On reading two epistles of Muhammad Amin Ibn ‘Abidin of Damascus

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1 Ibn ‘Abidin’s Sharh al-risala al-musamma’ bi-‘uqud rasm al-mufti (‘A commentary on the epistle entitled Chaplets on the task of the mufti’) and Nashr al-‘arf fi bina’ ba’d al-ahkam ‘ala’l-‘urf (‘The wafting of perfume concerning building some judgements on custom’) are both dated rabi’ al-awwal 1243AH/1827CE. On a wider stage, the year belonged to a tumultuous period: in 1826 Istanbul witnessed the sanguinary abolition of the central Janissary corps by Sultan Mahmud II; in 1827 European powers defeated the Ottomans in the battle of Navarino, presaging the loss of Greece. For the Damascene jurist, challenges to Ottoman power were close to home: early in the century, Wahhabi control of the Hijaz culminating in the taking of Mecca and Medina (in 1805) had halted the Ottoman hajj caravan. The eventual defeat in 1818 of the Al Sa’ud by the rising power of Muhammad ‘Ali Pasha in Egypt, with forces under the leadership of his son Ibrahim Pasha, was to be followed by Ibrahim Pasha moving to take Syria and Damascus by 1832.

2 Ibn ‘Abidin’s silence on such environing struggles did not preclude a doctrinal condemnation of Wahhabi tenets in the great legal commentary he worked on during these years. But it was a more intimate loss in 1827 that was later to prompt Ibn ‘Abidin to write. In that year his spiritual guide, Shaykh Khalid of the Naqshabandi tariqa died in an epidemic in Damascus. It was subsequent attacks on Shaykh Khalid’s legacy, in the wake of disputes concerning succession to leadership within the Khalidiya Naqshabandiya tariqa, which were to draw a response in writing from Ibn ‘Abidin. This is to say that we need to attempt to place the two epistles within the context of doctrinal traditions at the time Ibn ‘Abidin wrote. It is always tempting to try to interpret the texts of such a major figure as Ibn ‘Abidin against a wider historical compass. But this is not easy given the problems that attend historical understanding of the 1820s more generally. As Christine Philliou has argued concerning the early 19th century:
This period, in fact, is perhaps the central pivot in the statist master narrative that still haunts the modern field of Ottoman history: the narrative of rise (fourteenth to sixteenth century), decline (late sixteenth to late eighteenth century), and Westernization (the long nineteenth century). Indeed, the early nineteenth century is still implied to be the turning point between centuries of decline (even for those who have switched to its revisionist variants such as decentralization, transformation, and change) and the new trajectory of top-down modernization (or Westernization) that would revive the empire for another century before its final demise in the wake of World War I. And yet, as pivotal as it is, this period, and in particular the reign of Sultan Mahmud II (1808-39), has never been studied in depth.

In this essay, I therefore try to frame a reading of Ibn ‘Abidin’s epistles within the intellectual traditions and debates of its day and not within ‘the telos of the Tanzimat’. This requires first a brief account of the two epistles and their relation; then discussion of three central issues for a reading – the character of Ibn ‘Abidin’s fiqh, the ambit of ‘custom’/‘urf’, and the locus of juridical sovereignty; and finally some remarks on recent scholarly commentary on the epistles.

Dated in the same month, the two epistles are closely related. The ‘Uqud takes the form of a commentary upon a didactic poem by Ibn ‘Abidin concerning the task of the mufti in reaching an opinion. Indeed Ibn ‘Abidin introduces Nashr al-‘urf noting that when he reached the commentary on the verse (wa-‘urf fi-‘l-shar’ la-hu i’tibar li-dha ‘alai-hi al-hukm qad yudar; ‘Custom has much authority in the shar’ and so a rule may well turn about it’) he wrote all night, and as day broke, he realised that there remained hidden points in the corners requiring clarification. Thus he restricted the commentary on the verse to the essential points and developed the treatment of the topic in a separate epistle, because he did not see that anyone had given this topic its due or explicated it as deserved.

Thus, following the order of composition, let us first briefly describe the ‘Uqud.

As Norman Calder notes in his translation and explication of the ‘Uqud, the poem sets out the structure of authority of the madhhab, the identification of priorities within and the application of rules for the construction of judgement on the basis of the juristic tradition. It details the components of the ‘manifest transmission’ (zahir al-riwayah) of the Hanafi madhhab which must be followed – unless qualified by authoritative preference. Ibn ‘Abidin singles out the great work of al-Sarakhsi for distinguishing the judgements from the foundational texts (masa’il al-usul), from less definitively authenticated works (nawadir) and from later rulings not found in the two previous sets of texts (fatawa, i.e. naważil/waqi’at). In his exposition, Ibn ‘Abidin discusses first the hierarchy of books, then that of authorities. The hierarchy of authorities (which earlier had been overridden in seventeen cases where the madhhab had preferred opinions of Zufar over the founding masters) is binding on later jurists. The ranking of texts places foundational texts (mutun) before commentaries (shuruh) and fatwas (fatawa). The list of mutun given by Ibn ‘Abidin stretches from al-Quduri’s (d. 428/1037) Mukhtasar to al-Halabi’s (d. 956/1549) Multaqa al-Abhur. The principles to identify the ‘sound’ opinion in the juristic tradition are discussed as are cases where either two sound opinions exist or no dominant opinion exists. It is here that issues of choice or quality of argument are mentioned, and that the difficulty of interpretation of language – juristic language and everyday language – is evoked. It is only towards the end of the poem (line 69 of 74) after all the textual apparatus is discussed, that the weight of living practice in judgement is evoked: wa-‘urf fi-‘l-shar’ la-hu i’tibar li-dha ‘alai-hi al-hukm qad yudar. The last verses of
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On very limited terms, Ibn 'Abidin allows this to a mufti but not to a judge (qadi); in that he respects the terms of state appointment of qadis. In Calder's translation:

To act, or to respond to a petitioner
Using a view that's weak is not allowed.
Save one who acts under necessity (darura)
And one whose skill and knowledge is renowned.
But not a qadi, he can't judge this way;
And if he does, his judgement does not stand.
Especially qadis now; they are restricted
To school-established rules when they're appointed.14

Calder closes his reading of the poem and its commentary by emphasizing the grand tradition of Hanafi jurisprudence sketched by Ibn 'Abidin and his 'unapologetic assertion of continuity, loyalty, and commitment' to this tradition that spanned one thousand years.15

The question remains as to how we are to understand what Calder describes as ‘a brief statement on the importance of custom, much amplified in his commentary and in his independent treatise, Nashr al-Arf’.16 The commentary on the relevant verse of the ‘Uqud contains the nucleus of Ibn 'Abidin’s argument when he asks the rhetorical question: ‘given that 'urf changes, can the mufti follow the new practice ('urf) in contradiction to texts?’ He answers that later jurists who overrode written doctrine did so only because of new custom after the time of the Imam, it being the prerogative of the mufti to follow new practice and changes in current language, so long as the mufti has a sound judgement (la-hu ra'y wa nazar sahih wa-ma'rifat bi-qawa'id al-shar' hatta yumayyiz bain al-'urf alladhi yajuz bina' al-ahkam 'alai-hi wa-bain ghairi-hi) and can distinguish between practices on which judgements may be based and those on which they cannot.17 If a qadi or a mufti simply sticks to the apparent meaning of transmitted texts and neglects practice and clear evidence, remaining ignorant of the conditions of people, then many rights will be lost and injustice would ensue for many.18 These statements are backed by multiple citations from later juristic works.

Ibn 'Abidin expands on this set of themes in his epistle Nashr al-'urf. Nashr al-'urf consists of an introduction and two parts: the introduction covers the definition of 'urf and its conventional division into three, general, particular and juristic (al-'amma, al-khassa and al-shar'iya). Part 1 examines cases when the shar'i stipulation (al-dalil al-shar'i) is in part or in whole contrary to al-'urf,19 and part 2 cases when custom runs contrary to the dominant doctrine of the madhhab, itself less closely delimited by a binding text (nass) from the Qur’an or hadith. The introduction and the first part build closely upon the treatment of the topic in Ibn Nujaym’s Al-ashbah wa-'l-naza’ir,20 section 1 general rules, principle 6: custom is determinant (al-'adah muhakkama). As did many other jurists, Ibn 'Abidin wrote a commentary on the work, Nuzhat al-nawazir 'ala 'l-ashbah wa-al-naza’ir.21 There are no real surprises here in relation to other scholars, the basic distinctions being respected and a review of a number of fundamental problems conducted: this is true in regard to the identification of relevant ‘custom’ and to the integration of custom with doctrine. Following other scholars, Ibn ‘Abidin discusses (a) the interpretation of binding nass in terms of the specification of its application (takhsis al-nass)22 and in the light of custom (ta'lil al-nass bi-'l-'adah);23 (b) the relation of binding nass to madhhab doctrine; and (c) the requirement that madhhab doctrine not be applied literally without regard to

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the poem, before the closing verse praising God return to whether a weaker opinion of the juristic tradition may be adopted in a judgement.

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custom by judges and muftis (laisa li-ʼl-mufti wa-la li-ʼl-qadi an yahkuma ʻala zahir al-madhhab wa-yatraka ʻl-ʻurf).

10 In certain of the examples Ibn ʻAbidin tackles issues close to heart, notably the difficulty of judgement when coinage (money) was itself a matter of different values; this problem was one of 'custom' for Ibn ʻAbidin, while to us today it is also one of government (and eminently a matter of unification within an insignia of modern state sovereignty).

11 But it is part 2 of the essay where Ibn ʻAbidin reveals to us some of the distance traversed during the three centuries of Ottoman rule since Ibn Nujaym and where, from the outset, he speaks in the first person from the text:

Where ʻurf differs from what is the manifest transmission [of the madhhab], we say:

‘know that jurisprudential questions are either fixed by a clear text and that is the first chapter [of this work] or by ijtihad or reasoned opinion (ray). For many of these questions the mujtahid builds on practice of his day in such a manner that if he lived with today's practices he would have reached a different decision to that he did earlier. For this reason [the jurists] have stated that one of the conditions for full juristic reasoning (ijtihad) is to know the practice of the people, as many of the rulings differ according to change over time, either through change in people’s practices or through necessity or the corruption of people of the day. Thus if judgement stayed as it had been earlier, it would cause distress and harm to people and would thereby contravene the principles of the shari'a which are founded on lightening and easing [life], and avoiding harm and corruption so that the world remain in most perfect order and finest balance.'

12 Here Ibn ʻAbidin turns to those elements of madhhab doctrine not fixed by an indisputable text (of Qur’an or hadith) where legal reasoning and opinion dominate; he articulates the resulting, and historically changing, doctrine of the school as a translation of the principles of the shari'a: to ease [human life] and to prevent harm and corruption, so that the world may remain in the most complete order (nizam) and finest balance. If here one can translate nizam by ‘order’, Ibn ʻAbidin would not have been ignorant of its use by Ottoman jurists writing in Turkish in the phrase nizam-i memleket, denoting the order and, at times, the reason of state.

13 Following from this opening statement, Ibn ʻAbidin examines two intertwined problems: first, the need for judges and muftis to know the conditions and customs of the time and, second, the nature of cases on which doctrine of the school has changed over time.

14 Judges and muftis need to know the conditions and customs of those for whom they would write rulings; in the phrase of the jurist al-Zahidi (Najm al-Din al-Zahidi, d. 658/1260) citing a fatwa, ‘he who does not know the people of his time is an ignorant man’ (man lam yakun ‘aliman bi-ahl zamani-hi fa-huwa jahi l) and in Ibn ʻAbidin’s own words: ‘the mufti should not remain inflexibly with what is transmitted in the books of the manifest transmission without regard for his era and the people of that era lest he cause many a right to be lost and the harm he cause prove greater than the benefit’ (inna al-mufti laysa la-hu al-jumud ‘ala ʻl-manqul fi kutub zahir al-riwaya min ghair mura’at al-zaman wa-ahla-hu wa-illa yudi’ huqaq kathira wa-yakun darar-hu a’zam min na’fi-hi). There flows from this, a reflection on the difficult issue of the nature of a jurist’s knowledge of persons and customs. As Tim Murphy reminds us with regard to the common law, what ‘the law’ knows of ‘society’ is in no sense an obvious matter. In the common law also, the
central context for ‘knowing’ was that of judgement, at least prior to the importation in recent years of specialized technical or social knowledge to which the law becomes subject. So Ibn ‘Abidin here discusses a judge’s recognition of intent, acknowledgement of different forms of speech, and admission of types of evidence. He expresses well the fragility and conditionality of judgement.

Then, Ibn ‘Abidin goes on to examine different legal questions where the dominant doctrine of the school had in fact changed with time. Among these issues were the validity of certain contractual forms, the legal responsibility for taxation, and the character of penal rulings. With regard to penal rules, two departures from long established doctrine are noted: that coercion (ikrah) may be exercised by another person than the Sultan and that someone who has killed (al-qatil) may be imprisoned as punishment. Ibn ‘Abidin offers little comment on these issues although he does legitimate the former by the historical vision, spelt out often in draconian form in siyaset texts, that contemporary relations between men being more deceitful and violent than those in the days of the Prophet, correspondingly harsher measures are needed.

It is with taxation, notably the practice whereby the lessee of agricultural land and not the owner pays the tax (‘ushr wa-kharaj), that Ibn ‘Abidin turns in detail to the custom of government. This issue lay at the core of the problem faced in legitimating the Ottoman (and indeed the Mamluk and Mughal) legal structure of property rights, which was long recognized as in clear contradiction with the early doctrine of the school and legitimated by fiscal necessity. Here the ‘custom’ extends from government to the people and to that central institution of Islamic jurisprudence waqf:

It has become the practice in our times that the holders of timars and powers who act as agents of our lord the Sultan (God Almighty grant him victory) collect the taxes from the tenants [not the owners]. And so it has also become the custom that government agents (hukkam al-siyasa) also collect the fines and dues imposed on land from the tenants. Given that most of the villages and mazra’ahs are waqf, because of what we just mentioned [the high other impositions], the tenant pays only a low rent for the land itself.

Hence following other late Hanafi scholars, notably Shaikh Khayr al-Din al-Ramli (d. 1671), the mufti of Damascus and student of ‘Ala’ al-Din al-Haskafi Shaikh Isma’il al-Ha’ik (d. 1702), Shaikh Zakariya Efendi (d. 1001/1592), ‘Ata’allah the efendi of the muftis in the imperial centre (Dar al-saltana al-mahmiya) (d. 1236/1820), and lastly Hamid Efendi al-‘Imadi the mufti of Damascus (d. 1758), Ibn ‘Abidin views it as necessary to legitimate the practice.

This in turn leads Ibn ‘Abidin to the topic of documentation where he will explicitly differ not only with classical Hanafi doctrine but also with Ibn Nujaym and will go on to recognize the legal validity as proof not only of the records of traders, which earlier jurists had judged licit as not subject to forgery and as a source to be relied upon on the grounds of both custom and necessity (‘urf wa-darura), but above all the instructions and registers held by government. Ibn ‘Abidin discusses the Sultanic letters of appointment and dismissal of officials, appointment (berat) documents from the Sultan, promissory notes (especially between the princes and notables against whom it is not possible to bear witness) and the registers of taxation and rights for all manner of land. Ibn ‘Abidin notes that if security against forgery was considered as a reason for the legal validity of certain commercial records by the classical scholars al-Bazzazi, al-Sarakhsi and Qadi Khan, then the principle applies even more so (and in accordance with the judgements of the shaikh
al-islam 'Abdullah Efendi (d. 1744) and in the commentary of Hibatu'lllah al-Ba'li (d. 1809)) to the registers of the government.\textsuperscript{34}

\textbf{19} Ibn 'Abidin writes:\textsuperscript{35}

This characteristic is yet more evident in the Sultanic registers as anyone who witnessed how they are copied knows well: first they are written only by the leave of the Sultan and after many people agree on copying them without any accidental addition or omission, then they are presented to the [official] appointed for that who countersigns them, whence they are presented to the official responsible for their keeping, who is entitled the defter emini who writes on them. After that the originals are returned to their storage place under seal and safe from counterfeiting. Because of this, all the people and scribes of the state (jami' ahl al-daulah wa-'l-kataba) know that if it is written in the registers that a particular place is waqf for a particular school then that fact can be acted upon without further proof.

\textbf{20} In this manner what we would call the bureaucratic order is assimilated to the custom of government. At stake is not merely the internal custom of the ‘people of the state’ (in Ibn ‘Abidin’s words ahl al-daula or in the Ottoman Turkish phrase ehl-i örf) but government documentation of most basic property rights and tax obligations in general.

\textbf{21} Ibn 'Abidin ends his essay with a discussion of the long debated questions of how a jurist and judge should interpret the words of a person who states that s/he is endowing a waqf according to the shari‘i principles of division (‘ala ‘l-farida ‘l-shari‘iya).\textsuperscript{36} Should the jurist give weight to the intention of the endower and the customary understanding of the phrase in the mind of the endower (when that is to grant the male the part of two females) or should he follow the more proper and established juristic argument that waqf being a pious act it is fitting to respect equal division between male and female? We may be disappointed to learn that Ibn ‘Abidin tends to give the legal power to the intention of the endower over the lofty principle of equal division well established in different schools, not least the Hanafi. But that he treats this issue so extensively and with a certain hesitation in his essay may well speak to its contemporary (and enduring) importance: Ibn ‘Abidin was to die eleven years before his former student Ahmad ‘Arif Hikmat al-Husayni, appointed shaykh al-islam 1846-1854, was to issue the instructions accompanying the sultanic irade granting equal rights to daughters as to sons in the devolution of usufructuary rights to miri land. The widening of the circle of rights to miri land (and which was also to apply to usufructuary rights to waqf agricultural land) was justified as evidence of ‘the justice, concern and compassion of the sultan and the splendid effect of his imperial presence working for an age of equity’.\textsuperscript{37} In this manner the juristic debate was resolved by the application of the higher order of justice of the shari‘a, in an argument not so very different in its terms from Ibn ‘Abidin’s ‘the rules of the shari‘a [are] built on [the principle of] easing [life] and warding off harm and corruption so that the world remain in most perfect order and finest balance’.\textsuperscript{38}

\textbf{22} How should one read these epistles? I wish here to turn to the first of the issues listed in the introduction to this paper: the components of Ibn ‘Abidin’s juridical writing. Ibn ‘Abidin was the most masterful scholar of the Hanafi tradition of his day, a fact underscored by his biographers. Yet, although his writing is encyclopaedic and analytically organized, as the phrase just cited expresses, he too embodied both his younger training in the Shafi‘i madhhab and his engagement in the ethical traditions of Sufism. This combination – early Shafism, subsequent Hanafism, and Sufism – was also true of Ibn ‘Abidin’s great predecessor, ‘Abd al-Ghani al-Nabulusi. Both were
distinguished authors, not in any manner defined as office holders of the Ottoman state, and both in their very different ways – al-Nabulusi being a supremely elegant writer, a polymath, a great sufi in the ecstatic tradition whereas Ibn ’Abidin being far more an analytical encyclopaedic juridical intelligence – stand out amidst their contemporaries. But the ethical voice which each possesses in his epistles, whereby when al-Nabulusi or Ibn ’Abidin may deploy the conventional ‘I said’ (qultu), the reader experiences that the author is indeed speaking, echoes the particular Damascene fusion of the Shafi’i concern with justice in the rulers, Hanafi juridical analysis, and the ethical tradition of Sufism. Part of the problem in modern commentary on the epistles is that we do not command that meeting of intellectual and ethical traditions which formed great Damascene authors over many centuries. Clearly the world about them was changing, but without an understanding of all three of the formative traditions from which they came, our historical commentaries on their work remain stunted and even reductive. This is not to say that I myself command all three traditions but that I am aware that a deeper reading of these texts requires a recognition of the fusion of the three traditions in the greater jurist-writers of Damascus in the 18th and early 19th century.

But on what kinds of juridical literature do Ibn ’Abidin’s two epistles build? If the ‘Uqud may bear comparison with didactic texts for judges (adab al-qadi), Nashr al-’arf builds on the tradition of legal maxims (qawa’id fiqhiya) and more particularly on works of al-ashbah wa-T-naza’ir. Not unlike the didactic poem, the latter organize cases under memorable maxims. While the terms (qawa’id, furuq, ashbah wa-naza’ir) may be as old as the 4th/10th century, works so entitled and structured appear from the 8th/14th century, first among Shafi’i scholars – Taj al-Din Ibn al-Subki (771/1370) and Jalal al-Din al-Suyuti (d. 911/1505) – and then Hanafi scholars, most notably Ibn Nujaym (d. 970/1563),40 whose al-Ashbah wa-T-naza’ir was to be the object of many commentaries.41 Ibn ’Abidin himself wrote a commentary on the text.42 Given that it is one of Ibn Nujaym’s six core rules – al-’ada muhakkama – on which Ibn ’Abidin expands in Nashr al-’arf,43 any judgement on the degree to which he actually departs from other later writers would require a comparison of the later commentaries by other Hanafi (and indeed Shafi’i) jurists on this famous maxim, only some of which have been published.

This is all the more logical given the strong recognition by later Hanafi jurists of internal doctrinal change and, for officially appointed jurists, of what can only be termed a kind of raison d’état in justifying state rules that clearly contravened a principle of school doctrine.44 As we shall see at the end of this essay, Wael Hallaq attributes to Ibn ’Abidin a break with millennia tradition. But it is most unclear that Ibn ’Abidin here is doing more than systematically drawing out the principles that later (al-muta’akhkhirun) jurists deployed in debate and doctrinal elaboration.

This being so, we should pause to consider the remit of the term ‘urf in Ibn ’Abidin’s essay. I have here often translated the term not by custom but by practice.45 This is because today custom has become a somewhat shrunken term compared to the reach of ‘urf ‘amm. At issue is not only translation, which by definition needs to examine the context of the use of a term, but of our own socio-legal understandings: it is not entirely surprising that a contemporary jurist such as Mohammad Husain Fadlallah will largely abandon the term in favour of al-maudu’.46 As we have seen above, for Ibn ’Abidin ‘urf subsumes not only popular and commercial practice but also the practice of government. That is to say that for Ibn ’Abidin the conceptual locus of juridical sovereignty remains the shar’. This is a very different understanding of legitimate normality to a modern
state-centric understanding of legal sovereignty. For a jurist such as Ibn ‘Abidin, the world was made by God in his justice – His Word in revelation being transcendent – but the jurists’ own judgements and the body of norms were changing and possibly fallible human acts. Law-making is coterminous with human history; conceptually it requires neither a founding social contract from a state of nature nor the threat of return to foundational violence. Thus the notion of custom/practice can embrace both the customs of people/s and the custom of government, each productive of norms to be judged within an Islamic juridical textual tradition.

In conclusion let me close with a few words on recent readings on Ibn ‘Abidin’s two epistles, of which only that by Norman Calder has been discussed. Calder explicates the ‘Uqud stressing the fidelity of Ibn ‘Abidin to the Hanafi tradition, passing over with little comment his excursus on ‘urf. Calder’s reading differs in important ways from those of Haim Gerber and Wael Hallaq. In an essay cautioning against forgetting Ibn ‘Abidin’s engagement with Khalidiya Sufism, Itzchak Weismann placed their arguments within the context of responses designed to ‘dislodge the once-prevalent paradigm according to which, after its formative period, Islamic law became increasingly rigid, to be resuscitated by the impact of the modern West.’ This framework leads Weismann to a charitable account of their arguments concerning what Gerber interpreted as the ‘secularization of the law’ through the potential of ‘urf for ‘a revolutionary development, since it is legally valid material not drawn from revelation’. Weismann summarized their arguments as below:

As the centrepiece of his innovative activity they identified the principle of custom (‘urf), along with the supporting devices of necessity (darura) and the deterioration of time (fasad al-zaman). Wael Hallaq...argues...that Ibn ‘Abidin succeeded in elevating custom to the status of a legal source, capable of overriding the effects of other sources, not excluding much of the Qur’an and the Sunna. Thereby, he in effect sacrificed the entire structure of law and legal methodology, despite his expressed loyalty to the accepted hierarchy of his school, and paved the way to modern legal reform. In a slightly earlier study which took a broader look at law as a cultural product, Haim Gerber calls Ibn ‘Abidin’s treatment of ‘urf ‘the practical secularization of Islamic law’. According to Gerber, the great jurist departed in an unprecedented manner from the most fundamental postulate of the law, namely its attribution to revelation. Ibn ‘Abidin openly claimed that the founders of the legal schools (madhahib) established many of their rulings on personal opinion according to the customs of their time, and that therefore, with the change of circumstances, these rulings may also be changed.

While Weismann is disturbed by the general failure of these writers to mention that along with his scholarly occupation Ibn ‘Abidin had been a no less ardent Sufi, he nevertheless integrates that into what he terms Ibn ‘Abidin’s ‘overall programme of reform’.

The ‘telos of the Tanzimat’ whereby Wael Hallaq casts Ibn ‘Abidin as offering ‘a program of legal reform in the Ottoman Empire’, becomes truly problematical when combined with a vision wherein the historicity of later Hanafi fiqh becomes an issue of ‘secularization’, that is to say when fiqh is interpreted within the frame of a (Durkheimian) dichotomy between sacred and secular. That Ibn ‘Abidin takes forward debates within the juridical tradition of his day should not invite us to follow Hallaq who sees there a rupture with ‘the divine decree as construed and constructed in the school’s doctrine’ engendered by an alleged ‘split loyalty’ between that doctrine and ‘the humanistic considerations of the law’. That Ibn ‘Abidin condemns certain practices (and condones others) does not mean we need to cast him as a ‘reformer’ within the telos of
the Tanzimat. The Majalla opens with a list of ninety-nine qawa'id (maxims). But no one suggests that the many jurists from the 16th century onwards who wrote commentaries structured about some of these maxims were thereby engaged in a process of reform the telos of which was to replace the millennial corpus of mutun and shuruh by a code with numbered clauses, or to restructure legal education so as to render both mutun and shuruh otiose. It is in fact Ibn ‘Abidin’s greatness that he does combine explicitly the vast textual tradition (including Qur’an and hadith) with a clear recognition of historical change and a deeply ethical understanding of the jurist’s task. This is due in no mean measure to his retaining ultimate juridical sovereignty in the tradition of fiqh and not in the state. The resulting tripartite understanding of legitimate normativity (the doctrinal tradition, popular practice, and state regulation) allows degrees of freedom within the Islamic tradition to resist dominant modern understandings of law wherein the ultimate power and source of law is seen to lie outside society, be they European, from Carl Schmitt to Hans Kelsen and Giorgio Agamben, or Islamic (in the concept of al-hakimiyyah li-llah), from Sayyid Qutb to Abu al-A’la Maududi and Ayatollah Khomeini. It is precisely the non-fusion of the Divine with the Law/State that renders Ibn ‘Abidin’s essays of enduring interest.

NOTES

2. This is his great commentary or Hashiya (completed by his son ‘Ala’ al-Din after his death) entitled Radd al-muhtar on al-Haskafi’s (mufti of Damascus d. 1678) al-Durr al-mukhtar on the work Tanwir al-absar wa-jami’ al-bihar of al-Timurtashi (d. 1596–97).
5. Even the degree to which Ibn ‘Abidin in Damascus could be assimilated to the position of ‘ulama’ in the capital Istanbul during this period needs not to be taken for granted. On the latter, see Avigdor Levy, (1971). ‘The Ottoman ulema and the military reforms of Sultan Mahmud II’, in Gabriel Baer (ed.) Special issue on The ‘Ulama’ in Modern History: Studies in memory of Professor Uriel Heyd, Asian and African Studies 7, pp. 12-39.
8. I have followed Calder’s translation but retained the term shar’ rather than Calder’s ‘Law’: ‘Custom has much authority in Law and so a rule may well be based on it’, ‘The ‘Uqud’, p. 323.
13. Al-'Uqud, p. 44.
15. Ibid, p. 331.
17. Al-'Uqud, p. 45.
18. Ibid, p. 47.
22. Ibid, p. 118.
24. Ibid, p. 115, see also p. 131.
26. Compare f.n. 42 below.
27. Ibid, p. 130.
28. Ibid. p. 131.
29. Hallaq translates al-nas by society, something of a neologism. It is with Fadlallah that we find al-mujtama'. Ibn 'Abidin's nas is better translated as 'people'.
34. The former is presumably Abdullah Efendi Yenişehirli (d. 1156AH/1744CE) who wrote an important fatwa collection; the latter is Muhammad Hibatu'llah al-Taji al-Ba’li (d. 1224AH/1809-10) author of a commentary al-Tahqiq al-bahir sharh al-ashbah wa-l-naza'ir.


39. I do not mean to imply that such a fusion of traditions was found only in Damascus, the relations between Kurdish and Syrian Arab scholars being evident from the Ayyubid period onwards. For a sense of the complexity and depth of scholarly networks see the unparalleled work of Louis Pouzet, (1991). Damsas au VIIe/XIIIe siècle: Vie et structures religieuses d’une métropole islamique, Beirut, Dar el-Machreq. It should be noted that Shaykh Khalid was himself a native Kurdish speaker, came to fame in the Naqshabandi order in Delhi, and built in Damascus his tariqa organisation before that was curtailed by his early death.


42. This has been published as Muhammad Muti’ al-Hafiz (ed.), (1986). Nuzhat al-nawazir ‘ala ‘l-’Ashbah wa-’l-naza’ir, Damascus, Dar al-Fikr.


45. The term more common in Maliki texts, ‘amal, clearly suggests to our ears ‘practice’.


52. Hallaq, ‘A prelude to Ottoman reform’.

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