as they appear in the tenth chapter of the *Faraj* (which collects medical stories), as well as on the idea that the cures for those illnesses were regarded as a kind of "secular miracle."[25] With the exception of Mattieu Tillier's identification of some judicial themes in the *Nishwār*,[26] legal historians have yet to home in specifically on the presence and relevance of judicial proceedings in Tanūkhī's literary output.

At bottom, Tanūkhī's works bear all the hallmarks of other *adab* works, and yet can be read for insight into judicial procedure. They are written meditations on moral and social upbringing, intellectual education, and entertainment.[27] And they also provide useful insight into the social and political norms of his time – including norms relating to adjudication and the social significance of Islamic law and procedure, the theme to which we now turn.

II. On Judges and Courts in Tanūkhī's Works: Three Cases

While both the *Faraj* and the *Nishwār* contain stories about judges, we focus on the *Faraj* to illustrate ways in which Tanūkhī sometimes deployed contemporary norms of procedure and Islamic law in giving courtroom form to the "relief after hardship" theme. In the process of recounting his stories, each with a social-moral lesson, these cases elucidate important elements of procedure that were prevalent in the courts of his time and, therefore, in the mind of the judges as well as the elite or average person likely to encounter Tanūkhī's stories. In what follows, we present three examples of these cases to display some of the complexities of the literary-moral lessons and the incidental rules of procedure present in each (highlighted in bold).

Case 1: The Persistent Litigant[28]

The first episode is an anecdote that — in literary terms — teaches lessons against excessive persistence and unreasonable demands in situations where showing mercy would better accrue to one's advantage. In procedural terms, the story shows the role of witnesses to the Islamic legal system: in establishing rights, attesting to those rights in court, and judicial practices choosing the rules of certain schools of law in determining how to give effect to those rights.

The case comes in the course of the author narrating a tale that he likely heard from a teacher of the famous Central Asian jurist Abū l-Ḥasan al-Karkhī (d. 340/952), while that

22 Fähndrich, "Die Tischgespräche des mesopotamischen Richters - Untersuchungen zu al-Muḥassin at-Tanūḫīs *Nišwār al-Muḥāḍara*."
23 Gabrieli, "Il *valore letterario e storico* del *Faraǧ baʿda aš-Šidda di Tanūḫī*."
24 El Cheikh, "Women's History: A Study of al-Tanūkhī."
25 Bray, "The Physical World and the Writer's Eye, al-Tanūkhī and Medicine."
26 See Tillier, "L'Exemplarité chez al-Tanūḫī: Les cadis dans le *Nišwār al-muḥāḍara*."
27 Orfali, "A Sketch Map of Arabic Poetry Anthologies," 29–30.
28 Tanūkhī, *Faraj*, no. 272, 3:73–76 (*al-Lajjāj* [or *al-lajāj*] *shuʾm*: lit., the persistent one [or persistence] is cursed).

teacher was serving as a judge over the districts on the outskirts of Wāsiṭ and Ahwāz.[29] As Tanūkhī's story goes, when two men became excessively argumentative on a trip to perform the *ḥajj* pilgrimage, a third man (narrating the tale) decided to tell them a story about a court case designed to demonstrate why their behavior would come to no good. The story was news of an earlier case over which the narrator-judge had presided:

> [Judge]: I had been appointed to the judgeship in a certain town, and two men came to me. One of them claimed that the other owed him 20 *dīnār*s (gold coins). I asked the respondent "How do you plead?"
>
> [The debtor-respondent] said: "I do owe him that [sum of money], but I am a slave to a certain family, under contract to earn my freedom (*mukātib*) and thus have permission to conduct transactions. I engaged in commerce but [operated] at a loss, and I don't have [the money] to give him. This man has employed me for many years, and profited this amount in *dīnār*s from my labor many times over. So I ask the judge to request mercy from him toward me. I am a slave, I am weak, and I have no way out."
>
> I [the narrator-judge] asked the creditor to show lenience to [the slave], and to give him respite until a later [date], but he refused. I then said [to the slave]: "You heard [him]."
>
> [Debtor-respondent]: "I have no alternative!"
>
> [Creditor-petitioner]: "Imprison him for me!"
>
> [Judge]: The slave began again to ask me [for help], but I asked [him] not to. However, he cried until I felt compassion for him, and I asked [the petitioner] to not [insist on] imprison[ing] him, and to give him time [to pay his debt] (*yunẓiruh*).
>
> [Creditor-petitioner]: "I will not."
>
> The slave [i.e., the debtor-respondent] said: "If he [insists on] imprison[ing] me, it would destroy me, and by God I would have nothing to return to. He would oppress me and insist on intervening in my affairs (*wa-yalij fī amrī*), even though he has already benefitted from me by this amount in *dīnār*s many times over. I inherited thousands of *dīnār*s from my brother some time ago, but he [the creditor-petitioner] counseled me against claiming my inheritance in front of a judge, so I did not [pursue it]."
>
> [The narrator-judge then said]: "When he said that, [the creditor-petitioner] turned to me with a look of greed (*ṭama'*) in his absolute insistence on the debtor (*gharīm*) [repaying him, to the point that] he angered me (*ghāẓanī*) in his excessive insistence and persistence (*fī-lajājih wa-maḥikkih*). I asked: 'How did you inherit from your brother, such that you wanted to submit a claim against him [the creditor]?'"
>
> [Debtor-respondent]: "My brother was his slave and was permitted to conduct transactions. He used to trade and engage in transactions, and would get a certain

29 Tanūkhī, *Faraj*, no. 272, 3:73.

commission [from it], such that he collected money and goods to the tune of more than three thousand *dīnār*s. He died and left no one but myself surviving. But I am a weak man, a slave, and have two young sons from a free woman who are both free. I take care of those two as well as myself and my wife, and also pay my master a fee (*ḍarība*). So I wanted to submit a claim against [the master] to claim my inheritance, and to take something that I could use for myself and for my children and family. But I was told: 'You will not inherit,' so I opted not to pursue the claim, in deference to him [the creditor, who told me that]. But he is now oppressing me."

[Judge]: "I then asked the man, 'Is it as he said – that his brother was your slave, and died, and left to you his estate with a value of three thousand *dīnār*s?'"

[Creditor-petitioner]: "Yes."

[Judge]: "And [is it true that] this man has two young children?"

[Creditor-petitioner]: "Yes."

[Judge]: "Stand up, and postpone [repayment] of the *dīnār*s or don't demand them from him [at all]."

[Creditor-petitioner]: "I won't be satisfied with anything less than the *dīnār*s or his imprisonment."

[Judge]: "Accept my opinion, and don't persist."

[Creditor-petitioner]: "I will not!"

[Judge]: "If you don't, then you will lose a lot of money."

[Creditor-petitioner (repeating)]: "I will not!"

[The judge] then indicated [that he] said to the slave: "I have given you permission to speak about your two young sons; and **they are – according to the school of ʿAbd Allāh b. Masʿūd, which is my school – more entitled to the inheritance than the [brother-slave's] master**, even though you are alive, because you [legally] occupy the place of a deceased [person] given your slave status. That means that he demanded the inheritance to the exclusion of your two free sons.

"[The slave] demanded [the money] from him [the slavemaster, after all]. I then brought witnesses (*fa-aḥḍartu l-shuhūd*), reopened the case and revisited the claim (*fa-aʿāda l-khuṣūma wa-l-daʿwā*), then stayed with the slavemaster until I had the witnesses attest to his acknowledgement (*iqrār*) as to what he had admitted before me. I then ruled in favor of the two sons on the inheritance [claim]; I removed the entire sum from [the master's] possession and returned twenty *dīnār*s to him to account for what the slave had acknowledged; and I made that amount a debt that he owed his two sons.

"I also distributed the value of the price of the slave from the money of the two sons to one of the reliable trustees (*amīn min umanāʾ*) [of the court], and told

him: purchase their father from his master with these *dīnār*s, and free him to them, which he did.

"And I gave the remaining amount of the two children's money to their father, and made the trustee an overseer of it, and commanded the father to trade with the money on their behalf, and to take one third of the profit in consideration for his work. **I ruled as to all of this, and had witnesses observe the execution of the judgment (*wa-ashhadtu ʿalā infādhī l-ḥukma lahu l-shuhūd*).**"

The slave stood up, ecstatic, for God had relieved him (*wa-qad farraja llāh ʿanh*) – protected him from being imprisoned, freed him from his enslavement, and made him rich.

The excessively insistent one (*lajjāj*) [the creditor] stood up, [and] having lost [the case], confusedly took his 20 *dīnār*s but paid 3000 *dīnār*s![30]

The moral of the story is that excessive insistence and argumentativeness — one might even say unreasonable litigiousness even in the context of valid claims — do no good. Importantly, we see in the story incidental details of substantive rules of Islamic laws — including the fact that the judge in the case imposed the substantive legal rule from the legal school that *he* followed — that of Ibn Masʿūd (d. 32/652–3) in Iraq[31] — without inquiring about the school of the litigants and without the Ḥanafī school dominating the proceedings, as subsequently came to occur in much of Sunnī Iraq. Indeed, this case came on the heels of an earlier would-be inheritance case for which the debtor-slave might have prevailed to recover inheritance from his deceased brother, though the creditor had persuaded the debtor not to pursue his claim and took the entire inheritance himself (signaling that he followed another school of law in which the slave indeed would not have prevailed). In the end, the substantive rule in Ibn Masʿūd's school applied in a way that made the initial petitioner ultimately the biggest loser.

For our purposes, the more significant aspects of the story are the procedures observed in which the role of witnesses loom large. This was not a case of disputed fact. The creditor brought a claim that a slave who worked for him owed him a large sum of money. The debtor was a slave who acknowledged the debt, but offered an excuse – for which he simply asked for the judge's intervention to get the creditor to be lenient toward him, perhaps by offering him an extended repayment period or allowing him to avoid imprisonment. The creditor refused every attempt, to the point that his own insistence on severity led the judge to inquire into the circumstances surrounding the situation in which the debtor found himself – that is, the underlying facts and the earlier case that the debtor did not pursue. As it turns out, both the creditor and the debtor in the case before him acknowledged that the latter had a brother who died with no other heir but him, that the creditor-slavemaster had inherited from the slave's own brother rather than the debtor-slave, and that the slave was responsible for taking care of his free wife and two free sons.

At this point, the case actually flipped, and along with it, the procedural rule. The debtor-respondent became the petitioner, and the petitioner-creditor became the respondent.

30 Tanūkhī, *Faraj*, no. 272, 3:73–76.

31 On Ibn Masʿūd and his jurisprudence, see Qalʿahjī, *Mawsūʿat fiqh ʿAbd Allāh b. Masʿūd*, 2nd ed.

The judge reopened the earlier case, made the slave debtor make a claim and had witnesses attest to the acknowledgements. This change of events and the witness attestation provided the evidence that a *petitioner* needed to proffer according to the well-known procedural legal canon *al-bayyina ʿalā l-muddaʿī*.[32] The respondent did not contest the facts, so swore no oath to the contrary – as would be required by the remainder of that canon: *waʾl-yamīn ʿalā l-muddaʿā ʿalayh* or *ʿalā man ankar*.[33] Yet, he seemed unaware of the law or at least the legal consequences of his stance – despite the general warning from the judge. The judge ruled accordingly, awarding the deceased brother's share in the estate to the slave's free sons, who had a greater right of inheritance under Ibn Masʿūd's rule, and used that sum to satisfy the more minor debt from the second case, free the slave, and put him in a position to conduct transactions on his children's behalf with the oversight of a reliable trustee. The case did not end there, procedurally. The judge also had witnesses attest to the execution of his judgment.

All of this suggests that witnesses were key, as we see the role of witnesses throughout: in verifying confessions, in giving a basis to flip a litigant from being a respondent to a petitioner (depending on the claim), and in verifying execution of the judgment. Should anyone later contest the outcome on the facts, the judge could call in the witnesses to verify both the confession (and thus the fact-based aspect of the claim) and the judgment itself, or refer to his official court witnesses to verify the court record (*sijill*, *maḥḍar*) that the case witnesses had established. All of this points to important lessons about the important role of witnesses in judicial procedure in this period. False testimony was a known problem in medieval Baghdad and elsewhere,[34] and witness testimony shows up here as a remedy to ensure that the court proceedings were public and attested, even where the facts were not in dispute.

Case 2: The Case of Abū ʿAlī Aḥmad al-Ṣūlī and the Promissory Note[35]

Another story comes from an episode that Tanūkhī relates about himself from the time he witnessed his father, who was a judge in Baṣra, handling an inheritance case with which the younger Tanūkhī was later to become intimately involved. The year was 335/946–7, when Tanūkhī first observed the events unfold as a school boy:

> I was in school in Basra …, [at a stage where], nearing adolescence, [I] could understand, memorize, listen [attentively to the lessons], and well grasp what was happening, [when the following events unfolded].
>
> Abū Bakr Muḥammad b. Yaḥyā al-Ṣūlī had died there during the month of Ramadan that year, and had designated my father [as recipient of] his estate, having noted in his will (*waṣiyya*) that he had no heir.

32 On procedural legal canons, see Rabb, *Doubt in Islamic Law,* Appendix C ("On the Rise of Islamic Legal Maxims"), 354.

33 See Rabb, *Doubt in Islamic Law*, 354.

34 For a discussion, see Rabb, *Doubt in Islamic Law*, 126. For a similar concern in medieval European and English law, see Whitman, *The Origins of Reasonable Doubt.*

35 Tanūkhī, *Faraj*, 3:262–67, no. 328 (*al-Qāḍī al-Tanūkhī yataḥaddath ʿan qiṣṣatih maʿ Abī ʿAlī Aḥmad al-Ṣūlī*).

> Three young brothers came to my father – all poor, in the worst of conditions. The oldest of them was called Abū ʿAlī Aḥmad, the middle one Abū l-Ḥasan Muḥammad, and the youngest Abū l-Qāsim – [all] sons of Muḥammad al-Tammār. They informed my father that their mother was a relative of Abū Bakr al-Ṣūlī, and that they [should have] inherited from him by virtue of her relationship to him. They then proceeded to specify her blood relationship and connection to him [the deceased].
>
> **My father demanded that they produce evidence of that claim to him in the form of two reliable witnesses (*fa-sāmahum abī an yubayyinū dhālik ʿindah bi-shahādat shāhidayn min al-ʿudūl*),** before he would distribute to them the excess funds of the one-third remainder after paying off the debts from the estate. **So they went about doing that, going around to and fro for months to solicit the testimony (*fa-kānū yataʿakkasūn fī iqāmat al-shahāda shuhūran*),** [before] finally coming back to my father's door.[36]

Tanūkhī went on to describe the setting for what came next: his school consisted of a room that "protruded from the house" onto a narrow lane that abutted it. There, he used to sit on a long bench between the lane and the door of the house with his teacher and other students. The Ṣūlī brothers — it seems, unsuccessful at immediately proving their claim of blood relations and thus their entitlement to the inheritance, but seeing an opportunity in hanging around the Tanūkhī household — began to sit with the younger Tanūkhī at the school house, seeking another way to gain access to money. Tanūkhī describes it this way:

> The [Ṣūlī] brothers often used to sit with me in my school, being friendly with my teacher, playing with me, getting close to me, and asking me to present their case to my father through petition after petition that they gave me.
>
> One day, the eldest of them – that is, Abū ʿAlī Aḥmad b. Muḥammad – said to me: If God extends your life until you take up the judgeship, and you become like your father, the judge (*qāḍī*), in stature and in wealth, and if I were to come to you, what would you give me?
>
> I said to him, out of youthful [innocence] and as came to my lips [lit.: tongue]: 500 *dīnār*s.
>
> He said: Give me that in writing!
>
> I became shy and said nothing.
>
> He said to my teacher, "Tell him to write it [down] for me."
>
> [The teacher] said to me: "Write it [down] for him," and my teacher and **Abū ʿAlī dictated to me a document (*ruqʿa*) to that effect, which Abū ʿAlī then took.**
>
> **Only a few days passed until the testimony was heard before my father (*istaddat lahum al-shahāda ʿinda Abī*),** confirming the validity of their claim to the maternal

36 Tanūkhī, *Faraj*, no. 328, 3:262.

relation [to the deceased], and their entitlement to the inheritance [of Abū Bakr al-Ṣūlī] based on it.

My father had sold the estate, paid out the debt, divided the remaining third, and kept the rest of the money. So he ordered that it [the latter sum] be delivered to [the Ṣūlī brothers], **had its receipt by them witnessed (*wa-ashhada bi-qabḍih ʿalayhim*), and they left.**[37]

That was the end of the story for then — though the young Tanūkhī was later to encounter one of the Ṣūlī brothers. It was some two decades later, when the younger Tanūkhī had become a judge in Ahwāz, that he came across the oldest Ṣūlī brother again. Abū ʿAlī al-Ṣūlī — the same one who extracted the promissory note from the schoolboy to pay 500 *dīnār*s should he one day become a well-to-do judge — managed to track down the boy-turned-judge in the year 356/966-7. He came to the judge from Baghdad, looking disheveled, and informed the judge that he needed a large sum of money to repay his debts from Iraq. Apparently, the Ṣūlīs were constantly in need of money. Confused at first, this Judge Tanūkhī only recognized the man after he produced a document, showing the judge his own old schoolboy scribbles.[38] As soon as he saw it, he "remembered the conversation, praised God profusely, and … said: the debt is an obligation now: **a substantiated, actionable claim (*ḥaqq marʿiyy wakīd*).**"[39] He did not have 500 *dīnār*s, which was a considerable amount of money, so instead gave the oldest Ṣūlī brother a house, clothes, and 300 silver coins (*dirham*s); impressed upon other town officials to give the man 10 *dīnār*s plus another 200 dirhams immediately; and then gave the brother a position that would entitle him to receive two *dīnār*s per month until the debt was paid off.[40] When Tanūkhī left his judicial post in Ahwāz to accept another post, the succeeding judge **confirmed his decision and continued to ensure that the payments went to the Ṣūlī brother (*al-qāḍī alladhī waliya l-qaḍāʾ baʿdī aqarrahu ʿalā mā kuntu walaytuh*).**[41] Thereafter, to make a long story short, the brother abused the position and took advantage of Judge Tanūkhī, constantly holding him hostage to an old debt until it was satisfied. Even when the debt was settled, he was still in need of money and continued to appeal to Tanūkhī for help — who in the end only gave it out of the goodness of his heart once he had left the city for some three years and then returned as governor of Ahwāz.[42] It was a lesson that one should behave well toward others, as one may someday be at their mercy, and it was also a reminder to repay debts and show kindness when in positions of power even to those showing unkindness.

The story is certainly a tale that fits well within the literary genre of the *Faraj*. The Ṣulī brothers had first operated to get what they claimed to be their share of inheritance from a man whom they clearly did not know well but to whom they could claim some relation. But the oldest Ṣūlī brother took it one step farther — conniving to get a promise of even more money and then cashing in on it twenty years after the fact. He was delivered from hardship

37 Tanūkhī, *Faraj*, no. 328, 3:262–63.
38 Tanūkhī, *Faraj*, no. 328, 3:263–64.
39 Tanūkhī, *Faraj*, no. 328, 3:264.
40 Tanūkhī, *Faraj*, no. 328, 3:265–66.
41 Tanūkhī, *Faraj*, no. 328, 3:267.
42 Tanūkhī, *Faraj*, no. 328, 3:266.

not by any good deed of his, but by the generosity of the protagonist Tanūkhī, which prevailed over the antagonist's bad behavior. The story was also a lesson to be on one's guard in legal proceedings, and not to agree to gratuitous payments — especially not in writing — if one was not prepared to deliver on them. It was a self-praising lesson, too, where the author used himself as a model to instruct the reader on the value of upholding one's promises and meeting grubbiness with kindness.

Notable here are the incidental uses of procedure that Tanūkhī references throughout the stories. Three are worth highlighting. First, Tanūkhī's father, who was responsible in his capacity as a judge for disposing of the estate of a deceased man who left no heirs, required evidence in the form of testimony of at least two upright witnesses to a subsequent claim of familial relations in order to satisfy a demand for inheritance. This rule fit within the norms expressed by the famous legal canon noted above: "the claimant must produce the evidence: *al-bayyina ʿalā l-muddaʿī* ..." to establish a claim or right, usually juxtaposed against the respondent, who must swear an oath to deny a claim (*wa-l-yamīn ʿalā l-muddaʿā ʿalayh* or *ʿalā man ankar*).[43] What is notable is the fact that this legal canon applied even to situations, where, as here, there was no counter-claimant or opposing litigant.

Second, the story shows that it was commonplace to have witnesses verify receipt of money to which they were entitled. That is, Tanūkhī's father not only requested that two upright witnesses prove the claim of entitlement, but also had two witnesses attest that the claimants had received the money and he had satisfied the claim – just as the earlier judge had required witnesses to attest to satisfaction of the judgment. Such procedure would have been necessary in a society where court proceedings were not always widely attended. During that time, court sessions were regularly held in the home, the mosque, or the market place.[44] Having witnesses attest to the proceedings and satisfactions of claims like this one would add finality to the case, particularly where the judge did not have a simple system to which he could appeal for recourse if accused of failing to satisfy such claims. To be sure, there was the *maẓālim* (royal) court system by which a litigant injured by an official's actions could appeal to the executive.[45] The attestation of the judge's satisfaction of the claim would insulate him from frivolous claims. As it turned out, narratively, he might well have needed such insulation when dealing with the likes of the Ṣūlī brothers.

Third, written evidence of financial obligations was clearly common and clearly actionable – despite a general assumption in the field that early Islamic history exhibited overall antipathy toward written evidence. Evidently, even as a schoolboy, the young Tanūkhī had reached an age at which he was legally subject to liability for his actions and able to engage in financial transactions. That is, in writing about the case, Tanūkhī makes it a point to note that his younger schoolboy self was old enough to understand and grasp what was going on – suggesting that he had reached the age or maturity that triggered legal personhood (*rushd*). Accordingly, his older judge self recognized the obligation as soon as the oldest Ṣūlī brother presented to him the document written in the younger Tanūkhī's own

43 See above, note 32.

44 On these varied locations in which judges held court sessions in Umayyad and ʿAbbāsid lands, see, e.g., Wakīʿ, *Akhbār al-quḍāt*, 76-77 (at home), 99 (in the mosque), 187 (at a public square in front of the mosque), 202 (within the market – which was like the congregational mosque).

45 See Tillier, "Qāḍīs and the Political Use of the *Maẓālim* Jurisdiction," 49–50.

handwriting. Here we notably see the use of written evidence, despite the idea in contemporary scholarship that oral evidence occupied a primary, almost exclusionary place, to written evidence in early Islamic law.[46] In all of these ways, we see the common, ordinary court procedures percolating in everyday life as depicted in Tanūkhī's literary tale.

Case 3: The Case of the Falsely Accused Slavewoman of Vizier Aḥmad b. Abī Khālid[47]

In a final episode, Tanūkhī tells a tale involving the threat of false testimony, even with written and testamentary evidence in the form of witnesses. Not even the ordinary procedures of verifying written evidence were failsafe. It was a lesson that judges were to be constantly vigilant in uncovering causes for doubting facts and in ascertaining the truth – through certain judicial procedures – of seemingly probative witness evidence.

In this episode, said to have unfolded around the turn of the 3rd/9th century, a slavewoman belonging to the caliph's vizier, Aḥmad b. Abī Khālid,[48] was accused, in sworn documentary evidence, of committing fornication. It was up to the presiding judge, Ibrāhīm b. al-ʿAbbās al-Ṣūlī,[49] to determine what actually happened and whether the slavewoman was to be subjected to the most final of punishments that the vizier wished to impose: the death penalty.[50] According to the judge, the vizier produced a document (*ruqʿa*) alleging that his slavewoman had slept with someone else. To verify its contents, he **"called on two of his trustworthy servants to bear witness to the document (*yastashhid fī l-ruqʿa bi-khādimayn kānā thiqatayn ʿindah*)."** While they did not initially attest to the contents of the document, eventually they did. Perhaps it was their delay in attesting to the contents of the document that raised doubts for the judge. Moreover, he came to find out that the process of securing their testimony was questionable to say the least. As the vizier reportedly told him:

> I called the two servants, and asked them both about [the affair], **which they denied (*fa-ankarā*)**. So I threatened them. They were steadfast in their denial. So I beat them and presented to them both an instrument of torture (*wa-aḥḍartu lahumā ālat al-ʿadhāb*). They then confessed to everything in the document (*ruqʿa*) against the slavewoman. But I did not eat a bite of food yesterday or today (lit: taste food) without being preoccupied with putting the slavewoman to death.

46 See, for example, Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad b. Idris al-Shāfiʿī*, noting that Shāfiʿī indicates in his legal treatises that oral transmission is preferred to written tradition, at least for *ḥadīth* records, which form the basic source of Islamic law after the Qurʾān. For further discussion on a general preference for oral to written transmission of *ḥadīth* in early Islamic history and that written evidence played a role in private rather than public life, see Cook, "The Opponents of Writing of Tradition in Early Islam." Here, the use of the promissory note against Tanūkhī might be the type of private-life written documentation to which Cook refers, but notably his use of sources is also much wider than the normative legal sources.

47 Tanūkhī, *Faraj*, no. 81, 1:243–44 (*Aḥmad b. Abī Khālid yablughuh anna jāriyatan lah tūṭiʾu firāshah ghayrah*).

48 He was Aḥmad b. Abī Khālid al-Aḥwal, the vizier to Maʾmūn – who was a smart man and an eloquent writer – who reportedly remained the vizier until Maʾmūn's death in 210 AH (Tanūkhī, *Faraj*, editor's note 2, p. 264).

49 Ṣūlī is Abū Isḥāq Ibrāhīm b. al-ʿAbbās b. Muḥammad b. Ṣūlī (176–243), a scribe and poet with a biography at the end of the story no. 55 of Tanūkhī, *Faraj* (see editor's note 3, p. 264).

50 Tanūkhī, *Faraj*, no. 81, 1:243.

On hearing this, the judge looked at the Qurʾān to see if it could offer any guidance. Opening it to a random page for that purpose (a process called *ifti'āl*), his eyes fell on the verse: "O believers: if a sinner comes to you with a piece of news, then verify it …: *Yā ayyuhā 'lladhīna āmanū in jā'akum fāsiqun bi-naba'in fa-tabayyanū* [*an tuṣībū qawman bi-jahālatin fa-tuṣbiḥū 'alā mā fa'altum nādimīn* (Q. 6:49)]." That verse, the judge said, "gave me doubt about the validity of the story (*fī ṣiḥḥat al-ḥadīth*) …."

After securing the vizier's permission to take the matter into his own hands, the judge used a different type of procedure to ascertain the probity of the evidence. He separated the witnesses, until one of them confessed that the wife of the vizier gave him 1000 *dīnār*s in exchange for his testimony against the slavewoman. He proved it by producing a [cash-laden?] envelope with her seal. Eventually, a second document from the woman arrived, informing the judge that the first [accusatory] document was of her doing "out of jealousy because of the slavewoman, that everything in it was false, and that she forced the two servants" to testify falsely against the slavewoman. In that way, the slavewoman was exonerated.

While the social moral of the story might have been to warn men away from plights caused by wives' sexual jealousy, the legal lesson to be gained from this story was more directly procedural than the others: Judges should be especially attentive to ensuring that testimony, whether written or oral, is authentic and probative. In fact, the story reflects an ongoing problem in early Islamic societies and the central importance of judicial procedure in addressing it: an ever-present specter of false testimony (*shahādat al-zūr*) — which was a threat so great that it appeared in popular literary stories like this one to warn against it generally and to caution judges to implement procedures designed to root it out.

III. Conclusion

Tanūkhī's career as a judge left an imprint on his literary output, and his output reflected regular elements of judicial procedure in early Islamic law. In our review of some of that output, we have not sought to analyze the literary complexities of the stories in terms of their plots, themes, and cultural codes; nor have we sought to assess or evaluate their provenance or veracity in terms of their sources, transmission history, and circulation.

Instead we have keyed in on the ways that Tanūkhī's stories reflect the urban Abbasid society of his time and how hence, both Islamic law and judicial procedure appear naturally in them. The characters in the stories conduct business transactions, dispute with one another about debts owed, go on pilgrimage to observe religious rites and rituals, and, when they die, have their estates distributed according to Islamic law. All of these stories impart lessons warning against unreasonable persistence, excessive greed, and false accusations. Yet, the relief these characters feel after hardship in each story – per the theme of the book's title – are not the only lessons.

To glean additional lessons about judicial procedure, we have rather singularly focused on identifying features related to Islamic law and judicial procedure that appear throughout the *Faraj* through these illustrative cases of relief after hardship. Importantly, these episodes add texture to the flat views of procedure than we can glean from the legal sources alone. In particular, we see the use of witnesses in consonance with the legal canons that the sources suggest typically apply to contested cases with other litigants. We see the witness-attestation of a judge's satisfaction of claims, which the legal sources are typically

silent about but that accord with the structure of *maẓālim* courts as a venue for appeal from administrative injustices. And we see the regular use of written evidence, with the acceptance of it in one context and distrust of it in another together with a cautionary lesson to always exercise caution in the face of doubt and to verify evidence whenever possible. Even if the stories are not accurate or are stylized, as they surely are, the incidental reference to these procedural facts help round out the picture to reveal ways in which Islamic law played out outside of the law books.

By focusing on judicial procedure in this selection of Tanūkhī's judge-focused literary stories, we hope to have demonstrated a modest point cloaked in these colorful tales: In addition to depicting the relief that comes to the stories' characters after their various hardships, these tales also have something to teach those characters, and the modern legal historian, about Islamic judicial procedure. The incidental mention of that procedure underscores its importance and centrality to the very construction of early Islamic law and society.

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