

**THE AUTHOR-JURIST AND LEGAL CHANGE
IN TRADITIONAL ISLAMIC LAW**

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I

In this article¹ I do not intend to show that Islamic law underwent change at different points in its history or in particular regions under its jurisdiction, although there is sufficient justification to do so in light of the fact that modern Islamicist scholarship has, until recently, categorically denied that this law experienced any noticeable, much less fundamental, development after the formative period. Instead, and going beyond the narrow confines of this issue, I will focus on explaining *how* change took place and *who* were the agents of this process. For in explaining the modalities of legal change, one can at the same time demonstrate, *a fortiori*, that not only did change take place but that its means of accommodation were a fundamental, and indeed a structural, feature of Islamic law.

Before we proceed any further, a preliminary but important remark is in order; namely, that Muslim jurists and Islamic legal culture in general not only, as we shall see, experienced legal change in very concrete terms but were also aware of change as a distinct feature of the law. A society (or an individual, for that matter) may experience a certain phenomenon and even partake in it actively, yet may nevertheless fail to articulate the experience consciously and may thus remain unaware of the processes taking place and in which it is involved. This certainly was not the case with legal change in Islam. Muslim jurists were acutely aware of both the *occurrence* of, and the *need* for, change in the law, and they articulated this awareness

through such maxims as “the *fatwā* changes with changing times” (*taghayyur al-fatwā bi-taghayyur al-azmān*) or through the explicit notion that the law is subject to modification according to “the changing of the times or to the changing conditions of society.”²

II

In determining the modalities and agents of legal change, the focus of the present enquiry, it is necessary to maintain a distinction between the four most important juristic roles that dominated Islamic legal culture, namely, the *qādī*, the *muftī*, the author-jurist and the professor. These roles rarely stood independently of each other, for a jurist may combine two, three or the entire set of roles, let alone other subsidiary ones. It is remarkable that after the second/eighth century, the pillars of the legal profession usually excelled, or at least successfully engaged, in all four roles. Generally speaking, a jurist's career was not considered complete without his having fulfilled all these roles, although the role of *qādī*, in the case of a number of distinguished legists, does not seem to have been seen as a prerequisite for crowning success. A typical example of an accomplished career is that of Kamāl al-Dīn Ibn al-Zamālikānā (d. 727/1326) who was considered, during the later part of his life, the leader of Syrian Shāfi'ism. He is reported to have excelled as a *muftī* and professor, to have presided as a *qādī* in Aleppo and to have authored several works of law. Other typically distinguished careers are those of Ibn Surayj (d. 306/918), Taqī al-Dīn al-Subkī (d. 756/1356), Sharaf al-Dīn al-Manāwī (d. 757/1356), and Sirāj al-Dīn al-Bulqīnī (d. 805/1402), all of whom were *qādīs*, distinguished *muftīs*, professors and prolific authors.

The current state of knowledge in Islamic legal studies renders unnecessary any general comment on the nature of the offices of the jurisconsult, the judge or the professor at law.³ But a word on the author-jurist as a professional category seems required, since this category has not been sufficiently noticed, much less studied. As part

of the veneration in Islam for the written word, it was deemed meritorious for the learned to write, since writing (*taṣnīf*)⁴ was viewed as a religious act in the service of 'ilm.⁵ The writing of treatises, short and long, was an essential part of any distinguished legal career. There is no complete biographical notice in the *ṭabaqāt* works of the jurists which does not include a list of the treatises written by the jurist under discussion. The mere absence of such a list from any biographical notice speaks volumes. A jurist who did not engage in *taṣnīf* was considered to be lacking in some way as a member of the legal profession. Zayn al-Dīn al-Khazrajī (d. 833/1429), for instance, is said to have failed to produce notable, successful students, a failure that was matched only by his inability to write anything of significance.⁶ Others, however, are characterized by the sources as prolific authors, and as having gained merit by their practise of devoting at least one-third of night-time to *taṣnīf*.⁷

Taṣnīf as a legal activity was the exclusive domain of the author-jurist. Conversely, as an act of authoring, *taṣnīf* was not a prerequisite either for the *qādī*, the *muftī* or the professor. The *qādī*, for one, was not himself required, as part of his normal duties, to write down his decisions, much less the minutes of the court proceedings, since this task devolved upon the scribe (*kātib*) who was a permanent functionary of the court.⁸ Even the formulation of the language in which court decisions and minutes were recorded was spared him, as this task was the province of the scribe as well. Nor was it part of the professor's function to write, although he had his teaching notes and supervised the writing, by his graduate students, of *ta'liqas*. That some jurists wrote treatises on law while being engaged in teaching should in no way mean that *taṣnīf* was part of their professional role as professors. This remained true even when they wrote *mukhtaṣars* — short treatises used, *inter alia*, for pedagogical purposes. When they wrote such treatises, they were doing so as author-jurists, not as professors, for after all, most professors did not write *mukhtaṣars* and yet many of them were highly successful teachers.⁹

It may be argued that the *muftī* was an author-jurist because he wrote or authored *fatwās*. But this argument is at best incomplete and

at worst misleading since the *muftī* may have been an author only in a very limited sense. The majority of *fatwās* consisted of a succinct statement of the law and rarely involved the elaboration of legal arguments, a practise highly discouraged.¹⁰ Ibn al-Ṣalāḥ, himself an author of an influential manual on the art of *iftā'*, vehemently argues that *fatwās* should be kept short, to the point and unreasoned, so that they would not fall into the category of *taṣnīf*.¹¹ Indeed, even the more extensive *fatwās* lacked the discursive strategies and forms of argumentation usually found in the works of the author-jurists. The fact that many *fatwās* consisted of very short answers — as short as “Yes” or “No” — is indicative of the very limited function of the *fatwā* as authored discourse. It was the custom that only the most distinguished *muftīs*, when faced with a problem of frequent occurrence or of fundamental importance, would rise to the occasion by writing a *risāla* in which lengthy and complex arguments were constructed. In such cases, the jurist would be exchanging the *muftī*'s hat for that of the author-jurist.¹² The art of writing the *risāla* and other forms of *taṣnīf* distinctly differed from that of *fatwā*.

It can safely be stated that, as a rule, accomplished jurists are portrayed in the biographical dictionaries as having been seriously engaged in teaching, writing and issuing *fatwās*. Engaging in *qāḍī*', however, was not necessarily regarded as the culmination of a successful legal career, since a number of first-rate jurists were never engaged in it, or at least are not reported to have done so. Even if they played this role, it is significant in itself that the biographers did not see it as worthwhile to record such an activity. For had it been an essential requirement, the biographers would surely have taken pains to stress this accomplishment, as they did in the cases of *taṣnīf*, *iftā'* and *tadrīs* (teaching). One notable example of such a career is that of Abū 'Amr Ibn al-Ṣalāḥ who was renowned as a *muftī*, a professor and an influential author of legal and other works. Ibn al-Ṣalāḥ attained fame and distinction despite the fact that he never served in the capacity of a *qāḍī*.

In due course we shall see that the *qāḍī qua qāḍī*, by virtue of the nature of, and limitations imposed upon his function, was of little if

any consequence as an agent of legal change in the post-formative period. I say *qāḍī qua qāḍī* because the four roles, including that of *qāḍī*', were not always clearly distinguished from each other when they were present in the career of a single jurist — and this frequently was the case. Here, it is useful to recall sociology's theory of roles which acknowledges the participation of a role-set whenever any single role is engaged in. Just as any social status involves an array of associated roles and does not stand, to any significant extent, independently of these roles, any or all of the juristic roles described above might come into play when a specific role is exercised. A modern-day professor of constitutional law, for example, must teach students, interact with her colleagues and the university administration, publish works of scholarship and perform public duties when constitutional issues are debated. While still a professor, she might serve on a government sub-committee, preside as a judge or work as an attorney. None of these roles can be kept entirely separate from the other ones, for as an author, she might write a book on a fundamental issue of constitutional law, while as a member of a sub-committee she might prepare a report which heavily, if not totally, draws on her research for her monograph. The question that arises here pertains to the nature of her report: Is it a production of her work as a professor or as a member of the government sub-committee?

A similar question arises in the case of the *muftī* who engages in discourse that transcends the limits of the *fatwā* strictly so defined. A *muftī*, such as Taqī al-Dīn al-Subkī or Ibn Ḥajar al-Haytamī, might elect to address, in the form of a short treatise, a legal issue which had already elicited many *fatwās* and which continued to be problematic and of general concern to the community or a segment thereof (*mā ta'ummu bihi 'l-balwā*). In this case, how should the treatise be classified? Is it merely an extended *fatwā*, the work of the *muftī*? Or is it a *risāla*, the product of the author-jurist? For now, we only need to assert that such questions of role-sets bear equally upon the *qāḍī*'s role in legal change. According to the strict definition of the *qāḍī*'s profession (that is, the *qāḍī* as entirely dissociated from other roles), the institution of *qāḍī*', after the formative period, was, by and large,

of marginal importance in legal change. The *qāḍī qua qāḍī* heard cases, determined certain facts as relevant and, in accordance with these facts, rendered a judgment that was usually based upon an authoritative opinion in his school. Once rendered, his judgment was normally recorded in the *dīwān*, the register of the court's minutes.¹³ At times, a copy of the record of the decision was given to one or both parties to a litigation, but such documents had no legal significance beyond the immediate and future interests of these parties. The court cases, however, were viewed as constituting a considerable part of practise, and the *qāḍīs dīwān* amounted to a discursive reflection of this practise. But it was not the *qāḍī's* function to assess or evaluate that *corpus juris* in which practise manifested itself. Such assessment and evaluation was the province of the *muftī* and perhaps more so that of the author-jurist. If a *qāḍī* was to assess the significance of court cases for legal practise, he would not be doing so as a *qāḍī*, but rather as a *muftī*, an author-jurist, or as both.

At any rate, such an assessment logically presupposed a repertoire of court cases, and thus represented a juristic activity that, materially speaking, came at the tail-end of the adjudication process. We know, for instance, that Taqī al-Dīn al-Subkī drew heavily on his own experience as judge when he issued *fatwās* and wrote several *rasā'il* on fundamental and highly relevant legal issues in his day. But it is important to realize that when he did so, it was in virtue of his role as a *muftī* and author-jurist, respectively. For it was in no way the function of the *qāḍī*, strictly speaking, either to engage in issuing *fatwās* or to discourse, beyond the boundaries of his court, on legal issues.

If the determination of what constitutes predominant practise was not the *qāḍīs'* responsibility, then these latter, despite their participation in that practise,¹⁴ could never have been directly involved in legal change. But could they have contributed to change insofar as they gradually but increasingly abandoned the authoritative doctrine in favour of another, one consisting of the practise which the author-jurist used, *ex post eventum*, as justification of legal change? Elsewhere, I have shown that the consideration of predominant practise was one

factor in effecting legal change.¹⁵ If what was once a minority opinion became frequently applied, and, later still, gained even wider circulation, it would likely be raised to the authoritative level of opinion known as the *ṣaḥīḥ* or the *mashhūr*, depending on the particular school involved. Now the question that poses itself here is: Did the *qāḍīs* participate in the practise through which an opinion was transformed from having a relatively marginal status to one having an authoritative status? This question in effect both implies and amounts to another: Did *qāḍīs qua qāḍīs* apply what was at the moment of decision other than the authoritative opinions to the cases they adjudicated? If the answer is negative, then it is difficult to argue that they played any role in legal change, for had they done so it would have been precisely in this sphere of juristic activity. But if the answer is in the affirmative, then a further question may be posed: Was it the *qāḍīs qua qāḍīs* who were responsible for departing from authoritative opinions in favour of less authoritative ones? Answers to these questions are by no means easy to give, since the present state of our knowledge of the processes involved in the *qāḍī's* decision leaves much to be desired. Our answer must, therefore, remain tentative, based as it is on indirect evidence.

It is our contention that the *qāḍī qua qāḍī* was not, in the final analysis, free to depart from what is considered the authoritative opinion of the school. Even when there was no universal agreement on a certain question or case, it was not, generally speaking, the *qāḍī* who ultimately decided which of the two was the more authoritative. If *qāḍīs* were, from time to time, engaged in this latter activity, they were so engaged not necessarily in their role as *qāḍīs* but rather as jurists playing other roles, especially the *muftī* who had a central function in courts of law. Our evidence strongly suggests that the *qāḍī* regularly turned to the *muftī* for legal advice. As early as the second/eighth century, it was already recognized that the *qāḍī* might or might not be a highly competent jurist, which was not usually the case with the *muftī*. During this early period, and even later on, the *muftī* was mostly considered the ultimate hermeneutical authority, while the *qāḍī* largely fell short of this high expectation. Shāfi'ī already encouraged

qādīs to seek legal counsel from learned jurists, i.e., the *muftīs* whom he considered in his discourse as *mujtahids*.¹⁶ The Hanafite Jaṣṣāṣ perhaps represented the average position on this issue when he insisted that the *qādī*, in deciding which opinion is the soundest and most suitable for the case at hand, must seek the jurists' counsel by listening to their opinions.¹⁷ Indeed, Islamic legal history abundantly attests to the centrality of the *muftī* to the *qādī*'s work. Suffice it here to adduce the vast bulk of *fatwās* that have been hitherto published. The majority of these show beyond doubt that they originated as *istiḥṣā*'s requested by *qādīs* from *muftīs*¹⁸ for the purpose of deciding court cases.

If the *qādī* was not responsible either for departing from authoritative opinions in favour of weaker ones, or for determining that the predominant application of a weaker opinion should be given an authoritative status, then he, *qua qādī*, cannot, to any meaningful extent, be considered an agent of legal change. This assertion, however, should remain at this point tentative. For we know that *qādīs* gradually departed from certain authoritative doctrines of their school, and that this practise of theirs constituted the embryo of legal change. Yet, it took no less than the *muftī* and the author-jurist to articulate and justify this change, and without their juristic endeavour, the first stages of legal change that had been initiated by the *qādīs*' practises – if at all – would never have come to fruition. Therefore, it is far less tentative to argue that if the *qādīs* contributed in some instances to legal change, their contribution must have been at best a necessary, but by no means sufficient, condition.

Nor can it be argued that the professor of law, again as an independent juristic role, was involved in legal change any more than the *qādī* was. Of course, some professors belonged to that rank of jurists who were engaged in articulating a legal reaction to social and other changes, but when they were engaged in this task, they were not acting as professors *qua* professors, but rather as *muftīs* and/or author-jurists. The professor taught law students and wrote what is usually considered condensed works for their benefit. In his *ḥalaqa*, he may have discussed certain cases of law in terms of what we now – with the benefit of hindsight – call legal change, but articulating legal

change was not part of his role as professor.

Having excluded the *qādī* and the professor as significant agents of legal change, we are therefore left with the *muftī* and the author-jurist. It is these two types of jurists – playing two distinct roles – who, we shall argue, undertook the major part, if not the entirety, of the task of articulating the law's reaction to social and other changes. However, I will not discuss here the role of the *muftī*. Elsewhere, I have treated the *fatwā* as a socio-legal tool, the mechanism by means of which it became part of substantive law, and the role the *muftī* played in modifying the law.¹⁹

Nonetheless, throughout the forthcoming discussion, it must remain clear that two distinct roles were involved, successively, in the transformation of the *fatwā* from the point of its social origin to its ultimate abode in substantive legal works. The first role, ending with the issuance and dissemination of the *fatwā*, was, *ipso facto*, that of the *muftī*, while the second, ending with the final incorporation of the *fatwā* in positive legal works, was that of the author-jurist. It is largely through this process of transformation that legal change was articulated and effected.

III

It may be safely stated that without the contributions of the author-jurist, the full legal potential of *fatwās* would never have been realized, for it was he who finally integrated them into the larger context of the law, and it was he who determined the extent of their contribution to legal continuity, evolution and change. The authority of the author-jurist stemmed from the fact that he was qualified to determine which opinions and *fatwās* were worthy of incorporation into his text, in which he aspired to assemble the authoritative doctrine of the school. Thus, like the *muftī*, and certainly not unlike the founding Imam,²⁰ the author-jurist's authority was primarily – if not, in his case, exclusively – epistemic.

In illustration of this process of legal change, we shall discuss the

modalities of written communication prevalent among the *qādīs*, a subject that occupies space in both *adab al-qādī* works and *shurūt* manuals. The usual Arabic designation for this type of communication is *kitāb al-qādī ilā 'l-qādī* and it takes place when "a *qādī* of a particular locale writes to a *qādī* of a different locale regarding a person's right that he, the first *qādī*, was able to establish against another person, in order that the receiving *qādī* shall carry out the effects of the communication in his locale."²¹ The practical significance of this mode of writing is all too obvious, and the jurists never underestimated the fundamental need for such a practise.²² It was by means of such a written instrument that justice could be done in a medieval society which was geographically widespread and mobile. A debt owed to a person in a remote town or village might not be paid by the debtor without the intervention of the long arm of the court. Similarly, this instrument could mediate the return to the master of a slave who had fled to an outlying village. The use of this instrument, in effect, brought together otherwise dispersed and independent jurisdictional units into a single, interconnected juridical system. Without such a legal device, one jurist correctly observed, rights would be lost and justice would remain suspended.²³

Now, one of the central conditions for the validity of such written instruments is the presence of two witnesses who will testify to the documentary transfer from one *qādī* to another. This condition was the common doctrinal denominator among all four schools. All the so-called founders, co-founders and their immediate followers subscribed to, and indeed insisted upon, this requirement. The early Malikites, such as Ibn al-Qāsim (d. 191/806), Ashhab (d. 204/819), Ibn al-Mājjishūn (d. 212/827), and Muṭarrif (d. 282/895) never compromised the requirement of two witnesses.²⁴ It is reported that Sahnūn used to know the handwriting of some of his deputy judges, and yet still insisted upon the presence of two witnesses before whom he broke the seal and unfolded the *kitāb*.²⁵

It appears that sometime during the fifth/eleventh century²⁶ the Malikite school underwent a dramatic change in the practise of the *qādīs'* written communications, a change that had no parallel among

the other three schools. At around this time, the Andalusian and Maghribi *qādīs* apparently began to admit the validity of such written instruments without the testimony of witnesses.²⁷ Authentication through the attestation of the *qādī's* handwriting (*al-shahāda 'alā 'l-khatt*) was sufficient to validate the document.²⁸ In other words, if a *qādī* felt reasonably certain that the document before him was in the handwriting of another *qādī*, then that would constitute sufficient proof of its authenticity.

It is highly probable that the practise initially started in eastern Andalusia, and spread later to the west of the peninsula and the African littoral.²⁹ The earlier Zāhirite acceptance of this doctrine and practise may represent the forerunner of this Malikite development. Ibn Sahl, who died in 486/1093, reports that the eastern Andalusian *qādīs* were not only satisfied with handwriting and the seal, but accepted the *kitāb* as true and authentic even if the *qādī* wrote nothing in it but the *'unwān*, a short statement that includes the names of the sending and receiving *qādīs*.³⁰ Although this had never been the case before, it was to become the standard doctrine, acknowledged to be a distinctly Malikite entity by the other schools as well as by the political authorities of the day.³¹ The early Malikite scholars considered a *qādī's kitāb* invalid if its authentication depended solely on identification of the handwriting.³² Muṭarrif and Ibn al-Mājjishūn rejected the authenticity of a *kitāb* even though two witnesses might testify that they had seen the issuing *qādī* write it with his own hand.³³ They insisted, as did all the other jurists, that the witnesses attest to the fact by declaring that the issuing *qādī*, whom they knew, had made them testify on a certain day in his courtroom (*majlīs*) in a particular city or village; that the instrument (the witnesses would at this time point to the document) was his *kitāb*; and that it bore his seal. At this point, the witnesses would be required to reiterate the contents of the document. Nothing short of this testimony would suffice.

Writing around 600/1200, Ibn al-Munāṣif portrays a vivid picture of the onset of procedural change in the Maghrib and Andalusia:

In the regions with which we are in contact, the people [viz.

jurists] of our age have nowadays agreed to permit the *kitābs* of *qāḍīs* in matters of judgments and rights on the basis of sheer knowledge of the *qāḍī*'s handwriting without his attestation to it, and without a recognized seal. They have demonstrably acquiesced in permitting and practising this [matter]. I do not think there is anyone who can turn them away from it, because it [the practise] has become widespread in all the regions, and because they have colluded to accept and assert it.³⁴

That the change took place during the decades preceding Ibn al-Munāṣif's time may be inferred not only from his reaction to it as a novelty but also from the urgency with which he felt the need to justify the new practise. "We have established that Mālik's school, like other schools, deems the *qāḍīs*' *kitābs* which have been attested by witnesses lawful, and that these [instruments] could not be considered admissible merely on the evidence of handwriting." Yet, Ibn al-Munāṣif continues, "people and all judges [of our times and regions] are in full agreement as to their permissibility, bindingness and putative authority; therefore we need to investigate the matter...." by means of "finding out a good way to make this [issue] rest on a sound method and clear foundations to which one can refer and on the basis of which the rules of Shari'a may be derived."³⁵ It is precisely here that the contribution of Ibn al-Munāṣif as an author-jurist lies.

Our author argues that the new practise is justified on the basis of *ḍarūra* (necessity), a principle much invoked to explain and rationalize otherwise inadmissible but necessary legal practises and concepts, including, interestingly enough, the very concept and practise of *kitāb al-qāḍī ilā 'l-qāḍī*. The principle of *ḍarūra* finds justification in Quran II:185: "God wants things to be easy for you and does not want any hardship for you."³⁶ Ibn al-Munāṣif argues that it is often difficult to find two witnesses who can travel from one town to another, probably quite remote, in order to attest to the authenticity of the conveyed document. Attesting to handwriting thus became the solution to this problem. For without this solution, Ibn al-Munāṣif averred, either justice

would be thwarted or the witnesses would have to endure the hardship of travel; and both results would be objectionable. Furthermore, since the ultimate goal is to prove the authenticity of the *qāḍī*'s *kitāb* against forgery and distortion, any means which achieves this end must be considered legitimate. If, therefore, the receiving *qāḍī* can establish beyond a shadow of doubt that the document in question – written by the hand of the sending *qāḍī* and set by his seal – truly belongs to the *qāḍī* who claims to have sent it to him, then the document possesses an authenticating power equal to, if not better than (*qāhā*), another document that has been attested and conveyed by two just witnesses.³⁷

From all this two distinct features emerge in the context of the attestation to handwriting. First, the pervasive practise on the popular and professional legal levels – as vividly described by Ibn al-Munāṣif – appears to amount to a socio-legal consensus. The practise was so entrenched that any notion of reversing it would seem utterly unfeasible. True, this sort of consensus does not possess the backing of the traditional mechanisms of law, but its putative force – in its own locale and context – is nonetheless equal to that of traditional *ijmā'*. Second, the justification of the practise squarely rests on the principle of necessity, sanctioned as a means by which undue hardship and harm are to be averted. Now, what is most interesting about these two features is that they both also played a most central role in introducing the *kitāb al-qāḍī ilā 'l-qāḍī* into the realm of formal legal discourse. Consensus was emblematic of its extensive existence in the world of practise, and the principle of necessity was instrumental in bringing it into the realm of formal legitimacy. Ibn al-Munāṣif, as an author-jurist, thus both articulates and formally sanctions legal change.

IV

Admittedly, however, Ibn al-Munāṣif does not steer his discourse beyond the dictates of the legal reality in which he lived. As we have said, he articulates and gives a formal sanction for what he observed on the ground. But the tools of the author-jurist did permit him to venture

beyond these relatively narrow confines. One such tool, and an important one at that, is the appropriation and re-working of earlier discourse through the utilization of operative terminology.

Consider, for instance, the change that took place between the fifth/eleventh and seventh/thirteenth centuries with regard to claims of movable property sought to be redressed by means of *kitāb al-qāḍī ilā 'l-qāḍī*. In a section of his influential work *Adab al-Qaḍā'*, Ibn Abī 'l-Damm discussed this and other issues on the basis of Māwardī's treatise *Adab al-Qāḍī*. At first glance, the former appears to reproduce the latter's discussion not only verbatim but lock, stock and barrel. However, a closer examination shows that the former borrowed from the latter selectively and only inasmuch as he needed to. If the movable property (e.g., a horse or a slave) possessed particular qualities which distinguished it from other similar properties, then the *qāḍī* must hear the testimony of witnesses and write what is in effect an open letter addressed to the locale in which the property was found.³⁸

Māwardī, on the other hand, distinguished between two opinions (*qawlān*) with regard to a plaintiff who, at a court of law, claims the right to a movable property that was in the possession of an *absente reo*. In his view, the less acceptable of the two opinions was the one already mentioned by Ibn Abī 'l-Damm. Māwardī maintained that the authoritative doctrine of the Shafi'ites is that the *qāḍī* shall not decide on the right of ownership unless the property was physically present before the witnesses when they render their testimony. For allowing a testimony with regard to an absent property would raise the probability of error significantly because the property might be confused with another, similar one. This opinion of the Shafi'ites, he asserted, has been put into normative practise (*ma'mūl 'alayh*), which explains, in terms of authority, its superiority over the other opinion.³⁹

It seems safe to assume that what was normative practise in Māwardī's time and place (Iraq in the fifth/eleventh century) was no longer so in Ibn Abī 'l-Damm's seventh/thirteenth century Syria. It is with this consideration in mind that Ibn Abī 'l-Damm took exception to what Māwardī thought authoritative. Needless to say, this selective appropriation is emblematic of the creative reenactment of legal doctrine

within the authoritative structure of the school. To say that Māwardī's discourse is used more as a mantle of authority than a real source of substantive legal doctrine is not only to state the obvious, but also to describe a common practise.

Selective appropriation and manipulation of earlier juristic discourse is the hallmark of the author's venture. To give adequate attention to this tool of change, we shall now turn to the issue of custom in the (later) Hanafite legal tradition. This issue will illustrate a significant and fundamental transformation in the law, a transformation that was, no doubt, initially precipitated by legal praxis. Custom presented a major problem for later Hanafite jurists, since the school tradition of positive law and legal theory left little latitude for customary practises to establish themselves readily as authoritative entities. The difficulty is apparent in the fact that legal doctrine never succeeded in recognizing custom as an independent and formal legal source. Indeed, even when compared with the so-called supplementary sources – *istiḥsān*, *istiṣlāḥ*, etc. —, custom never managed to occupy a place equal to that which these latter had attained in the hierarchy of legal sources. As a formal entity, it remained marginal to the legal arsenal of the four schools, although the Hanafites and Malikites seem to have given it, at least outwardly, more recognition than did the other two schools, however informal this recognition might have been.

The failure of custom to occupy a place among the formal sources of the law becomes all the more striking since Abū Yūsuf, a foremost Hanafite authority and second only to Abū Ḥanīfa himself, seems to have recognized it as a source.⁴⁰ But for reasons that still await further research,⁴¹ Abū Yūsuf's position failed to gain majority support and was in effect abandoned.⁴² Instead, throughout the five or six centuries subsequent to Abū Yūsuf, the Hanafite school upheld the fundamental proposition that the textual sources unquestionably overrode custom.

The discourse of Hanafite texts during this period reflects their strong commitment to this proposition, since its vindication on the grounds that the textual sources are superior to custom was universally accepted.⁴³ While occasional references to custom remained part of the same discourse, it is nonetheless significant that such references appear

fleetingly, as contingent entities intermittently relevant to the law. In Sarakhsī's highly acclaimed *Mabsūt*, for instance, both explicit reference and allusion to custom appear a number of times and in connection with a variety of topics.⁴⁴ In the context of rent, for instance, he states the maxim "What is known through custom is equivalent to that which is stipulated by the clear texts of revelation."⁴⁵ It is clear, however, that the maxim is not cited with the purpose of establishing a legal principle, but rather as a justification for a highly specific doctrine concerning the rent of residential property. If a house is rented, and the contract includes no stipulation as to the purpose for which it was rented, then the operative assumption – which the said maxim legitimizes – would be that it was leased for residential and not commercial or other purposes. The tendency to confine custom to very specific cases – which is evident in Sarakhsī's work – is only matched by its acceptance under the guise of other formal principles, such as *istihsān* and consensus. Custom was often treated in the law and law books *qua* custom, pure and simple, this being an unambiguous indication of the inability of jurists to introduce it into the law under the guise of established methodological tools.⁴⁶

The incorporation into the law of custom *qua* custom seems to have increased sometime after the sixth/twelfth century, although this incorporation was to remain on a case-by-case basis. While the cumulative increase in the instances of custom was evident, there was still no formal place for it in the methodological and theoretical scheme, no doubt because legal theory and methodology had become too well-established to allow for a structural and fundamental change.

By the tenth/sixteenth century, it had become obvious that custom had to be accounted for in a manner which adequately acknowledged its role in the law but which did not disturb the postulates and basic assumptions of legal theory. This was no easy task. In the Hanafite school, Ibn Nujaym (d. 970/1563)⁴⁷ seems to have been one of the more prominent author-jurists to undertake the articulation of the relationship between law, legal theory and custom. In his important work *al-Ashbāh wa'l-Nazā'ir*, he dedicates a chapter to custom, significantly titled "Custom Determines Legal Norms" (*al-'āda muḥakkima*).⁴⁸

The first issue traditionally discussed in the exposition of legal sources is authoritativeness (*hujjiyya*), namely, a conclusive demonstration through textual support (*dalīl qat'i*) that the source in question is valid, admissible and constitutes an authoritative basis for further legal construction. But all Ibn Nujaym can adduce in terms of textual support is the allegedly Prophetic report "Whatever Muslims find good, God finds it likewise,"⁴⁹ which is universally considered to be deficient. Ibn Nujaym acknowledges that the report lacks the final link with the Prophet, insinuating that it originated with Ibn Mas'ūd.⁵⁰ Al-Ḥaṣḥāfi al-'Alā'i also observes that after an extensive search he could find it in none of the *ḥadīth* collections except for Ibn Ḥanbal's *Musnad*.⁵¹ Curiously, despite his obvious failure to demonstrate any authoritative basis for custom – a failure shared by the entire community of Muslim jurists – Ibn Nujaym proceeds to discuss those areas in the law where custom has traditionally been taken into account.⁵²

After listing a number of legal cases acknowledged by the community of jurists as having been dictated by customary conventions, he argues that, in matters of usury not stipulated by the revealed texts, custom must be recognized. Those commodities which are measured by volume and/or by weight and which have been regulated by the revealed texts as lying outside the compass of usurious transactions are in no way affected by customary usage, of course. This, he maintains, is the opinion of Abū Ḥanīfa and Shaybānī, but not that of Abū Yūsuf who, as we have seen, permitted the intervention of custom. Abū Ḥanīfa's and Shaybānī's opinion, he further asserts, is strengthened by Ibn al-Humām's arguments (*wa-qawwāhu fī Fath al-Qadīr*)⁵³ in which the latter stresses, along with Zāhir al-Dīn (d. 619/1222),⁵⁴ that a clear text (*naṣṣ*) cannot be superseded by considerations of custom.⁵⁵

Ibn Nujaym distinguishes between two types of custom, namely, universal (*'urf 'āmm*) and local custom (*'urf khāṣṣ*). The former prevails throughout Muslim lands, while the latter is in effect in a restricted area or in a town or village.⁵⁶ When the former does not contravene a *naṣṣ*, the authoritative doctrine of the Hanafite school is that it ought to be taken into consideration in legal construction. The contract of *istiṣnā'* is but one example in point.⁵⁷ However, the Hanafites differed over

whether local custom has any legal force. Najm al-Dīn al-Zāhidī (d. 658/1259),⁵⁸ for instance, refused to acknowledge that local custom had any such force, since the weight of local considerations is negligible. Others, such as the Bukhāran jurists, disagreed. Indeed, as quoted by Ibn Nujaym, Zāhidī gives us to understand that these jurists were the first in the history of the Hanafite school to advocate such an opinion.⁵⁹ But Zāhidī emphatically states that the correct opinion (*al-saḥīḥ*) is that local practises are effectively insufficient to establish themselves as legally admissible customs.

Ultimately, however, the question is not whether local custom can or cannot generate legal norms, for it was clear to the jurists that such customs cannot yield universal and normative legal rules, but only, if at all, particular ones. A universal rule simply cannot emanate from a local custom (*al-ḥukm al-‘amm lā yathbut bi’l-‘urf al-khāṣṣ*).⁶⁰ This, Ibn Nujaym asserts, is the authoritative doctrine of the school (*al-madhhab*), although a good number of Hanafite jurists have issued *fatwās* on the basis of local custom and in contravention of this doctrine. It is interesting that Ibn Nujaym finally takes the side of these jurists, in a conscious and bold decision to go against the *madhhab* doctrine.⁶¹

Ibn Nujaym’s recognition of custom as an extraneous legal source represents only a later stage in a checkered historical process that began with the three founders of the Hanafite school. The religio-legal developments between the second/eighth and fourth/tenth centuries⁶² appear to have led to the suppression of Abū Yūsuf’s doctrine in favour of a less formal role for custom. Sarakhsī’s recognition of custom on a case-by-case basis is but one illustration of the success of the thesis of divine origins of the law, a thesis that ensured the near decimation of Abū Yūsuf’s doctrine and its likes. But the serious demands imposed by custom persisted. The practises and writings of the Bukhāran jurists, among others, were conducive to a process in which the informal role of custom as a source of law was expanded and given more weight. Ibn Nujaym’s writings, in which he selectively but skilfully draws on earlier authorities, including the Bukhārāns, typify the near culmination of this process.

The process reached its zenith with the writings of the last major

Hanafite jurist, the Damascene al-Sayyid Amīn Ibn ‘Ābidīn (1198/1783-1252/1836), whose career spanned the crucial period that immediately preceded the introduction of Ottoman *tanzīmāt*. There is no indication that Ibn ‘Ābidīn held an official post in the state, and he seems to have been distant from the circles of political power. His training and later career were strictly traditional: He read the Quran and studied language and Shafi’ite law with Shaykh Sa‘īd al-Ḥamawī. Later, he continued his legal studies with Shaykh Shākir al-‘Aqqād who apparently persuaded him to convert to Hanafism. With him he studied arithmetic, law of inheritance, legal theory, *ḥadīth*, Quranic exegesis, Sūfism and the rational sciences. Among the texts he read with his Shaykh were those of Ibn Nujaym, Ṣadr al-Sharī‘a, Ibn al-Humām, and of other significant Hanafite authors.⁶³ His successful career brought him distinction in several spheres, not the least of which was his rise to prominence as a highly celebrated author and *muftī*. As a professor, he seems to have had an equally successful career, involving, among other things, the privilege of bestowing *ijāzas* on such important men as the Ottoman Shaykh al-Islām ‘Arif Ḥikmat Bey.⁶⁴

True, Ibn ‘Ābidīn flourished before the *tanzīmāt* started, but he was already witness to the changes that began to sweep the Empire long before. When his legal education began, the *Nizām-i Cedid* of Salīm III was well under way, and when his writing career reached its apex, Maḥmūd II and his men centralized, in an unprecedented but immeasurably crucial move, the major charitable trusts of the Empire under the Ministry of Imperial Pious Endowments, which was established in 1826.⁶⁵ These significant developments, coupled with the changes that Damascene society experienced due to western penetration and intervention, already effected a new outlook that culminated not only in the *tanzīmāt* reforms but also in a rudimentary rupture with traditional forms.⁶⁶ Ibn ‘Ābidīn’s writings do not mirror any clear sense of crises, either in epistemological or in cultural terms, but they do reflect a certain measure of subtle and latent impatience with some constricting aspects of tradition. This perhaps explains an insightful remark made nearly a century ago by one of the shrewdest commentators on Islamic law. Nicholas Aghnides has pointed out that

Ibn 'Ābidīn's *magnum opus*, *Hāshiyat Radd al-Muḥtār*, "may be said to be the last word in the authoritative interpretation of Hanafite law. It shows originality in attempting to determine the status of present practical situations, as a rule, shunned by others."⁶⁷ This originality, which manifests itself even more acutely in his writings on custom, may be seen as representing a euphemism for a discursive attempt to twist and transform legal concepts within the fetters of an authoritative and binding tradition. Originality often does take such forms.

Sometime in 1243/1827, Ibn 'Ābidīn wrote a short gloss on his '*Uqūd Rasm al-Muḥtār*', a composition in verse which sums up the rules that govern the office of *iftā'*, its functions and the limits of the *mufti's* field of hermeneutics.⁶⁸ In the same year, he authored a *risāla* in which he amplifies his commentary on one line in the verse, a line that specifically addresses the role of custom ('*urf*') in law.⁶⁹ Having been written at the same time, cross references between the two *risālas* are many.⁷⁰ The disintegration of textual boundaries between the two treatises is further enhanced by constant reference to, and juxtaposition with, his super-gloss *Hāshiyat Radd al-Muḥtār*. In the latter, he also refers,⁷¹ in the past tense, to his two *risālas*, and in the two *risālas*, in the same tense, to his *Hāshiya*.⁷² This synchronous multiple cross-referencing suggests that Ibn 'Ābidīn authored his two *risālas* during the lengthy process of writing the *Hāshiya*, which he never completed.

Establishing for these treatises a chronological order, or the absence thereof, is particularly important here because a correct analysis of Ibn 'Ābidīn's concept of custom depends on the relationship of his epistemological and authority-based assumptions in *Nashr al-'Urf* to the hierarchy of authority which he sets forth in, and which governs the discourse of, his *Hāshiya*.⁷³ That *Nashr al-'Urf* and *Hāshiya* were authored simultaneously and that the former in fact represents a discursive extension of the latter, suggests to us that Ibn 'Ābidīn continued to uphold the structure of authority and epistemology as he laid it down in his *Hāshiya* and as it was articulated in the Hanafite school for several centuries before him. It is precisely the resolution of the tension between this structure of authority and the role he assigned to custom in the law that presented Ibn 'Ābidīn with one of his greatest

challenges.

The declared *raison d'être* of *Nashr al-'Urf* is that custom presents the jurist with several complexities which Ibn 'Ābidīn's predecessors had not adequately addressed.⁷⁴ (In treating this presumably neglected area, Ibn 'Ābidīn seems to promise a certain measure of originality.) A careful reading of the *risāla* reveals that these complexities revolve around custom as a legal source as well as around its relationship to both the unambiguous revealed sources⁷⁵ and the authoritative opinions embodied in *zāhir al-riwāya*.

But before proceeding to unravel these complexities, Ibn 'Ābidīn attempts a definition of custom ('*ada*'). What is important about the definition is not so much its substance as the manner in which it is expounded. And it is this manner of discursive elaboration that characterizes, in distinctly structural ways, the methods and ways of the author-jurist. Here, as elsewhere in the *risāla*, the mode of discourse is selective citation and juxtaposition of earlier authorities, a mode that has for centuries been a common practise of the author-jurist. However conventional or novel they may be, arguments are presented as falling within the boundaries of authoritative tradition, for they are generally adduced as the total sum of quotations from earlier authorities, cemented together by the author's own interpolations, interventions, counter-arguments, and qualifications. Through this process, new arguments acquire the backing of tradition, represented in an array of voices that range from the highly authoritative to the not-so-authoritative. This salient feature of textual elaboration makes for a discursive strategy that we must keep in mind at all times, whether reading Ibn 'Ābidīn or other author-jurists.

Once a definition has been constructed, a necessary second step in the exposition of any legal source is to demonstrate its authoritativeness, and custom, if it must claim the status of a source, proves no exception to this rule. Here, Ibn 'Ābidīn falls back on Ibn Nujaym's by now familiar argument which is itself exclusively based on Ibn Mas'ūd's weak tradition. Realizing the weakness of the tradition and thus the invalidity of this argument, he remarks that custom was so frequently resorted to in the law that it was made a principle (*aṣl*), as evidenced in

Sarakhsī's statement: "What is known through custom is equivalent to that which is stipulated by the clear texts of revelation."⁷⁶ But Ibn 'Ābidīn's compensatory argument does nothing to conceal the fact that custom could never find any textually authoritative vindication. Nor does justification in terms of frequent use in the law lead to anything but a *petitio principii*, namely, that custom should be used in the law because it is used in the law. Be that as it may, Ibn 'Ābidīn states his piece and moves on, being little, if at all, perturbed by his own, and tradition's, failure to persuade on this matter. Little perturbed, because the focus of his agenda lay elsewhere: he, and the tradition in which he wrote, were cognizant of the theological and epistemological limitations that had been imposed on custom when legal theory was still in the process of formation. The challenge he now faced was to circumvent these limitations.

Thus, the real issue for Ibn 'Ābidīn is one of more immediate and practical concern. It is one that is problematized through the introduction of two competing opinions on the relationship between custom and the doctrines of *zāhir al-riwāya*. In his *Qunya*, Zāhidī is reported to have maintained that neither the *muftī* nor the *qādī* should adopt the opinions of *zāhir al-riwāya* to the utter exclusion of custom. Both Hindī⁷⁷ and Bīrī⁷⁸ cited Zāhidī's argument, apparently approving its conclusion. These assertions, Ibn 'Ābidīn argues, raise a problem, since the common doctrine of the school is that the opinions of *zāhir al-riwāya* remain binding unless the leading legal scholars (*al-mashāyikh*) decide to replace them by other opinions that have been subjected to *taṣhīḥ*. The problem is accentuated in those areas of the law where the opinions of *zāhir al-riwāya* were constructed on the basis of revealed texts of an unambiguous nature (*ṣarīḥ al-naṣṣ*) and/or sanctioned by the conclusive authority of consensus. In these areas, custom does not, nor should it, constitute a source, for unlike the texts, it may simply be wrong. In what seems to be an attempt to accentuate this problematic, Ibn 'Ābidīn invokes Ibn Nujaym's statement to the effect that custom must be set aside in the presence of a text, and conversely, that it may be taken into consideration only when no text governing the case in question is to be found.

Before Ibn 'Ābidīn begins his treatment of this problematic, he introduces, in the footsteps of Ibn Nujaym, the distinction between universal and particular custom. Each of these two types is said to stand in a particular relationship with both the unambiguous revealed texts and *zāhir al-riwāya*, thereby creating what is in effect a four-fold classification. But Ibn 'Ābidīn reduces them to a two-part discussion, one treating custom's relationship with the unambiguous revealed texts, the other its relationship with *zāhir al-riwāya*.

In line with traditional juristic epistemology, it remains Ibn 'Ābidīn's tenet that whatever contravenes, in every respect (*min kulli wajh*), the explicit and unequivocal dictates of the revealed texts is void, carrying neither legal effect nor authority. The case of intoxicants affords an eloquent example of this sort of contravention. The key element in the formulation of this tenet is the clause "in every respect," a clause that quite effectively limits the boundaries of those texts that engender exclusive authority by removing from their purview all cases which posit no straightforward or direct contravention of these texts. A partial correspondence between the text and custom does not therefore render the latter inadmissible, for what is being considered in such cases is the corresponding part, not the differential. That part therefore particularizes (*yukhaṣṣis*) the text, but does in no way abrogate it. However, in order for custom to have this particularizing effect, it must be universal. If universal custom can particularize a text, then it can, *a fortiori*, override a *qiyās* which is no more than a probabilistic inference. *Istiṣnā'*, as we have seen, is a case in point.⁷⁹

Turning to particular custom, Ibn 'Ābidīn makes the categorical statement that, according to the school's authoritative doctrine (*madhhab*), it is not taken into consideration (*lā tu'tabar*). But this rather forward statement of doctrine is undermined by Ibn 'Ābidīn's introduction of a succession of qualifying and opposing opinions expressed by other jurists. Before doing so, however, he states, on the authority of earlier jurists, the traditional school doctrine, thereby engaging in what amounts to polemical manoeuvring. As might be expected, Ibn Nujaym's weighty attestation is given first, the intention being to introduce not so much an affirmation of the school's doctrine

but mainly Ibn Nujaym's partial qualification and exception that many jurists have issued *fatwās* in accordance with particular custom. This is immediately followed by another, more drastic statement made by Ibn Māza who reported that the Balkh jurists, including Naṣīr b. Yaḥyā⁸⁰ and Muḥammad b. Salama,⁸¹ permitted, among other things, a certain type of rent which is otherwise deemed prohibited. The permissibility of this type was justified on the grounds that the practise was not explicitly regulated by the texts and that it had become customary among the people of Balkh. The license of this exception in no way meant that the principles of rent were set aside. If this type of rent was permitted, it was deemed to be an exception, in the same manner *istiṣnā'* represents an exception to the principle that the object being sold must at the time of sale be in existence.

But Ibn Māza does not, in the final analysis, agree with the Balkh jurists. Having fully stated their case, he cautions that exceptions, made through particularization (*takhṣiṣ*) on the basis of a particular custom, are not deemed valid because the weight of such a custom is negligible, and that this engenders doubt (*shakk*) which does not exist in the case of *istiṣnā'*, a pervasive practise that has been shown "to exist in all regions" (*fī 'l-bilād kullihā*). In support of Ibn Māza, Ibn 'Ābidīn interjects Ibn Nujaym's discussion of particular custom, which is in turn based on a series of citations from other jurists. Here, he concludes that *qiyās* cannot be abandoned in favour of particular custom, although, as we have seen, some of Ibn Nujaym's authorities do recognize it. The commentators, Ibn 'Ābidīn argues, have upheld the rule that wheat, barley, dates and salt are to be sold, without exception, by volume, while gold and silver are to be sold by weight. This rule is dictated by a well-known and explicit Prophetic tradition. Thus, the sale of wheat by weight and of gold by volume is unanimously considered null and void, whether or not it is sanctioned by custom. The explicit texts must always stand supreme. However, other commodities that carry no stipulations in the texts may be sold in accordance with the custom prevalent in a certain society.⁸²

An apparently hypothetical interlocutor is made to state, on Qudūrī's authority, that Abū Yūsuf allowed custom to prevail over the Prophetic

tradition concerning usury in the sale of certain commodities. Accordingly, gold might be sold in volume if custom dictated that it should be so.⁸³ This departure from the imperatives of the revealed texts therefore justifies the practise of usury and other unlawful matters as long as custom requires it.

Taking this to be a distortion of Abū Yūsuf's position, Ibn 'Ābidīn argues that what the master meant to do was to use custom as the *ratio legis* of the textual prohibition. If the Prophetic tradition dictated measurement by weight for certain commodities, and by volume for others, it was merely because it was the custom to do so at the time of the Prophet. Had custom been different, it is entirely conceivable that the Prophetic tradition might have permitted the sale of gold by volume, and that of barley by weight. Therefore, Ibn 'Ābidīn concludes, "if custom undergoes change, then the legal norm (*ḥukm*) must change too. In taking changing and unprecedented custom into consideration there is no violation of the texts; in fact, if any thing, such consideration constitutes adherence to [the imperatives of] the texts."⁸⁴ At this point, Ibn 'Ābidīn hastens to add that certain pecuniary practises prevalent in his time — such as "buying *darāhim* for *darāhim*" or borrowing money on the basis of face value (or by count; *'adad*) — do not in fact constitute violations of the texts, thanks to Abū Yūsuf's doctrine. "May God abundantly reward Abū Yūsuf for what he did for the people of these times of ours. He saved them from the serious affliction that is usury."⁸⁵

The liberties granted with regard to borrowing money at face value and not by weight or volume were reached by means of *takhrīj*, representing a direct extension of Abū Yūsuf's doctrine.⁸⁶ This was originally Sa'dī Afandī's *takhrīj*, confirmed later by Sirāj al-Dīn Ibn Nujaym (d. 1005/1596)⁸⁷ and others. Nābulusī,⁸⁸ however, thought the entire juristic construction needless since the coins struck by the state had a specific weight, and borrowing or exchange by denomination was effectively the same as representation of weight. Ibn 'Ābidīn introduces Nābulusī's argument only to disagree with it, apparently using it as a rhetorical pretext to further bolster his arguments. It may have been the case, he maintains, that in Nābulusī's time coins were equal in terms of

weight and value; nevertheless, “in these times of ours” (*fi zamāninā*) each sultan struck currency of lower quality than that struck by his predecessor. The practise during Ibn ‘Ābidīn’s period involved the use of all sorts of currency, some containing a high ratio of gold and silver as well as those of a lower quality. When people borrow, for instance, they do not specify the type of currency but only the number, for when repayment becomes due, they may use any type of currency as long as the value of the amount paid equals that which had been borrowed.⁸⁹ Had it not been for Abū Yūsuf’s doctrine, these types of transactions could have been said to involve usury because the weight of the coins borrowed was never identical to that with which repayment was made. If, on the other hand, such transactions were to be regulated by Abū Ḥanīfa’s and Shaybānī’s doctrines – which require the stipulation in the contract of the type of currency and the year of minting – the outcome would surely be objectionable since all pecuniary contracts and transactions would be deemed null and void. Their doctrines would thus lead to great difficulties (*ḥaraj ‘azīm*), since they would also necessarily entail the conclusion that the people of our age are unbelievers. The only way out of this quandary, Ibn ‘Ābidīn asserts, is to go by Abū Yūsuf’s doctrine which is left as the only basis of practise.⁹⁰

In favouring Abū Yūsuf’s weaker doctrine over and against the other one – also held by Abū Ḥanīfa and Shaybānī – there is an undeniable difficulty. Bypassing three authoritative doctrines by the most influential figures of the school in favour of a weak opinion certainly called for an explanation. Ibn ‘Ābidīn alludes to two possible solutions, one by upholding custom *qua* custom as a sufficient justification, the other by resorting to the notion of necessity (*ḍarūra*).⁹¹ But Ibn ‘Ābidīn does not articulate the distinction between these two means of justification, for he immediately abandons custom in favour of necessity. This is to be expected. Rationalizing the relevance of Abū Yūsuf’s doctrine and the need for it by means of custom amounts to rationalizing custom by custom, an argument involving the fallacy of a *petitio principii*. Falling back on necessity is thus left as the only logical choice.

Although the notion of necessity has been used to justify a number of departures from the stringent demands of the law, it is, like custom,

restricted to those areas upon which the explicit texts of revelation are silent. Abū Yūsuf, for instance, was criticised when he held the opinion – which ran against the dictates of Prophetic Sunna – that cutting grass in the Sacred Precinct was permissible due to necessity. In this case, Ibn ‘Ābidīn does not seem to agree with Abū Yūsuf, his reasoning being that since the Prophet excluded from the prohibition the *idhkhir* plant,⁹² we must conclude that the prohibition remains in effect, and that removal of the prohibition due to necessity is applicable only to that particular plant. More important, the hardship that may result from the prohibition against cutting the grass pales into insignificance when compared with the consequences of forcing a society to change its habits and customs. Ibn ‘Ābidīn lists a number of cases in which hardship was mitigated due to necessity but then concludes that these cases are in no way comparable to the enormity of the hardship resulting from the imposition of a legal norm that contradicts prevailing social customs.

Having thus established necessity *a fortiori*, Ibn ‘Ābidīn seeks to locate it in the hierarchy of school doctrine. Probably drawing on Ibn Nujaym, who argued that a good number of Hanafite jurists issued *fatwās* on the basis of local custom, Ibn ‘Ābidīn asserts that the acceptance of local custom⁹³ as a basis for a particular legal norm has become one of the opinions of the school, albeit a weak one (*qawl ḍa‘īf*). Now, necessity renders the adoption of such an opinion permissible.⁹⁴ But this constitutes a serious departure from the mainstream doctrine of the school according to which the application of weak opinions is deemed strictly forbidden, since it violates, *inter alia*, the principles of consensus.⁹⁵ Furthermore, hermeneutically, weak opinions are considered void for they belong to the category of the abrogated (*mansūkh*), it being understood that they have been repealed by a sound or preponderant opinion (*rājiḥ*). The later Shafi‘ites, however, adopt a less rigorous position on this matter than the Hanafites, and hence it is to them that Ibn ‘Ābidīn turns for a way out of his quandary. In one of his *fatwās*, the influential Taqī al-Dīn al-Subkī⁹⁶ states – concerning a case of *waqf* – that a weak opinion may be adopted if it is limited to the person and matter at hand and if it is not made transferable to other cases, be it in courts of law or in *iftā’*.⁹⁷

But Ibn 'Ābidīn apparently finds that having recourse to a Shafī'ite authority is insufficient. To enhance Subkī's view, he refers the reader, among other things, to Marghīnānī's *Mukhtārāt al-Nawāzil*,⁹⁸ a well-known work which commentators on the same author's *Hidāya* often use in the writing of their glosses. There, Marghīnānī held the opinion that the blood seeping from a wound does not nullify ablution, an opinion that Ibn 'Ābidīn admits to be not only unprecedented, but also one that failed to gain any support among the Hanafites during or after Marghīnānī's time. Although he fully acknowledges that the opinion is irregular (*shādh*), he nonetheless argues that Marghīnānī stands as an illustrious Hanafite, one of the greatest in the school and considered among the highly distinguished *aṣḥāb al-takhrīj*.⁹⁹ Therefore, he continues, his opinion ought to be considered sound and the application of a weak opinion must thus be allowed on a restricted basis when it is deemed necessary to do so.¹⁰⁰ Why only in a restricted sense? Because given its weak nature, it is not considered universal in the sense that a local custom gives rise to a legal norm that is applicable only to the city, town, or village where that custom is predominant.

It is to be noted here that Ibn 'Ābidīn's reasoning entails a fundamental leap which he does not address, much less justify. The restricted practise which has been deemed permitted by the four schools, usually termed *fi ḥaqqi nafsīhi*, is a principle traditionally limited to the person exercising legal reasoning, the *mujtahid*. For example, a heretical *mujtahid* is allowed to apply his own legal formulations to himself (*fi ḥaqqi nafsīhi*) but he is barred from issuing *fatwās* for other Muslims.¹⁰¹ Subkī himself appears to have made just such a leap in allowing the principle to apply to a *waqf* beneficiary, and Ibn 'Ābidīn went even further in imposing its application upon the inhabitants of a village, town, and even a city. It is quite interesting to observe that it is, in the final analysis, immaterial whether Ibn 'Ābidīn vindicates each and every step he takes in the construction of his arguments. Just as the anomalous opinions of Subkī and Marghīnānī were readily and unquestioningly brought into Ibn 'Ābidīn's discursive strategies to serve an end, so will Ibn 'Ābidīn's own conclusion be utilized to score further points in the future. The question that seems to matter most at this point – namely,

whether local custom can lawfully give rise to a particular ruling – has been solved; and Ibn 'Ābidīn is responsible for it, in the face of opponents and proponents alike.

Thus far, local custom has been shown to be capable of yielding a particular rule in the locale in which it is predominant, even when contradicted by the dictates of a clear text.¹⁰² What remains to be clarified is the relationship between custom and those opinions in *zāhir al-riwāya* derived from the texts by means of inferential reasoning. This is perhaps the most central theme of *Nashr al-'Urf*, and an important one in *Sharḥ al-Manzūma*.¹⁰³ Ibn 'Ābidīn avers in these two works that such opinions are arrived at by *mujtahids* on the basis of a number of considerations, not the least of which are the customary practises prevalent at the time when these opinions were formed. The need for taking customary practises into consideration explains the theoretical requirement that the *mujtahid* must possess precise knowledge of the habits and customs prevalent in the society that he serves.¹⁰⁴ The *mujtahid*'s reasoning, and the results which it yields, therefore reflect a particular combination of law and fact, the latter being in part, if not entirely, determined by custom. If these practises differ from time to time, or from one place to another, they would lead the *mujtahids* to different legal conclusions, depending on the time and place. This, Ibn 'Ābidīn argues, explains why the later *mujtahids* (*mashāyikh al-madhhab*) diverged in a number of areas from the rules that had been established by the school founders, the prevailing assumption being that had these founders faced the same customs that the later *mujtahids* encountered, they, the founders, would have formed the same opinions as their later counterparts came to hold.

Here, Ibn 'Ābidīn cites at least a few dozen cases in which *mashāyikh al-madhhab* differed with the founding masters.¹⁰⁵ One example in point is the regional and chronological variation in the law of *waqf*. In Anatolia, for instance, it is customary to dedicate cash or coins as *waqf*, when it is the authoritative doctrine of the school that moveable property cannot be used as charitable trusts.¹⁰⁶ In "our region," Ibn 'Ābidīn notes, such has never been the practise. An example of chronological change is the practise of dedicating the farmer's axe as

waqf, which used to be customary in Syria during earlier periods “but unheard of in our times.”¹⁰⁷ The change in the habits of a society must therefore lead to a correlative change in the law. But it is important to note, as Ibn ‘Ābidīn does, that such a legal change is not precipitated by a change in the law as a system of evidence or as a methodology of legal reasoning. Instead, it is one that is stimulated by changing times.¹⁰⁸

The impressive list of cases compiled by Ibn ‘Ābidīn is intended to demonstrate that the jurisconsult “must not stubbornly adhere to the opinions transmitted in *ẓāhir al-riwāya* without giving due attention to society and the [demands of the] age it lives in. If he does, he will cause many rights to be lost, and will thus be more harmful than beneficial.”¹⁰⁹ “The jurisconsult must follow custom even though it might contradict the authoritative opinions of *ẓāhir al-riwāya*.¹¹⁰ Both universal and local customs are included under these generalizations. “Even if local custom opposes the school doctrines (*al-naṣṣ al-madhhabī*) that have been transmitted on the authority of the school founder (*ṣāhib al-madhhab*), it must be taken into consideration.”¹¹¹

Having reached this conclusion by what he takes to be an inductive survey of the law, Ibn ‘Ābidīn goes on to say that the jurisconsult must treat both local and universal customs as equal insofar as they override the corpus of *ẓāhir al-riwāya*. The only difference between them is that universal custom produces a universal legal norm, whereas local custom effects a particular norm. Put differently, the legal norm resulting from a universal custom is binding on Muslims throughout Muslim lands, while local custom is binding in the village or town in which it prevails.¹¹² These conclusions Ibn ‘Ābidīn seeks to defend and justify at any expense. Here, he introduces a statement reportedly made by Ahmad al-Ḥamawī in his *Ḥāshiya ‘alā ‘l-Ashbāh*, a commentary on Ibn Nujaym’s work. In this work, Ḥamawī remarked that from Ibn Nujaym’s statement that “a local custom can never yield a universal legal norm” one can infer that “a local custom can result in a particular legal norm.”¹¹³ Obviously, there is nothing in the logic of entailment that justifies this inference. But Ibn ‘Ābidīn accepts Ḥamawī’s conclusion readily and unquestioningly.

The principles which justify the dominance of local custom over the

school’s authoritative doctrine also justify, with equal force, the continuous displacement of one local custom by another. If a local custom could repeal those doctrines which had been established by the school founders, then a later local custom, superseding in dominance its forerunner, can override both the forerunner and the *ẓāhir al-riwāya*. This much is clear from Ibn ‘Ābidīn’s statement that the local custom which overrides the school’s authoritative doctrine includes both old and new local customs.¹¹⁴ The legitimation of this continuous modification lies in Ibn ‘Ābidīn’s deep conviction that the founding fathers would have held the same legal opinions had they encountered the same customs that the later jurists had to face.¹¹⁵ This is one of Ibn ‘Ābidīn’s cardinal tenets which he nearly developed into a legal maxim.

Ibn ‘Ābidīn’s hermeneutical venture resulted in a conflict between his loyalty to the authoritative hierarchy of Hanafite doctrine and the demands of custom not only as a set of individual legal cases but more importantly as a source of law. For as a body of individual legal cases, custom was fairly successfully incorporated into law, a fact abundantly attested to in the works of early jurists, and exemplified, as we have seen, in Sarakhsī’s *Mabsūṭ*. But in attempting, as Ibn ‘Ābidīn did, to raise the status of custom to that of a legal source, there arose a distinct difficulty in squaring this source not only with *ẓāhir al-riwāya* but also with the legal methodology that sustained both the doctrinal hierarchy and the theological backing of the law. That Ibn ‘Ābidīn was entirely loyal to the hermeneutical imperatives of the Hanafite school and, at one and the same time, a vehement promoter of custom as a legal source makes his task all the more remarkable. Ultimately, through the discursive tools of the author-jurist, Ibn ‘Ābidīn succeeded in constructing an argument that elevates custom to the status of a legal source, capable of overriding the effects of other sources, including the Quran and the Sunna.

Ibn ‘Ābidīn’s discourse on custom is instructive from a number of perspectives, not the least of which is the way it invokes the weak and minority positions in the tradition. These positions are made, by necessity, to juxtapose with the authoritative doctrine of the school, that which represents the dominant mainstream of legal doctrine and practise.

The initial impulse that propelled the minority position was Abū Yūsuf's opinion which had largely been abandoned by Ibn Nujaym's time. Abū Yūsuf's opinion was revived through the device of necessity, a device that must have seemed handy when all other hermeneutical ventures appeared to have no prospect of success. Ibn 'Ābidīn's hermeneutics also entailed the manipulation of other minor opinions, such as those of Subkī and Marghīnānī. In this hermeneutical exercise, which turned the ladder of doctrinal authority right on its head, Ibn 'Ābidīn's skills as a polemicist, author and textual strategist are not to be underestimated. Admittedly, however, they involved certain flaws in logical argumentation, flaws which were undoubtedly more a result of the strains inherent in Ibn 'Ābidīn's hermeneutically exacting venture than they were a reflection of his competence as a reasoner.

Ibn 'Ābidīn's discourse is also instructive in that it contained a complex and multi-layered hermeneutical texture, a prominent feature in the author-jurist's enterprise. Functioning within the context of a school authority, Ibn 'Ābidīn's discourse was dominated by the ever-present perception of a legal tradition within which he had to function and beyond which he could not tread. But the tradition was by no means so constraining. Rather, it offered multiple levels of discourse originating, chronologically, in centuries of legal evolution and, geographically, in far-flung regions dominated by Hanafite as well as other schools. This rich multiplicity afforded the author-jurist a large measure of freedom to include or exclude opinions at will. Opinions from distant and immediate predecessors were selectively cited and juxtaposed. They represented, at one and the same time, the dominant weight of the tradition and the means by which the tradition itself could effectively be manipulated. The author-jurist, the manipulator, cements the selected citations that make up the building blocks of his discourse through the medium of interpolations, interventions, counter-arguments and qualifications. Although the manipulator's presence in the text that he produces seems more often than not to be minimal, it is he who decides how the tradition and its authority are to be used, shaped and reproduced. It is a remarkable feature of the author-jurist's legal discourse that it was able to reproduce this varied and multi-layered tradition in a seemingly

infinite number of ways. The interpretive possibilities seem astounding.

V

Our enquiry compels us to conclude that it was the author-jurist (together with the *mufti*) who responded to the need for legal change by means of articulating and legitimizing that aspect of general legal practise in which change was implicit. The *qādis*, as a community of legal practitioners, may have been involved in the application of newer or weak doctrines that differed from the established and authoritative doctrines of the school. But such a practise, assuming that it permeated all the schools, was merely a necessary – but by no means sufficient – condition for the implementation of change. In the entire process of change, the *qādis*' contribution, whenever it was present, was only at an embryonic stage, and could not, in and by itself, have culminated in change. For in order to effect legal change in a formal and authoritative manner – which represents the full extent of the process of such change – the intervention of other agents was needed. These were the *mufti* and the author-jurist.

Elsewhere, we noted that the *madhhab*-opinions gained authoritative status due to the fact that they were normatively used as the basis of *fatwās*.¹¹⁶ The *fatwā* thus acquired general, almost universal, relevance within the school, in contradistinction to the *qādi*'s ruling which was confined to the individual case at hand. And it was in such a capacity that the *fatwā* possessed the power to articulate and, in the final analysis, legitimize change.

The authoritative character of the *fatwā* as a universal statement of the law and as a reflection of legitimized legal practise made it a prime target of the author-jurist. An essential part of the *mufti*'s function was to articulate and legitimize legal change, but it was the author-jurist who was mainly responsible for setting the final seal on *fatwās* by incorporating them into the school's works of positive law. This incorporation signified the final stage of legitimization, not as the exclusive doctrines of the school but rather as part of the school's *corpus juris*. We should

not expect more, for it was rarely, quite rarely, the case that a single opinion governing a particular legal issue could for long stand as the exclusive doctrine of a school.

It is precisely here, in the multiplicity of opinions for each case, that the author-jurist was most creative in accommodating legal change. Ibn 'Ābidīn's discourse on custom is perhaps the most eloquent illustration in point. The multiple levels of discourse that were available to him, and on which he felt free to draw, enabled him in effect to turn the hierarchy of authoritative legal sources right on its head. Custom, in the end, was to override the authoritative doctrine of the school. It is no less than impressive that Ibn 'Ābidīn could have achieved this end while remaining within the hermeneutical boundaries of traditional Hanafite scholarship — a testimony to the Muslim jurist and to his ability to navigate so freely in what is seemingly a constrained tradition. The ability of the *mufti* and the author-jurist to articulate, legitimize and ultimately effect legal change was not a contingent, *ad hoc* feature, but one that was structural, built into the very system that is Islamic law.

NOTES

- 1 I thank Cambridge University Press for granting permission to reproduce here parts of Chapter 6 of my *Authority, Continuity and Change in Islamic Law*, 2001.
- 2 For a momentous discussion of this theme, see Ibn Qayyim al-Jawziyya, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, ed. M. 'Abd al-Ḥamīd, 4 vols., Beirut, 1987, III, 14-p. 70, and I, p. 110 f. See also Fakhr al-Dīn Qāḍīkhān, *Fatāwā*, printed with *al-Fatāwā al-Hindiyya*, vols. 1-3, Repr. Beirut, 1980, I, pp. 2-3; Khayr al-Dīn al-Ramlī, *Fatāwā*, 2 vols., Cairo, 1893, I, p. 3; Muḥammad Amīn Ibn 'Ābidīn, *Nashr al-'Urf*, in his *Majmū'at Rasā'il*, 2 vols., n.p., 1970, II, pp. 114-147; idem, *Ḥāshiyat Radd al-Muhtār*, 8 vols., Beirut, 1979, I, p. 69.
- 3 On these offices or roles, see E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 2nd ed., Leiden, 1960, 100 ff., p. 219 ff.; idem, "Judicial Organization," in Majid Khadduri and Herbert

- Liebesny, eds., *Law in the Middle East*, Washington, 1955, pp. 236-253, 259-271; Masud, Khalid, et al., eds., *Islamic Legal Interpretation: Muftis and their Fatwas*, Cambridge, Mass., 1996, pp. 8-15, 20-26; George Makdisi, *The Rise of Colleges*, Edinburgh, 1981, pp. 148-159, 197-201, and passim; J. Nielsen, *Secular Justice in an Islamic State: Maẓālim under the Bahrī Mamlūks, 662/1264-789/1387*, Istanbul, 1985, pp. 3-6, 8-10, 19-27, 42-47, and passim; R. C. Repp, *The Müfti of Istanbul: A Study in the Development of the Ottoman Learned Hierarchy*, Oxford, 1986; J. H. Escovitz, *The Office of Qādī al-Quḍāt in Cairo Under the Bahrī Mamlūks*, Berlin, 1984, pp. 131-162.
- 4 Although the verb *ṣannaḥa* and the verbal noun *taṣnīf* were most common, other terms were used as well, e.g., *allaḥa* and *ta'līf*. See Shams al-Dīn Ibn Farḥūn, *al-Dībāj al-Mudhahhab fī Ma'rīfat A'yān al-Madhhab*, Beirut, 1996, pp. 254, 334, 335, 338, 340, 341, 348, and passim.
- 5 Makdisi, *Rise*, p. 206 ff. On writing books in general, see J. Pedersen, *The Arabic Book*, trans. G. French, Princeton: Princeton University Press, 1984, pp. 20-36.
- 6 Taqī al-Dīn Ibn Qāḍī Shuhba, *Ṭabaqāt al-Shāfi'iyya*, ed. 'Abd al-'Alīm Khān, 4 vols., Haidarabad, 1978, IV, pp. 96-97.
- 7 *Ibid.*, I, p. 20, 108.
- 8 Hallaq, "Qāḍī's *Dīwān* (*Sijill*) before the Ottomans," *Bulletin of the School of oriental and African Studies*, 61, 1998, p. 422 f., 426.
- 9 Makdisi, *Rise*, 208; "The working of students [*ishtighāl*] was distinguished from the function of the professor of law (*tadrīs*), and from the writing of books (*taṣnīf*)."
- 10 See Sharaf al-Dīn al-Nawawī, *al-Majmū'*, 12 vols., Cairo, 1925, I, pp. 52, 57; Taqī al-Dīn Ibn al-Ṣalāh, *Adab al-Muftī wa'l-Mustaftī*, ed. Muwaffaq b. 'Abd al-Qādir, Beirut, 1986, p. 141; al-Shaykh al-Nizām, *al-Fatāwā al-Hindiyya*, 6 vols., Beirut, 1980, III, p. 309.
- 11 The argument was first articulated by Māwārdī, but incorporated as part of Ibn al-Ṣalāh's discourse. Ibn al-Ṣalāh, *Adab al-Muftī*, 141: *al-muftī 'alayhi an yakhtaṣir jawābahu fa-yaktaṣṭ fīhi bi-annahu yajūz aw lā yajūz, aw haqq aw bāṭil, wa-lā ya'dul ilā 'l-iṭāla wa'l-iḥtijāj li-yufarriq bayn al-fatwā wa'l-taṣnīf*.
- 12 Typical examples of such discourse may be found in Taqī al-Dīn al-Subkī, *Fatāwā*, 2 vols., Cairo, 1937, I, pp. 453-461; II, pp. 309, 333-337, 477-483, and passim. (Note that in this work these writings are

- characterised as *mu'allafāt* (i.e., authored works), not *fatwās*; see especially I, 519, II, 650.). See also Zayn al-Dīn Ibn Nujaym, *Rasā'il*, ed. Khalīl al-Mays, Beirut, 1980; Ibn 'Ābidīn, *Majmū'at Rasā'il*, 2 vols., n.p., 1970.
- 13 See Hallaq, "Qādī's *Dīwān* (*Sijill*) before the Ottomans," p. 422 ff.
- 14 The *qādīs* did at times deviate from established doctrine, thereby initiating what appears to us to have been, with the benefit of hindsight, the embryonic stages of legal change. But this initial participation would have amounted to very little without the intervention of the *muftī* and/or the author-jurist who articulated and legitimized that change.
- 15 See Hallaq, *Authority*, chapter 5.
- 16 Ibn Idrīs al-Shāfi'ī, *al-Umm*, ed. M. Matarjī, 9 vols., Beirut, 1993, VI, p. 287.
- 17 Abū Bakr al-Jaṣṣās, *Sharḥ Kitāb Adab al-Qādī*, ed. F. Ziadeh, Cairo, 1978, pp. 37-39, 42-43, 101-102, 105, 106. See also al-Ḥusām al-Shahīd Ibn Māza, *Sharḥ Adab al-Qādī*, ed. Abū 'l-Wafā al-Afghānī and M. al-Hāshimī, Beirut, 1994, pp. 76-77.
- 18 Some *istiftā's* were requested by *muftīs* who were consulted by *qādīs* but who had to turn to more competent *muftīs*, apparently because they found the questions too difficult to answer, the point being that the final authority was the *muftī*, not the *qādī*.
- 19 See Hallaq, "From *Fatwās* to *Furū'*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society*, 1, 1994, pp. 17-56; idem., "Murder in Cordoba: *Ijtihād*, *Iftā'* and the Evolution of Substantive Law in Medieval Islam," *Acta Orientalia*, 55, 1994, pp. 55-83.
- 20 On the epitemic authority of the founding Imams, see Hallaq, *Authority*, chapter 2.
- 21 See Abū 'l-Walīd Sulaymān b. Khalaf al-Bājī, *Fuṣūl al-Aḥkām wa-Bayān mā Maḍā 'alayhi al-'amal 'inda al-Fuqahā' wa'l-Hukkām*, ed. al-Bāṭūl b. 'Alī, Rabat, 1410/1990, p. 269.
- 22 Abū 'l-Qāsim 'Alī b. Muḥammad al-Simnānī, *Rawḍat al-Qudāt wa-Tarīq al-Najāt*, ed. Ṣalāḥ al-Dīn al-Nāhī, 4 vols., Beirut & Amman, 1404/1984, I, p. 330; Kamāl al-Dīn Ibn al-Humām, *Sharḥ Fath al-Qadīr*, 10 vols., Repr., Beirut, 1990, VII, pp. 285-286; 'Alī b. Abī Bakr al-Marghīnānī, *al-Hidāya*, 4 vols, Cairo, 1980, III, p. 105; Ahmad b. Yaḥyā al-Wansharīsī, *al-Mī'yār al-Mughrib*, 13 vols., Beirut, 1981, X, p. 60 ff.; Abū Sahl al-Sarakhsī, *Mabsūt*, 30 vols., Cairo, 1906-12, XV, p. 95; 'Abd al-Wahhāb al-Baghdādī, *al-Ma'ūna*, ed.

- Ḥumaysh 'Abd al-Ḥaqq, 3 vols., Riyad, 1415/1995, III, p. 1511; Ibrāhīm al-Halabī, *Multaqā 'l-Abhur*, ed. Wahbī al-Albānī, 2 vols., Beirut, 1989, II, p. 73, n. 1 (citing al-'Aynī). Muwaffaq al-Dīn Ibn Qudāma, *Mughnī*, 12 vols., Beirut, 1983, XI, p. 458; idem., *al-Kāfi*, 4 vols., Beirut, 1992-94, IV, p. 302; Shams al-Dīn Abū 'l-Faraj 'Abd al-Raḥmān Ibn Qudāma, *al-Sharḥ al-Kabīr*, printed with Muwaffaq al-Dīn Ibn Qudāma, *al-Mughnī*, XI, p. 467; Muḥammad Ibn al-Munāṣif, *Tanbīh al-Hukkām*, Tunis, 1988, p. 156; Muḥammad b. Ḥabīb al-Māwardī, *Adab al-Qādī*, ed. Muḥyī Hilāl Sarḥān, 2 vols., Baghdad, 1971, II, p. 89; 'Alā' al-Dīn 'Alī b. Khalīl al-Ṭarābulusī, *Mu'īn al-Hukkām fī-mā Yataraddad bayn al-Khaṣmayn min al-Aḥkām*, Cairo, 1393/1973, p. 118.
- 23 Ibn al-Munāṣif, *Tanbīh al-Hukkām*, pp. 152-153; 'Abd al-Wahhāb al-Baghdādī, *al-Ma'ūna*, 3 vols., Riyad, 1995, III, p. 1511.
- 24 Shams al-Dīn Ibn Farḥūn, *Tabṣirat al-Hukkām*, 2 vols., Cairo, 1883, II, p. 37; Ibn Salmūn al-Kinānī, *al-'Iqd al-Munazzam*, 2 vols., Cairo, 1883, II, pp. 201-202; Abū Yūsuf Ya'qūb b. Ibrāhīm, *Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā*, Cairo, 1357/1938, p. 159. A few of the "legal specialists" who predated the schools of law, such as Ḥasan al-Baṣrī and 'Ubayd Allāh b. Ḥasan al-'Anbarī, are said to have admitted handwriting, without testimonial evidence, as valid proof. See Muḥammad al-Qaffāl al-Shāshī, *Ḥulyat al-'Ulamā'*, 8 vols., Amman, 1988, VIII, p. 151. Of the later jurists, it is reported that Abū Sa'īd al-Iṣṭakhrī held, what seems to have been a unique view, that acquaintance with the *qādī's* handwriting and seal are sufficient for the acceptance of the *kitāb*. Abū 'l-Qāsim al-Simnānī, *Rawḍat al-Qudāt*, 4 vols., Beirut & Amman, 1984, I, p. 331.
- 25 Ibn al-Munāṣif, *Tanbīh al-Hukkām*, pp. 155-156.
- 26 A somewhat earlier date still is not to be excluded, especially if Zāhirite doctrine and practice may be accepted as a forerunner. The Zāhirites did admit the *kitāb* on the basis of attestation to handwriting.
- 27 The change appears with all likelihood to have taken place both in the eastern and western parts of the Muslim world. Our evidence for the west will be discussed below. For the east, see the royal decrees of judicial appointment in Aḥmad b. 'Alī al-Qalqashandī, *Subḥ al-A'shā*, 14 vols., Beirut, 1987, XI, pp. 192, 201. But Qalqashandī's evidence belongs to a period after the 660s/1260s, when under the Mamlūks a Chief Justice was appointed to each of the four schools.

- 28 For a detailed account of the law pertaining to *al-shahāda 'alā 'l-khaṭṭ*, see Ibn Farḥūn, *Tabṣīrat al-Hukkām*, I, pp. 284-293.
- 29 For North Africa, particularly Tunis, see Ibn 'Abd al-Salām's and Ibn Rāshid's weighty statements in Wansharīsī, *al-Mi'yār al-Mughrib*, X, pp. 61-62. This Ibn 'Abd al-Salām, who was a Malikite, is not to be confused with his Shafi'ite namesake, a highly distinguished jurist who flourished in the east.
- 30 Ibn Sahl's comment on the evidence of handwriting is cited in Wansharīsī, *al-Mi'yār al-Mughrib*, X, p. 61. The Malikite Ibn 'Abd al-Salām, as quoted by Wansharīsī (ibid., X, p. 62), reveals something about the origins of the doctrine which admits the practise of authenticating the *kitāb* through handwriting. He argues that this later doctrine and practise utterly deviate from the authoritative doctrines of the school's founding fathers, and was originally based on a faulty interpretation of the practise of Saḥnūn and Ibn Kināna, who used, on some occasions, to accept the written instruments of persons whom they knew intimately, and in whom they placed their personal trust and confidence. This exceptional and provisional practise, Ibn 'Abd al-Salām says, was taken by later generations of judges and jurists to constitute a general principle (*aṣl*), on the basis of which an entire doctrine had come to be constructed. It is in this sense that we should understand the statement of Ibn Hishām al-Qurṭubī (d. 606/1209), who attributed a similar doctrine to Ibn al-Mājishūn and Muṭarrif. In his *Mufīd al-Hukkām*, he argued that in certain (but by no means all) cases a *qāḍī* should admit the validity of another *qāḍī's kitāb* if he, the former, was certain (*lam yashikk*) that the written communication was undoubtedly that of the latter. See Alfonso Carmona González, "La Correspondencia Oficial entre Jueces en el *Mufīd* de Ibn Hishām de Córdoba," in *Homenaje al Prof. Jacinto Bosch Vilá*, I, Granada, 1991, pp. 505-506. Similarly, see María Arcas Campoy, "La Correspondencia de los Cadies en el *Muntajab al-Aḥkām* de Ibn Abī Zamanīn," *Actas del XII Congreso de la U.E.A.I. (Malaga, 1984)*, Madrid, 1986, p. 62.
- 31 See Qalqashandī, *Ṣubḥ al-A'shā*, XI, pp. 192, 201, where one royal decree of judicial appointment, probably issued sometime after the middle of the seventh/thirteenth century, acknowledges *al-shahāda 'alā 'l-khaṭṭ* as being a distinctly Malikite institution that is beneficial and conducive to the welfare of society (*qubūl al-shahāda 'alā 'l-khaṭṭ...fa-hādha mim-mā fīhi fusha li'l-nāsi wa-rāḥa mā fīhā ba's...wa-hwa mim-*

- mā tafarrad bihi huwa* [viz. the Malikite *madhhab*] *dūn al-baqīyya wa-fīhi maṣlaḥa*). See 'Abd al-Raḥmān Bā'alawī, *Bughyat al-Mustarshidīn*, Cairo, 1952, p. 266. The Shafi'ite and Hanafite schools stand in diametrical opposition to the Malikites on this issue. See Ibn Abī 'l-Damm, *Adab al-Qadā'*, p. 76.
- 32 Ibn Farḥūn, *Tabṣīrat al-Hukkām*, I, p. 287.
- 33 Ibn al-Munāsif, *Tanbīh al-Hukkām*, p. 155.
- 34 *Ibid.*, p. 156. With a minor variation in the opening line, this revealing statement was cited as an authoritative attestation to the practise by Wansharīsī, *al-Mi'yār al-Mughrib*, X, p. 62.
- 35 Ibn al-Munāsif, *Tanbīh al-Hukkām*, pp. 164-165 in conjunction with p. 156, both passages having the same theme: *wa-idhā qarrarnā min madhhab Mālik wa-ghayrihi jawāz kutub al-quḍāt bi'l-ishhād 'alayhā wa-man' al-qabūl bi-mujarrad ma'rīfat al-khaṭṭ, wa-anna 'l-nās al-yawm wa-kāffat al-hukkām mutamālūn 'alā ijāzat dhālik wa-'ltizāmīhi wa'l-'amal bihi fa-lā budd an nuḥaqqiq fī dhālika* (pp. 164-165); *wa-lā budd...min al-tanqīb wa'l-talaṭṭuf fī isnād dhālika ilā wajh ṣaḥīḥ wa-aṣl wāḍiḥ yaṣluḥ al-maṣīr ilayhi wa-binā' aḥkām al-sharī'a 'alayh* (p. 156). The first part of this statement was cited, with minor variations, by Wansharīsī, *al-Mi'yār al-Mughrib*, X, p. 64.
- 36 The textual justification of attesting to handwriting operates on two levels, one direct, the other oblique. The Quranic verse (II: 185) is indirect in the sense that it occasions a principle, *qarūra*, by which the practice is in turn justified. But Ibn al-Munāsif (*Tanbīh al-Hukkām*, 165) also resorts to Prophetic *sīra* to validate the practice directly on textual basis, citing the Prophet's letters to the Byzantine Emperor Hiraql (Heraclius) and the Sassanid Kisrā (Khusru Parviz). See also Ibn Ḥajar al-'Asqalānī, *Fath al-Bārī*, 13 vols., Beirut, 1980, XIII, pp. 140-145.
- 37 Ibn al-Munāsif, *Tanbīh al-Hukkām*, p. 165.
- 38 Ibn Abī 'l-Damm, *Adab al-Qadā'*, p. 346.
- 39 Māwardī, *Adab al-Qadī*, II, p. 107.
- 40 Ibn 'Abidīn, *Nashr al-'Urf*, II, p. 118.
- 41 Reasons that may well be related to legal developments during the second/eighth and third/ninth centuries when traditionalist groups were battling rationalist jurisprudence. The abandonment of certain rationalist theses seems to have become necessary in order to gain membership in mainstream Sunnism, just as traditionalism, especially its extreme anti-

- rationalist varieties, had to relinquish some of its fundamental doctrines to avoid being entirely marginalized, and perhaps even ousted altogether from within the pale of Sunnism. Hanafite jurisprudence was forced to substitute *ḥadīth* for *ra'y* during the third/ninth century, an accomplishment to be attributed to Muḥammad b. Shujā' al-Thaljī (d. 266/879). Another concession that the Hanafite jurists had to make was to reduce their reliance on rationalistic reasoning, a feature of Abū Ḥanīfa's influential legal doctrines. Abū Yūsuf's recognition of custom as a source of law must have stood as a flagrant violation of the traditionalist-rationalist synthesis which Sunnī Islam had reached by the end of the third/ninth century and beginning of the fourth/tenth. Indeed, it was this synthesis and the historical processes that lay behind them which led to what later became known as *uṣūl al-fiqh* and, per force, to the exclusion therefrom of custom as a formal entity. On the traditionalist-rationalist conflict, see Ch. Melchert, *Formation of the Sunni Schools of Law*, Leiden, 1997, p. 1 ff. On the synthesis between the two camps, see W. Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies*, 4, 1993, pp. 587-605; idem, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies*, 16, 1984, pp. 7-10. On Thaljī's contribution to the transformation of Hanafite jurisprudence, see the revealing biographical notice in Ibn al-Nadīm, *Fihrist*, Beirut, 1978, p. 291; Abū 'l-Wafā' al-Qurashī, *al-Jawāhir al-Mudī'a*, 2 vols., Haydarabad, 1913, II, p. 221; Zayn al-Dīn Ibn Qutlūbughā, *Tāj al-Tarājim*, Baghdad, 1962, pp. 55-56.
- 42 Until, that is, our author, Ibn 'Ābidīn, not only rejuvenated interest in his position, but essentially revived it, as we shall see later.
- 43 Zayn al-Dīn Ibn Nujaym, *al-Ashbāh wa'l-Nazā'ir*, Calcutta, 1844, p. 131 (on the authority of Zāhīr al-Dīn b. Aḥmad); Jalāl al-Dīn al-Suyūfī, *al-Ashbāh wa'l-Nazā'ir*, Beirut, 1979, p. 93. For Marghīnānī's statement that "an explicit textual ruling is stronger than a custom and one does not abandon something stronger in favour of something weaker," see Gedeon Libson, "On the Development of Custom as a Source of Law in Islamic Law," *Islamic Law and Society*, 4, 2, (1997), p. 145.
- 44 See next note. For a biographical account of Sarakhsī, see Ibn Qutlūbughā, *Tāj al-Tarājim*, pp. 52-53.
- 45 Sarakhsī, *Mabsūṭ*, XV, p. 130; *al-ma'lūm bi'l-'urf ka'l-mashrūt bi'l-*

- naṣṣ*. See also XV, pp. 85-86, 132, 142, 171; XII, p. 142, and *passim*.
- 46 It would, in this context, be instructive to explore the possible reasons that lie behind the incorporation of customary practises into law through these two distinctly different channels, namely, direct incorporation (= custom *qua* custom) and incorporation via formal and supplementary sources. Granting, as I do, the valid explanation in terms of chronological developments (whereby custom came into law as part of the evolutionary processes that gave rise to both positive law and legal theory), there remains the question as to why the supplementary and formal sources of law could not permit, under their own rubric, the total absorption of customary practises in the later period.
- 47 Carl Brockelmann, *Geschichte der arabischen Litteratur*, 2 vols., Leiden, 1943-49, II, pp. 401-403.
- 48 Ibn Nujaym, *al-Ashbāh wa'l-Nazā'ir*, p. 129.
- 49 *Mā ra'āhu al-Muslimūna ḥasanan fa-hwa 'inda Allāhi ḥasan*.
- 50 Ibn Nujaym, *al-Ashbāh wa'l-Nazā'ir*, pp. 129-130.
- 51 Ibn 'Ābidīn, *Nashr al-'Urf*, p. 115; Suyūfī, *al-Ashbāh wa'l-Nazā'ir*, p. 89. This *ḥadīth* is also used by Shaybānī in justification of consensus. See W. B. Hallaq, "On the Authoritativeness of Sunni Consensus," *International Journal of Middle East Studies*, 18, 1986, p. 431.
- 52 An inductive survey of the instances of custom that have been incorporated into law appears to have been often offered as a substitute for a proof of authoritativeness (*ḥujjiyya*), although such a substitute clearly involved begging the question. It is perhaps the jurists' acute awareness of the pernicious effects of circularity that prevented them from claiming inductive knowledge to constitute a solution to the problem of *ḥujjiyya*.
- 53 *Fath al-Qadīr* being Ibn al-Humām's (d. 681/1282) work which is a commentary on Marghīnānī's *Hidāya*.
- 54 Zāhīr al-Dīn Abū Bakr Muḥammad b. Aḥmad, the author of the well-known *fatwā* collection, *al-Zāhiriyya*. See Qurashī, *al-Jawāhir al-Mudī'a*, II, p. 20.
- 55 Ibn Nujaym, *al-Ashbāh wa'l-Nazā'ir*, p. 131.
- 56 *Ibid.*, 137; Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 132. On universal and local customs, see B. Johansen, "Coutumes locales et coutumes universelles," *Annales Islamologiques*, 27, 1993, pp. 29-35.
- 57 *Istiṣnā'* is a manufacturing contract whereby a sale is concluded with the condition of future delivery. The contract may also be one of hire,

- such as when a person gives a blacksmith a certain amount of metal so that the latter manufactures therefrom a pot or container, for a stipulated payment. Being of the same type as the *salam* contract, *istiṣnā'* goes against the principles of *qiyās* which require the avoidance of risk (*gharar*) by ensuring that the object of sale or hire be in existence at the time of sale. See Sarakhsī, *Mabsūt*, XV, p. 84 ff.
- 58 For a biographical notice, see Ibn Qutlūbughā, *Tāj al-Tarājim*, p. 73; Brockelmann, *Geschichte*, I, p. 382 (475).
- 59 Ibn Nujaym states that these Bukhārāns themselves formulated this opinion (*aḥdathahu ba'd ahl Bukhārā*), it being almost certain that their opinion is a reflection of their juridical practises. See his *al-Ashbāh wa'l-Nazā'ir*, p. 138.
- 60 *Ibid.*, p. 137.
- 61 *Ibid.*, p. 138; *lākin aḥtā kathīr min al-mashāyikh bi-i'ibārihi, fa-aqūl 'alā i'tibārihi*.
- 62 As briefly alluded to in n. 41, above.
- 63 For Ibn 'Ābidīn's biographical notices, see Khalīl Mardam Bey, *A'yān al-Qarn al-Thālith 'Ashar fī 'l-Fikr wa'l-Siyāsa wa'l-Ijtīmā'*, Beirut, 1977, pp. 36-39; 'Abd al-Razzāq al-Bīṭār, *Hulyat al-Bashar fī Tārīkh al-Qarn al-Thālith 'Ashar*, ed. M. B. Bīṭār, 3 vols., Damascus, 1963, III, pp. 1230-1239; Ziriklī, *al-A'lām*, VI, p. 42.
- 64 Mardam, *A'yān*, p. 37.
- 65 See Madeline C. Zilfi, "The *Ilmiye* Registers and the Ottoman *Medrese* System prior to the Tanzimat," in *Contributions à l'histoire économique et sociale de l'Empire ottoman*, Leuven, 1983: pp. 309-327, at 312-313.
- 66 For a general history of Damascus during this period, see George Koury, *The Province of Damascus*, Ph.D. dissertation: University of Michigan, 1970; Yūsuf Na'īsa, *Mujtama' Madīnat Dimashq*, 2 vols., Damascus, 1986.
- 67 N. Aghnides, *Mohammedan Theories of Finance*, New York, 1916, p. 183.
- 68 Ibn 'Ābidīn, *Sharḥ al-Manzūma*, in his *Majmū'at Rasā'il*, I, pp. 1-53.
- 69 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 114; the line runs as follows: *wa'l-'urfu fī 'l-shar'i laḥū (i) 'tibār / li-dhā 'alayhi 'l-hukmu qad yudār*.
- 70 *Ibid.*, II, pp. 114, 125, and passim; *Sharḥ al-Manzūma*, I, p. 48, and passim.
- 71 Ibn 'Ābidīn, *Hāshiya*, IV, pp. 364, 434, 519 and passim.

- 72 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 139 and passim; *Sharḥ al-Manzūma*, I, p. 15.
- 73 Ibn 'Ābidīn, *Hāshiya*, I, p. 70 ff. See also *Sharḥ al-Manzūma*, I, pp. 16-18.
- 74 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 114.
- 75 That is, the *naṣṣ*, as distinguished from ambiguous texts which are by definition capable of more than one interpretation. See Abū 'l-Walīd al-Bājī, *al-Ḥudūd fī 'l-Uṣūl*, ed. Nazīh Ḥammād, Beirut, 1973, p. 42 ff. The ambiguous, equivocal texts did not present a challenge to custom because their hermeneutical effects were indeterminate.
- 76 Sarakhsī, *Mabsūt*, XV, p. 130; *al-ma'lūm bi'l-'urf ka'l-mashrūṭ bi'l-naṣṣ*.
- 77 In *Khizānat al-Riwāyāt*. See Brockelmann, *Geschichte*, II, p. 221 (286).
- 78 Whom I could not identify.
- 79 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 116.
- 80 Muḥammad al-Mudarris, *Mashāyikh Balkh min al-Ḥanafīyya*, 2 vols., Baghdad, 1979, I, pp. 53, 76, and see index at II, p. 942.
- 81 *Ibid.*, I, pp. 53, 89, and see index at II, p. 938.
- 82 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 118.
- 83 Cf. Qudūrī, *Mukhtaṣar*, p. 87.
- 84 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 118; *takūn al-'āda ḥiya al-manzūr ilayhā fa-idhā taghayyarat taghayyar al-hukm, fa-laysa fī i'tibār al-'āda al-mutaghayyira al-ḥāditha mukhālafa li'l-naṣṣ bal fīhi ittibā' al-naṣṣ*.
- 85 *Ibid.*, p. 118: *fa-law ta'āraf al-nās bay' al-darāhim bi'l-darāhim aw istiqrādhā bi'l-'adad, ka-mā fī zamāninā, lā yakūn mukhālīfan li'l-nās; fa-Llāh ta'ālā yajzī 'l-Imām Abā Yūsuf 'an ahl hādihā 'l-zamān khayr al-jazā' fa-la-qad sadd 'anhum bāban 'aẓīman min al-ribā*.
- 86 On *takhrīj* and its relationship to the doctrines of the schools' founders, see chapter 2, section III, above.
- 87 In his *al-Nahr al-Fā'iḳ*. See Brockelmann, *Geschichte*, S II, p. 266.
- 88 Probably, Ismā'īl b. 'Abd al-Majīd al-Nābulusī (d. 1043/1633). See Brockelmann, *Geschichte*, S II, p. 476.
- 89 For a detailed discussion of fiscal issues in law, see Ibn 'Ābidīn, *Tanbīh al-Ruqūd 'alā Masā'il al-Nuqūd*, in his *Majmū'at Rasā'il*, II, pp. 58-67.
- 90 Ibn 'Ābidīn, *Nashr al-'Urf*, II, 119; *fa-yalzam minhu tafsīq ahl hādihā 'l-'aṣr, fa-yata'ayyan al-iftā' bi-dhālik 'alā hādhihi 'l-riwāya 'an Abī Yūsuf*. (See also *ibid.*, II, pp. 119-124, where similar arguments are

- made).
- 91 *Ibid.*, II, p. 120; *wa-'alā kull, fa-yanbaghī 'l-jawāz wa'l-khurūj 'an al-ithm 'ind Allāh ta'ālā immā binā'an 'alā 'l-'amal bi'l-'urf aw li'l-'darūra.*
- 92 An aromatic plant that grew around Mecca and was used, when cut, in decorating houses and in funerals. See Jamāl al-Dīn Ibn Manẓūr, *Lisān al-'Arab*, 15 vols., Repr., Beirut, 1972, IV, pp. 302-303.
- 93 It is worth noting that Ibn 'Ābidīn stresses the point that for a local custom to be considered a valid legal source, it must thoroughly permeate the society in which it is found. See *Nashr al-'Urf*, II, p. 134.
- 94 *Ibid.*, p. 125; *al-qawl al-ḍa'if yajūz al-'amal bihi 'ind al-'darūra.*
- 95 Ibn 'Ābidīn, *Sharḥ al-Manẓūma*, I, pp. 10-11, 48.
- 96 For a biographical notice, see Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfi'iyya al-Kubrā*, 6 vols., Cairo, 1906, VI, pp. 146-227.
- 97 Ibn 'Ābidīn's reference seems to be to Subkī's *Fatāwā*, II, p. 10 ff.; *Sharḥ al-Manẓūma*, I, p. 49; *yajūz taqlīd al-wajh al-ḍa'if fī nafs al-amr bi'l-'nisba li'l-'amal fī haqq nafsīhi, lā fī 'l-fatwā wa'l-hukm.*
- 98 Brockelmann, *Geschichte*, I, p. 378 (469); Marghīnānī, *Hidāya*, I, pp. 3-9.
- 99 Ibn 'Ābidīn, *Sharḥ al-Manẓūma*, I, pp. 49-50.
- 100 *Ibid.*, I, p. 50.
- 101 Ibn al-Ṣalāḥ, *Adab al-Muftī*, p. 107.
- 102 Although the contradiction is seen in terms of particularization (*takhṣīs*).
- 103 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 128 (l. 17); idem, *Sharḥ al-Manẓūma*, I, p. 46 f.
- 104 Ibn 'Ābidīn, *Nashr al-'Urf*, II, pp. 128-130.
- 105 *Ibid.*, II, pp. 126-128.
- 106 On this practise, see J. E. Mandaville, "Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire," *International Journal of Middle East Studies*, 10, 1979, pp. 295-304.
- 107 Ibn 'Ābidīn, *Ḥāshiya*, IV, p. 364.
- 108 Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 126; *wa-qad naṣṣ al-'ulamā' 'alā anna ḥādḥā 'l-ikhtilāf (huwa) ikhtilāf 'aṣr wa-awān lā ikhtilāf ḥujja wa-burhān.*
- 109 *Ibid.*, II, p. 131; *Sharḥ al-Manẓūma*, I, p. 47.
- 110 *Nashr al-'Urf*, II, pp. 131-132, restated at II, p. 133.
- 111 *Ibid.*, II, p. 133.
- 112 *Ibid.*, II, p. 132; *fa'l-'urf al-'āmm fī sā'ir al-bilād yathbut ḥukmuḥu*

- 'alā ahl sā'ir al-bilād wa'l-khāṣṣ fī balda wāḥida yathbut ḥukmuḥu 'alā tilka 'l-balda faqat.*
- 113 Aḥmad al-Ḥamawī, *Sharḥ al-Ashbāḥ*, printed with Ibn Nujaym's *al-Ashbāḥ wa'l-Naẓā'ir*, p. 137; Ibn 'Ābidīn, *Nashr al-'Urf*, II, p. 132: *qāl al-'allāma al-Sayyid Aḥmad al-Ḥamawī...al-hukm al-'āmm lā yathbut bi'l-'urf al-khāṣṣ, yufham minhu anna 'l-hukm al-khāṣṣ yathbut bi'l-'urf al-khāṣṣ.*
- 114 *Sharḥ al-Manẓūma*, I, p. 45; idem, *Nashr al-'Urf*, II, p. 133: *ammā 'l-'urf al-khāṣṣ, idhā 'āraḍ al-naṣṣ al-madhhabī al-manqūl 'an ṣāhib al-madhhab fa-hwa mu'tabar...wa-shamal al-'urf al-khāṣṣ al-qadīm wa'l-ḥādith.*
- 115 Ibn 'Ābidīn, *Nashr al-'Urf*, II, pp. 128, 130; *law kāna Abū Ḥanīfa ra'a mā ra'aw, la-aftā bihi* (at 130, l. 15); idem, *Sharḥ al-Manẓūma*, I, p. 14.
- 116 See Hallaq, *Authority*, chapter 5, especially, section V.