Chapter 1: The discursive origins of the fiqh in light of the mounting fiction of the madhhab
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“The ‘ālim cannot teach [the common people] what to do [and what they ought to know from the shari’a] because he has no control over them. And even if they become aware [of the ‘ālim’s knowledge], they would still practice what they got accustomed to do best and what they have learned from generation to generation” (Ibn ‘Ābidin, Rasā‘īl, 2:138).

“Under certain conditions a “legal order” can remain unchanged while economic relations are undergoing a radical transformation” (Max Weber, Economy and Society, 1:333-4).

Beginnings

1 “The beginning of every science is difficult,” complained Karl Marx in the celebrated preface to the first edition of Kapital, thus warning his reader beforehand on what to expect, especially as far as the “beginning” of “political economy” is concerned. Beginnings tend to be forgotten in the modern age, in particular that contemporary education, whether in the arts or sciences, finds that the construction of a general discourse on the foundations of a science or art is a costly matter—and even costlier to transmit to students and scholars—and will never receive the endorsement it badly needs from the scientific community. Artistic and scientific communities of the modern age are constructed around invisible consensual discursive practices (or “grammars”), which are seldom questioned by the practitioners themselves, let alone by historians looking for an external point of reference for their narratives. But if the “beginning” (or foundations, or “Grund, ground” in Martin Heidegger’s terminology) of a science, artistic field or professional activity eludes practitioners and enthusiasts alike, it is because such intellectual exercises, common in both medieval Islamdom and Christendom, and later in the formative period of modern Europe, are contemptuously looked upon as reminiscent of obsolete cultures whose foundations for knowledge are locked within the group that reproduced the canon. The modern age, being characterized by a (scientifically) competitive and open approach to knowledge, accepts at face value the Enlightenment
epistemology of a knowing subject phenomenologically approaching its object through the lenses of the arts and sciences. Karl Marx must have been one of the latest in the grand tradition of western intellectuals to have questioned such foundations.

2 For an ‘īlm (“knowledge”) like the fiqh, which is “knowledge” par excellence, its foundations are usually associated with the notion of ʿuṣūl al-fiqh, which in turn is the (mostly written) work of the founders of each school (madhhab). But by the time the Ottomans had conquered Greater Syria and Egypt in 1516-17, the heritage of the fiqh was bulky enough to have discouraged even the brightest minds when it came to working from its ʿuṣūl. For one thing, even though the kutub al-ʿuṣūl have been well delimited and extensively interpreted among Ḥanafīs, time poses a challenging problem as it questions the ʿuṣūl from a perspective of change. Moreover, since layers of ʿuṣūl have been added to the original ones, it was up to the leading faqāhī (jurists) to bring a new order into the picture. And so they did—with a vengeance. In effect, an organization of the foundations has to proceed not only through the original ʿuṣūl and their various layers, but also through a score of compiled fatwā manuals, shariʿa court records, sultanic legislation, and other parallel judicial instances such as the regional councils, not to mention all the literature produced by Ottoman officials, whether religious or secular. Considering the large number of textual sources, it is not to be expected therefore that one more reinterpretation of the ʿuṣūl will give much of a guideline: the organization and interpretation in question will have to go through a much larger number of canonical texts than presumably assumed. Moreover, the canon had to be redefined so as to encompass texts whose circulation (tawātur) among the learned had left an impact.

3 The first unorthodox challenge was to come from an early Ottoman legal scholar (faqīh), Ibn Nujaym (d. 970/1562), who in his al-Ashbāḥ wa-l-naẓāʾir (“Similarities and theories”) had constructed ground-breaking general rules for the Ḥanafī fiqh.² Those general rules, known as the qawāʿid kulliya, are abstract enough as to cross the boundaries between the ʿibādat (religious rituals) and the muʿāmalāt (pecuniary transactions). But their impact, despite all the praise that Ibn Nujaym eventually received from his peers, would have to wait for the Ottoman Majalla (1877), which was looked upon as the new civil code of the second Tanẓīmāt (even though the Majalla provided more of a refurbished law of contracts than a civil law per se). The committee behind the Majalla thought so highly of Ibn Nujaym’s rules that it decided to include them all, add more rules, order and number them, and place them right at the beginning, in the first introductory chapter. Since the significance of those general rules will be expounded upon throughout this study, I am more interested to note for now that those rules were kept throughout the Ottoman period; scholars neither challenged their general character, their logic, nor their order. Needless to say, no new rules were created prior to the enterprise of the Majalla. The radical nature of Ibn Nujaym’s enterprise might be partly to blame, as Ibn ‘Ābidīn cautiously noted, that in spite of his predecessor’s wide knowledge, it became unclear to later generations of scholars how those rules were linked to the ʿuṣūl, and the later scholar was even suspicious about whether or not Ibn Nujaym had attempted to override aspects of the ʿuṣūl (more on this later).

4 Compared to his predecessor, Ibn ‘Ābidīn’s enterprise in the “foundational” domain—which looks in hindsight modest and traditional, yet, coming as it does from the last major Ḥanafī faqīh and immediately before major legal upheavals—is definitely worth looking at. Ibn ‘Ābidīn (1198/1783-1252/1836), who originally belonged to the Shāfiʿī school and only converted to Ḥanafism much later, is acknowledged to be the last major
figure among the Ḥanafīs, and, as a result, his major work, the \( \text{Ḥāshiyat radd al-muhtār} \), remains to date the main reference in Sunnī courts (which now handle mostly personal status matters) in Greater Syria. Ibn 'Ābidīn's musings on where to begin and how to create an order in the long established Ḥanafī tradition come through on at least two occasions. The first is the “Muqaddima” to the \( \text{Radd} \), which extensively demonstrates that the traditional hierarchies of scholars and their works (in addition to a few rasā'il, probably of a more systematic nature in that the main elements of \( \text{īlm al-fiqh} \) are concisely stated), its orders and sub-orders, discursive practices, and ties to language and custom come more nicely tied together, thus giving the impression that those parts were probably drafted later than the Muqaddima. The Muqaddima, being a general introduction to a much larger work, is less structured, and addresses the crucial issue of organizing a material that vast and diffuse, and nested within layers upon layers of mussy interpretations, into something whose cogency is visible enough to both scholar and layman. But which parts were drafted first is only a matter of pure speculation since Ibn 'Ābidīn kept his three major works, the \( \text{Rasā'il, Tanqīḍ,} \) and the \( \text{Radd} \), as a research-in-progress all his life, and since they were for the most part posthumously published, kept an open organization that continuously integrated all the various \( \text{maṭlābs} \) (“requests”), cross-referencing them among one another and with the fatāwān the \( \text{Tanqīḍ}. \) The “requests” could be looked upon as case-law inquiries in a question-and-answer form, which may have been either based on real court cases, or else triggered by inquiries from scholars, muftīs, and judges, if not by Ibn 'Ābidīn himself for the self-inflicted pleasure of solving difficult problems. In effect, the style between the “requests” and fatwās is suspiciously similar, in that both pose a problem, or at least come in the form of an urgent or not-so-urgent inquiry. But while fatwās are typically limited to such inquiries, whether real or fictitious, the “requests” were also generated by the large Ḥanafī literature, so that Ibn 'Ābidīn would occasionally feel the urge to reply to a long-standing issue in the \( \text{madhhab} \), one that would necessitate a digression due probably to a link to his own times. Obviously, the real danger is one of total fragmentation, in particular that Ibn 'Ābidīn’s approach lacks the daringly abstract rule-oriented approach of his predecessor Ibn Nujaym, and for this reason alone the Muqaddima ought to be looked upon with care, at least before one ventures into the eight-volume and 5,000-plus pages of densely packed text.

One of the last Damascene biographers of the Ottoman period, Muḥammad Jamīl al-Shaṭṭī, muses about Ibn 'Ābidīn’s reading of the \( \text{Durr al-mukhtar} \) by Ḥaṣkafī (d. 1088/1677), which in turn was a commentary on the \( \text{Tanwīr al-ābṣār} \) by Timurtashti (d. 1004/1595), with a group of ‘ulama’, of which the most prominent was Shaykh Sa‘īd al-Ḥalabī. Prior to that Ibn ‘Abbūdīn had studied with Shaykh Shākir al-'Aqqād who had converted him to Ḥanafism, and with whom he went on to learn the basics. The point of honor in his distinguished career was definitely the dozen or so \( \text{jāzās} \) (pl. \( \text{jāzāt} \), which were short memoranda that one would receive from a master on a particular topic, and which were an equivalent to modern college degrees. When Shaykh Ḥalabī died, Ibn ‘Abbūdīn had to complete the reading of Ḥaṣkafī’s \( \text{Durr} \) on his own, an effort that led to his own voluminous and unfinished commentary. The point of this short biographical notice (and biographies of the ‘ulama’ tend to be tediously short, secretive, and monotonously polite), was the juristic typology of the \( \text{madhhab} \), which provided the faqīh with an order of things, and specifically, an order for the discursive layers within the school. The same order applied to muftīs and judges as well, which having been recruited for the most part within the same milieu, shared similar values. But even though all those functions did
overlap—at least marginally in the trajectory of a minority of ālims (mostly in the venerable positions of judge, deputy-judge, and scribe)—there was nevertheless a deep perception that the scholar faqīh was the most authoritative source of all, followed by the muftī, and then the judge. The reason is simple enough: *ijtihād* is the ability to exercise one’s independent reasoning either on difficult matters, or on issues for which no clear opinion exists. It doesn’t make sense, noted Ibn ʿĀbidīn in his introduction to the *Radd*, to appoint a muftī who proves unable to exercise *ijtihād* on his own, while a judge could rely either on a scholar’s or muftī’s reasoning.

Obviously, Ibn ʿĀbidīn was one of the latest Ḥanafī mujtahids, if not the most influential of the last two centuries. Apparently, drafting his own *Muqaddima* was no easy matter. I emphasize own as the style tends to get more personal with the *Muqaddima* and even more so with the *Rasī̇l*, which represent the quintessential exercises in *ijtihād*. In between his *Muqaddima* and the *Rasī̇l*, Ibn ʿĀbidīn was attempting nothing more than to plea for what Max Weber would have called a “legal order.” The purpose was therefore to discover such an “order” and the grounds of “legal domination.” In the context of Ḥanafī practice, the discovery of a “legal order” implies sorting out the discursive juristic typology within the vast fiqh literature. Such a structuring of discourse, however, is no easy matter as the legal practice cannot be limited to scholarly texts only. One needs to include, for example, the practice of muftīs, some of whom had their work compiled by disciples, or the judicial decision-making processes of the courts, whose “cases” were normally not the subject of compilation and scrutiny, not to mention the impact that customary practices had on canon law. Moreover, since Ḥanafīsm had become, since the military absolutism of the Mongols, a quasi-private law with little or no interference from the state, but which received the latter’s formal approval, the whole issue of the relationship between the fiqh and state law was expected to be preponderant, for example, in the role of sultanic legislation, or in the specific functions of judicial instances such as the regional councils. As will be argued later, however, all such judicial or quasi-judicial institutions did not necessarily act in accordance with one another’s jurisdictions, and, while not being antagonistic to one another, they nevertheless acted autonomously so that no higher centralizing judicial authority ever existed. That is why it is so difficult to discuss the Ottoman judiciary in terms of an apparatus of justice as such, since a “case” would have to find its way through one of the many judicial authorities pending on one’s own strategies. Thus, for example, a Maronite confronted with a land-title dispute in Mount Lebanon would have been presented with a multiplicity of options ranging from the arbitration of the Maronite church itself, which had its own line of judges applying a combination of canon law and customary practice, not to mention their knowledge in the Ḥanafī fiqh; or the arbitration of the Ḥanafī courts of the neighboring cities such as Beirut or Damascus; or that of one of the notables, the mashāyikh, which as an alternative would have represented a shorter and more direct route, but whose costs might have been exorbitant. In short, when that many choices were presented, and when various judicial authorities were entrusted with different functions so that the in-between hierarchies remained formal, several discourses competed with one another rather than forming a coherent whole.

In fact, the issue at stake here, which the micro approach adopted in this study tackles through a juxtaposition of texts produced through different jurisdictions, is whether the fragmentation of the “legal order” would also imply a fragmented social order, or one whose rationality cannot achieve a higher level of coherence (in which the state
institutions would have occupied a major role). In effect, since a legal order assumes a domination of some kind, that domination is established through the production of discursive practices that empower the jurisdiction in question and gives it the legitimacy it needs. Thus, the legal discourse found itself in competition with other discursive worlds such as the political, religious, and that of the Sūfī orders, to name only the most preponderant, but none of which, however, assumed a leading societal role. In such a context, it was probably difficult for any discourse to assume a “public” role that gave the juridical discourse of the fuqahāʾ a “communal” role, one that protected the values of those urban communities in terms of their customs, religious values, and status-oriented contractual settlements and property rights, while avoiding larger public issues such as the role of the state, its bureaucracy, and the taxation system it imposed. Such juridical discourse established therefore what could be described, following Max Weber, a “modality of rule,” a context of action that promoted particular discursive practices through a number of institutions mostly centered around the shariʿa courts, though by no means limited to the latter. I would like to argue that a notion of social authority as a modality of rule is precisely what stands behind Ibn ʿĀbidin’s own discourse, which is particularly visible in his “introductory” statements, such as the Muqaddima and some of the rasāʾil, but by no means limited to them. In fact, the social authority of an ʿālim was a direct outcome of that same ʿulamāʾ milieu that provided him with the education and skills he badly needed. But that authority, however, would have been in limbo were it not for the discursive activities that the ʿālim found himself into and which he probably contributed in producing. Justice and morality notwithstanding, the juridical discourse aimed for consistency, which means that it had both to pursue consistency and achieve it. To be sure, what characterizes a legal discourse over the political and economic is such an ethos of consistency, which, in the case of shariʿa law meant harboring for a long time the ʿibādat with the muʿāmalāt.

The social authority of an ʿālim, besides providing him with a specific role, was what gave meaning to the discourse in which he had to situate himself and contributed to its ordering and production. Empowered by an authority from his own ʿulamāʾ group, that same group from which a number of scholars licensed him through the ijtihād system, Ibn ʿAbidin had to rethink the modality of rule for Ḥanafī practice, which implied the following: (1) determining all the texts that could have the status of the original ʿuṣūl manuals (such as Shaybānī’s six canonical treatises), as well as ones that could claim a similar status; (2) rethinking ijtihād in terms of the needs of one’s own time, which implied a de facto look at custom; (3) reevaluating the muftī’s function in terms of the ijtihād it required, and without which the ʾiftāʾ would stand as meaningless; (4) reevaluating the traditional hierarchy of scholar, muftī, and judge, and precisely in that order, one that framed the madhhah in terms of the ijtihād that would bring all issues to bear on the contemporary needs of one’s society; and, finally, (5) generally perceiving the madhhah as a discursive activity, one whose discourse had to be crafted in accordance with the authorities of the past and the interpretation of their works, in particular all those who had achieved that dubious status of ʿuṣūl. Needless to say, such topoi were not peculiar to Ibn ʿAbidin, and if one were to historically assess his opus, the likelihood is that a radical approach of any kind could not have possibly materialized in such a milieu. His originality should therefore be looked upon in terms of the last summa to ever come from Ḥanafism.
The authority that the ‘ālim inherits from his social status thus perseveres through the production of discourse within a modality of rule. It is the consistency that the legal discourse seeks that grants it a status in society that neither the political nor the economic can hope for. It was therefore the legal order, not the “market,” that provided society with a constitutive order, and it was precisely the roots of the hermeneutics of Ḥanafī practice that Ibn ʿAbidīn was attempting to reconstruct in his Muqaddima and rasā'il. Thus, a contractual settlement, for example, fits within a particular discourse produced by a legal order and through which it finds its meaning. There is, therefore, no “theoretical” versus a “practical” level as far as legal practice is concerned since all the spheres, such as property, contract, tort, and crime, which are normally considered as “the practice of the law” are themselves an integral part of the legal order, and which they contribute in shaping. Thus, as far as Ḥanafī practice is concerned, its discourse was the creation of the labor of scholars, muftīs, and judges alike, not to mention the practice of the courts, whose modalities would have been inconceivable without the broader domination of the apparatus of justice and its discursive strategies.

Social authority as a modality of rule would be inconceivable without a sense of juristic typology through which an ʿālim would find his place in society and his own madhhab, and Ibn ʿAbidīn had to work out his genealogical affiliations in the “preface” to the Radd, situating it right before the venerable Muqaddima. At one level, the “preface” looks like a well-documented bibliographic essay, one that includes a pell-mell combination of authors, texts, and influential scholars, some of whom the author had the benefit of a close relation, such as the Shaykh ʿSaʿīd and Ibrāhīm al-Ḥalabi, by whom he was initiated into the reading and commenting upon the original Radd al-muḥtar, and it was based upon those exercises of interpretation that his Ḥāshiyat grew as an independent work of ijtihād which gave Ibn ʿAbidīn his long-standing fame and authority. There is no need at this stage to go through into all the names and authorities listed in the “preface,” as we will come across some of their works as we find our way through the Radd, the fatwās, and the court cases. Moreover, the next section of this chapter, based on a reading of a couple of the Rasā'il, will look at the construction of authorial scholarship of some of the most influential Ḥanafī scholars through the lens of Ibn ʿAbidīn’s peculiar order, which grosso modo was that of the late Ḥanafīs.

This genealogical prolegomenon, which self-situated the author in his own madhhab, serve as a preamble to the Muqaddima, so that once the reader reaches the introduction, the text is already situated within and acts as a source of legitimation for the Ḥanafī madhhab. In other words, the author creates a text through which he situates himself within his madhhab, and now that his authority has been self-proclaimed, he then proceeds with his introductory statements. The Muqaddima, argues our author, has to be looked upon both as an introduction to our knowledge of the fiqh (muqaddimat al-ʿilm), on the one hand, and as introductory digressions to the project of the book (kitāb) as a whole, on the other. How can one then reconcile the ʿilm with the kitāb, and what kind of conceptual unit do they form together? Ibn ʿAbidīn played on the change of meaning that the same word can acquire once the vocalization on one of its letters is modified, so that muqaddima would become maqaddama. But the two words are indeed related, at least from his perspective, so that the Muqaddima (“introduction”) is muqaddama, meaning it is something that “comes ahead” before anything else, and is not limited to texts. It thus used to be that the faction (ṭāʾīfah) ahead of all others in the army was described as muqaddama, prior to identifying that adjective with all things “that come first.” But the
turning point was probably when muqaddima began to be associated with general terms that point to a “global concept (maḥāmī kullī)” which might have been abstracted from “specific statements tied to a customary truth (al-alfāẓ al-makhṣūṣa ḥaqiqā ʿurfiyya).” As we shall see later in this chapter, the fiqh stumbled upon the division between a “local custom (ʿurf khāṣṣ)” and a “general (universal) custom (ʿurf ʿāmm),” which only a linguistic generalization could solve: How is it possible for a particular local custom to act as a source of law acknowledged as such by the fiqh? But if customary practices are reduced to their linguistic components—which is possible only if we assume that all legally valid customs must be in the form of utterances (rather than, say, an association of body gestures only)—the next step would be to work out more abstract and general sets from those local components. This is precisely Ibn ʿĀbidīn’s notion of what a book’s Muqaddima ought to be all about, namely a combination of statements of a general nature whose purpose is “to be ahead” of what the book as a whole contains, and for which it serves as a general supportive framework. Beyond that, however, it remains unclear how one goes from the “specific”—which is always associated in the fiqh with a “customary truth (ḥaqiqā ʿurfiyya)”—to the more “general” and universal. We come here to the heart of the fiqh’s problematic, the way concepts are linked together. First, the immediate reality of things, or their sensual perception, is given to us through custom. Such perceptive realities constitute “specifics (khuṣūṣīyyāt),” all of which are “true” because administered by custom. In short, any customary practice has to be accepted as such for its own sake, and it makes no sense to reject it: a custom only degrades and is forgotten through non-use.

Second, in order to proceed from the directly sensuous and the customary—or what is given to us in its immediacy—to the more abstract and general, a method of some kind needs to be created. That is a question that every philosophical system has to confront, and for which various systematic constructions have been elaborated for various cultural systems. It is well known that in the fiqh of the classical period, that of the founders, a methodology came into being in the form of the four rules of the Qurʾān, the sunna, analogy, and consensus. But even before the Ottomans’ adoption of the Ḥanafī fiqh as their official law, the four rules were only formally stated as there was little that could still be retrieved from the combination of Qurʾān and sunna. On the other hand, the uṣūl of each madhhab were given priority, and it was a combination of inductive and deductive rules which enabled practitioners within the framework of a school to build a method of reasoning based on the uṣūl. Finally, the truth of the matter is that when it came to describing those methodological rules that enabled a particular school to persevere for centuries, the scholars were at best elusive, always hiding behind their statutory hierarchies. That is probably one of the major differences between a traditional mode of reasoning and one that is modern, namely that the latter cannot possibly rely on totemic figures of the past, such as the founders of a madhhab. To be sure, we’ll have more to say on the modus operandi of the apparatus of justice in its totality, and on the modus vivendi of its coexisting (or conflicting) parts, but suffice to say, for the sake of this Muqaddima, that Ibn ʿĀbidīn will look much more conventional in his approach than someone like Ibn Nujaym who, a couple of centuries earlier, had aggressively sought abstract rules from his own erudition.

Ibn ʿĀbidīn’s method was more organizational in nature than a rationalized abstractionism that would seek to generalize in order to create rules. It situated first the fiqh vis-à-vis the other sciences, then attempted to explain why the fiqh should be given...
priority. Once such a privilege was granted, then the functions, divisions, and hierarchies of the fiqh would all be clearly stated and elaborated. Even though the fiqh would find itself in competition with the other non-sharʿī sciences such as politics, philosophy, linguistics, history, Śūfism, and algebra, it could not be placed in tandem with them. For one thing, the fiqh was considered the knowledge (or the science) of the aḥkām, which is the plural for ḥukm, considered as “God’s discourse [khiṭāb] which addresses the actions [afāl] of His believers.” Those divine regulations were in turn based on “indications (dalāʾil, s. dalāl)” which served as “evidence” for the faqīh on how to proceed and construct more rules based on such adilla. The faqīh should therefore learn the “path towards evidence (ṭarīq al-istidlāl)” with the aim of constructing a fiqh that would act as “the knowledge of rules based on evidence (ʾilm al-aḥkām min dalāʿil-ḥā).” The faqīh was therefore an interpreter of divine evidence, and through interpretation he would be able to create even more rules as a mujtahid. That is why the knowledge accorded by the prophet in his sunna was not part of the fiqh as such, because the prophetic tradition stands as “sharʿī evidence for normative rules (dalil sharʿī li-li-ḥukm),” while the fiqh was based on that kind of evidence out of which more norms will be created.

But then not everything could be based on that kind of divine evidence, hence the decisive role of custom. Each customary practice was itself a datum whose role as evidence pointed to a certain truth (al-ḥaqīqa tutrak bi-dalālat al-ʿāda). In other words, a custom, in a way similar to a divine norm, was a dalīl (or dalāla) that would serve as “evidence” towards the reconstruction of a certain problematic of truth. Thus, every custom-as-datum could be used as the basis of prime inference out of which a ruling could be construed. For example, the utterances of a benefactor, either in a donation, a will, or a waqf, ought to be contextualized in relation to the linguistic norms of the community from which they have emanated, and without which they might become confusing, if not incomprehensible. Such a custom acted therefore as evidence of a primary truth (ḥaqīqa aṣliyya), or a self-evident truth which in its essence (aṣl) was simply given as a datum, and for which the divine norms, out of which the fiqh enterprise found its logic, did not serve as supportive evidence. In short, the enterprise of the fiqh was based on two sources of knowledge, one that is based on revelation and the interpretation of divine normative rules, while the other is encapsulated in (linguistic) custom and the self-evident truths that they generated.

It is the concomitant use of those two lines of normative rules, one divine and the other customary, which generates the discipline of the fiqh, a knowledge that aims at interpreting all kinds of normative indications (adilla) and creates an order by sorting them out and organizing them. The texts generated in such an enterprise are thus purely interpretive in their nature in that they all propose a possible line of interpretation—one among several other possibilities—hence the great diversity of the legal schools, and the even greater multiplicities of interpretations created within each school on its own. But in such a large hermeneutical enterprise, one that spans over a dozen centuries for each one of the schools, not all texts are obviously of the same caliber, and an ordering becomes more than beneficial. (1) First comes the ʿuṣūl manuals, all of which based on the drafted opinions of the three Ḥanafi founders, and particularly on the six Shaybānī manuals collectively known as Zāhir al-riwāya (“the manifest in the narration,” or the authoritative doctrines). These texts are consensually agreed upon as being among the most reliable (“reliability” is always associated with the transmission of the texts, or the dubious process of isnād). (2) Next, the nawādir (“rarities,” or the less authoritative
doctrines), which though in principle are based on the uṣūl in (1), are nevertheless less reliable simply because the chains of their isnād make less sense, and because many are simply “attributed” to the founders without credible evidence. Some of these have been allegedly “dictated” by the founders to their students and disciples, and are hence also known as the amāli (s. ʿimlāʾ, dictation). In short, they can still be referred to but are nevertheless less authoritative. Finally, (3) the texts known as the wāqiʿāt (“happenings”) contain issues deduced through the process of istinbāṭ (a form of analogical reasoning through deduction) by late scholars, but for which, however, there is no equivalent original narration in (1). Not only the bulk of the fatāwā would easily fit under that category, but, since customary practices are not rooted in the uṣūl, the process of “accommodating” them within the fiqh would also be assimilated within the wāqiʿāt literature. That category of texts is definitely the broadest, and, being mostly based on the labor of independent mujtahids, is what updates the older texts to their contemporary connotations. That is definitely the case of the fatāwā, whether those that were inserted in the sharīʿa records (see Chapter 7 infra) or those compiled by disciples and scholars who think highly of them. But even shurūfi manuals like the Radd would also have that status.

The coherence of speech and the fiction of an unfolding madhhab

16 Ibn ʿAbidin’s second risāla comes as a surprise: “ʿUqūd rasm al-muftī [“Chaplets on the muftī’s task”],”14 since the title is much narrower than its content.15 In fact, the declared purpose of the epistle is to help all those involved in ʿiftāʾ (described as muftīs and ʿāmilīs, those in legal practice) in deciding between various opinions: how to sort them out, know the strong from the weak, and the reliable from the unreliable—in short, what could be described as rasm al-muftī, or all the signs and indications (ʿalāma, pl. ʿalāmāt) that point to the muftī his way for a just opinion.16 The process of sorting out opinions and giving preferential treatment to one over the other is known as tarjīḥ (from the verb ṭajjaḥa, to surpass or give preference) and is common to all madhāhib; each legal school, however, fosters different tarjīḥ rules, which may vary from one period to another. The epistle therefore begins with the most commonly accepted Ḥanāfi tarjīḥ rules, prior to reiterating the well known divisions between muqallids and mujtahids, then goes through all their sub-divisions, and digresses into the nature of custom and language and their interconnection (a necessary step since all opinions are based on prior knowledge of custom),17 before concluding on what constitutes a genuine opinion. Thus, even though the second epistle does not add much to the notions of ʿurf, ʿāda, and language (see the following section below), it is indeed the place to start, considering all the elements it brings together regarding speech and its place within the unfolding rules of the madhhab.

17 The first rule is obvious: practitioners of the fiqh should follow opinions approved by consensus and favored by their madhhab; when no consensus is available, adjudication based on a favored opinion (al-ʾiftāʾ bi-l-marjāḥ) has its own rules, which muftīs and others should follow, except under special circumstances (a muftī informs about an adjudication while a judge is bound—obligated—by it). Muftīs cannot then adjudicate between two conflicting opinions without prior meditation (naẓar), and, following Qarāfī,18 it is illegal to adjudicate without fully reflecting upon a prevalent opinion. Thus, three types of
When sorting out conflicting opinions, knowledge of the “status”-as-class (ṭabaqa, pl. ʿabaqāt, or the bio-biographical literature) for mujtahids is essential. There are seven classes of fuqahāʾ: (1) the four founders of the four legal schools are at the top of the hierarchy since they established all the basic ʿuṣūl rules; (2) they are followed by the founders of each school individually, such as Abū Yūṣuf and Shaybānī for the Ḥanafīs, who work by deduction and analogy from the set of established rules by the one and only founder, and thus act as muqallids in the ʿuṣūl and mujtahids in the furūʿ (meaning they can disagree with the founder in this area alone); (3) they are followed in turn by a class of mujtahids, such as Khaṣṣāf, Sarakhsi, and Qāḍīkhān, who exercised their independent reasoning on issues avoided by the school’s founder or his disciples, even though such jurists enjoyed no right in opposing the master in both furūʿ and ʿuṣūl; (4) muqallids such as Abū Bakr al-Rāzī (better known as Jaṣṣāṣ) who, even though weak in ijtihād, possessed wide enough knowledge in both ʿuṣūl and furūʿ so as to have felt confident to state the two sides of an opinion that was either delivered by the founder or one of the disciples (an opinion is two sided if it considers both sides of a conflict, while a ruling deals with the possibility of two issues); (5) muqallids, among them Abū al-Ḥasan al-Qaddūrī, known as ʿṣḥāb al-takhrīj, who derive the consequences and the facts of a case, then deduce from the source, and point to others what should be followed and what ought to be avoided, and what leads to consensus; (6) muqallids who can distinguish between the weak and strong, reliable and unreliable, who are able to discern mutāfīn from shurūṭ, and whose contribution consists mainly in avoiding references in their manuals to weak and clumsy opinions; and (7) the last category of muqallids is also the worst: those who are unable to discern right from wrong and who should be avoided at all cost.

According to Hallaq, it was the Ottoman Shaykh al-Īslām Aḥmad Ibn Kamāl Pāshāzādeh (d. 940/1533) who apparently articulated the first Ḥanafī typology of jurists in which seven ranks (ṭabaqaūt) are recognized, and to which that of Ibn ʿAbidin was only a late (and probably the last) variant.
Such a juristic typology should be placed in conjunction with the enterprise of tarjīḥ: the higher we are in the hierarchy—the top three classes—the safer we are. Mujtahids are safer by definition; they also represent a much older generation than muqallids: those of the third category, who constitute the essence of Ḥanafi ījīḥād, died between 261/875 (Khaṣṣāf) and 592/1196 (Qāḍīkhān), and the title of mujtahid does not even seem to apply to new contenders. It then becomes a matter of degree between the four remaining categories of muqallids, the fourth being the most reliable. But even a well thought out hierarchy cannot adequately solve the pressing issue of which manuals a muftī or judge should use when adjudicating. Moreover, assuming that most practitioners in the legal field tend to use the more updated works of later jurists, the place of the latter within all seven categories is uncertain: prominent Mamlūk and Ottoman jurists such as Ibn al-Humām, Ibn Nujaym, and Ramlī are not associated with any category, thus the assessment of their work is itself a matter of ījīḥād. Some of their works, such as Ḥaṣfakī’s Durr al-mukhtār and Ibn Nujaym’s Ashbāḥ, are even looked upon with great caution: “they are so concise and condensed that many of their statements are purely enigmatic; add to this that several statements and passages have been dropped in the act of copying [between manuscripts], thus encouraging preferences against [legally accepted] tarjīḥ, and even encouraging preferences predominant in other schools” (1:13). False statements, opinions, and preferences were copied irresponsibly from one manual to another, thus prompting jurists into a delicate enterprise while sorting out confusing or false opinions. A case in point is the issue of fee payment for the recitation of the Qur’ān (al-isti‘jār ‘ala talāwāt al-Qur’ān) which received a number of conflicting opinions. Some declared the īstījār as legal, while others limited it to teaching the Qur’ān only, and others on pious deeds (al-isti‘jār ‘ala al-tā‘āt)—all such opinions Ibn ‘Abidīn considered false. He in fact notes that the tā‘āt opinion originated with the three founders who declared it illegal. But later generations of mujtahids reassessed the founders’ opinion by declaring teaching the Qur’ān for a fee is legally valid for its necessity only (li-l-ḥarāṣ); some teachers were rewarded by the treasury, but then this practice stopped. The point here is deciding whether or not a fee should be paid is crucial because if it becomes invalid, then “both text and religion are lost” (2:14): somehow iktīsāb in the name of religion tarnishes its image and purpose. Fee payment has even been extended by late jurists to the ādḥān and imāmā, their argument being that the three founders would have adjudicated the same way, had they lived in later periods. Thus, for generations, mutān, shurūḥ, and fatāwā were drafted on accepting making a living from reading and teaching the Qur’ān, and what made things worse was that readings of the Qur’ān were usually performed with music, dance, and body rituals in the background.

The history of the fiqh is therefore filled with such anecdotal evidence where, according to the claim of few late jurists, the opinions of the founders have been grossly distorted in favor of more “realistic” ones. Ibn ‘Abidīn would himself have adopted a more realistic tone too, which he did in the second half of his risāla when he accepted some of those illegal practices on the basis of their “customary” nature. Prior to such a decisive step, however, he attempted another classification, but this time limited to the Ḥanafi fiqh only, one which adhered to the notion of “classes” or “generations” [ṭabāqāt], and, as noted earlier, only three come to mind. (i) The uṣūl of the Ḥanafi school is commonly referred to either as Īzhīr al-riwāyah or Īzhīr al-madhhab; but even though the uṣūl is a common enterprise to the three founders, the notion of Īzhīr al-riwāyah (“the literal meaning of an opinion”) is only limited to the works of Shaybānī (six specifically);
are labeled so simply “because they were told by Muḥammad [al-Shaybānī] in such a reliable way that they were either transmitted [tawātur] by him or well associated to his name” (1:16). The association of the uṣūl with Shaybānī is obviously related to his extensive coverage of many issues, at least much more than the other two founders. (ii) Rare issues not covered in any of Shaybānī’s six manuals, but often in some of his others, do not fall within the first category: for one thing, having not emerged authoritatively from Shaybānī, they are thus less reliable; and having often originated from secondary works such as Abū Yūsuf’s Amālī, that is, a work of “dictation [ilmā]” where the master opens up to his students on a number of issues that they “copy,” then having been assembled as utterances into a book form known as amālī (pl. ilmā), but without having the work revised by their teacher, all such factors combined to make the case against the reliability of those texts. In other words, the issue raised here is one of “authorship”: who was the real “author” in this case—teacher or students?, a strange question indeed considering that even in works attributed to a single author, he would typically conceal himself in the third-person of qāla and ḥaddatha-nā. This form of writing, in combination with isnād, detaches the subject-author from the text while granting it with an aura of independence from the person who produced it. Thus, the first category of Zāhir consists of six manuals attributed to a single author, Shaybānī, but they have also been objectified because of the authoritative isnād links and tawātur that made them possible. On the other hand, texts of the second category were less authoritative because the text was produced by a multitude of persons/students while the real author allegedly dictated. Thus, such texts did have an author, but they were nevertheless unreliable because unchecked and untrustworthy opinions could have been added. (iii) The final and third category of texts did have an author, but they were nevertheles s unreliable because unchecked and untrustworthy opinions could have been added. (iii) The final and third category of texts is also the largest since it includes all issues deduced from the uṣūl works in (i), and over which they were either unclear or silent, and then collected in shūrūḥ and fatāwā manuals. The point here is that in this vast body of works, texts should be always confronted with the reliable six Zāhirs. Ibn ʿAbīdīn rejects any distinction between uṣūl and Ẓāhir al-riwāya as unnecessary: there is no need to look at any uṣūl beyond the Zāhir because the latter includes all possible uṣūl. Such a claim is defended by means of digressions regarding Shaybānī’s method of work, and the only other authoritative work that stands out in comparison to Shaybānī’s six is Sarakhsī’s Mabsūṭ.

The two hierarchical alusūq sets, however, even when looked upon in conjunction with one another, provide no more than a rough and idealized sketch for judicial decision making. Considering that differences in opinion among the three founders were common, even the Ẓāhir category, covering the uṣūl, places jurists head on with serious uncertainties. Opinions become even more uncertain when no word has been uttered by any of the founders on the related issue, and very recent ones are probably the most problematic in this respect. But, overall, what preoccupies jurists is less the silence of the law than already stated and well documented conflicting opinions emanating from prestigious sources (such as Shaybānī’s six manuals and Sarakhsī’s Mabsūṭ). Judges and muftīs can always pull out a favorable opinion from the large body of authoritative manuals, but it all boils down to the network of power relations that into which mujtahids find themselves embroiled a particular time: what in fact determines the authoritativeness of an opinion is more its acceptance within a network of disciples than its ability to persuade. It is to be expected therefore that practitioners of the fiqh will have to fight one another on the most essential aspect of an opinion—its authority. But no rules are to be expected here since a “rule” is no more than an opinion, stated by a mujtahid situated in turn within a network of networks, and attempting to impose his
own discursive hierarchy. Thus, the labor of the fuqahā’ is more to be perceived within than between the seven ūqāṣ. In other words, late mujtahids will neither challenge the founders’ opinions nor those of early mujtahids, but their focus will not be limited to scholars of their own generation: their attention will rather span over what they will perceive as an influential period, then using the earlier period of the founders as a reference point for their arguments.

24 A common problem is the conflicting opinions among reliable and authoritative scholars: those could be of different generations, and hence conflicts show up among mujtahids; they could also be localized within the opus of a single scholar—even the founders do not escape from such inconsistencies. Since two contradictory opinions from a mujtahid on a single issue could render them both invalid, it should first be checked which of the two came last: that in itself would constitute an indication that the second opinion was a rujū’ from the first; but other scenarios are also possible: the unreliability of transmitters who could not distinguish between two opinions of the same mujtahid (or founder), one establishing a firm view of the matter while the other was much more cautious. Thus, cautiousness and certainty open up for contextualization—Why were there two different opinions by the same mujtahid on a single issue?—since transmitters seldom do care about placing statements in their contexts. The fiqh literature itself is full of syntactic rules which in themselves already constitute indications towards contextualization. Thus, for example, “Abū Ḥanīfa said so” and “it was reported that Abū Ḥanīfa said so” are two different statements with different implications, the second being less certain since it holds the status of an “allegation.” But even though linguistic indications are randomly provided to mujtahids, a decision must be made when two conflicting opinions show up. This is particularly embarrassing when the two opinions allegedly emanated from the same mujtahid (or one of the founders). In short, whatever the cause of the conflict, be it from the “source [maṣdar]” itself or from the chain of transmission, the mujtahid has no other choice but to practice ṭarjīḥ. Ṭarjīḥ is a much stronger form of ʾiḥtiyāṭ than ʾiḥtiyāṭ, precaution, because the latter only involves a mild preference of an opinion over another (it could be either way—both sources are reliable—but it would be preferable to go that way), while ṭarjīḥ is more decisive because it declares one of the opinions as false and invalid. Ṭarjīḥ, however, comes as a last resort after applying the Qur’ān, sunna, companions, and analogy. Thus, ṭarjīḥ is a last resort to ḵumā’ without which no consensus is possible. But even though Ibn ‘Abīdīn sides with Qarāfī on the necessity of limiting oneself to a single opinion in both ʾifā’ and rulings, he acknowledges that this might be an impossibility under some circumstances. Mujtahids, for a variety of reasons (such as the lack of adequate information, or the impossibility in deciding between two equally valid opinions), might feel compelled to not favor an opinion over another (1:22).

25 The issue of fee payment for reciting or teaching the Qur’ān can now be looked upon in light of ṭarjīḥ, but its importance, as an example on how to deal with opinions that conflict with ʾuṣūl, goes beyond what has been advanced thus far. In fact, the ʾistiʿjār line of conflicting opinions will serve as an example as to how an opinion would be tempered with local customs:

Those whose opinions [regarding teaching the Qur’ān] are in conflict with their great imām [Abū Ḥanīfa] are not necessarily against their school if those opinions were favored by authoritative jurists [rajja-hu al-mashāyikh al-muṭabār-ūn], or were based on customary practices created by changing times, necessity, and the like. (1:25)
26 Even though such arguments will be brought more forcefully in Ibn ʿAbīdīn’s ṣaḥīḥ on custom, its importance in this context stems from the fact that it connects so well with his arguments on ʾusūl. The irony is that, having first established what the foundations of the school are, and the fact that all opinions—past, present, and future—should be tied to Shaybānī’s six manuals, the ṣaḥīḥ takes a sudden and unexpected turn by placing all conflicting opinions, and opinions in conflict with the ʾusūl, at the mercy of customary practices. But even though Ibn ʿAbīdīn looks upon custom as a ʾfait accompli, or more precisely, as a datum with its self-generating referents of truth-value (al-ṭaḥqīqa ṭurtak bi-dalālāt al-ʿāda), it does not therefore stand within the ʿmaṣāliḥ mursalah, a body of practices accepted for a certain period, and which are neither prohibited nor recommended. Those were in fact associated with broad imperial policies, though by no means limited to them, which were usually of a bureaucratic nature and covering fiscal matters. Thus, the mīrī-ʾiltizām system was also looked upon as a ʾfait accompli, but in a way very different from customary practices: it was, indeed, corruption per se (more about this in the following section).

27 Moreover, an acknowledgment of custom will bring to the fiqh a set of practices which it has thus far had a hard time accepting mainly related to “unequal contracts”—then try to accommodate them, even though they would fit within the general history of the discipline at great pains. But, more important, the acceptance of custom will not be complete without its discursive integration into the domain of the fiqh: in other words, an oral customary practice will undergo a process of translation prior to becoming a discursive practice. To be sure, customs in their original oral form are made up, at least in part, of linguistic components, but they could hardly be referred to as discursive at that stage. In fact, if discourse is to be limited to a systematic set of statements on a specific object, even though it might be far from coherent, then customary practices cannot be discursive in spite of their strong linguistic components. Their punctual, piecemeal, and step-by-step nature considerably limits their possibility for discourse. However, even if convincing arguments are laid out in favor of the discursive nature of oral customary practices, they would anyhow have to undergo some alterations in the process of integration within the fiqh literature. In other words, the fiqh does acknowledge a few customary practices but it cannot accept them in their crude and native state: once integrated in the fiqh literature, their discursivity is greatly transformed in order to fit within the (narrower) fiqh’s horizon.

28 In spite of Ẓāhir al-riwāya, which establishes Shaybānī’s six manuals as the basis of ʾusūl, there is no easy way to decide between conflicting opinions of the founders and their companions. One of the many “rules” states that if the conflict is between Abū Ḥanīfa and one of his two companions versus the other companion, then the opinion of the first two is favored; but Abū Ḥanīfa versus his two companions creates a more complex problem depending on whether their disagreement is one of an era and time period [ikhtilāf ʿaṣr wa-zamān] or on a ruling based on the essence of law [al-qaṭā’ bi-Ẓāhir al-ʿadāla]. A mujtahid would favor the two companions’ opinion because the conditions people live in [al-waṣāl al-nās] have changed. In matters such as sharecropping [muzāraʿa] and contract [muʿāmda] their opinion is favored because late jurists accepted them by consensus. In other matters, a muftī mujtahid is left to decide on his own” (1:27). Abū Ḥanīfa’s opinions are dropped, on some crucial issues, because they are out of touch with current times, and mujtahids are advised to rule in favor of Ẓāhir al-ʿadāla, which is not a perfectly clear notion yet, but probably implies ruling while taking into consideration the specific
conditions of an era and locality; later in the *risāla*, the *zāhir* will be tied more forcefully to custom and the lengthy statement; “the conditions people live in,” will be referred to purely and simply as custom. But notwithstanding Abū Ḥanīfa’s (or his companions’) opinions, mujtahids are left with a great deal of leverage, and such a “freedom” would have been unthinkable without the path to custom. Such drifts, however, from what the founders (or their companions) had preached, is not perceived as “walking away [khurūj]” from the madhhab: in fact, *ikhtilāf* is not a necessarily pejorative enterprise, and, in conjunction of a notion of “change” related to the *fiqh*, disagreements are indeed perceived as a necessary but helpful evil: “not every sound opinion [ṣaḥīḥ] is a valid *fatwā* since the valid in itself is not necessarily subject to a *fatwā*; considering that things change in time and out of necessity, there might be better opinions [awfāq]” (1:38).

29 The ground is now ripe to accept the necessity—at times—not to follow the *uṣūl*, and the relative freedom granted to mujtahids, thanks to custom. To be sure, the *fiqh* always granted some leeway to custom, but a turn occurred at the beginning of the Ottoman period when Ibn Nujaym established in his *Ashbah*, and as an integral part of his “general rules [al-qawā'id al-kulliya],” that “custom [habit] serves as basis for ruling [al-ʿādamuḥ akkama].” His most well-known example was regarding the practice of *khulū* in Cairo: he thus made the point that since tenants had to pay large deposits prior to renting their homes or shops—a practice forbidden in the *fiqh*—such a custom, had it been declared illegal by sharīʿa law, would have ruined the majority of tenants. 35 It therefore had to be accepted as a de facto standard. Such strong views remained vigorous enough for Ibn ʿAbidīn to state that “what is established by custom shares the status of the Text [al-thābit bi-l-urf ka-l-thābit bi-l-naṣṣ]” (1:43), even though he does no more but reiterate upon a discursive practice inaugurated by his predecessor. The statement itself remains remarkable in that it places *urf and naṣṣ on the same footing, prior to the *urf itself metamorphosing into naṣṣ once integrated into the textuality of the *fiqh*. But even more radical statements are yet to come: “You should know that habit and custom have become referential on so many issues to the point that they have achieved the status of *uṣūl*” (1:44). Custom achieving the status of *uṣūl*? This is not surprising since custom is the only practice that could impose itself on a well established *uṣūl* rule and override it:

Considering that custom changes in time, what if a new custom has no equivalent in another time, should a muftī bypass the text and follow the new custom? I reply positively, because late jurists who did not follow the naṣṣ on some issues did so only because a new custom came into being after the imām’s era. The muftī should therefore follow his new custom based on customary statements [al-fāẓʿ ʿurfīyya]. The same applies to a mujtahid’s rulings who had to follow the custom of his own time, but then his custom changed to something else (1:45).

30 Having first acknowledged the importance of custom in judicial decision making, then, provided it a similar status to *uṣūl*, the third step would be to associate custom with language. In effect, customary practices, from the *fiqh*’s standpoint, are exclusively linguistic statements described as “customary statements [al-fāẓʿ ʿurfīyya].” This implies that a customary practice does reduce, from a juridical point of view, to its linguistic components, to the point that had such al-fāẓʿ ʿurfīyya not existed, then they would have been impossible to account for. To be sure, many customary practices have non-linguistic components—e.g., bodily signs—which are the subject of anthropological research; such components, however, cannot be used in any legal enterprise such as a court ruling, muftī’s *fatwā*, or a mujtahid’s opinion.
The interest in the linguistic component of custom is not that surprising considering that the fiqh protects itself in discourse and its indefinite and deadly repetition: (1) the foundations of the fiqh, the uṣūl, are looked upon as consisting of the statements (including utterances) and meanings (alḥāẓa-wa-ma‘āni) of the founders; (2) for later generations of mujtahids, the rules deduced from the uṣūl are in turn linguistic (discursive) in nature, also consisting of statements, utterances, and meanings; (3) the fiqh is more interested in the ṣāhir over the bīṭin, that is, in statements as explicitly stated rather than in their intrinsic meaning or the subjective intentions and motivations of the social actors; (4) the fiqh looks upon statements and utterances outside its own domain—such as utterances coming from disputants in court, and customary practices, with the same logic as its own enterprise; (5) the process of tarjīḥ is one of interpretation in which texts are contextualized first with respect to the author’s time, and then based on the mujtahid’s own preoccupations and period; (6) tarjīḥ therefore implies full knowledge of customary practices since they represent a fundamental element of change in any process of adjudication; (7) like the uṣūl and the fiqh in general, customs are made up of statements and utterances, and are subject to the same linguistic rules; (8) only the extrinsic meaning of a statement or utterance (ṣāhir al-ma‘na) stands to be legally valid, while purpose or intention (gharaḍ/aghraḍ) cannot be accounted for; (9) in sum, the interpretive (hermeneutical) process, which permanently reordered Ḥanafī practice, was therefore linguistic in nature and also paralleled the epistemology of the sharī‘a courts when it came to objective evidence, since both endorsed the ṣāhir al-ma‘na as a safe bet.

What therefore pushed for a successful contextualization, in a process that initially was meant to bypass historical change altogether, was custom. Only customary practices pushed the fiqh to acknowledge changes that time imposed. This raised several questions: (i) How was change perceived? Was it socio-historical, linguistic, etc.?; (ii) Leaving custom aside, what kind of change did the hermeneutics of tarjīḥ assume? In other words, how did a mujtahid account for conflicting opinions: Was it only an outcome of custom?

The broadest rule regarding utterances relative to their corresponding custom could be stated as follows: “Our Ḥanafī imāms have asserted in their manuals that oaths [a ymin] in our school are based on utterances [alḥāẓ] rather than on purposes [aghraḍ: meanings]. They’ve also stated that an oath is based on custom” (1:270). In short, an oath ought to be contextualized within the specific custom that produced it and made it possible; such a step was meant to be practical in that courts had to look for indications of the truthfulness of an oath not inherently in terms of its content—that would push the whole issue of meaning back to the surface—but to the objective implications of oath-taking procedures, all of which followed localized customs and hence were considered “genuine” within that contextual evidence. Needless to say, what applied to oath-taking was also applicable to witnessing, drafting wills and contracts, or any activity in which the use of language reflected custom as a major referent, which was the objective evidence that scholars, muftis, and judges were all looking for. (The procedural fictions, which we will be discussing at length, were also meant to provide for an “objective evidence” in the bargaining process that resulted from the fictitious “litigation.” Similarly, the intention of a culprit accused of homicide was discovered thanks to the “tool of the killing” itself rather than through subjective intent.)
Utterances, which are then always situated within a hermeneutical process, could be of different kinds beginning with the sayings of the founders, of generations of mujtahids, and also of ordinary people in their daily lives. Regarding contracts, witnessing, and all activities in which the use of language is unavoidable, Ḥanafi doctrine dissociates the linguistic components of an utterance from its purpose. Thus, an oath-utterance of the kind “I’m not going to hit my slave with a stick anymore,” is literally taken, so that if the utterer did hit his slave but with his fist, his action would not be looked upon as a negation of his utterance, even though it is obvious that the purpose is not to hit the slave. Hence, if the utterance was stated under oath in court, the act that followed would not have been considered illegal. The separation between utterances and their purpose (intent) limits judicial decision making to the explicit meaning of statements, and custom intervenes only as a linguistic tool of contextualization since it helps in informing on the explicit meaning relative to a locality at a particular time. In other words, custom does not help in pointing to the meaning of individual actions and their purpose, but only to the general meaning of an utterance. Thus, serving primarily as a linguistic tool of contextualization, custom only helps in recognizing a social practice that the fiqh would have otherwise rejected as contrary to its principles. In fact, even customary practices that were introduced on the basis of their economic necessity—such as the khulū, marṣad, sharecropping, and, more generally, contractual forms in which the value of exchange has yet to be determined—are reduced in the fiqh to their contractual and linguistic components. In short, a social practice only exists if associated with language: “there is no violation of an oath without an utterance [lāḥin th bi-lālafż]” (1:270), which, paraphrasing Descartes, could be stated as “there is an utterance, therefore a custom exists.”

Having established the primacy of the literal meaning of language in legal matters—“only utterances are taken into consideration, but not their purpose” (1:275)—the problem becomes one of connecting utterances to their specific meanings—a process of contextualization referred to as takḥṣiṣ where “the general would be made specific and tied to custom” (1:276). Besides its technical linguistic aspect, takḥṣiṣ is a parallel heuristic device to tarjīḥ since it enables broad statements, established either in the ʿuṣūl or through generations of mujtahids, to apply to specific cases. The hermeneutic process as a whole is thus intimately tied up to both language and custom, together forming “a customary linguistic truth [ḥaqīqa ʿurfiyya lughawiyya]” (1:277), simply because each utterance “needs to be made specific by custom: this is a priority because it reflects the will of all the people” (1:276)—“truth [ḥaqīqa]” is here taken as what is opposed to a metaphorical meaning of utterances (maḥāz), that is, a statement at its face value. The “will of the people [irādat jamīʿ al-nās]” is what provides custom with the power to impose itself in every juridical and adjudicative act, and gives each utterance the ability to manifest itself alongside the law: thus, for example, “the texts drafted by the founder of a waqf [among others] have the status of the text of the legislator” (1:277)—“text” is here any text, whether oral, written, or a combination of both, and clearly such assertions would have been unthinkable without the power attributed to custom in the first place.

The dissociation between custom and utterances on the one hand, and meaning on the other, seems in direct conflict with the first general rule established by Ibn Nujaym: “no reward without intention [lāthawāb ʾillā bi-l-niyya].” If reward, either in the world itself or in the afterworld, is inseparable from intention, then why are statements and customs—customs are statements—based on their explicit—manifest—meaning? If every action and
statement finds its meaning in intention (niyya), then the manifest can only be what shines at the surface and needs to be connected with intention that lies deep beneath. However, the general rule does not connect every practice with intention. To simplify, only the ‘ibādāt are assessed in terms of the intention that motivated them, while the mu‘āmalāt, including contracts, are not. The two categories ought therefore to be assessed each on its own, without the need, however, to be analytically separated.

A known ḥadīth states that “all actions are assessed in terms of their intentions [innamāl al-a’māl bi-l-niyyāt],” the fiqh, however, leans more towards “assessing actions [ḥukm al-a’māl].” Assessment implies no more than breaking down “actions” into those that should be practiced with a declared intention in conformity to šari'a law, and those practiced with no intention. In this respect, the broad division between ‘ibādāt and mu‘āmalāt only serves as a general guideline since intention is not linked to all former practices, while some of the latter require a manifest purpose. Thus, intention is a requirement in praying, zakāt, fasting, and Ḥajj, but not in ablution, cleaning, or washing, even though the latter all are an intrinsic part of the ‘ibādāt. Similarly, conversion to Islam does not formally require intention because “a forced Islam is valid [al-Islām al-mukrāḥ Sahīḥ].” Without going into all judgments regarding the ‘ibādāt, suffice it to say that Ḥanafī practice generally requires intent as a normative rule, but avoids doing so either when the practices are a necessary requirement for other ones (ablution is a requirement for prayer, washing a dead body is a requirement for burial), or when they are the outcome of war and conquest (conversion to Islam by force).

What does a niyya entail? Usually, no more than a declaration of intent of the form “I intend to pray [anwī al-ṣalāt],” which could be either stated aloud or silently (into one’s consciousness) before practicing the act; and, as far as the fiqh goes, there are no requirements for an “understanding” or knowledge of any practice. Should a pilgrim know about all the different twists and turns of pilgrimage? —ūfīs, such as Ghazālī (d. 505/1111), posed such requirements on intended practices, but the fiqh only limits itself to manifest intentions in the form of statements, which do not have to be orally stated and heard by others. Needless to say, since intention is not a deep matter of consciousness, the borderline between practices that require intention and those that don’t, is indeed very thin. In fact, even though the niyya requirement on most ‘ibādāt is formal, imposing it on contracts would have placed the courts into a totally different situation, requiring from them, say, an assessment of the intentions or the individual wills of the contracting parties. In other words, the distinction between subjective versus objective evidence would indeed have been crucial.

In fact, once we move into domains with “legal” implications, the requirement for intent ceases—with notable exceptions, however, such as judging, which anyhow is looked upon as part of the ‘ibādāt: “judging is rewarded on intent.” But buying, selling, renting, donating, gift giving (“donating while in a joking mood is legally valid”), and the like, are all independent of intent. So is crime—at least indirectly. In fact, a court must know whether the accused committed his crime on purpose (qaṣd) or not. But, surprisingly, knowing the intent of the accused does not require delving into the subjective meaning of the act since the tool of the crime (ālat al-qatl) is all by itself enough to decide on intent:

Punishment is tied to the purpose of the killer for committing his act. But they said: if purpose is hidden [bāṭin], the tool is then what reveals it. Killing someone with a tool that divides the body parts is usually considered as a purposeful act and is subject to punishment. But if the victim was killed with a tool that does not divide the body parts, but nevertheless kills in most instances, then that quasi-
premeditation [ṣībīh 'amd] would not require punishment according to the greatest
imām [Abū Ḥanīfa].

The separation of all those elements—practice, intent, statement, purpose, act—in
practices with direct legal implications tremendously narrows the procedures of the
courts. By freeing them from all subjective components of a transaction, contract,
testimony, crime, etc., the courts are limited to face-value statements. Connections are no
longer between an action (fā'il), the subject (fā'il), and intent (niyya), but between the
explicit meaning of statements. In fact, sharī'a law reduces major practices into their
basic linguistic components: thus, customs, testimonies, contracts, opinions, and the like,
are all reduced to statements (al-fā'uz lughawiyya) whose “real meaning (al-ma'na al-
haqiqī)” is what matters foremost; only if an ambiguity reveals itself at that level should the
“metaphorical meaning (al-ma'na al-majāzī)” become, in turn, essential. But whatever of
the two meanings is looked upon, intention is out and seldom does it come into question.

The ambiguity of pre-modern discourses

A word of caution before we proceed in our discussion of linguistic custom. The reader is
now in the legitimate position of asking whether in our démarche towards Hanafism we
have manifested an over-confidence in accepting the fuqahā’ assertions at face value.
What indications, if any, do we have that the juristic typology prescribed by an eminent
mujtahid of the caliber of Ibn 'Ābidīn (and few others as well) had any practical value, or
that at least it was accounted for by the practitioners of law? Was the distinction between
mujtahids and muqallids that significant, and were the former the driving force behind
legal change? In fact, the general suspicion, common in contemporary literature—hence
the excessive focus on the sharī'a court records and the Ottoman archival records on the
basis of their “reliability,” not to mention their alleged non-ideological character on the
basis that they lack an authorial subjective point-of-view—is that all texts authored by an
individual are a suspicious entity in the first place. To make things worse, the fiqh texts
are even less reliable since they tend to be obsessively locked into a fictitious past, and
hence much less informative about the present than we would have liked them to be. In
short, and in toto, such texts are not much of an informative source, or are unreliable at
best.

Even though such criticisms and suspicions share their own merits, they nevertheless
tend to be naïve in ignoring all the assumptions behind discursive analysis in general and
the ambiguities of pre-modern discourses in particular. Let us note beforehand that there
is no text as such that does not embody a discourse, so that a court record carries within
it—or at least assumes—a discourse in the same way that a fiqh manual does. Since
originating from different “legal” instances, such as the enterprise of the fiqh, the sharī'a
courts or the regional councils, and sultanic (bureaucratic legislation), those discourses
end up being very different from one another in both content and structure, even though
they tend to overlap and borrow heavily from each other. The traditional way of looking
at discourses (or ideologies as some would like to call them) fails when it attempts to lock
one of the discursive levels—for example, the sharī'a courts—as the most “decisive,”
meaning the one which, in the final analysis (as the Marxists would say), forms the
essence of “practice.” To begin with, all discourses are by definition theoretical—because
of an abstract use of language and a peculiar way in ordering things—and practical since
they contribute in making a particular reality possible. To be sure, our method will
irritate those who reason in terms of “theory” and “practice” since nothing in our understanding of the texts matches such a dichotomy, and once we give up on such preliminary divisions, it will become more obvious that all texts, whatever their institutional origins, will represent similar difficulties of interpretation. Hence the assumed “practicality” of the court records will not make them more “reliable” from our perspective, and several issues need to be addressed in order to render their reading more accessible, hence more “reliable.” In fact, the so-called “reliability” or “objectivity” does not originate from the text itself, but from the process of contextualization which helps in a questioning of the text, and which lets us discover its modus operandi, on the one hand, and its modus vivendi with other texts, on the other.

But probably the most crucial issue at hand is the specific nature of pre-modern discourses and the particular difficulties they generate even from preliminary interpretations. To begin with, such discourses do not seem concerned either with historical change as such or with the historicity of their own becoming. Ḥanafism, for example, looks upon every discursive activity it generates—which, if perceived as “new,” is looked upon as an independent act of ijtihād—as part of an old and preestablished order that originates in the sharīʿa and the discourse of the founders. Every act of ijtihād, even though conceived as an independent act, is thus part of a much more global enterprise, one that spans over several centuries, and into which every single act of ijtihād finds its place. Thus, even though Ibn ʿAbid enumerates the most prestigious mujtahids one by one and then creates a juristic typology out of his list, it was indeed the place of the mujtahid in that hierarchical flux that ultimately turned out to be the most relevant. By giving each one his own place, the individualistic nature of their enterprise was put aside in favor of the coherence of the madhhab. Such a coherence is obviously a legal fiction, but one whose role was essential in the creation of discourses that were part of a more global enterprise.

From a modern (if not modernist) perspective, such discourses might therefore look disappointing because of the non-historical nature of their enterprise. But it is precisely this attachment to a fictitious past, while representing the enterprise of the fiqh as “adapting,” in its own right, to contemporary concerns, which characterizes Ḥanafi practice, and which needs to be reconstructed in terms of the paradigmatic activities it has generated. Thus, in the case of custom, for example, it was posed—in a way similar to the divine normative rules—as a self-generating referent, and one whose signs (adilla) only point to other linguistic referents. But if the scholars had no problem pointing to that linguistic component of custom, the “historical” relations that custom might generate within a specific period was, as we shall see in the following section, of utmost concern, and remained for the most part an unresolved issue with too many diverging opinions.

“Customary law” and the fiction of legal change

It is generally accepted that “custom” plays a major—albeit uncertain and undeclared—role in Ḥanafi practice. To be sure, the importance of such a role varies from one madhhab to another, and is also very much affected by the historical making of a particular epoch. But beyond that, everything about custom remains uncertain, if not indeterminate. For one thing, it is unclear how an unwritten law, or lex non scripta, could survive so long as to pose itself side by side with the canonical sharīʿa law. In fact, not
only is it difficult to imagine that an orally established custom would pose itself as law, but that it would eventually become a written law, or *lex scripta*. That process specifically is still more convenient to reconstruct in theory (in particular by means of anthropological arguments and the like) than to describe historically, that is, by means of concrete empirical situations that would show the passage from one form of law to the other. If we accept the idea that Ḥanafī practice owes so much to custom, it then remains to be seen which customs were assimilated within the fiqh, and during which specific periods and regions, so as to become an integral part of its normative rules. The question is so elusive due to the oral, hence unwritten, nature of custom, that each argument and counter-argument would necessarily run into unavoidable circles. The question as to whether custom should be perceived as an integral part of or autonomous from the fiqh owes its difficulty precisely to the oral nature of custom. Another difficulty is related to the *regional* nature of custom: How would a norm accepted as such within a certain locality be assimilated within the larger corpus of canon law, hence assume a degree of “universality” it has hitherto not known? What further adds to the confusion is the fact that it is usually an *anthropological* notion of custom that dominates the debates on custom and law, which by itself is very different from what custom-as-norm implies. In fact, it is not enough for a custom as such, simply because it is known and accepted within a locality, to become a de facto legally accepted norm, even if it remains at its most basic unwritten stage. Indeed, if custom is accepted on a de facto basis, that is to say, by the sheer fact that it exists and perseveres in its being, it would be unable to furnish a “demonstrable rationality,” but would exist by “the simple fact of its having remained in usage,” while the multi-layered fiqh belongs by contrast to a radically different logic in sorting out norms, interpreting them, and in creating new ones through interpretation.

Several difficulties ought to be dealt with. First, the relationship between Ḥanafī and customary practices is historical, and it thus needs to be seen whether, since its formative period, the former took the challenge of custom seriously, and if so, then its representations of custom are what matters the most. Second, when looking upon specific historical instances of a Ḥanafī “assimilation” of custom we must ask, is it possible to remain situated “inside” the discourse of the fuqahā’ and accept their representations of customary practices? In other words, since custom, due to its oral and unwritten character, cannot be assessed all by itself but only through the discourse of a “competing” legal practice, does that impose limitations towards a modern assessment of custom?

Third, a final limitation comes to mind, regarding the handling of the fiqh texts: Which texts ought to be chosen specifically for our task? As in all the chapters to follow (on contracts and obligations, land, crime, etc.), the choice of texts has been left to its minimum so as to be able to follow the construction of their discursive logic and their internal logic, whether coherent or not, as closely as possible. Only to paraphrase J.G.A. Pocock, one would add that the histories of such practices not only relate to one another by virtue of their discursive nature, but that they have a history by virtue of becoming discourse. Similarly, custom has only a history once assimilated to the canonical discourse of the fiqh, that is, by becoming law. Indeed the history of custom, like that of the fiqh, could be looked upon as one of an open-ended interaction of *parole* with *langue*, where new blood is being injected by the constant action of speech upon language.
Custom within the perspective of law and economics

Max Weber distinguishes between law, convention, and custom, which roughly correspond to what the fiqh meant by *sharʿ*, 'āda, and 'urf (see below).\(^{43}\) Thus, custom is, a typically uniform activity which is kept on the beaten track simply because men are “accustomed” to it and persist in it by unreflective imitation. It is a collective way of acting [Massenhandeln], the perpetuation of which by the individual is not “required” in any sense by anyone. (1:319)\(^{44}\)

Since Weber looked upon law, convention, and custom, as belonging “to the same continuum with imperceptible transitions leading from one to the other” (ibid.), he mainly perceived the difference in terms of the degree of “coercion” that a binding norm—whether law, convention, or custom—imposes on individuals. Thus, convention is the least coercive of all (while custom is coercive without being “required”):

Convention, on the other hand, shall be said to exist wherever a certain conduct is sought to be induced without, however, any coercion, physical or psychological, and, at least under normal circumstances, without any direct reaction other than the expression of approval or disapproval on the part of those persons who constitute the environment of the actor. (ibid.)

Thus, like the ‘āda, convention acts as if situated at the “root” of custom even though it does not always presuppose it. In fact, it is perfectly possible for a custom to develop without any convention that behaves as a “supportive” agency. This is particularly true in the economic sphere where customs, which, even though they might not have any strict legal equivalent, are nevertheless needed within a community. Hence Weber perceives custom not only in terms of coercion but, more important perhaps, in its economic effectiveness (or religious, or political) once achieving a quasi-legal status.

At any rate, adherence to what has as such become customary is such a strong component of all conduct and, consequently, of all social action, that legal coercion, where it transforms a custom into legal obligation (by invocation of the “usual”) often adds practically nothing to its effectiveness, and, where it opposes custom, frequently fails in the attempt to influence actual conduct (1:320).

Custom could thus at least be as equally binding as law, and in the absence of a strong rational legal system which receives its institutional support from the state, custom could be the only binding norm within the community, even though such a role is even possible in advanced liberal societies.\(^{45}\) Convention is equally effective since, in the same way, “The existence of a ‘convention’ may thus be far more determinative of [a] conduct than the existence of legal enforcement machinery” (ibid.). Thus, for example, in Ottoman societies where the legal system was limited in its capacities and scope, the argument would go that custom would serve as a truly binding force, or as some kind of a cheap economic alternative to a limited judiciary. But it all depends, however, as to what we understand in this particular case by “legal system”: if we thus assume that the sharīʿa courts and the work of all kinds of scholars constitute the essence of the “legal,” then we are confronted with a system whose force of coercion was instituted more by the customary norms of the various communities than by any state agency. Custom and Ḥanafi practice would then be perceived, within this perspective, as “acting together” and as a normative system which for the most part remained outside the control of the state.
After laying out his definitions, Weber becomes mainly concerned with custom becoming law, on the one hand, and the subjective meaning of custom and law, on the other. Custom becoming law does not seem to be a cumulative process from the Weberian perspective: “the emerging innovation is most likely to produce consensus and ultimately law, when it derives from a strong inspiration or an intensive identification” (1:322). There is a parallel here between the coming of a new religious system and a legal one since both require charismatic authority. Thus, what usually pushes forward a set of conventions, rules, customs, and customary laws, from their generally “accepted” status based on an oral “consensus,” and “transform it into enacted law” (1:323) is an unusual experience of strong identification. In Islamic history, the construction of the legal system came into being as an outcome of the charismatic religious figure of the Prophet Muhammad. Similarly, the bulk of the Ottoman qanûnnaâme would not have been possible without the establishment of a new ruling dynasty whose conquests and land acquisitions made imperative the enactment of new codes (war was always an agent for a new set of laws and regulations since all conquerors were in need of making their laws explicit). But what about modern times when conquests are less common and when industrialized societies grow “peacefully”? Is “custom” still a significant legal category? On what basis do legal codes change: customs becoming laws or laws made from previous laws, or is it a combination of both? Weber had no general theory that would incorporate custom into gradual changes within “peaceful” legal systems, that is, not subjected to wars and conquests, even though “discovering empirical processes in which nonstatutory norms arise as valid customary law” (2:753) would be a valid enterprise since it would point to historical processes where a norm became law. He did, however, see a parallel between the “so-called ‘silent trade’ among primitive peoples as well as in modern business, especially on the stock exchange” (1:328). This is a sign that custom—in lieu of codified laws—could be effective in modern contexts such as the stock exchange. In fact, Weber thought of custom and convention not so much in terms of modernity versus primitive societies, but more so in terms of what following a “rule” or convention meant while being tied to a specific “environment”:

the fact that some type of conduct is “approved” or “disapproved” by ever so many persons is insufficient to constitute it as a “convention”; it is essential that such attitudes are likely to find expression in a specific environment. [...] It does not matter in this context whether the test is constituted by profession, kinship, neighborhood, status group, ethnic group, religion, political allegiance, or anything else (1:324).

But, “Today economic exchange is quite overwhelmingly guaranteed by the threat of legal coercion” (1:329), and Weber was probably thinking in terms of the routinization of contract law which many advanced societies had already completed: a firm state authority together with a well routinized and rationalized law of contract minimize transaction costs, which enable individuals to open up to strangers and take more risks. Even, however, the most advanced legal systems typically leave many things to be regulated outside the judiciary: “It is a fact that the most ‘fundamental’ questions often are left unregulated by law even in legal orders which are otherwise thoroughly rationalized” (1:330). But the difference between those “thoroughly rationalized” systems and those which were less fortunate in rationalization might well be, among others, in the way they handle what lies “outside the law”: in the modern rationalized systems, the judicial seems to follow the rule of absolute necessity—avoid coding what is unnecessary, superfluous, or what could be regulated “on its own” (because there is, say, a professional
environment that makes auto-regulation possible); however, in less rational systems, there is more reliance on custom as a way of avoiding explicitly formulated codes.

**Change with the make-belief that it all conforms to tradition**

56 As was common to many Ḥanafi scholars, Ibn ʿAbidīn made a number of scattered remarks on custom throughout his work; however, only in one of his rasāʾil (“epistles”)—and the risāla is supposed to be a work of genuine ijtihād, since it must address issues that were either left out, or that at least were not handled in this form—does he devote an entire risāla on the issue of custom and habit (“The Propagation of custom while reconstructing some rulings on custom”). The paucity of such systematic texts is indeed surprising since, as noted earlier, the relationship between Ḥanafi and customary practices was crucial: it is only in analyzing the significance of custom do we realize how much the Ḥanafis had to “accept” and absorb social practices that were “outside” their own norms. In fact, Ibn ʿAbidīn is not interested in custom in general, but only in so far as it affects judicial decision making and legal doctrine. This raises the issue of a custom that is strictly “legal,” and thus falls short of modern anthropological notions of custom (which tends to perceive custom within a context of social action): What are the implications then for reducing our understanding of social practices to their “legal” side only? In other words, what if those “customary practices,” once anthropologically situated, turned out to be strategies of a different nature than what jurists thought they were? If the legal approach is necessarily reductive and limited to only few aspects of custom (whether legal or not), should we then reconstruct a different and more global notion of custom? In fact, once we accept the jurists at face value, we are then confronted with the social and political implications of their choice: the fuqahāʾ restricted themselves to that part of custom that mattered the most to them, that is, one that successfully integrated within their legal framework; while the remaining incognito part—the “residue”—the essential part for our purposes, had to be ignored altogether. The essential question is therefore to see whether such a reconstruction is at all possible (since custom is by definition unwritten, how can we then reconstruct custom within a historical perspective?); then pose the argument as to why such a reconstruction is essential and whether it is feasible or not; and, finally, what is the significance of what is “left out” vis-à-vis what has been officially accepted by the jurists as “their” custom.46

57 Custom as ʿurf “is something which sharī’a law takes into consideration [lahu ʾitibār], so that a ruling would be based on it” (2:112).47 But custom as ʿāda, or “habit,” based on Ibn Nujaym’s al-Asbāb wa-l-naẓāʾir and Hindi’s Sharh al-mughnī, “is what becomes accepted by the human soul of things that keep recurring [al-umār al-mutakarrira] and which are reasonable [maʿqūl] to healthy spirits.” Those habits are of three types: 1) Public customs, ʿurfyya ʿāmma, which are of the most general type and are concerned only with public behavior such as making a public statement of the kind, “I refuse to step my foot in a particular home”—an assertion known in the fiqh as the “position of the leg” (waḍʿ al-qadam) and “coming in” (dukhūl)—so that if I do step in, either by walking in or while riding an animal,48 then I have broken my oath (ḥanitha). 2) Private customs, ʿurfyya khāṣṣa, which represent what a group of people adopt as a common ground (iṣṭīlāḥ) to conduct their daily business (or for other purposes); for example, the craft-guilds (ṭawāʾif) use different internal “rules” in their ongoing business. Finally, 3) customary norms of the...
shar’, ʿurfyia sharʿiyya, such as praying, or paying the zakāt, or pilgrimage, all of which “have their linguistic meanings [maʿānhāʿ-al-lughawiya] kept in accordance to their legal meanings” (2:112).

58 How do ʿurf and ʿāda interrelate, and could they be used interchangeably for our purposes? Since the term ʿāda is closely connected to muʿāwada, it necessarily implies the repetition of a specific act an infinite number of times “till it becomes accepted by the souls and minds without even thinking about it [min ghayr ʿalāqa ʿaqliyya, “without relating it to the mind”].” Thus, an ʿāda would become ʿurf through this process of infinite repetition and, from this standpoint at least, “they share one and the same meaning [maʿna ] even if they differ conceptually [mafiḥûm].” In other words, what is of interest to sharʿa law is primarily the ʿurf, or the ʿāda that has materialized as ʿurf through a process of infinite repetition to the point that we automatically, and without much thinking, follow it in our daily lives. Furthermore, the ʿurf is at the same time “deed [ʿamal-ī] and word [qawl-ī]” (ibid.), meaning that it could be as practical as “agreeing” (through the long habit of custom) on eating a specific meat among a group of people (qawm) so that if I were asked to buy food or meat for those people, I would know exactly what to purchase following the rules of the ʿurf ʿamali, without even anyone reminding me of what those rules or customs are. As to the linguistic side of the ʿurf, it consists in associating a word (lafẓ) with a meaning (maʿna) so that such an association becomes automatic and a matter of habit: a case in point would be the currency used in a locality since by simply uttering the word itself, we know what we are talking about. Thus, the difference between the ʿurf ʿamali and lafẓi is that the former is oriented towards objects in the first place: the word meat in a particular locality designates in practice a specific type of meat; while the second is language oriented: the specific name of a currency tells us—through custom—what we are dealing with.

59 Having calibrated the distinction between customs based on deeds and others on words, Ibn ʿĀbidin proceeds to link them, rather confusingly, to his earlier distinctions of ʿāmm and khāṣṣ, of public and private (or the “common” and the “specific”): thus, the word-based ʿurf is specific to the ʿāmm, as the currency example shows since it ought to be accepted by the entire community (it wouldn’t make much sense that only a specific—private—group of people adopts a particular currency); as to deed-based ʿurf, it should also be ʿāmm, at least from the point of view of the Ḥanafīs (though not the Shāfiʿis) (2:113). So if both word- and deed-oriented ʿurf are ʿāmm, what is then the use of such a classification? The aim is indeed to give the ʿurf ʿāmm, whether based on deeds or words, a higher status and make it acceptable to the sharʿ on the sole basis that it has become the custom and habit of an entire community for a long period of time. It should be stressed that the distinction between ʿāmm and khāṣṣ is, strictly speaking, between the community as a whole and the smaller professional or other groups that are part of this community; or between a locality (region) and the larger province (or empire); in other words, it does not have much to do with our modern categories of “public sphere” versus “individual (private) rights.”

Table 1-1
Public versus private custom

<table>
<thead>
<tr>
<th>Public custom, ʿurf ʿāmm</th>
<th>Private custom, ʿurf khāṣṣ</th>
<th>Legal custom, ʿurf sharʿi</th>
</tr>
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The grammars of adjudication
Deed-based 'urf ('amal-ī)

Word-based 'urf (qawl-ī)

Customs and habits (ādāt) accepted by the community at large, and hence have a “public” value.

Customs shared by specific—usually professional—groups, and hence have a “private” value.

The customs which shari'a law explicitly approves: praying, fasting, marriage, divorce, etc.

Which ‘urfs and ādāt are “legitimate” enough to be “accepted” by or “integrated” within the larger framework of shari'a law? A hadīth in Ibn Ḥanbal’s Musnad states that “What the Muslims see as good for themselves is also accepted by God as good.” But, as noted earlier, it was in Ibn Nujaym’s Ashbāh that custom was finally given in Ḥanafi practice a manifest role, to the point that one of the “general rules (qawā'id kulliyā)” was specifically devoted to custom. Those are indeed supposed to combine the “particular” with the “general” so that a scholar, jurist, judge, or muftī would all be able to work out a specific issue at hand by means of a general and abstract rule. In themselves, the qawā'id are an even more powerful tool than analogy since the latter proceeds by comparing two particulars, while the “general rules” link a particular (juz'īyyāt, or furū') to the more general (kullī, ghālibī). A case in point is the issue of the validity of custom in judicial decision making. The sixth general rule (which the Majalla has reiterated as its rule 36) states that “al-‘āda muṭḥakkama,” or “custom is a force in adjudication” (also: “custom is of force”). Indeed, throughout the section devoted to his sixth rule on “habits” (ādāt) and their corollary, the ‘urf, Ibn Nujaym argues in favor of considering at least some ‘urfs into shari’a law. The reason why custom is so tenacious is that it is so well “known” (ma'rūf) within a particular community to the point that people—even court officials, judges, muftīs, etc.—start applying it in lieu of shari’a law. Hence Ibn Nujaym’s assertion that “what is known by custom is identical to what is placed as a condition in shari’a law [al-ma'rūf 'urf-an ka-l-mashrūṭ shar'-an]” (2:108).

And few lines later, he will go even as far as to assert that “silence acts like a stipulation [al-sukūt ka-l-ishtirāq: silence has the status of stipulation];” or “what is common knowledge enjoys the status of stipulation [al-ma'rūf ka-l-mashrūt],” all of which identify “common knowledge” with “silence.” The ‘urf is indeed so well-known, ma'rūf; to the point that no one even bothers to elicit it anymore—hence acts in a background of silence: in other words, it belongs to the domain of the “unconscious” or the impensé of a particular community. The function of a jurist, therefore, will be precisely in reminding a society of those forgotten customs over the years in terms of its basic ‘urfs; and the only purpose for that kind of operation is indeed judicial decision making. Obviously, not just any ‘urf is of interest to the faqīh: only the ones that do not “match” in one way or another the commands of shari’a law—and these are quite numerous.

Part of Ibn Nujaym’s arguments are based on his elaborations of the complex relationship between ‘urf and language. Shari’a law, unlike custom, is based on language, or more precisely on the written word, hence on a set of abstract signs which are more oriented towards the generic than the particular. A legal opinion would thus typically speak of bread in general rather than of a specific kind of bread common, say, to the inhabitants of Cairo. By contrast, the ‘urf stands as the exact opposite: it is specific to this-and-that rather than generic and abstract. Hence, there is, as Ibn Nujaym put it, a natural
“contradiction between custom and language [ta’āruḍ al-‘urf ma’ al-lugha]” (106). Thus, it is by considering the specificity of the ‘urf that the jurist seeks to incorporate it into shari‘a law. This is a very delicate matter that requires great knowledge of the community (or locality) in question, its inhabitants, their manners, and the history of both legal institutions. At this point, Ibn Nujaym introduces the distinction, already encountered in Ibn ‘Ābidin’s risāla, between ‘urf ‘amali and ‘urf lafzī, but the distinction is here more meaningful: the ‘urf is in essence linked to practice, that is, to ‘amal, and the habit itself is nothing more but a ‘urf ‘amali (laysat al-‘āda illā ‘urf-an ‘amali-yyan) (2:107). So, the ‘urf is by definition practical, specific (mukhaṣṣaṣṣ), denotes particular objects (muqayyad), an association of accumulated (body) habits over long periods of time, and related more to the “external” (zāhir) state of things, al-ashyā‘ala zāhir mājara bihi al-‘āda (2:110); by contrast, Ḥanafī practice is language-based, general, and more interested in the intrinsic meaning of things and their relation to the scriptures, the madhhab, and the uṣūl al-fiqh.

What is it that gets accepted as legalized custom, that is, ‘urf validated by shari‘a law? Ibn ‘Ābidin quotes Sarakhsi’s Mabsūṭ as claiming that “what is firmly established by custom is also firmly acknowledged in the [shari‘a] text [al-thābit bi-l-‘urf ka-l-thābit bi-l-naṣṣ]” (2:113). The problem, however, is precisely to determine how things get “firmly established by custom” since obviously there are many ‘urfs well absorbed within their own communities but with which the fuqahā‘ would certainly disagree, and both Ibn Nujaym and Ibn ‘Ābidin provide ample examples on this matter. Even the general rule of public versus private does not seem to operate well in many concrete historical situations since, put simply, what establishes an ‘urf as valid is its intrinsic force and power—the fact that it has been accepted by the people of a locality.

The rest of Ibn ‘Ābidin’s risāla is mostly devoted to a variety of problems that might arise between the ‘urf and shari‘a law. This is especially true at the practical level, that is, for muftīs and judges whose work is oriented towards concrete day-to-day matters. Thus, quoting first a passage from Zāhidi’s Qinyah, that “the muftī and judge have no right to make a ruling based only on what Ḥanafī practice formally establishes in its uṣūl [zāhir al-madhhab] and to forgo custom altogether by dumping the issues it raises into the common stock of tales [naql al-mas‘ala ‘an-hu fi khīţānat al-riwāyāt]” (2:113), Ibn ‘Ābidin seems concerned with two related issues. The first is when an established custom in a particular locality has no equivalent in shari‘a law, that is, when the law is silent on that particular subject matter; in this case, muftīs and judges would rule in conformity with such a custom but only on the condition that their ruling is in accordance with the general precepts of the shari‘a (some examples will be provided later). The second is when an established custom comes in direct contradiction with what has already been established in shari‘a law; for such cases, and those did constitute the majority, Ibn ‘Ābidin’s opinion seems to be twofold. On the one hand, when such a conflict does occur, then shari‘a law is given the priority; but, on the other hand, and in practice, things could turn out more confusing: for one thing, shari‘a law is based on the notions of zāhir and bāţin, and a ‘urf would not fit well with what the law formally acknowledges in its zāhir, that is, as objective evidence only. In other words, things could turn out differently once we get into their intrinsic meaning, the bāţin. The other problem in this complex relationship between custom and law is that older legal opinions upon which the legitimacy of the madhhab is founded become so out of touch that they do not apply to
present times: in short, they need to be re-adapted and this is primarily the work of muftis and judges, and also the fuqaha to a certain degree.

How is it possible to practice [yu’mal] with a custom that is in contradistinction [mukhālif] with what has been formally accepted in the usūl of the Ḥanafi madhhab [zāhir al-rīwāya], since the latter would be solely based on the Text [ṣari’ī al-naṣṣ] from the Qurʾān, sunna, and consensus [jimā’]? There should be no consideration to custom that is in direct contradiction [opposition] to the Text because, according to Ibn al-Humām, custom could be invalid [bāṭl] while the Text is never so (2:113).

Thus custom is invalid when directly opposing the scriptural texts on whatever stance. Such a broad assertion, however, does not work all that well in practice. For one thing, a custom would not have pressed to become law had there been any equivalent in sharī’ī law. For another, customs are all too powerful to be ignored by the fiqh, in particular when they achieve the status of law within a community. Being aware of this, but without explicitly stating it as such, Ibn ʿAbidin’s main concern becomes in delimiting which customs ought to be accepted as legitimate. This also leads him to another question: historically speaking, which customs imposed themselves on Ḥanafi practice to the point of becoming indistinguishable from the latter? And for which specific reasons? Did such customs impose themselves simply because the law was silent, obsolete, or confusing, or because it prohibited some practices that custom had to impose forcefully?

Ibn ʿAbidin goes back once more to his distinction between private and public custom, while avoiding identifying custom into a single monolithic bloc. Both types of customs pose no problem to the fiqh as long as they are in accordance with the legal texts. In the case of a conflict, then, either 1) the ‘urf is in every aspect in opposition to basic premises of the fiqh (dalīl shar’ī) on a particular issue, such as imposing abusive interest rates on loans (riba), alcoholic beverages, wearing silk and gold—the custom is then rejected as illegal; or 2) sharī’ī law has a well established general opinion (dalīl ‘āmm) on a particular issue, but custom contradicts it on a specific part only (khālaṣ-hu fi ba’d afrāḍi-hi), custom would then be accepted on the condition that it is public, ‘āmm. Thus, a ‘urf khāṣṣ which contradicts even minor aspects of sharī’ī law is invalid. In order to fully understand such statements, we need to work out more fully the distinction between private and public, and also see, from concrete examples, how the dalīl ‘āmm would be challenged by custom in some of its parts (afrāḍ).

In order to pursue his point on the difference between private and public, Ibn ʿAbidin gives the example of the town of Balkh⁴⁴ (in Khurasān) which apparently had a practice (taʿāmul), approved by their elders (mashāyikh), in providing their weavers in advance with all the materials they needed in order to exchange it later, once the production cycle was complete, on a one-third basis. The issue is brought in analogy to a classical problem for the Ḥanafīs known as “Qafiz al-ḥalḥān,” in which a man gives his grain to a baker so that he would grind it for him, and for which the baker will receive a fraction of the produce in lieu of his labor. It is in short the classical problem of receiving an equivalent of a payment (as ujra) out of something that does not exist yet. Even though Ibn ʿAbidin is not clear enough on what this one-third implies, it does seem, however, that the weaver would keep one-third of the produce as ujra for himself and give the remaining two-thirds to those who provided him with the material. Yet, despite the existence of similar types of sharecropping contracts such as the murābaʿa and musāqāt among the peasantry,⁵⁵ which were a one-fourth association (the tenant-farmer would keep one-fourth of the produce and give the remaining three-fourths to the “proprietor” or multazim for using the land), the problem that the one-third association posed for jurists was of another
nature. For one, the weaver was provided in advance with the needed material, and in exchange for this “gift,” he would later give its “equivalent” in commodities he produced all by himself. The whole problem is therefore to determine what this “equivalent” means since what is being exchanged are two different things: different commodities made up of the same substance, and the second commodity, the cloth, has an added value to it—the amount of labor of the weaver. It is therefore the time delay that poses a legal problem, in addition to the different nature of the commodities, all of which would create a phenomenon similar to money-lending with interest (riba). Jurists did even coin a term: istiṣna‘, which means “to sell what one does not possess while forbidden from doing so” (114). Thus, istiṣna‘ (from šana‘a, to produce) means that one is selling a commodity in advance, which is yet to be produced, and hence, for the jurists, that thing is non-existent (ma‘dūm); and to do so, another person, the creditor, has to furnish a “guarantee” by providing the seller with the raw-materials. So what those weavers in the aforementioned village were in fact “working with” and became part of their custom—’urf is usually associated with ‘amal, that is, “labor” in the sense of praxis—was the illegal practice of istiṣna‘. That was a case where an ‘urf khāṣṣ specific to the inhabitants of a particular village was in direct opposition to the legal texts because sharī‘a law “prohibits selling what the person does not possess” (2:114). One would therefore think that a private custom such as the istiṣna‘ would have to be dropped altogether because of its illegal character; there should, however, be a way to work around this problem since, if istiṣna‘ is permitted in practice—and istiṣna‘ means selling what one does not possess; an act which is forbidden—what we are in fact doing is making the legal text more specific [on a particular issue] [takhṣīṣ minnā l-naṣṣ] which prohibited a person from selling what he does not possess. We are therefore not abandoning the text altogether (ibid.).

In other words, if Ḥanafī practice decides to incorporate a custom like istiṣna‘ within its legal corpus, it is not abandoning the precept that “selling what one does not possess is illegal.” This general law is only narrowed down (takhṣīṣ) to the custom of istiṣna‘, which implies that weavers receive their raw materials in advance in exchange for commodities they will exchange only later. Thus, because the fiqh is by essence general and abstract, it needs, vis-à-vis custom, to be re-conceptualized on a case-by-case basis. That, indeed, seems to have been Ibn ‘Ābidin’s “method” for bringing the fiqh and custom closer so that one does not ignore the other. Since custom narrows down the fiqh to specific practices in space and time, it injects it with a life of its own, so that the whole legal apparatus becomes patched with customary laws that were the creation of daily practices of individuals and their groups.

However, the concept—or “method”—of takhṣīṣ did not win the hearts of all the jurists since there was no consensus around it: “The text should not be left out for the sake of some [customary] practice [ta‘āmul], but only narrowed down [takhṣīṣ]. Our jurists [mashā‘iykh], however, did not permit such a narrowing down because this is a practice [istiṣna‘] which involves the inhabitants of a single village only” (ibid.). Such an opinion has already been reiterated in Ibn Nujaym’s Ashbāh and several other fiqh manuals. The problem, however, is a serious one and goes beyond being able to determine what is legal and what is not. For one, many customary practices will persevere as long as they are needed; they are entrenched in the minds of individuals and societies and there is no way that anything could stop them. For another, customs are by definition infinite in number, each one being usually region specific. But while the fiqh runs the risk of marginalization if
it persists in its staunch position towards customary practices, at some point, some conciliatory statements begins to emerge in Ibn 'Abidin's risāla:

People became accustomed to the trick [hila] of istiṣna' through common knowledge [bi-l-ta'ārif al-āmm] because this is a much needed practice which they have been accustomed to from one generation to the other; so it became permitted despite the fact that it did not fit with [the logic] of analogy [jāzat 'ala khilāf al-qiyās].

(2:115)

Analogy (qiyyās) is the fourth rule established in Shafi'i's Risāla, as a fourth step after the Qur'an, sunna, and consensus (ijmā'), in order to establish the validity of a legal rule as part of sharī'a law. In a previous statement, asserting that “analogy does not apply when we are dealing with the case of a single village [al-qiyās lāyutrak bi-ta'āmul baldah wāḥida]” (ibid.), Ibn 'Abidin nevertheless eliminates analogy altogether—at least for the kind of customary practices that seem too specific. But if, as the above passage does suggest, some customary practices have survived to become the norm and are then legalized despite breaking all four basic rules of the fiqh, it then remains to be seen whether they would nevertheless be fully incorporated in the canon and accepted as such. Would they even serve as future cases of analogy upon which similar opinions would be constructed? The remainder of the risāla will in fact ponder on this single issue: if, as it has often been stated that the “text is stronger than custom [al-naṣṣ aqwā mina al-'urf]” (2:116), how can the fiqh then accommodate customary practices that have already achieved the status of a de facto law?

In an unusual step, the remainder of the risāla shifts its interests from the abstract to more concrete, such as weights and measures, gold and silver, currencies, rent, taxes, and the status of land, all of which, in spite of the great changes to which they had been subjected in Ottoman times, did not have a thorough follow up in the fiqh literature. The general problem that establishes the dynamics between custom and the fiqh is as follows: “The sharī'a Text is stronger than custom, and the stronger should not be left in favor of the weaker. But if what the Text leaves out becomes taken over by the habits of people [maḥmūl 'ala 'adāt al-nās], then a ruling is possible in their favor [li-annahādalālah 'ala jawāz ḥukm]” (ibid.). For example, if people become acquainted in selling money for money or giving loans based on [the] number [of monies (coins)] [istiqrād-thābi-l-'adad], as in our time, this would be in conformity with the text” (ibid.), and judicial decision making should thus take such practices into consideration. The issue here, as before with the practice of istiṣna', is giving an advance “loan” (qarḍ) in the form of a commodity (including money) and getting a refund whose value would be superior to that of the original commodity: such a practice would be a loan-with-interest (ribā) pure and simple. Even “exchanging money for money” with no interest is no simple matter due to possible fluctuations in gold and silver prices from one year to another and because of the variations in the systems of weights and measures that often misleadingly carry the same name within different localities. Thus, for example, since the intrinsic value of most currencies was gradually decreasing, the weight of gold and silver contained in them was also decreasing; hence, a loan refunded years later by exactly the same amount—that is, the same number and type of coins—would be nominally the same but intrinsically less: obviously, in such a case, there would be no illegal act of ribā since the creditor lost and made no surplus from such a transaction. Ibn 'Abidin, however, presents much historical evidence that points to the fact that changes in the intrinsic value of the same currencies that have been minted in different periods pushes individuals in many instances towards ribā-practices, illegal customary practices that sharī'a law would not possibly tolerate. In
fact, such practices became so widespread that very few people were even aware of the illegality of many contractual forms, whether transactions, loans, credits, rents, and the like. Indeed, from the point of view of the fiqh, “all the contracts of our time are invalid [jami’ uqīd ahl hadhāāl-zamān fāsidā]” (2:117) since the only way to achieve a valid purchase is knowledge of the “real value” of things (miqdār al-thaman); that would only be achieved “by imposing an adjustment [musāwāt] among the various weights and measurements” (2:118). More practically, however, what people should do is either opt for a transaction where the value of commodities is assessed in terms of the respective weights of currencies (particularly gold and silver) or their number. This is particularly helpful when payments stretch over long periods of time or when they do not coincide with the delivery of the purchased commodities.

Currencies, weights, and measures are all examples of an ‘urf ‘āmm type of custom since they cannot be restricted to a small locality. The point here is the association of the variations between currencies, weights, and measures with custom; that is to say, since the association of a “value” to a particular coin is an arbitrary step, which is more the outcome of practice than reason, it would only be the outcome of custom. This is especially true in societies where local currencies were still minted with gold and silver and where paper money was not common. Since there was a systematic devaluation of coins in terms of their respective gold or silver weights, Ibn ‘Abidin identifies as custom the association that social actors unconsciously assume between their formal and intrinsic values. Obviously, all such associations were wrong, illegal, and led to invalid contracts—from the point of view of Ḥanafī practice, of course. But what would the sharī‘a do when confronted with massively established customary practices except request that some kind of order must be brought to them?

In the two examples discussed thus far, both of which operated on the distinction between private and public, the private custom was typically conceived as too weak to be of any value to the fiqh, or, in other words, it would have been too much asking from Ḥanafī practice to recognize as legitimate all regionally accepted customs. Ibn ‘Abidin’s own opinions, however, on these issues never seems clear cut. Thus, while accepting previous opinions on the primacy of text over custom, he did acknowledge—if not accept—some customs as a fait accompli. The whole question of custom vis-à-vis sharī‘a law would not have been that crucial in the first place had the latter posed itself as a socio-historical creation, as most modern systems of justice do, rather than as a religious (hence divine) and immutable entity tied to the formation of its madhāhib. Once a system of justice projects itself as a social and historical construction, it implicitly (or explicitly) accepts its codes and institutional foundations as relative to a specific historical period. In other words, what is yet to be coded, or the lebenswelt “outside” the codes and the system itself, is not perceived as “customary” anymore: from the complex institutional frameworks of society, and from the power-relations between classes, groups, individuals, etc., emerges sets of discursive and non-discursive practices that would establish the ground for new codes and legal practices. Societies with modern systems of justice that represent their own becomings as socio-historical typically tend to minimize the whole issue of “customary laws” as such in favor of state-enforced legislation: a practice is either legal or illegal, and if a non-legalized practice imposes itself and achieves the status of a quasi-law, it either has to originally fall within the domain of the customary, or else see its legality denied. Besides the socio-historical character of such systems, their formally
abstract and systematic codes allow them to bypass the issue of dealing with social practices (or customs) on a one-to-one basis.

It is indeed possible to narrow down [takhṣīṣ] a general or public custom ['urf 'āmm] [to its specifics] when there is enough evidence that those issues [masā'il] and the like had equivalent customs at the time of the first scholars [mujtahids] from the Companions and on. Otherwise, it should remain general [and accepted as such], in a way similar to a local custom ['urf khāṣṣ] which is valid in one locality [bālda] and which is what the majority of its inhabitants have practiced [ta'āmala] [for some time] whether it was old or new (2:123).

73 And few lines later,

The idea of accepting [i'tibār] the local custom of a single locality [as valid] came as an opinion [qawl] in the madhhab; [but this is a weak opinion] and a weak opinion would be worked [ʿamal] with when necessary (ibid.).

Ibn ʿĀbidin might indeed have been paving his way for a reconciliation between the local and general customs, on the one hand, and Ḥanafī practice, on the other, but for what purposes exactly? All the arguments thus far, despite what looks like a tortuous path, are in fact coherent enough: 1) Ḥanafī practice must remain the ultimate reference and should be taken into consideration whenever possible; 2) more specifically, the practice of the madhhab is stronger than custom; 3) when custom proves itself strong enough on particular issues and has adherents among a population, its acceptance by the fiqh depends on whether the two oppose each other or not; 4) there should be in principle no problem if they don’t; 5) if they do, the first question to be asked is, Is this custom general (public) or local (private)?; 6) Ḥanafism favors a public over a private custom; 7) but in both cases we might end up with customs only marginally supported by the fiqh, in spite of weak opinions, unless there is a possibility of a narrowing down (takhṣīṣ) that would link—by analogy?—those customary practices to old ones from the time of the Prophet and his Companions. So, takhṣīṣ seems to be indeed the legal method that establishes, by means of qiyās, the link between a current custom to an old one. But what if, as in the majority of cases, such a connection could not be completed? The historical examples surveyed by Ibn ʿĀbidin, covering both the general and local, are of primordial importance for the economies of these societies, and since many of them seem to be in direct confrontation with the fiqh, should they be simply taken as a fait accompli without being ever officially legitimized?

75 Besides the fact that both categories, the local and general, are of primordial importance to economy and society, the borderline that separates the two is not all too clear. Thus, in the ʿāmm were included currencies, weights, and measures, that is, all items that would not make sense if attached to a small locality only (a village or even a town would not survive with a currency of their own making); while various ijāra contracts, types of loans, and labor contracts such as the istišnā were classified as khāṣṣ on the basis of their being rooted within a single community. Beyond that, the demarcation line does not play that well: how small should a “community” be to be singled out as a specific case? But the main question remains, what ought to be done with all those customs, since no satisfactory solution has come up yet? It is only in the second half of his risāla that Ibn ʿĀbidin will open discussion up to those customs and “accept” them for their historical necessity.

76 He first states that independent and creative judgment, ījtimā’, implies “knowing the habits of people” (2:123); and then plays with the notion of time (zamān) as an essential
factor in explaining why opinions of mujtahids sometimes differ from one period to the other on a single issue.

For this reason, the learned men of the madhhab have often opposed what a mujtahid had decided on a particular issue, and whose opinion was related to his own time, because they assumed that had he lived in their own time, his opinion would have been like theirs, following the rules of the madhhab (ibid.).

Linking an opinion to the times that produced it will be the beginning of a “historicization” process that would eventually lead to accepting all kinds of norms—whether Ḥanafī or customary practices—as relative to their own time and space. But the notion of “historical”—which is not denoted as such in the texts under examination—ought to be taken very restrictively—as an awareness of the restrictions that time as such imposes on an opinion, rather than, say, a conceptualization of the fiqh as an enterprise whose overall meaning and significations become obsolete as a totality because of their historical nature. We are confronted here, once more, with the overall nature of pre-modern discourses and the way they conceptualize their praxis in terms of a binding totemic past.

Once the process of ijtihād is itself “historicized,” opinions of the canonical scholars would then have less weight on the present, and contemporary scholars would then adjudicate based on the needs of their own societies. That would give more room for jurists to validate customs that otherwise older opinions might have rejected. Such is simply stated the logic that emanates from the last section of the risāla: it begins to pave the way in explicating why it is sometimes necessary to forge different opinions from the canon. Thus, while mentioning a specific type of rent (istīḥār) over which the ‘ulamā’ had been in disagreement with their three Ḥanafī founders, and over which they wanted a similar kind of treatment as for fasting, praying, and pilgrimage, Ibn ‘Ābidīn describes such differences in opinions as a “conflict of age [ikhtilāf ‘aṣr]” rather than one of “argument and proof [ḥujja wa burhān]” (2:124). What fosters such differences is the fact that customs change in time, and, in turn, opinions of scholars are affected by such changes.

Custom changes according to the transformations of the times. So when a new custom comes into being, should the muftī of our time give an opinion while assuming the validity of the latter even if it is in opposition to what is already established in the legal manuals? The same applies for a judge (ḥākim) who has to find his way out through presumptions [qarāʾin]. (2:126)

This has been thus far Ibn ‘Ābidīn’s clearest and most straightforward formulation of the problem; it also constitutes an additional intermediary step prior to establishing that new opinions, which were inconsistent with older ones, might have been the outcome of changes in the customs rather than an inconsistency in the line of arguments itself.

You should know that the latecomers [muta’akhkhirūn] who opposed what was said in the manuals of the school on the previous questions, did so only because the times and customs have changed, and because they knew that had the founder of the school [ṣāḥib al-madhhab] lived in their times, he would have given an identical opinion to theirs (ibid.).

What was perceived at first hand as the “heretic” opinions of the latecomers, are now legitimate in accordance with changing times and customs. Custom is pushing Ḥanafī practice towards a modification of many of its opinions, but there does not seem much movement the other way round. That the fiqh was gradually transformed by custom—even though Ibn ‘Ābidīn would argue that such changes were not structural, that is, they
did not affect the substance of the fiqh but only “formalities” that were due to changing times—was indeed a major acknowledgment coming from a nineteenth-century faqīh. To my knowledge, none of his predecessors formulated it that openly. Still, several questions need to be answered before we determine how radical a statement it was. How did jurists and muftis decide on “new” opinions? How did those new opinions relate to older ones, in particular the ones considered as “foundational”? And how did they affect the Ḥanafi school as a legal doctrine: Were the new opinions simply patched, or did they provoke a restructuring on some issues? Were new opinions always integrated into the legal corpus to catch up with emerging customs, or was the resolution to some customs left unanswered? Concrete historical examples need to supplement each answer, whenever possible. Overall, Ibn ‘Abidīn seems unable to work out the relationship between custom and law with a set of abstract, rational, and coherent rules. Instead, he leaves a lot to personal independent judgment at the discretion of jurists, judges, and muftis. Thus, in reply to the first question, How did muftis decide on “new” opinions?, his answer seems to be typically focusing on the individual responsibility and knowledge of each muftī.

81 The muftī who gives an opinion based on custom has to know well his own time and the lives of people, and whether the custom in question is general or local, and whether it contradicts the text in the first place. (2:127)

82 The muftī’s “method” in deciding how to relate emerging customs with Ḥanafi practice in order to state an opinion based on his knowledge of his society, places him in a mindset with “casuistical questions,” to use Kant’s terminology of the Metaphysics of Morals. That implies that the questions can only be answered by careful thinking about a particular issue, and not just by deploying rules. Weber also thought—probably extending the Kantian argument to another domain—that many legal systems argue casuistically, that is, by providing probable and carefully thought answers on a case-by-case basis rather than through general legal rules (Weber shared similar views for the social sciences as well). For Weber, “casuistical logic” seems a necessity for any legal system; a serious structural problem emerges, however, when the system as a whole is unable to work through abstract rational rules and reasons casuistically for almost any issue. In our case here, what needs to be analyzed is whether the “casuistical questions” that every muftī had to challenge were the outcome of necessary “consultations” that would have only been framed the way they were, or else produced by a system in crisis whose emerging opinions would no longer conform to the old precepts of the school.

83 In the passage above, besides the jurist’s knowledge of his own society and customs, the main problem, prior to adventuring into producing an opinion, is to check whether the custom in question is general or local, and whether it is in conflict with shari‘a law. The distinction between general and local custom has been haunting the risāla from its beginning, but, thus far, what is to be accepted as legitimate remains uncertain at best. The only “rule” that has been established with certainty is when any custom, whether general or local, should be rejected by the legal system—that is, muftī should not rule in its favor—when in (formal) contradiction with any text of the shari‘a: but even here, a muftī could accept it on the basis that it was a product of its own times. The other rule of thumb is that general customs are usually a stronger category than the local or private and thus have more chance of survival. Beyond that, even the main issue of determining the category of a custom—general or local—seems to follow no definite rule and is one more of those numerous “casuistical questions” left for the muftī (or jurist, or judge) to meditate upon. Is it therefore that important to differentiate between a general and local
custom as long as they both seem in contradiction with shari’a law? To Ibn ʿĀbidin the answer seems positive:

A ruling based on a custom [ḥukm al-ʻurf] would show whether it is global or local. Thus, since a general custom is practiced all over [sāır al-bilād in other localities], its ruling will also be applied to those people all over [living in other localities] [ahl sāır al-bilād]; as to a local or private custom, since it is specific to a locality, rulings [based on this type of custom] will be applied only to the people of that locality (2:130).

The presupposition here is that general and local customs are two different and distinct categories which are neither contained in one another, nor assume each other, nor overlap, so that even “a general ruling cannot stand firm (stabilize) upon a local custom [al-ḥukm al-ʻamm lāyathbut bi-l-ʻurf al-khāṣṣ]” (ibid.). What in fact jurists would have liked to avoid is the possibility of rulings, based on local customs, that would eventually metamorphose into general rulings accepted in many courts all over; obviously, there is no problem vice versa. The main problem, however, remains the vagueness of the expression sāır al-bilād, which only denotes a large enough locality: but how “large,” and what were “large” enough proportions from the standpoint of the fiqh? Like a mufti’s personal knowledge and judgment on the customs of his own locality, “largeness” did not seem to follow a specific criteria and was therefore left to the discretion of scholars: “Muftis and judges should not rule on a question formally [ẓāhir al-riwāya, that is, based mainly on Ḥanafi ʿusūl] and leave out custom” (2:131). But now that custom looks to be certainly unavoidable, what is it that would be identified as a customary law that a scholar would integrate, using his discretionary powers, into his judicial decision making?

When general or local customs seem at first hand to contradict Ḥanafi practice, they still ought to be examined carefully prior to discrediting them; the two categories, however, do not mix together, and a ruling based on a local custom should not become a general ruling. All this leaves plenty of room for muftis and judges to maneuver, a step that could be described as casuistical questioning and reasoning. In fact, there seems to be two distinct and interrelated levels that make possible that kind of reasoning, that of ʿusūl, on the one hand, and their furūʾ. General and local customs are indeed often in conflict with shari’a law, or more specifically with ʿusūl al-madhhab, the foundations of a particular legal school. However, because muftis and judges share a common power to accept a general or local custom, they created a parallel literature known as the furūʾ, or the positive legal rulings, which consists of the various mutān, shurūṭ, and fatāwā. The furūʾ makes possible therefore the survival of all kinds of customs and their textualization into a body of texts. Indeed, in some respect, the furūʾ would be considered as the “historical textualization of customs.”

When a local or private custom is in conflict with the text of the legal school [al-naṣṣ al-madhhab], which, in turn, is based [maqāīl] on the founder of the school [sāḥ ib al-madhhab], then the custom in question would be accepted [mu’tabar] following [the opinions] of the scholars of the mutūn, shurūṭ, and fatāwā in the furūʾ which we have already mentioned (2:131).

The “original” customary practice is thus metamorphosed and buried, in the domain of the fiqh, within layers and layers of texts that constitute the essence of the furūʾ. This process of custom-textualization, besides establishing a “precedent” for a customary practice, also links a newly accepted custom with a textualized precedent. Thus, the whole domain of custom, which in essence belongs to what Pierre Bourdieu described as le sens...
pratique, is within Ḥanafī practice metamorphosed into something else: a legal set of texts, the furūʿ, which were parallel to the ʿuṣūl, and which served as handbooks for the muftis and judges to accommodate the newly emerging customs. Because each custom had to be matched with some textual precedent in the furūʿ, the reductive character of such an enterprise—the only legitimate one within the domain of the fiqh—needs to be questioned in terms of what it leaves out from those customary practices. But what if a custom has no precedent? Did the jurists ever recognize the existence of such customs?

The linguistic roots of custom

What should be of interest in the context of our discursive approach is Ibn ʿĀbidīn’s crucial step in associating custom with language. This takes place at two levels. First, the association between a newly emerging custom and a textual precedent from the furūʿ; then, second, the problem of a common language essential not only in the daily lives of people, but also in the way commoners understand the law, how they interpret it when they draft wills, erect waqfs, or come to court as disputants, representatives, witnesses, plaintiffs, or defendants. In all such cases, common language acts like custom: it carries within it presuppositions, practices, and power-relations, all of which ʿāṣa law would tend to perceive under a different eye. Indeed, Ibn ʿĀbidīn reasons in terms of a major difference (ikhtilāf) between “the commoners [ʿawām] and the professionals [khāwāṣ, meaning the jurists]” (2:136) in terms of linguistic differences and perceptions. The last few pages of his risāla, which elaborates on those historical linguistic differences, is in fact the richest of the text.

Ibn ʿĀbidīn begins with the example of a woman who claimed that she purchased something from her husband. The majority of women and commoners (ʿawām) understood the sheer enjoyment (istimtāʾ) of what was allegedly purchased, and the satisfaction (riḍā) that resulted from it, as enough evidence in themselves that this property belonged in fact to that woman. From a legal point of view, however, such attitudes are valueless since they fail to prove any property (or other) rights. Evidence (bayyina) is needed to show that this was, say, transferred to her as a gift (hiba) or in some other way (2:133).

There is obviously a gap between the official language of the fiqh and the courts, on the one hand, and the common language of everyday life on the other. Thus, when people come to court, rather than adapt to the official legal language, their utterances would typically reflect their own understandings of what they were saying. What would end up as a gross misunderstanding operates in fact at two distinct levels. First, social actors using the legal system in order to draft a will, bequeath a waqf, or start a lawsuit, do so in a language they have been accustomed to and they find convenient. Because legal scholars are accustomed to their own scholarly and more generic language, they might misunderstand or reject “common statements” on the basis that they either constitute a violation to the law or that they do not fit within commonly accepted legal practices. Second, because the fiqh typically ignores such linguistic variations, opinions are usually drafted with an official legal language in mind. In short, language operates in a way very similar—if not identical—to custom—we would indeed even speak of customary language as a level that is corollary to customary practices. In fact, practices would have a linguistic foundation of some sort without, however, being limited to the linguistic. Practices could be symbolic, bodily, or both. For example, the īstiṣnāʾ custom considered earlier was a
case that involved a customary practice similar to the lending of money with interest: it was indeed a labor contract where the laborer would have to pay a surplus for the advance credit he received. Since this type of labor contract was based on a “linguistic understanding” of some sort (modes of payments, advances in kind or cash, etc.), the practice of *istiṣnā* becomes indistinguishable from the language of the community that made it possible. But there might also be signs, symbols, images, or representations accepted in a locality, which in essence are not linguistic, and whose assimilation into a legal corpus would be even more challenging.

The overall assumption here is that language plays a fundamental role in the power-relations between customs and the fiqh—each level trying to impose its own standards. That was fairly obvious in the attempt of the fiqh to accommodate customary practices as part of its *furū* and create a “precedent” for them; but despite the fact that the linguistic ambiguities of those practices were absorbed and normalized within a more standard language, the issue of what an interlocutor really meant to say remains an essential problem among the long list of “casuistical questions” to be posed by muftis, judges, and other legal scholars.

Arabic language [*kalām*] in its various dialects [*luḥār*] serves the purpose of agreeing among and talking to one another [*taḥfiham wa takḥāṭub*], and undoubtedly, each interlocutor intends the meaning of his own dialect [*yaḥṣud madāl luḥāti-hi*] so that his utterances assume that dialect [*yaḥmul kalāmi-hu ‘alayhi*], even if it is in conflict with the dialect of the ḥākim and judge in terms of its purpose [*qaṣd*]. (2:136)

In some respects, this view is close to some linguistic approaches common in the social sciences today, namely, the dialectical relationship between **langue** versus **parole**, or *lugha* and *kalām*. In fact, even though Ibn ‘Abidin’s use of *lugha* and *kalām* is confusing at this stage—*kalām* is used both as a regional dialect and a source for Arabic language—the intention is nevertheless to differentiate between the official Arabic language (*lugha*), on the one hand, and the various regional and individual dialects (*kalām*), on the other. The point here is that the various individual and regional dialects are always in a process of becoming, and they thus might create confusion and misunderstanding in their daily use. Hence customs, in a way similar to vernacular languages, are subject to the same linguistic fluctuations and thus pose a problem in the process of judicial decision making. The jurist by contrast drafts opinions to be associated with the more general and discursive logic of his own madhhab: in other words, if the jurist’s opinions are part of a collectively structured *lugha*, regional dialects, customs, and individual communications are all based on *kalām*, or a speech whose modification into a more structured discursive language like the fiqh involves a long historical process. So, when a judge is engaged in the decision-making process, should his decision take into consideration all such variations in speech, and what would the usefulness of such a step be? It should be noted that the judge himself possesses a *kalām* of his own, at least one that is yet to become part of the larger corpus of the fiqh, in particular if that judge intends to be a mujtahid and his opinions accepted by a wider audience. So, put simply, the fiqh is unable to ignore all such vernacular and idiomatic variations, and it has always had to assimilate them in its various *furū*.

The other fundamental aspect, at least from the viewpoint of speech-act theory, is that oral utterances, unlike written statements, are not divided on a true-false basis. This comes from the performative nature of every utterance—hence the term **performative utterances**: social actors do not simply transmit information to their interlocutors, but also
to convince, dramatize, lie, deceive, make promises, etc. Thus, an utterance, with what apparently looks like one meaning attached to it, generally manifests much more ambiguity at the performative level.

Ibn ʿĀbidīn’s language game is close, in some respects, to what Austin had in mind with his “speech acts”: that one must never look at what an utterance has to say at face value—that is, in its presupposed formal meaning—but only in association with the performance that ends up constituting its most essential aspect. Ibn ʿĀbidīn certainly did not argue in terms of performative utterances, but his notion of “customary language” was close to it. The language which he had in mind, and which at times was in direct conflict with the fiqh, is one learned by custom; and since learning a language by custom does not simply imply words, sentences, and syntax rules, but, more importantly, how to use them effectively as a resource for one’s status and interaction with others, “customary language” is certainly above all performative by nature. Even though Ibn ʿĀbidīn’s notion of custom—in the broad sense of the term—seems to have been restricted in everything we have encountered thus far to what is accepted by a “community” and to what its elders transmit as custom, or to what the furūʿ literature has assimilated of the latter and brought to discourse, in short, to customary law that would act as a parallel institution to Ḥanafi practice, it is still a big and major step to associate custom with the intricacies of language. Judicial interpretation is thus meaningless without its “sens évolutif,” or how concepts and notions come to be re-interpreted based on their present meaning rather than what the ancestors had in mind.

Speaking, for example, of the drafting of waqf documents, Ibn ʿĀbidīn maintains that, the propositions [ʿibārat] chosen by the founders of the waqfs [in their waqfīyyas] are neither necessarily based on the foundations of the fiqh, nor on those of the Arabic language, as maintained by imām Bulqūnī in his fatawa, but only on the way [those proposals] are articulated and understood in custom, and on what is close to the founders’ intentions and habits. (2:144)

Bulqūnī had ruled in a risāla (“al-Risāla al-marḍiyya fī-l-farḍa al-sharʿiyya”) that when the founder of a waqf explicitly stated in the written act that “the revenues should be distributed among my children [awlād] and descendants [dhurriya] according to sharīʿa law [ʿala al-farḍa al-sharʿiyya],” that implied, from Bulqūnī’s point of view, that revenues should be distributed equally among all males and females. His logic was based on an opinion by Abū ʿYūsuf who, in turn, based his on a hadith stating that the revenues or donations (aṭiyya) should always be distributed on an equal and fair basis (al-ʿadl wa-l-taswīya) among all males and females. Thus, among the main representatives of the Hanafi school, the idea was that regarding donations, gifts, revenues, and the like, the distribution among males and females should be on an equal basis, that is, for all categories of money and property transfers that exclude direct inheritance, the well-known rules of inheritance in Islam—males should inherit twice as much as the females—should not be followed. However, and despite the official precepts of the Ḥanafīs that opted for a distribution on an equal basis, customary practices—at least in the area of Bīlād al-Shām—imposed a different order by applying the same rules of inheritance to matters related to the distribution of revenues among descendants. Thus, it became indeed a well-known practice to give men twice the shares of the females when it came to distributing the revenues of a waqf. Ibn ʿĀbidīn notes that even though such practices were well-known to muftis and judges, some still insisted that the expression “according to sharīʿa law,” as stated in an act of a waqf, should be applied according to Ḥanafi practice, that is, equality between the sexes, his own ijtihād on that matter favors an
interpretation based on the accepted customs of those localities: *li-l-dhakar mithla ḥazz al-unthhayayn*. Indeed, for the period under study, Ibn Ḥābidīn’s opinion seems to have been the prevailing one. In all the waqf cases covered in this study (Chapters 6 & 8 *infra*), the distribution of revenues was on an unequal basis among all beneficiaries.

96 The acceptance of such customary practices is a sign that what matters, in the final analysis, is how language operates as custom: judges should thus read, say, a waqfiyya based on how statements and propositions made sense to the founder herself, that is, relative to the everyday language of her community. The privilege given to the process of *language contextualization*—with custom itself operating as a quasi-“context”—even pushed some jurists into accepting oral formulations as more “genuine” than their written counterparts. Thus, for example, in one of the cases analyzed below (C 8-1), the judge, basing himself on an opinion by Ibn Nujaym, accepted the oral alterations that the founder added later to his written waqfiyya, on the basis that the final ruling should follow “what the founder has said and not what was drafted in the waqfiyya.” It indeed all amounts to that notion of “customary language” (or linguistic custom) which is by definition oral, and, at one point, Ibn Ḥābidīn goes as far as to suggest that each utterance or statement should be taken individually, that is, relative to the utterer: “The statements [kalām] of the founder of a waqf should be contextualized [ḥaml al-kalām] according to his own knowledge of things [māhuwa al-ma'rūf 'inda-hu], and according to what he himself intended in his statements” (2:144); and: “It is our duty to accept the dialect [kalām] of each person making a contract ['āqid] in the context of his own habits, even if it opposed the language [lugha] of the Arabs and that of the shari'a” (ibid.). Even though the distinction between kalām and lugha (which, in this case, is accurately used and clarifies the confusion of the previous passage) is reminiscent in many ways of the tension that modern linguistic theories perceive between *langue* and *parole*, or the spoken and written in any language, the question as to why such a distinction is useful to legal doctrine is yet to be forcefully articulated.

97 Pursuing his inquiry regarding the unequal distribution of a waqf’s revenues among its beneficiaries, Ibn Ḥābidīn notes that what shari'a law prescribes for inheritance is the principle of *mufāḍala*, that is, differentiation between the sexes: “Differentiation is a basic rule in the domain of inheritance [bāḥ al-mīrāth]” (ibid.), but what custom does is to (wrongly) transfer such a principle to the domain of the waqf, even though, ironically, the majority of jurists were against it. Those who therefore push for “equality (taswiya)” between the sexes in the domain of the waqf should realize that they are favoring an idea that is “disliked” (makrūḥ) in the shari’a. But since “the meaning of [the expression] farīḍ a shar'iyya implies differentiation rather than hate” (ibid.), then by transferring such a principle to the domain of the waqf, we in fact fully satisfy both the shari’a and custom.

98 As our discussion in Chapter 4 shows, the basic precepts in Ḥanāfi practice regarding land, property, rent, and taxes had a poor following in Ottoman times. Worse still, Ḥanafī doctrine lagged behind and did not have much to say on the new contractual forms that were necessary for the long survival of the iltizām and mīrī system (not to mention its predecessor, the *timār-sipāhī* system). Classical Ḥanafī doctrine prescribed that the two main “taxes” of ‘ushr and kharāj were to be imposed on private lands only. Indeed, the “rent contract (‘aqd ījāra)” between the owner and the tenant-farmer assumes that the proprietor was in full possession of his property, and the contract itself is a sign that the land was milk. It was also established from the beginning, since this was one of Abū Ḥanīfa’s opinions, that the taxes of ‘ushr and kharāj should be paid by the lessor (mu’ājjir).
So, in this early system, the lessee paid a rent (ujra) to the proprietor for using the land, and the latter, in turn, extracted from the “rent” he received from the tenant-farmer the “taxes” of ‘ushr or kharāj (in principle, it should be one or the other, but it could also be both) to be paid to the state.

In his concluding statements, Ibn ‘Abidīn describes very well the changes that this system had been subjected to in Ottoman times. The main transformation came from the fact that most rural lands became state owned, that is, mīrī (even though he seldom uses this term). When the state became the main proprietor, the classical distinction between “rent” and “tax” faded away, and what the treasury of the state was extracting from the peasantry—through its multazim class—was the “rent” as such. Moreover, it was unclear what the classical “taxes” of ‘ushr and kharāj meant in this context; thus while kharāj was almost totally dropped as a term in the sharī‘a courts and the majālis records of the Tanẓīmān, the ‘ushr was kept in conjunction with the mīrī (or māl mīrī); but it remains unclear, since the fuqahā’ never dealt with the issue, what the difference between the two was. Before we move to what Ibn ‘Abidīn has to say on the most delicate issue facing the Empire (since land was the major source of wealth), it should be noted that the fuqahā’ used a different kind of terminology from the one of the courts and the majālis: basically, they kept discussing systems—the ‘ushr and kharāj—which ceased to exist a long time ago, at least in their initial connotations. What did the ‘ushr then mean when it was extracted on mīrī lands?

Ibn ‘Abidīn’s main preoccupation in his concluding remarks was on who should pay the ‘ushr: the tenant or the lessor? Obviously, from the standpoint of classical Ḥanafī doctrine, the ‘ushr should have been paid by the lessor since it was considered a “tax” on the “rent” (ujra) paid by the tenant to the proprietor. But in the Ottoman system, whoever might have been the lessor, he often ended with little revenues due to the fact that the state extracted most of the “rent” from the peasants or tenant-farmers. The complaint was therefore about the fact that “it became a custom in our times to extract the ‘ushr from the tenant [musta‘jir] rather than the lessor” (2:140). He then traces back the rule of “the tenant rather than the lessor [al-musta‘jir duna al-mu‘ajjir]” to Abū Ḥanīfah’s two disciples who did not agree with their master’s opinion that only the lessor should pay. Others, such as Khaṣṣāf and Qāḍīkhan, among the early Ḥanafīes, followed the rule too; and there were even more that endorsed it generations later, such as Ramli and ‘Imādī. Ibn ‘Abidīn then muses upon the implications of such an “event” (ḥāditha)—meaning, forcing the tenant to pay the ‘ushr—for his own time.

Should the imām reveal the truth [about the payment of the ‘ushr], a great damage would ensue on the waqfs and other types [of properties] that no one would dare to speak about. This is because it became a custom in our time that the owners [aṣḥāb] of the timār and the zu‘amā‘ [ze‘āmet] who are the agents [wukalā‘] of the sultan, God renders him victorious, extract both the ‘ushr and kharāj from the tenants [musta‘jir-ūn]. And it also became a habit that the political class [ḥukkām al-siyāsā] to receive the dues [gharāmāt] extracted [wārida] from the tenants’ lands. Since the majority of the villages and farms [mazārī] are waqfs, the tenant, because of what we have just said, can lease [yasta‘jir] the land with a small rent [ujra] only. It could be a big village whose rent [should in principle have been] more than a thousand dirhams, but it is rented for, say, only twenty dirhams, and this, because of what the political class extracts from [the tenant] in terms of the many dues [and the like], and because of what the owners of the timārs extract, in turn, from him. So if the administrator [mutawalli] [of the waqf] leases [ājara] this village for

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twenty dirhams, is it permissible for anyone to issue a fatwā requesting that the administrator [of the waqf] pays one-tenth [‘ushr] of what the village has produced [considering how low the rent is]? This is something that no one would accept (ibid.).

102 What makes this passage and many others opaque and confusing is Ibn ‘Ābidīn’s insistence in using a different terminology from the one commonly accepted in court records and official documents, and in not naming things by their name. To begin, the nineteenth-century land tenure system unanimously referred to was the ʿiltizām, and the multazims were the state-appointed agents (in principle to the highest bidder of the fiscal unit in question) who extracted the “rent”—that is, the māl mīrī—from the peasantry. In many cases, however, those multazims were from the aʿyān status group to the point that it would be safer to describe them as a combined aʿyān-multazims group appointed to extract the mīrī. Because land was formally state-owned, the aʿyān-multazims did not own the lands they were granted, and thus the peasant-farmers could not possibly have been their “tenants.” They were not the state’s tenants either. Actually, the whole system was one of corvée labor where the peasants enjoyed no “contract,” and were extracted most of their produce. The multazims were the ones appointed to extract this produce, kept part of it for their own expenses, and gave the rest to the state. The old timār and zeʿāmet system had mostly disappeared by the nineteenth century and fiscal units with life-time appointments were known as mālikāne, which, in turn, basically shared the same fundamental fiscal principles as the ʿiltizām. Only those who owned lands as private properties (milk) were able to lease them to tenant-farmers. It remains to be seen, however, what kind of “rent” those proprietors would have imposed in a system dominated by the “low rents” of the mīrī and waqf.

103 Knowing what the system really was, it is surprising to see Ibn ‘Ābidīn avoiding the most common terminology of the period to denote objects, groups, contractual relations, and processes. Instead, he creates a confusion by talking about the timār and zeʿāmet as if they were nineteenth-century notions, while ʿiltizām, multazim, and mīrī are surprisingly never mentioned; instead, he was more satisfied with euphemisms like the ḥukkām al-siyāsa and the gharāmats they imposed. Focusing then on the waqfs, since those represented, according to him, the majority of the rural lands, he notes the impossibility of charging the ‘ushr on the lessor (that is, the beneficiaries of the waqf, represented by the administrator) because the rents were much lower than what they ought to be. The reason why the lessor received so little in rent was quite obvious: by the time the “tenant” paid his “rent” to the administrator of the waqf, he had very little left after the multazim extracted from him the mīrī dues. As a matter of fact, the mīrī turned out to be the minimum since the state required additional “impositions” in kind from the peasantry, not to mention that multazims in general did their best to extract as much as they could. What the lessor ended up with was a minimal sum that could hardly be described as a “rent”; he therefore paid no ‘ushr, which was extracted from the peasantry through the state-appointed multazims. Hence both the ‘ushr and mīrī, as a combined sum (and assuming they coexisted over a single fiscal unit), were the real “rent.” This “rent” was what the state could extract: that makes sense since the state was the sole proprietor in the majority of cases. As to the claim that the waqf was the most common form of property, it remains to be seen where and when was this so. At any rate, the fact that the waqfs’ beneficiaries were paid very low rents was probably a sign that both waqf (at least family waqfs) and mīrī were practically the same in terms of the mīrī and ‘ushr...
dues to be extracted. Indeed, the same multazim could be assigned a fiscal unit that had both types of lands.

From customs to fatwas and beyond

104 A familiarity with the legal history of the Ottoman period reveals that the consolidation of custom as a source of legal change began with Ibn Nujaym’s Ashbāh, and achieved its ultimate formulation in Ibn ‘Abidin’s Rasā’il. Ibn Nujaym’s prime example of a custom-cum-law, the khulū, has become standard in Ḥanafī literature:

A fatwā should make it clear that the khulū which is imposed in some of Cairo’s sūqs on the shops [ḥawānīt] is necessary [lāzīm], and that khulū gives a right [to the tenant] for keeping the shop; to the point that the owner [ṣāḥīḥ] has no right to evict him [ikhrāj] or to rent it to someone else, even if it were a waqf.

105 A customary practice establishes itself within a community with a certain “legal validity” to the point that the muftī is pushed to drafting a fatwā acknowledging the custom-cum-law: it thus becomes textualized and moves around to other localities on this basis, and jurists would typically attempt to rationalize the existence of this newcomer on the basis that it originated in custom. But where laws do originate from is always uncertain, and a rationalization constructed in hindsight only serves to legitimize the existence of new norms: in fact, a norm imposed by sultanic legislation, such as the mīr-iltizām system, would be by all means legitimized as custom, and hence accepted as such.

106 Only judicial decision making, therefore, creates a process whereby a custom would become law. To think otherwise would imply that customs in general share an inherent (or autonomous) process on their own where by opinio necessitatis “the persons involved purposely follow a certain rule because they believe that it is a rule of law,” so that a “general conviction of law” is achieved. But a problem would immediately pose itself when attempting to explicate how a custom-cum-law gets accepted, is remembered, then falls into desuetude, and then is replaced by a new customary law. The missing link here is judicial decision making, and custom becoming law by virtue of an adjudicative process, either through the fiqh or the sharī‘a courts. That’s why Ibn ‘Abidin’s risāla gradually moves towards the containment of custom within the sphere of language and discourse: once formulated as parole, the customary law is then situated within the broader discourse of the fiqh, and thus achieves the status of a normative rule.

107 Ibn Nujaym had precisely such difficulties about custom in mind when he formulated what he called the “general rules (al-qawā‘id al-kulliya)” of the Ḥanafī fiqh. Such “rules” could in fact be looked upon as another historical attempt for a reworking of the Ḥanafī uṣūl as originally established in the Zāhir al-riwāya’s six manuals. A “rule” is by definition general, and its purpose is to bring the furū‘ together under a new set of principles so that even things that might have been disconnected in the first place between the ‘ibādāt and ma‘āmalāt might be coherently brought together under, say, the notion of “intention,” or niyya. Rules would also give the opportunity for jurists, judges, and muftis to exercise their own independent judgment when dealing, as they often do, with a specific question, so that knowledge of the “general rules” and their application “would enable a jurist to rise to the status of mujtahid even while drafting a fatwā.” Surprisingly, though, the only other attempt to define those “general rules” since Ibn Nujaym’s Ashbāh was the first chapter of the Majalla.
The Majalla was the Ottoman bureaucracy’s last attempt to save the Ḥanafi fiqh from desuetude. The first one-hundred articles were either taken word-for-word or adapted from Ibn Nujaym’s al-Ashbāḥ; and so was article 36 on custom (or habit): “al-ʿĀda muḥ akkama (“Custom has the status of law”).” One of the most authoritative sharḥ (explanation or interpretation) of the Majalla, that of Ṭāhir b. Ḥaydar, explains muḥakkama as “custom and habit become in themselves a ruling to lay down a foundation for a legal ruling [ḥukman li-ithbāt al-ḥukm al-sharʿī] in particular when there is no equivalent of a text to proceed with the ruling. If there is a text, then it should be followed; and the text should not be dropped in favor of the habit [habit and custom seem to be used interchangeably] because the believers do not have the right to modify texts. And the text is stronger than custom because the latter could be based on something false [bāṭil]...” Thus far, text is considered in its strong connotation of naṣṣ al-shārī, meaning “the Text of the legislator,” or the shari’a texts. This kind of Text is “stronger” than any custom. Such an assertion seems to be quite straightforward and easy to follow as a rule, yet in practice we have already encountered several historical examples, such as ʿṣhr, where the authority of traditional texts has been challenged if not bypassed altogether, thus creating a confusion among several generations of jurists before the custom in question became officially accepted—a “consensus” among leading jurists (even though it would have already been approved as a ḥukm in the courts).

But in what seems to be a broad consensus on texts conflicting with custom or vice versa, the Majalla opts for Abū Yūsuf’s opinion: “When text and custom are in conflict, it should be seen whether the text is based on custom and habit or not” (ibid.). That is, “when the text is based on custom and habit, the reference is habit while the text is left out. And when the text is not based on custom and habit, the reference is the text while the habit has no value.” Of the two propositions, the first seems the strangest: drop a text in favor of an “equivalent” habit? And how can a text be “based” on custom and habit? Let us suppose for the sake of clarity that a legal text was created for an existing custom: since the custom preceded the text and made its existence possible, why should custom become the “reference” in lieu of the text? That’s more understandable when the reverse takes place: a custom turned out to be in conflict with a pre-existing text—the text becomes an ipso facto reference. The two propositions seem indeed to contradict each other: in the second assertion the text is sacralized and kept despite the existence of customs and habits necessary for the survival of a society; while in the first, a text is dropped in favor of the custom upon which it was supposedly “rooted.” (The ambiguity is caused by this
“rootedness” (mabnī): how could a text be “rooted” in a custom?) Sensing these contradictions, or rather the possibility of misinterpretation, the sharḥ of ‘Alī Ḥaydar adds a cautionary remark:

This does not mean that what imām Abū Yūṣuf is implying is to forgo the text and work ['amal] with custom and habit, because, without any doubt [min ghayr shubba], the text is stronger than custom and habit, [and this applies] even to the text which comes from ordinary people [yaṣṣur mina al-nās: that originates from individuals]; [what he meant] in his opinion was something close to interpreting the text [ra'ya-hu bi-mathābat ta'wil li-l-naṣṣ].

Then follows an example:

When food is placed in front of a guest according to custom and habit, he would then be permitted to eat from this food. But if the host forbids his guest to eat, he would have then uttered a text [ṣadara min-hu naṣṣ] in opposition to the accepted custom and habit, and the guest will have to respect the text by not approaching the food and by forgoing custom and habit. If he eats, he would be acting against the text (40).

Here text is taken very broadly—not even restricting it to a written text—as anything that would be uttered by any individual in the form of an order, provision, or stipulation. It is not clear, however, how such an example clarifies Abū Yūsuf’s “rules” since this was a case of a stipulation privately uttered among two individuals and should have no legal consequences: the example only proves that the text—any text—is “stronger” than custom. But what would then be an example of a text dropped in favor of a custom? This seems to be the question around which the discourse on custom is turning around with no satisfying answer. But the only solution is to assume that once custom has metamorphosed into law, it will at some point be integrated into the furūʿi literature, hence become textualized, and the older text, if any, will be forgotten. The point here is that only judicial decision making inaugurates a custom into law and thus transforms it into a written text.

The sharḥ then proceeds with all the distinctions already encountered in Ibn ʿAbīdīn’s risāla: the private and public, and the practical and verbal. Several Majalla articles are in fact based on such distinctions. For example, article 230 states that the items normally included in an act of buying are so without being identified. Thus, when a house was purchased, say, in Cairo, a city where houses were on several floors, the stairs were normally included in the act of purchase without, however, an explicit mention. Article 576 states that when a custom in a specific locality imposes selling on the basis of several installments, then the contract should be according to that custom. In short, what those texts are saying is that written contractual documents (or orally established contracts for that matter) would not have possibly stated everything explicitly since their textuality was framed by the customs and habits which they never identified as such but always presupposed.

The following article—37—states that “When people make use of something, it becomes a proof that should be taken into consideration [isti‘māl al-nās ḥujjā yajib al-’amal biḥā].” When people become accustomed to a custom, its repetitive nature grants it the status of a ḥujjā, that is, as “evidence” that the custom is legally valid. Generally, we are told, the occupation (waḍ‘ yad) of a territory over a long period of time, and its possession (taṣarruf), are by themselves objective signs of full property (dalīl ʿala al-milk Zāhir-an) (1:41). Again, as before, customs follow the public-private division, meaning that everything is rooted in a locality, and a customary practice would end up accepted more generally only
when its acknowledgment goes beyond that particular locality. The above assertion, which is part of the sharḥ text that a waḍ yad represents as such an “external indication” for a vested right in the property, will be discussed in more detail later in conjunction with land tenure (Chapter 4 infra). Let me note very briefly that many of the cases discussed in the chapters below involve what might be labeled the hands-on and hands-off (waḍ yad and ṭaf yad) procedural fiction (Chapter 5 infra). The simplicity of that legal technique contributed in its ubiquitousness in the sharḥī’a courts: the plaintiff would claim that the defendant had illegally occupied and used his property for a period of time, while the latter would make the counter-claim that he had purchased it “for a known sum,” which remains unspecified (together with the alleged date of purchase), and since the plaintiff is unable to furnish any evidence regarding his alleged property rights, the judge would declare the property as the milk of the defendant. Add to this that plaintiff and defendant were in the majority of our cases closely related, meaning agnates from the same family as close as husband and wife, father and son (or daughter), and mother and daughter (or son). The purpose of such procedural fictions was to create contractual settlements that would be hard to revoke, and which in turn would consolidate specific property rights. The point here is that whenever Ḥanafism attempted to assimilate a practice that does not fit all too well with its corpus, it relegated it to custom and thus the textualization of the customary practice was self-legitimized on this basis. Judicial decision making was what usually did the trick: either in the form of procedural fictions (such as the waḍ yad technique), or in fatwās that accepted those new tenancy contractual forms (such as the marṣad, khulū, gedik, and sharecropping contracts). Remarkably, all this movement did not much affect the rationalization of substantive law itself: all those new contractual forms were worked out on the top of a law of sale and tenancy that basically remained untouched. Which is precisely what custom was supposed to contribute to Ḥanafī practice: let it accept what a rigid law of sale would not, while leaving that law unchanged.

In its simplest form, the relationship between custom and text boiled down, in the final analysis, to two basic rules. First, custom enjoys the status of a legal ḥujja as long as it is not in opposition to a text from one of the contracting parties—text is here understood very broadly as denoting any statement or utterance by any person involved in some kind of contractual relation (and not simply the legislator, shāri’). Thus, for example, when a person hires someone for so many hours a day, both should then follow the number of hours specified in the text of the contract rather than what custom, within their locality, prescribes. If the contract gives no specifications, then custom should be followed, hence the saying that “text is more forceful than custom.” The same rule should obviously apply whenever the text in question is derived from the fiqh. As to the second rule, it is concerned with the possibility of adopting a custom despite the existence of a contradictory text. This is indeed possible whenever the text is “based” on a custom. Thus, for example, a well-known hadith classifies gold and silver as objects characterized by their weight (mawzūn) rather than number, while barley is based on the kayl, that is, number. The Majalla claims that since there has been a reversal in the way such objects are measured, custom should therefore be here the prime reference. Such an attitude went well with Abū Yūsuf’s opinion on “when not to adopt the text” and against Abū Ḥanīfa and Shaybāni who gave privilege to the text under any condition.
Table 1-2
Text, custom, or both?

<table>
<thead>
<tr>
<th>Either Text</th>
<th>Or custom</th>
<th>Basis for a legal ḥujja</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 No text available</td>
<td>Available custom</td>
<td>custom</td>
</tr>
<tr>
<td>2 Text available</td>
<td>No custom</td>
<td>Text</td>
</tr>
<tr>
<td>Both text and custom available</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Custom and text in harmony</td>
<td>either one</td>
<td></td>
</tr>
<tr>
<td>4 Custom in contradiction with text:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4a If the reference is a shari’a text not based on custom</td>
<td>Text</td>
<td></td>
</tr>
<tr>
<td>4b If shari’a text is based on custom</td>
<td>possibility of adopting custom whenever it has crucially changed (Abū Yūsuf’s opinion)</td>
<td></td>
</tr>
<tr>
<td>4c If any (contractual) text opposes custom</td>
<td>Text</td>
<td></td>
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</tbody>
</table>

Out of all seven possible combinations, the first is indeed the most unusual since many customs became de facto laws because of the silence of the fiqh on many issues—or at least its inability to give satisfactory answers on issues raised in the past, with a set of followed opinions, but which had not been readapted to the realities of the times. One such example—and certainly the most crucial for Ottoman times—concerns the laws related to land, tax, and rent. Because the fiqh never confronted the Ottoman land tenure system and the massive state ownership openly, and felt comfortable with the classical obsolete notions of the ‘ushr and kharāj without thinking much about the new contractual forms that emerged out of the miri-iltizām system, laws had to supplemented from all kinds of sources, whether custom, or sultanic legislation in all its forms, not to mention the adjudication of the shari’a courts and the regional councils. But in all this, Ḥanafism was disappointing in that it never attempted to present the theoretical cohesion that the system needed (see Chapter 4 infra).

The other source of change, according to the Majalla, is when a shari’a text is “based” on custom. Because customs change over time, so do the shari’a laws related to them (article 39). One of the examples provided in the sharḥ applies to witnessing. Abū Ḥanīfa made no requirements concerning the “recommendation” (tazkiya) of witnesses in a money litigation unless there was a challenge (ta’n) from the other party. His disciples, however, “who lived in times when the ethical standards became corrupted” (1:43), required recommending the witnesses; and the Majalla followed those requirements.
But shari'a texts remain immune from change whenever they are custom free. An example, according to the Majalla, would be the law establishing that "the punishment of a killer who committed his action on purpose was capital punishment [jazā’ al-qātil al-and al-qatl]" (ibid.). It is hard to see why such a legal maxim is not based on any custom—otherwise, where did it originate from? In short, shari'a texts that have survived the hardships of the times are the ones not tied up to custom, while custom was the final cause whenever an excuse for change had to be rationalized.

A third rule should be added to complete our understanding of law and custom, namely concerning the dependence of custom on language and how it would affect judicial decision making. The Majalla’s shari‘a distinguishes, in line with many jurists, between three types of “utterances” (lafz): those whose meaning is “real” (ma‘na ḥaqiqi); those with a “metaphorical” meaning (ma‘na majazi); and, finally, those whose meaning is “metonymical” (ma‘na kinai) and could be either real or metaphorical (1:43-4). Obviously, whether we decide to follow the fiqh or modern linguistic theories, we have to accept that many words or use of words in any language do not denote anything “real” but constitute what would be described as “metaphorical” propositions (e.g., “the ruling had a chilling effect”). Thus, if I say, “He’s like a lion,” the real meaning would be to identify that man with being a lion, while as a metaphor it would point to the man’s courage and will: he has the courage of a lion. For the fiqh, such distinctions are of vital importance. To begin with, at a general level, there was an awareness that the majority of utterances could not be reduced to a flat, uni-dimensional, and real meaning. But accepting the principle of a necessary metaphorical level also implies an acceptance of the possibility of a multiplicity of meanings for each utterance. In the fiqh literature, such a multiplicity is either acknowledged on the basis of variations of custom from one locality to another, or variations in time (utterances have different meanings from one period to the other), or both. The Majalla worked with the assumption that “in essence” (fi-l-asl) each utterance has a real meaning; but such meanings, due either to inconvenience, impracticality, or time framework, had either acquired new metaphorical meanings or dropped (mahjur: abandoned) them altogether. This duality between asl and metaphor was another source of disagreement between Abū Ḥanifa and his two disciples. The founder thought that we should always “go back” to the original meaning to see right from wrong, while his disciples opted for the majaz over the asl. The Majalla, in turn, favored the opinions of Abū Yūsuf and Shaybānī on this issue, thus opting for a process of “contextualization” of every utterance. In short, Hanafism requests a similar process of contextualization for all kinds of customs, whether of linguistic origin or not—a process that opened the law to more variation and indeterminacy.

Table 1-3 The logic of the late (Ottoman) Ḥanafi practice in terms of legal doctrine and its relation to judicial decision making

<table>
<thead>
<tr>
<th>legal doctrine and basic normative rules</th>
<th>judicial decision making</th>
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The grammars of adjudication
<table>
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<tr>
<th>Even though the Ḥanafīs accept, as do all other schools, the four basic rules (originally developed by Shāfi’ī) of Qur’ān, sunna, analogy, and consensus, by the fourth/tenth century a consensus has developed within the literature which increasingly looks at the “foundations” (uṣūl) in terms of the works of the founding fathers of the school, and more specifically, Shaybānī’s six basic books (ṣāhir al-riwāya).</th>
<th>Judges and muftis selectively opt for opinions within the school, even though seldom by analogy, and mostly on an ad hoc basis through consensus.</th>
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<tr>
<td>The self-reliance on the literature of the school has created a “hermeneutic circle” where authors and texts are situated within a juristic typology of genuine interpreters and followers. Thus the bulk of “positive law” (furū’) became structured on the basis of rank and status within the school.</td>
<td>When judges and muftis quote opinions in their rulings, they care mostly about the “predominance” (tawātur) of the views of an author or text, and their status within the school.</td>
</tr>
<tr>
<td>Even though the Ḥanafīs did not develop a sophisticated theory of the state and political power, they nevertheless came to accommodate their doctrine within the constraints of the dynastic rules to which they had been subjected, and with the Ottomans, Ḥanafism became a state doctrine. Thus originated the notion of the maṣāliḥ mursala, norms that have been accepted for their “pragmatic” value, despite the fact that they are not particularly recommended.</td>
<td>The mīr-iltizām system was not particularly recommended by the late Ḥanafīs, and they left it for the most part outside the scope of their writings.</td>
</tr>
<tr>
<td>Customary norms are acknowledged by the Ḥanafīs and have the status of legal norms.</td>
<td>Judges and muftis sought to contextualize all utterances and practices based on the locality from which they had originated.</td>
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<tr>
<td>Property (milk) is understood as a “right” (ḥaqq) rather than as a “material” thing. The tripartite division between tangible objects (a’yūn), usufructs (manāfi’), and debts (duyūn) constitutes the domain of property as such. However, only tangible objects are māl, meaning that they could be freely exchanged with other commodities, while usufructs and debts are not, both of which are milk lā māl.</td>
<td>The Ottoman shari’a courts have considerably expanded the nature of contractual settlements through procedural fictions (see infra Table 2-2), so that in many cases, the validation of a contract went through a fictitious judge’s ruling.</td>
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</tbody>
</table>
Ibn Nujaym’s Ashbāh has accumulated what the Ḥanafīs have come to accept as their “general rules” (qawā‘id kulliya), which are general principles that serve to bring the foundations of the school under clearly established norms, thus (unofficially) bypassing the traditional “hermeneutical circle.”

The rules below have been selected on the basis of their links to the cases presented in this study.

Properties could either be acquired or else bargained for through an offer and acceptance (jāb wa-qabūl), thus leading to a contract (‘aqd) between the two parties. However, only a debt entails an “obligation” since the property must be handed in to the buyer to complete the transaction, which annuls any obligation.

<table>
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<tr>
<th>1. A judgment is in accordance with what the object of an act may be (al-umūr bi-maqāṣid-hā) (Majalla, 2).</th>
<th>If the purpose is, say, a donation, while the contract stipulates a payment to the giver, then the contract is invalidated, or else it would be considered a sale contract thus invalidating the donation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1 In contracts, attention is given to the objects and meaning, and not to the words and form (al-‘ibra fi-l-‘uqūd li-l-maqāṣid wa-l-ma‘āni lālīl-alfāż wa-l-mabānī) (Majalla, 3).</td>
<td>If the framing of the contract was, say, a donation, but the transaction involved a payment, then the contract would be invalidated as donation and transformed into a sale contract.</td>
</tr>
<tr>
<td>2. With doubt certitude does not fade (al-yaqīn lāyazūla bi-l-shakk) (Majalla, 4).</td>
<td>Judges should not waive an established evidence simply because of possible doubts over its veracity.</td>
</tr>
<tr>
<td>2.1 The remaining of a thing in the state in which it was found is the presumption (al-‘aṣl baqā‘ mākān ‘ala mākān) (Majalla, 5).</td>
<td>When there is uncertainty about an established evidence, judges should opt for the original state of the thing.</td>
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<td>2.2 When a thing is proved for one time, judgment will be given in favor of its continuance until there is proof to the contrary (māthabuta bi-zamān yuḥqam bi-baqā‘ih mālām yūjud dalīl ‘ala khilāfiḥ) (Majalla, 10).</td>
<td>Those rules became crucial in establishing evidence, in particular when it came to procedural fictions. Thus, “proof to the contrary” meant that the denier would take oath, and if he didn’t then the disputed thing would continue as it always was.</td>
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<td>2.3 As to attributes which may exist or not, the presumption, which there is, is that they do not exist (al-‘aṣl fi-l-umūr al-‘āriḍa al-‘ādām) (Majalla, 9).</td>
<td>The presumption for all “contingent things,” meaning all kinds of allegations that might or might not have occurred, is that they do not exit unless proven otherwise. A judge has therefore always to presume the innocence of the defendant, because innocence is the original state of any human being.</td>
</tr>
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<td>2.4 Freedom of indebtedness is to be presumed (al-ṣl barā’at al-dhimma) (Majalla, 8).</td>
<td>Since freedom of indebtedness is, like innocence, the original state of being, a judge has to presume it until evidence to the contrary.</td>
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<tr>
<td>2.5 To a man who keeps silence no word is imputed, but where there is a necessity shown, silence is a declaration (lāyunsu bi l-sūkī fī ma’rīḍ al-ḥāja ila al-bayān bayān) (Majalla, 67).</td>
<td>In the few shari’a cases involving homicides (see infra Chapter 11), silence turns out to be a golden rule. In fact, in those cases, plaintiffs typically come to court only with accusations, but without evidence. The plaintiff, however, has the right to push the defendant, as someone who denied the killing, to take oath, and had the latter kept silent, his silence would have been interpreted as declaration. For that very reason, plaintiffs did not push their defendants for oath taking for the sake of a contractual settlement.</td>
</tr>
<tr>
<td>3. Custom is of force (al-‘āda muḥakkama) (Majalla, 36).</td>
<td>Fundamental rule, one of the most important in the Ashbāḥ, out of which other sub-rules could be deduced, and which opened the way towards the integration of customary norms into the corpus of the fiqh. Many contractual settlements became accepted through fictional court procedures on the basis that their force originated in custom (see Chapters 1 &amp; 3).</td>
</tr>
<tr>
<td>3.1 What is directed by custom is as though directed by law (al-ta’īn bi-l-‘urf ka-l-ta’īn bi-l-naṣṣ) (Majalla, 45).</td>
<td>A sub-rule that gives custom the status of law.</td>
</tr>
<tr>
<td>3.2 Under the guidance of custom the true meaning is abandoned (al-ḥaqīqa tutrak bi-dalālat al-‘āda) (Majalla, 40).</td>
<td>The “true meaning” of an utterance or statement is their literal meaning, which stands in opposition to the “metaphorical meaning,” and which the law attempts to avoid. But custom, however, is an even stronger guide, so that the meaning of an utterance is relative to the locality from which it originated.</td>
</tr>
<tr>
<td>3.3 It cannot be denied that with a change of times, the requirements of the law change (lāyunkar taḥayyyur al-ādkām bi-taḥayyyur al-azmān) (Majalla, 39).</td>
<td>Fundamental rule (or sub-rule), for which Ibn ‘Ābidīn had devoted an entire “epistle,” that would have been incomprehensible without the notion of the changing customary practices. However, even though the Ḥanafīs did admit change, even one that could even influence the foundations of the school, such a change did not get “historicized” within their doctrine, so that we have opinions that are modified or become obsolete, but for which no historical path has been provided.</td>
</tr>
</tbody>
</table>
The marginalization of law

The two quotes at the beginning of the present Chapter exemplify best what our long détour has led us to. Both Ibn ʿĀbidin and Max Weber acknowledge in a way that is similar the influence of custom in such a way that the implementation of a new law by the legal authorities, and through a reinforcement of the state agencies, does not entail that the people in a particular community will forego custom and follow that law. Since my aim in this study is to highlight the mutual interactions between law and the economy—how those two “orders” influenced one another, and to what degree, at which level, they manifested a certain compatibility, and what kind of incongruence, if any, did exist—I would like to situate my project within a Weberian perspective which does not perceive the relationship between law and economics as causal in its nature, and then assimilate Ḥanafī practice and the Ottoman qānūn within such a perspective.

To begin with, and as a general rule, which reiterates the Weberian perspective outlined above, the correlation between a “legal order” and the “corresponding” “economic relations” remains always uncertain at best. Thus, “Under certain conditions a ‘legal order’ can remain unchanged while economic relations are undergoing a radical transformation.”

As we will see in Chapter 4, even late Ḥanafīs kept reasoning in terms of the much older “taxation” forms of the ʿushr and kharāj rather than provide a new legal language for the ilizām-mārī system. Such a discrepancy could be partly explained by the fact that shariʿa law neither interfered much with sultanic legislation, nor did it provide any framework for managing the economies of mārī domains. It thus remained an overall private system of adjudication, very much in conformity with the local customs in all their varieties, to the point that the two were for the most part indistinguishable. In fact, it is possible to think of the shariʿa system as a parallel system of adjudication to custom, but one whose authority went far beyond a certain locality, and whose knowledge and rulings were transmitted in writing, thus granting it more prestige and authority. But, other than that, the system did neither push for a greater homogenization of contract, which is the heart of any legal system (see Chapter 3), nor did it push collectively owned properties such as the waqfs into a form of sophisticated corporate arrangement (which would have also required the parallel notion of juristic personality). In short, and as rule, state intervention is neither needed to create and protect a legal order, nor to enforce the law, as the role of custom could be crucial in both. Thus, the Ottoman qānūn was a broader regional and inter-regional system creating legislation over matters, such as conscription, custom taxes, and obligations, and monetary transactions bearing an interest, for which shariʿa law either had not much to say or was outdated.

What the Ḥanafī discourse on custom points to was how much customary practices had a force of their own, so that the enforcement of contracts, whether emanating from a court or informally, was indeed inconceivable without that power of custom. In fact, in traditional societies contract was very much tied to status—what Weber labeled as “status contracts”—to the point that their enforcement went through the usual customary networks rather than any of the state agencies. The contractual settlements that we will come across in many of our cases, both civil and penal (even though such a distinction proves useless in many cases in particular when an “obligation” was framed in terms of a harm inflicted to the other party) were not implemented through a substantial legal protection monitored by the state, especially as such activities were practiced within a
small élite group. Thus, overall the courts remained relatively conservative when it came to working out a system of contracts and obligations that was more formal since that would have implied the spreading of contractual settlements towards a much broader base.

But, obviously, customs do not solely exist for the sake of a legal order, as their practices are associated with a variety of cultural, religious, and political implications, and their impact on an economic system tends to be unclear at best. Conversely, when the state aggressively promotes a series of economic and legal reforms, as was the case throughout the Tanẓīmāt, their impact on society could be very limited precisely because of custom and the binding role it plays, not to mention the parallel role of the shari'a courts. Moreover, the impact of a set of legal reforms on the economy could be very limited because the connection between law and economy is not necessarily a causal one, while drastic economic reforms, as have become fashionable in the Third World today (but also under advanced capitalism), are often implemented without their legal prerequisites, so that individuals find themselves in newly imposed contractual relations but with no adequate legal protection. Economic relations could thus undergo a radical transformation, due, for example, to an excessive inter-regional trade activity, while the legal order remains ensconsed within its old networks.

**Custom becoming law**

H.L.A. Hart made a famous distinction in which he conceptualized “law as the union of primary and secondary rules.” For our purposes here, custom could be viewed as those “primary rules” upon which the “secondary rules” of the fiqh act as a set of abstract norms with a long tradition and a juristic typology construed by jurists and scholars. Thus, rather than view a level as predominating and imposing itself upon the other, or to look upon the future in terms of a gradual process of codification through which custom will receive its share of marginalization, the alternative would be to perceive both levels as strongly interdependent on one another, concomitantly shaping each other’s practices. Custom would then be looked upon as a never ending flux of norms, ever alive and vibrant, but for the most part remaining vague and unformulated; hence as a process without which social life would come to a standstill. Following Fernand Braudel’s *longue durée*, custom would be perceived as what perseveres the most in a society, far below the flood of events and incidental happenings.

1. In a preliminary definition of custom, the Ḥanafīs broadly accept it as a behavior that people of a locality or region have very much adapted to in their daily lives to the point that it has achieved the status of norm.

2. The process as to how a norm becomes law has not been openly established, but the underlying assumption is that it must at some point be “acknowledged” by the fiqh.

3. That process of acknowledgment remains the most obscure part as it is unclear how the move from a commonly accepted normative behavior to a legal norm effectively takes place.

4. Even though the Ḥanafīs do acknowledge a “bodily custom [*urf ‘amalī],” their emphasis is indeed on “linguistic custom,” which perceives customary practices mostly relative to their linguistic components.
5. One can therefore assume that the transformation from custom to law, whenever that occurs, is a process of linguistic assimilation, that is to say, all what matters from a legal point of view is how the practice translates into speech, which, in turn, is what the law should restrict itself to once it accepts the customary norm.

6. What was effectively received by the fiqh as customary practices were for the most part all kinds of contractual settlements, such as the khulū, gedik, marṣad, musāqāt and muẓāra'a, and bay' al-wafā', all of which were received on a de facto basis with a poor integration into the corpus of the law of contract.

7. The assimilation of such practices into law probably first came in the form of local fatwās, prior to being acknowledged in some of the major doctrinal works, and, in between, the shari'a courts might have made some contribution through the required procedural fictions that legalized and routinized those contractual settlements.

8. The predominance of procedural fictions (see Table 2-2 infra)—at least in nineteenth-century shari'a courts—is a sign of the poor assimilation of customary practices becoming law: rather than openly and explicitly stating its objectives, a contractual settlement had to arise ex delicto, that is, one of the parties had to act as defendant for having committed a delict against the plaintiff, prior to achieving a contractual settlement in court. Procedural fictions thus became important tools of evidence in that they provided for a formalized bargaining process prior to the ruling.

9. Customs were therefore accepted as law for their economic necessity, so that not acknowledging them would have hurt the interests of the common people.

10. In spite of the fact that custom in general was fully endorsed, Ḥanafī scholars were for the most part unhappy with the customary practices that their madhhab had to reluctantly assimilate, even though the substance of the law remained intact, so that their assimilation remained conceptually marginal.

11. The fiqh had therefore assimilated lots of practices that did not match well with its core concepts (in particular regarding property, rent, and contracts). That in itself did not pose much of a problem for jurists who looked at such practices within the maṣāḥīḥ mursalah doctrine, that is, practices that were neither prohibited nor recommended, and thus kept the fiqh distanced from the contractual forms that originated in Ottoman times. Thus, Ibn Ḥābin's radical claim that "all the contracts of our time are invalid," falls well within the global attitude of Ottoman jurists that such contracts are invalid from a legal point of view, and their acknowledgment as customary practices is, faute-de-mieux, only temporary.

12. In effect, Ḥanafī doctrine on property, rent, and contracts did not substantially change, and the múrī-ilizām system had not been conceptually assimilated.

13. It remains uncertain what the fiqh labeled as "customary" originated from. In fact, it is naïve to even assume that such practices only originated in the localities they were attributed to. For one thing, borrowing from other legal systems is frequent, and, for another, many practices were, the outcome of the change in the Ottoman land-tenure system, towards which the fuqahā', for the most part, remained passive and uncompromising.

14. The core of Ḥanafism remained therefore substantially the same, with all kinds of peripheral—but economically essential—practices reluctantly integrated under the label of "custom." Thus, only the fiqh's recognition of customary normative behavior (whether
it effectively was or not) was what granted it the status of law to customs. The procedural fictions provided by the sharī‘a courts played an essential role in the process of official recognition as it enabled individuals to legalize their (customary) contractual settlements.

NOTES

5. See infra Chapter 2, Table 2-1.
6. Sunnī jīthād within the province of Damascus tended to be much more conservative and limited in its ambitions than its Shi‘ī counterpart in Jabal Āmil, which, being less tied to Ottoman control and the imperial center, reflected better the changing times and the socio-economic conditions of the region. Shi‘ī jīthād, being also far from the traditional centers of the production of Shi‘ī ‘ilm between Najaf and Karbala, had developed its own modus operandi in terms of understanding the changes of the late Ottoman period. For a description of such intellectual movements, in conjunction with their socio-economic underpinnings, beginning with the end of the Ottoman era until the independence of the Lebanon, see Sabrina Mervin, Un réformisme chiite (Paris-Beirut-Damascus: karthala-cermoc-ifead, 2000), Chapter 3 on the culture of the ‘ulamā’.
7. See infra Chapter 2.
8. It was up to the Ottomans, who had adopted the military absolutism of the Mongols and Mamlūks to their own needs by excessively bureaucratizing it, that Ḥanafism became the official legal madhhab. However, it would be misleading to think of Ḥanafism under the Ottomans as “state law,” or even as a quasi “state law,” since it essentially remained a privately protected and community-oriented system of transmission of normative values and of adjudication as well.
9. See, for example, Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic (Cambridge: Cambridge University Press, 1993), 32: “Legal domination may be seen more as the creation of a new context for action through the empowerment of a particular form of “creative imaginary reality”—legal discourse—as the modality of rule in a society.” The point here is to perceive law not as something purely “instrumental,” meaning a set of institutions whose sole purpose is to “adjust” to the preexisting economic order, and to play the role of an arbitrator for the latter. Thus, the notion of “modality of rule” grants the law a dynamic discursive role, which even though it overlaps with the economic order and its discourse (e.g., laissez-faire capitalism in the American republic), nevertheless maintains its own creative autonomy, and its own imaginative powers. Hence the necessity for a “legal domination,” which is not to be identified with political or economic domination, even though it assumes both for its survival, but one whose authority it derives both through the “pursuit of consistency” and the “achievement of consistency” (Tomlins, 294). In other words, it is precisely that social authority as a modality of...
Chapter 1: The discursive origins of the fiqh in light of the mounting fiction...

rule which provides the legal discourse the power to grant coherence to civil society, which neither politics nor laissez-faire economics can achieve on their own.

10. Muhammad Amin Ibn 'Abidin, Hāshiyyat ṭadd al-muṣḥaṭr 'ala ad-durr al-muṣḥaṭr: Sharḥ tanwūr al-ḥabīb fi fiqh maddīḥah al-imām Abī Ḥanīfa al-Nuʿmān, 8 vols. (Mekka: al-Maktaba al-Tijāriyya, 1386/1966) will be referred to throughout this study as the ṭadd, followed by the volume and page numbers. There are several editions available of the ṭadd, including a recent one by Dār al-Fikr (Damascus), which has a much better typescript and fewer errors than the one I have been reading for years, but which, unfortunately, like all the other editions, lacks the critical apparatus needed to understand such a difficult text, such that all of them look no better than printed manuscripts.

11. The Muḥaddima is located in the first volume of the ṭadd, 35-78. It is followed by “The book of purity (kitāb al-ṣahāra).”


14. I borrow the title’s translation from the late Norman Calder’s article on that same epistle, “The ‘Uqād rasm al-muḍīf of Ibn ‘Abidin,” Bulletin of the School of Oriental and African Studies 63, no. 2 (2000): 215-28, which is the only study I know of on Ibn ’Abidin’s work. Calder’s emphasis on the poetry that is integrated within the textuality of the fiqh, and which tends to be ignored by modern scholars, is well placed.

15. On the content of Ibn ‘Abidin’s rasā’il, see Appendix 2. I will be exclusively referring to the facsimile Beirut edition, Majmū‘at rasā’il ibn ‘Abidin (Beirut: Dār Iḥyā‘ al-Turāth al-‘Arabi, n.d.), which integrates two sets of rasā’il in one volume. Since each set has a different pagination, I will refer to them accordingly.


17. On the influence of custom on judicial decision making, see the final section below.


19. Ya‘qūb b. Ibrāhīm Abū Yusuf al-Qaḍī (d. 182/798), one of the three founders of the Ḥanafī fiqh together with Abū Ḥanīfa and Shaybānī, and was the first to be appointed to the newly created position of chief-judge (qāḍī al-qadīt) under Hārūn al-Rashīd; author of al-Kharāj (discussed below in Chapter 4).

20. Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804), one of the three founders of Ḥanafism with Abū Ḥanīfa and Abū Yusuf, and author of the six basic uṣūl manuals (see below).


22. Muḥammad b. Aḥmad al-Sarakhsī (d. 490/1097), major Ḥanafī faqīh and author of the influential Mabsūṭ.


24. Abū Bakr al-Rāzī (d. 370/981), Ḥanafī faqīh and man of letters (adīb), who resisted the attempts of the caliph al-Muṭṭi‘ (r. 334-63/946-74) to appoint him chief judge. His work on Qur’anic law, which shows his Mu’tazilite side, is briefly discussed in Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (Cambridge: Cambridge University Press, 2000), 334-38.


27. Hallaq, Authority, 14-17.

28. Kamāl al-Dīn Muḥammad Ibn al-Humām (d. 861/1457), Egyptian Ḥanafī faqīh of the late Mamlūk period, whose legal fiction of the “death of the kharāj-payer,” originally expounded in

The grammars of adjudication
his *Fath al-qa'dir*, will have an enormous impact on the early Ottoman jurists such as Ibn Nujaym, see Chapter 4 infra.

29. Khayr al-Dīn al-Ramlī (d. 1081/1670), Hanafi faqih from the Palestinian city of al-Ramlah, author of *al-Fatāwāl-khayriyya*, one of the major authorities in the *Radd*.

30. All in-text references in this section are from Ibn Ḥābidīn’s *Rasā’il*.


32. See the following section on “customary law.”


34. See *infra* Chapter 3 on contracts and obligations.

35. On the practice of *khulū*, see *infra* Chapter 3 on contracts.


39. See below Chapter 11 on crime.


44. All references to Weber are from his *Economy and Society*.

45. It has become common in contemporary anthropology to oppose custom with law, on the one hand, and to relate custom to practice (linguistic interactionism or general theory of practice), on the other. Thus, for example, as part of his “theory of practice,” Pierre Bourdieu states that, the “customary rules” preserved by the group memory are themselves the product of a small batch of schemes enabling agents to generate an infinity of practices adapted to endlessly changing situations, without those schemes ever being constituted as explicit principles. This is why, like Weber’s Kadi-justice, customary law always seems to pass from particular case to particular case, from the specific misdeed to the specific sanction, never expressly formulating the fundamental principles which “rational” law spells out explicitly (e.g., all men are equal in honor)... *Outline of a Theory of Practice*, Cambridge University Press, 1977, 16). The interesting point here is the parallelism that Bourdieu draws between “customary law” and Weber’s Kadi-justice, namely the fact each one of those systems—or “legal orders”—avoids general and abstract principles in favor of a case-by-case strategy. Thus, regardless of the fact whether such a characterization of “Islamic” judicial decision making is correct or not—and it should be emphasized that Weber did not intend to limit Kadi-justice to Islamic societies only—what is here implied is not the fact that a case-by-case strategy means that the system is open for total improvisation, but that a small number of “generative schemes” contributes towards an endless number of practices. In other words, customary practices function like language (even though Bourdieu does not reduce them to linguistic phenomena): on the one hand, they have to conform to a small number of grammatical rules which individuals are not even conscious of; and, on the other hand, those grammatical rules prepare for an infinite number of linguistic games—the potentials of any language are, indeed, infinite. In the case of Kabylia, Bourdieu notes that some of the customary laws explicitly assimilated within the *qānūn* became so precisely because they were stated in such a way as not to further aggravate a conflict. Thus in the case of theft, for
example, the generative schemes are so generally and automatically applicable that they are converted into explicit principles, formally stated, only in the very case in which the value of the object stolen is such as to sweep aside all extenuating or aggravating circumstances (ibid.).


47. All in-text page numbers in this section refer to volume 2 of Ibn ʿAbidin’s Rasāʾil.

48. The two events are supposed not to have happened accidentally.

49. All those statements, which originate in the Ashbāh, are quoted verbatim in Ibn ʿAbidin’s risāla.

50. See also Ibn ʿAbidin, Radd, 3:772-74: “on the issue of identifying the ‘urf ‘amalī with the ‘urf lafż i,” in which he reiterates the view that, unlike the Shāfiʿīs, the Ḥanafīs consider the ‘amalī as “specific,” mukhaṣṣaṣ.

51. Which became one of the several general rules in the Majalla devoted to custom (45). The other rules have the following numbers: 36 (main rule on custom as a “force in adjudication,” from which all others follow), 39 (crucial rule on the relation between time and custom, and hence on the necessity of adapting opinions and their meanings to the changing times), 40 (on speech, writing, and custom), 41, 42, 43, 44, 45, and 70.

52. Najm al-Dīn Mukhtār b. Maḥmūd al-Zāhīdī (d. 658/1260), Qinayat al-munya li-tattīm al-ghunya, known also as the Qinayah.

53. ʿUdhur al-madhhab has probably the same connotation as ẓāhir al-rīwāya, i.e., Shaybānī’s six treatises that lay down the foundations of the Ḥanafī madhhab.

54. The importance of the city of Balkh (now located in central Afghānistān) in Ḥanafī mythology stems probably from its crucial location at the crossroads of caravan trade routes that linked Persia with India, thus providing the city with an important silk trade with China. Having been conquered by the Muslims in the first Hijrī century (and then sacked by the Mongols in 1222), it became an important place for legal knowledge precisely because of its high-powered mercantilism, and thus provides an example of a “minor” and peripheral city to have offered, through a combination of its own regional customs, which touched upon the practices of a dynamic merchant class and an open-minded ’ulamāʾ, crucial normative values which have been acknowledged and practiced far beyond their center of origin.
55. See below, Chapter 3 on contracts and obligations, and the section on sharecropping.


57. If we understand by kalām the way individuals use a particular language at a particular moment, and lugha as the more abstract linguistic system, which by definition belongs to a collectivity, then the use of kalām with respect to the Arabic language is definitely misleading. Indeed, al-lugha al-’arabiyya would have been more correct since it would denote the idea of a complete linguistic and collective system, while kalām should be limited to the various regional and individual dialects. Thus, lugha is an equivalent to langue, while kalām is closer to parole. The fact that Ibn ‘Abidin either reverses his use of lugha and kalām, or does so interchangeably, is in my view more an indication of an unfortunate use of words than a conceptual tool.

58. The utterances of an interlocutor are here described as kalām, which is correct, but that renders kalām for the “Arabic language” improper.

59. On the significance of speech-act theory in reading sharī’ī texts, or more generally legal texts and court cases, see infra Chapter 8.

60. “The President of the highest French Court, M. Ballot-Beaupré, explained a few years ago, that the provisions of the Napoleonic legislation had been adapted to modern conditions by a judicial interpretation in ‘le sens évolutif.’ ‘We do not inquire,’ he said, ‘what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be’” (munroe Smith, “Jurisprudence,” 29-30, quoted in, Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), 84). “It follows from all this that the interpretation of a statute must by no means of necessity remain the same forever. To speak of an exclusively correct interpretation, one which would be the true meaning of the statute from the beginning to the end of its days, is altogether erroneous” (kohler, “Interpretation of Law,” 192, quoted in Cardozo, Nature, 85). Cardozo himself, who endorsed such “evolutionary interpretations” of the law, describes his own method as “the method of sociology” (see in particular Lecture III in Nature), on the basis that “the judge as legislator” must have a “sociological” knowledge of the society in question, which is a bit unfortunate considering that what is above all needed is an historical-hermeneutical approach to texts and sources that would be primarily concerned in the reconstruction of their historical meanings prior to adapting them to modern needs and circumstances.

61. Ruslān b. Abī Bakr al-Buqlīnī (d. 756/1355), Egyptian faqīh.

62. For a discussion of those differences, see Chapter 4.

63. Since there were not that many timārās and ze’āmets left over by the first half of the nineteenth century (in fact that system became obsolete by the late seventeenth century), Ibn ‘Abidin must have most probably implied the mīrī-iltizām system.

64. Probably implying the multazims as a group.

65. Probably implying the a’yān-multazims class.

66. For similar passages on land tenure, see Chapter 4 below.


68. Watson, Evolution, 45.

69. Ibn Nujaym, Ashbāh, 10.

70. All in-text page numbers in this concluding section refer to Ḥaydar’s Durar, vol. 1.

71. See infra Chapter 3 on contracts and obligations.

72. On the meaning of aṣl in the context of the Ḥanafi fiqh, see, Ya’akov Meron, “Forme et substance en droit musulman,” Islamic Law and Society 5, no. 1 (1998): 22-34. Zarqā’, Madkhal, 2:1061, defines aṣl as “what could be constructed upon, while it cannot itself construct on anything else [māyahni ‘alayhi ghayri-hi wa-lāyabni huwa ‘ala ghayri-hi].” For both Meron and Zarqā’, aṣl is close to the Aristotelian notion of essence.
73. The elliptic Arabic of the general rules, as originally stated in Ibn Nujaym’s *Ashbāh*, makes their translation no easy task. One could thus opt for *al-umūr bi-maqāṣid-hā* literal translation, such as “things should be assessed in terms of their purpose,” or a more comprehensive translation that would make it easier to understand the rule: “A judgment is in accordance with what the object of an act may be.” I’ve adopted the latter from an early translation of the Majalla, published in Lahore: “All-Pakistan Legal Decisions” (1967, reprint of 1901 edition), which I’ve used in this study in correlation with my own understanding of the Majalla.

