The State, the Community and the Individual;
Local Custom and the Construction of Orthodoxy in the *Sijills* of Ottoman-Cairo, 1558-1646

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Abstract

Through the evidence of the court records (*sijills*), this dissertation examines the interplay between Islamic jurisprudence (*fiqh*), codified sultanic law (*qānūn*) and customary law in the *sharī'a* courts of Ottoman-Cairo in the sixteenth and seventeenth centuries. The thesis forwarded suggests that custom was a declining source of law in these centuries as a result of two factors: the imposition of a codified *qānūn*, and a redacted *fiqh*.

Conflict between Egyptian and Ottoman jurists, a well-documented feature of the sixteenth century, is often depicted as a by-product of the tension between *qānūn* and *fiqh*. Questioning this framework of analysis, this study views the conflict between Egyptian jurists and their Ottoman counterparts as an exemplar of 'antagonistic *sharī'as*.' The Ottoman *sharī'a*, defined by 'universalism,' entailed a redacted *fiqh* in which Ḥanafism was privileged above the other schools of law, and a *qānūn* in which sultanic customs were imposed in lieu of local custom. The 'Egyptian *sharī'a*,' on the other hand, was defined by pluralism as it envisioned parity between the schools of law while upholding the role of local custom over and above the authority of the imported *qānūn*. At the core of this antagonism, therefore, are two cross-cutting predispositions: one, a propensity for legal orthodoxy; and, two, a propensity (on the part of the Egyptian judiciary) to retain the traditional features of Islamic legal orthopraxy.

At the heart of the state's endeavour to construct a legal orthodoxy was a desire to promote a model of 'correct outward conduct' that would generate cultural parity between the empire's myriad ethnic communities. Such an undertaking fostered more than a growing social homogeneity, however. Positioned as the final arbiters of social justice and morality, the state and its courts were able to realign the social contract between the state and its subjects to strengthen the ties binding the individual to the state while weakening communal bonds. In the final analysis, the increasingly assimilative role of an Ottoman-defined *sharī'a* over local custom, diminished the communities' roles in the arbitration of justice and led to the making of a proto-citizen in the Ottoman Empire.

Résumé

En se basant sur des procès-verbaux authentiques provenant des tribunaux *(sijills),* cette thèse examine l'interaction entre la jurisprudence islamique (*fiqh*), la loi sultanique codifiée (*qānūn*) et la loi coutumière des *sharī'a* des cours de justice d'Ottoman-Caire aux seizième et dix-septième siècles. La théorie développée ici suggère que cette coutume fut une source de loi en déclin durant ces siècles à cause de deux éléments : l'abus d'un *qānūn* codifié, et un *fiqh* rédigé.

Le conflit entre les juristes égyptiens et ottomans est bien documenté au seizième siècle, et est souvent dépeint comme un dérivé de la tension entre *qānūn* et *fiqh*. Dans le cadre de cette analyse, cette étude montre le conflit entre les juristes égyptiens et leurs homologues ottomans comme un modèle de *'sharī'a.* antagoniste'. Le *sharī'a* ottoman, défini par 'l'universalisme', compris d'un *fiqh* rédigé dans lequel *Ḥanafism* était privilégié au-dessus des autres écoles de loi, et d'un *qānūn* dans lequel les coutumes sultanesques ont été imposées à la place de la coutume locale. D'autre part, le '*sharī'a* égyptien' était défini par le pluralisme, envisageant la parité entre les écoles de loi tout en soutenant le rôle de coutume locale au dessous de l'autorité importée du *qānūn*. Au cœur de cet antagonisme, donc, se situent deux prédispositions contradictoires: premièrement une propension à l'orthodoxie légale ; et deuxièmement, une propension (de la part du système judicaire égyptien) à retenir les caractéristiques traditionnelles d'orthopraxie légale islamique.

Au cœur de la tentative de l'état de construire une orthodoxie légale, se trouvait le désir de promouvoir un modèle de 'conduite extérieure correcte' qui créerait la parité entre les myriades de communautés ethniques de l'empire. Cependant, une telle entreprise a encouragé bien plus que l'homogénéité sociale grandissante. Grace à leur position d'arbitres finaux de la justice sociale et de la moralité, l'état et ses tribunaux pouvaient réaligner le contrat social entre l'état et ses sujets afin de fortifier les liens reliant l'individu à l'état tout en affaiblissant les liens communaux. Dans la dernière analyse, le rôle de plus en plus assimilatif d'un 'ottoman-défini *sharī'a*' placé au-dessus de la coutume locale a diminué le rôle des communautés dans l'arbitrage de la justice et a mené à la création d'un proto-citoyen dans l'Empire ottoman.

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Transliteration Note

The Arabic transliteration method followed in this dissertation is that endorsed by the Institute of Islamic Studies, McGill University. For the sake of simplicity and consistency, Turkish words/offices widely used in Egypt have been transliterated according to the Arabic system, although the alternate Turkish transliteration is also given in brackets. In the same vein, the names of Ottoman governors and judges are transliterated in Arabic format in accordance with the Egyptian sources from which they are derived. The only exceptions to the above are the names of Ottoman sultans and chroniclers, for which I have given Turkish transliterations. Words that have entered the English dictionary, such as pasha and sultan, are not transliterated.

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Chapter four
Mu'āmala as it is and *Mu'āmala* as it Should Be: Custom & the Rights of Man (*Ḥuqūq al-Ādamiyyīn)*

Introduction

How do the customs of communities intersect with formal Islamic law and its attendant institutions to produce, expunge or modify Muslim culture? Where are the lines drawn between 'what is inside' and 'what is outside' the limits of the *sharī'a* and how do they (re)define the boundaries of Muslim 'orthodoxy?' And finally, does the theory of the legist correspond to legal practice? Any work that addresses itself to the place of customary law in the *sijills* of formal Islamic courts is, necessarily, faced with these questions.

The steady growth of research on Ottoman *sijills* has made enormous contributions to our knowledge of the economic, municipal and, to a more limited extent, the cultural history of the Islamic city. Concurrently, two broad themes have received the lion's share of attention: social and economic history. Books and articles have proliferated on social themes such as gender, minorities and slaves in the Ottoman *sijills* in turn broadening and deepening our understanding of the nuances of everyday life.[1] With few exceptions, however, they have not yielded much insight into the one

[1]For an introduction to the stylistic, and formulary structure of the Ottoman *sijill* see, S. A. I. Mīlād, "Registres judiciaires du tribunal de la Ṣāliḥiyya Naǧmiyya," *Annales Islamologique*, xii (1974): 163-253; Kāmil Jamīl al-'Asalī, *Wathā'iq Maqddasiyya Tārīkhiyya*, 3 vols. (Amman: Jordan University, 1983); K. Salameh, "Aspects of the *Sijills* of the Shari'a Court in Jerusalem," *Ottoman Jerusalem the Living City, 1517-1917*, ed. S. Auld (Jerusalem: al-Tājir World of Islam Trust, 2000). For political analysis based on the Ottoman registers see, R.C. Jennings, "Kadi Court and Legal Procedure in Seventeenth Century Ottoman Kayseri," *Studia Islamica*, 48 (1978): 133-72; and, "Limitations on the Judicial Powers of the Kadi in Seventeenth Century Ottoman Kayseri," *Studia Islamica*, 50 (1979): 151-84; For social history see, J. Tucker, *In the House of Law* (Berkeley: University of California Press, 1998); A. Layish, "Customary Khul' as Reflected in the *Sijill* of the Libyan Sharī'a Courts," *BOAS*, 51 (1988): 428-439; and "The *Sijill* of the Jaffa and Nazareth *Shari'a* Courts as a Source for the Political and Social History of Ottoman

area that is of obvious relevance to the *sijill* – legal practice. Writing on the significance of the Ḥaram documents, D .P. Little identified Islamic law as one of three areas:

for which the documents hold promise...the study of which has been bedeviled by what scholars suspect to be the discrepancy between Muslim legist theory recorded in the manuals of Islamic jurisprudence and that which Muslim judges administered in practice...and the insistence of eminent Western scholars that there is little, if any correspondence between the two, in spite of the fact that there has heretofore been hardly any evidence of legal practice with which to compare the allegedly theoretical manuals.[2]

His latest article, "A fourteenth-century Jerusalem court record of a divorce hearing," attempts to do just that and provides an exemplar for scholars and students interested in comparing legal theory and legal practice.[3]

The daunting requirements of such a project, mastery of Arabic, "chancery and notarial scripts, the *sharī'a* as embodied in the works of fiqh"[4] and history,

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Palestine," *Studies on Palestine in the Ottoman Period* (1975): 252-532. For an analysis of the *sijill* as a source of economic and social history see, S. Faroqhi, "Political Activity Among Ottoman Taxpayers and the Problem of Sultanic Legitimation (1500-1650)," *Journal of the Economic and Social History of the Orient*, 35 (1992): 1-39; and, "Towns, Agriculture and the State in Sixteenth-century Ottoman Anatolia," *JESHO*, 33 (1990): 125-56; J. Reilly, *A Small Town in Syria: Ottoman Hama in the Eighteenth and Nineteenth Centuries* (Oxford: P. Lang, 2000), uses the *sijill* to provide a socio-cultural, economic and, to a more limited extent, political portrait of the city. A limited number of works, focusing on Mamluk as opposed to Ottoman documents, have deepened the discussion by elaborating on the usefulness of the documents as a source for the study of Islamic art and architecture see, D. P. Little, "The Ḥaram Documents as Sources for the Art and Architecture of the Mamluk Period," *Muqarnas*, 2 (1984): 61-72. For more on Mamluk documents as a source of social history see other works by Little: "Six Fourteenth Century Purchase Deeds for Slaves from al-Ḥaram ash-Sharīf," *Zeitschrift der Deutschen Morgenlendischen Gesellschaft*, 131 (1981): 297-337; and "Two Fourteenth Century Court Records from Jerusalem Concerning the Disposition of Slaves by Minors," *Arabica*, 29 (1982): 16-49. The most important for students/scholars of legal documents more generally is his article, "The Significance of the Ḥaram Documents for the Study of Medieval Islamic History," *Der Islam*, 57 (1980): 189-219.

[2] Little, "The Significance of the Ḥaram Documents," pp. 216-17.

[3] D. P. Little, "A Fourteenth-century Jerusalem Court Record of a Divorce Hearing: A case study," *Mamluks and Ottomans: Studies in Honour of Michael Winter*, eds. D. J. Wasserstein and A. Ayalon (New York: Routledge, 2006): 67-85.

explain, no doubt, why few have endeavored to meet the challenge. Admittedly awed by the requirements of such a task, my only consolation is that the following work examines one small corner of legal theory - that pertaining to custom - assessing its relevance for the *sijills* of Ottoman-Cairo from the mid-sixteenth to the mid-seventeenth century. Another source of comfort is that, by contrast with cases settled in accordance with *fiqh*, which do not elaborate/explain how rulings were derived (i.e., in accordance with which judicial opinion or branch of positive law), the *sijills* clearly indicate when a case is decided on the basis of custom.

That said, works that focus on custom are rare in the field of Islamic studies. An unfortunate consequence of this neglect has been the inhibition of research into how Islamic legal theory "and popular culture were bound to exert an 'osmotic' influence on one another and interact in a variety of ways."[5] The majority of works on custom focus on the so-called Islamic 'periphery,' that is South-East Asian Islam as represented by Indonesia and Malaysia, South Asia or, in the case of Arab states, subgroups like the Berber or the Bedouin.[6] None, however, have attempted to tie the matter of customary practice to the formal courts of the so-called urban 'heartland.' This skewed approach is perhaps encouraged by the view that 'peripheral' states rest on civilizational fault lines, breeding 'heterodox' rather than

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[4] Ibid., p. 217.

[5] B. Shoshan's attempts to answer his own question are predicated on a Marxist analysis that divides subgroups along familiar class lines, i.e. "bourgeoisie" "scholarly," "bureaucratic," "low" and "elite." But Shoshan's analysis is essentialist in positing culture as a feature of class. B. Shoshan, *Popular Culture in Medieval Cairo* (Cambridge: Cambridge University Press, 1993), p. 67.

[6] See, J. C. Heesterman, "State and Adat," *Two Colonial Empires*, ed. C. A. Bayly and D. H. A. Kolff (Dordrecht: Nijhoff Press, 1986), pp. 189-201; Z. Kling, *Images of Malay-Indonesian Identity*, ed. M. Hitchcock & V. T. King (Kuala Lumpur: Oxford University Press, 1997): 45-52.

'orthodox' Muslim cultures.[7] But 'heartland states' like Egypt were not as culturally homogenous as is often assumed. In fact, as demonstrated below, culture in Cairo was far from monolithic, and encompassed a great array of linguistic, religious and ethnic variation.

A notable exception to the above trend is R. B. Serjeant whose systematic forays into the customs of southern Arabia have done much to shed light on the subject while raising intriguing questions about our understanding of the process of 'Islamization.'[8] Apart from this, the bloc of scholars known as 'Arab Ottomanists' have produced the most promising, albeit fragmented, research on the role of custom in the seventeenth and eighteenth centuries. To my knowledge the only work that directly addresses the *sijill* from the perspective of custom is H. Gerber's, "Sharia, Kanun and Custom: the Court Records of 17th-century Bursa."[9] But the subject is not infrequently alluded to, albeit peripherally, as part of the broader discussion on the 'decline/re-adjustment' of the Ottoman state in the late sixteenth century. Concurrently, one broad thesis has emerged - that which trumpets 'custom' as an increasing source of law in the seventeenth century.

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[7] This view is evinced in the literature on 'origins' and 'religio-ethnic' identity of the Ottomans, the Mughals and the Malay Sultanates, all of whom have been described, as 'nominal' Muslims, 'shamanistic,' or 'Indic.' See C. Geertz, *the Religion of Java* (Glencoe: Free Press, 1960); R. P. Linder, *Nomads and Ottomans in Medieval Anatolia* (Bloomington: Indiana University Press, 1983); R. C. Jennings, "Some Thoughts on the Gazi-Theses," *WZKM*, 76 (1986): 151-61; M. R. Choudhury, *The Din-i Ilahi, or the Religion of Akbar* (Calcutta: Das Gupta Publishers, 1952).

[8] See, R. B. Serjeant, *Custom and Shari'ah Law in Arabian Society* (Vermont: Variorum, 1991); and *Studies in Arabian History and Civilization* (London: Variorum, 1981).

[9] H. Gerber, "Sharia Kanun and Custom: the Court Records of 17th century Bursa," *International Journal of Turkish Studies*, 21 (1981): 131-147.

Taking their cue from the thesis forwarded by scholars in the Cambridge History of Islam,[10] i.e., that local 'capitalist classes' emerge to challenge the central authority of the state in the seventeenth century; many scholars have produced what may be described as a general theory of custom's role in the rivalry between 'local and state interests.' R. Jennings, H. Gerber, A. Marcus and N. Hanna argue that the seventeenth century heralds the 'triumph' of local custom in *sharī'a* courts across the empire, from Bursa to Aleppo, Damascus and Cairo over against its rival, the imperial *qānūn*.[11] More recently, Leslie Peirce's work on the *sijills* of Aintab in the year 1540-41 has made an enormous contribution to our understanding of Ottoman legal culture and its relationship to local custom in the first half of the sixteenth century. Her conclusions take into consideration something virtually ignored by the above scholars; namely, that "[t]he new hegemony of the Ottoman sultanate as the

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[10] The "Cambridge school" is exemplified in H. Inalcik, "The Heyday and Decline of the Ottoman Empire" and, Uriel Heyd, "The Later Ottoman Empire in Rumelia and Anatolia," *The Cambridge History of Islam*, vol. 2B, ed. P.M. Holt, K. S. Lambton and B. Lewis (Cambridge: Cambridge University Press, 1971): 295-323. In the case of Egypt see, P.M. Holt, "The Later Ottoman Empire in Egypt and the Fertile Crescent," *The Cambridge History of Islam*: 374-393.

[11] The secondary sources have characterized the seventeenth century as one of 'triumph' for local '*urf* versus *qānūn*. See, H. Gerber, "Sharī'a, Kānūn and Custom," who argues that the fluidity of legal sources at the *qāḍī*'s disposal resulted in 'informal' proceedings wherein local custom was often upheld in contravention of imperial orders. Gerber's approach to the issue is somewhat ambiguous however. In *Law and Society* he devotes a chapter to the rise of *qāḍī* and the *sharī'a* courts, stressing the rise of a rule-based Islamic judicial system that was increasingly concerned with applying legal theory in practice. A. Marcus, confirms the hypothesis but de-links it from the question of the *qāḍī*'s 'arbitrary' justice to argue that the courts "regularly enforced 'established custom' because it gave legislative expression to local interests." See, A. Marcus, "The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century," *Journal of the Economic and Social History of the Orient*, 26 (1983), pp. 104-5; N. Hanna, "The Administration of Courts in Ottoman Cairo," *The State ands its Servants; Administration in Egypt from Ottoman Times to the Present*, ed. N. Hanna (Cairo: American University Press, 1995): 44-59.

standard-bearer for sunni Islam meant a replacement of the colorful cultural palette of the empire's youth by a more sober social orthodoxy."[12]

At the same time, Peirce balances the paradigm forwarded by the *Cambridge History of Islam* scholars with her own findings to conclude that, "legal culture was heavily influenced by local participation and local customary law."[13] She further dilutes the claim that the Ottomans successfully promoted a new orthodoxy by limiting its reach to, "cities in the orbit of the capital" while, "in the provinces which were, in fact, the bulk of the empire regional cultures inevitably infused the practice of the law."[14] B. Ergene supports this contention, arguing that in the provincial Anatolian courts of Çankiri and Kastamonu, "Ottoman courts were responsive to social, political, and cultural pressures in their localities."[15] Both scholars acknowledge that Ottoman courts were rule-based, but also emphasize the importance of local community custom in helping the courts arbitrate disputes. While accepting the claim that local custom played a role in court processes, it will be shown that, in the case of Cairo, a new legal orthodoxy integrating issues of morality, or the 'rights of God,' and issues of public law, or the 'rights of man,' was applied, often at the expense of customary law.

The generally accepted claim that custom was a prolific source of law in the late sixteenth and seventeenth centuries, is based on a misreading of the evidence of the *sijill* arising from two methodological flaws. First, an undue emphasis on

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[12] L. Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkley: University of California Press, 2003), p. 389.

[13] Ibid., p. 8.

[14] Ibid.

[15] B. A. Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire* (Leiden: E.J. Brill, 2003), p. 211.

reading the documents from the perspective of economic paradigms, to the exclusion of any consideration of the dominant 'ideological' paradigms in which judicial 'innovations' may have been packaged. The argument that Ottoman reforms were limited to the 'legal process' rather than the 'law produced' derives from this deficiency. Second, and even more problematically, is that the 'narrative' *sijill* (that is the relevance of the document as a source of social history) and the 'institutional' *sijill* (its relevance from the perspective of the function and status of documents) remain disconnected themes of inquiry. Thus, the function and textual status of the document and its social narrative have been treated as mutually exclusive features of the *sijill*'s identity.

To address the first methodological issue, chapter one examines Ottoman judicial reforms through ideological, rather than political or economic lenses. Viewed from this perspective, the state's legal reforms gradually assume the contours of a distinct 'Ottoman *sharī'a*,' one that valued legal consolidation above the traditional pluralism of the customary laws of its various regions. It is, to borrow Har-El's political framework of analysis, a 'universalizing Sunnī state'[16] which, I will argue, also sought to advance a 'universal' law. The ideology of Sunnī re-unification is amply demonstrated in the rhetoric of state propaganda and is expressively conveyed in the language of *'tajdīd'* (renewal) and *'takfīr'* (ex-communication). Far from characterizing itself as a 'military-

[16] S. Har-El, *Struggle for Domination in the Middle East; the Ottoman-Mamluk War 1485-91* (Leiden: E.J. Brill, 1995), p. 13. Har-El argues that Sunnī re-unification was the impulse justifying Ottoman territorial expansion within Muslim domains.

conquest' state, a label consigned to it by much of the secondary literature,[17] this discourse reveals that the Ottoman Empire projected itself as a 'renewer of the faith.'

As shown in chapter one, prominent members of the Egyptian judiciary were confronted with the demand to "renew their religion (*dīn*)"[18] and to follow "*al-sayq al-'uthmānī*" (*sayq* may be a plural of *yasaq,* meaning customary state law or a local variant of the word) in the first quarter century of Ottoman rule.[19] Accompanying such demands were frequent 'purges' depriving local members of the judiciary of their jobs, and by a sustained campaign to 'redact' Islamic law into a 'unified *madhhab.*' Moreover, Ottoman forays into the twin domains of Islamic law, the 'rights of God' (*ḥuqūq Allāh* which translate into matters of *'ibādāt*) and the 'rights of man' (*ḥuqūq al-'ibād* which translate into legal *mu'āmalāt*), provide explicit evidence that the state 'innovated' in key socio-legal doctrines in its attempts to realize a measure of legal unification. In view of this claim, the static polarity created by the labels generally attached to such questions, i.e. juristic 'orthodoxy' and state 'heterodoxy,' serve no purpose but to entrench the general mould in which the rivalry between jurists and the Ottoman state has always been cast - a 'tension' between *qānūn* and *sharī'a.*[20]

In the case of Egypt, however, the tension is more aptly described as a rivalry between two 'antagonistic *sharī'as,*' one orthoprax and the other moving towards the construction of an orthodox Islam. Traditional Islam, with its multiple schools of

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[17] J. Hathaway, "Egypt in the Seventeenth Century," *The Cambridge History of Egypt,* vol. 2, ed. Carl F. Petrie and M. W. Daly (Cambridge: Cambridge University Press, 1998), p. 35.
[18] Al-Damīrī, *Quḍāt Miṣr fī al-Qarn al-'Ashr wa Awā'il al-Qarn al-Ḥādī 'Ashr,* MS (Cairo: Dār al-Kutub), p. 68.
[19] Ibn Iyās, *Badā'i'*, p. 417.
[20] See, R. Repp, "Ottoman Developments of the Qānūn and Sharī'a," *International Journal of Turkish Studies,* 24 (1988): 33-56.

thought and legal schools, is an orthoprax religion upholding models of 'correct conduct' above models of 'correct opinion.' Because human interpretations of 'God's will' can only be approximations of the latter, and are subject to fallacy and error, the intellectual arena remains one in which many plausible - but never certain - opinions circulate within the confines of the four schools of Sunnī jurisprudence. And while the schools may adopt differing views on that which constitutes correct conduct, each position is, in theory, equally sound. Any project to unify that system of reasoning/practice is, therefore, seeking to replace traditional juristic orthopraxy with orthodoxy. As the progenitor of such a project, the Ottoman state could not help but to depart from previous formulas for the accommodation of the 'local,' or that which is validated by custom.

To tackle the second methodological flaw in studies of Ottoman court documents, chapter two considers the 'institutional' *sijill*'s influence on the narrative histories produced. The term 'institutional' denotes the structure, organization and format of the *sijill* as well as its status as a written legal instrument. An enduring paradox for the historian of the *sijill* is the 'ambiguous' if not 'extra-legal' status they (and all written legal documents) retain in Islamic legal theory.[21] Sequentially, the issue of the *sijill*'s institutional function has not been substantively integrated into a unified discussion on the *'sijill'* as a source of social history. The pitfalls of this schism are apparent in the literature that posits custom as 'triumphant.' In assuming that Ottoman courts mirror the 'ambiguities' of legal theory in relation to written documents, scholars run the risk of underestimating the

[21] J. Wakin, *The Function of Documents* (Albany: SUNY Press, 1972), pp. 3-4; B. Messick, *The Calligraphic State* (Berkeley: University of California Press, 1993), p. 204.

state's capacity, and motivation, for eliminating such ambiguity. As chapter two attempts to show, a discernible shift in favour of legal documents is evident in the Ottoman judiciary system and is attested to in the pages of the *sijill* itself. If, therefore, the *sijills* disclose a 'spike' in the number of cases settled through custom, it must be asked whether this phenomenon reflects the 'triumph' of custom, or the 'triumph' of the document? Is local custom expanding as a source of legislation or is it more frequently catalogued?

It will be argued that the importance of written documentation in this period is symptomatic of a transformation in the latter's status, from 'ambiguous' to 'sound' evidentiary legal proofs. If proven, this transformation would explain why cases traditionally settled by means of customary arbitration are now brought out of the legal shadows and into the light of the *sharī'a* courts. In sum, the sheer necessity of legal documentation would have pushed people to use the courts, and to abandon informal systems of arbitration. Even where those systems were not abandoned, but merely brought into the *sharī'a* court (for example cases of *ṣulḥ*), it will be shown that the 'modifying hand' of the state and its jurists could now absorb and effectively delimit the scope of the latter.

Chapters three and four examine strategies of 'delimitation' by exploring the role of the state in the two domains of Islamic law – the 'rights of God' and the 'rights of man.' Traditionally, Islamic legal theory affords custom a role in each area, for example in determining the amount of the marriage dower, in defining the public bounds of modesty, establishing fiscal policies, etc. In the move to consolidate law, however, Ottoman customary law (*qānūn*), was collated, codified

and exported throughout the empire, overriding many of the customs of various Muslim populations. This is demonstrated in chapter three where the state's interpretation of the 'rights of God' (*'ibādāt*) reveals, that contrary to the 'triumph' of local custom, we are witnessing its delimitation in the *sijill*. Specifically, this is seen with regard to the areas of women's access to public space, modesty, and divorce, the rights of the bride and the administration and exchange of *waqf*. At times this entailed the abandonment of non-Ottoman custom in favour of *qānūn* and at others it entailed the alignment of practice with Islamic legal theory. In both cases, the curtailment of custom is implicit.

Chapter four follows the same line of inquiry into the 'rights of man' (*mu'āmalāt*), which are interpreted no less innovatively under the Ottomans. Here the bid to impose Empire-wide practices on local communities is amply illustrated in the areas of marriage, *iltizām* (practice of binding peasants to the land) municipal law as well as market *iḥtisāb*. Such cases will demonstrate that references to 'custom' do not always signify a nod to grassroots local practices but often refer to state customs originating in *siyāsa* legislation, both Ottoman and pre-Ottoman. The need for caution in equating all references to custom with 'local' or community-based practices is thus amply illustrated. Moreover, the *sijills* demonstrate that even in cases where local custom is upheld by the courts, it is often done provisionally, reviewed annually, and issued only on a case-by-case basis. Such examples illustrate that even those customs that are recognized by the courts are often exceptional in nature and cannot be viewed as generalized endorsements of local custom.

That said, the methodological concerns that the subject of custom in the *sijill* raises are formidable. How does one study a society's different elements not only separately but also as an integral part of the larger tradition? Furthermore, what is the "larger tradition" and how do we identify or classify the "different elements" that comprise local custom? As segue to answering such questions, a review of the conceptual approaches adopted in the secondary literature is in order.

Section i: The Empire in Historiography;
Nation, Race and custom

It may not be readily apparent why a thesis on custom and *sijills* in Ottoman-Cairo should be preceded by a discussion on colonialism and the formation of the successor states that arose in the Empire's wake. Several methodological reasons may be given, however, the more obvious being that the writing of 'nationalist histories' has contributed to what A. Raymond plainly terms "the falsifying of the modern history of Arab countries for the purpose of justifying European colonization."[22] As the Ottoman Empire was compromised, so too was its narrative, now cast in nationalist terms pitting 'indigenous sons of the soil' against the 'invading foreigner.'

Less explicit, however, is the link forged in Ottoman studies between nationalist theory, the rise of capital classes and the emergence of 'local vernaculars' in the seventeenth century, as a precursor to the formation of the

[22] A. Raymond, "The Ottoman Conquest and Development of the Great Arab Towns," *Arab Cities in the Ottoman Period*, ed. A. Raymond (Ashgate: Variorum, 2002), p. 17.

nation-state. In this thesis, local capital classes and potentates lend local customs a growing authority vis-à-vis the unified 'absolutism' of state *qānūn*. Informing much of the work of Ottoman historians on state and society in the seventeenth and eighteenth centuries, but also the more prominent theories on the empire's 'political decline,' advocates of this thesis have argued that local custom was an increasingly dominant source of law in these centuries. Thus, in the first instance, nationalist sentiments have shaped the view of the Ottoman era as, "foreign, obscurantist, responsible for the decline of Egypt and Cairo."[23] In the second, nationalist theory has informed our analyses of the economic and political forces fueling the rise of local society in those centuries.

Unflattering histories of the Ottoman Empire in the Arab world were in vogue in the nineteenth and early twentieth centuries. Far from being limited to Western histories, this bias plagued Arab historians equally. Thus, in spite of the unparalleled number of archival sources, the Ottoman era remains one of the least investigated chapters in Egyptian history. The tendency to equate the Empire with the decline and disintegration that marked the final moments of its late nineteenth and early twentieth century history was "natural" writes Raymond, but ultimately skewed.[24] More than that, "Arab historians feel reluctant to study a phase of their history which they tend, by analogy with a more recent period of their history, to consider as colonial."[25] Echoing Raymond's conviction that the obfuscation of Ottoman Arab history serves ideological rather than objective ends, the Egyptian

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[23] A. Raymond, *Cairo*, trans. W. Wood (Cambridge: Harvard University Press, 2000), p. 189.
[24] Raymond, "The Ottoman Conquest," p. 17.
[25] Ibid.

historian 'Abd al-Razzāq 'Īsā writes of his mounting frustration that a collusion of forces "to keep this epoch of our history dark," remains active. [26]

Racial categories of association, a residual component of nationalist definitions of 'self' and 'other,' have proven resolute and underscore a persistent tendency to see the Ottoman era as 'foreign,' 'Turkish' and, therefore, 'colonial.' But, as Raymond rightly argues "the most immediate comparison to be drawn is not of course between the Ottomans and the British/French," but with the Muslim states which preceded them. While a step on the right path, Raymond's suggestion only alleviates one aspect of a much wider historiographic problem.

General histories of Egypt (not limited to the Ottoman period) written between the nineteenth and first half of the twentieth centuries, invariably begin with the dictum that an uninterrupted line of 'foreign' conquerors has ruled the country since the end of the Pharaonic era.[27] This maxim commands wide currency not just in the popular imagination, but in much academic scholarship as well, resonating far beyond the field of Ottoman history. For Egyptians, who cultivated their modern historiography in the midst of liberation struggles against European colonization, the propensity to 'nationalize' history in the service of ideological ends proved irresistible. 'Race,' 'monarchy' and 'nation' were thus conflated into a

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[26] 'Abd al-Razzāq 'Abd al-Razzāq 'Īsā, ed. Shaykh al-Islām Muḥammad b. al-Surūr al-Bakrī al-Ṣiddiqī, *al-Nuzha al-Zahiyya fī Dhikr Wulāt Miṣr wal-Qāhira al-Mu'izziyya* (Cairo: Al-'Arabī lil-Nashr wal-Tawzī',1998), p. 2.

[27] See, A. Gorman, *Historians, State and Politics in Twentieth Century Egypt: Contesting the Nation* (New York: Routledge, 2002); Salīm Khalīl Naqqāsh, *Miṣr lil-Miṣriyyīn* (Alexandria: Maṭba'at Jarīdat al-Maḥrūsa, 1998); Shāyih Ibrāhīm, *Judhūr al-Salbiyya al-Sha'biyya fī Miṣr* (Madīnat Naṣr, Cairo: Dār al-Bustānī lil-Nashr wal-Tawzī', 2000); Mīlād al-Ḥannā, *Miṣr li-Kull al-Miṣriyyīn* (Kuwait: Dār Su'ād al-Ṣabāḥ; al-Qāhirah: Markaz Ibn Khaldūn lil-Dirāsāt al-Ijtimā'iyya, 1993); Aḥmad Ḥasan Abū Ṭālib, *'Urūbat Miṣr; Bayn al-Tārīkh wal-Siyāsa* (Cairo: Markaz al-Maḥrūsa lil-Buḥūth wal-Tadrīb wal-Nashr, 1996).

triumvirate of symbols representing a national sovereignty lost in antiquity. Egyptian historians were hardly innovating, but merely joining the global fray where, "since World War II every successful revolution has defined itself in national terms."[28]

When transposed onto history, the link between race and nation generates a generalized model that identifies historical agents as 'indigenous' or 'foreign' actors. The bombastic claim that the Free Soldiers movement represents the first 'native regime' (i.e., racially Egyptian) to rule Egypt in over three millennia could thus be argued and replicated in countless works. But if 'race' is the main criterion by which to assess who is 'foreign' and who 'native,' we should have to conclude that even the Free Officers fail to meet the criterion of 'nativity.' Jamāl 'Abd al-Nāṣir, the revolution's most famous face, was from a Ḥijāzī tribe that settled in the southern village of Banī Murr only two hundred years ago.[29] Like wise, Anwar al-Sādāt was the child of a Sudanese mother and an Albanian/Turkish father.[30] Pushed to its limits the argument would reach its apex in the conclusion that Egypt is yet to be ruled by a 'real' Egyptian. D. Hopwood's perspective is rare in asserting, "once the native Egyptian rule of the Pharaohs had collapsed it is true that, strictly speaking, foreigners ruled the country, but often only in the sense that the successors of William the Conqueror were not native Englishmen." [31]

The problems generated by the link between race and nation, are not of course limited to Islamic studies but have wide resonance for historical inquiry in

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[28] B. Anderson, *Imagined Communities* (New York: Verso, 1991), p. 2.
[29] R. Stephens, *Nasser: A Political Biography* (Middlesex: Penguin Books, 1971), p. 22.
[30] C. Sadat, *My Father and I* (New York: Macmillan Publishing Company, 1985), pp. 80-81.
[31] D. Hopwood, *Egypt; Politics and Society 1945-1984* (Boston: Unwin Hymen, 1985), p. 8.

general. In the European narrative, associations between race, monarchy and nation have bred equally contrived histories. The social historian, Benedict Anderson, argues that contrary to popular ideas:

> The fundamental legitimacy of most ...[European] dynasties had nothing to do with nationalness. Romanovs ruled over Tatars and Letts, Germans and Armenians, Russians and Finns. Hapsburg's were perched high over Magyars and Croats, Slovaks and Italians, Ukrainians and Austro-Germans. Hanoverians presided over Bengalis and Quebecois, as well as Scots and Irish, English and Welsh.[32]

Nonetheless:

> Insofar as all dynasties by mid-century were using some vernacular as language-of-state, and also because of the rapidly rising prestige all over Europe of the national idea, there was a discernible tendency among the Euro-Mediterranean monarchies to sidle toward a beckoning national identification. Romanovs discovered they were Great Russians, Hanoverians that they were English, Hohenzollerns that they were German.[33]

Anderson's forerunner, E. Gellner, expressed frustration at the sheer impossibility of defining the 'nation,' let alone constructing a coherent narrative of its history. "Nationalism," he concludes, "is not the awakening of nations to self-consciousness: it invents nations where they do not exist." [34] Objecting to the allusions of 'invention' and 'fabrication,' Anderson formulates 'imagining' and 'creation' in their stead. Thus, it is not the 'falsity/genuiness' of the claims to nationhood that should be considered, but "the style in which they are imagined."[35]

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[32] B. Anderson, *Imagined Communities*, p. 83.
[33] Ibid., p. 85.
[34] E. Gellner, *Thought and Change* (London: Weidenfeld and Nicholson, 1964), p. 169.
[35] "It is imagined because members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion." It is limited because it is exclusionary by definition. "No nation imagines itself coterminous with mankind...it is imagined as sovereign because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm." Anderson, *Imagined Communities*, p. 7.

Prominent Subalternist,[36] P. Chatterjee, voices one central objection to Anderson's ideas: "if nationalisms in the rest of the world have to choose their imagined community from certain 'modular' forms already made available to them by Europe and the Americas, what do they have left to imagine?"[37] The fullness of this critique need not concern us, but a central question raised by Chatterjee's objection does: "whose imagined community?"

Modern Egyptian historiography provides ambivalent, if not incoherent, responses to Chatterjee's question. For example, a readiness to categorize the Ottomans and Mamluks in particular as 'foreign Turks' is decidedly less pronounced when it comes to the Arab Umayyad or Abbasid dynasties. Others, such as Salāma Mūsa, Ṭāha Ḥusayn and Tawfīq al-Ḥakīm were in the minority when they eschewed Egypt's Arab-Islamic heritage altogether, in favour of emphasizing its Hellenic-Mediterranean roots.[38] In spite of their efforts, however, Arab nationalism dominated the Egyptian political spectrum for much of the twentieth century, shaping historiographic trends that 'imagined' Arabs and Egyptians as kin. Blurring the lines between ethnic and regional divisions, Arab nationalism empties popular Arab identity of its disparate ethnic origins, creating an 'Arab' from an

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[36] A school of South Asian studies comprising Marxist historians, largely from Britain, Australia and India. The central thesis shared by these scholars is that the social realm can be divided into two spheres of activity, the elite and the subaltern, the first representing the ruling classes, the second encompassing the 'masses.' The innovation in this claimed by Subalternists is that each of these spheres of activity is defined by particular modes of power, culture and so on. For a complete discussion on this group and their general thesis see, R. Guha and G. Spivak eds., *A Subaltern Studies Reader, 1986-1995* (Minneapolis: University of Minnesota Press, 1998).

[37] P. Chatterjee, *The Nation and its Fragments* (Princeton: Princeton University Press, 1993), p. 5.

[38] See, Salāma Mūsa, *Mā Hiya al-Nahḍa?* (Cairo: Salāma Mūsa lil-Nashr wal-Tawzī', 1961); Taha Hussayn, *The Future of Culture in Egypt* (Washington: Washington Council of Learned Societies, 1954).

'Arabic-speaker.' In the popular mind, therefore, Arabic-speakers are more than a linguistic community - they now constitute an ethnicity.[39]

But how did the pre-modern Egyptian chronicler 'imagine community'? It is notable that Egyptian chroniclers from the period in question never use the label 'Egyptian' and rarely even 'the people of Egypt' (*ahl Miṣr*), instead referring to 'the communities of Egypt' (*ahālī Miṣr*), 'the Muslims in Egypt' (*al-Muslimūn fī Miṣr*) or alternately, 'the Christians/Jews in Egypt.' Significantly, the general appellate 'Muslims in Egypt,' groups Muslim Egyptians with non-Egyptian Muslims. However, Muslim visitors or short-term residents were distinguished from the Egyptian Muslim population by carrying the added appellate of *ajnabī, khawāja* or *'ajamī*.[40] Similarly, the religious minorities who resided in Egypt were distinguished from Christian or Jewish groups that did not originate within the empire. The label reserved for them was *faranj,* capturing the notion of the 'foreign,' largely European, Christian. Beyond ethnic/religious divisions, distinctions based on

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[39] See, D. al-Jundi, "The Foundations and Objectives of Arab Nationalism," *Political and Social Thought in the Contemporary Middle East,* ed. K. H. Karpat (New York: Praeger, 1982): 31-37. Iraqi thinker, 'Abd al-'Aziz al-Duri, traces Arab nationalism to 'pre-Islamic roots' planted "in the move toward formulating a unified literary language." See, 'Abd al-'Aziz al-Duri, "The Historical Roots of Arab Nationalism," *Political and Social Thought in the Contemporary Middle East*: 21-26. For a view which ties Arabism to Pharaonic Egypt by arguing that the ancient Egyptians were Arabs, see the Iraqi writer, Abd al-Hadi al-Fikyaki, "The Shu'ubiyya in Arab Nationalism," *Political and Social Thought*: 44-50; A. K. Khater, ed, *Sources in the History of the Modern Middle East* (New York: Houghton Mufflin Company, 2004), pp. 166-70.

[40] Such labels are consistently used by, al-Bakrī al-Ṣiddīqī, *al-Nuzha*; Muḥammad b. Abī al-Surūr al-Bakrī al-Ṣiddīqī, *al-Minaḥ al-Raḥmāniyya fi al-Dawla al-'Uthmāniyya,* ed. Layla al-Ṣabbāgh (Damascus: Dār al-Bashā'ir, 1995); Muḥammad b. al-Mu'ṭī b. Abī al-Fatḥ b. Aḥmad Ibn 'Abd al-Mughnī b. 'Alī al-Isḥāqī 'al-Manūfī, *Akhbār al-Awwal fī-man Taṣarraf fī Miṣr min Arbāb al-Duwal* (Cairo: Al-Maṭba'a al-'Uthmāniyya, 1886); Muḥammad Ibn Aḥmad Ibn Iyās, *Badā'i' al-Zuhūr fi Waqā'i' al-Duhūr*, 5 vols., ed. Muḥammad Muṣṭafā (Wiesbaden: E.J. Brill, 1975).

linguistic identity and class affiliation were also in use as seen from the labels, *awlād al-'Arab* (the Arabic-speaking masses) and *awlād al-nās* (the sons and daughters of the Mamluk political elite, who constituted a civilian aristocracy). Thus, all groups were divided into several sub-communities or *ṭawā'if*, based on any number of given factors including, religion, ethnicity, language, class or profession, and even residence in a particular district or *ḥāra*. Nothing in this model implies that the non-Egyptians, be they Arab or Turk, occupy a position of uneven 'foreignness' or 'kinship' vis-à-vis the ethnic Egyptian.

But how did local Muslims, Egyptians and non-Egyptians, 'imagine' the political community? The first hand account of Ibn Iyās (d.1524), brimming with a vivid immediacy born of his vantage as an eyewitness to the conquest of Cairo, is generally held to be an accurate, if not entirely objective, 'native perspective.' But his barely concealed contempt for the Ottomans is too easily read as indication of 'native' Egyptian sentiment towards the 'Turk.' This would be an over-simplification, however, for as a member of the *awlād al-nās,* Ibn Iyās was himself, ethnically speaking, a 'Turk.'[41] Thus, it would be a mistake to construe his loyalty to the Mamluk regime as anything but an expression of class affiliation with the state. This point is substantiated by a perusal of Ibn Zunbul's (d. 1599) chronicle, written some sixty years after Ibn Iyās' work, and which is less hostile to the Ottomans.[42]

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[41] Winter, "Ottoman Egypt, 1525-1609," *The Cambridge History of Egypt,* vol. 2, ed. W. M. Daly (Cambridge: Cambridge University Press, 1998), p. 2.

[42] Aḥmad 'al-Rammāl al-Maḥallī Ibn Zunbul, *Ākhirat al-Mamālīk; Wāqi'at al-Ṣulṭān al-Ghūrī ma'a Salīm al-'Uthmānī,* ed. 'Abd al-Mun'im 'Āmir (Cairo: Dār al-Qawmiyya lil-Ṭibā'a wal-Nashr, 1962).

Al-Isḥāqī al-Manūfī, (d. 1580) another chronicler, does not merely sympathize with the Ottoman state, he is its ardent spokesman, claiming:

It is unrivaled, given what we know of the history of previous states. We have not seen or heard of a state like that of Banī 'Uthmān's, nor a better system, nor more *qānūn* bound, nor more obedient to the dictates of the *sharī'a,* nor as abundant in *ahl al-'ilm,* nor as proprietary of the Qur'ān, nor as beneficent to the poor, the vulnerable and the residents of the al-Ḥaramayn al-Sharīfayn and its surrounds... we ask God to sustain the state of Banī 'Uthmān to the end of time.[43]

A final historiographic point of note is that, unlike Ibn Iyās or Ibn Zunbul, al-Manūfī adopts a historical narrative which portrays the Ottomans as more pious than the Mamluks. The last Mamluk Sultan, Al-Ghūrī, is described as an "unjust ruler" swept from power by the "pious Ottomans." The Mamluk perspective, last exemplified by Ibn Iyās, simply has no validity in al-Manūfī's cheerful proclamation, "*wa ghār al-Ghūrī"* (and so al-Ghūrī sank/fell).[44] Likewise, al-Damīrī (d. 1621-5?) also provides a narrative that privileges the Ottomans by endowing them with piety over and above their Mamluk counterparts.[45]

The veracity of al-Damīrī's views notwithstanding, its pervasiveness in Egyptian histories amply demonstrates that the Ottoman conquest was viewed as an Islamic "*fatḥ,*" akin to the earlier Arab conquests. There is little, therefore, which would indicate that, at its height, fealty to the Mamluk state was greater than that expressed to the Ottoman state after the first quarter century. After all, both Mamluks and Ottomans were foreigners as far as origin, language, mentality,

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[43] Al-Manūfī, *Akhbār,* p. 144.
[44] Ibid., p. 145.
[45] He speaks of Mamluk corruption in the administration of *waqf,* suggesting that the Ottoman invasion was spurred by a need to correct this state of affairs and to restore 'correct' religious values. See, al-Damīrī, *Quḍāt Miṣr fī al-Qarn al-'Āshir wa Awā'il al-Qarn al-Ḥādī 'Āshir,* MS (Cairo: Dār al-Kutub), p. 47.

and customs were concerned. As Winter notes, the Maghribīs of Cairo, even during the conquest, refused al-Ghawrī's demand that they fight the Ottomans, saying, we shall fight only against the Franks, not against Muslims.[46] In the final analysis, the Ottomans were not considered more foreign than the Mamluks.

At a glance, therefore, we can see that the variegated and layered definitions of identity current in Islamic Egypt do not correspond with those proffered by nationalist theory or colonial models, for at the most simplistic level, the Islamicate model divides native Egyptians into three distinct, universal communities. 'The Muslims in Egypt,' a rubric under which all Muslims, be they Egyptian, Arab or Turk, fall; the 'Christians in Egypt,' a rubric which places the Coptic Egyptian alongside Syrian Orthodox, Greek Orthodox and Armenian Christians; and finally, the 'Jews in Egypt,' be they native, Iberian, or Iraqi in origin. In this way, native Egyptians were distinguished from one another and grouped according to their transcendent religious identities. On the other hand, the term '*ahalī Miṣr*' (the communities of Egypt) grouped all communities which resided in Egypt, sectarian and ethnic, under a unifying territorial rubric. Even the singular term, *ahl Miṣr* (the people of Egypt) refers to nothing more than the combined sum of the communities who lived in Egypt – be they Arab, Turk Egyptian, Muslim or Non-Muslim.

Without denying that there may have been an awareness of the 'other' as 'foreign,' it would be a gross oversimplification to assume that such labels form the essential core of social identity. As such, a city like Cairo is best seen as an amalgam of as many customary clusters as there are communities. By falling in step

[46] M. Winter, "The Ottoman Occupation," *The Cambridge History of Egypt, 641-1517,* vol. 1, ed. C. F. Petry (Cambridge: Cambridge University Press, 1998), p. 507.

with the terminology employed in the primary Arabic sources, the pitfalls of a 'national history' peopled with 'foreign and indigenous' actors, can be evaded. Likewise, the dialectic between state and society can be studied from a perspective that accommodates the complex of customs informing the political, judicial, military and merchant identity of the city.

Enigmatically, while the idea of a vast empire encompassing huge swathes of terrain has evoked discussion on 'inter-empire trade,' and 'central bureaucracy,'[47] it has evoked less interest in the 'inter-empire culture' that was its underpinning. Generally overlooked, encounters between diverse linguistic, religious and ethnic communities within the empire point to ethnic engagement and negotiated co-existence on a scale that would rival any modern metropolitan centre. The oversight is especially glaring where Arab cities are concerned, largely due to the stereotype of the 'homogenous,' 'orthodox,' Arab-speaking heartland, by contrast with the syncretic 'peripheries of Islam.'

In truth, however, there is a notable difference between the diversity that may be encountered in a so-called 'peripheral' Muslim region and that found in a 'heartland' state. Peripheries are to be distinguished by their majority non-Muslim populations, while heartlands are characteristically majority Muslim. But as Ottoman Cairo teaches us, this does not signify homogeneity. What makes 'inter-empire' cultural encounters in Ottoman-Cairo especially intriguing is that they are predominantly 'inter-Muslim.' As shown below, the number of non-Egyptian Muslims in Egypt equaled or exceeded that of the religious minorities. Moreover,

[47] For a detailed review of this literature see chapter one, Section i.

they played key roles in the political, military and judicial governance of the state. Cairo, it should be remembered, hosted Arab, Turkic, Circassian, Mongol and Abyssinian troops and political elites of diverse racial backgrounds. Merchant and scholarly classes also contained sizable communities of Moroccans, Syrians, Arabians, Yemenis and Persians etc. J. Hathaway stresses that throughout the sixteenth and seventeenth centuries:

> Caucasian Mamluks were evidently still flowing into Egypt, [and] the province was receiving an influx of military and administrative personnel from the Ottoman Empire's Anatolian and Balkan regions... Meanwhile, Turcophone bureaucrats of various ethnic origins arrived in Cairo to staff the provincial administration, and the Ottoman governors transported their own sizable entourages to Cairo.[48]

Commenting on the size of these entourages, Raymond writes:

> In Cairo in the sixteenth and seventeenth centuries, the militias (the most important of which were those of the janissaries and 'Azab) must have numbered 15,000 men not including the households of the Mamluk emirs. Toward the end of the eighteenth century, the ruling caste numbered about 10,000 men, not reckoning the families and servants, and was still therefore an important part of the Cairo population. [49]

Jomard, one of the authors of the *Description de l'Egypt*, estimated Cairo's population at 263,700 at the end of the eighteenth century.[50] Of these, 25,000 were non-Egyptian Muslims; 10,000 Turks, 10,000 North Africans and 5,000 Syrians. An equal number of non-Muslims also resided there: 10,000 Copts, 5000 Syrian Christians, 5,000 Franks, 3,000 Jews, 2,000 Armenians.[51] Raymond estimates that

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[48] J. Hathaway, "Egypt in the Seventeenth Century," *The Cambridge History of Egypt*, vol. 2, eds. Carl F. Petrie and M. W. Daly (Cambridge: Cambridge University Press, 1998), pp. 37-38.

[49] Raymond, "Ottoman Conquest," pp. 23-24.

[50] M. Winter, *Egyptian Society Under Ottoman Rule* (New York: Routledge, 1992), p. 226.

[51] See, A. Raymond, "The Role of the Communities (*tawa'if*) in the Administration of Cairo in the Ottoman Period," *The State and its Servants: Administration in Egypt from Ottoman Times to the Present*, ed. N. Hanna (Cairo: American University in Cairo Press, 1995): 32-43.

in the seventeenth century Cairo's total population exceeded 300,000, a figure which indicates that the non-Egyptian ethnic communities were also larger. Underscoring this diversity, M. Winter writes:

> travelers were deeply impressed by its size and heterogeneity of its population. All the accounts of Cairo, whether written by the Turks Mustafa 'Ali and Evliya Celebi, by the Maghribi visitors, or the many Europeans describe their authors' astonishment at the sight of this great city with its large number of foreigners, merchants and other segments of society.[52]

In spite of the above, the 'multi-cultural' heartland remains unrecognized, much less studied. The few works that engage in cultural studies of the 'heartland,' generally adapt culture to a classic Marxist model, dividing it into that of the "of the rulers, of the scholars, of the wealthy merchants and bureaucrats."[53] Undeniably, class is a pivotal factor, but when considered alone it invites an essentialist perspective unable to admit the complex of cultures (religious, ethnic, linguistic etc.) that thrived alongside class distinctions in the Islamic Arab city. For this reason, custom rather than class provides a sound analytical framework by which to probe the ways in which different communities modulated their distinct ethnic and religious identities within the confines of a legalistic, 'universalizing' state. Necessarily, some of these methods were syncretic, others negotiated and others still coercive.

The extent to which the Ottoman state was already predicated on universalistic principles on the eve of the conquest is shown in chapter one. The 'universalism' of the principles underlying Ottoman governance is demonstrated in two areas – warfare and judicial reforms. Both amplify state propaganda and

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[52] Winter, *Egyptian Society*, p. 227.
[53] Shoshan, *Popular Culture*, p. 67.

underscore the methods by which state legitimation was pursued and 'idealized,' allowing one to reconstruct the religious and moral tone of the Empire at the time of the conquest. It behooves us, therefore, to consider the terminology that will be employed in reference to these 'religious and moral' standards.

Writing in the fifties M. Hodgson concluded "that the moral tone of the centralizing empire was already deeply set by the time that Selim's conquest in the Arab lands (1517) gave it a first-line role in Islamdom as a whole."[54] Inalcik argued that as early as the fourteenth century, Islamic legitimation and questions of Islamic orthodoxy were of growing importance to the Ottoman state, which considered the defence and extension of Islam its most important role and aspired to uphold the *sharī'a*. This was made possible by the "*shariah* military alliance" that "associated the major civilian institutions relatively closely with the central government."[55] Many of these notions derive from P. Wittek's *ghazā* thesis, which held that the Ottoman Empire's *raison d'etre* was to expand the borders of Islam by perpetuating the *jihād* against *Dār al-Ḥarb*.[56]

In the intervening years, many facets of the *ghazā* thesis have been criticized on the grounds that a *jihād* ideology against Christendom is an insufficient motive for many Ottoman policies, such as recruiting Byzantines into their ranks, fighting other Muslims etc.[57] As part of this argument, the very 'Muslimness' of the *ghāzīs*

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[54] M. Hodgson, *The Venture of Islam*, vol. 3 (Chicago: Chicago University Press, 1961), p. 107.
[55] H. Inalcik, *The Ottoman Empire: The Classical Age 1300-1600* (London: Dweidenfeld and Nicolson, 1973), p. 16.
[56] P. Wittek, "De la défaite d'Ankara á la prise de Constantinople," *Revue des Etudes Islamiques* (1938), pp. 8-10.
[57] R. P. Lindner, *Nomads and Ottomans in Medieval Anatolia*, pp. 153, 155.

was thrown into question, Linder going so far as suggest that "Osman and his followers were holy warriors in another just cause, that of shamanism."[58] But C. Kafadar argues that "refutations" of this thesis based on discrepancies between *ghazā* ideology and Ottoman practice miss the point, since the *ghazā* thesis is not bound to idealized and anachronistic definitions of *ghazā* based on standards of 'orthodox' or 'true Islam.'[59] Kafadar's point is well taken, particularly his objections to the terminology employed to capture these developments. The heterogeneous and fluid boundaries of the frontier, he writes, simply defy the labels 'heterodox ' and 'orthodox.' "Taskoprizade, an eminent Sunnī scholar of the sixteenth century," he explains, "was probably much more conscious of the distinction between orthodoxy and heterodoxy than his fourteenth century Ottoman forebears."[60] Ataseven also warns that:

> In a society where the population is Sunnī, Shīī, or both or none, and where many are Sufis, then distinctions between these words cannot be perpetually upheld. In a struggle to legitimise a position of power and where orthodoxy is a means towards such legitimation, this orthodoxy is everything and nothing at the same time. It is the perspective of power that refuses to see a complex reality. It dresses difference in an orthodox vocabulary that often gives the illusion that the heterodox of society and the orthodox are arguing against each other... [61]

In view of Ataseven's arguments, Kafadar need not have limited his observations to the 'frontier' culture of the earlier Ottoman centuries for, as will be argued, even in

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[58] R. P. Lindner, "Stimulus and Justification in Early Ottoman History," *Greek Orthodox Theological Review*, 27 (1982), p. 216.
[59] C. Kafadar, *Between Two Worlds; The Construction of the Ottoman State* (San Francisco: University of California Press, 1995), p. 52.
[60] Ibid., p. 54.
[60] I. Ataseven, *The Alevi-Bektasi Legacy: Problems of Acquisition and Explanation*, ed. T. Olsson (Lund, Sweden: Nova Press, 1997), p. 102.

the 'homogenous, Sunnī heartland,' one could argue that "orthodoxy was everything and nothing" in the sixteenth century.

It is well known that Ottoman judicial reforms triggered opposition from Syrian and Egyptian jurists who bemoaned the demise of Islam under the Ottomans. Persuaded by their own bias that the Arabs are/were the bastions of 'Sunnī orthodoxy,' scholars have generally framed the conflict as a rivalry between the 'secular/royal' *qānūn* and the 'sacred' *sharī'a*. The tendency to view one side of the conflict as heterodox and the other as orthodox is problematic however. It suggests the existence of a clearly delineated orthodoxy (usually legalistic and even then bereft of any nuance) to be measured against an equally obvious heterodoxy. Predictably, it is the Ottoman state which is consigned to the heterodox heap while the objections of Egyptian *'ulamā'* are viewed as templates of orthodoxy.[62] And while it is fairly certain that the latter viewed themselves as such, the question yet to be asked is, did the Ottomans view the Egyptians as more orthodox than they? The evidence presented in the coming chapters suggests not.

But most scholars, including Kafadar, appear unperturbed by the language of orthodoxy or 'Islamization' when referring to the transformations of the mid-sixteenth century. Kafadar writes, "people began to realize...that some of the ways of the earlier Ottomans did not exactly conform to the norms of orthodox Islam as understood by its learned representatives serving the Sunnī state."[63] Without challenging the veracity of this widely accepted paradigm (discussed in chapter

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[62] M. Winter, "Ottoman Occupation," p. 510. Many of his views are derived from Egyptian sources, described in another of his articles, "Attitudes Toward the Ottomans in Egyptian Historiography During the Ottoman Rule," *The Great Ottoman-Turkish Civilization*, vol. 3, ed. Kemal Çiçek (Ankara: Yeni Türkiye, 2000), pp. 290-299.
[63] Kafadar, *Between Two Worlds,* p. 153.

one), it is prudent to remember that such transformations do not negate the possibility that the earlier Ottomans understood themselves to be proper Sunnī Muslims. Kafadar himself makes the same point about the *ghāzī* culture of the frontiers, arguing that "[t]he conduct of Geyikli Baba, for instance, a dervish of early Ottoman Bithynia, may have appeared un-Islamic to a hyperorthodox scholar but there is no doubt that Geyikli Baba considered himself a Muslim and was thus recognized by many others."[64] There is no reason to think that the same could not be said of early to mid-sixteenth century Ottomans.

M. Zilfi's work on seventeenth and eighteenth century Anatolian revivalist movements is notable for avoiding the conceptual brackets critiqued above. Drawing on the work of Hodgson and Fazlur Rahman, she writes that:

> The distinguishing features of the dispute ... were neither the set of condemned usages nor even the appealing, if superficial, ordering of the antagonists along Sufi-orthodox lines. Both innovations and innovators fit an established pattern of debate over the place of Sufism, from the sober to the ecstatic, within Islam.[65]

In making this argument, Zilfi posits the antagonists as equally 'Islamic' but ideologically polarized between the 'intoxicated' and the 'sober' poles of Muslim thought. These brackets stem from a typology in Sufi thought which separates the more antinomian (anti-*sharʿī*) world view from that which advocates conformity with the *sharīʿa*. While highly useful, this approach cannot be applied to the study at hand for the simple reason that, here, the debate is not between antinomian and law-minded doctrines, but between advocates of legal pluralism and advocates of

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[64] Ibid., pp. 53-4.

[65] M. Zilfi, "The Kadizadelis: Discordant Revivalism in Seventeenth Century Istanbul," *Journal of Near Eastern Studies*, vol. 45, no. 4 (1986), p. 256. Also see, M. G. S. Hodgson, *The Venture*, vol. 3, pp. 359-409; Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), pp. 153-202.

legal unification. For that reason, a perspective which views the conflict as one between 'antagonistic *sharī'as*,' is best suited to the themes at hand. As F. Denny emphasizes, Islam is not a religion predicated on notions of orthodoxy, or correct opinion, but an orthoprax tradition emphasizing correct conduct.[66] This is nowhere more applicable than in the field of Islamic law. As mentioned, Sunnī Islamic law can admit for four schools of law, while recognizing the opinions which flow from each – even those that are contradictory - as equally Islamic. Viewed in this light, the Ottoman state's attempt to unify the law must be seen as an endeavour to construct a legal orthodoxy in lieu of the prevailing orthoprax tradition. Such an endeavour would not distinguish the Ottoman State from its contemporary states, but rather place it squarely in line with global trends of the fifteenth and sixteenth centuries.[67]

Section ii: The Sources

While the above indicates the conceptual approach I adopt, my methodological approach to the sources remains to be outlined. The *sijills* used in this research span the dates 965H/1558CE to 1056H/1646 and include the courts of Maḥkamat Ṭūlūn (the Ṭūlūn Islamic court), *Sijill* 165: 1-5, 284-7, 965-66H;

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[66] F. Denny, *Introduction to Islam*, third ed. (New Jersey: Prentice Hall, 2006) pp. 102-3. Denny is himself quick to add that in areas of belief and ritual there are indeed 'orthodox' tenets (three pillars of faith and five pillars of conduct), but characterizes intellectual Islam, i.e. that which comprises theological, legal and philosophical Islam, as an orthoprax tradition.

[67] J. Henderson has shown an acceleration in the trend to promote religious 'orthodoxy' by Christian and neo-Confucian states in the fifteenth and sixteenth centuries. J. B. Henderson, *The Construction of Orthodoxy and Heresy; Neo-Confucian, Islamic, Jewish and Early Christian Patterns* (Albany: SUNY Press, 1998).

Maḥkamat al-Qiṣma al-'Arabiyya (the Islamic Court of Arab affairs), *Sijill* 5: 1-45, 985H; Maḥkamat al-Qiṣma al-'Askeriyya (the Islamic Court of Military personnel), *Sijill* 5: 1-15, 275-285, 970H; Maḥkamat al-Bāb al-'Ālī (the Islamic Court of the Bāb al-Ālī) *Sijill* 96: 10-22, 445-446, 1023-24H; *Sijill* 66: 1-5, 51-65, 1005-06H; *Sijill* 124, 1-2, 160-178, 405-408, 1055-6H.

The available evidence suggests that documents in general, particularly legal formularies (model contracts) were part and parcel of the Near Eastern pre-Islamic tradition.[68] Describing the contents of the Ḥaram documents, Little lists deeds (*'uqūd*) of purchase and lease, bills of sale, marriage and divorce; testamentary bequests (*waṣiyyas*); written legal depositions made before legal witnesses (*ishhāds*); written, witnessed and binding legal acknowledgments (*iqrārs*);[69] estate inventories; decrees; petitions (*qiṣāṣ* in Mamluk usage, and *ma'rūḍ/ma'rūz* in Ottoman registers);[70] vouchers; receipts (*qabḍ*); reports (*muṭāla'āt*); death

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[68] The works of R. Yaron, A Steinwenter, A Schiller and W. Siedl, among others, demonstrate the stability of the notarial tradition in the ancient Near East. Steinwenter has emphasized the dependence of the Coptic notarial forms on the late Byzantine ones while E. Seidl sees more than borrowing as, he reasons, even though the documents were drawn up in Coptic, "on closer examination it becomes evident that the phrases used there were nothing but translations of those used in Greek documents." See, J. Wakin, *the Function of Documents*, p. 6; R. Yaron, *Introduction to the Law of the Aramaic Papyri* (London: Clarendon Press, 1961); A Steinwenter, *Die Bedeutung der Papyrologie fur die koptische Urkundenlehre* (Munich, 1934); E Seidl, "Law," *The Legacy of Egypt*, ed. S. R. K Glanville (London: Clarendon Press, 1972); A Schiller, "Prologmena to the Study of Coptic Law," *Archives d'Histoire du Droit Oriental*, II (1938): 360-61; W Siegle, *The Quest for Law* (New York, 1941). A. Gacek, "The Ancient *Sijill* of Qayrawan," *Middle Eastern Library Association Notes*, 46 (1989): 26-29; J. Reychmann and A. Zajaczkowski, "Diplomatics," *EI*, CD Rom Edition.

[69] D. P. Little, "The Significance of the Ḥaram Documents for the Study of Medieval Islamic History," *Der Islam*, 57 (1980), pp. 208-209.

[70] For Mamluk usage, see Little, "The Significance of the Ḥaram Documents," p. 197. For Ottoman usage see, A. Bayinder, "The Function of the Judiciary in the Ottoman Empire," *The Great Ottoman Turkish Civilization*, vol. iii, ed. Kemal Çiçek (Ankara: Semih Ofset, 2000), p. 642.

inventories; the solicitation of a legal opinion and the reply (*istiftā'* and *futyā*); and finally, court records containing a summary of the case and the decision of the judge.[71]

S. A. I. Mīlād provides an appendix of the types of documents found in Cairo in the court of the Ṣāliḥiyya al-Najmiyya which include the above types as well as documents pertaining to reconciliation between spouses, adoption, appointments of wet nurses, embezzlement of public foundations, embezzlement more generally, imprisonment and release from prison.[72] Most of the above of types of documents are found in the collection under study, although the cases highlighted pertain to marriage, divorce, *ṣulḥ* (customary arbitration), *iqrārs*, *waqf* and court records concerning municipal disputes, *iltizām* (binding peasants to the land), morality and metrology.

Chosen with the aim of straddling a period, often labeled 'transitional,' this timeline marks the Empire's passing from centralized authority to what has been described as a period of 'crises and re-adjustment,' which heralded 'decentralization' and, according to some, greater political autonomy for the provinces. As previously stated, this paradigm gave rise to the argument that local interests, represented by *'urf*, found increasing expression in the *sharī'a* court of the early seventeenth century. Collectively, then, the *sijills* spanning this hundred-year

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[71] See, D. P. Little, *A Catalogue of Islamic Documents from al-Ḥaram aš-Šarīf in Jerusalem.* (Beirut: Orient-Institut der Deutschen Morgenlandischen Gesellschaft, 1984); and "The Significance of the Ḥaram Documents," pp. 189-219.

[72] S. A. I. Mīlād, "Registres judiciares du tribunal de la Ṣāliḥiyya Naǧmiyya," *Annales Islamologiques*, xii (1974), pp 190-200.

period position me to broach this thesis meaningfully while allowing for a general inquiry into the place of custom in an Islamic court.

Beyond gauging the veracity of the above paradigm by charting the actual rate at which the courts employed custom over this period of time, we add nuance to the discussion by asking, what kind of custom was employed? As shown in chapters three and four, the *sijills* employ a wide range of terminology when referring to custom. A principal task is thus delimiting the lexical tropes that encompass customary laws, separating those that function in the private domain/rights of God (e.g. how often a wife could visit her parents or the rules of a *'urfī* marriage) from those that function in the public domains/rights of man (e.g. the weight of an Egyptian measuring unit versus the unit assigned by the *muḥtasib*).

Secondly, a further distinction is made between the *'urf* of various ethnic, linguistic and religious communities frequenting the Islamic court. Towards that end, the *sijills* of the Qisma 'Arabiyya and the Qisma 'Askeriyya of the mid to late sixteenth century will be especially helpful. The latter court was not, as may be assumed from the title, a military tribunal. To the contrary, most of the cases handled by this court included mundane civil suits, involving marriage, divorce, inheritance disputes etc. The term *'Askeriyya* only denotes that military and administrative personnel associated with the High Porte or their families, frequented this court. For the time it existed, this two-tiered court system divided court space in half, securing 'state' personnel in one venue and local residents in another. Fortuitously, this invites comparison between the *'urf* of the *'Askeriyya*

(predominantly Anatolian groups) with that of the *'Arabiyya* (predominantly Egyptian).

Equally important to this discussion on the 'varieties' of customary law in evidence, is the distinction between popular custom (local *'urf)* and state custom (*qānūn*). Without this distinction, the usual focus of legal and social historians on the tension between *sharī'a* and *qānūn,* cannot be broadened to account for another equally important point of tension, that between *qānūn* and local *'urf.* With this in mind, sample cases were extracted from the front of the *sijill,* where civil cases are recorded, and the back, where *firmāns*, edicts and contracts are recorded. A juxtaposition of state customs and popular customs in terms of preponderance and content is thus possible, as is an investigation into areas of possible conflict between them.

On a final note, it is prudent to recall one of the more prescient criticisms of histories based on the *sijill* – the circularity of the sources. Anchored to one genre/body of documents, the histories produced are often devoid of the historical detail and movement found in the historical chronicles. Aiming to avoid this circularity, liberal use of other sources, including historical chronicles, juristic works and *ṭabaqāṭ* literature, is made throughout. Of special importance is a manuscript by al-Damīrī, *Quḍāt Miṣr fīl-Qarn al-'Āshir wa-Awā'il al-Qarn al-Ḥādī 'Āshir,* covering almost the same timeline (sixteenth and early seventeenth century) as this study, the manuscript furnishes rich detail on the identities of the individual Ottoman chief *qāḍīs* as well as on the dynamic between them, their *nā'ibs* (deputy judges) and their *shuhūd* (professional witnesses). Other prominent primary sources

include: Ibn Iyās, *Badā'i' al-Zuhūr*; Shaykh al-Islām Muḥammad b. al-Surūr al-Bakrī al-Ṣiddiqī (d. 1676), *al-Nuzha al-Zahiyya fī Dhikr Wulāt Miṣr wal-Qāhira al-Mu'izziyya*; Muhammad b. al-Mu'ṭī b. Abī al-Fatḥ b. Aḥmed Ibn 'Abd al-Mughnī b. 'Alī al-Isḥāqī al-Manūfī (d. 1580), *Akhbār al-Awwal fi-man Taṣarraf fī Miṣr min Arbāb al-Duwal*; and finally, 'Abd al-Wahhāb al-Sha'rānī's (d.1565) writings as found in M. Winter, *Society and Religion in Early Ottoman Egypt; Studies in the Writings of 'Abd al-Wahhāb al-Sha'rānī.*[73]

Furthermore, in order to provide a meaningful appraisal of custom 's role in the *sharī'a* courts, a detailed analyses of the judicial theory of custom is necessary. Such a survey permits us to supplement the evidence of the *sijill* and to evaluate it in the context of the juristic subtext on the limitations of state legislation. Similarly, a survey of the development of key doctrines extracted from the works of political philosophy will shed light on the tactics adopted by the state in its quest for legislative authority.

Finally, a word on the qualitative and quantitative evidence of the sijill is necessary. Like many, if not most, other studies of the *sijill*, this work employs a

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[73] Muḥammad Ibn Aḥmad Ibn Iyās, *Badā'i' al-Zuhūr fī Waqā'i' al-Duhūr.* 5 Vols. Ed. Muḥammad Muṣṭafā (Wiesbaden: E.J. Brill, 1975); Muḥammad bin al-Mu'ṭī bin Abī al-Fatḥ bin Aḥmad Ibn 'Abd al-Mughnī bin 'Alī al-Isḥāqī al-Manūfī, *Akhbār al-Awwal fi-man taṣarraf fī Miṣr min Arbāb al-Duwal* (Cairo: Al-Maṭba'a al-'Uthmāniya, 1886); Al-Damīrī, *Quḍāt Miṣr fī al-Qarn al-'Āshir wa Awā'il al-Qarn al-Ḥādī 'Āshir,* MS, Dār al-Kutub, Cairo; Shaykh al-Islām Muḥammad b. al-Surūr al-Bakrī al-Ṣiddīqī, *al-Nuzha al-Zahiyya fī Dhikr Wulāt Miṣr wa-l' Qāhira al-Mu'izziyya*, ed. 'Abd al-Razzāq 'Abd al-Razzāq 'Īsā. (Cairo: al-'Arabī lil-Nashr wal-Tawzī', 1998); M. Winter, *Society and Religion in Early Ottoman Egypt; Studies in the Writings of 'Abd al-Wahhāb al-Sha'rānī* (London: Transaction Books, 1982).

micro-analytical approach to the sources. A macro-analysis is indeed both feasible and desirable as an approach to outlining general trends, but a micro-analysis, examining some sixty documents over the span of a hundred years, can be equally illuminating. The documents examined in this work are extracted from thousands of documents chosen at random from the various *sijills* spanning this time frame. As such they represent the only documents to address the issue of custom directly or indirectly. From this perspective, they do provide some quantitative understanding of the frequency with which community custom shaped the law produced. On a final note, one must also concede that the results of this investigation cannot be generalized to represent Ottoman legal practice throughout Egypt, let alone the Empire, but must be limited to the city of Cairo until further research sheds light on practice within other provincial capitols.

Conclusion

I have outlined the most basic historiographic problems pertaining to one's view of the Ottoman state as 'foreign,' 'colonial' or, alternately, 'Islamicate,' and the impact of such views on the study of law and society. As well, an approach in which Cairo was presented as a composite of various ethnic customary clusters, rather than as a homogenous, 'native' entity sprinkled with 'foreign' visitors, was elaborated. Nationalist narratives, pitting native against foreign/colonial actors, were dismissed in favour of an approach positing the Ottoman state as the last, in a long line of Islamic empire-states. This allowed for an approach to the study of Ottoman-Cairo based upon the cohesion and the distinctiveness of its individual

ṭawā'if, and not on the criteria of either class or 'nativity' and 'foreignness' Cairo, assumes, therefore, the contours of a multi-ethnic, multi-religious centre in which the communities represent clusters of normative customs comprised of Moroccan, Syrian, Turcoman and predominantly Egyptian Muslim, Jewish and Coptic parts.

The proto-nationalist undertones that infuse many Cambridge scholars' writings are a natural extension of the school's economic thesis, but the link between local capital and proto-nationalist strategies or sentiments must be proven rather than hinted at. A study predicated on the *sijill*'s function and narrative, that is not uncritically accepting of this thesis, will it is hoped contribute to the debate. Towards that end, the *sijill* is treated as 'narrative,' 'text' and 'institution' grounded in the legal discourse on custom. This entails a three pronged approach to the document as a; (1) literary text; (2) as a social institution retained within the *maḥkama shar'iyya*[74] (the Islamic court); (3) and as a social narrative. Considered in this light, the evidence of the *sijill* implies that until the mid-seventeenth century, local custom was hardly 'triumphant,' but was considerably modified and redacted to reflect the consolidation of law in the Ottoman Empire.

Demonstrated in future chapters are the two policies that promoted judicial centralization. In brief, these included investing the Ḥanafī *madhhab* with a degree of authority over the other schools of law and, more importantly, from the perspective of this research, displacing local customary laws, where possible, with *qānūn*. Such policies bring into question the broad labels, including 'orthodox,' and 'heterodox,' generally used to define these judicial tensions. In their stead, the

[74] This is the self-referential term that appears in the *sijills*.

concept of 'antagonistic *sharī'as*' challenges the general view of the Ottoman Empire as a military-conquest state and shifts the traditional scholarly focus away from the relationship of *qānūn* to *sharī'a* and towards the relationship of *qānūn* to local custom. Viewed from this perspective, the loci of conflict rest between 'local' customs (associated with the various communities residing in Cairo) and 'imported' customs (packaged as *qānūn*) arriving from the imperial centre.

From an internal and subjective perspective, this fundamental issue raises the dispute over whether certain practices are to be considered "Islamic" or "un-Islamic" and throws into relief the rich variety of stimuli, both local and transcendent, at work in the complex lived reality of Muslim culture. From an external and objective perspective, it explores the *sijill* from the point of view of its institutional identities - as a document and as a courthouse (the *maḥkama shar'iyya*) - considering how the two intersect to produce, expunge and reproduce culture.

Chapter One

Renewal (*Tajdīd*) & Renunciation (*Takfīr*); the Rhetoric of *Sunnī* Re-Unification

Introduction

Did the economic and political landscape of the 'long' sixteenth century foster a judicial climate that enhanced or diminished the force of customary law (*'urf*) in Ottoman *sharī'a* courts? Basing themselves on the evidence of the *sijill*, a limited number of scholars have answered the question by characterizing the seventeenth century as one of 'triumph' for local custom. In the case of Bursa, H. Gerber argues that the fluidity of legal sources at the *qāḍī*'s (judge's) disposal resulted in 'informal' proceedings where local custom was often upheld in contravention of imperial orders.[1] In the case of Aleppo, A. Marcus, confirms the hypothesis but de-links it from the question of 'arbitrary' justice to argue that judges regularly enforced "established custom because it gave legislative expression to local interests."[2] In the case of Cairo, N. Hanna also notes a 'preponderance' of custom in the *sijills* of the seventeenth century, characterizing it as "a feature of the Ottoman judiciary system."[3] Like Marcus, she too views it as a tool for grass-roots legislative expression.

The above thesis arises out of a revisionist historiographic paradigm that displaces the old thesis of economic 'decline' under the Ottomans and substitutes it with 'crises and re-adjustment.' As shown ahead, in the secondary literature re-adjustment takes three broad forms over the 'long sixteenth century:' one,

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[1] See, H. Gerber, "Sharia, Kanun and Custom in the Ottoman Law; The Court Records of 17th-century Bursa," *International Journal of Turkish Studies*, 2i (1981): 131-147.
[2] A. Marcus, "The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century," *Journal of the Economic and Social History of the Orient*, 26 (1983), pp. 104-5
[3] N. Hanna, "Administration of Courts in Ottoman Cairo," in *The State and it Servants*, ed. N. Hanna (Cairo: AUC Press, 1995), p. 52.

'economic growth;' two 'de-centralization' (or 'political decline') and; three the 'Islamization' of state laws. All three of these trends, said to accelerate by the end of the end of the sixteenth century, represent the dominant paradigms through which the evidence of the *sijill* is filtered. In this analysis, patterns of 'economic growth' and 'political decline' are regarded as two of the most important antecedents in the rise of 'local capital classes,' a phenomenon viewed as the trigger for custom's 'triumph.' At best, however, this is a speculative conclusion as it is drawn, not from a quantitative survey of the *sijill* but rather, from a qualitative assessment of the nature of society and state in this century.

The most glaring problem with the paradigm employed by Hanna and Marcus is not its overarching economic thesis, but its exaggeration of the thesis of political decline and, what is more, its exclusion of any consideration of the link between 'religious ideology' and Ottoman legal reform prior to the 'late' sixteenth century. In turn, Ottoman polity is characterized as a 'military-conquest state' which responded to the 'crises' of the mid to late sixteenth century by transforming itself into a belated 'bastion of Sunnī Islam.' As such, scholars of Ottoman legal history are not attuned to the dominant ideological/religious currents of the early sixteenth century, let alone engaged in an attempt to link such trends to the judicial culture of the 'long' sixteenth or seventeenth centuries. That is to say, scholars study early sixteenth century legal reforms from the perspective of 'economic' and political' expedience, to the exclusion of any consideration of the 'universal religious principles' in which 'expedience' may have been cloaked.

In the hope that a consideration of religious ideology will make a contribution to this discourse, the following chapter examines state propaganda as framed in the Ottoman rhetoric of conquest and rule. What is revealed is the degree to which this rhetoric is consistently couched in the language of *tajdīd* (renewal) and *takfīr* (ex-communication), making it exceedingly apparent that the Ottoman Empire, far from presenting itself as a military-conquest state, presented itself as a 'renewer' of the faith in the early sixteenth century. As such it laid claim to 'universal sovereignty' over Muslims, in both the political and religious domains of life by pursuing a policy of 'Sunnī-reunification' through the twin instruments of *tajdīd* and *takfīr*.

A survey of the rhetoric of the intra-Muslim *jihād*, provided in Section ii, amply demonstrates the impulse for 'Sunnī re-unification.' Har-El has shown that during the conquest of the Arab lands, 'Sunnī re-unification' translated into a sustained campaign of *takfīr* against the Mamluk state.[4] But as argued in Section iii, the rhetoric of 'Sunnī re-unification' was not limited to the arena of warfare, it also permeated the internal dialectic shaping law and society. Rather than *takfīr*, however, '*tajdīd*' was the rhetorical tool of choice. This is well documented in the sources cataloguing the myriad conflicts that erupted between state and local '*ulāmā'* throughout the sixteenth century and well into the seventeenth. Also revealed in the conflict is the degree to which the state sought to unify the 'legal process' and more importantly, the 'law produced.' In view of this claim, it will be argued that custom was a diminishing source of law for much of the sixteenth

[4]S. Har-El, *Struggle for Domination in the Middle East; the Ottoman-Mamluk War 1485-91* (Leiden; E.J. Brill, 1995), p. 98.

century and well into the seventeenth. The customary laws of the various Muslim communities that inhabited the great Ottoman cities were a source of legal diversity and, by definition, an obstacle in the path to 'legal unification.'

To establish the argument that 'legal unification' was indeed the objective of the state, its pursuit of three policies is highlighted. One, the investment of the state Ḥanafī *madhhab* with procedural and substantive authority over the other Sunnī schools of law. Second, is the evolution of Ottoman *qānūn* from a 'locally bounded' set of customary state laws, to a 'universally unbounded' legal code. And third, the strict management of the 'law produced' through judicial purges, a general prohibition on *ijtihād* and calls for *tajdīd* of local legal doctrines. Thus, even if we accept the arguable claim that the state had declined in political authority by the end of the sixteenth century, we must still ponder the degree to which the movement for legal unification had already molded judicial trends over the course of this century. At the very least, the questions raised invite a more nuanced reading of the evidence of the *sijill.*

To begin, a critique of the secondary literature, particularly that relating to the dominant paradigms associated with the latter part of the sixteenth century, is provided. It is hoped that by demonstrating the weaknesses inherent in the theory of 'political decline' and the problems inherent in the thesis of 'Islamization,' a more ideologically cognizant Ottoman-Egyptian history will emerge. Only then will we be able to assess the impact of Ottoman legal culture on the customs of Cairo's communities, or begin to answer the question posed at the start of this section.

Section i
The Empire in Historiography: Inter-Empire Trade and the Rise of Local Capital

Revisionist economic and political histories advocated by Ottomanists and, more widely, by scholars of the Mediterranean in the sixteenth and seventeenth centuries have overturned early twentieth century paradigms of 'Arab economic decline' under the Ottomans. The new thesis, that the era ushered in a period of 'spectacular economic growth,' and sparked the rise of a local capital class, has allowed scholars to re-conceive of the long sixteenth century as a period of 'crises and re-adjustment' rather than 'decline.' The old view of the Ottomans as responsible for the decline of the Arab provinces was supported by the general thesis that the Mediterranean region as a whole suffered an economic depression in the sixteenth century. Stemming from the work of Ferdinand Braudel, this thesis held that the 1590's witnessed the beginning of a depression in European economies. That date, writes S. Faroqhi, was modified by later research and pushed back to the 1650's-80's.[5] While some scholars rejected the idea of a depression for England, France, Belgium and Holland, for the Mediterranean in general, "a long-term economic crises has frequently been linked with the circumnavigation of Africa by heavily armed Dutch ships."[6] As part of the revisionist school challenging this paradigm, O. L. Barkan, H. Inalcik, A. Raymond, N. Hanna, J. Hathaway, S.

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[5]S. Faroqhi, *Towns and Townsmen of Ottoman Anatolia: Trade, Crafts, and Food Production in an Urban Setting, 1520-1650* (New York: Cambridge University Press, 1984), p. 1.
[6] Ibid.

Faroqhi and others have allowed us to re-consider the thesis of economic decline.[7] In the case of Anatolia, Faroqhi casts the period between 1500 and 1600 as one of "unusual growth and crises," arguing that during the course of this century the population of the Anatolian taxpaying urban population almost doubled.[8] Parallel developments in Spain, Southern France and Italy are also observable in the sixteenth century and point to what researchers have termed a 'broad period of demographic upswing.'

In the case of Ottoman Cairo, Raymond's research set the stage for a reassessment of the view of Ottoman rule as 'responsible for the decline of Egypt and Cairo ' and framed the discussion in terms of the 'continuity,' 'change' or 'growth' that occurred in the shift from one Muslim dynastic state to another. Deconstructing the argument that decline was precipitated by Ottoman rule he argued that the economic decline of Arab centres well preceded the conquest. Baghdad, for example, had not revived after the Mongol invasions, while Damascus

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[7]See J. L. Barkan and M.A. Cook, "The Price Revolution of the Sixteenth Century: a Turning Point in the Economic History of the Near East," *International Journal of Middle East Studies*, 6 (1975): 3-28; L. Barkan, "La 'Méditerranée' de Fernand Braudel vue d'Istamboul," *Annales, Economies, Sociétés, Civilisations*, 9 (1954): 189-200; M. Zilfi, *The Politics of Piety: the Ottoman Ulema in the Postclassical Age (1600-1800)* (Minneapolis: Bibliotheca Islamica, 1988); A. Raymond, "The Ottoman Conquest and Development of the Great Arab Towns," *Arab Cities in the Ottoman Period*, ed. A. Raymond (Ashgate: Variorum, 2002); J. Hathaway, "Egypt in the Seventeenth Century," *The Cambridge History of Egypt*, vol. 2, ed. C.F. Petry and W. M. Daly (Cambridge: Cambridge University Press, 1998); Faroqhi, *Towns;* N. Hanna, "the Chronicles of Ottoman-Egypt: History or Entertainment? " *The Historiography of Islamic Egypt*, ed H. Kennedy (Leiden: E.J. Brill, 2001), and *Money, Land and Trade: an Economic History of the Muslim Mediterranean* (Strasbourg: The European Science Foundation, 2002); H. Inalcik and D. Quataert eds., *Economic and Social History of the Ottoman Empire, 1300-1914* (Cambridge: Cambridge University Press, 1994).

[8] Faroqhi, *Towns*, p. 2.

"ransacked by Tamerlane in 1400... had never recovered."[9] The Ḥijāz, Palestine and Syria under Egyptian Mamluk rule had also begun declining in the 15th century while the contemporary Maghrib "was already going through a dark period."[10]

On the other hand, suggests Raymond, a consideration of the benefits that accrued to the Arab states as a result of their inclusion in the empire reveals a source of economic opportunity as yet overlooked – the inter-empire trade.[11] The unification of vast stretches of territory, resurrecting the old borders of the Roman Empire, allowed "subjects of the emperor...[to] go from the Danube to the Indian Ocean and from Persia to the Maghreb without ceasing to be submitted to the same laws."[12] The "easy circulation of men and goods," allowed by this territorial unity says Raymond, facilitated the rise of "a huge market" that was open to the great cities of Egypt and Syria.[13] If the distant trade to and from the Far East and Southeast Asia began to be diverted towards the "great European places of market," the opportunities provided by inter-empire trade more than compensated.

A final factor contributing to the economic boom, "was the presence in the capitals of the provinces of a large class of persons with a high level of consumption

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[9] Raymond, "Conquest," p.18.
[10] Ibid.
[11] Ibid.
[12] Ibid., p. 7. Quoted from Sauvaget, "Esquisse" p. 468.
[13] As early as the sixteenth century, coffee appears as the new trade commodity during this period exceeding, "the volume of the spice trade which had preceded it." Ibid., p. 19. First introduced in the early sixteenth century, coffee would become a vital component of economic recovery and, as shown in chapter five, of religious debate. This is but one example of how the inter-empire economy was also generating an inter-empire cultural/judicial discourse. Another example was the *ḥajj,* which became an event of major cultural and economic import. This "brisk commercial activity ...resulted in a spectacular growth of the economic substructures of some of the biggest Arab towns of the Empire," Ibid., p. 23.

of luxury goods."[14] This consumer class was numbered in the tens of thousands. Added to the fact that tribute paid to the central Istanbul treasury was small - "in Egypt the hazina never went beyond 30 million paras"—this meant that the bulk of the levies were spent in local markets. The vigorous economic activity fostered in this climate is something "to which the number of trade guilds [estimated at 250] bear witness."[15]

While the notion of economic decline has been dismissed, no comparable shifts in the notion of 'cultural' or 'political' decline are evinced in most works on law and society.[16] Combined, 'economic growth' and 'political decline' have fostered the argument that judicial institutions were increasingly autonomous and increasingly amenable to the dictates of local custom. Hanna for instance, argues that the "indigenous" Egyptian judiciary was able to re-assert its domination over the 'law,' if not the 'legal process,' by the late sixteenth/early seventeenth

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[14] Ibid.

[15] Ibid., p. 24.

[16] Raymond concludes "we do not see any inconsistency between material development of the cities and the cultural apathy which, no doubt, characterized the Arab world at that time." Ibid., p. 31. This assessment is shared by M. Winter who characterizes the period as intellectually 'lethargic'. M. Winter, *Society and Religion in Early Ottoman Egypt; Studies in the Writings of 'Abd al-Wahhāb al-Sha'rānī* (London: Transaction Books, 1982), p. 1. One of the sources of the thesis of cultural decline originates in the disparaging comparisons made between Mamluk and Ottoman historiography. The latter is characterized as the culmination of a 'high literary' tradition, while the former is dismissed "because it is in decline." Conceding that great differences exist between the two literary traditions, Hanna has questioned 'the social function' represented by each historical tradition to posit an innovative hypothesis. Ottoman-Egyptian chronicles are written in a simplified vernacular because "a process of popularization of historical works" was underway, a direct consequence of the expanding market forces described above. An expanding consumer class and rising literacy rates, she conjectures, were generating a demand for intellectual as well as material commodities. She writes, "a wide market in fact existed outside the framework of educational institutions, in the private homes of people. This is confirmed by the court records, notably those of the courts of the *Qisma 'Askeriyya* and *Qisma 'Arabiyya*, where the property of deceased persons was divided amongst their heirs." See, N. Hanna, "the Chronicles of Ottoman-Egypt: History or Entertainment?" pp. 237, 241.

century.[17] More than that, she stresses that even at the height of its political power, the Ottoman state only controlled the 'legal process,' never the 'law produced.' "The way justice was carried out," she concludes, "was to a large measure left to the discretion of the magistrates working in the courts...the *qāḍī* administered justice according to the rules of the *madhhab* as he saw fit."[18] A lynchpin of her argument is the claim that deputy judges, who often remained within their posts for life, were a more stable source of influence on grassroots legal practices than their Ottoman counterparts, whose average period of tenure was between one and three years. But Hanna's logic takes little account of the purges (described in Section iii) targeting local deputy judges (*nā'ib*s) throughout the sixteenth century.

Ottoman court 'purges' were justified on the grounds that corruption was rife. Unless we accept the Ottoman charge that the courts of Cairo were permeated with corrupt and inept officials at face value, another motive must be sought for the termination of *nā'ib*s, *wakīl*s (representatives) and *shāhid*s (professional witnesses).[19] Winter suggests that:

> [i]n the organization of Egypt's system of justice, the Ottomans adopted an approach of trial and error, but ultimately aimed at Ottomanization and centralization...[20]

Like Hanna, however, he makes a distinction between the 'legal process' and the 'law produced,' suggesting it was only the former that came under state auspices:

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[17] N. Hanna, "Administration," p. 47.
[18] Ibid., p. 49.
[19] M. Winter, "Ottoman Occupation," *The Cambridge History of Egypt,* vol. 1, ed. C. F. Petry and W. M. Daly (Cambridge: Cambridge University Press, 1998), p. 510.
[20] Ibid., p. 509.

[t]he Ottomans did not infringe upon the religious or scholarly life of Egypt. Indeed, they limited their interference to material things[21]...It stands to reason that the Ottoman 'ulama' were awed by the strength and depth of the Islamic scholarly tradition of Egypt."[22]

Winter's assumption is not supported by the evidence, which suggests that the Ottomans were not so "awed" that they were dissuaded from challenging the legal rulings (*aḥkām*) of the local judiciary. Even where he finds of evidence of this confrontation, and of efforts at *tajdīd*, he dismisses it as the capricious whim of "[a] certain arrogant chief *qāḍī* [who] declared upon his arrival that he would renew (*yujaddidu*) the Egyptians' religion."[23]

The distinction erected between the 'law produced' and the 'legal process' allows Hanna to assert the impenetrability of the former and, what is more, to claim that the state's hold on the latter was compromised by the end of the sixteenth when the powers of the chief Ottoman judge were "drastically curtailed."[24] As an example of his declining authority she writes that the orders issued by the chief Ottoman judge 'Abd al-Wahhāb al-Rūmī (1009/1600) - directing deputy judges to reduce the number of people working in the courts - were reversed upon his departure.[25] But as may be gleaned from Ibn Iyās' early sixteenth century accounts, it was far from unusual for a judge to issue such orders, or for them to be ignored.[26] Moreover, al-Damīrī's biography of late sixteenth and early seventeenth century

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[21] M. Winter, "Ottoman Egypt, 1525-1609," *The Cambridge History of Egypt,* vol. 2, ed. W. M. Daly (Cambridge: Cambridge University Press, 1998), p. 24.
[22] Ibid., p. 27.
[23] M. Winter, "Attitudes Toward the Ottomans in Egyptian Historiography During Ottoman Rule," in *The Historiography of Islamic Egypt* (Leiden: Brill, 2001), p. 209.
[24] Hanna, "Administration," p. 48.
[25] Ibid.
[26] Muḥammad Ibn Aḥmad Ibn Iyās, *Badā'i' al-Zuhūr fi Waqā'i' al-Duhūr*, ed. Muḥammad Muṣṭafā, vol. 5 (Wiesbaden: E.J. Brill, 1975), pp. 184, 187.

Ottoman chief judges gainsays Hanna's portrait of the toothless Ottoman judicial figurehead. Ḥusayn b. Muḥammad Ḥusām al-Dīn Qarāchlī Zāda, appointed in 987/1579,[27] was well respected and liked by the communities of Cairo because he exercised strict control upon the governor and his men (*ḥukkām al-siyāsiyya*) such that they were unable to " deviate from his orders and rulings."[28] Well into the seventeenth century, 'Abd Allāh b. 'Alī Jān Zāda, who took office in 1020/1611, was best known for confronting Muṣṭafā Bek when the latter blocked a prominent gate near the *khān al-khalīlī* market to build himself a shop. The judge ordered it demolished and the gate returned to its original structure. He "was a degree above *ḥukkām al-siyāsa,*" concludes al-Damīrī.[29] Another demonstration of the political authority of the state comes in 1016-20/1607-11 when, after decades of failed attempts, the state was finally able to eradicate the *ṭulba* (an illegal tax imposed by rural landlords/administrators on the peasantry).[30] None of the above hints of 'political decline.'

Challenging the entire thesis of 'political decline,' H. Gerber writes, "the theory about the decline of the center is exaggerated for the entire polity."[31] Many of the characteristics of decline to which scholars point, he concludes, "are simply pervasive characteristics of past centuries."[32] Gerber suggests that the notion of

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[27] Al-Damīrī, *Quḍāt Miṣr fī al-Qarn al-'Āshir wa Awā'il al-Qarn al-Ḥādī 'Āshir,* MS (Cairo: Dār al-Kutub), p. 18.
[28] Ibid.
[29] Ibid., p. 93.
[30] This occurred under the auspices of Governor Muḥammad Pasha. See, Shaykh al-Islām Muḥammad b. al-Surūr al-Bakrī al-Ṣiddīqī, *al-Nuzha al-Zahiyya fī Dhikr Wulāt Miṣr wa-l' Qāhira al-Mu'izziyya*, ed. 'Abd al-Razzāq 'Abd al-Razzāq 'Īsā. (Cairo: al-'Arabī lil-Nashr wal-Tawzī', 1998), p. 181.
[31] H. Gerber, *State, Society and Law in Islam* (New York: SUNY Press, 1994), p. 130.
[32] Ibid., p. 135.

'decline' first arose in sixteenth century Ottoman *naṣiḥa* Literature, when the fifteenth century was idealized as a 'utopic golden age.' But this, he argues, is a symptom of the dramatic changes overtaking society in the late sixteenth century rather than decline.[33] Fleischer wrote that one such writer, Muḥammad 'Alī, described his own times so disparagingly because:

> he was the child of an age in which the few who were literate and learned could hope ...for a rewarding career as a judge, teacher or member of the expanding bureaucracy...he lived into another age in which the government ranks were crowded, when basic literacy was more commonly available.[34]

Building on Fleischer's point, Gerber argues that to see symptoms of political decline "in the Ottoman custom of co-opting local elites into positions of authority," is to base the theory of decline on an "optical illusion."[35] Many of the changes, seen as characteristic signs of decline, are in fact signs of adaptation to the Empire's rapidly expanding frontiers he argues. As such, it would be both paradoxical and "absurd to claim that the growth of the empire was a symptom of decline."[36]

The theory of political decline dovetails into (and bolsters) the argument that local institutions resisted 'Ottomanization' and retained their Mamluk features.[37] In general terms, Winter states that "the survival of Mamluks and their

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[33] Ibid., p. 130.
[34] C. Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire* (Princeton: Princeton University Press, 1986), p. 9.
[35] Gerber, *State, Society and Law*, p. 135.
[36] Ibid.
[37] Writing in the fifties, Hodgson forwarded the paradigm that "it was only in the nuclear provinces of [Anatolia and Rumelia] that the distinctive Ottoman institutions were fully developed." In these areas, "not only were diverse heritages effectively integrated; this integration was embodied in numerous interdependent institutions locally established and hallowed by custom." M. Hodgson, *The Venture of Islam*, vol. 3 (Chicago: Chicago University Press, 1961), p. 106.

eventual resumption of prominence and power is the most obscure but intriguing question,"[38] and, that overall Egypt continued to be governed by a "provincial administrative system [that] was still based on Mamluk methods and traditions."[39] The appointment of Khayrbak (d. 1522) (a Mamluk *amīr* who had collaborated with the Ottomans against the Mamluks) as governor of Egypt allowed him to "resurrect several customs and ceremonies associated with the Mamluk Sultanate."[40] P.M. Holt, another proponent of the Mamluk continuum theory, has argued that the post of *sanjak bey* in Ottoman Egypt was a resurrection of the Mamluk office of *amīr mi'a* (an officer who held an *iqṭā'* that supported one hundred horsemen). Holt and others have extended this theory to elite households in Egypt, which they regard to be modeled on those of the Mamluk Sultanate.[41]

Taking a more cautionary note, J. Hathaway points out that a process of decentralization begun late in the sixteenth century led to "empire wide political culture based on households, up to and including the household of the Ottoman Sultan himself in the Topkapī palace."[42] Without cognizance of this fact, she continues, "the competition between *beys* and officers in seventeenth-century Egypt is too easily interpreted as a confrontation between traditional Mamluk institutions and Ottoman innovations." Hathaway's analysis implies transformation and continuum, linking local conditions in Egypt to 'empire-wide' political and economic trends.

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[38] Winter, "Ottoman Egypt, 1525-1609," p. 11.
[39] Ibid., p. 13.
[40] M. Winter, "The Ottoman Occupation," p. 507.
[41] P. M. Holt, *Egypt and the Fertile Crescent* (Ithaca: Cornell University Press, 1966), pp. 73, 85, 90-92.
[42] J. Hathaway, "Egypt in the Seventeenth Century," p. 42.

D. Ayalon, who has researched the question of 'continuum' and transformation' in the Mamluk army, finds more evidence of the latter. Noting that the Ottomans compelled Mamluks to abandon their Turkic names and to adopt Arab ones, he concludes that:

> One of the main differences between the two societies under discussion, which had far-reaching effects on their respective destinies and structures, was that the earlier mamluks bore almost exclusively Turkish or other non-Arab names, whereas the mamluks of Ottoman Egypt bore, with quite a limited number of exceptions, only Arab names.[43]

Effectively contrasting the politics of identity in both states, Ayalon's observations have broad implications from the perspective of ideology and culture. In the Mamluk system, non-Arab names bestowed a prestige on their bearer and underlined the exclusivity of the Mamluk ranks. Sultan al-Ẓāhir Timurbughā and his predecessor Yalbāy, for instance, withheld the payment of the *nafaqa* from the children of Mamluks, or *awlād al-nās*, "for they hate whoever is called after the name of a prophet or of the companion of a prophet."[44]

Under the Ottomans, however, Arab names became the yardstick for 'correct outward conduct,' signaling a disavowal of excessive differentiation based on ethnic pride in favour of more unitary/universal trends based, in this case, on Prophetic Sunna. The outward appeal to Prophetic Sunna was one strategy by which to remedy the divisive politics of identity within a multi-ethnic army. But other examples, provided in the final

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[43] D. Ayalon, "Studies in al-Jabartī: I. Notes on the Transformation of Mamluk Society in Egypt Under the Ottomans," *Studies on the Mamluks of Egypt* (London: Variorum Reprint, 1977), p.152.

[44] Ibid. Also see, D. Ayalon, "Studies on the Structure of the Mamluk Army," *Bulletin of the School of Oriental and African Studies*, vol. 16, no. 1 (1953), pp. 456-459.

section, demonstrate that the state often appealed directly to "Ottoman" custom rather than Prophetic Sunna when legitimating its reforms.

The symbolic nature of Ottoman military and political reforms should not diminish their practical significance. Whether promoting 'Prophetic Sunna,' or 'Ottoman custom,' the point to be made is that unifying impulses based on universal principles pervaded Ottoman statecraft. Gerber writes that the evidence suggests:

Ottoman bureaucracy was permeated with universalistic principles to a greater extent than is usually allowed for.[45]

An expanding state and a mushrooming bureaucracy, he reasons, stimulated the development of these universal principles:

It is natural for a bureaucratic state to strive for the creation of a relatively unified court system.[46]

But it was not merely a 'unified court system' but a 'unified law' that the Ottomans pursued. C. Imber is more cognizant of the Ottoman bid for the "standardization of *qanun*, particularly as the sixteenth century progressed."[47]

Imber lays stress on the late sixteenth century because of the widely accepted paradigm that the Ottoman Empire responded to the crisis[48] of the late

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[45] Gerber, *State, Society and Law*, p. 20.
[46] Ibid., p. 21.
[47] C. Imber, *Ebu's-Su'ud, The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997), p. 45.
[48] Massive inflation, due to an influx of Spanish American silver, led to a debasement of the *Aqcha* (Ottoman silver currency) and delayed the payment of troop salaries. See, J. Hathaway, "Egypt in the Seventeenth Century," pp. 34-69. In Anatolia itself, writes Zilfi, "debilitating warfare, rural depopulation, urban pressure, epidemics, inflation, capricious execution, a swollen and erratically paid central government, high taxation and chronic food shortages" were the order of the day. The Empire's course of continuous territorial expansion (form the mid-fifteenth century through to the late sixteenth century) had ground to a halt. See, M. Zilfi, *The Politics of Piety*, pp. 30-31. Also see, P.M. Holt, "The Later

sixteenth century "by transforming itself from a military conquest state into a bureaucratic state and bastion of Sunnī Islam."[49] R. Repp and Imber's combined research on the growing authority of the chief *muftī* of Istanbul reveal a movement to subject the *qānūn* to a rigorous process of 'Islamization.'[50] Such trends gained momentum, they argue, when Suleymān Qānūnī (1520-66) officially donned the mantle of the caliphate. It was not until his time, writes Imber that "the Ottoman use of the title acquired a doctrinal as well as a rhetorical significance."[51] Most notably, it accorded the Sultan a role as "both the interpreter and the executor of the *sharī'a*."[52] Suleymān thus became the first Ottoman Sultan to claim "not merely the title but also the office of Caliphate with its implications of universal sovereignty."[53] In the Egyptian context, M. Winter confirms this conclusion, writing tensions between Ottoman officials and Egyptians eased, as there are

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Ottoman Empire in Egypt and the Fertile Crescent," *The Cambridge History of Islam*, vol. 1A, ed. P.M. Holt, A. K. S. Lambton and B. Lewis (Cambridge: Cambridge University Press, 1970): 374-393; S. Faroqhi, *Town and Townsmen*, pp 1-8; J. Hathaway, "Egypt in the Seventeenth Century"; part 2 of Inalcik with Quataert eds., *Economic and Social History of the Ottoman Empire, 1300-1914* (Cambridge: Cambridge University Press, 1994), pp. 413-14, 468-70, 572-73; Douglas A. Howard , "Ottoman Historiography and the Literature of 'Decline' of the Sixteenth and Seventeenth Centuries," *Journal of Asian History*, 22 (1988): 52-77.

[49] Hathaway, "Egypt in the Seventeenth Century," p. 35. Also see, L. Barkan, *Kanunlar* (Istanbul: Burhaneddin Matbaası, 1943), pp, 350-54; H. Inalcik, *The Ottoman Empire: the Classical Age 1300-1600* (London: Weidenfeld and Nicolson, 1973) and "Suleyman the Lawgiver and Ottoman Law." *Archivium Ottomanicum*, 1 (1969): 105-38; U. Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Menage (Oxford: Clarendon Press, 1973).

[50] Imber, *Ebu's-Su'ud*, p. 58. Also see, R. Repp, "Ottoman Developments of the Qānūn and the Sharī'a," *International Journal of Turkish Studies* 24 (1988): 33-56; and "Qānūn and Sharī'a in the Ottoman Context," *Islamic Law: Social and Historical Contexts*, ed. A. al-Azmeh (London: Routledge, 1988): 125-43. Building on Barkan's thesis, Repp argues that this occurred when the co-option of the '*ulāmā'* into the state system rendered them willing to work "with the secular government for the common good." Repp, "Qānūn," p. 131.

[51] Imber, *Ebu's-Su'ud*, p. 104.

[52] Ibid.

[53] Ibid., p. 98.

indications that "as the sixteenth century progressed, the empire was increasingly orthodox."[54]

R. Abou-El-Haj, however, throws doubt on the above claim by showing that "the designation [Sultan] is interchangeably used with caliph" in the early sixteenth century.[55] This suggests that the title may have had 'rhetorical' and 'doctrinal' significance at a much earlier date. Moreover, even though the *qānūn* was modified to reflect the growing authority and input of state *'ulamā'* in the late sixteenth century, its essential form and organization were laid in the fifteenth century.

Between the years 1451-81, Mehmed issued the first two *qānūnnāmās* intended for "universal" application. The first and only one of its kind ever to be promulgated, it organized the offices of state and the *'ulamā'* into a bureaucratic hierarchy beneath the office of sultan. The other was chiefly concerned with taxes and land laws, feudal holdings and criminal law. That the document was not abolished but later subsumed under a new title, *Qānūnnāmā Osmānī,* in 1501 by Bayezid II (1481-1512), is a testament to the stability of Mehmed's legacy and to the consistency of early sixteenth century Ottoman 'universal' doctrines.[56] It is difficult, therefore, to accept the claim that the impulse to 'standardize' the law was not asserted prior to the late sixteenth century.

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[54] Winter, "Ottoman Egypt, 1525-1609," p. 6.

[55] R. A. Abou al-Haj, "Aspects of the Legitimation of Ottoman Rule as Reflected in the Preambles to Two Early Liva Kanunnameler," *Turcica*, xxi-xxii (1991), p. 373. Suggesting that Islam was but one of three sources of political inspiration, C. Kafadar writes that Ottoman Sultans used three titles interchangeably – Khan, Caliph and Emperor. See, C. Kafadar, *Between Two Worlds; The Construction of the Ottoman State* (San Francisco: University of California Press, 1995).

[56] Imber, *Ebu's-Su'ud,* p. 47.

Without minimizing the claims that the *qānūn* were modified from mid to late sixteenth century, it can be argued that the doctrinal impulses underlying the production, modification and application of *qānūn*, throughout the long sixteenth century, are consistent. If anything the early, and mid to late sixteenth century reforms represent two phases in the maturation of one intellectual trend. The critique made of the secondary literature should not suggest that scholars have completely ignored the impact of ideology on Ottoman institutions, but that, in the case of Arab cities, they have subsumed that history to the 'economic' and 'political' paradigms of which I have spoken. In the final analysis, it will be shown that while outward conformity to procedural continuum and precedent was often professed, the functioning of judicial institutions in Ottoman-Egypt was shaped by an ideological agenda that demanded a minimum degree of institutional and substantive unification.

A close examination of the systemic conflicts that undermined relations between state and local jurists throughout the 'long sixteenth century' underlines the element of ideology. Economic theories of growth and political theories of decline do little to explain why the state felt it necessary to exile local judges from legal practice, especially as they appeared willing – too willing judging from Ibn Iyās' comments – to resume their roles in the newly renovated court system. What they were not willing to do, it will be shown in Section iii, was oblige the state's repeated demands that they 'renew their faith' and by extension their legal doctrines.

Before jumping to the issue of judicial reform, however, the Ottoman state's claim to 'universal sovereignty' will be demonstrated through a close examination of the ideological rhetoric employed on the eve of war. Here, propaganda draped in the rhetoric of '*takfīr*' lays bare the ideological impulses of the Ottoman state to re-constitute the *umma* in the political image of bygone universal Islamic empires.

Section ii
Takfīr; The Intra-Muslim *Jihād*

Careful to avoid the charge that they were perpetrating *fitna* by initiating a Muslim civil war, the Ottoman's instigated their hostilities against the Mamluk state by dipping the sword in the religious idiom.[57] The conquests of Egypt and Syria were presented, not as an attack upon the Sunnī peoples of the Arab heartland, but as a *jihād* to check the tyrannical rule of the Mamluk Sultan, al-Ghūrī: an Islamic *fatḥ* akin to the early Arabian conquests.

Selīm had to be acutely conscious that a conquest of the Sunnī Arab heartland would catapult him in stature from a mere *ghāzī* on the frontiers of the Muslim world to 'the protector of Mecca, Medina and Jerusalem' and 'official guardian of the pilgrimage routes.' He also had to be aware that credentials such as these carried more weight than the title of caliph, claimed, at the time, by a number of rulers in the Muslim world.[58] But before moving on his prize, Selīm first had the difficult task of legitimating war against the other great Sunnī power. Legitimation

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[57] D. Behrens-Abouseif, *Egypt's Adjustment to Ottoman Rule: Institutions, Waqfs and Architecture in Cairo -16th and 17th Centuries* (Leiden: E.J. Brill, 1994), p. 70.
[58] D. Sourdel, "Khalīfa," *EI,* CD Rom Edition.

was necessary in order to demonstrate to the Muslim populace, and to their clerics, that the war was between two military castes/dynasties and not two Muslim peoples. To present it as anything less would invite perpetual resistance. In this, the Ottoman state had ample historical precedent on which to draw.[59]

The Qur'ān (4:92) forbade the shedding of Muslim blood, and the theory of *jihād* only recognized holy wars launched in the path of Allāh (*fī sabīl Allāh*). Legal theory provided no special rules for the regulation of intra-Muslim warfare. Without forsaking the notion of a universal *Dār al-Islām,* jurists could not elaborate a formal branch of legal literature that would recognize the *de facto* break up of the political *umma* (religio-political community) by establishing rules to govern intra-Muslim wars and treaties. In theory, writes Har-El, the intra-Muslim war remained illegal.[60]But the absence of theory did not of course reflect practice, where intra-Muslim warfare was far from uncommon. In the absence of a theoretical basis from which to conduct such wars, the *siyar* (literature governing relations between Muslim and non-Muslim states) became a practical guide for the regulation of both intra-Muslim and international relations.[61] For all intents and purposes, this permitted Muslim states to launch wars of *jihād* upon one another. Generally,

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[59] The tri-partite schism which developed after the first *fitna* in 650-51 H. between Mu'āwiyya and 'Alī was the first incident to shake the classical legal assumption that a universal caliphate existed and held dominion over a unified state. The second was the 'Abbāsid revolution of 750, which one might argue was the culmination of the *fitna* of 650. The 'Abbāsid state's claim to universal sovereignty was challenged by the birth of the Umayyad state in Spain in 756. By the ninth century, the Ṭāhirid dynasty (822-73) had established its political dominion over the Iranian highlands and northeast lands. In Egypt, the Ṭūlūnids (868-905) ruled autonomously while in the Maghrib the *Shī'a* Idrīsids (788-974) ruled from Fez and the Aghlabids (801-909) ruled from Qayrawān. Hodgson, *The Venture*, vol. 1, p. 489.

[60] Har-El, *Struggle for Domination*, p. 11.

[61] Ibid., p. 10.

however, these wars were given the added designation of *muqātala* (conflict) *fitna* (strife) *ḥarb* (war) or *qitāl* (battle).[62]

Because the welfare of the *umma*, and not the state, was paramount in Islamic political philosophy, the transgression of the *sharī'a* by one Muslim state empowered another to intervene. In practice, intra-Muslim *jihād* was conducted on two levels: *jihād* against political dissension, usually involving rebellion or secession; and *jihād* against religious dissension.[63] Moreover, the intra-Muslim *jihād* differed from the *jihād* conducted in *Dār al-Ḥarb* in one important respect - the Muslim armies and populations which were conquered were to be accorded their full rights as Muslims under the *sharī'a*. Thus the property of a Muslim could not be confiscated as part of the spoils of war nor could he/she be enslaved. The same applied to the property of non-Muslim *dhimma* (protected minorities) who resided in Muslim territories. Anything less would violate the legal pretences under which the war had been waged.

Baghdad's destruction in 1258, and with it the seat of the universal Muslim caliphate, exacerbated the conditions which generated the intra-Muslim *jihād*. From the moment of its inception in 750, the 'Abbāsid state faced secessionist challenges, but the notion of an Islamic political centre to which all looked, even nominally, for political investitures and for spiritual authority, had not diminished with the growing number of independent Muslim states. Only after 1258 was this notion, more or less, extinguished. By the time Ibn Taymiyya, the Ḥanbalī jurist, was

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[62] Ibid.
[63] Ibid., pp. 10-11.

writing (d. 728/1328), the *umma* could be classified as "a natural confederation of states" and the caliphate as an unnecessary fiction.[64]

At the same time as this de facto 'confederation of Muslim states' was being intellectualized, the political landscape of the 13, 14th and 15th centuries was becoming an arena in which intra-Muslim *jihāds* were now as common as the *jihād* against the 'infidel.' New patterns of conquest, expansion and annexation within *Dār al-Islām* asserted themselves at an unprecedented rate. Squarely at the centre of this phenomenon was the Ottoman state. Relatively novel, and certainly un-anticipated by classical *fiqh*, this form of conquest gave rise to a host of doctrinal paradoxes for the ruling and intellectual elite.

It is not without significance that the earliest state petitions to Ottoman *muftīs* were in the form of questions on the legality of the intra-Muslim *jihād*.[65] Used to legitimate and reinforce state actions, the *fatwā* features prominently in the preparatory stages of intra-Muslim war, for unlike regular *jihāds* directed against *Dār al-Ḥarb, jihād* against Muslims had to be carefully justified. Notably, the *fatwā* authorizing such a war was always preceded by *takfīr* (excommunication/charge of

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[64] K. Jindan, *The Islamic Theory of Government According to Ibn Taymiyya* (Ph.D. Dissertation, Georgetown University, 1979), pp. 40-47.

[65] The vehicle for the transmission of legal knowledge, from its inception in theory to its assimilation in practice, is the legal responsa, or *fatwā*.. The *fatwā* is a figurative bridge between the law and society, the road by which theoretical constructs travel to a destination in juristic practice. See the general collection of articles in M. K. Masud, B. Messick and D. Powers, eds., *Islamic Legal Interpretation: Muftīs and their Fatwās* (Cambridge: Harvard University Press, 1996). That *iftā'* was an instrument of state policy is attested to in one of several criticisms made of Bayezid I's Grand Vezir by "Ašikpašazade" who complains of, "[t]hose who came and made the fetva an instrument of trickery and did away with piety." R. Repp, *the Muftī of Istanbul, A Study in the Development of the Ottoman Learned Hierarchy* (London: Ithaca Press, 1986), p. 114

unbelief) against the Muslim foe.[66] Other charges, such as *fasād* (corruption) *ẓulm* (oppression) *jawr* (tyranny) usually preceded or accompanied the charge. But *takfīr*, concludes Har El, is the only legal tool that legitimized this type of war.[67]

Soon after his ascension to power in 1362 Murād I (763-91/1362-89) consulted his *'ulamā'* on "whether, in the face of threats from Anatolian rulers, troops collected for the purpose of the *ghazā'* against the unbelievers in Rumeli might be used to meet the threat in Anadalu first [against the Muslim principalities] and the *ghazā'* consequently delayed."[68] In Murād II's (824-55/1421-51) reign, *fatwās* on the legality of the punitive expedition against Karamān on 24 Safar 848/12 June 1444, were sought from the *'ulamā'* of Egypt.[69] Thus as early as in Murad I's reign, the *fatwā* had become an important instrument for punitive military action against other Anatolian Muslim states.[70]

Commonly, the *fatwās* issued in response included denunciations of the 'duplicitous' conduct of Anatolian kings who were accused of exploiting the Ottoman pre-occupation with the *jihād* against the infidel to attack them from behind.[71] Şükrüllah expressed this sentiment in canonical terms, voicing the *'ulamā'*'s consensus that Murād I should, "before embarking on *gazā* against Serbia and Hungary... make war on the neighboring Muslim kings who planned to attack

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[66] Har-El, *Struggle for Domination*, p. 11.
[67] Ibid.
[68] R. C. Repp, *The Muftī of Istanbul; A study in the development of Ottoman Learned Hierarchy* (London: Ithaca Press, 1986), p. 114.
[69] Ibid., p. 114.
[70] Sultan Orhan is reported to have asked Tāj al-Dīn Kurdī for a *fatwā* on the legality of breaking an agreement over booty made with one of his commanders. Ibid., p. 112.
[71] The Ottomans claimed to be the rightful heirs to the Seljuk dynasty and invented a genealogy which traced their ancestry to Noah and to Oghuz Khān, "the legendary ancestor of the western Turkish peoples." Imber, *Ebu's-Su'ud*, p. 73. Between 1512-1520, Selīm fought the Safavids as declared 'heretics.' Ibid., p. 74.

Bursa in his absence."[72] *Ghazā'*, according to the *'ulamā'*, was a communal obligation, whereas the prevention of injury to Muslims was the individual obligation of the monarch.

It is significant that Muslim states resorted to the concept of *jihād* when fighting one another and conformed in rhetoric to its terms of engagement. As mentioned, some authors have attributed this development to an Islamic drive to re-universalize the *umma* and the Islamic state. Har-El writes, "both the Mamluks and the Ottomans followed a policy of Sunnī religious revivalism and Islamic political unification."[73] In the eyes of the protagonist states therefore, an effective expansion into *Dār al-Ḥarb* could only be achieved if "a reborn universal caliphate" existed. To achieve this, however, the state had to be committed to prolonged warfare against other Muslim states, a policy that threatened to cost the Ottomans their doctrinal legitimation.[74]

It follows, therefore, that the links which bound *iftā'* to intra-Muslim *jihād* and to the state, would be most visible when the Ottoman state came to a head with "the extremely difficult problem of justifying war against the other great Sunnī

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[72] Muṣṭafā 'Alī, "Künhü al-Ahbār," *Pure Water for Thirsty Muslims: A Study of Mustafa Ali of Gallipoli's Künhü al-Ahbār*, ed. and translated by Jan Schmidt (Leiden: Het Oosters Institut, 1991), p. 230.

[73] Har-El, *Struggle for Domination*, p. 13.

[74] A crisis of legitimation was fuelled during and after the battle of Ankara in 1402 when Ṣulṭān Bayezid's troops deserted on the battlefield. His critics levied severe accusations against him. See, P. Wittek, "De la défaite d'Ankara á la prise de Constantinoplé," *Revue des Etudes Islamiques* (1938), pp. 8-10. So long as the Ottoman state had limited itself to the *jihād* in *Dār al-Ḥarb,* Egyptian *'ulamā,'* with the consent of the Mamluk Sultans, routinely issued Ottoman Sultans *fatwās* authorizing their *jihād.* In the late fifteenth century, however, alarmed by the Ottoman state's expansion into Muslim territories, Egyptian scholars refused to issue further *fatwās*. When Mehmed annexed the Muslim Turcoman principality of Isfendiyār (Kastamonu) in 865/1461, relations between the two Sunnī giants became openly hostile. Har-El, *Struggle for Domination*, p. 79.

ruler."[75] More than that, it was the seat of the 'Abbāsid caliph, the Arabic-speaking heartlands and the Ḥijāz. Turkish chroniclers report that before launching his war against the Mamluk army at Marj Dābiq (1516), Selīm awaited the authorizing *fatwā* of Alī Çemalī, the chief *muftī* of Istanbul, on the battlefield.[76] It can be assumed, however, that the operation "had [already] been thoroughly canvassed," writes Repp, implying that some kind of "consensus of the *'ulamā'*"[77] had been achieved long before Selīm left Istanbul. He writes that, "[i]f Selīm did, as Çelalzāde Muṣṭafā says, seek his advise individually even if only to confirm an already established policy, the fact would not be without significance as it would constitute perhaps the first demonstrable instance of a Sultan's having applied exclusively to the *mufti* on a point of public policy."[78]

The rhetoric of some of the *fatwās* issued in anticipation of the Mamluk-Ottoman showdown demonstrates an escalation in vitriol proportionate to the escalation in tensions. Notably, the indictments against the Mamluks grow more severe the closer the Ottoman state moves to an actual declaration of war. Years before the conquest, Bayezid II (r. 1481-1512) had launched war against Qāytbāy (r.1467-1468), accusing the latter of being an "infidel Circassian" for his support of prince Cem's uprising.[79] Most of the Anatolian *'ulamā'* were said to be in favour of the war, even resisting Bayezid's efforts to secure a *modus vivendi* with the Mamluks. Making their position known through the *fatwā*, the empire's *'ulamā'*

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[75] Repp, *The Muftī*, p. 214.
[76] Muṣṭafā 'Alī, "Künhü al-Ahbār," p. 313.
[77] Repp, *The Muftī*, p. 215.
[78] Ibid., p. 112.
[79] Har-El, *Struggle for Domination*, p. 206.

justified *jihād* against him and "the heresy, oppression and rebellion of the rulers of Egypt and Syria (*ilḥād va ẓulm va 'iṣyān li-mulūk Miṣr va Shām.*)."[80] At this stage, the Mamluks may be heretics, but they are not as yet *Kuffār* (unbelievers).

The last Mamluk Sultan al-Ashraf Qanṣūḥ al-Ghūrī (r. 1510-1516) is accused of spoiling the 'father-son' relationship between him and Selīm I by establishing relations with the heretic Safavids and harboring intentions to attack the Ottomans. A *fatwā* was peremptorily issued by the chief *muftī* stating that war with Circassians (Mamluks) was a religious obligation, no less, because they educated their children in infidel Circassia and allowed their coins, which bore the *shahāda* "to be spoiled in the hands of unclean members of the world's 72 nations."[81] The Mamluks are now infidels.[82]

If it was Selīm's aim to convince his audience in Anatolia, the Arab lands, and indeed Muslims around the world, that his aggressions were directed not against the Muslim populace (in whose name the battle was fought) but against the Mamluk regime, his propaganda was effective. After the initial trauma of the conquest, the Muslim populations of the Arab provinces appear to have adjusted to the latest dynasty as they had to its predecessors.[83] Military-state propaganda justifying the intra-Muslim *jihād* demonstrates the extent to which Islamic doctrine and symbolism, in this case *takfīr*, were wielded in the service of a 'universalist'

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[80] Ibid.
[81] C. Imber, *Studies in Ottoman History and Law* (Istanbul: The Isis University Press, 1996), p.122.
[82] Al-Ghūrī was unpopular in Egypt, making Selīm's task of vilifying the Mamluk regime somewhat easy. "In Ghūrī's state, we witnessed strange things and bore more than we had the capacity to bear. And enough transpired in our [last] year from lack of security and highway robbery." Ibn Iyās, *Badā'i'*, p.14.
[83] See, M. Winter, "Attitudes Toward the Ottomans," pp. 195-209.

ideology, cloaking 'expansionist' impulses within the rhetoric of unification. In the social arena, one observes the same impulses expressed through the doctrine of *tajdīd.*

Section iii
Tajdīd; The Social Conquest

In 923/1517, the 18th of Ramadan, the state called on Circassian Mamluks who had re-surfaced in Cairo to dress according to Ottoman custom. But the order was soon rescinded, writes Ibn Iyās.[84] A few years later, however, remnants of the Mamluk army were again ordered to 'Ottomanize.' After dismissing a thousand Mamluks and *awlād al-nās* from active military service in December 1521, Khayrbak personally cut off half the beards of several Mamluks during a public military parade and handed them to their former owners saying:

Follow the Ottoman rules in cutting your beard, narrowing the sleeves of your dress and in everything that the Ottomans do."[85]

All of these efforts, writes Winter, were intensified after Muṣṭafā Pasha (Sultan Suleymān's brother-in law) replaced Khayrbek in 1522. What is most notable about these changes is that they signal an abrogation of the symbols of the Mamluk army.[86] On a note

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[84] Mamluks dressed in Ottoman military garb were accused of imperiling the Ottoman army's reputation by robbing traveling merchants and harassing the general populace. Ibid., p. 213.

[85] Winter, "Ottoman Occupation," pp. 511-12.

[86] The *amīr*s were forbidden from having servants walk, or ride behind them on a mule when they rode horseback through the streets. Instead the servant was to walk in front of his Mamluk master "according to Ottoman custom." Ibid., p. 512. The shock which Ibn Iyās expresses at the easy informality with which Ottoman soldiers carried themselves suggests to Winter that Ottoman military *adab* was a marked departure from Mamluk *adab.* "Egyptians were displeased by the apparently egalitarian spirit in the Ottoman army." Ibid., p. 505. Ayalon writes that it would have been inconceivable in the Mamluk army for a

of resignation, Ibn Iyās marks the passing of an era by advising Mamluk soldiers to adapt to the new customs of the age:

Walk with time oh wronged one,
and shed the clothes of parades/processions *(mawākib)*
and follow the Sultan in robes (*suqmān*) or hats (*ṭarṭūr)*
and be among the political community (*qawm*) and the nations (*al-awṭān*) in dress .[87]

More importantly, Ibn Iyās is also conceding that the *qawm*, now defined as the Ottoman polity, demands a set degree of cultural 'standardization' between the various 'nations' (*al-awṭān*) it embraces. General trends over the course of the sixteenth century, confirm the persistence of this universal ideal and, judging by Ayalon's conclusions, its success:

In the Mamluk sultanate racial rivalries played a most prominent part, and many a time they silenced the rivalries of the various factions of the Mamluks. The hostility of the Circassians to the other Mamluk races and their feeling of superiority is well documented in the contemporary sources...In the period covered by al-Jābartī and ad-Dimurdāshī, the picture is entirely different. The racial problem simply does not exist.[88]

Even beyond military etiquette, many of the most prominent symbols of the Mamluk state, especially those associated with religious festivals, were also abrogated. Ibn Iyās writes:

Mamluk to ride mounted from his patron's house alone, to marry, to enter business, etc. However, in the Ottoman period, Mamluks married, acquired houses and servants of their own, rode horses and had the temerity to smoke on their rides in the main streets. Other trends that hint of a breakdown in the rigid hierarchy of the army include a Mamluk riding to his patron's house on hearing that a notable had died to ask for the widow's hand. Patrons seemingly accommodated such requests, and would accompany the Mamluk "to the house of the deceased even before the funeral." Ayalon, "Studies in al-Jabartī," pp. 160-161

[87] Ibn Iyās, *Badā'i'*, p. 208.

[88] While this may have been the case for Mamluk and Ottoman soldiery, it was less true for recruits (*wāfida*) from among the *awlād al-'Arab*, who were brought into the seven corps (*ojaqāt*) of the Ottoman garrison in high numbers toward the end of the century. Bucking the trend, members of the *ojāqs* tried to prevent *awlād al-'Arab* from entering the army and from wearing "*Rūmī*" clothing, even resorting to murder. Ayalon, "Studies in al-Jabartī," p. 318.

And so ended the parades which would proceed during the *ʿīd al-naḥr,* as though that system (*niẓām*) had never been. And so lapsed (*baṭṭal*) many of the symbols of the kingdom enacted for sultans past during the *aʿyād,* until Egypt became bereft of any *niẓam* that once was.[89]

Also abolished was the Mamluk practice of distributing meat (*aḍḥiyya*) on the occasion of *ʿīd* to the jurists, *amīr*s, soldiers and even the Sufi monasteries and graveyards. The same occurred the following year in 924 and when the people complained to the governor, he replied, " I follow only Ibn 'Uthmān's ways in all matters."[90] Ibn Iyās is especially chagrined however, at the fact that the Mamluk tent, purchased for 30,000 *dīnār*s by Qāytbāy was sold to the Moroccan community for a pittance at 4,000 *dīnār*s, writing, "it was one of the symbols of the kingdom."[91] He also condemns them for forsaking customs associated with the *mawlid al-nabī* (public celebration of the Prophet's birthday) - an 'innovation' and a source of juristic debate for centuries - such as giving gifts to the preachers, the jurists and the Qur'ān reciters (*qurrāʾ*).[92] The neglect of Egypt's customary religious festivals (*aʿyād*), and the end of the famous processions which proceeded on "land and water," prompts the mournful words: "Oh my sorrow (*lahfī*) for Egypt's festivals, how they have perished."[93] Only the *ḥajj* (pilgrimage to Mecca) procession continued to go forward as per the old customs.[94]

Like the theory of 'decline,' the theory that local institutions (especially judicial) resisted 'Ottomanization,' may originate with the Ottomans themselves. It

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[89] Ibn Iyās, *Badāʾiʿ*, p. 226.
[90] Ibid., p. 285.
[91] Winter, "The Ottoman Occupation," p. 506.
[92] Ibn Iyās, *Badāʾiʿ*, p. 245.
[93] Ibid., p. 276.
[94] Ibid., p. 280.

was expedient for the Ottoman state to portray itself as a continuum with the Mamluk order for reasons of political legitimacy - something it assiduously cultivated. As such, its officials were compelled to bow before the concept of 'precedent,' encapsulated in the Islamic ideal of *Sunna*. Consistently referring to Egypt and its administrative institutions by the biblical adage of *al-Diyār al-Yūsufiyya* (the abode of the Prophet Joseph) and *al-Takht al-Yūsufiyya* (the bench of the Prophet Joseph) for example, is homage to that principle.[95] Other nods to local custom were made in the early years of the conquest, when rapid, often fundamental, changes were first introduced. In such an environment, outward appeals to continuum and claims to universal sovereignty were vital rhetorical weapons in the bid to forestall civil unrest. The latter is aggressively asserted in the *Qānūnnāma Shām* (intended for greater Syira), composed in 1519, two years after the conquest. Here the acquisition of Egypt and Syria is recorded as "an assignment from God."[96] Moreover, the document draws parallels between the Prophet's *khilāfa* and the reign of the Ottoman Sultan.

But even claims to universal sovereignty were not enough to stem social discontent. The relative stability that the province had enjoyed under Khayrbek, ended with his death, writes the Turkish chronicler Uzunçarsili, when a steep rise in the number of rebellions was recorded.[97] Khayrbak's successor, the Ottoman officer

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[95] Behrens-Abouseif, *Egypt's Adjustment,* p. 50; Also see, Celālzāde Muṣṭafā Celebī, "Ṭabaqāt al-Mamālīk wa-Darajāt al-Masālik," in *Geschichte Sultan Suleymān Kānūnīs, von 1520 bis 1557,* (Wiesbadedn, 1981), p. 140. He writes that to be ruler of Egypt is "a gift from God."

[96] R. Abu al-Haj, "Aspects of the Legitimation," p. 379.

[97] *Qānūnnāma Miṣr,* ed. and trans. M. A. Fu'ād (Cairo: Anglo-Egyptian Bookshop, 1986), pp. 3-4.

Muṣṭafā Pasha, had intensified efforts to 'Ottomanize' local institutions by imposing Ottoman taxes in place of Mamluk ones. In so doing, he lit a social fuse that was only diffused when the new laws were packaged as extensions of the 'old.'

In 1524, Suleymān's *tazkarjī* (also called *tawqī'ī* or *nashānjī*), Ibrāhīm Pasha, who was commissioned to investigate the source of the unrest gripping Cairo, found that the army had not participated in a single uprising, and that the principal antagonists were the '*azbān* (a militia stationed at the citadel)[98] and the *ahālī* (communities).[99] Thus, it was Cairo's various civilian communities who were at the forefront of this rebellion. Their demands say much about the core issues in dispute, including a reduction in Ottoman taxes, a return to Mamluk *qānūn* and a repeal of Ottoman *qānūn* which "did not suit the conditions of *al-Diyār al-Miṣriyya*."[100] It is significant that the rebels do not call for a repeal of Ottoman *qānūn* and a return to the *sharī'a*, as is often implied in the secondary literature, but for a return to "Mamluk *qānūn*." Popular anger was also directed at the Egyptian *fuqahā'* who were accused by Ibn Iyās of fearing for their 'seats' instead of safeguarding the "rights of Muslims against these edicts (*rusūm*)."[101]

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[98] Originally meaning bachelor, the term was eventually applied to a wide variety of troops that resided in the citadel. Their members were called "*mushah*" and were rivals of the *inshikāriyya* (sometimes written as *yanjiriyya* or *yankijriyya* in the *sijills*) another faction stationed at the citadel were known as the *awjāq al-Ṣulṭāniyya* because they represented Sultanic authority. The '*azbān*'s duties included protecting the citadels in and outside of Cairo and protecting the pasha. Because they resided in the citadel, asserts al-Bakrī, they were able to control/influence *siyāsa* in Cairo. Al-Bakrī al-Ṣiddiqī, *al-Nuzha al-Zahiyya,* p. 25-26.

[99] *Qānūnnāma Miṣr,* p. 5.

[100] Ibid.

[101] Ibn Iyās, *Badā'i'*, p. 452. The *rusūm* in question are the court fees introduced by the Ottomans.

According to the *Qānūnnāma Miṣr* itself, when Suleymān Qānūnī sent Ibrāhīm to Egypt to negotiate with the *ahālī* in 1525, the latter immediately availed himself of a copy of Qāytbāy's (d.1468) *qānūn*. After consulting it, he compiled the *Qānūnnāma Miṣr* (reportedly penned in his own hand), a document which claimed to amend Ottoman *'askerī* and *qadā'ī* laws by harmonizing between the new *qānūn* of Selīm and the old *qānūn* of Qāytbāy.[102] Naturally, scholars have asked themselves why the laws of Qāytbāy rather than the laws of a more recent Mamluk Sultan, like al-Ghūrī or Ṭūmānbāy? H. Inalcik speculates that there must have existed a "codex of Qāytbāy's laws."[103] Behrens-Abouseif, however, dismisses the possibility, arguing that there is nothing to indicate that Qāytbāy was a legislator of any importance.[104] A careful reading of the text of the *Qānūnnāmā* supports Behrens-Abouseif's position for nowhere does it actually refer to a 'codex of Qāytbāy,' but to "the *'āda* (custom) and *qānūn* that were applied in the time of Qāytbāy."[105]

The question persists, why Qāytbāy? It will be remembered that in waging his *jihād* against the last Mamluk Sultans, Selīm had labelled them *kuffār*, a charge which stripped them of legislative authority. Bayezid II (1481-1512), it should be mentioned, had also accused Qāytbāy (d. 1468) of 'heresy' (*ilḥād*), but that was a lesser charge made by a different Sultan. The doctrinal paradoxes that would have been generated by enacting the *qānūn* of a declared *kāfir* like al-Ghūri, are multiple, but less imminent in the case of a remote 'heretic' like Qāytbāy.

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[102] *Qānūnnāma Miṣr*, p. 5.
[103] See, H. Inalcik, "Ḳānūnnāme," *EI*, CD Rom Edition.
[104] Behrens-Abouseif, *Egypt's Adjustment*, pp. 35-45.
[105] *Qānūnnāma Miṣr*, pp. 30, 32, 33.

The Ottomans were not making special concessions to the Egyptians but following their own established policies. Imber writes that:

> When a sultan conquered new lands, he would order the compilation of both a new cadastral survey and a new law-book for the area. The new law-book would, as a rule, simply list pre-conquest taxes and note whether these had been confirmed or abolished. In the provinces of eastern and south-eastern Anatolia, for example, which Selim I (1512-1520) conquered between 1514 and 1516, the first Ottoman law books for the area normally state in their preambles that they are compiled 'in accordance with the *qanun* of Hasan Padishah,' a reference to the laws in force in the days of the Akkoyunlu Sultan, Uzun Hasan, who had died in 1478.[106]

Heyd makes the important observation, however, that they referred to the imposition of their "law-books" as *tajdīd*, rather than *'urf/'amal/jadīd*.[107] Making pretences to a continuum between their rule and that of predecessor dynasties was thus of some importance to the Ottomans, but not enough to dissuade them from enforcing a new legal regime under the guise of 'renewal.'

In the case of the *Qānūnnāma Miṣr* it is clear that the Ottoman claim to 'enacting the laws of Qāytbāy' was more fictive than genuine. On the one hand, the *Qanūnnāmā Miṣr* speaks of activating the laws of Qāytbāy, and on the other of enacting in Cairo the *qānūn* that is "applied (*ma'mūl bihī*) in the province of *Rūm*," indicating that "copies of it [should] be preserved in the *Dīwān Miṣr*."[108] A double movement is thus at work in the *Qanūnnāmā Miṣr*. In the first, it appears to acknowledge that past precedent confers authority on local *qānūn*, and on the other it exhibits a notable impulse to replicate the application of imperial *qānūn* from one territory to another. A survey of the judicial reforms initiated immediately after the conquest will demonstrate the extent to which the so-called movement to

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[106] Imber, *Ebu's-Su'ud*, p. 44.
[107] Heyd, *Studies*, p. 169.
[108] *Qānūnnāma Miṣr*, p. 34.

'harmonize' between the laws of Selīm and the laws of Qāytbāy was mere conciliatory propaganda.

The impact of the conquest on the 'legal process,' the 'law produced' and the 'lawmakers' was immediate and profound. The first to be affected were the four chief judges *(quḍāt al-quḍāt)* of the legal schools in Cairo who were formally dismissed. They were eventually re-instated a in 928/1521 by the Ottoman *Qāḍī al-Quḍāt* Muḥammad Ḥalabī, but only as the latter's deputies in the *Qiṣma 'Arabiyya* district court.[109]

In 929/1522, a *marsūm* (sultanic decree) arrived announcing two new offices in lieu of the Ottoman *qaḍī al-quḍāt* - a *qāḍī 'askar* and a *qāḍī 'arab.* Both positions were reserved for Turcophile Ḥanafis.[110] Yet again, the four *quḍāt al-quḍāt* were dismissed and formally re-instated in August 1523, as deputies of *the qāḍī al-'arab.* The point to be made is that the demotion of Egypt's chief judges was immediate and lasting.

But it is the mainstay of the Egyptian judiciary, the deputies of the former chief judges who encountered the worst. In the year 924/1517, the Shāfi'ī chief judge, Kamāl al-Dīn al-Ṭawīl, was ordered to dismiss all but four of his deputy judges.[111] This persisted for some time, writes Ibn Iyās, until he reinstated more. Two years later, in Rajab 926/1519, the governor ordered the chief *qāḍī*s of the other schools to follow suit. This time, the Shāfi'ī *qāḍī* reduced his to five, the

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[109] Al-Damīrī, *Quḍāt Miṣr,* p. 221.
[110] Sayyidī Jalabī (Turkish: Celebī), "the greatest of Sultan Suleymān's *qāḍī*s and their most senior," was announced as the first "*qāḍī 'asker.*" Ibn Iyās, *Badā'i',* p. 453-54. The *qāḍī askar* was the top legal authority in Cairo, if not the provinces. Appointed from Istanbul, his tenure was recorded in the *sijill*s. Al-Bakrī al-Ṣiddīqī, *al-Nuzha al-Zahiyya,* p. 36.
[111] Ibid., p. 282.

Ḥanafī to two, the Mālikī to seven and the Ḥanbalī to three. Indicating that these measures were adopted, but only temporarily, is another *rasm* issued by the same governor in Dhu'l Ḥujja 927/1520, warning the "four *qāḍī*s to 'control' their *nuwwāb*."[112] But this time, each *madhhab* was allowed to retain seven *nā'ib*s and two *shāhid*s, in line with the demands of Ottoman "*yasaq*."

The campaign to reduce the number of deputy judges from all the schools of law, was an obvious attempt to bolster the authority of the Ḥanafī *madhhab*, and to constrain the only element in Egyptian society that could be an impediment to Ottoman legal reforms. The governor's order of 927/1520 insofar as it permitted for higher numbers of Mālikī, Shāfi'ī and Ḥanbalī *nā'ib*s than in the previous *rasm*, is perhaps indication enough that the attempt to exclude local members of the judiciary was simply untenable. No sooner would an order arrive stipulating a reduction in the number of *nā'ib*s before their numbers had again proliferated. Nothing comparable had ever before occurred, writes Ibn Iyās, who laments the harm that befell the *nuwwāb*. But apart from the *nuwwāb, wakīl*s (loosely translated as attorneys or legal representatives) and *shāhid*s, a permanent body of court accredited witnesses, were also dismissed on the grounds that they were 'corrupt.'[113]

Ironically, however, it may have been local Ḥanafī judges in Egypt who bore the brunt of this campaign as Ottoman *qāḍī 'askar*s had their own retinue of Ottoman '*nā'ib*s', often students or relatives, installed in the district courts. When Yeḥya b. Zakariyya (*qāḍī 'askar* in 1009-10/1600-01) was appointed to Damascus,

[112] Ibn Iyās, *Badā'i'*, pp. 418-20.
[113] Ibid., p. 55.

he is said to have taken with him eleven of his and his father's students to appoint as his *nā'ib*s.[114] Underscoring this relationship, Ḥanafī deputies attached to the court of the Bāb al-'Ālī did not hold their posts for life, but travelled with the *qāḍī 'askar*. Explaining the relevance of such a policy, Nahal writes "[a]s outsiders they could be detached from the locale over which they were to administer justice."[115] Moreover, this policy of containing/controlling the local judiciary was not limited to the early sixteenth century, but is a recurring feature of the long sixteenth century.

As late as 1000/1591, Al-Effendī Ḥasan is vilified by al-Damīrī for dismissing *nā'ib*s and *shuhūd* even before his scheduled arrival in Cairo - his acting deputy undertook the task on his behalf. Mercifully, writes al-Damīrī, he was killed at sea during a storm before reaching Egypt, "and so the Muslim were spared his evil-doing."[116] While the judge who was appointed in Ḥasan's stead was a more conciliatory figure, the worst had yet to come for the local judiciary. In the year 1009/1600, the most infamous chief judge, 'Abd al-Wahhāb b. Ibrāhīm al-Rūmī al-Ḥanafī was appointed. One of his first acts was also to purge the courts of most witnesses and deputy judges.[117]

The care taken to control the activities of local lawmakers belies the claim that the Ottomans only tampered with the 'legal process.' More compellingly, local

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[114] G. al-Nahal, *The Judicial Administration of Ottoman Egypt* (Chicago: Bibliotheca Islamica, 1979), p. 14.
[115] Ibid., p. 17.
[116] But even if al-Effendī Ḥasan never made it to Cairo, the damage done by his deputy warranted the obligatory poem. Alluding to his mode of death, it reads: "Oceans have crashed upon the fuqahā' especially its judges and our witnesses." Al-Damīrī, *Quḍāt Miṣr*, p. 8-9.
[117] Ibid., p. 24.

jurists who were fortunate enough to continue working were denied the authority to preside over the most basic of social contracts - marriage and divorce – for a number of years after the conquest. That privilege was reserved for the *qāḍī 'askar* alone.[118] As shown in future chapters, the Ottomans also attempted to re-define the rights of the wife in marriage as well legislate the boundaries of public morality.[119] Moreover, only the chief Ottoman judge could make a *waqf* appointment or "make a decision regarding *waqf* expenditures that went beyond routine expenses."[120] No legal document (*ḥujja*) or rental contract (*ijāra*) could be issued without his approval. And so, "peoples' rights were lost," laments Ibn Iyās.[121] The Ottoman judge, he writes, succeeded in blocking all judges and witnesses from practicing law. A poem written by an anonymous jurist reads:

Prevented were we from ruling
and from witnessing also
prevented, all of us, through no fault [of ours]
as though we had come to them in drunkenness.[122]

Thus, for a number of years after the conquest, a virtual freeze had been imposed on local judicial activity in the sensitive area of family law, *waqf*, etc. This

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[118] Winter, "Ottoman Occupation," p. 510. By the mid sixteenth century, the deputy judges of Egypt were divided into six stations comprising the *quḍāt al-akhṭāṭ fī Miṣr* beneath the authority of the *qāḍī 'asker*. According to the new hierarchy, an appointment to the courts of Cairo had to be preceded by five other stations. The *qāḍīs* of the *khuṭāṭ* were considered the deputies of the *qāḍī 'asker*, who appointed or terminated their positions as recorded in the *sijill*. Another three judges representing the other schools of law would also be in attendance. See, al-Bakrī Siddīqī, *al-Nuzha al-Zahiyya*, p. 47.

[119] Ibn Iyās, *Badā'i'*, p. 461. See chapter three for a fuller discussion of this phenomenon and on legal strategies for circumventing it.

[120] Hanna, "Administration," p. 46.

[121] Ibn Iyās, *Badā'i'*, p. 165.

[122] Ibid., p. 166.

at a time when people were being "pushed to use the courts."[123] In all, such reforms, like those pertaining to marriage, were a departure from traditional legal practices as "all that was required in Islamic law was that both parties consented to the marriage before two witnesses, and made their marriage public."[124]

By the late sixteenth century, al-Bakrī al-Ṣiddīqi tells us that the *qāḍī 'askar*'s jurisdiction included: a) authority over arable lands; b) annulment/cancellation (*ibṭāl*) of contracts; c) the ratification of long trade contracts; d) resignation from the villages (*al-qurrā*); exchange (*istibdāl*) of *waqf* endowments; e) Judgment upon the absentee (*al-ghā'ib*); f) and finally, the annulment of marriage contracts (*faskh al-nikāḥ*). [125]

It seems curious, to say the least, that a state only interested in reforming the 'legal process' would interject itself into what are arguably the most regulated of Muslim legal contracts. But as argued, the Ottomans fashioned themselves as the harbingers of 'social renewal,' a nomenclature that required, and licensed innovation in key social doctrines. It is precisely this claim that made it possible for the state to challenge the local judiciary's 'legal competence,' and to assert the authority of the state *madhhab* as a step on the path to legal unification.

Nahal writes that, "[t]he Ḥanafī school of jurisprudence was the official school of the empire, and the *qāḍī 'askar* and the provincial *qāḍī*s were Ḥanafis."[126] The preference shown to the Ḥanafī *madhhab* is observable in the physical protocol

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[123] Hanna, "Administration," p. 50. Also see Chapter Two where it is argued that the growing authority of written documents also compelled people to use the courts.
[124] Hanna, "Administration," p. 50.
[125] al-Bakrī al-Ṣiddīqī, *al-Nuzha al-Zahiyya*, p. 36.
[126] Nahal, *the Judicial Administration*, p. 14.

observed at the court of the Bāb al-'Ālī. Seated alone behind the *qāḍī 'askar* was the Ḥanafī deputy judge, whose scribes (*'udūl*) leaned toward him in a circle. Behind him, "the deputies of the Shāfi'ī, Mālikī and Ḥanbalī schools sat together in a single row, their scribes forming the very last row known as *al-ṣaff al-mustaqīm* (the regular row)."[127]

Even before the actual conquest of Egypt, rumors to the effect that Sultan Selīm planned to abolish all legal schools in Syria, which fell in 1516, were already rife in Cairo. Ibn Iyās writes that in 924/1517, all but the Ḥanafī School had been suspended in Damascus(*abṭal min al-Shām*) , as per the "custom in his [Selīm] lands" (*'ādatih fī bilādih*). [128] In 926/1519, more rumours abounded that the new Ottoman governor of Damascus, Amīr Jan Birdī al-Ghazālī, had persecuted the Shāfi'ī *Qāḍī al-Quḍāt,* Shihāb al-Dīn Aḥmad Ibn Farfūr al-Dimashqī, even attempting to murder him. Ibn Farfūr, it was said, was given an ultimatum - rule according to the Ḥanafī rite or forfeit your office - your life according to other reports.[129] Ibn Farfūr reportedly fled Damascus and made it to Ḥalab, from where he wrote directly to Sultan Selīm, complaining of the indignities he had suffered at the hands of al-Ghazālī. Selīm responded with a *marsūm* conferring on Ibn Farfūr *qāḍī*ship of Ḥalab, where he permanently re-settled after sending for his wife and children.[130] Whether exaggerated or not, the main events surrounding Ibn Farfūr's career, his exile and demotion, symbolize the very real tribulations of the elite Damascene judiciary.

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[127] Ibid., p. 16.
[128] Ibn Iyās, *Badā'i'*, p. 243.
[129] Ibid.
[130] Ibid., p. 340.

The movement to consolidate the authority of Ḥanafism gained momentum by mid-century when the local judiciary was officially transformed into a 'state-salaried' bureaucracy. Al-Damīrī reports that in 960-962/1552-54, this initiative was carried out by the *qāḍī 'askar* 'Abd al-Bāqī b. 'Alī al-'Arabī al-Rūmī, who apportioned salaries to the *'ulamā'* of al-Azhar.[131] This measure effectively 'co-opted' the local judiciary into an empire-wide bureaucracy of scholars, culminating in the supreme judicial office of the chief *muftī* of Istanbul. An altercation between al-Rūmī and the important Egyptian scholar, Shams al-Dīn Muḥammad al-Ḥanbalī, shows the scale of local opposition to this policy. The latter authored a poem deriding the Ottoman chief judge so popular, wrote al-Damīrī, that donkey drivers (*rukbān*) recited it in and around Cairo:

Were the ceiling made of silver
he would wish a fire upon the house
were graves piled high with gold
he would rush death
were he alone with the beloved
he would forget romance and remember her jewels to steal. [132]

When the *nāẓim* (district administrator) obtained a copy of the poem, he gave it to the *qāḍī* of Gīza, who was heading to Istanbul, with instructions that it be read aloud to Sultan Suleymān by no less than the grand *muftī* of Istanbul, *Shaykh al-Islām* Abū al-Su'ūd (Turkish, Ebū Su'ūd). The *nāẓim*'s motives in doing so are unclear, but the author seems to suggest that he intended to draw the Porte's attention to the chief judge's unpopularity. Learning of the plan, the *Qāḍī 'Askar* complained to the governor, 'Alī Pasha, that a certain Shams al-Dīn al-Ḥanbalī had

[131] He also allocated portions for the poor and *aṣḥāb al-a'zār*. Al-Damīrī, *Quḍāt Miṣr*, p. 62.
[132] Ibid., p. 66.

"attacked us" in his poem and sent it to the Sultan with a certain Muḥammad Effendī al-Manshī. Al-Manshī was intercepted in Alexandria and brought before the *dīwān,* "poem in hand."

The offending poet/Shaykh, Shams al-Dīn, was then summoned from his post at the Madrasa al-Ẓāhiriyya and questioned by the governor: "Oh Shaykh, are these your words insulting the *shaykh al-Islām, qāḍī Miṣr*." He answered simply, "Yes."[133] When asked, "[w]ere you not afraid of what might befall you writing such things," he replied, "I merely relayed the events as they unfolded." At which point the Ottoman judge interjected, "the principle among Ḥanafis [holds], that to insult a *qāḍī* is *kufr,*" and to demand his detractor's execution.[134] But the governor would not endorse the death sentence, causing the Chief Judge to threaten to "shut the courts of Egypt and leave the county."

In the end, the courts remained open and Shams al-Dīn remained among the living. But, he was imprisoned and visited on a daily basis by the governor's emissary, al-Daylamī. The poignant exchange that is alleged to have transpired between the latter and the jailed Shaykh demonstrates the use of religious ideology in the campaign to 'renew' legal practices. For days al-Daylamī beseeched Shams al-Dīn: "Renew your Islam" (*jaddid islāmak*). With equal consistency, Shams al-Dīn replied:

I am a Muslim, and nothing has emanated forth from me that contradicts Islam or [the rulings of] its Shaykh, al-Qarrāfī.[135]

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[133] Ibid., p. 67.
[134] Ibid., p. 68.
[135] Ibid.

Eventually, the Shaykh was released and nothing more is written of this incident, except for the observation that many years later the same chief judge had died in Anatolia. Surprisingly, when Shams al-Dīn heard of his death he wrote two lines, this time eulogizing his former nemesis:

How our differences caused tears of blood
now that he is gone we weep for him. [136]

While we can assume that Shams al-Dīn was letting bygones be bygones, it still seems strange that he should write anything conciliatory of a man he had accused of a being a rapacious thief. Unless, of course, Shams al-Dīn's attack on the chief judge had never been personal at all. The vulgar materialism of which Shams al-Dīn accused the latter, was not directed at the Ottoman judge's personal character so much as his official role in interjecting profane elements (state salaries and bureaucracy) into a sacred occupation. What transpired in the *dīwān* between both men, only confirms that the "differences" of which Shams al-Dīn wrote, though foiled in personal language, was in reality ideological. His critique was directed against policies guided by state directive, not by the capricious whim of an individual judge.

One of the most glaring examples of Ḥanafī bias is relayed by Damīrī, who reserves his harshest criticisms for its progenitor, 'Abd al-Wahhāb b. Ibrāhīm al-Rūmī al-Ḥanafī 1009/1600, the most infamous chief judge of the early seventeenth century. Apparently, the latter attempted the unthinkable - the elimination of the three schools of Islamic law. With no exceptions, all but the Ḥanafī *madhhab* were

[136] Ibid., p. 69.

suspended.[137] Only one of Cairo's numerous courts, the Bāb al-'Ālī, was allowed to retain deputies from the other schools of law. In effect, this meant that the various communities of Cairo, most of whom were *not* adherents of Ḥanafism, had recourse to Ḥanafī law alone for the better part of this judge's year-long tenure. The list of 'Abd al-Wahhāb's 'offences' does not end there.

'Abd al-Wahhāb was also accused of interfering with the administration of *waqf* (endowments) and of imposing a harsh criminal code, meting out severe punishment for the slightest of crimes. Moreover, he would not allow court staff to collect more than three *anṣāf* for their services, bringing added poverty on those who remained in judicial service. Egypt, concludes al-Damīrī, had not seen a judge of his kind since the Ottoman conquest.[138] Not surprisingly, the poems satirizing 'Abd al-Wahhāb are numerous and biting:

Cut, cut, you cut the livelihood of the *shuhūd*
you swapped known customs (*al-ta'āruf*) with denial (*juḥūd*)
[brought] death to rain (*al-mughīth*) and that which is known/good (*al-ma'rūf*).[139]

News of 'Abd al-Wahhāb's *'azl* arrived in 1010. Again what's especially noteworthy is that al-Damīrī ends this long litany of charges and complaints by stressing that this judge was not without personal merit after all for he never accepted bribes. Once again the point to be made is that these charges transcended issues of personal character or integrity and were linked to debates surrounding antagonistic legal doctrines.

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[137] Ibid., pp. 24-25,100-101.
[138] Ibid., p. 102.
[139] Ibid., p. 103.

Another means of undermining local jurists was by challenging their legal competence. In 923, a Shāfi'ī judge married a Mamluk woman (*nisā' al-atrāk*) to an Ottoman individual, despite the existence of a state ban on such unions. The Sultan had called on all judges, and witnesses, to refrain from ratifying marriages between Mamluk women and Ottoman soldiers, an order ignored by many according to Ibn Iyās as "none of Egypt's judges paid him heed, nor did the witnesses."[140] Soon after, the Sultan called on his soldiers to divorce women they had recently wed from among *ahl Miṣr,* or face hanging without appeal. Some complied and others did not we are told. To make an example of judges who continued to ignore the order, the Ottoman chief judge charged one of them with violating the principles of *fiqh* by failing to ascertain whether the woman had completed the obligatory waiting period (or *'idda*) after the death of her first husband. As a punishment, he was beaten and paraded around Cairo saddled backwards on a donkey.

It is interesting that most of the local judiciary felt it could ignore imperial decrees even in the early years of Ottoman rule. It explains, no doubt, why so many were targets of 'court purges.' But what is even more interesting is that the Ottoman chief judge used a *fiqh*-based pretext for punishing the Shāfi'ī judge, rather than the actual reason, which was that the latter had violated sultanic law. This is highly significant and indicates that the Egyptian judiciary may have articulated their objections to the law on the grounds that preventing two Muslims from entering into marriage had no basis in Islamic legal theory. Presumably unwilling/unable to challenge this logic, the Ottoman judge found fault with his

[140] Ibn Iyās, *Badā'i'*, p. 184.

adversary's ruling on the very same basis – failing to meet the criteria of Islamic legal theory.

Other cases, less dramatic and detailed than that above, also demonstrate the propensity of the state to undermine the competence of particular jurists. In Ramaḍān, 925, the Shāfi'ī chief judge, Kamāl al-Dīn al-Ṭawīl attended the monthly *majlis* to plead the case of his *nā'ib*, Nūr al-Dīn 'Alī al-Maymūnī, who had been exiled by the Governor of Cairo to Ḍamanhūr. Al-Ṭawīl petitioned for the latter's right to return to Cairo and while we learn little of the particulars of the case, the governor's answer - that the deputy would be permitted to return on the condition that he "never" practice law again – is revealing.[141] The provocation this engendered is captured by Ibn Iyās who says, it showed that under the Ottomans, "the rulings (*rasm*) of Islam's judges have been effaced."[142]

A policy of dissuading local jurists from exercising independent *ijtihād* soon followed. As a prerogative that would have undermined the project for a 'universal' and 'unitary' law, *ijtihād* was seen as subversive. The example of al-Laqānī, a Mālikī judge, who refused to accept the position of deputy (*nā'ib*) to the chief Turkish judge in 931/1524, is a case in point. Soon after being coerced into the position of Mālikī deputy to the chief Ḥanafī judge, "as per the custom (*'ādāt*) of the Anatolian judges (*quḍāt al-arwām*),"[143] Laqānī's rulings were challenged on the grounds that they were based on weak *ḥadīth* (*qawl*). In rebuttal, Laqānī informed

[141] Ibid., p. 187.
[142] Ibid., p. 418.
[143] Al-Damīrī, *Quḍāṭ Miṣr*, p. 192.

the chief judge that he was an independent scholar, entitled to engage in unfettered independent reasoning (*ijtihād muṭlaq*):

> Among us [we hold] the principle that if a judge issues a ruling on the basis of a weak opinion, he renders that opinion strong and it enters into practice (*ma'mūl bihī*) and I have attained a station [that will not permit] my rulings to be contradicted when I am the expounder (*shāriḥ*) of the *madhhab*. I have no need of the post [deputy judge] and have exiled myself... exiled myself... exiled myself.[144]

Each time Laqānī proclaimed his own exile, the Chief Judge interjected, "I have reinstated you." While al-Damīrī never tells us what the disputed ruling was about, he does imply that Laqānī's ruling was in the end overturned and that the latter died of "fever" soon after.

Again, confrontations such as those above were not limited to the earlier parts of the century, but were a consistent feature of the first hundred years of Ottoman rule. Muḥammad Ibn Aḥmad Najm al-Dīn al-Ghīṭī (d. 981/1573/74), who held the important post of teacher at al-Ṣāliḥiyya al-Najmiyya, defended Sha'rānī (b.1493-d.1565), a Ṣūfī and an *'ālim*, when the latter was accused of engaging in *ijtihād muṭlaq*.[145] Laqānī's unfortunate fate, and Shar'ānī's brush with Ottoman officials, illustrate that jurists who were perceived (or who perceived themselves) as great *mujtahid*s could be found in the sixteenth century, and more importantly, that their activities brought on confrontation with the Ottoman state.

Even without engaging in *ijtihād*, local jurists earned the censure of the state by merely challenging or critiquing Ottoman judicial policy. An example is the important Ḥanafī scholar, 'Alī Nūr al-Dīn al-Ṭarābulsī, who rose to prominence

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[144] Ibid., p. 194.

[145] In Sufism he was a follower of 'Alī al-Shūnī and a student of al-Ramlī, indicating, in Winter's view, the "headway that Sufism had made within al-Azhar." Winter, *Society and Religion*, p. 222.

when he challenged the chief judge, Muḥammad Ibn Ilyās, or Jèvizāda's, right to allow the 'exchange' of *waqf*.[146] Al-Ṭarābulsī was dismissed from service and prohibited from practicing law, but he was defiant and continued to issue *fatwās* until an order of execution was issued against him. "He died the day it arrived."[147]

Most often, however, when local jurists raised their voices against Ottoman judicial policy, it was in opposition to the *qānūn*. The *qānūn* was regarded as a secular code with dubious roots in 'foreign' customs. The opposition to Ottoman *qānūn* was such that scholars who opposed them, were immortalized in the chronicles and biographies of the time. Sha'rānī commends the early sixteenth century Fakhr al-Dīn al-Sunbāṭī, who resigned his post as judge when he learned that the *qānūn*, (in this case the court fees/*rusūm*) would be imposed on judges. He retired to his village, writes Sha'rānī, where he heard cases as a *farḍ kifāyya* (a religious obligation which one or more individuals may undertake on behalf of the community) free of charge.[148]

Similarly, Ottoman chief judges who imposed the *qānūn* with vigour, were posthumously disparaged. Muḥammad Shāh b. Ḥazm, supposedly a descendant of Abū Bakr, came to Egypt in 971/1563 and became known for his rigid and stern rule. His authority was so absolute that even the governor was diminished in

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[146] Such measures would have been advantageous to the state but not to the local Sufis and *'ulamā'* who depended on them for their livelihoods. Ibid., p. 223.

[147] Each time a judge incurs the death penalty in Damīrī's work, it arrives on the same day that the culprit dies of either natural causes or of "fever." This is an obvious literary device indicating that such sentences had more symbolic than actual significance as no judge was ever actually executed. This is not to suggest that the accused judges were not impeded from practicing law, only that their lives were spared.

[148] Winter, *Society and Religion*, p. 244.

stature next to him. He implemented the "*nāmūs*"[149] (state law) till heads "cracked" (*ṭa'ṭa'at*) writes al-Damīrī.[150] Extremely unpopular, this judge inspired many a satiric poem against him and his "*siyāsa*." Al-Damīrī attempts to explain this judge's behavior by citing his ignorance of the nature of the communities of Egypt (*ahālī miṣr*), who were used to "lenience and unaccustomed to his ways." But a description of the rewards bestowed upon Ḥazm when he returned to Istanbul, undermines the claim that he was acting out of 'ignorance.' Ḥazm was rewarded, not for his individual initiatives, but for implementing the Porte's directives with vigour.

Demonstrating the incursion of the Ottoman state into the domain of public and private morality (or the rights of God) are the waves of religious revivalism which al-Damīrī describes.[151] Ḥusayn b. Muḥammad Ḥusām al-Dīn Qarāchlī Zāda, appointed in 987/1579, was a strict prohibitionist and "no scent of intoxicant was smelled in Cairo in his time."[152] Nonetheless, Qarachlī Zāda was well respected and well liked by the communities of Cairo because he exercised strict control upon the governor and his men such that they were unable to "deviate from his orders and rulings."[153] The same praise is heaped upon his deputies (*nā'ibs*). Locals were willing, therefore, to overlook their discomfiture with the strict moral codes propounded by certain Ottoman judges if they could be guaranteed that the often

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[149] For more on the *nāmūs* and its Ottoman usage see Chapter Three, Section iii.
[150] Al-Damīrī, *Quḍāṭ Miṣr*, p. 232.
[151] Such waves were inspired by popular religious leaders and by Ottoman scholars. For further discussion see chapter four.
[152] Ibid., p. 17.
[153] Ibid., p. 18.

random and illegal taxes/punishments imposed by *ḥukkām al-siyāsa* on the ordinary people, would be lifted.[154]

Al-Damīrī's biography ends in the early seventeenth century with several more anecdotes that suggest tensions between Turkish judges and local judges continued to flare. Among the complaints directed against *qāḍī* Ṣāliḥ b. Sa'īd (1021-23/1612-13) was that he delegated too much authority to his *atbā'* (followers) and allowed them to exert too much influence in judicial matters. They in turn were a corrupt lot who abused their powers says al-Damīrī.

While the above may suggest a clear delineation between 'local' and 'Ottoman' jurists, al-Damīrī's biography of the chief Ottoman judges in Egypt reveals a far more complex relationship. Many an Ottoman chief judge won the admiration of Cairo's communities by shielding them from *qānūn*, upholding the principle of judicial *ikhtilāf* by respecting the *madhāhib* and legitimating local customary laws. Some did this without upsetting the Porte or drawing too much attention to their activities, while others paid a heavy price for dissent.

In 956/1549 Ṣāliḥ b. Jalāl was praised for his opposition to *ḥukkām al-siyāsa* and for upholding the "*shar'*." The chronicler writes that he was renowned for "expertise in lifting the harm from Muslims," implying that this judge recognized legal tools that allowed for the incorporation of local custom under the guise of "lifting the harm" (*izālat al-ḍarar*). He was also praised by Sultan Salīm Qānūnī, writes the author, implying that these more lenient measures were in accord with the Porte's dictates. In the year 977/1569, the chief judge Muḥammad b. 'Abd al-

[154] For example the *Ṭulba*, an illegal tax imposed on farmers.

Qādir was praised as a scholar of Sufism whose knowledge of religious sciences (*'ilm*) and of the 'customary practice' of the people (*'amal*) was impeccable.[155] In the case of another, chief judge Muḥammad b. Shaykh Muḥammad b. Ilyās who left office in 978/1570, al-Damīrī writes he was praised by the people of knowledge (*ahl al-ma'ārif*) for his knowledge, again a reference to the scholar's sufi credentials.[156] Al-Damīrī commends the judge's inclination for consultation with Egyptian jurists and for correspondence with jurists from many *madhhabs*, "of which he was highly knowledgeable."[157] Significantly, he was also well regarded for looking into the welfare or *maṣāliḥ* of Muslims.[158]As we shall see in chapter three, *maṣlaḥa* was a legal tool of choice for jurists who were pre-disposed to the legitimation of local customary law.

Pervez al-Rūmī, who came to office in 982/1574, was also commended for resorting to *maṣlaḥa*.[159] 'Abd al-Ghānī b. Mīr Shāh, who assumed the chief judgeship of Egypt twice (first in 984-86/1576-78 and again in 994-95/1585-86), was another well-regarded scholar who was well inclined toward *awlād al-'Arab* and the *fuqahā'* and paid heed to *maṣlaḥa*.[160] But the most remarkable of the stories of the popular Ottoman chief judges is that of Fayḍ Allāh b. Aḥmad known as Qāf Zāda, who took office in 1000/1591. More than any other, Qāf Zāda's story illustrates that the most popular judges were praised, not for their lenient interpretations of Ottoman law, but for their blatant disregard of it. Our biographer

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[155] Ibid., p. 237.
[156] Ibid., p. 249.
[157] Ibid., pp. 252- 56.
[158] Ibid., p. 260.
[159] Ibid., p. 86.
[160] Ibid., p. 83.

praises Qāf Zāda for consciously disregarding important aspects of the *qānūn*, notably the collection of the stipulated court fees. In so doing, Qāf Zāda was responsible for "ending the deterioration of the divine laws of the venerable *shar'*."[161] "People counted his days as a dream," writes al-Damīrī, who credits him with sparking an intellectual renaissance.[162] More than that, Qāf Zāda attempted to re-invest the chief judges of the four schools of law with some of the judicial privileges they had possessed prior to the conquest. He wrote to Shaykh Badr al-Dīn al-Qarāfī, chief judge of the Mālikī school, reassuring him that, "we issued the order that none but you shall issue *fatwās* for the Mālikī *madhhab* without your consent."[163]

Another immensely popular judge, 'Uthmān b. Muḥammad Pasha, known as Rawā Zāda, had the sole distinction of presiding over the chief judgeship of Egypt three times; first in 1002/1593 and again in 1004/1595 and finally one last time in 1010/1601.[164] The last date is highly significant as it coincides with the end of 'Abd al-Wahhāb's tenure in 1600. The turmoil generated by the latter appears to have dissuaded the Porte from escalating its conflict with the local judiciary any further. After assuming office from 'Abd al-Wahhāb, Rawā Zāda's first task was to reverse his predecessor's policies, ordering the witnesses and judges to return to work, a measure which earned him their full support.

Most significantly, on his departure from Egypt, Rawā Zāda sought out a copy of the last section of Ibn Nujaym's *Sharḥ al-Kanz* and publicly asked God's

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[161] Ibid., p. 149.
[162] Ibid., p. 152.
[163] Ibid., p. 169.
[164] Ibid., p. 117.

forgiveness for the sins committed by 'Abd al-Wahhāb. As shown in chapter three, Ibn Nujaym's work, considered a definitive sixteenth century Ḥanafī text, attempted to grant custom a formal place in Islamic legal theory. It is not surprising, therefore, that Rawā Zāda was praised as a scholar who upheld "public welfare and custom" (*al-maṣāliḥ wal-ma'rūf*).[165]

One cannot fail to note, that the most popular Ottoman judges in Egypt, like 'Alī b. Yāsīn al-Ṭarābulsī al-Ḥanafī (date unknown) in the early seventeenth century, were often held in low regard by their Ottoman peers.[166] Considered a very pious individual who personally performed the *adhān* five times a day, al-Ṭarābulsī was loathed by the *'ulamā'* of *Rūm*. When he was alive they condemned him to the Sultan, writes al-Damīrī, and when he died they denied the validity of his *fatwās*. They attacked his "popular/weighty *madhhab*" and vigorously implored the Sultan to exile or execute the miscreant judge. In time, the campaign was successful in securing a sultanic edict (*marsūm*) proclaiming a death sentence on Ṭarābulsī. Reportedly, the edict arrived in Cairo on the day Rawā Zāda died of natural causes. On a note of finality, as though capturing the essence of the judicial wrangling he has described, al-Damīrī makes a point of recounting the good example of his own grandfather, the Mālikī chief judge Muḥammad b. 'Abd al-Karīm b. Aḥmad b. Ṣiddīq al-Damīrī, who only implemented those "*qawānīn* that did not contravene the *sharī'a*."[167]

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[165] Ibid.
[166] Ibid., p. 118.
[167] Ibid., p. 185.

Al-Damīrī's biographical narratives throw serious doubt on the claim that the Ottoman state's only ambition was to wrest control of the legal process. Clearly, the state asserted its dominion over both the administration of justice and its application, in the first and latter half of the sixteenth century. The emphasis on 'universalist' trends notwithstanding, it should be made clear that this in no way implies, a rigid, authoritarian or 'totalitarian' legal system. To the contrary, secondary literature on court registers from the sixteenth and seventeenth centuries suggests that Ottoman courts functioned well, serving as equitable venues where "a woman or a slave" could win rulings against *amīrs*; where the *qāḍī*s judgements were expeditious and enforced with the assistance of the *shurṭa*; where *dhimmī*s preferred to have their cases heard; and, where *sharī'a* courts handled a broader range of cases than ever before.[168] The question we tackle in the coming chapters is, to what degree does this reflect the state's success, or failure, in constructing a new legal orthodoxy? And what consequences did this have on the production and management of the customary laws of Cairo's various *ṭawā'if*?

Conclusion

What we learn of the sixteenth century thus far is enough to warrant a re-examination of thesis that the Ottomans: a) only controlled the legal process; b) that tensions between local jurists and the state eased after the vagaries of the conquest; c) that the local judiciary was able to re-assert its independence and; d)

[168] See Hanna, "The Administration;" Gerber, *State, Society and Law*; A. Cohen, *A World Within: Jewish Life as Reflected in Muslim Court Documents from the Sijill of Jerusalem* (Pennsylvania: Centre for Judaic Studies, 1994).

that the Ottoman empire was a 'military-conquest state' for much of the sixteenth century rather than an 'ideological polity.'

The discussion on conquest and rule permitted a separation of those political/judicial reforms based on political expedience from those based on ideological imperative. The rhetoric of *takfīr* and *tajdīd* amply demonstrated this phenomenon and, what is more, highlighted the Ottoman self-view as 'renewers' of the faith. In the legal domain, this translated into a sustained push for the manufacture of 'universal laws,' generating friction between state and local *'ulamā'*. The latter upheld the traditional juristic paradigm that local custom had a legitimate role to play in a community's legal affairs, while the state challenged this assertion by endowing the *qānūn* with a 'universal legitimacy,' by curbing the local judiciary's right to *ijtihād* and circumscribing the traditional pluralism of Islamic legal theory. In this environment, it was argued local customary laws were hardly 'triumphant' but firmly checked.

Where *fiqh* had left room for local custom to determine 'grey areas' of the law, such as the number of times a bride could visit her family etc., *qānūn* now attempted to fill that space. Its imposition on the courts in Egypt most clearly indicates how elements of Anatolian custom were universalised in three stages: i) incorporation into sultanic decrees, ii) adoption and codification into *qānūn* and iii) export throughout the empire. An undertaking such as this, it was argued, could only be attempted by a state that projected itself as both 'defender of the faith' and, more importantly, its 'renewer.' Other examples provided in future chapters demonstrate the incursion of Ottoman custom into the area of *waqf*, taxation, *ḥisba* (weights & measures), criminal penal law as well as the sensitive area of personal status laws.

We are now poised to explore the limits of this universalism between the years 965 H/1558 CE to 1056 H/1646 CE. To what extent have these 'universal' principles shaped or tempered the general socio-economic trends outlined in this chapter? Most importantly, how is this reflected in the *sijill*?

Chapter Two

The Institutional *Sijill:* The Court, the Archive & the Triumph of the Document

Introduction

What defined Ottoman attitudes to the *sijill* as an institution, to written legal documents in general and to systems of archiving? This question must be answered before we can derive any information from the narrative text of the *sijill* that sheds light on legal trends in the Ottoman centuries. Without cognizance of the duality of the *sijill*'s identity, as a source of legal history and as a legal institution, the significance of the latter on the law produced is entirely missed.

As shown below, there was nothing innovative in the practice of keeping judicial registers, nor in the content and formulaic style of the legal documents contained therein. But the stability of these practices in no way diminishes the many innovations introduced by the Ottomans to daily judicial procedure. Among the most important, I argue, is a shift in the status of written legal documents, away from the conventionally ambiguous view of the legists and towards a view that conferred 'sound' to 'certain' status on a great number of them. In other words, Ottoman *sharī'a* courts did not adhere to the conventional wisdom that legal documents held an 'extra-legal' status, a claim which is borne out by the evidence of the *sijill*. Rather, they recognized legal documents that met set criteria, treating them as 'sound' or 'certain' evidentiary proofs. The movement to grant documents a more authoritative status would not have been possible without a concurrent shift in two areas of judicial administration, namely the introduction of a fixed court and a fixed archive. Without availing of these two institutions, the state could not have

allayed the traditional suspicions with which Muslim jurists viewed the document, or enhanced its status in practice.

Invariably, the question of the state's 'motivation' for introducing such innovations is raised. Raymond, it will be recalled, emphasized the "easy circulation of men and goods" under the Ottomans, and credited them with sparking the "spectacular growth" of local economies. It remains to be asked, however, whether such a system could have arisen in the absence of, a) a unified substantive legal system and b) a judiciary system in which documents were triumphant. Nothing less could have sustained the economic supra-structure that Raymond and others describe. But in view of the 'Islamic credentials' which the state brandished, and its claims to being a 'renewer' of the faith, such a policy could not have been pursued if the latter had failed to address the demands of Islamic legal theory.

As shown ahead, the misgivings shared by legists for written documents were underwritten by the real fear that they could be altered or forged. As such, they could not be admitted as formal evidentiary proofs without the support of a witness's oral testimony. But there was also a great deal of disputation on the subject for, as seen below, legists did not view all documents with the same level of suspicion, creating categories of distinction between 'chaste' ones (i.e., those kept in safe-storage) and unreliable ones. Moreover, the sheer necessity of documents, and the real dependence of the courts on them, meant that written legal instruments were indispensable in practice. In the opinion of many scholars, this facet of Muslim legal culture represents a dissonance between theory and practice. But 'theory' was

hardly monolithic and, as shown ahead, divided on the issue. One must ask, therefore, which theory is praxis at odds with, and which is it harmonized with?

In the case of the Ottomans, it is well known that the judicial directives of state were guided by Ḥanafī interpretations. Moreover, there is positive evidence to suggest that the state greatly reduced the ambiguity of the document by devising a system of storage and archiving that met the challenge of Ḥanafī legists by greatly minimizing the risk of forgery. What we are witnessing, therefore, is not a final rupture between theory and practice, but an attempt to align the two and to allay the concerns of Islamic legists by guaranteeing the document's 'reliability' and guarding its 'chastity.'

The above would not have been possible without the introduction of what is arguably the most innovative of the Ottomans state's judicial reforms – a rigorous system of archiving that may well be unprecedented in the history of the Islamic state. Equally important in this regard was a concurrent re-definition of the very concept of an 'Islamic court.' As mentioned, the Ottomans were the first to establish fixed courts, generating an unprecedented spatial distinction between the person of the judge and the physical 'courtroom.' In so doing, the state effectively abrogated old protocols, which recognized a judge's custodial rights to the *sijill*, and introduced new protocols that transferred custody to state bureaucrats. The departure that this represented from venerated conventions, where the judge retained custody of the *sijill* and was largely immune from extra-judicial review, was a substantial blow to the traditional independence of judges. But the rigorous efficiency of the Ottoman archival system, yielding millions of systematically

organized and well-preserved documents in a manner scarcely duplicated by any predecessor state, could not have been achieved otherwise. Nor could the 'triumph' of the document.

The link between the document's status and the *sijill* as a source of legal history should be self-evident. The more authoritative the documents, the more people would be pushed to use the courts as a way of obtaining legal 'proofs.' If, therefore, the 'narrative *sijill*' reveals a spike in the number of cases settled through custom, one must ask how this development relates to the structural and conceptual changes overtaking the 'institutional *sijill*.' To repeat the question posed in the Introduction to this dissertation, does the narrative *sijill* reflect the 'triumph' of custom, or the triumph of documents?

Section i: The Document in Theory

> O believers, when you contract a debt, one upon another for a stated term, write it down, and let a writer write it down between you justly, and let not any writer refuse to write it down, as God taught him; so let him write, and let the debtor dictate, and let him fear God his Lord and not diminish aught of it. And if the debtor be a fool, or weak, or unable to dictate himself, then let his guardian dictate justly. And call in to witness two witnesses, men; or if the two be not men, then one man and two women, such witnesses as you approve of, that if one of the two women errs the other will remind her; and let the witnesses not refuse, whenever they are summoned. (2: 282-84)

Notwithstanding the unambiguous Qur'anic passage above, an enduring paradox for the historian of the *sijill* has been the 'unofficial,' and, by some arguments, even 'extra-legal' status they, and all written documents, are afforded by Islamic legal theory. While the above verse endorsed the practice of putting contracts into writing, and this practice did in fact persist in Muslim society,

Islamic law, argues B. Messick, "emptied the Qur'anic command of all binding force, denied validity to written documents, and insisted on the evidence of eye witnesses."[1] Ever suspicious of the written document, Muslim jurists reflected ancient misgivings articulated by Socrates:

> Once a thing is put in writing, the composition, whatever it may be, drifts all over the place, getting into the hands of not only those who understand it, but equally those who have no business with it; it doesn't know how to address the right people, and not address the wrong. And when it is ill treated and unfairly abused, it always needs its parent [living speech] to come to its help, being unable to defend or help itself.[2]

Underscoring a tension between the spoken and the written word, Socrates' cautionary note would resonate in Islamic society where the rules of 'evidentiary procedure' undermined the authority of documents.[3] In F. Rosenthal's words, Muslim society was "peculiar" in adhering to a never abandoned fiction –very soon to be enshrined in the very centre of Muslim intellectual life, the science of *ḥadīth* – of the primacy of the spoken word.[4] Essentially agreeing, Messick adds that, "a structural tension [developed] between testimony and text, resulting in a decisive but unstable privileging of the former."[5]

Within the specialized domain of evidence, the unique authority of the spoken word represented certainty, the very embodiment of 'presence' of the testifying human witness. Quintessentially, witnesses (*shuhūd*, sing. *shāhid*) are

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[1] B. Messick, *The Calligraphic State* (Berkeley: University of California Press, 1993), p. 204.
[2] Ibid., p. 211.
[3] Ibid., p. 204.
[4] F. Rosenthal, "Of Making Books there is no End," *The Book in the Islamic World; the Written Word and Communication in the Middle East*, ed. G. N. Atiyeh (New York: SUNY Press, 1995), p. 36.
[5] Messick, *The Calligraphic State*, p. 204.

defined as "those present" (*al-ḥuḍūr*), a quality that has two dimensions. The first is 'presence' at the word or deed borne witness to, and the second is 'presence' at the moment of litigation before a judge. Without witnessing, the open interpretability and isolation of the written word was deemed incapable of standing alone in an Islamic *shar'ī* assembly. In stark contrast to the written document, writes Messick:

> Witnesses 'carry' testimony, ideally embodying (memorizing) the evidence involved securely within themselves from the moment of its original apprehension to the moment of its communication to the court.[6]

The centrality of memory is reflected in the juristic literature on the conduct of judges (*adab al-qāḍī*). An oft-asked question in these manuals is, can judges appeal exclusively to their written records if they are unable to recollect the documents from memory? Prominent among those who argued that a judge's "written records provides grounds for further litigation" in the absence of memory are the Ḥanafī Jurists Ibn Abī Laylā and Abū Yūsuf, who overruled the opinion of their founding father to attain this judgment.[7] Not so the thirteenth century Shāfi'ī Nawawī, who admonished judges who ratified documents issued from their own court and bearing their seals, before they had recalled it to memory.[8]

The sheer necessity of documentation, and the fact that Jurists of the ninth and tenth centuries, such as the Ḥanafī, al-Ṭaḥāwī, were "deeply concerned" with

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[6] Ibid., p. 206. The centrality of this institution is captured in a juridical dictum that rendered 'witnessing' a religious obligation (*farḍ*) on the Muslim collective. In al-Nawawī's words, "[b]earing witness is a collective responsibility (*farḍ kifāyya*) in marriage and also in acknowledgements, financial transactions and the writing of documents." Ibid., pp. 204-05.
[7] W. Hallaq,"The Qāḍī's Dīwān (*Sijill*) Before the Ottomans." *Bulletin of the School of Oriental and African Studies*, vol. 61, no. 3, fn 88, p. 430.
[8] Messick, *The Calligraphic State*, p. 210.

their status, provides an important area of contact between theory and practice.[9] After all, writes J. Wakin, documents remained "crucial to the everyday conduct of affairs."[10] Even in the pre-Ottoman period:

> Court is otherwise portrayed in the manuals as a place of paperwork: transcripts, and records are made of proceedings, and judicial memoranda, correspondence, summons with seal and judgment documentation are produced, copied and archived.[11]

It is not surprising, therefore, that the continued use of written documents became the subject of a rich literary genre.

But, while "the manuals do envision witnessing acts associated with the preparation of written instruments," writes Messick, they do not take further steps to legitimate the written document as a source of evidence independent of the former.[12] In Wakin's view, in spite of the attention given by jurists to the question of documents, the status of the 'written word' remained "ambiguous."[13] A persistent diffidence to the qualitative value of the written word is reflected in another of the questions posed in the *adab al-qāḍī* manuals – is it necessary that a judge be able to write? The opinion which held that a judge should be able to write was "sound" wrote al-Ghazālī, but the "more correct is the opposite."[14] But in the fourteenth century Abū Shujā' wrote that a judge, must be able to write, suggesting a shift, in Messick's view, in favour of the written document. However, he also concedes, that the reverse view - that he need not - inserted immediately thereafter

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[9] J. Wakin, *The Function of Documents* (Albany: SUNY Press, 1972), pp. vii, 5.
[10] Ibid., p. 4.
[11] Messick, *The Calligraphic State,* p. 204.
[12] Ibid.
[13] Wakin, *The Function of Documents,* p. 4
[14] Messick, *The Calligraphic State,* p. 209.

by a commentator, suggests that nothing near a consensus had been achieved.[15] This seeming reluctance to overturn the position of the classical legists did not, however, prevent the authors of the juristic manuals from insisting on the presence of a *kātib* (scribe) whose sole occupation was to write.[16]

The above suggests a rift between theory and practice, or to borrow Rosenthal's wording, the endurance of a 'fiction' that documents were extra-legal. According to E. Tyan, this rift persisted down to the period of modernist legislation in all the schools of law, except the Mālikī in North Africa. When the institution of the pre-certified designated witness was grafted onto that of the notarial profession, he argues, Mālikī jurists were able to facilitate the 'triumph' of the legal document as admissible evidence.[17] But even before this transformation in Mālikī doctrine, many jurists, especially Ḥanafīs, made contributions on both sides of the debate, at times writing within the constraints of the 'ideal' doctrine and at others directly facing the demands of practical necessity.

Messick notes that some legists viewed documents that were 'well-guarded' (i.e. kept in safe storage) as 'chaste' because they had not been allowed to circulate freely in the public realm and could be deemed reliable.[18] Moreover, Wakin has shown that the scholars of the Ḥanafī school took a leading role in "cultivating" the practical literature on *ḥiyal* (legal devices or evasions) and on *shurūṭ* (model

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[15] Ibid.

[16] Scribes should be Muslim, knowledgeable of jurisprudence, intelligent, have excellent script and possess the quality of '*adāla* (just character) they confirm. Ibid., p. 209; Hallaq, "the Qāḍī's Dīwān," p. 423.

[17] E. Tyan, *Le notariat et le régime de la preuve par écrit dans la pratique du droit musulman* (Saint Paul: IMP, 1959) p. 84.

[18] Messick, *The Calligraphic State,* p. 211.

contracts) as well as the works on "the *maḥāḍir* and *sijillāt*, formularies containing model documents for use of the qadi and his clerks."[19] The literature on legal documents and their formularies "grew," she argues, out of an "attempt by jurists to bring ideal theory and practices together."[20] While noting the contributions of the other schools to this literature, she also mentions that they were considerably smaller and, "a later synthetic creation made possible largely by the success of the Ḥanafī works."[21]

Many Ḥanafī legists did, therefore, provide set criteria by which to assess the document's 'worth,' and provided it met the criteria indicated, were prepared to accept it as an evidentiary proof. The Ottoman civil code of 1877, the Mejelle, conveys this recognition, "albeit in a negative way," concludes Wakin, declaring "that the witnessed document had no value in itself – unless it met those requirements mentioned above."[22] Equally indicative of this juristic trend is a notable feature of the *Fatāwā 'Ālamgīriyya*, an enormous compendium of Ḥanafī law composed in 1075-1083/1664-1672 by order of the Mughal Emperor Awrangzīb. The arrangement and selection of subjects in the *Fatāwā* follows the *Hidāya* of al-Marghinānī (d. 1196) - itself adopted from the classical works of Ḥanafī fiqh - except where it adds five new sections.[23] Most significant are the two new sections on *maḥāḍir* (judicial proceedings) and *sijillāt* (summary of the judicial

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[19] Wakin, *The Function of Documents*, p. 11.
[20] Ibid., p. 10.
[21] Ibid., pp. 12-13. She also notes that the Ḥanbalīs produced no *shurūṭ* works that are known of, and were averse to *ḥiyal* altogether.
[22] Ibid., p. 9
[23] See A. M. Geunther, "Ḥanafī Fiqh in Mughal India: The Fatāwā-i 'Ālamgīrī," *India's Islamic Traditions, 711-1750*, ed. R. M. Eaton (New Delhi: Oxford University Press, 2003), pp. 214-215.

proceedings and judge's decision), indicating the degree to which Ḥanafi doctrines had absorbed the document.[24]

In the final analysis, however, jurists from all the schools of law agreed on one basic point - that safeguards against forgery were the only things standing between the document and its potential 'triumph.' And while no consensus had been reached on the subject of achieving such guarantees (or indeed on whether this was even possible), the absence of consensus does not preclude the state from endorsing one judicial view above the rest. This is especially pertinent to the Ottoman state, which, as argued in Chapter One, was notable in its predilection for legal unification and its aversion to *ikhtilāf*. By building on the opinions of prominent Ḥanafi jurists, therefore, and availing itself of the necessary 'safeguards' for ensuring a document's 'chastity,' the state was, in effect, meeting the challenge of the legists. In so doing, it significantly enhanced the status of the written document.

The evidence presented below suggests that, to a great extent, the document had already triumphed by the mid sixteenth century. *Sijills* in Ottoman Cairo bear evidence that certain documents held the status of 'sound evidentiary proofs' requiring no witnessed testimony or recollection from memory. Before presenting the evidence, however, a few words on the institutional innovations that made this possible are in order.

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[24] See the *Fatāwā 'Ālamgīrī*, ed. 'Abd al-Laṭīf Ḥasan 'Abd al-Raḥmān, vol. 6 (Karachi edition, nd.) pp. 193-293.

Section ii: The Institutional *Sijill*

The precise history of the *sijill* as an institution, its bureaucratic roots and its evolution in form and function have yet to be determined, leaving serious questions as to the general and the particular in Ottoman administrative practice and historiography open ended. The available evidence suggests that documents in general, particularly legal formularies (model contracts) were part and parcel of the Near Eastern pre-Islamic tradition.[25] The evidence is less prescient when it comes to the names and types of documents contained within the judicial registers of the pre-Ottoman period.[26]

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[25] See, J. Wakin, *The Function of Documents,* p. 6; R. Yaron, *Introduction to the Law of the Aramaic Papyri* (London: Clarendon Press, 1961); A Steinwenter, *Die Bedeutung der Papyrologie fur die koptische Urkundenlehre* (Munich, 1934); E Seidl, "Law," *The Legacy of Egypt,* ed. S. R. K Glanville (London: Clarendon Press, 1972); A Schiller, "Prologmena to the Study of Coptic Law," *Archives d'Histoire du Droit Oriental,* II (1938), pp. 360-61; W Siegle, *The Quest for Law* (New York, 1941). A. Gacek, "The Ancient *Sijill* of Qayrawan," *Middle Eastern Library Association Notes,* 46 (1989), pp. 26-29. In pre-Islamic Arabia too, Wakin, Tyan and J. David-Weill confirm that the written document was known and served the bustling commercial activity and financial operations of the Meccans. Wakin has argued that, "the use of legal documents is an institution in the Near East that has an unbroken tradition since cuneiform times."J. Wakin, *the Function,* p. 5. Also see, E. Tyan, *Le notariat.* Basing herself on David-Weill's research, Wakin writes, "title deeds inscribed on wood or stone on private houses, buildings of pious foundations and other structures are nothing less than legal documents too, drawn up in the same legally valid form as a contract." Wakin, *The Function,* p. 5, fn. 2. Later Arabic formularies are an independent genre of literature of which three types may be identified: "1) collections of models similar to the formularies of the West, 2) treatises on stylistics and rules concerning the drawing up of the documents, similar to the Western artes or summae dictaminis, 3) a mixture of both, that is to say, formularies with theoretical commentary, or theoretical treatises with examples from practice, similar to the ones found in the West from the 12th century onwards." J. Reychmann and A. Zajaczkowski, "Diplomatic," *EI,* CD Rom Edition.

[26] Grohmann attempted to classify Arabic documents "with and without legal content, public and private documents, cancellarial and non-cancellarial documents, mandates, diplomas, evidential and business document, etc." Ibid. Arab scholars like al-Qalqashandī "likewise classified their documents clearly." The following are general terms encountered: *kitāb, wathīqa, ṣakk, sanad, ḥujja, sijill, ẓahīr.* In the earlier periods, documents of state were simply known as *kutub,* although a distinction was made, between *kutub al-'āmma* or *muṭlaqāt,* and *kutub khāṣṣa,* soon thereafter. These were further sub-divided according to content and subject. "Their inclusion under the heading of 'state documents' gives this a

In Qur'anic and early Arabic usage, de Blois writes that the word *sijill* denotes documents of an official or juridical nature.[27] Deriving from the classical Latin *sigillum* (meaning seal in classical usage), it denoted in Medieval Latin a document with an affixed seal. Filtering into Byzantine vocabulary, the word eventually passed into Arabic via Aramaic. In Arabic the word "never means seal" but does denote a written document. In classical Arabic it is "frequently used for a document containing the judgments of a ḳāḍī and in various other technical senses."[28] In *Mafātīḥ al-'Ulūm*, al-Khawārazmī indicates that it denotes a "credit note given to official messengers exempting them from the costs of their journey."[29] D.P. Little writes that in *Ṣubḥ al-A'shā*, the Mamluk scholar al-Qalqashandī used the word in reference to documents issued by Fatimid caliphs, and "[o]therwise, he used *sidjill* once to designate a document issued by a judge to certify (*isdjāl*) the legal integrity of his son."[30]

In *shurūṭ* works (model contracts), the term s*ijill* was given "technical denotations and was defined in contrast to two other types of documents or records"[31] - *nuskhā* (an exact copy of a document) and *maḥḍar*. Wakin and Little describe the *maḥāḍir* as written records of the proceedings before the judge (or the minutes of the court) and the *sijillāt* as the written judgments containing the

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very wide meaning. Consequently, the exchange of letters concerning matters of state was called *mukātabāt* by the Abbāsids, and the chancellery the *dīwān al-mukātabāt*. This was also usual in Egypt, under the Fātimids, Ayyūbids, and Mamlūks. For specifically legal documents of state, *yarligh* indicated a pass for foreign ambassadors, while *iṭlāqāt* was the term used in reference to the orders issued by former rulers. For a complete list and description of Arabic documents see, Ibid.

[27] F.C. De Blois, "Sidjill," *EI*, CD Rom Edition.

[28] Ibid.

[29] Ibid.

[30] D. P. Little, "Sidjill," *EI*, CD Rom Edition.

[31] Ibid.

judges' decisions.[32] The *Fatāwā 'Ālamgīrī* confirm this usage but also indicate that the *sijill* is to contain an exact copy of the original *maḥḍar* of the case.[33]

In the final analysis, "the precise denotation of *sidjillāt* in this context of various kinds of decrees is not yet clear,"[34] in the pre-Ottoman era. All that can be said with any degree of certainty is that in Ottoman usage, the terms "*kādī sidjillerī*" or "*sher'iyye sidjillerī*" referred to the complete register from an Ottoman court.[35] Unfortunately, a systematic survey of the latter (that is, types and names of legal documents encountered in *qāḍī* registers) remains elusive as scholars have yet to fully identity/decipher the range of legal documents found to date. However, a limited survey is certainly possible as is a comparative look at the range of documents found in pre-Ottoman registers.

Describing the contents of the Ḥaram documents, Little lists deeds (*'uqūd*) of purchase and lease, bills of sale, marriage and divorce; testamentary bequests (*waṣiyyas*); written legal depositions made before legal witnesses (*ishhāds*); written, witnessed and binding legal acknowledgments (*iqrārs*);[36] estate inventories; decrees (*marsūm* in Mamluk usage, but in Ottoman usage one also encounters the terms *berat, amr* and *buyuruldī*); petitions (*qiṣas* in Mamluk usage, and *ma'ruḍ/ma'rūz* in

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[32] Ibid. Also see, Wakin, *The Function of Documents*, p. 11. She bases this assessment on Kindī's, *Wulāt*, p. 397 and Tyan's, *Organization*, p. 181, n. 7. In the analysis of each, *sijill* was "used to mean the text of a judgment and by extension the register of judicial decisions and even any official register." Ibid.

[33] *Al-Fatāwā 'Ālamgīrī*, pp. 199, 201.

[34] Little, "Sidjill," *EI*, CD Rom Edition.

[35] Faroqhi, "Sidjill," *EI*, CD Rom Edition.

[36] D. P. Little, "The Significance of the Ḥaram Documents for the Study of Medieval Islamic History," *Der Islam*, 57 (1980), pp. 208-209.

Ottoman registers);[37] vouchers; receipts (*qabḍ*); reports (*muṭāla'āt*); death inventories (the format of which is called *daftars* in Ottoman records); the solicitation of a legal opinion and the reply (*istiftā'* and *futyā*); and finally, court records containing a summary of the case and the decision of the judge.[38]

Underscoring the striking similarity of legal documents found from one era to the next is Salameh's description of the Ottoman-Jerusalem *sijills* as encompassing, "records of marriages, divorces, alimony, guardianship, inventories of estates, buying, selling and trading, prices of commodities, construction, documents related to the villages of Jerusalem with regard to the purchase of land and documents related to murders [or reports]."[39] S. A. I. Mīlād provides an appendix of the types of documents found in Cairo in the court of the Ṣāliḥiyya al-Najmiyya which include the above types as well as documents pertaining to reconciliation between spouses, adoption, appointments of wet nurses, embezzlement of public foundations, embezzlement more generally, imprisonment and release from prison.[40]

A. Bayinder finds much the same in Anatolian courts, but adds another type of document, *ḥujjas*, in which the judgment of an act is registered with the seal and signature of the jurist at the bottom, and also notes the preponderance of another

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[37] For Mamluk usage, see Little, "The Significance of the Ḥaram Documents," p. 197. For Ottoman usage see, A. Bayinder, "The Function of the Judiciary in the Ottoman Empire," *The Great Ottoman Turkish Civilization*, vol. iii, ed. Kemal Çiçek (Ankara: Semih Ofset, 2000), p. 642.

[38] See D. P. Little, *A Catalogue of Islamic Documents from al-Ḥaram aš-Šarīf in Jerusalem.* (Beirut: Orient-Institut der Deutschen Morgenlandischen Gesellschaft, 1984); and "The Significance of the Ḥaram Documents," pp. 189-219.

[39] K. Salameh, "Aspects of the *Sijills*," *Ottoman Jerusalem the Living City, 1517-1917,* ed. S. Auld (al-Tajir World of Islam Trust, 2000), p. 110.

[40] S. A. I. Mīlād, "Registres judiciares du tribunal de la Ṣāliḥiyya Nağmiyya," *Annales Islamologiques*, xii (1974), pp. 190-200.

type of court document, the *i'lām*. The latter is a summary of an extended case settled over many days or weeks and includes all claims of plaintiff, proofs, response of defendant, relevant proofs and finally, the judgment of the jurist.[41] Though not equivalent, the *i'lām* shares much in common with the "complex document" from the Mamluk period, described by Little as generally containing "a bill of sale accompanied by at least six other documents," encompassing *ishhād*s and *iqrār*s.[42]

In the selection at my disposal, examples of all of the above types of documents are found, (excepting those relating to adoption, embezzlement or vouchers). But a 'new' document (or at least a new name for a document) emerges, - the *tawrīq*. Out of a total of 50 legal documents from the Bāb al-'Ālī court in the year 1005-6, five are identified as *tawrīq*s. According to Dozy, the word, originating from the root *waraq* (paper) designated a copy of a document.[43] This definition fits the description of the documents herein where the word *tawrīq* is encountered on the extreme right hand margin of the page atop the text of the contract. In the fifth document, however, it appears in the body of the opening statement, "this is a certain, *shar'ī* address (*tawwajuh*) and a clear *tawrīq ta'āqud* (copy of a contract)."[44] All cases of *tawrīq* involve high-ranking individuals, for example members of the judicial and merchant elite and officials from the *dīwān*. Two involve the same individuals, an amīr and a merchant by the name of Khawājā Ismā'īl, one being an

[41] Bayinder, "The Function of the Judiciary in the Ottoman Empire," p. 642.
[42] Little, "the Significance of the Ḥaram Documents," p. 212.
[43] See, R. P. Dozy, *Supplément aux dictionnaires arabes*, 3rd ed. (Leiden: E.J. Brill, 1967).
[44] Al-Bāb al-'Ālī, *Sijill* no. 66, Doc. 13.

iqrār and the second a purchase.[45] In another case, it precedes a case involving the *multazim,* the chief *muftī,* a member of the famous Bakrī clan, and others to oversee the rent of a portion of a *waqf* property.[46] Most perplexing is that, half a century later in 1055-6, this term is not encountered in a single document out of a total of 201 from the same court. It may tentatively be suggested that the 'disappearance' of this type of document is connected to the shift in the status of written legal instruments and the emergence of the *ḥujja* (sound written instrument) described below.

To return to the *sijill* as the complete register of a judge's records, Faroqhi writes that by the beginning of the sixteenth century the compilation of registers "formed part of the established routine at least in the larger cities."[47] Special registers for inheritance were established in the bigger cities like Bursa or Cairo, but these were not the responsibility of the judge and "were kept by a special official known as the '*askerī qassām.*"[48] But again, this may not have been innovative as the establishment of Dīwān al-Mawārīth (Ministry of Inheritance) for the allocation of inheritance was itself an established institution which, one would assume, required the keeping of 'special registers.' Little writes that:

In the Mamluk and other periods the state often confiscated parts or the whole of estates as a means of securing public or private gain. This aspect of the Islamic laws of inheritance were in fact institutionalized in the Ayyūbid and Mamlūk empires in a Dīwān al-Mawārīth (Ministry of Inheritance), which undertook to monitor the

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[45] Ibid., Docs. 184, 185.
[46] Ibid., Doc. 207.
[47] Faroqhi, "Sidjill," *EI,* CD Rom Edition.
[48] Ibid. The "*qassām* came from Istanbul to impose a tax on bequests." The latter collected a 20 percent inheritance tax. See, M. Winter, "The Ottoman Conquest of Egypt," *The Cambridge History of Egypt,* vol. 2, ed. C. F. Petrie and M. W. Daly (Cambridge: Cambridge University Press, 1998), p. 510.

estates of deceased persons and to collect the portion due to the state, called *al-mawārīth al-ḥashriyya*, or escheat estates). In fact we know from one of the Ḥaram documents (#535) that a bureau called Dīwān al-Mawārīth al-Ḥashshiyya was operative in Jerusalem during the eighth/fourteenth century.[49]

Because we lack a complete judicial register from the Mamluk period, we cannot say anything further about the former's structural organization. But as far as the Ottoman-Cairean *sijill* goes (much like the Anatolian *sijills* described by Faroqhi[50]), the first section generally gathers contractual agreements witnessed and preserved in the local court, such as sales, loans, marriage/divorce contracts and the manumission of slaves. The second half of the Cairo *sijill* is taken up with orders issued by the sultan's council. Similar to modern circulars some are general orders to governors while others are specifically addressed to the chief judge of the courts. Most are written in Ottoman Turkish. Again this is reflected in the records of Ottoman Jerusalem from the Khālidī family *daftar* where, Little and A. U. Turgay write, "in contrast to the documents written in Ottoman Turkish, almost all are connected in some way or another, as we have seen, with royal affairs, the Arabic documents, with one exception, deal with private affairs."[51]

At the beginning of each *sijill* is a confirmatory page documenting the name of the judge and clerk assigned to the court. Both the Jerusalem and the Cairo *sijill* open with virtually the same confirmatory statement, the former distinguished by its brevity:

This page was prepared to ascertain the events that occurred in the time of ...Muhammad Efendi, the *qadi* at that time in the city of Jerusalem, along with his

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[49] Little, "The Significance of the Ḥaram Documents," p. 205.
[50] See, Faroqhi, "Sidjill," *EI*, CD Rom Edition.
[51] D. P. Little & A. U. Turgay, "Documents from the Ottoman Period in the Khālidī Library in Jerusalem." *Die Welt des Islam*, 20 (1980), p. 48.

deputy 'Abd Allah ibn 'Umar, beginning at the end of Rabi' II 1122/24 September 1710.[52]

The *sijill* of the Bāb al-'Ālī in Cairo is an elaborated version:

Thanks and prayers and peace be upon the prophet Muḥammad (SAAWS). This jubilant (*sa'īd*) *sijill* is blessed in its commencement, gracious in its conclusion, prepared (*al-mu'id*) to ascertain the *shar'ī* events which originate from the court of the Bāb al-'Ālī in *Miṣr al-Maḥrūsa* to eradicate (*īzālat*) its sins by *qānūn* in the reign of [the judge] *sayyiddina mawlāna Shaykh al-Islām , ṣadr al-mawālī al-kirām*, pride of the times,... Muḥammad Efendī b. al-Mawla, son of the late *Shaykh al-Islām* Ḥasan Efendī __? and the deputy [Ḥanafī judge] *Mawlānā*, pride of the *'ulamā'* __? al-Efendi b. *Mawlānā* Darwīsh Efendī, on the blessed day of __? in the year 1055/1646. *Khatam.*[53]

Another notable feature of documents contained within the *sijill* is their adherence to strict formularies, another factor critical to the document's 'integrity.'

(a) Formularies

Faroqhi, who presumed that the senior scribes of the Ottoman courts "put the claims of plaintiff, defendant and witnesses into the appropriate legal formulas,"[54] has, to some extent, been proven correct. Nahal and Salameh note that deciphering the script of the early sixteenth century scribes is sometimes possible only because of the preponderance of legal clichés. Bayinder goes further to assert, "[t]he rules of court registration took place within the *'es-Surut'* and *'al-Mahadir ve's-sicillat'* parts of the Islamic law Books."[55] Again, in keeping with the desire to minimize the risk of forgery, and to standardize the law produced, the Ottomans adopted what conformed with these objectives from its predecessors - in this case the use of model *shurūṭ* contracts.

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[52] Salameh, "Aspects of the *Sijills*," p. 108.
[53] Al-Bāb al-'Ālī, *Sijill* no. 124, page 1.
[54] Faroqhi, "Sidjill."
[55] Bayinder, "The Function of the Judiciary," p. 642.

Lest we assume that the adherence to strict formularies was an Ottoman innovation, it should be noted that a highly formulaic style of writing is also a feature of the Mamluk legal documents. Little has shown that of the 333 records which are inventories listing the possessions of a dead or dying individual in the Ḥaram collection, the majority begin with the phrase, *ḥaṣalā l-wuqūf 'alā,* another 34 contain the alternate phrase, *waqafā 'alā,* while 11 begin with the phrase, *ḍubiṭat ḥawā'ij fulān* (the possessions of *fulān* were recorded).[56] While no inventories for a dead or dying individual are found in the sample at my disposal, witnessed inventories were common in the records of the Qismas in Cairo and generally begin with the phrase:

Ḥaḍarat al-ḥurma fulāna li'thubūti mā lahā. (the woman *fulāna* attended [court] to establish what is hers/what is owing her ....)

Ishhāds in the Ḥaram documents always began with the phrase, "*ashhada 'alayhī fulān*" (*fulān* testified for him) or "*ḥaḍara ilā shuhūdihi wa-ashhada 'alā ...*"[57] The documents on which this research is based include a total of 33 *ishhāds*, all of which follow the same exact formulas.[58]

Within the Ottoman Empire, the stability of formulaic clichés is evident across geographic boundaries. In the *sijills* of Ottoman-Jerusalem, writes Salameh, "the beginning of each document differs depending on the topic. In general the topic

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[56] Little, "The Significance of the Ḥaram Documents," p. 203.
[57] Ibid., p. 209.
[58] Al-Bāb al-'Ālī *Sijill* nos. 124, 96, and 66 contain a total of 18 *ishhāds*; from the court of Ibn Ṭulūn, *Sijill* no. 165, there are 2; from the Qisma 'Askeriyya, *Sijill* no. 5 there are 8; from the Qisma 'Arabiyya, *Sijill* no. 5 there are 5.

can be understood by reading the first two lines."[59] Examples of identical formulaic clichés for legal contracts such as, sales, rent, acknowledgements and marriage from both the Jerusalem and Cairo *sijills* abound. Providing samples from the former, Salameh lists the following formulaic opening lines:

> "Muhammad ibn Muhammad alleged...The renter our Lord...Before our lord the Efendi...Was purchased...The woman testified against her[60]...The husband *fulan,* the wife *fulana, al-sadaq* amount X, *al maqbud bi yad wakilaha fulan* amount Y, and the rest *(wal-baqi)* amount Z, owed to her on the death of or separation [from] her husband.[61]

Comparison with the Cairo *sijill* confirms the procedural conformity of Ottoman courts to the same formulaic clichés.[62] Forty-nine documents in the collection under study begin with the lines "*fulān* alleged," 15 rental contracts begin "the renter *fulān*," and 7 marriage contracts are identical to the contract Salameh described.[63] Out of 35 *Khuṭṭūba*'s (the custom of signing a marriage contract but delaying the *dukhla*, or date of consummation to a later time), for example, the identical formula can appear in various forms of abridgement, "Before our Ḥanafī lord, *fulān* attested (*aṣdaq*) to his engagement," or simply, "*fulān* attested."[64] What follows can include the conditional clauses of the particular family or community involved and, as we shall in future chapters, can vary depending on the customs of each.

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[59] Salameh, "Aspects of the *Sijills*," p. 108. Qisma 'Askeriyya, *Sijill* no. 5, Docs. 6, 7, 8, 9, 10.
[60] Salameh, "Aspects of the *Sijills*,"p. 108.
[61] Ibid., p. 110.
[62] For a complete and systematic overview of the documents comprising the *sijill* of the court of the Ṣāliḥiyya al-Najmiyya, see the appendix to Mīlād's article, which enumerates the types of documents as well as the opening and closing statements of each. Mīlād, "Registres Judiciaires," pp. 190-200.
[63] Qisma 'Askeriyya, *Sijill* no. 5, Docs., 6, 7, 8, 9, 10, 44, 45.
[64] The same formula is contained within the documents from the Najmiyya al-Ṣāliḥiyya. Mīlād, "Registres Judiciares" p. 209.

In 17 cases of *istiftā'* and *futyā* (where people sought and received a jurist's legal opinion) the document is always composed of two parts, the first contains the question, the second contains the *muftī*'s reply: "The woman asked...and he answered her query."[65] This brief sample indicates some stability in the formulaic clichés encountered in witnessed depositions from Mamluk to Ottoman documents. It also demonstrates symmetry between formularies from the mid-sixteenth to the mid-seventeenth centuries in two Arab cities within the Empire.

It is not surprising that the Ottomans would adhere to legal procedures that facilitated the integrity of the document, as formularies are oft to do. The combination of a legible, and formulaic *sijill* facilitated the 'unification' of the legal process by ensuring adherence to strict 'models.' In the final analysis, it also made the task of extra-judicial review that much easier while minimizing the risk of forgery. The priority made of the latter is reflected in the self-referential terminology found in the Cairo *sijill*.

> The assembly of the honourable *shar'* and the circle of the *ḥanīf* faith, [which is] protected (*maṣūn*) against alterations (*taghyīr*). [Emphasis added].[66]

Before we explore the way in which the courts used documents, a brief overview of the document's 'alter ego' – the spoken word – is in order.

b) The Testifying Witnesses

The argument above should in no way diminish the importance of the role played by witnesses in the *sharī'a* court. By suggesting that the document was attaining a higher status, it is not my intention to demonstrate a comparable decline

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[65] Al-Bāb al-'Ālī, *Sijill* no. 66, Doc. 181.
[66] Ibid., *Sijill* no. 124, page 1.

in the status of the witness. To the contrary, as part of the argument that the document's integrity was paramount, the Ottoman state continued to adhere to traditional practices where witnesses were concerned for, like formularies, their principal function was to minimize the risk of forgery. The centrality of this institution within Ottoman courts is a sign of the care taken to adhere to the bounds of Islamic legal theory.

Like the *sijill,* witnessing was also common to the pre-Islamic Near East, although in Islam its function is more religious than administrative.[67] Wakin writes that the danger of a moral or religious flaw in the witness' character led *qāḍī*'s to ascertain the *'adāla* (integrity) of witnesses "through a regulated system of screening and formal certification."[68] In this way, a permanent body of accredited witnesses arose. Thereafter, their testimony, bearing witness to and furnishing proof of the court's proceedings, was accepted as sound. She writes, "[t]he witness penetrated the whole of society and was influential in preserving and spreading Islamic values."[69]

Apart from the designated witnesses who oversaw the incorporation of all legal documents into the *sijill,* and signed their name beneath the phrase *"shuhūd al-ḥāl,"*[70] G. Nahal identified another body of witnesses known as *ahl al-khibra,* a body of 'expert' witnesses in such fields as engineering, medicine or the like.[71] Faroqhi

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[67] Wakin *The Function of Documents*, p. 7.
[68] Ibid.
[69] Ibid., p. 8.
[70] R. C. Jennings, "Limitations on the Judicial Powers of the Kadi in Seventeenth Century Ottoman Kayseri," *Studia Islamica*, 50 (1979), p. 161.
[71] G. Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Chicago: Bibliotheca Islamica, 1979), p. 22.

refers to a similar body attached to Anatolian courts, known as *ahl al-'urf* (Turkish, *ahl-ī 'urf*) who often represented members of the merchant or scholarly elite. Whether the two bodies are absolutely equivalent is unclear, but the need for expert testimony (in municipal and customary law) in the major courts of the empire, is self-evident. Indeed, the term applied to this body in Anatolia, *ahl al-'urf*, suggests the latter were experts in the area of customary law, a secular counter body, as it were, for 'designated' witnesses whose main area of expertise was *sharī'a*.[72] This type of witness never signed the document, but their testimonies and names are always provided in the body of the text.

A third category of witness is the eyewitnesses to the event or deed in contention. The sworn testimonials of such individuals, was always recorded in the text of the document, as were their full names and relationship to the concerned parties or property. At other times, however, the collective testimony of an amorphous body of casual witnesses is provided with nothing more specific to identify them than the term "and a number of those present" (*wa 'adad min al-ḥāḍirīn*) alongside the signatures of the designated witnesses. 'Collective' testimonials are often provided in cases pertaining to an individual's reputation.

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[72] Nahal has identified this group as a fixed body of witnesses in seventeenth century Cairene courts. He provides little other information that might suggest who they were or what their areas of expertise might have been. Faroqhi identifies a group know as *'ahl al-'urf* in Anatolian courts, writing "oppression and the governor's men *(ehl-i 'orf)* are presented as two closely allied terms." S. Faroqhi, "Political Activity among Ottoman Taxpayers and the Problem of Sultanic Legitimation (1500-1650)," *Journal of the Economic and Social History of the Orient* 35 (1992), p. 13. R. C. Jennings makes reference to them as well, arguing that the *shuhūd* (referred to as *suhūd al-ḥāl* in Kayseri *sijills*) included the "*ehl-ī 'orf*." The witnesses were usually peers of the litigants, he explains, and of three types: men who attended because of personal interest in the case; men possessed of expertise relevant to the case; men who happened to be present. See R. C. Jennings, "Limitations on the Judicial Powers," pp. 161-162.

But in such instances, the witnessing body is not comprised of "those present" but of "a number of Muslims" to whom the litigant was known. Generally, they were residents of the same neighborhood or relatives or friends. Ḥijāziyya, for example, brought forward "a number of Muslims" from her quarter (*ḥāra*) to testify that her brother had wrongfully slandered her.[73]

In some cases, the number of witnesses reached into the tens, maybe even hundreds. When a 'collective' complaint was lodged with the courts on behalf of a community or the residents of a given district, the testimonies of a large number of residents were given. Often these were important municipal cases involving high-ranking officials. In one such case, the Muslim and Christian residents of al-Darb al-Wāsi'a (formally know as Darb al-Raqīq), complained that a certain *amīr* had removed a portion of the alley wall that lent privacy to the main door of a women's public bath. Attending the hearings were the chief judge, the *wazīr*, the *nāẓir fī aḥkām al-shar'iyya*, the Ḥanafī deputy judge, the *amīr al-ḥājj*, the *amīr radwān*, the *kātib al-ḥurūf*, a number of *'ulamā'*,and finally "*ahl al-khibra al-handasiyya*" (or engineering experts).[74]

But the witness's role was not limited to the realm of the 'spoken' word for it also encompassed a 'written' component, exemplifying the interdependence of the spoken and the written word in this time period.

c) The Notary Witness

It will be recalled that Tyan described the convergence of the role of witnesses and notaries in Mālikī theory as the 'triumph' of the document in the

[73] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 65.
[74] Ibid., Doc. 785.

twentieth century.[75] Strictly speaking, Tyan is correct. But there is considerable evidence to suggest that this convergence occurred in practice, if not in theory, at a much earlier date. As shown below, the function of the notary was traditionally private, i.e. commissioned outside of court and performed in the name of the notary rather than the judge. In the Ottoman period, however, the designated witness was a clerk of the court and acted as both witness and notary. In other words, notaries no longer had a private function. The first piece of evidence in support of this conclusion is the identities of the notaries who, from the first half of the sixteenth century, were no longer drawn from the local notarial class, but from a pool of Ottoman-trained clerks.

The notary profession emerged with the spread of script and the proliferation of written legal documents. Unable to process the vast number of legal instruments demanded by the public, judges delegated part of this responsibility to a professional class of notaries.[76] Significantly, notaries were always recruited from the ranks of professional witnesses and were distinguished as "clerks who practice their profession outside of the court."[77] In this manner, the notary acted as private "assistant to the judge," who maintained final authority over the adjudication

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[75] But C. Petry describes witnesses and notaries as having overlapping functions in Medieval Cairo. C. Petry, *the Civilian Elite of Cairo in the Later Middle Ages* (Princeton: Princeton University Press, 1981) p. 225. Petry uses the term *shāhid* and notary interchangeably.

[76] R. Vesely, "Die Hauptprobleme der Diplomatik arabischer Privaturkurden aus dem spätmittelalterlichen Ägypten," *Archiv Orientali*, XL (1972), p. 322.

[77] Former judges were often recruited by incoming judges and served as notaries for the courts from which they had been discharged. Moreover, there were families who were distinguished as notary or professional witness families, indicating the high status of such occupations. Ibid., p. 321.

process.[78] As R. Vesely indicates, professional witnesses, and the notaries who were culled from their ranks, are often referred to as a *kātibs* (writers or scribes), *muwaththiqs* (drafters of instruments), *shurūṭīs* (instrument adepts or drafters of formularies) or *shuhūd 'adl* (just witnesses).[79]

Because notaries do not have a special designation in Islamic law, the task of identifying the writer of a court document is extremely problematic, making it difficult to ascertain whether the person who wrote the instrument did so as a clerk of the court or as a private notary. Nonetheless, the documents do yield a number of clues. The first hint as to the identity of the clerks (*'udūl*) who staffed the courts of the Bāb al-'Ālī and the Qisma courts in Cairo, is the handwriting. The close correspondence between the handwriting found in Ottoman-Anatolian *sijills* and those found in Cairo in the earlier part of the sixteenth century, suggests that those who transcribed cases into both *sijills* were of the same class of notaries. Nahal, Faorqhi and Salameh, make the point that deciphering the script of the early sixteenth century is very difficult. The latter writes that documents from the first Ottoman century in Jerusalem are "written in a poor naskhi script while the closer the sijills come to the modern period, the easier the language becomes to read."[80] Faroqhi writes that "[s]pelling errors and clumsy handwriting also are not rare in the early registers,"[81] but notes that by the 17th century "scribes in the larger courts wrote in a relatively uniform hand."[82] A comparison between the fourteenth century

[78] Ibid., p. 322.
[79] Ibid.
[80] Salameh, "Aspects of the *Sijills*," p. 107.
[81] Faorqhi, "Sidjill," *EI*, CD Rom Edition.
[82] Ibid., p. 541.

Ḥaram documents and early sixteenth century Ottoman *sijills* reveals that the former are written in a relatively lucid, uniform script[83] and are free of the defects described above. One may confidently suggest, therefore, that it is not the penmanship of the Mamluk-trained scribes which is found in the pages of the Cairene Qismas or the Bāb al-'Ālī from the early to mid-sixteenth century.[84] Such a claim is lent credence by the chroniclers who recount the campaigns initiated by the Ottomans against the indigenous class of professional witnesses and notaries.

After the conquest, designated witnesses were barred from working unless they obtained authorization from the Ḥanafī chief judge.[85] Many, were dismissed from court service and persecuted outside of court by the chief judges. Among the complaints Ibn Iyās lists against one chief judge is the closing of the shops of the witnesses in Rajab, 928/1521.[86] Ibn Iyās is probably referring to the *ḥawānīt al-ta'dīl*, or special chambers where notaries awaited their clients on benches.[87] If the aim of the state was to promulgate a new procedure with respect to the composition and storage of documents, such a policy makes eminent sense.

The *sijills* of the Ottoman Qassāms (judges who divide inheritance) and the Chief Ottoman Judge of the Bāb al-'Ālī bear the same penmanship (loose, often illegible and imprecise). Even in the largely Mālikī constituency of the court of Ibn Ṭūlūn, the script is generally poor when a Ḥanafī judge is presiding, whereas cases

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[83] See Little, *A Catalogue of Islamic Documents*, for an example of Mamluk notarial penmanship microfilm #34.
[84] See, the *sijills* of the Qisma 'Askeriyya, Qisma 'Arabiyya and the Bāb al-'Ālī from the mid-sixteenth century.
[85] Al-Bakrī, *al-Nuzha al-Zahiyya*, p. 48.
[86] Muḥammad Ibn Aḥmad Ibn Iyās, *Badā'i' al-Zuhūr fi Waqā'i' al-Duhūr*, ed. Muḥammad Muṣṭafā, vol. 5 (Weisbaden: E.J. Brill, 1975), p. 469
[87] Vesely, "Die Hauptprobleme der Diplomatik arabischer," p. 324.

arbitrated by Mālikī judges are more legible and closer in style to those found in the Ḥaram documents.[88] This suggests that the author of the document changed depending on the presiding judge and that non-Ḥanafī judges continued to employ local notaries. Furthermore, it indicates that notaries wrote most, if not all, documents encountered in the Ottoman *sijill.* This claim is substantiated by the fact that a degree of overlap is found between the role of court clerk and private notary.

As mentioned, Vesely describes the notary's function as a private one, where the document issued is not written in the name of any judge.[89] Such a distinction may have been diminished in the Ottoman court where a close association between private notaries and court appointed witnesses is observable. Nahal, for example, finds evidence of symmetry between the job of a *shurūṭī/muwaththiq* and the job of a *kātib/'ādil,*[90] describing the latter as 'acting notaries,' with an expertise in drawing up various model contracts.[91] The overlap this implies in terms of the notary's private role and the witnesses' court-appointed role suggests a diminution in the private function. This is substantiated by the *sijill,* which reveals that the function of the court appointed witness and the notary could and did overlap.

In document 821, dating from 1055/1646 in the *sijill* of the Bāb al-'Āli, the words "*min khaṭ al-Shaykh Aḥmad al-Sha'rāwī*" or "by the hand of al-Shaykh

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[88] Maḥkamat Ṭūlūn, *Sijill* no.165, Docs. 1314, 1315, 1316.
[89] Vesely, "Die Hauptprobleme der Ddiplomatik arabischer," p.324.
[90] Nahal, *The Judicial Administration,* p. 10. This view is rejected by Hallaq who argues that the "function of the scribe must here be differentiated from that of the notary...who did not sit in the *qāḍī*'s court and whose function was a private not public one, which the *kātib*'s was." See, Hallaq, "The Qāḍī's Dīwān," p. 423
[91] The *'udūl* were seated in a circle behind each of the chief judges in the court of the Bāb al-'Āli. Nahal, *The Judicial Administration,* p. 16.

Aḥmad al-Sha'rāwī" are encountered at the bottom of the text.[92] In the Cambridge University Genizah Series, the authors indicate "[w]hen the witness wrote the witness clause himself he generally indicated this by adding the phrase *bi-khaṭṭihi* ('in his writing')."[93] In fact they go so far as to say that notaries were designated witnesses (*'udūl*) who "acted as one of the witnesses to the documents they drew up."[94] Given the fact that there is nothing to distinguish Sha'rāwī's penmanship from that of the principal scribe for pages 1-20 and 160-178, we may assume that the latter was both designated court notary and witness.[95]

In an environment in which the document is serving as a formal legal instrument, an overlap between the role of notary and witness is to be expected. Ultimately, this development served to minimize the risk of error or forgery by eliminating repetition, such that a two-step process (i.e. notarising the document first, then copying it into the *sijill*) is reduced to one. Hence, a natural progression toward the "grafting" of the role of the witness onto that of the notary contributed to the document's status.

In spite of the persistent importance of the witness, it will be shown that such policies enabled the courts to produce "sound written documents" or *ḥujja*s, and even more importantly, to recognize them in the absence of witnesses. The

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[92] Al-Bāb al-'Ālī, *Sijill* no.124, Doc. 821.
[93] Cambridge University Library Genizah Series 10, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collection*, (Cambridge: Cambridge University Press, 1993), p. 8.
[94] Ibid.
[95] As part of the effort to guard the document against forgery, Salameh notes that "no blank spaces are left on the pages, whether between the documents or in the margins. Each double page is filled up completely with writing over all four sides." If a space is left, the word *baṭṭal* appears so as to prevent forgery. In the selection at my disposal, the word *baṭṭal* is used stylistically. Salameh, "Aspects of the *Sijill*s," p. 107.

important shifts that such cases signify in the institutional history of the *sijill*, must be prefaced by a description of the administrative innovations which made them possible.

Section iii: The Court & its Archive

In spite of the enormous textual evidence suggesting that record keeping, by any name, was an established practice, some scholars have contested this idea. Impressed by the fact that the only complete, extant *sijill*s date from the first two decades of Ottoman rule – in the case of Egypt from the Maḥkama al-Ṣāliḥiyya - scholars such as 'Ādil Mannā' have suggested that the practice of compiling registers of legal documents (*sijill*-keeping) was an Ottoman innovation.[96] This is not a view endorsed by most scholars who agree that the practice long pre-dates the Ottomans and is, in all likelihood, pre-Islamic in origin.[97] Indeed there is virtually no evidence to support the claim that the Ottoman state was the first to invent the *sijill* (as a legal register) or the archive.[98] After all, the discovery of a compilation of

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[96] A. Mannā', "The *Sijill* as a Source for the Study of Palestine During the Ottoman Period, with Special Reference to the French Invasion," *Palestine in the Late Ottoman Period*, ed. D. Kushner (Jerusalem: Yad Izhak Ben-Zevi, 1986), pp. 351-353.

[97] See, Little, "the Significance of the Ḥaram Documents," pp. 189-219.; Wakin, *The Function of Documents*; Du Blois, "Sidjill;" Faroqhi, "Sidjill;" J. Mandaville, "The Ottoman Court Records of Syria and Jordan," *Journal of the American Oriental Society*, 86 (1996), pp. 311-19; R. Y. Ebeid and J. L. Young, *Some Arabic Documents of the Ottoman Period* (Leiden: E.J. Brill, 1976), pp. 1-2.

[98] The preservation of original documents and copies in archives was already customary in the Ancient Orient and in Greek Egypt. It may be assumed that the Arabs also knew of this institution at an early date. Indeed there is "a short précis on the back of some papyri, intended to facilitate storing and reference. But there is no evidence of the existence of a central archive, as there was in Greek times." W. Bjorkman, "Diplomatic," *EI*, CD Rom Edition. Also see, J Barthold, *Arkhivnïe Kursï*, vol. i (Petrograd), 1920; cf. *Islamica*, iv, 145. "There was," they continue, "a proper archive in Fātimid times, and Ibn al- Ṣayrafī (Ḳānūn, 142) calls the archivist *Khāzin* [*q.v.*], and stresses his importance. He praises the Baghdād archive *al-khizāna al-'uẓmā* as a model." The function of the archivist was to "file the originals of incoming documents, and the copies of the outgoing ones according to

Mamluk legal documents in the Ḥaram collection represent fragments of an archive and lay to rest any such notion.

Moreover, as we have seen from the variety and names of Ḥaram documents, they share much in form and content with their counterparts in the Ottoman *sijill.* As such, there is little in the Ottoman style of *sijill*-writing that would distinguish it from any predecessor state, particularly as the content and organization of the documents that make up the collectivity of the judges' court records have retained a large measure of stability. Moreover, the formulaic clichés encountered in the *shurūṭ* manuals share a strong affinity with those found in the *sijills* of both Mamluk and Ottoman states.[99] What, then, was innovative about the Ottoman system of record keeping and archiving, and how/why did it contribute to the triumph as well as the preservation of documents in the "millions?"[100]

As mentioned, the closest thing to a judicial archive is found in the *Ḥaram* collection, containing copies of documents from the court of a late 14th century Shāfi'ī judge in Jerusalem. Nonetheless, as Little cautions, "we are not dealing with an archive but, at best, fragments from an archive."[101] Apart from the important collection of Ḥaram documents, the only other significant collection of court records are those studied by M. Gronke from twelfth and thirteenth century Ardabīl, Maḥmūd Ḥammūda's collection of Mamluk documents, and those discovered by H.

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months, in folders with headings. A certain decline in this practice seems to have set in Mamlūk times, and there were periods when the *dawādār* of the confidential secretary sufficed as an archivist." Ibid.

[99] "The rules of court registration took place within the 'es-Surut' and 'al-Mahadir ve's-sicillat' parts of the Islamic law Books." Bayinder, "The Function of the Judiciary," p. 642.

[100] Little, "The Significance of the Ḥaram Documents," p. 189.

[101] Little, *A Catalogue of the Islamic Documents,* p. 18.

Rabi, some from the Fāṭimid and Ayyūbid periods, but most from the Mamluk.[102]

D. P. Little writes, that:

> approximately 925 Mamluk documents are known to exist at present exclusive of the Ḥaram documents, the discovery of which means a doubling of the total now available.[103]

Because so little has survived from the pre-Ottoman archives, little can be said of the classical or medieval system of record keeping. Nonetheless, one might argue that all states would have established a designated archive for important records, such as documents on large *waqf*s, taxation, land distribution etc. But the question remains: what distinguishes the Ottomans from their predecessors? The more obvious explanation is that the Ottoman era is the most contemporaneous and, therefore, most likely to yield the largest number of surviving documents. As ordinary records documenting purchases, marriages, divorces etc., became archaic, they were no doubt disposed of, or retained within private collections, as with the Khālidī family's *daftar*. But the sheer contrast between that which survives from the Ottoman and the pre-Ottoman periods - the fact that not a single complete Mamluk archive has been discovered - suggests the need for a fuller explanation.

The few scholars who have taken on the question generally agree that it is the system of archiving that distinguishes the Ottomans from their predecessors. Mannā' connects the existence of systematic archives to the explanation that

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[102] M. Gronke, *Arabische und persische Privaturkunden des 12. und 13 .Jahrhunderts aus Ardabil (Aserbeidschan)* (Berlin: Karl Schwartz, 1982); H. Rabie, *Financial System of Egypt, A.H. 564-741/A.D. 1169-1341* (London: Oxford University Press, 1972); Maḥmūd Ḥammūda, *al-Madkhal ilā Dirāsat al-Wathā'iq al-'Arabiyya* (Cairo: Dār al-Thaqāfa, 1980), pp. 187-213.

[103] Little, *A Catalogue of the Islamic Documents*, p. 15.

Ottomans were "fervent Muslims" who "respected their religion."[104] Linking the development of systematic state archives to a wish to 'respect' religious sensibilities is justified in so far as this entailed the juristic sensibilities of Muslim scholars. As a direct corollary of the growing authority of documents, a concern for their integrity translated into the creation of protected archives. In fact, the system devised, in so far as it discouraged the free circulation of documents in the public domain or in individual hands, allayed the concerns raised by jurists such as Ṭaḥāwī while contributing to the preservation of millions of documents. Milād has done an admirable job of outlining the probable location of the Ottoman archives in Cairo as well as the procedural steps that would have been followed in the collection and storage of various court *sijills*.

Mīlād suggests that prior to 1021/1620, each of the judges from the legal schools possessed their own *sijill* or judicial register, titled the "*sijill* of the Ḥanafi, Shāfi'ī, Mālikī or Ḥanbalī rite." After 1021, by order of the Qāḍī 'asker, all separate registers were fused into one unified *sijill*.[105] She substantiates this claim by pointing to the "interpenetration" of court documents from all four schools of law on the same page, e.g. a case proclaiming "before our Ḥanafī lord," followed by another "before the Mālikī judge," followed by another "before the Shāfi'ī judge," etc. This implies, she argues, that documents could not have been fully registered into the "unified" *sijill* the day of their production.[106]

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[104] Mannā', "the *Sijill* as a Source," p. 353.
[105] Mīlād, " Registres Judiciares," p. 164.
[106] Ibid. Mīlād's points are well taken, but it should also be noted that even before the creation of the 'unified *sijill*' (for all four schools) the judgments of the Ḥanafī deputies who were attached to various courts can be found interspersed with the documents issued

Speaking of the actual storage facilities in which these unified *sijills* would have been kept, Milād argues that incomplete *sijills* (such as those from the Ṣāliḥiyya Najmiyya) were retained within the actual court, i.e. in its main hall (*qā'a*) or within its residential quarters, presumably in the judge's personal quarters. Finished *sijills* on the other hand, were collated in a special "depot" reserved for all complete judicial registers from Cairo's various courts. Basing her case on three isolated (*mufrada*) documents found within the archives of the Ministry of *Waqf*, Milād argues that this 'unified archive' was located within the court of the Bāb al-'Ālī, which in turn, was located within the walls of the Cairo citadel. [107]

Even more interesting than the evolution of the archive, however, is the judicial innovation that made it possible – namely, the re-definition of the spatial conception of the Islamic 'court.' Prior to the Ottomans, the Islamic court (*majlis al-ḥukm*) was embodied in the person of the judge, who held his sessions in a number of changing venues. Mosques and certain *madrasas*, which generally functioned as places of arbitration between judges and litigants were, in all likelihood, the main depositories for important judicial registers or documents. The fact that the Ḥaram documents were found "within the precincts of the al-Ḥaram aš-Šarīf in Jerusalem, the third most holy place in the Muslim world," suggests as much.[108] However, a great many more registers would have been circulating in the

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by the principal judge of a non-Ḥanafī court. This is the case with *Sijill* no. 165 from the year 965-6/1557 H., which features the judgements of the Mālikī and the Ḥanafī judges together on the same page.

[107] One of those documents contains the following line: "Ceci est une copie provenant du registre de la Sublime Porte, se trouvant conservé au dépôt des registres complets a Miṣr." Ibid., p. 166.

[108] Little, "A Catalogue of the Islamic Documents," p. 1.

private homes of individual judges or their descendants for, in homage to a tradition dating from the classical period, it was established juridical etiquette for an outgoing judge to surrender (*taslīm/tasalum*) his registers to the incoming judge.[109] In the absence of a fixed courthouse, the 'court' (*majlis al-shar'*) was, for all intents and purposes, personified in the judge who was also the sole custodian of the judicial register. No doubt, archaic or dated registers were destroyed or held in anonymous private hands, explaining why so few survive today.

Under the Ottomans, however, the erection of fixed courthouses led to a physical separation between the person of the judge and the actual court and, by extension, the *sijill.* Seven years after the conquest and one year before the issuance of the *Qānūnnāma Miṣr,* the Ottomans had already begun the process of overhauling the Egyptian judicial process by establishing "the first courtrooms" in 1522.[110] The concept of a fixed courthouse, replaced the old system where, as mentioned, *qāḍī*s held court in a number of changing venues including their homes, mosques or *madrasa*s. A fixed court venue was useful for three reasons: one, it standardized the legal process throughout the empire; two, it allowed for the efficient distribution of state *qānūn* and finally, a physically grounded court, and the paperwork that it generates, is easily monitored. Most importantly, however, a fixed rather than 'free-

[109] Occasionally, a copy of the original *sijill* would be made for the new judge while the retired judge retained the original *sijill* in his private collection. In the early centuries of Islam, this '*sijill*' consisted of loose sheets of paper carried in the judges 'kerchief'. Muḥammad ibn Masrūq, an Egyptian judge from 793-800, is believed to have been the first to use a *qimaṭr* (type of bookcase for the document). See, W. Hallaq, "The Qāḍī's Dīwān (*Sijill*) Before the Ottomans," *Bulletin of the School of Oriental and African Studies,* vol. 16, part 3 (1998), pp. 418, 433.

[110] N. Hanna, "The Administration of Courts in Ottoman Cairo," in *The State and it Servants,* ed. N. Hanna (Cairo: AUC Press, 1995), p. 46.

floating' court meant that *sijills* were now physically anchored to the courthouse, rather than to the judge.

Even before the creation of fixed courts, however, Ibn Iyās writes that in the early days of the conquest, the governor called on all local judges and witnesses to surrender their files to the 'deputies' of the Ottoman *qāḍī 'asker.* None complied, he continues, and the order went un-enforced until a *muqaddim* was dispatched by the governor to each of the courts of the local four chief judges.[111] A *muqaddim*'s job was to attend and observe the court proceedings until evening. At the end of the day, he would collect all marriage contracts and proceed with them to the governor's *dīwān.* There, the files would be surrendered and stored according to rules ordained by Ottoman "*yasaq.*"[112]

Writing in the seventeenth century, al-Bakrī al-Ṣiddīqī (d.1676) described the same judicial routine persisting into his day. But in addition to the presence of a *muqaddim,* the *qāḍī 'asker* also had his records examined every three days.[113] Again, this is a significant departure from past precedent when only suspicion of forgery or wrongdoing could justify the 'review' of a judge's records. Gone are the days when a judge would only surrender his *sijill* on death or retirement, for now the records that comprise the *sijills* were collated by the *muqaddim,* reviewed by bureaucrats and archived on a daily basis.

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[111] Ibn Iyās, *Badā'i'*, p. 418.
[112] Ibid.
[113] Shaykh al-Islām Muḥammad b. al-Surūr al-Bakrī al-Ṣiddīqī, *al-Nuzha al-Zahiyya fī Dhikr Wulāt Miṣr wa-l'Qāhira al-Mu'izziyya,* ed. Abd al-Razzāq 'Abd al-Razzāq 'Īsā (Cairo: al-'Arabī lil-Nashr wal-Tawzī', 1998), p. 52.

A striking textual indicant of the shifting boundaries of the Muslim 'court,' is found in the lines preceding every court case. Little notes that every court record contained within the Ḥaram collection began with the address, "*ḥaḍara fulān ilā majlis al-ḥukm al-'azīz al-fulānī.*"[114] The wording is significantly different in the Cairo *sijills*, which often read: "So and so attended the Bāb al'Āli (*ḥaḍara al-Bāb al-'Āli fulān*).[115] Beyond identifying the exact venue, the majority of court records are addressed to a particular judge, for example, "*before mawlāna al-Ḥanafī/ mawlāna al-qassām, fulān* alleged."[116] This is not to suggest that Mamluk court documents do not also indicate the identity of the judge, only that the term "*majlis al-ḥukm*" is no longer used with any consistency in the Ottoman period. The only exceptions are the documents from the Bāb al-'Āli in the year 1005-6H/1596-7 which are recorded in a manner which does not indicate the judge's identity, for example, "*ḥadara fulān*" without adding '*majlis al-ḥukm*' or naming the court venue. In part, this may be explained by the fact that the 'unified *sijill*'s of which Mīlād spoke had not yet been initiated. Nonetheless, this explanation is insufficient if we recall that the Bāb al-'Āli court (as explained in chapter one) also had permanent representatives from each of the schools (sitting in rows behind the chief Ottoman judge) whose judgments were always found alongside the chief judge's and his deputies. An explanation presents itself, however, when we recall that in 1000/1591, Al-Efendī Ḥasan, and his acting deputy were criticized by al-Damīrī for dismissing *nā'ibs* and

[114] Little, "The Significance of the Ḥaram Documents," p. 210.
[115] Al-Bāb al-'Āli, *Sijill* no. 66, Docs. 5, 193, 196, 213.
[116] Al-Bāb al-'Āli, *Sijill* no. 96, Docs. 15, 72, 73 74, 75, 76, 77; Maḥkamat Ṭūlūn, *Sijill* no. 165, Docs. 164, 165, 4, 5, 6, 7, 8, 9, 10.

shuhūd associated with the various legal schools.[117] Nine years later in 1009/1600, the chief judge 'Abd al-Wahhāb, formally suspended all the schools of law. Not coincidentally, the *sijill* of 1005/1596-7 falls within the tenure of each, suggesting that we may be seeing the traces of the decline or even full suspension of the *madhāhib* in this decade.

In sum, the variant clichés employed by Mamluk and Ottoman scribes highlight the distinction between the court (*majlis al-ḥukm*) and the judge (*mawlānā al-ḥākim*). The term *majlis al-ḥukm* does not denote a place, but an assembly embodied in the person of the judge. Wherever the latter 'held court' constituted the *majlis al-ḥukm* or *majlis shar'ī*. In the Ottoman system, a specific judge and venue is indicated at the beginning of all court documents because the *sijill* was no longer anchored to an individual *qāḍī,* but rather to a physical space, ratified by various judges and registered by various clerks.

The importance of this shift on judicial protocol pertaining to the custody and storage of legal documents cannot be over-exaggerated. The stability which underlined many of the judicial procedures between the Ottoman and earlier eras should not, therefore, detract from the real innovations they introduced to the physical geography of the courtroom and to the parameters of a judge's jurisdiction over his own register. Combined, they are what made it possible for the state to actualise the 'triumph' of the document without creating a rupture between practice and theory. We may now observe the combined effects of these innovations on the status of the document in court.

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[117] Al-Damīrī, *Quḍāt Miṣr,* pp. 8-9.

Section iv: The Document Triumphant

In the main, Ottoman courts treated two types of documents as 'sound' or 'certain' in the absence of memory or witnesses. Written *ḥujjas* (Turkish: *hüccet*), or documents that are approved and signed by jurists containing the confession of one party and the acceptance of another,[118] as well as state edicts. The latter were always treated as 'certain' documents, while the former generally occupied a status that could be considered anywhere from 'sound' to 'certain.' Documents that held a 'sound' status were the most common, and were generally used to sway the court in cases where two testimonies conflicted. As seen below, in such cases the courts always favoured the party who could provide written 'proof' of their claims. But it must also be said that this manner of using *ḥujjas* pre-dates the Ottomans, as may be gleaned from Taḥāwī's work.[119] In the example of a contract of sale that has been cancelled, "Abū Ḥanīfa and others call for a separate document (*ḥujja*) that specifically cancels the sale."[120] Thus, *ḥujjas* could be documents, but more often than not, the theological and legal literature uses the word in the sense of a 'proof' provided in the form of a 'sign,' oral testimony or by Ṭaḥāwī's time, a document.[121]

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[118] Bayinder, "The Function of the Judiciary," p. 642.
[119] Wakin, *The Function of Documents,* pp. 46-47.
[120] Ibid.
[121] *Ḥujja* can be both "proof and the presentation of proof." The term is Qur'ānic in origin, and is applied to any argument attempting to prove what is false as well as what is true. "Men should have no Hudjdja against God (IV, 165)." As a 'proof,' *hujja* is closely associated with *dalīl* and in the sense of 'argument' it is associated with *burhān.* But where *dalīl* serves as the 'guide' to certainty, *ḥujja* "suggests the conclusive argument that leaves an opponent without a reply." And where *burhān* is evidence of an irrefutable proof, *ḥujja* "retains the idea of a contrary argument. 'Dialectical proof' would perhaps be the translation that best renders the primary meaning of *ḥujja.*" It also assumes a technical meaning in the science of Ḥadīth and becomes one of the initiatory degrees of Ismā'īlī gnosis. For the *mutakallimūn* and the *falāsifa* (in treatises on logic or methodology), "it

Wakin sees in this a positive indication of the importance of having "written documents in one's hands."[122] That need was accentuated in the late sixteenth century judging by the fact that written *ḥujjas* became more common-place and were endowed with a status of 'certainty/soundness' before the law. Such a development cannot be separated from a decisive technological innovation, the introduction of "European paper" in place of parchment or papyri by the end of the sixteenth century.[123] The sheer number of people who came to the *sharī'a* court to obtain written records, ranging from contracts, amicable settlements (*ṣulḥ*), or to list their earthly belongings, no matter how meager, lends this conclusion some weight. It is this feature of the Ottoman *sijill* that has prompted scholars like Hanna, Gerber and others to emphasize the "easy accessibility" of the Ottoman court. But "accessibility" is only one facet of this phenomenon. A clarification of the points of convergence and departure between the Ottomans and their predecessors in the use of documents will elucidate the point.

A 'certain' document is defined as one that does not originate from the court of the presiding judge, or require the testimony of a witness who was present at its composition, or the signature of a "secondary witness" (defined below). State edicts, which were often dispatched to the courts of the empire in the form of 'copies' (*ṣūra)* of state *qānūns,* arrived regularly and were always preceded by the heading *"ṣūrat birat,"*[124] *"ṣūrat buyuruldī,"*[125] or *"ṣūrat amr sharīf."*[126] Because these

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remains, according to the authors' inclinations, somewhat imprecise." L. Gardet, "Ḥudjdja," *EI,* CD Rom Edition.

[122] Wakin, *The Function of Documents*, p. 46.

[123] Vesely, "Die Hauptprobleme der Diplomatic," p. 336.

[124] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 2830.

public, legal documents were sealed and delivered by trusted, official emissaries, the risk of forgery was minimal. Should the need for corroboration arise, the original document, safely ensconced in the Istanbul archives, was available for verification. As such, the contents of a state *berat* were taken at face value and were not undersigned by any witnesses to their incorporation into the *sijill*.[127] It must be assumed that such practices, critical to the enforcement of state circulars in a large empire, pre-dates the Ottomans. But, the Ottomans were the first to dispatch their *qānūn* to the chief judge for enforcement, rather than to the governor, a measure that collapsed the barrier between the enforcers of 'secular' and 'sacred' law.[128] In short, the purveyors of *sharī'a* law were now compelled to accommodate legal documents generated by the state and to trust in the integrity of their contents. But this is only one aspect of the document's evolution for, apart from public edicts, the status allotted private documents in this period is substantial.

It is not yet clear when a precise lexical vocabulary denoting the sound/certain private document emerged. The *Fatāwā 'Ālamgīrī* allude to the authority of the *sijill* itself as a written legal proof, proclaiming "this *sijill* is a *ḥujja* for the recipient of this judgment" *(maḥkūm lahu)*.[129] In theological and classical judicial usage, the term *ḥujja* is used in the sense of an indeterminate 'proof' or

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[125] Al-Bāb al-'Ālī, *Sijill* no. 96, Docs. 2836, 2837, 2838.
[126] The latter pertained, to large *waqf*. Ibid., p. 2 [modern Egyptian archival numbering] of *Sijill* no. 124.
[127] D. P. Little and A. U. Turgay, "Documents from the Ottoman Period in the Khālidī Library in Jerusalem," *Die Welt des Islam*, 20 (1980), pp. 54, 55, 56.
[128] See, Faroqhi, "Sidjill."
[129] *Al-Fatāwā 'Ālamgīrī*, p. 200.

'sign.'[130] As mentioned, in Ottoman judicial usage it eventually came to refer to written documents that were approved and stamped by jurists.[131] This transformation was made possible by another Ottoman innovation in the area of documentary authentication.

In Mamluk times, the inferiority of the written instrument demanded that a document ratified by one judge could only be transmitted to a second judge through the oral testimony of at least two witnesses.[132] The testimony of the witness (*ikhbār*) – among them the author of the entire instrument – was then authenticated by a special judicial annotation known as *i'lām* or *raqm*.[133] A judge then inserted the latter beneath the signatures of witnesses. The "contamination" of the "*isǧalé*" in only one *sijill*, however, brought an end to this complicated procedure explains Vesely.[134] By the middle of the sixteenth century, a simplified version of this procedure was introduced by the Ottomans who set aside the authentication of the *ikhbār* by the judge. Thus by the mid sixteenth century the "form of the *isǧāl*...and the form of authentication changed as well. The rather complicated procedure which was used among the Mamluks was abolished and the *'unwān* was introduced in its place."[135]

Truncating the procedures involved in the authentication of written instruments facilitated their usage in Ottoman courts. By the end of the sixteenth

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[130] See, M. G. S. Hodgson and L. Gardet "Ḥudjdja," *EI*, CD Rom Edition.
[131] This usage is also evident in documents from Ottoman-Jerusalem. See, Little & Turgay, "Documents from the Ottoman Period," pp. 55, 56.
[132] Vesely, "Die Hauptprobleme der Diplomatic," pp. 333-4.
[133] Ibid.
[134] Ibid.
[135] Ibid., p. 332. The *'unwān* contained the judge's name and was supplemented with the imprint of his stamp. This was the case for both two-part instruments, and simple instruments.

century *ḥujja*s are frequently encountered in the Cairo *sijill* and registered as "*ḥujja shar'iyya*," indicating a *fiqh*-based reconciliation between the written document and legal theory. Equally significant is another conjugation, "*ḥujja muṣaṭṭara*," simply indicating a "written proof,[136]" or even "*ḥujja shar'iyya muṣaṭṭara*."[137] A close examination of the manner in which documents were used - to (dis)prove people's claims – from the mid sixteenth to the mid-seventeenth century demonstrates the growing authority of documents.

Wakin argues that, historically, documents were used to arbitrate cases when two testimonies conflicted.[138] Where no documentation was produced, the court simply refused to issue a judgment. The same is true of Ottoman courts, as seen by the case of al-Nūrī, a Muslim who charged that Ghirghis bin Mus'ad, a Christian, had struck him when he demanded the repayment of a debt. In the absence of Girghis' confession, and in the absence of any other proof, the charge was rendered null and void.[139] Two more cases from the mid seventeenth century, involving religious minorities, help confirm the argument that documents possessed more authority than oral testimonies. The first concerns Jewish parents who alleged that their daughter had wed Isḥāq bin –(?), and that the latter had failed to pay them the remaining half the dower owing. When questioned, Isḥāq denied that he had ever wed their daughter, and challenged them to produce oral proof (*bayyina*) to that effect. The parents left, but returned later (it is not clear whether it was later that day, that week, etc.) without the requisite evidence. Isḥāq then took an oath

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[136] Bāb al-'Ālī, *Sijill* no. 96, Doc. 72.
[137] Ibid., Doc. 96.
[138] Wakin, *The Function of Documents*, p. 31.
[139] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 816.

upon the Torah and reiterated his earlier denial. This satisfied the court, and the parents' claim was dismissed.[140] In another case from the mid seventeenth century a Jewish couple alleged that their daughter had wed Isḥāq bin –(?), and that the latter had failed to pay them the remaining half of the dower. When questioned, Isḥāq denied that he had ever wed their daughter, and challenged them to produce oral proof (*bayyina*) to that effect. The parents left, but returned later (it is not clear whether it was later that day, that week, etc.) without the requisite evidence. Isḥāq then took an oath upon the Torah and reiterated his earlier denial. This satisfied the court, and the parents' claim was dismissed.[141] If however one party could provide documentation, it inevitably tipped the scale in their favour. Again this is in keeping with historical practices, but the sheer number of cases settled on the basis of documentation alone by the mid seventeenth century far exceeds those from the mid-sixteenth.

In the year 1054/1646, a copy of a state edict (*ṣurat buyuruldī*)[142] served as a *ḥujja* and was instrumental in helping a high-ranking scholar (*Mawlānā fakhr 'ulamā' al-Islām*) win his case against the governor (*Muḥāfiẓ al-Mamlaka al-Miṣriyya*) when the latter challenged his right to monies received for the administration of a *waqf*. Another dispute over *waqf* involving a man's widow and his daughter from an earlier marriage, is settled in the latter's favour when she is able to produce a written document issued in her name from the Qisma 'Askeriyya, naming her as the designated administrator. The widow's legal agent (*wakīl*)

[140] Ibid., Doc. 101.
[141] Ibid., Doc. 101.
[142] Ibid., Doc. 107.

Muḥammad al-Baṭāyīnī, is granted a period of time in which to produce equivalent documents, but returns empty handed.[143] Predictably, he lost the case.

The social relevance of documentation is made amply clear by the case of ʻĀbidah who came to court in the presence of several witnesses from her neighborhood to testify that her husband Ḥijāzī, who had divorced her, was now denying the divorce had ever taken place and was (re)claiming his conjugal rights.[144] Without documentation supported by eyewitness testimony, ʻĀbida's legal status, and that of thousands of women, would have been in question. ʻĀbida thus requested, not only that the court block Ḥijāzī's claims, but that it issue a written document recognizing the divorce so as to pre-empt him from re-asserting such claims in the future.

Another case, however, demonstrates the authority of the document over and above the oral testimony of a litigant in a manner that illustrates a clear shift in favour of the written word. Sālim Ibn al-Ḥājj ʻAwaḍ bin Sālim was accused of failing to pay a portion of the *ṣadāq* owing his wife Ṣāliḥa daughter of al-Shaykh Tāj al-ʻĀrifīn, to whom he had been married by his father's *wikāla*. An agreement, signed by the groom's father and presented by the father-in-law, stipulated that the groom would pay the remaining portion of the *ṣadāq* when he (and his father) returned from the pilgrimage to Mecca. When the two returned from the *ḥajj*, the bride's father approached the groom and was given a verbal assurance that the *ṣadāq* would be paid. But Sālim failed to abide by the terms of the contract and continued to evade his financial obligations. What makes this case interesting is

[143] Ibid., Doc. 108.
[144] Ibid., Doc. 104.

that when questioned, the groom, denied that he had agreed to the terms of the contract negotiated by his father. Unfortunately for Sālim, his father, the original signatory to the marriage contract, was in court to testify against him. Faced with conflicting oral testimony and a document to which one of the principal protagonists was not even a signatory, the court was swayed by the weight of the latter.

But the dilemma generated by a ruling issued on the basis of a document which flatly contradicted the oral testimony of a witness – and, again it must be stressed, a witness who was not a signatory to the document - demanded innovative tactics. It will also be noted that the groom was not a minor at the time the document was drawn. As an adult, he was free to repudiate the terms of any marital contract signed by a *wakīl*.[145] Compensating for this fact, the judge abandoned the usual stratagem of posing a singular question and accepting or recording a singular answer (a formula encountered in hundreds of documents), to interrogate the groom. Pressing him "over and over again, time after time"(*marra ba'd marra, fatra ba'd fatra*) the judge posed the same question - had he, Sālim, verbally agreed to the terms of the contract? For his part, Sālim consistently denied that he had given his verbal consent. His denials were made in vain, however, for in the final analysis, the weight of the document in tandem with the testimony of Sālim's father and father-in-law, convinced the judge of the veracity of their claims. Thus, in the face of a

[145] Wakin explains that fathers who concluded contracts for their children when they were minors, resorted to the 'primary witnesses' who could "testify to the minority of the boy, [and] to his father's guardianship..." This is because a father's unfettered authority to act as *wakīl* for his children (especially sons) is no longer absolute once they reach legal maturity. Wakin, *The Function of Documents*, p. 69.

sworn testimony contradicted by a document to which the litigant was not a signatory, and by the sworn testimony of two witnesses, the document tipped the scale in favour of its holder.[146]

In another case, two Christian men claimed to be married to the same woman.[147] Dāwūd claimed that he had recently wed Tuffāḥa through her brother's *wikāla*, while 'Abd Rabb al-Masīḥ claimed that they had been married in childhood through her father's *wikāla*. Even though they had never cohabitated, al-Masīḥ claimed that he had paid her father the dower as well as her maintenance expenditures for eleven years. While Dāwūd was able to produce a written marriage contract, al-Masīḥ was not and, predictably, lost his case. The closing line read, "'Abd Rabb al-Masīḥ was not believed."

A typical example of a 'sound' written *ḥujja*, like the one issued in 1562 in the Qisma 'Askeriyya to the wife of a prisoner of war seeking *faskh* (marriage annulment) reads:

This is a *shar'ī ḥujja*, and a sound (*ṣaḥīḥa*), protected (*mar'iyya*) document, made public and composed in the presence of our lord the *qassām*.[148]

The above heading precedes a documented catalogue listing all of the wife's earthly belongings (conspicuously modest) item by item, presumably to forestall any future litigation. It is worth underlining the fact that this was a woman who possessed few material possessions and who was of humble origins, suggesting that written *ḥujja*s were not reserved for important or large cases. Another example of a 'sound' document exhibits an important difference:

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[146] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 96.
[147] Ibid., Doc. 82.
[148] Qisma 'Askeriyya, *Sijill* no. 5, Doc. 3.

This is a clear *shar'ī ḥujja* and a protected, forthright (*ṣarīḥatin*) document, the contents of which are known, and the text [of which] is interpreted according to our lord *fulān*'s understanding.[149]

In this case, the presiding judge is ratifying and interpreting a *ḥujja* issued by another judge, the *Qassām*. This particular document was used to license the issuance of a new *ḥujja*, issued to the daughter of a wealthy, deceased Ḥanafī scholar, stipulating she had received her fair portion of the inheritance and that she was neither owed, nor claimed anything further.

Legal documents were also circulated across geographic boundaries within the empire. For example, a *ḥujja* signed in the court of Ḥalab in the year 1016/1607 for a resident of that city is presented in Cairo to confirm the appointment of his *wakīl* in Egypt.[150] Moreover, documents circulated across temporal boundaries, such that 'old' documents, *ḥujja qadīma*, which could no longer be verified by living witnesses, were also accepted as sound.[151] Almost all cases pertaining to *waqf*, for example, are *'ilāms* (complex documents) with references to multiple legal documents, dating back to the date of its establishment, the testamentary bequest stipulating its distribution (indicated over multiple generations) and its administration.[152]

Yet again, the above is characteristic of centuries of legal practice predating the Ottomans. By the ninth century jurists had legitimated the use of documents for which "the witnesses were no longer available, if they should die or be distant from

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[149] Ibid., Doc. 39.
[150] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc. 96.
[151] All examples of 'old' documents at my disposal originated in the courts of Cairo, and most often contained the judgment of a former chief judge. Often they were *i'lāms*. Al-Bāb al-'Ālī. *Sijill* no. 66, Doc. 7.
[152] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 822.

the town where the litigation took place."[153] But in such cases, writes Wakin, judges called for the testimony of 'secondary witnesses' to affirm that of the principal witnesses.[154] Eventually, she continues the document itself would have to suffice, but not without the signature of the secondary witness placed, "at the end of clauses declaring he had given his oral deposition."[155] Significantly, this procedure is omitted in the records at my disposal, where a *ḥujja qadīma* stands on its own, without the addition of a secondary witness' signature.

The last document we consider is, however, the most compelling. Providing certain evidence that a qualitative shift in the status of the written document had occurred, is a document in the possession of an ordinary individual, Muṣṭafā Numjarāwī, presented in the court of the Bāb al-'Ālī. It makes the unabashed pronouncement:

This is a sound and *shar'ī* document and a clear, protected writ/deed, its content informative (*yu'rib maḍmūnniha*) in mention of that which (*'an dhikrī mā*) was decreed and acknowledged in the honourable *shar'ī majlis* and the seat of the Ḥanīf faith [which is] sheltered against change or corruption.[156]

A header at the top right margin of the document reads " a copy of the manumission of Muṣṭafā al-Numjarāwī, the original document composed in Constantinople" (*ṣūrat 'itqnāma Muṣṭafā al-Numjarāwī, al-aṣl maktab bi-Qusṭanṭiniyya*).[157] The date on which the original document was written and the date on which it was incorporated into the Cairo *sijill,* are carefully noted.

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[153] Wakin, *The Function of Documents*, p. 31.
[154] Secondary witnesses were most often the designated witnesses of the court. Their role was to ascertain the authenticity of the handwriting of the original signatories. Ibid., p. 30.
[155] Ibid., p. 31.
[156] Al-Bāb al-'Ālī *Sijill* no. 96, Doc. 2833.
[157] Copies of documents were also used to minimize forgery and were always exact duplicates of the original document. See Wakin, *The Function of Documents*, pp. 46-47.

Overcoming centuries of intellectual ambiguity, this document asserts its status as a 'sound copy of a *ḥujja*' issued in Istanbul. It is 'sound' in the absence of the original document and in the absence of witnesses to its composition.[158] What is most intriguing about Numjarāwī's document is that it was neither a religious *fatwā* nor a state edict, but an unremarkable certificate attesting to the manumission of an ordinary slave. We may assert, therefore, that written instruments had attained a sufficient degree of standing to permit for the transmission, not only of original *ḥujja*s, but of copies of the original. The only supporting proof of the document's reliability is the original version stored in the Istanbul archives. This, rather than a witness who can corroborate that the document was drafted in his presence, appears to be the only criterion by which the latter is judged as a 'sound legal proof.'

The need for manumitted persons to carry proof of their status is demonstrated by another case that crops up in the year 1054/1646. Al-Zaynī Yūsuf came to court to testify that Abū Bakr, b. ʿĪsā al-Rūmī, a merchant from the Khān al-Khalīlī market, had struck him in the street, deriding him as a slave. But the latter had been formally manumitted by Muḥammad Ḥalabī and had the papers to prove it, causing the judge to order Abū Bakr to refrain from harassing him and publicly reaffirming al-Zaynī's status as a free man.[159] The need for documents

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[158] The transmission and multiplication of documents was a practice recognized by the Arabs at an early date in Islamic history. They noted differences between a draft, an original and a draft copy (*musawwada*). "A capable copyist (*nāsikh*) might advance to being a *munshi'* (Ṣūlī 118). Ibn al-Ṣayrafī 142 mentions copying as an important occupation, and also mentions a fair-copyist (*mubayyiḍ*). Copies are marked with *nusikha* or *nusikhat*, and, like originals, could be attested by *ṣaḥḥ*. The copies were kept, and it may well be that some collected works of the *inshā'* literature were compiled from collections of drafts or books of copies..." M. Hamidullah has collected "269 texts attributed to the period before 652." See, W. Björkman, "Diplomatic," *EI*, CD Rom Edition.

[159] Al-Bāb al-ʿĀlī, *Sijill* no. 124, Doc. 830.

establishing one's status, particularly documents that were valid across geographic boundaries, is evident in a state that facilitated the easy circulation of men and goods.

Apart from understanding why people needed to carry proof of their status, and why a copy of Numjarāwī 's manumission would have been given the status of a *ḥujja saḥīḥa*, a number of inferences can be made about the legal system which upheld it. One, the document fails to identify any designated court or judge as the recipient of said document, indicating that it was valid in any 'high' court in the empire. Two, the role of witnesses in ascertaining the veracity of the contents of this document is nil. Numjarāwī is unaccompanied by any witnesses who can testify that they were present at the moment of the document's composition in Istanbul. The only signatories are those who are witnesses to the document's incorporation into the Cairo *sijill,* not to its drafting in Istanbul. But the high number of designated witnesses who officiated over its incorporation into the court records, suggests that documents such as this were unusual. In a *sijill* where the usual number of witnesses per document rarely exceeds three, the signatures of seven designated witnesses, as well as "a number of those present" in the court (*'adad min al-ḥāḍirīn*), are incorporated under the document. [160] These are not, however, the secondary witnesses of which Wakin wrote. As she herself explains, the latter were often the designated witnesses of the court, and their principal role was to ascertain the authenticity of the handwriting of the original signatories to the document. But as mentioned, there were no signatories to Numjarāwī's original document. Finally,

[160] Ibid., Doc. 5.

the reader will note that Numjarāwī's document was not an original, but a copy (*ṣūra*) of the original document stored in Istanbul, indicating that the validity of *ḥujja*s hinged, not on witnesses, but on the existence of an 'original' kept in the safe storage of the Constantinople archives.

It must also be stressed, however, that there were limits imposed upon the 'authoritative' document. For example, in Cairo such document could never be ratified by any court but the Bāb al-'Ālī, seat of the Ottoman chief judge. There were strict rules prohibiting local deputy judges from endorsing the rulings of another judge, from adding his seal to a document issued from a court other than his own, and from signing a *ḥujja* without the signature of the witnesses to the document's original composition.[161] Numjarāwī's document was, therefore, only valid before the chief judges of the Ottoman Empire.

In the final analysis, without engineering a rupture between theory and practice, the Ottomans fostered an ideal in which 'one' school of legal thought informed all practice. But having tipped the scales in favour of the document, the Ottomans were also meticulous in taking the necessary pre-cautions to ensure its integrity against forgery or corruption. The development of a fixed court and more importantly, a fixed archive greatly facilitated this enterprise and, what is more, modulated practice to reflect the concerns of the legists. As we have seen, the role of the witness and the authority of the spoken word remained paramount in the Ottoman courts. But an elaborate system of archiving, and an innovative judicial

[161] Al-Bakrī, *al-Nuzha al-Zahiyya*, p. 50.

protocol with respect to *sijills*, allowed high-ranking judges to elevate the written document to a status which rivaled its oral foil - the spoken word.

Conclusion

I began this chapter by asking what was innovative and what was commonplace in Ottoman attitudes to the written legal document. It was shown that the least innovative policies were those relating to the formula and composition of the legal document, which exhibit remarkable stability from the Mamluk to the Ottoman period. The most innovative initiatives were those pertaining to the legal status of the document and its system of storage and archiving. It was also argued that such measures enabled the state to invest the document with formal authority, not by ignoring legal theory, but by attempting to meet the requirements of one judicial theory in practice.

The shift in the qualitative value of the document and the ensuing need for a modicum of adherence to the bounds of legal theory was reflected in the birth of systematic archives devised to preserve and guard the 'written word' against corruption or forgery. A judicial process that encompassed fixed courts complemented such a policy by generating a spatial distinction between the judge, traditionally the embodiment of the court, and the physical courthouse. By extension, the judge lost his custodial privileges to the *sijill,* which was now collected and stored by government bureaucrats who helped preserve the 'chastity' of the legal document for contemporaneous and future generations.

Apart from the archive, other textual and administrative devices were used to minimize the risk of forgery. The grafting of the institution of notary onto court clerk, the use of textual devices offsetting the risk of interpolation as well as the continued emphasis on the primacy of witnessing, all contributed to the production of the authoritative *ḥujja*. Such a development carries enormous implications for any researcher interested in quantifying the evidence of the narrative *sijill* to identify 'spikes' or 'declines' in Muslim legal trends. A legal system in which people could obtain written proofs of their claims and rights would compel them to bring their legal affairs, great or small, before the *sharī'a* court.

In such an environment, customary law was coaxed out of the shadows and into the formal light of the *sharī'a* courts. As shown in future chapters, this development only served to bring custom under the modifying gaze of both the legists and the state.

Chapter Three

'Ibāda as it is and *'Ibāda* as it Should be: *Sharī'a, Nāmūs* & the Rights of God (*Ḥuqūq Allāh*)

Life without khalā'a (licentiousness) is a life deprived
only an expert can tell you
by the 'uluwī (celestial world) world
I swear I have rebelled against the salafī (pious ancestors) world.
How many nights did I unload my worries in the pond (birka)?
And around me, young men,
all like me
they are spoken of well by those who are good
called ignorant by the people of ignorance
Shihāb al-Manṣūrī[1]

The bounds of Muslim morality and the degree to which the state or society enforced those bounds through censure or coercion, are the subject of poetic laments, juristic polemic, political theory and modern Islamist conflict in the twenty-first century. In this chapter, we explore those bounds through an examination of the 'rights of God' (*ḥuqūq Allāh*), as developed by the legists and as interpreted by the state. The term, 'rights of God,' encompasses the basic social institutions of marriage, divorce and inheritance, religious endowments as well as the fixed penalties (*ḥudūd*) governing adultery, fornication, intoxication and theft. Because jurisprudential theory allowed branches of custom (*siyāsa* and *'āda*) to play a 'refining' role in the institutions arising from these rights (e.g., the determination of the bride price or dowry), the link between the rights of God and custom is both tangible and permanent. As such, the manner in which these rights are interpreted

[1] Shaykh al-Islām Muḥammad b. al-Surūr al-Bakrī al-Ṣiddīqī, *al-Nuzha al-Zahiyya fī Dhikr Wulāt Miṣr wal' Qāhira al-Mu'izziyya*, ed. 'Abd al-Razzāq 'Abd al-Razzāq 'Īsā. (Cairo: al-'Arabī lil-Nashr wal-Tawzī', 1998), p. 265. The poem is addressed to the critics of Birkat al-Raṭlī, a settlement round a lake that Maqrizī describedas a den of iniquity. Al-Bakrī writes that boats used to ply these waters laden with passengers, and that scandalous incidents took place as men and 'disreputable' women intermingled, alcohol flowed freely and drunkenness was displayed. Ibid., p. 261. When Ibn Ḥajār al-'Asqalānī resided in the *birka*, he was appalled at these occurrences and worked to stop them in the year 180/796. Ibid., p. 262. Al-Manṣūrī's poem is a rejoinder to such efforts.

by both the state and the legists can serve as barometers of the (in)tolerance exhibited towards custom at any given time.

Because there are two areas of investigation, legal theory and legal practice, this chapter is divided into two parts. Part I outlines some of the predominant views associated with the schools of law, as well as those found in the secondary literature regarding the development of a theory of custom. Part II explores the trajectory of these intellectual debates in practice by juxtaposing the evidence of the *sijills* with the writings of sixteenth century chroniclers.

It has been argued that the development of a theory of custom in Islam allowed for its admission as a 'secondary' source of law.[2] Conversely, however, it has also been argued that the very same theory allowed jurists to delimit its authority, particularly custom-based *siyāsa* legislation, by bringing the latter under the aegis of the *fuqahā'*.[3] Part I of this chapter adopts the latter argument, but adds to the discussion by considering the means by which the Ottoman state circumvented such juristic strategies. As shown below, a politically motivated, but philosophically grounded campaign, successfully transformed the ancient concept of *nāmūs* from 'divine laws,' to 'divinely inspired state laws.' This transformation effectively elevated state legislation from 'profane' to 'divinely ordained' heights. In all, such efforts made it possible for the state to construct and promote a unified legal orthodoxy –otherwise referred to as codification of *siyāsa* laws into *qānūn*. In

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[2] See, G. Libson, *Jewish and Islamic Law; A Comparative Study of Custom During the Geonic Period* (Cambridge: Harvard University Press, 2003); and G. Libson, "On the Development of Custom as a Source of Law in Islamic Law," *Islamic Law and Society*, vol. IV, 2 (June 1997): 13-24.

[3] I. Netton, "Siyāsa," *EI*, CD Rom Edition.

much of the secondary literature, the tensions generated by such efforts are ascribed to a rivalry between *sharī'a* and *qānūn*. For the most part, however, the tensions that existed were not between *qānūn* and *fiqh*-based laws but between codified state customary laws (packaged as *qānūn*) and local customary laws. In other words, what is observable in these centuries is a clash between 'imported' state custom, and 'local' custom born of the movement to elevate state legislation from profane to divinely ordained heights.

Part I begins by illustrating the development of positivistic legal devices in Islamic legal theory, such as juristic preference (*istiḥsān*) and public welfare (*maṣlaḥa*), both of which link custom to the judicial discourse on 'ethics' (*ḥusn* and *qubḥ*). The development of a theory of custom availing itself of these devices is then outlined for the purpose of demonstrating that one could also argue that the more recognition afforded custom by legal theory, the more controlled it became in practice. As shown ahead, the proscription or admission of custom depended on whether the latter informed *mu'āmalāt* (rights of man) or *'ibādāt* (rights of God).[4] Even jurists who accepted 'secondary sources' of law such as *maṣlaḥa* and *istiḥsān*, including Ibn Taymiyya, were generally wary of custom and worked to delimit its authority in practice, particularly in areas of *'ibādāt*. In I. R. Netton's view, conservative jurists like Ibn Taymiyya only accepted these devices as a means of subordinating *siyāsa* legislation to the authority of the *fuqahā'*.[5] Without denying, therefore, that Islamic legal theory afforded custom a place alongside jurists' law, it

[4] This is a standard division in jurisprudential theory separating laws of ritual worship from laws governing relations between men. See, Part I, Section ii of this chapter.
[5] Netton, "Siyāsa."

will be argued that this same theory also allowed for the modulation, even abrogation, of custom. Indeed, it is the theory of custom which allowed Egyptian scholars to challenge the authority of Ottoman *qānūn* as an invalid collection of imported sultanic/Anatolian customs. This is the subject of Section ii.

As the product of *siyāsa* legislation, *qānūn* bore directly on the 'rights of God.' This reflects its two dimensions in Islam: on the one hand, *siyāsa* is considered a branch of custom,[6] while on the other, it also has a sacred dimension as jurists delegated the enforcement of the 'rights of God' to the state. In view of this overlapping function, any re-interpretation of the limits of *siyāsa* entails transformation in the understanding and application of the rights of God. Perhaps because of the close association between '*ibādāt* and *siyāsa*, jurisprudential works on the subject are extensive. As mentioned above, Netton views this pre-occupation as a juristic attempt to control state practice. What is less understood, however, is how the state counteracted such efforts.

Drawing upon a 'renovated' ancient Greek philosophical concept, i.e., the *nomos* (Arabic: *nāmūs),* the Ottoman state presented its reforms, not as 'innovations,' but as 'renewal.' In the classical period the word *nāmūs* refers to the religious laws revealed to the Prophets. In the Ottoman period, however, it is pointedly used in reference to legislation deriving from a 'higher *siyāsa,*' or '*siyāsat-i ilāhi,*' aiming at the moral perfection of man in the material world. As demonstrated in Section iii, this 'higher *siyāsa*' served to infuse the customs of the Ottomans, as embodied in *qānūn,* with a sacred purpose.

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[6] See, F. Gabriel, "Adab," *EI,* CD Rom Edition. A fuller discussion is provided below in Part I, Section iii.

The application of the Ottoman *nāmūs* in Egypt is explored in Part II, where the theoretical discussion on the bounds of Muslim morality is tied to the manner in which the 'rights of God' were historically enforced. The example of the Ottomans provides a unique opportunity to observe the above discourse in practice and, what is more, to observe how the state redefined the bounds of Muslim morality. Most remarkably, it is those who dwelt on the 'periphery' that initiated this re-modulation for the 'Muslim heartland.' As shown below, however, the 'ideal' embodied in the new orthodoxy, or *nāmūs,* was never static. Rather, it was in a state of perpetual flux, by turns contracting and expanding the bounds of Muslim morality. This will be demonstrated when we examine the attitudes pertaining to women, their freedom of movement and their rights in marriage and divorce. It was perhaps this increasing liberalism on the part of Ottoman courts in early seventeenth century Cairo, and presumably Aleppo and Bursa, that has helped convince scholars that custom was triumphant. However, such swings in the moral pendulum did not signal a more tolerant view of custom; rather, they signal a change in the 'ideal.'

As demonstrated in Part II, Section iii, the Ottoman courts of the late sixteenth century waged a successful campaign to diminish the force of custom where it threatened to infringe on *fiqh* or *qānūn.* This is particularly evident in the fiercely protective stance adopted by the courts with respect to women's financial rights. Numerous cases attest to the fact that patriarchal custom often worked to deprive women of their right to the dowry. In some instances, male relatives, or even acquaintances acting as *wakīls*, would conclude marriage contracts on behalf

of an adult woman, without the latter's knowledge, consent or the delivery of a dowry. In addition to combating such practices and upholding *fiqh*-based rights, the Ottomans also worked to bring local custom in line with the 'perfected customs' contained within *qānūn*.[7]

In turn, the *sijills* reveal the vigorous opposition that such policies fostered and illuminate the strategies by which locals circumvented them. Prominent among these strategies was the usage of the 'conditional clause,' a *fiqh*-based device recognized by the Ḥanafī school, that provided a convenient means of negating some *qānūn*. In addition to the conditional clause, other legal devices allowed for the assertion of custom. The case of *waqf* (endowment), for instance, demonstrates the ways in which legal theory sheltered local customs by granting the founder of a religious endowment (*waqf*) the right to bequeath its revenues to a group or individual in perpetuity.[8] In this manner, individuals were able to circumvent the Islamic laws of inheritance and to assert custom-based inheritance patterns. Other than that, allowances for custom in the administration of *waqf* were exceptional and, as shown below, wrapped in layers of procedural and bureaucratic red tape.

Thus, apart from the exceptions generated by Islamic legal theory itself, custom was hardly triumphant by the middle of the seventeenth century. The

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[7] Muḥammad Ibn Aḥmad Ibn Iyās, *Badā'i' al-Zuhūr fī Waqā'i' al-Duhūr*, ed. Muḥammad Muṣṭafā, vol. 5 (Weisbaden: E.J. Brill, 1975), p. 461.

[8] A *waqf*, or endowment, is established for the benefit of a given charitable or familial fund. For more on the relationship of endowments to wills see, A. Layish, "The Mālikī *Waqf* According to Wills and *Waqfiyyāt*," *BSOAS*, XLVI (1983): 9-10. For a historical overview of the institution in various contexts, see, N. A. Stillman, "*Waqf* and the Ideology of Charity in Medieval Islam, " *Studies in Honour of Clifford Edmund Bosworth*, ed. I. Netton (Leiden: E. J. Brill, 2000): 357-72; G. Baer, "The *Waqf* as a Prop for the Social System (16th-20th Centuries," *Islamic Law and Society*, vol. 4, 3 (1997): 264-97; and M. Z. Othman, "Institution of *Waqf*," *Islamic Culture*, 58 (1984): 55-62.

qānūn, and the new orthodoxy it promoted, was universalized with the express aim of eliminating variation arising from custom in line with the state's vision of an ideal, perfected, moral law. Understandably, juristic objections to this policy centered on whether *siyāsa* could yield laws that would serve as a means to moral perfection. The doctrine of the *nāmūs*, however, provided the state with a counter-doctrine that drew *siyāsa* and *sharī'a* legislation closer by insisting that the source of jurist law and state law was the same – namely, the 'moral/divine law' found in nature. A survey of the discourse on morality and its relationship to custom is our point of departure.

PART ONE

Section i
The "Good" and the "Detestable" in Islamic Legal Theory

What is the status of an act before revelation assigns it value? Reinhart argues that the relevance of this question, posed by Muslim jurists themselves, was all but ignored by Islamicists who viewed it as an exercise in jurisprudential 'thought experiments.' As all Muslims live after the era with which these scholars are concerned - that is after revelation – scholars have dismissed the entire discourse as an intellectual polemic with little bearing on reality. In his discussion of Islamic legal theory, for instance, S. Hurgronje dismissed the relevance of the question of whether all acts are forbidden by nature except for those allowed by the divine law, concluding that while such musings may have been of importance to the Imām al-Ḥaramayn, they added little to a correct understanding of Islam.[9] Reinhart, however, argues that the polemicists were not just asking about acts "before revelation" but also "reflecting upon the important epistemological questions in the background. They were asking about the importance of 'revealed' knowledge over against other sources of knowledge."[10] In other words, are acts good or bad because they have an intrinsic value that is recognizable to the '*aql* (reason), or because of the value assigned to each by revelation? Reinhart reaches the reasonable conclusion that, "what was being determined through reflection on such topics as these

[9] K. Reinhart, *Before Revelation; the Boundaries of Muslim Moral Thought* (New York: SUNY Press, 1995), p. 5.
[10] Ibid.

was the relation between morality and culture."[11] Is morality universal and is man innately capable of apprehending moral truth through reason?

The answer to this question determines how jurists assess the status of an act as 'obligatory,' 'proscribed,' 'permitted,' 'disapproved' of or 'indifferent.' It also represents a rational attempt to "ground the valuations in something more than legal hermeneutic," that is, more than the rulings (*aḥkām*) derived from scripture.[12] K. Abu El Fadl notes that because these acts were assessed on the basis of "higher-order/lower-order values [it] did not just refer to the five values of Sharī'a, but also to moral imperatives."[13] These imperatives influenced the relationship between legal hermeneutics (i.e., the relationship between jurisprudence and scripture) and the informal laws (custom) that pre-dated and existed alongside the former. This is made apparent when we consider that the phrases used for 'before revelation,' (*qabl wurūd al-shar'*) can mean 'before the *shar'* arrives', 'before it is met with,' or 'before it takes effect.'[14] Hence, whether the customary laws and traditions that pre-date Islam are seen as valid is dependent on how one answers the question, 'is there a universal morality?' If the answer is affirmative, then a 'lie' told in pre-Islamic times is as sinful as a 'lie' told in Islamic times. If, on the other hand, morality can only be uncovered through revelation, and has no meaning outside of revelation, it *cannot* be determined that a 'lie' in pre-Islamic times was a sin at all. If, therefore, 'acts' have no status outside of that assigned to them by revelation, then

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[11] Ibid.
[12] Ibid., p. 4.
[13] K. Abu El Fadl, *Speaking in God's Name; Islamic Law, Authority and Women* (Oxford: Oneworld Press, 2001), p. 247.
[14] Reinhart, *Before Revelation*, p. 6.

customary laws governing these 'acts' cannot have any determinate status and are neither valid nor invalid.

When this question was first raised in the ninth century, purportedly by Abu Ḥanīfa himself, it elicited three responses: one, the view that proscribed the use of what came before, including the appeal to non-Muslim scripture; two, the view that permitted the use of what came before; and three, the view which held that acts had no status outside of that assigned to them by revelation, championed by Ibn Ḥanbal. Attributions made to Shāfiʿī reveal a similar ambiguity and hesitation about appealing to what came 'before revelation.'[15]

From the point of view of Muslim jurists, customs possess a dual identity. On the one hand, they represent 'positive laws;' while on the other they contain within them a 'positive morality.' The latter is generally of two types, morality 'as it is' without regard to its merits, and 'morality as it would be' if it conformed to the eternal or divine law. Custom fits into the first category, i.e. 'morality as it is.' The reason that some scholars ignore the distinction between 'morality as it is' and 'morality as it should be' is because they use *sharīʿa* and *fiqh* interchangeably when referring to Islamic law, ignoring a jurisprudential distinction between the former as perfected divine law and the latter as a human approximation of the latter. The distinction is an important one, however, and goes to the heart of jurisprudential attitudes in Islam toward customary law.

At the heart of this juristic discourse, asserts Reinhart, is the debate over the "limitations of human moral-epistemological capacity," and "the nature of acts

[15] Ibid., pp. 6-7.

themselves."[16] K. Abu El Fadl adds that "[t]he core-logic of the debate focused on a hierarchy of normatives according to which lower-order values are evaluated in light of higher-order values."[17] As an example he points to the *sharī'a* requirement of justice, which would compel jurists to determine 'what is necessary for justice?' In other words, 'morality as it should be' is constantly informing, shaping or potentially abrogating 'morality as it is.' Concepts of *maṣlaḥa* (utility/public good) and *istiḥsān* (juristic preference), which derive from the theological determination of what is good (*ḥusn*) and what is ugly/reprehensible (*qubḥ*), provide the legal tools by which this is effected.[18] The practical relevance of this process is demonstrated in Shāṭibī's work which uses the criterion of *ḥusn* and *qubḥ* to argue that the practice of covering the head is a custom (*'ādā*) subject to change, as it may be good in Muslim societies but not so elsewhere.[19] In other words, covering the head is a feature of 'morality as it is' in Muslim societies, not of 'morality as it should be.' Implicit here are notions of 'natural law' or a universal morality (perfected divine law) that can be 'uncovered' by qualified jurists. Concepts of 'natural' morality have influenced the way in which Muslim jurists assessed the status of acts arising from custom, both 'before' and 'after revelation.'[20] Returning to the question

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[16] Ibid.

[17] "These higher-order/lower-order values did not just refer to the five values of *Sharī'a*, but also to moral imperatives." K. Abu El Fadl, *Speaking in God's Name*, p. 247.

[18] Reinhart, *Before Revelation*, p. 8.

[19] K. Masud, *Islamic Legal Philosophy: a Study of Abu Ishaq al-Shatibi's Life and Thought* (Islamabad: Islamic Research Institute, 1977), p. 295.

[20] One often sees Islamic jurisprudence described as 'natural' law,' or alternately 'positive law.' Seeing as these are Western terms, it may be helpful to outline the development of these concepts in the works of Western jurists. 'Natural law' in Thomas Aquinas' view, "is nothing else than the rational creature's participation of the eternal law." T. Aquinas, "Whether There is in Us a Natural Law." *Readings in Philosophy of Law,* ed. J. Arthur and William H. Shaw (New Jersey: Prentice-Hall Inc., 1984), p. 5. The 'rational creature,' being endowed of a share of divine providence and, therefore, of 'eternal reason,' is ably equipped to uncover the eternal law. In other words, a universal morality, containing within it an

at the outset, therefore, one must conclude that the status of an act arising from custom, 'before revelation' and 'after revelation,' was well considered and assigned a definitive value. This value, derived from a consideration of what is 'beautiful' and what is 'ugly,' translated into juristic practice through the twin judicial tools of *istiḥsān* and *maṣlaḥa*. We may now explore the idea that the criteria by which this value was assigned served not only to legitimate, but also to de-legitimate custom when, and where, it failed to meet the criteria of 'morality as it should be.'

Section ii
Custom in Islamic legal theory

The relationship of morality to custom receives considerable attention in the legal literature because the latter serves as a broad rubric under which the various social and normative standards associated with a given community, individual, or

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eternal law, exists and may be discovered through the application of human reason. This is akin to the Islamic concept of *sharī'a*, which, appropriately, translates into the "the way/path to the watering well." 'The way', the correct path to correct outward conduct, can be uncovered through both revelation and reason. The relation between law and reason is unmistakable as in Aquinas' view "the participation of the eternal law in the rational creature is properly called a law, since a law is something pertaining to reason." Like Muslim jurists, he denies that the rational creature can ever hope to attain " a full participation of the dictate of the divine reason, but according to its own mode, and imperfectly." Positive law on the other hand is "law set by political superiors to political inferiors." p. 12. The source of 'positive' legislation is neither scriptural nor revelation, but rather the concepts of 'utility.' This is roughly correspondent to the concept of *siyāsa* legislation. A second class of positive laws is set by "sentiments felt by an indeterminate body of men in regard to human conduct." These sentiments are "mere opinions" shaped by 'positive morality," p. 13. This is where the analogy with Islamic legal systems becomes problematic for this 'positive morality' shaped by 'opinions' can apply to both jurists' law and customary law. Because, however, Muslim jurists endeavour to tap into 'natural morality/divine law' through an attachment to scripture and a particular mode of legal reasoning, their rulings are not merely positivistic and utilitarian. Hence, if the *sharī'a* represents 'morality as it should be,' *fiqh* represents an imperfect, human approximation of the latter. 'Positive law,' on the other hand, represents 'morality as it is,' and is, in the Islamic context, shaped by local custom and *siyāsa*.

state, are grouped. Yet, in spite of the attention given to the status of acts 'before revelation,' custom was never incorporated as a primary source of law alongside the Qur'an, Ḥadīth, *qiyās*, and *ijmā'*.[21] It was, however, accepted as a secondary source of law and eventually, in Libsons' assessment, as a formal, albeit, subsidiary source of law. The term custom serves as a very large umbrella under which the various social and normative standards associated with a given culture are grouped. Because Islamic jurisprudence refused to make custom an official source of law, however much customs contribute to the law produced, scholars have argued that this is further evidence of the dissonance between theory and practice. But customary laws have not fared any better in the Western legal tradition.[22] Like their Muslim counterparts, for example, many European thinkers disqualified customary laws from the canon of positive law for the simple reason that, strictly speaking, 'laws' signified commands. Unless adopted and enforced by government, custom lacks an imperative quality and is rendered ambiguous.[23] This does not mean that either society was perpetuating a legal fiction, but that each was seeking to delimit the authority of informal customary laws so as to prevent 'morality as it is' from overshadowing 'morality as it should be.' Moreover, as Libson has shown, Muslim

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[21] For an introduction to the four sources of law in Islam see: J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950); N. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964).

[22] M. A. Glendon, et. al., *Comparative Legal Traditions,* 2nd ed. (New York: West Pub. Co., 1999); H. P. Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000). See, chapter 1-5 on the role of custom in European law.

[23] J. Austin, "From the Province of Jurisprudence Determined," *Readings in Philosophy of Law,* ed. J. Arthur and W. H. Shaw (New Jersey: Prentice-Hall Inc., 1984), p. 16. He argues that "the German admirers" of customary law argue that they constitute commands independent of the state because "the citizens or subjects have observed them." The other view, adversarial to custom and to 'judicial law,' held that all judge-made law is "purely the creature of the judges by whom it is established immediately." Ibid., p. 17. But Austin dismisses both views, arguing that customary law is imperative law.

jurists did eventually confer a measure of recognition on custom in the eleventh century, classifying it as imperative law in some of the major Mālikī and Ḥanafī works, a trend that continued to gain momentum from the fourteenth through to the sixteenth century.[24] Prior to the ninth century, however, Libson writes that:

> [s]o long as the literary redaction of *ḥadīth* collections was still in progress...new customs and practises could find refuge in the *ḥadīth*-literature and there was no special need to grant them formal, independent recognition, that is to accept custom as a source of law.[25]

By the beginning of the Abbasid period most of these terms had undergone technical specification and further individuation into distinct disciplines.

From the eleventh century on, jurists incorporated custom under the maxim that what is known by custom is equivalent to that which is stipulated. In other words it is given the force of imperative law.[26] The Ḥanafī jurist al-Sarakhsī (d.490/1097) recognized it as a material source of law, a view that prevailed in his day, giving it the force of a written stipulation. Anything dictated by custom, equals that dictated by text.[27] In short, this view finds that custom, whether general or specific, did constitute a basis for judicial decisions. Sarakhsī and others were able to do this by bringing *'urf* under the umbrella of

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[24]The word *'urf* and its derivative, *ma'rūf*, occur in the Qur'an. The latter, occurring more frequently, is equated with the 'good' (and its opposite the *munkar*) rather than its literal meaning, "what is known." Qur'anic chapter 22 commands, "hold to forgiveness, command what is right (*ma'rūf*); but turn away from the ignorant." For a fuller discussion on Qur'anic exegesis and custom see, Samīr 'Alia, *Al-Qaḍī wal-'Urf fī al-Islām* (Beirut: al-Mu'assasa al-Jāmi'iyya lil-Dirāsāt wal-Nashr wal-Tawzī', 1986), p. 172.

[25]G. Libson, "On the Development of Custom as a Source of Law in Islamic Law," *Islamic Law and Society*, vol. iv, 2, June (1997), p. 139.

[26] Ibid., p. 142.

[27] B. Hakini, "The Role of 'Urf in Shaping the Islamic City," *Islam and Public Law*, ed. C. Mallat (Boston: Graham and Trotman, 1994) p. 147.

other secondary sources of law, such as *istiḥsān* and *ḍarūra* (necessity), paving the way for the next generation of jurists.[28]

K. Masud argues that "the foundations of modern renaissance in Islamic legal thought were laid in the fourteenth century by the Muslim jurists who wrote on the methodology and the ends of Islamic law."[29] And while Ḥanafīs worked to incorporate custom into the law, it was a Mālikī who built on Sarakhsī's ideas to develop the theory of *maṣlaḥa* as a 'secondary' source of law alongside the primary *uṣūl*. A judicial theory of *istiḥsān* and *maṣlaḥa* was constructed by Shāṭibī to give the concept of *taḥsīniyyāt* legal teeth.[30] A legal principle relating to custom was developed, stipulating that if the side of *maṣlaḥa* predominates, the matter is considered *maṣlaḥa*; if it does not, it is *mafsada* (public detriment).[31] Shāṭibī and others could do this because they believed "in the relationship of *sharī'a* to *'āda*

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[28] Libson, "On the Development of Custom," p. 151.
[29] Masud, *Islamic Legal Philosophy*, p. 197.
[30] R. Paret argues that *maṣlaḥa*, as a technical legal term , is not used by Shāfi'ī or Mālik. See, R. Paret, "Maṣlaḥa," *EI*, CD Rom Edition. But Masud argues that this does not mean that concepts similar to *maṣlaḥa* were not in use. For example, Ghazālī said that what is meant by *maṣlaḥa* is the preservation of the intent of the law which consists of five things: preservation of religion, of life, of reason, of descendants and of property. Ibid., p. 151. There are three types of *maṣlaḥa*: 1) that which is supported by textual evidence, 2) that which is denied by textual evidence (forbidden), and 3) that for which there exists no textual evidence for or against. The latter type is known as *al-maṣlaḥa al-mursala* and is controversial. Shāfi'ī and Mālikī jurists accepted this category if it was deemed of absolute necessity (*darūrī, qaṭ'i* and *kullī*). As an example of how this principle works, Shāṭibī considers a scenario in which enemy forces use Muslims as shields. If not firing for fear of killing the Muslim hostages means the entire Muslim population is overrun, then it is *maṣlaḥa* to fire, in contravention of the principle that holds Muslims may not kill other Muslims. Ibid., p. 153. If it did not meet the criterion of absolute necessity, it was more akin to *istiṣlaḥ* or *istiḥsān* (judicial preference) which he considered invalid. In sum, there are two positions: 1) theological determinism – all that God commands is *maṣlaḥa*; 2) methodological determinism which linked *maṣlaḥa* with *qiyās*, to avoid its potential for arbitrariness. Ibid., p. 160.
[31] Ibid., p. 230.

more than in the relationship between *sharī'a* and *aql*."[32] In other words, 'morality as it is' was a more reliable indicant of 'morality as it should be' than a reason-based approximation of the latter. As Shāṭibī saw it, "the values of good and evil already existed" as instituted by *'āda*, although they were confused.[33] The *sharī'a*, he concludes, never rejected custom entirely since the *sharī'a* of Muḥammad confirmed many, if not most, of the *'ādāt* of *jāhilī* Arabia. But as shown ahead, this did not mean that Shāṭibī was a simple champion of custom, for he vigorously opposed the influence of the latter on the 'rights of God' (*'ibādāt*), considering it a 'negative innovation.'

The next generation of sixteenth century scholars undertook the first serious attempt to incorporate practical custom into the law without granting it formal recognition. By this point, argues Libson, Ḥanafīs frequently appealed to it as an independent source of law. In an attribution to *qāḍī* Ḥusayn, "probably by al-Marwazī al-Shāfi'ī (d. 462/1070) by Aḥmad Muḥammad al-Qasṭallānī (d. 923/1517)" we read: "resort to custom is one of the five foundations on which the law (*fiqh*) is built."[34] In a work of the same title, *al-Ashbāh wal-Naẓa'ir,* al-Ṣuyūṭī (d. 911/1505) writes:

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[32] Ibid., p. 295.

[33] Examples include *diya, qasāma* (compurgation), gathering on the day of *'Arūba* (ancient Arabic name for Friday) for sermons, and *qirāḍ* (loan) etc." Ibid., p. 295. There is also abundant evidence that a considerable portion of family law was preserved from pre-Islamic times, including the formula for repudiation of a wife and the *nikāḥ* marriage contract. See, Leila Ahmed, *Women and Gender in Islam* (New Haven; Yale University, 1992), pp. 41-45; and J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950)

[34] Libson, *Jewish and Islamic Law*, p. 70.

Know that the consideration of *'āda* and *'urf* is referred to in jurisprudence on so many questions that they rendered it a source of law in the chapter on the [moral] truths which may be uncovered through deduction and custom.[35]

He also delivers the maxim, "what is proven by *'urf* is equivalent to that proven by a *sharī* proof."[36] Ibn Nujaym (d.970/1563), an Egyptian Ḥanafi jurist, was the first to devote a separate chapter (*bāb*) to the topic. According to him, the sixth principle of *fiqh* holds that, "custom is authoritative" (*al-'āda muḥkama*), because, "what is good in the view of Muslims, is good in God's view."[37] The seventeenth century historian Hezāfenn Ḥusayn, expressing the common sentiments of his time, said, "every age has its *orf* and every *orf* its requirements...He who does not know the *orf* of his contemporaries is ignorant (*jāhil*)."[38]

All of the above seems to indicate a growing recognition of custom, which Libson equates with its eventual acceptance as a formal source of law. However, one should not assume that the recognition of custom implies its growing influence. A closer examination reveals that with each stage in the development of these doctrines, custom became more narrowly defined and delimited in practice. By the time it was accorded written confirmation in the eleventh century, for example, custom had been deprived of the broad and fluid features it possessed in the ninth century. It was no longer a term encompassing the practice of the Prophet, the ancestors, the general community and the practice of other religious communities: now it referred to an amalgamation of broadly related and clearly delineated

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[35] Quoted in Ibn Nujaym, *al-Ashbāh wal-Naẓā'ir* (Beirut: Dār al-Kutub al-'Ilmiyya, 1983), p. 93.
[36] Hakini, "The Role of 'Urf," p. 144.
[37] Libson, "On the Development of Custom," p. 147.
[38] U. Heyd, *Studies in Old Ottoman Criminal Law,* ed. V. L. Menage (Oxford: Clarendon Press, 1973), p. 170.

disciplines – *'urf, 'ādāt, 'amal, adab,* and *siyāsa/qānūn.* By the time it was recognized as a 'secondary' source of law in the sixteenth century, centuries of discussion on what constituted *ḥusn* and *qubḥ*, or what was acceptable innovation and what was not, had helped define the boundaries of Muslim moral thought ever more precisely. Far from broadening the scope of custom in Islamic law, this represented a juristic move to delimit the definition and scope of all customary laws, be they popular or state-sponsored and to assimilate them to a *fiqh*-based *sharī'a.*

In the same way Ibn Taymiyya's work helped bring *siyāsa* under the aegis of the jurists, Shāṭibī's development of the theory of *maṣlaḥa* brought popular custom under the aegis of *fiqh*-based legal devices. Thus, while it is true that the theories of *maṣlaḥa* and *istiḥsān* allowed for the admission of custom, they also provided firm criteria by which to assess what could *not* be legitimately admitted. In the final analysis, it was the theory of the legists, and their discourse on the limits of *siyāsa* and *'āda* (i.e., what constituted a valid or invalid custom) that made it possible for Egyptian jurists to challenge the legality of codified state custom, or *qānūn.*

Muslim scholars considered every aspect of state administration, be it *siyāsa, qānūn* or bureaucratic administration, to be a branch of custom.[39] But *siyāsa* in Islam has two dimensions: the first grants rulers/states the authority to promulgate laws derived from customs while the second obliges rulers/states to

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[39] *'Amal* becomes defined as judicial practice based in custom, *'urf* and *'adāt* as customary practice. In Andalusia "there prevailed a tendency to require judges to follow the practice of Cordova." See J. Berque, "'Amal," *EI,* CD Rom Edition. *'Urf* and *'āda* assume much the same meaning, customary practice, and eventually came to mean *siyāsa* legislation. In Persia it was known as *'urf* and in Anatolia as *qānūn.* See, G. H. Bousquet, "'Āda," *EI,* CD Rom Edition.

assume responsibility for avenging the rights of God against wine-drinkers, fornicators, adulterers and thieves, or to enforce and punish transgressions of the *ḥudūd*. Sarakhsī assigns exclusive authority over the fixed penalties of the *ḥudūd* to the sovereign.[40] Imber argues that this division and "the classification of these offences and the penalties for them does not in any sense arise out of the structural logic of the law, but solely out of scriptural authority."[41] *Siyāsa* yields, therefore, to non-*qāḍī* adjudication, otherwise known as *maẓālim* courts, supported by *shurṭa* in cases of criminal law.[42]

The close association between custom and *siyāsa* is evident from the fact that scholars, such as Ibn Taymiyya, use the terms *maṣlaḥa* and *siyāsa* interchangeably. It is precisely this close association that sparked a general juristic movement after the advent of Mongol rule:

> when states adopted or imitated the Mongol practice of dynastic laws and customs called *yāsak* or *yāsa*, and often applied the term *siyāsa* to these rules...Makrīzī went so far as to claim that "*siyāsa*" in Mamlūk military-class usage was not Arabic at all, but derives from *yāsa*.[43]

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[40] In general, jurists delegated all substantive criminal law to the secular authorities discretion (*ta'zīr*). C. Imber, *Ebu's-Su'ud: The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997), p.89.

[41] Ibid., p. 90.

[42] In the Abbasid period, so-called secular courts (referred to as *maẓālim* or *siyāsa*) were established early on. See: M. H. Kamali, *Principles of Islamic Jurisprudence* (Pelanduk, 1989), p. 368. and J. Nielsen, *Secular Justice in an Islamic State: Maẓālim Under the Baḥrī Mamlūks* (Nederland Historisch-Archaeologisch Instituut te Istanbul, 1985).

[43] "The Turks called it Türe and the Mongols called it *Yāsa*." I.R. Netton, "Siyāsa," *EI*, CD Rom Edition. Also see, D. Ayalon, "The Great Yasa of Chingiz Khan," *SI*, xxxiii (1971): 1-15; J. Nielsen, *Secular Justice in an Islamic State*, (Nederland Historisch-Archaeologisch Instituut te Istanbul, 1985) pp. 104-9; D. O. Morgan, "The Great Yāsa of Chingiz Khān and Mongol Law in the Ilkhānate," *BSOAS*, xlix (1986): 163-76.

A staunch opponent of syncretic popular and state customs, Ibn Taymiyya was neither a strict rejectionist nor a strict proponent of the doctrine of *maṣlaḥa*.[44] But he was willing to accept the limited application of *maṣlaḥa*, if only because it brought *siyāsa* under the authority of the *'ulamā'*. Similarly, Shāṭibī, the jurist who developed the theory of *maṣlaḥa*, opposed all forms of 'innovation' arising from custom in the area of '*ibādāt* and sought, through his work, to avoid any repetition of the 'confusion' in pre-Islamic *jāhilī* times between *'amal* and *shar'*.[45]

Thus far, I have outlined the broad theoretical development of the doctrine of custom in legal theory, arguing against the view that holds it represented a growing source of authority. It remains to be seen how, a) local jurists challenged the legality of the *qānūn* by recourse to this theory and, b) how the development of the doctrine of *nāmūs* helped the state counter the doctrines of the jurists.

Section iv
The Legality of *Qānūn*

Winter alludes to the controversy in the Ottoman Empire over the sources of law in quoting the following passage from Sha'rānī:

The father of our Shaykh said, I asked Aḥmad Ibn Yūsuf al-Ḥanafī while he was serving as a *qadi* in Damascus about the legality of the *yasaq*, that is the fee that the

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[44] Ibn Taymiyya objected that to argue on the basis of absolute utility (*al-maṣlaḥa al-mursala*) "is to legislate in matters of religion," as ultimately, all given *maṣlaḥa* is already found in Muslim scripture. Masud, *Islamic Legal Philosophy*, p. 163. But "in his analysis of the *sharī'a* definition of *maṣlaḥa*," Shāṭibī observed that the *sharī'a* had regularized as legal good what was considered good in the social experience. Ibid., p. 217. *Sharī'a* obligations fall into preventive and positive rules. Positive are: *'ibādāt, 'ādāt* and *mu'āmalāt*. Preventive are: *jināyāt* (penalties). At the other extreme, Najm al-Dīn al-Ṭūfī (d. 1316) justified the use of *maṣlaḥa* to the extent of setting aside the text and argued that it prevailed over all other methods and principles. Ibid., p. 165.

[45] Ibid., p. 295.

qadi collects. The legal 'provisions are derived from the Qur'ān, the Sunna, the consensus or the analogy: from which of the four do you take this *yasak*?' He was quiet and then said: 'No by God, it is according to the ways of the clients (*mawali*).' I said to him: 'Ignorance should not be a model.'[46]

Commenting elsewhere, Winter writes:

Nothing the Ottomans did provoked as much anger as their legal and juridical innovations, particularly in the sensitive area of personal law...The most offensive legal change was a tax on marriage contracts called *yasaq*... A Maghribi *'alim*...cried into the governor's face: "This is the infidels' law!"[47]

R. Repp views similar conflicts across the Empire as symptoms of 'tension' between *qānūn* and *sharī'a* explained in terms of the "universal, systematically developed character of the *şeriat* and ... the limited, pre-eminently pragmatic and applied nature of the *kānūn*."[48] I would argue that it was exactly the opposite. The *sharī'a* allows for *ikhtilāf*, i.e., a multiplicity of schools of thought and a jurisprudential methodology which can, in theory, yield a multitude of opinions. The *qānūn*, on the other hand, is neither necessarily pragmatic nor limited, modifying aspects of *'ibādāt* as well as *mu'āmalāt* to reflect a universal 'perfected' law. A familiarity with the juristic criteria for assessing what is valid and what is invalid innovation (*bid'a*) may help clarify the fulcrum of debate.

As mentioned earlier, the areas in which the architect of the theory of *maṣlaḥa*, Shāṭibī, rejected adaptation to social change included ritual and worship, family and trusts (i.e., *'ibādāt*), but he showed flexibility with respect to taxes (an area of *mu'āmalāt*). Out of 40 cases of religious/social 'innovation,' Shāṭibī accepted social

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[46] M. Winter, *Society and Religion in Early Ottoman Egypt; Studies in the Writings of 'Abd al-Wahhab al-Sharani* (London: Transaction Books, 1982), p. 243.
[47] M. Winter, *Egyptian Society Under Ottoman Rule, 1517-1798* (New York: Routledge), p. 11
[48] R. Repp, "Qānūn and Sharī'a in the Ottoman Context," *Islamic Law: Social and Historical Contexts*, ed. A. al-Azmeh (London: Routledge, 1988), p. 128.

change in 14 and rejected 23.[49] Thus, he distinguished between two kinds of obligations, those which are absolute and not subject to change, consisting of *'ibādāt*, or the 'rights of God,' and those which are relative and subject to change, consisting of *'ādāt* and including *mu'āmalāt* or 'the rights of man.' The former are liturgical (*ta'abbudī*) and the latter utilitarian (*maṣlaḥī*).[50] Although both *sharī'a* and *'ādāt* are closely connected and both willed by God, the latter "belongs to the creative will," while the former "belongs to the Legislative." Any changes in custom must consider "the intent of the law" (*maqāṣid al-sharī'a*).[51]

Shāṭibī also identified two basic categories of living customs: 'universal customs' (*al-'awā'id al-'āmma*) that do not change with time, place or state, (including very limited biological activities such as eating, drinking, feeling joy and sorrow), and those customs associated with a particular region or culture (*al-'awā'id al-jāriyya*), which do change with time, place or state (including forms of dress, dwelling etc.). Here change occurs in 5 ways: 1) differences in *ḥusn* and *qubḥ* based on social norms, e.g. ,covering the head; 2) change resulting from technological shifts; 3) differences in *mu'āmalāt*, e.g., giving the dowry before the marriage; 4) differences arising from considerations external to the act in question, e.g. determining the age of maturity on the basis of either puberty or age;[52] and 5) those 'irregular' *'awā'id* which are associated with an individual, e.g., habits, hobbies

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[49] Masud, *Islamic Legal Philosophy*, p. 137.
[50] *'Ibādāt* protect *dīn* and *'ādāt* protect the *nafs* and *'aql*. *Mu'āmalāt* also protect the *nafs* and *'aql* but through *'ādāt*. Ibid., p. 226.
[51] To know the intent of the law, one must study *'āda* in combination with the principles inductively derived from *sharī'a*. Ibid., p. 321.
[52] Ibid., p. 295.

etc.[53] But even those *'ādāt* which could, in theory, change, were conditional upon three things. First, custom cannot work retroactively. In other words, valid *'ādāt* must represent a common and recurrent phenomenon. Second, it cannot contravene the principles of a contractual agreement, and third, custom should not violate scripture (*naṣṣ*).[54]

'Ādāt belong to the physical world and are constant. Shāṭibī uses the term in the sense of habits, behavior as well as custom, "as an opposite term to *'ibādāt.*"[55] When an event happens contrary to *'āda* it is considered a "breach in custom" (*kharq al-'āda*). Only the prophets, and none other, are permitted to bring about a complete breach in customs.[56]This is not to suggest that all *'ādāt* are constant, however, for only "universal customs" are perpetually so (*al-'awā'id al-mustamirra*). [57] For Shāṭibī, gradual change was only permitted in areas of *mu'āmalāt*, but not *'ibādāt* where it was always considered negative innovation (*bid'a*).[58] Not so for Ibn Nujaym, however, who argued that *bid'a* could occur in both realms of law.[59]

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[53] Shāṭibī was opposed to the practices of the *fuqahā'* rather than the Sufis, including reading the *khuṭba* in the Sultan's name and praying for him at the end of the ritual prayers. On this issue he was opposed by all the *qāḍīs* in Spain and North Africa as well as by political figures. Ibid., p. 105. The reason he forbade innovation in religious ritual was that "they imposed certain practices as religious obligations, whereas the right of imposing such an obligation belongs only to God." Ibid., p. 122.

[54] S. 'Alia, *al-Qaḍā' wal-'Urf fī al-Islām*, pp. 143-44.

[55] Masud, *Islamic Legal Philosophy*, p. 271.

[56] Ibid., p. 271.

[57] Some *'awā'id* are either introduced or sanctioned by *sharī'a*, hence called *al-'awā'id al-shar'iyya*. Others are current in the practice of the people, hence called *al-'awā'id al-jāriyya*. *Sharī'a* does not oppose *al-'awā'id al-jāriyya*, "it shows a constant regard for them." Still others, *al-'awā'id al-mutabiddala*, are replaced by customs from elsewhere. Ibid., p. 271.

[58] Ibid., p. 294.

[59] Ibn Nujaym, *al-Ashbāh wal-Naẓā'ir*, p. 137.

Ibn Nujaym's departure from Shāṭibī can only be understood in the context of his Egyptian setting where the Ottomans introduced innovation to both areas of *'ibādāt* and *mu'āmalāt*. In the former area, the reform that triggered the loudest protests was the *qānūn* of 927, when the Ottomans imposed the *rusūm*, a marriage tax - 60 *nifṣ* for a virgin and 30 for marriage to a widow or divorcee – upon the local populace. A portion was to go the *'āqid*, some to the *shāhid* and the rest remitted to the governor.[60] The *rusūm*, customary charges levied for such services throughout Anatolia, were universalised and levied across the empire. Ibn Iyās writes that *qāḍī*s were given little choice but to "follow *al-sayq al-'uthmānī*."[61] Seeing it as a penalty against marriage and divorce, however, people refused to marry under the new regulations, and "the *Sunna* of marriage was discontinued" for a time.[62]

Al-Azhar protested against the Ottoman marriage tax, and about 100 jurists descended upon the governor Khā'ir Bey (who only met the most senior among them) to voice their opposition. Objecting to the marriage tax on *shar'ī* grounds, they argued that it violated the Sunna of the Prophet, who was married by exchanging a simple silver ring, six *anṣāf* of silver and the reading of a verse from the holy book. They also argued that it made the costs of marriage too prohibitive as the couple also had to pay the witnesses as well as the *muqadimīn*. Quoting numerous *ḥadīth* contradicting the new Ottoman marriage tax, the jurist attempted to shake the governor's resolve. However, indicating that the decision was not his

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[60] Furthermore, no divorce or marriage would be ratified outside of one of the four chief judges' courts. Muḥammad Ibn Aḥmad Ibn Iyās, *Badā'i' al-Zuhūr fī Waqā'i' al-Duhūr*, ed. Muḥammad Muṣṭafā, vol. 5 (Weisbaden: E.J. Brill, 1975), p. 417.
[61] Ibid., p. 418.
[62] Ibid.

to take, the governor proclaimed: "Who am I? *Al-Khūndikār* has decreed such...In Egypt you are to follow al-*sayq al-'Uthmānī*." To which the Azharī Shaykh 'Īsa, replied: "This is the *sayq* of *kufr*." The comment led to the Shaykh's incarceration until a group of *amīr*s interceded on his behalf.[63] But undaunted, other jurists continued to debate until finally the governor indicated his powerlessness to deviate from the *qānūn* by conceding to Shaykh Shams al-Dīn al-Laqānī the Mālikī, " I fear for my own neck more than I fear for yours. Go in God's name."[64] They left, but not before promising to send an official delegation to inform Sultan Suleymān of the injustices occurring in Egypt and threatening to close the mosques and schools. Greatly agitated, the governor sent an emissary to Istanbul, presumably to seek further instructions. The fact that no changes or revisions were made to the *qānūn* is indicative of the Porte's response.

By the end of the century, the matter continued to rankle locals, judging by Sha'rānī's warning: "Pay willingly the money due to the *qānūn* and the *qassām*. If one does not give of his free will, he will give in spite of himself. He is wise who knows his time." [65] We have already seen how jurists argued against this law, namely that it had no basis in *fiqh*, and might actually have been in violation by taxing one of the 'rights of God' and introducing unnecessary hardship and cost.

Ibn Nujaym's willingness to label changes in *mu'āmalāt* as *bid'a*, must, therefore, be read as a pointed attack on Ottoman *siyāsa* and its codified, universal,

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[63] Ibid., p. 427.
[64] Ibid.
[65] Winter, *Society and Religion*, p. 243. Sha'rānī commends Fakhr al-Dīn al-Sunbaṭī who abdicated his position as *qāḍī* when he learned that judges would be required to enforce *qānūn*. He retired to his village where he heard cases free of charge as a *fard kifāya*. Ibid., p. 244.

qānūn.[66] Attacking the idea that a 'universal *'urf*' can be promulgated, Ibn Nujaym quotes Bukhārī's maxim that such an *'urf* cannot be promulgated on the basis of a local custom. Refuting the possibility that a particular/local (*khāṣṣ*) custom can ever serve as the basis of a general ruling, Ibn Nujaym uses the case of weights and measurements to defend local practices against Ottoman efforts at standardization.[67]

Ibn Nujaym also paid heed to the question of what was and was not acceptable innovation in the compensation/gifts due to judges for their services. Again as part of his critique of the Ottoman marriage tax, as well as of the co-option of the local judiciary into salaried state posts, Ibn Nujaym broaches the questions: "Is it permissible for a judge to accept gifts?" and: "Does a judge receive pay on his holiday from *bayt al- māl*?" Again he determines that such questions should be resolved according to the customs of a people.[68] Acceptance of gifts by judges is permitted but should not exceed the amount stipulated by local *'āda*.[69] If the amount received exceeds that established by custom, the difference should be returned. The critical differences between Ibn Nujaym and Shāṭibī on the question of what constitutes *bid'a* juxtaposes, therefore, the distinct political, geographic and political experiences of each.

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[66] Using the case of weights and measurements Ibn Nujaym argues that a general ruling cannot be made on the basis of a local custom. Ibn Nujaym, *al-Ashbāh*, p. 102. For example, he defends the position that local Egyptian custom, in the case of the *khilliw* (down payment) for renting shops in the Egyptian market, is a right of the owner because he no longer possesses the power to evict the tenant. Ibid., p. 103.

[67] Ibid. For a fuller discussion, see Chapter Four.

[68] Ibn Nujaym, *al-Ashbāh*, p. 95.

[69] Custom also determines pedagogy: *Ahl al-Shām* give *ḥadīth* lessons by *samā'* (hearing) and the instructor speaks some of the time, while the Egyptians combine both methods. Ibid., p. 96. According to al-Zayla'ī, oaths are governed by linguistic *'urf* (local dialect) not by linguistic *ḥaqā'iq* (literal meaning). Thus, if an oath to abstain from eating meat is given, it is custom that defines what is meant by 'meat.' If liver, and stomach count as meat in a given locale, then they are included in the oath. Ibid., p. 98.

For their part, the Ottomans never employed the term *bid'a* to refer to their legal reforms, not even positive *bid'a*. Innovation could only originate in non-Sultanic custom and could be classified as 'recognized custom and innovation' (*bid'at-i ma'rufe*) and 'rejected innovation and custom' (*bid'at-i mardude*) also called *hayf* (injustice), *ẓulm* (oppression) and *senā'āt* (fabricated).[70] Heyd writes it "is to be noticed that the *sharī'a* term *bid'at* in official Ottoman usage signifies not only innovations contrary to the religious law but also those in contravention of the *kānūn*."[71] Innovation through *qānūn* was only referred to as *tajdīd*. In the Cairo *sijills*, the *qānūn* standardizing weights and measurements is called "oppressive renewal" (*tajdīd muẓlim*).[72] In the *Qānūnnāma* of Baghdad of 943/1527, the same *qānūns* are referred to as "recognized customs" (*'adāt-ī ma'lūm*) and "illegal innovations" are abolished.[73]

Needless to say, from the perspective of Arab jurists such as Ibn Nujaym, the application of the *qānūn* came at the cost of a 'breach' in local customs, and as such qualified as *bid'a* rather than *tajdīd*. In Anatolia, the legality of Ottoman *qānūn*, which met the *sharī'a*'s conditions and conformed to established local norms, was in no doubt. In Egypt and other Arab provinces, the *qānūn* (originating in and flowing from Turco-Islamic traditions) did not conform to the established customary norms of the new provinces, transgressing into areas of public morality, the rights of the bride, women's attire and freedom of movement. Thus, when local

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[70] H. Inalcik, "Suleyman the Lawgiver and Ottoman Law," *Archivum Ottomanicum*, I (1969), p. 112.
[71] Heyd, *Studies in Old Ottoman Criminal Law*, p. 169.
[72] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 68.
[73] Heyd, *Studies in Old Ottoman Criminal Law*, p. 169.

'ulamā' charged that Ottoman *qānūn* was in violation of the *sharī'a*, they were, it is argued, referring to this exigency. Their complaints were prefaced on the argument that imported custom is invalidated by the first rule governing the validity of *'āda/'urf*, that it must represent a common and recurrent phenomenon.

To cap, the discussion on the theoretical treatment of morality, and its relation to custom in the Muslim sources, shows that the more pre-occupied legal theory became with custom, the more controlled it became in practice. Indeed, it was the theory of custom that allowed Egyptian jurists to challenge *qānūn* as a collection of invalid customs. We may now examine the mode by which the state countered such arguments.

Section iii
Nāmūs and the *Siyāsat Ilāhī*

Political theory came to the aid of *siyāsa* by allowing the state to draw upon, and renovate, an ancient philosophical concept – the *nāmūs*. This movement effectively helped the state to imbue its *siyāsa* legislation with 'sacred' overtones and facilitated the movement toward codification. While the origin and meaning of the word *nāmūs* is known, very little has been written on its medieval usage. M. Plessner has shown that in the classical period the word had multiple meanings as a philosophical, religious and zoological concept.[74] The latter originates in the Arabic language while the former concepts are borrowed from the Greek (*nomos*) through

[74] M. Plessner, "Nāmūs," *EI*, CD Rom Edition. In Greek philosophical usage, "Plato says, guard the law (*nāmūs*) and it will protect you." I. J. Rosenthal, *Political Thought in Medieval Islam: an Introductory Outline* (Cambridge: Cambridge University Press, 1968), p. 223.

the Syriac Gospels. The latter refers to the coming of the paraclete promised by Jesus, an idea which eventually "falls into the background till it was finally interpreted as the name of an individual and even received an epithet."[75] The word is first used in the Arabic by Ibn Isḥāq who had access to the Syriac Gospels, and is relayed by Ibn Hishām in the context of Waraqa bin Nawfal's comment to his cousin: "If thou hast reported the truth to me then truly the greatest *nāmūs* has come to him, who used to come to Mūsā, and then he (Muḥammad) is the prophet of this *umma*."[76]

The favourite meaning, according to Plessner, is divine law, "with or without the addition of *ilāhī*," revealed through the Prophets.[77] Al-Qalqashandī describes it as the first among the *'ulūm al-shar'iyya*, while Ibn Sīna, influenced by Aristotle's definition of the term in the *Nicomachean Ethics*, used it in the sense of *Sunna* or revelation in his discussion of the rational sciences:

> The *Falāsifa* mean by law (*nāmūs*) not what the masses think, namely that it is trickery and cunning ruse, but rather that it is the *Sunna*, the permanent, certain pattern and the revelation sent down [from heaven]. The Arabs also call the angel, who brings down a revelation, law (*nāmūs*). Through this part of practical philosophy we know the existence of prophecy [as something necessary] and that the human race needs the *Sharī'a* for its existence, preservation and future life.[78]

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[75] Plessner, "Nāmūs." When the word entered Hebrew from Arabic in the Middle Ages it meant "law, religious law (of other peoples), morality, propriety." Ibid. In the modern dialect of Mecca, S. Hurgronje found that *nāmūs* meant "the spotless honourable name which one has among men, and its opposite is '*ār*, 'shame.'" Ibid.

[76] Ibid. T. Andrae traced the *nāmūs* of the Waraqa b. Nawfal tradition to the writings of the pseudo-Clementines. The word also occurs in the writings of the *Ikhwān al-Ṣafā'* to refer to the spiritual kingdom. Ibid.

[77] Ibid.

[78] E. Rosenthal, *Political Thought*, p. 145.

Miskawayh (d.1030), on the other hand, adds that *nāmūs*, "in striking contrast to Ibn Sīna (d. 1037), means in Greek, *siyāsa* and *tadbīr*."[79] Seemingly influenced by the latter, the *Shī'a* philosopher Naṣr al-Dīn al-Ṭūsī (d.1274) wrote that justice is served by three things , the *nāmūs ilāhī* (divine law), the ruler and money.[80] A just political and economic order is, therefore, a lesser form of *nāmūs* as "[t]he philosophers laid it down that the greatest *nāmūs* is the *sharī'a*, the second is the *ṣulṭān* who obeys *Sharī'a* – for *dīn* and *mulk* are twins – and the third *nāmūs* is money."[81] Al-Dawwānī (d.1503) displays important variations from Ṭūsī, replacing all references to *nāmūs ilāhī* with the word *sharī'a*, affecting in Rosenthal's view the "assimilation to Islam" of Greek philosophical concepts. But Dawwānī does more than that. By replacing the phrase *nāmūs ilāhī* (divine law) with the word *sharī'a*, but preserving the label of *nāmūs* for the ruler, whom he calls "the second *nāmūs*,"[82] Dawwānī has also affected a change in its meaning. Claiming that the philosophers meant by *nāmūs*, "rule and government," as opposed to divine law, Dawwānī's formulation represents the missing link between the classical definition of the term and its definition in the Ottoman period.[83] This is not to suggest that Dawwānī ceased to see the *sharī'a* as the greatest *nāmūs*, only that he boldly linked the *siyāsa* to the *nāmūs* in a manner that effectively elevated the former to sacred heights. In other words, like jurist law, state law could also claim to be 'uncovering'

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[79] Plessner, "Nāmūs."
[80] Rosenthal, *Political Thought,* p. 212.
[81] Ibid., p. 213.
[82] Ibid.
[83] Ibid.

that "permanent, certain pattern"[84] of natural laws which signify 'morality as it should be.'

Tursun Beğ, an author of a history of Meḥmed II and holder of multiple government posts in the second half of the fifteenth century, says "in our (Ottoman) usage, *örf* means *siyāset-i sulṭāni* or *yasāġ -i pādişāhī.*"[85] The measures arising from this category of *siyāsa* allowed for the order of life in the material world (*niẓām-i ẓāhir içün*).[86] But more interesting is that:

> On a higher level, however, than this form of *siyāset* (which we may call political), there is, in Tursun Beğ's opinion, a (philosophical or religious) *siyāset*, which aims at the moral perfection of man and ensuring not only the order of the material world, but also that of the hidden (*bāṭin*)... [The philosophers called this the] *siyāset-i ilāhi* and its institutor they call *nāmūs*.[87]

Heyd translates *nāmūs* as the "rational" rather than the 'divine' law. But, this simple dichotomy obscures the levels of nuance implied above. Tursun Beğ suggests that *nāmūs* is the instrument by which a 'higher *siyāsa*' is activated. When state laws reflect the attempt to 'uncover/discover' the moral truths (perfected divine laws) that exist in nature, the *nāmūs* is activated. In other words, it is state officials, rather than independent jurists alone, who may uncover the moral laws found in nature. As such, the *nāmūs* is no more, and no less, 'rational' than *fiqh* and is best translated as 'natural state law.' Ottoman *siyāsa*, and its attendant *qānūn*, are thus compendiums of customs imbued with sacred authority derived from natural state

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[84] Ibid.
[85] Heyd, *Studies in Old Ottoman Criminal Law*, p. 169.
[86] Ibid., p. 170.
[87] Ibid.

laws. A review of the term's usage among Egyptian scholars confirms this argument.

Egyptian scholars use the words *nāmūs* and *qānūn* interchangeably. According to al-Damīrī, the Ottoman chief judge of Egypt in 971/1563, Muḥammad Shāh b. Ḥazm, was known, for implementing the "*nāmūs*" till heads "cracked" (*ṭa'ṭa'at*).[88] In a discussion with Sha'rānī, the sixteenth century Egyptian Sufi, concerning the legitimacy of Ottoman *qānūn*, Shaykh Khawwāṣ coveys this same understanding:

> The spirit of the revelation consists of the world order. If religious laws disappear, the rule of *nāmūs* replaces them in each generation in which they are lacking. This is what is meant now by [the term] *qānūn* in the Ottoman state. Its application, however, is lawful only in countries that have no religious laws. As for Egypt, Syria, Baghdad, North Africa and the other lands of Islam, the application there of the *qānūn* is unlawful, because it is not infallible and it may have been set down by the kings of the infidels.[89]

By implying that the *nāmūs* is valid only "if the religious laws disappear," Khawwāṣ dispels any doubt that the term is now exclusively used for laws derived from Ottoman *siyāsa* and is to be distinguished from "religious laws."

At the same time, Khawwāṣ' statement is a strong rebuttal to the Ottoman attempt at 'universalizing' state customs, voicing the open suspicion that the *qānūn* of the Ottomans embodies the values and customs passed down by "infidel kings." Again, the implication is that the customs of former 'infidels' should not have precedence over the customs of 'real' Muslims. But given that all Muslims are, by definition, the descendants of former infidels, Khawwāṣ' misgiving would

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[88] Al-Damīrī, *Quḍat Miṣr fī al-Qarn al-'Āshir wa Awā'il al-Qarn al-Ḥādī 'Āshir*, MS (Cairo, Dār al-Kutub), p. 232.
[89] M. Winter, *Society and Religion*, p. 245.

invalidate all customary laws. Clearly, however, this was not what was he was advocating. Rather, he was objecting to the imposition of Turkic/Ottoman customs on non-Turks, and his most effective means of doing so was to attack the 'orthodoxy' of his opponent, implying they had misapplied the *nāmūs* in lands where the "religious laws" reign. On the surface, this may seem to suggest that the conflict revolved around the supremacy of the *sharī'a* **vis-à-vis** the *qānūn*. This would be an erroneous assumption, however, as it is not *fiqh*-based laws which are jeopardized by *qānūn*, but local customary laws.

Qānūn and *'Adāt* are often used interchangeably. Heyd writes that "synonymous with kānūn in meaning is 'adet," and that the regulations of Uzun Ḥasan are also sometimes called 'ādāt."[90] The term is also used interchangeably with *yāsa*.[91] Ibn Taymiyya used the term *al-'āda al-ṣulṭāniyya*, in a manner equivalent to the *Ottoman örf-ī pādisāhī*,[92] and officials who carried out the sultan's orders were called *ehli-i 'örf*.[93] Heyd explains that:

In many cases, the expression *şer' ve örf* may have the same meaning as *şer' ve ḳānūn*...indeed, in some contexts '*örf* is still used in a meaning close to its original significance, reflecting the fact that the Ottoman *ḳānūn*, like the *ḳānūns* of other rulers , often confirmed existing local practice. [94]

Fleischer does not hesitate to place *qānūn* firmly within the domain of custom:

The cumulative character of dynastic law was such that the ascription of a *qanūnūnāma* to a particular sultan did not affect its legality; the two greatest

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[90] Ibid., p. 168.
[91] Ibid.
[92] Ibid., p. 169.
[93] "The term 'örf ('urf), which originally meant 'common usage' and in Ottoman law often has the restricted sense of torture, is used, it seems, as a synonym of ḳānūn." Ibid.
[94] Ibid., p. 168.

lawgivers of the empire, Meḥmed II and Sulaymān, were compilers of custom as much as promulgators of new regulations, required by new circumstances.[95]

A survey of the rhetoric of Egyptian jurists and of the criteria they employed to critique the *qānūn*, supports the claim that, at heart, the conflict was between two broad clusters of Anatolian and Egyptian customs. And as argued throughout, the weapon of choice for local jurists opposed to the 'universal' *qānūn*, was the doctrine of custom itself.

[95] C. Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire: the Historian Mustafa Ali (1541-1600)* (Princeton: Princeton University Press, 1986), p. 54.

PART II

Section i
The *Nāmūs* Applied

As indicated in chapter one and by the poem at the start of this chapter, the *Sunnī* heartland was no less conflicted by the debate over what constituted 'correct conduct,' nor any less implicated by the criticisms emerging from this discourse, than the so-called 'peripheries' of Islam. Furthermore, when considered in the light of Ottoman pretences to religious renewal, the increasing authority of written documents, and the theory of the legists regulating custom, such a view seems simplistic at best, and at worst imbued with classic Orientalist essentialisms. A more complex view of Ottoman Egyptian relations emerges through a consideration of the 'rights of God' as (re)interpreted by the state and its legists, and the way in which this redefined the bounds of Muslim morality in the sixteenth Ottoman century.

With regards to the Ottoman understanding of the rights of God, the first point to be made is that the attempt to manufacture a legal orthodoxy should not imply a static Ottoman ideal. Indeed the chroniclers and the *sijills* of the *sharī'a* courts reveal that the understanding of the state and its jurists limit and delimit the bounds of Muslim morality over the course of the sixteenth and early seventeenth centuries. In some cases, this implies a narrowing of the definition of what is permissible, and in others a relaxation. The freedom of movement allotted women represents one of the best examples of this 'evolving' understanding of correct outward conduct.

The second point to be made is that the drive for legal orthodoxy is not to be confused with an ethnic or geographical bias in favour of purely Turkish or Anatolian custom. As seen below, what was deemed a 'morally perfected' custom could at times originate in non-Anatolian practices. For example, customs originating in Egyptian and Syrian practice, such as the deferred dowry, were sometimes incorporated into the *qānūn* as a way of eliminating variation arising from Anatolian practice.[96]

A third and final point to be made is that the *sijills* also reveal a court system that was extremely vigilant to the usurpation of *fiqh*-based rights through custom. For example, the courts went to great lengths to combat the customary practice of diverting a woman's dowry (*mahr*) to a male member of the family. They also combated customs that unjustly disenfranchised adult women or usurped their rights to: 1) consent to marriage, 2) receive dowry, 3) receive inheritance, 4) or use the conditional clause in marital contracts to their maximum advantage. Indeed, the latter was used so effectively that it often meant the negation of some of the husband's *fiqh*-based rights. For example, a husband's right to take a second wife or concubine. On the other hand, in the area of *waqf*, they also reveal an area in which *fiqh*-based inheritance laws could be circumvented in lieu of custom-based laws to dispossess or, alternately, to benefit female descendants. But this is not something that originates in Ottoman practices but in classical judicial theory giving the

[96] For example, the practice of deferring the dowry, once vigorously opposed by legists as an Egyptian custom, was eventually incorporated and modulated by later generations of jurists. By the Ottoman period, the custom was so well established that Abū al-Su'ūd abolished the *kahin*, an Anatolian marriage gift in favour of the deferred and immediate portions of the dower, as per the custom of the Egyptians. See, Section iii.

founder of an endowment the right to name his/her beneficiaries. As such, *waqf* remained one of the few areas in which custom could still determine the economic distribution of wealth. Outside of the limits established by jurisprudence, however, the administration of *waqf* was strictly governed by the *qānūn,* permitting little to no deviation based on custom.

Before presenting the evidence of the *sijill,* a few words on the interpretation of the rights of God under the Ottomans, particularly the fixed penalties (*ḥudūd*), will shed light on the latter's understanding of the scope of their jurisdiction in the area of *'ibādāt.*

a) The Fixed Penalties

Imber argues that although the state was responsible for enforcing the *ḥudūd* in theory, in the case of the Ottomans, the only real crime to fall under its purview was highway robbery:

> For most offences of violence committed within a community, Hanafi law makes the community itself responsible for bringing assistance and, in cases of homicide where the killer is unknown, for defraying the blood-money paid to the heirs of the victim[97]... In practice, the infliction of the punishments for fornication and theft is impossible since the rules of procedure are so strict...With the exception of highway robbery, therefore, the fixed penalties are not legal realities.[98]

The jurists, he argues, adopted the attitude that the fixed penalties "are claims of God, and God has no need of a human agency to execute his will."[99] At the same time, however, jurists delegated to the state the right of *ta'zīr,* or discretionary punishment, in areas that did not include blood-money, compensation for damage,

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[97] Imber, *Ebu's-Su'ud,* p. 89.
[98] Ibid., p. 90.
[99] Ibid.

or the fixed penalties.[100] Because jurists do not define what constitutes a discretionary offence, Imber argues that, "ironically," they pushed more and more offences under the category of discretionary punishment. "Ebu's-Su'ud, for example was able to bring coffee-drinking into this category...The result was to bring the punishment of most offences under the authority of the ruler to deal with as he wished, with no judicial constraints."[101]

Even though the fixed penalties were not under the discretionary authority of *ta'zīr*, L. Pierce's work demonstrates "in the Aintab records for 1540-1541, we are observing an aggressive effort to punish zina."[102] Ibn Iyās provides abundant evidence to suggest that such offenses were vigorously prosecuted in Cairo soon after the conquest. Not only did the Ottoman state enforce the fixed penalties (including punishment for intoxication), but often exceeded their limits. Moreover, there is evidence to suggest that such policies were not limited to the years immediately following the conquest, but echoed well beyond the sixteenth century. The official intolerance for intoxication, for example, is noted in the works of latter day biographers such as al-Damīrī, who provides numerous examples of this at the end of the sixteenth century.

To begin with the conquest, Ibn Iyās' account provides (in minute detail) examples of *siyāsa* justice in the first years of the Ottoman rule, documenting the manner in which the penalties frequently exceeded the limits of the *sharī'a*. In one case, an Ottoman soldier apprehended a commoner when he "caught the latter's

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[100] Ibid., p. 94.
[101] Ibid.
[102] L. Pierce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003), p. 364.

hand in his pocket," stealing four *anṣāf*.[103] Taken before the governor, the culprit's hand was amputated, only to be followed by a public humiliation in which the latter was paraded through the streets, the offending hand "hanging from his neck." The people, writes Ibn Iyās, were saddened for the man, who lost his limb for a measly sum. Even more severely, another individual was put to death by hanging for stealing cucumbers from a field, something Ibn Iyās describes as a "repugnant (*shanī'*) event,"[104] that extinguished the life of a husband, father and son over a trifling.[105] Other examples of hangings for 'trifling' infractions are given, as well examples of the hanging of several people he describes as innocent of any offense.[106] In the year 927/1520, four more thieves were hanged,[107] leading Ibn Iyās to accuse the governor of presiding in judgment while "drunk" and of being an oppressor (*ẓālim*).[108] When the Ottoman currency was introduced, he continues, many more people were threatened with hanging for refusing to trade by the new currency.[109]

Ibn Iyās' shock, and that of the general populace, arises from the fact that such measures do, of course, exceed the *ḥudūd* limits. In the case of theft, Ibn Taymiyya's position is that a person's right hand must be amputated, but only in

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[103] Ibn Iyās, *Badā'i'*, p. 273.
[104] Ibid., pp. 254-5.
[105] A wealthy Persian (*'ajamī*) merchant from the east, accused by Khayrbek of being a spy for Shāh Isma'īl al-Ṣūfī, is wrongly executed according to Ibn Iyās, who accuses the governor of coveting the man's vast wealth. Ibid., p. 263.
[106] Ibid., pp. 358-9.
[107] Ibid., p. 414.
[108] Ibid., p. 274.
[109] Ibid., p. 244.

the case of theft over three *dirhams*,[110] while al-Māwardī points out that that there are differences of opinion on minimum amounts for amputation, the nature of the property that warrants amputation, and the person due amputation if the crime is committed in a group.[111] In all cases, however, a death sentence for the theft of a few cucumbers would not have been countenanced.

The level of unrest sparked by these measures eventually reached the Porte for in 926/1519, a *qāsim* arrived from Istanbul bearing edicts (*marāsīm*) from Sultan Selīm, addressed to Amīr Kamshbighā the governor of Cairo, informing him that news of the *maẓālim* he had opened in Cairo had aroused increasing complaints against him to the *khundekār*. Ibn Iyās calls Kamshbighā a murderous *Rūmī* and is pleased when he is recalled to Istanbul in the same edict.[112] But the departure of this governor did not imply a relaxation in the standards applied by later governors and Ottoman chief judges.

Al-Damīrī reports that in 941-43/1534-36 Khusrev Pasha suppressed crime so effectively that merchants left their stores unlocked. Masīḥ Pasha (1575-80) ordered the arms and legs of thieves cut off and thrown in the street.[113] The *Qānunnāma Miṣr* it will be remembered, eventually abolished the *maẓālim* and delegated all substantive law to the *sharī'a* court, a measure which may have helped ensure that criminal penalties stayed within the bounds of the *sharī'a*, but which did not, obviously, end the imposition of *siyāsa* penalties.

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[110] Ibn Taymiyya, *Al-Siyāsa al-Shar'iyya* (Cairo: Dār al-Kutub al-'Arabiyya, 1966), p. 112-114.
[111] Al-Māwardī *al-Aḥkām al-Sulṭāniyya* (London: Ta-Ha Publishers, 1996), pp. 245-47.
[112] Ibn Iyās, *Badā'i'*, p. 338.
[113] Winter, *Egyptian Society*, p. 231.

But it was not just criminal penalties that had been stiffened, blasphemy laws appear to have been enacted, leading to the beheading of a Christian.[114] *Dhimmī*s were also made to conform to Islamic legal theory as informed by the Covenant of 'Umar in matters of dress. This too was a consistent feature of the early and late sixteenth century. Al-Damīrī wrote that in Ḥassan Pasha al-Khādim's (988/1580) day, the Jews wore red hats (*ṭarāṭīr*) and the Christians wore black ones. Indicating that dress codes were already in effect, however, he writes that before Khādim's time, the Jews wore yellow hats and the Christians blue ones.[115] It does appear, therefore, that dress codes were frequently enforced, though it remains unclear how consistently.

A stridently negative attitude toward intoxicants, with the exception of coffee, is also a feature of the sixteenth, and first half of the seventeenth centuries. Ibn Iyās reports that in the year 925/1519 a merchant called al-Maḥalāwī, an individual of bad repute known for charging interest (*ribā*), was arrested on the charge that he had sold alcohol and *ma'jūn* (presumably a narcotic paste) to the Turcomen during the month of Ramaḍān. The Governor ordered that the individual be charged and prepared for hanging after the *'īd* festivities. But a group of the defendant's friends and clients from among the militias (*inshikāriyya*) prevented the charges from being laid. They then proceeded to *ṣūq al-waraāqīn* (paper merchants or producers), assaulting those who had informed on al-Maḥalāwī. When the merchants complained to the Governor, he ordered that the defendant be crucified

[114] Ibn Iyās, *Badā'i'*, p. 369.
[115] Muḥammad bin al-Mu'ṭī al-Isḥāqī al-Manūfī, *Akhbār al-Awwal fī-man Taṣarraf fī Miṣr min Arbāb al-Duwal* (Cairo: Al-Maṭba'a al-'Uthmāniyya, 1304/1886), p. 156.

on Bāb al-Midān.[116] Episodes such as these are repeated throughout the sixteenth century and well into the seventeenth. It will be remembered that in Chapter One, the Chief Ottoman Judge Ḥusayn b. Muḥammad Ḥusām al-Dīn Qarāchlī Zāda, appointed in 987/1579, was described by al-Damīrī as a strict prohibitionist and that "no scent of intoxicant was smelled in Cairo in his time."[117] Well into the seventeenth century, Ḥusayn Pasha (1637-37) banned all forms of smoking and subsequently killed fifty men caught in violation, on the spot.[118]

Coffee quickly became another source of immense controversy when, "under Sufi auspices the use of coffee as a beverage spread in the Near East in the fifteenth century."[119] It became an integral part of *dhikr* gatherings, and the name associated with the practice was that of the Shādhilī Shaykh, Abu'l-Ḥassan 'Alī ibn 'Umar (d. in Yemen 1418).[120] Opponents of the new product obtained *fatwās* and medical opinions against it while supporters did the same. These debates preoccupied members of the Egyptian and Ottoman judiciary as much as it did the state, and often times, the 'popular mob,' who frequently attacked coffee-houses at the behest of the Shaykhs.

Winter writes that the Egyptian Shaykh Ghazzī believed that an *ijmā'* had been achieved on this issue. So long as the drinking of coffee was not accompanied by wine-drinking, music and mixing with adolescents and women, it was permitted.

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[116] They also arrested al-Maḥalāwī's slave, who swore his master had freed him before his death. He was released only after the governor ordered his ear cut off. Ibn Iyās considers this an injustice against al-Maḥalāwī who, "did not deserve such a fate." Ibn Iyās, *Badā'i'*, p. 313.
[117] Al-Damīrī, *Qudāt Miṣr*, p. 17.
[118] Winter, *Egyptian Society*, p. 231.
[119] Winter, *Society and Religion*, p. 190.
[120] Ibid.

But his contemporary, 'Abd al-Ḥaq al-Sunbāṭī, was of a different opinion and frequently incited listeners at al-Azhar to attack the coffeehouses.[121] Sha'rānī regards these as trifling issues on which one should waste little time as the *'ulamā'* were themselves undecided.[122]

As the fixed penalties were enforced by the state, the *sijills* do not shed any light on the issue. They are, however, slightly more revealing of the debate on intoxication, providing a useful source of information on the legal trajectory of this debate in practice. There are no records of coffee traders or coffee-shop owners (*qahwajīs*) in any of the records at my disposal prior to the seventeenth century. However there are four such documents dated thereafter. In 1023/1614, the *sijill* of al-Bāb al-'Ālī records that the owner of a coffee shop (*qahwajī*) al-Manfalūṭī was released from jail after paying a debt of 10 *dīnārs*.[123] It is unclear whether the fine was levied on account of his profession or whether it was unrelated. It is only by the mid-seventeenth century, however, that the first case involving a commercial contract for the wholesale purchase of coffee is found.[124] In that same *sijill*, there are two other references to coffee shops as part of the description of a given neighbourhood (*ḥayy*), street or profession. In one, a coffee shop is said to be in an area adjacent to the tomb of a holy Sufi, Sayyid --? 'Uqb. In another case pertaining to *waqf*, the neighbourhood is described and identified by two names, "al-Ḥaramayn al-Sharīfayn" and "Qahwat Timsāḥ," indicating the degree to which

[121] Ibid., pp. 190-191.
[122] Ibid., p. 191.
[123] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc. 107.
[124] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 765.

coffee shops had become fixtures in local neighbourhoods.[125] The proximity of Sufi shrines to the coffee shops mentioned, indeed the fact that streets were often named after the shrine and the coffee shop simultaneously, is indicative of the continued association between Sufism and coffee.

Again, when it came to consumption of intoxicants, judicial opinion varies. Ibn Taymiyya argued that flogging was due anyone who consumed any intoxicant.[126] Al-Mawardī, however, suggests that punishment may not only vary from flogging to public humiliation, but that some scholars argue 'inebriation', rather than consumption, is the crime, while others argue that only wine, or only alcoholic intoxicants are banned, not inebriation itself.[127] The subtleties of this debate are lost in the interpretation of the 'rights of God' by the Ottoman state. But as demonstrated by the example of coffee, presumably because it had become a staple source of trade within the Empire, the bounds of 'ideal' morality were in a constant state of flux. As such, coffee went from an illicit brew, to a staple drink and source of commercial business, with the full backing of the state, by the seventeenth century. It stands to reason that Abū al-Su'ūd's categorization of coffee as a matter for discretionary punishment allowed the state to decide whether to criminalize or de-criminalize the drink. Coffee drinking serves, therefore, as a good example of the fluctuating Ottoman moral 'ideal,' as do the laws governing women, their rights in marriage and their freedom of movement.

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[125] Al-Bāb al-'Ālī, *Sijill* no. 124, Docs. 51, 74.
[126] Ibn Taymiyya, *al-Siyāsa*, p. 120.
[127] Al-Māwardī, *al-Aḥkām*, p. 248.

Section ii
The Threshold of Morality

In the early years of the conquest a draconian code of conduct was imposed on the women of Cairo by both the Governor and chief Ottoman judge. But almost a hundred years later, this code appears to have been considerably relaxed. Indeed, Ottoman courts in the late sixteenth to the mid-seventeenth century enforced a new ideal with respect to women and their right to freedom of movement. This does not represent the rising influence of local custom on Ottoman courts. Rather, it represents a change in 'ideal' doctrines. The point to be made, therefore, is that the boundaries of moral conduct, whether restricted or delimited, had little to do with custom. Neither extreme in the moral pendulum represented the normative standards sanctioned by local practices. In other words, while the Ottoman moral ideal fluctuated and changed, the state's basic drive, to unify legal practice and social conduct, did not.

The Ottomans had a clear notion of the role/place of women in society, including a variant threshold of sexual modesty from their Egyptian counterparts. This is amply demonstrated by the numerous examples of *siyāsa* justice meted out to women accused of unchaste conduct. In the year of the conquest, on the 9th of Ramaḍān 923/1517, four women accused of consorting with the Turcomen and of introducing them to women "strange to them" (*ajānib*), were paraded around town on donkeys, their faces "exposed and smeared in black." [128] In 925/1518, another woman was accosted in an alley by soldiers (*aṣbahāniyya*) who charged that she had been consorting with a Christian. She and the Christian were arrested and brought

[128] Ibn Iyās, *Badā'i'*, pp. 211-12.

before the governor who decreed that the woman be stripped of her clothes, her hands and legs bound, her feet attached to the back of a donkey and her body dragged through the streets, "face first," from al-Kadāshīn to Bāb Zuwayla, where she was to be hanged. Some said that she died before reaching the Bāb, while others said the soldiers drowned her in the Nile around the "middle Island."[129] Ibn Iyās laments her death and her terrible suffering. He does not, however, inform us of the fate of the Christian.

In 926/1519, a Muslim woman was apprehended consorting with a Jewish man, and when the matter became known, both were arrested as was the *makārī* (donkey driver) who had provided her transportation. A 'middle person,' who introduced the two, was also arrested, indicating that the woman may have been a professional prostitute. When the governor learned of the affair, he had the *makārī* beaten, the woman jailed "in a room" and the Jew sent to the "*Daylam*" prison.[130]

Sometime thereafter, by order of the Ottoman chief judge, criers called on the women of Cairo to stay indoors and to refrain from going to the markets or riding donkeys forthwith. Anyone who violated these rules would be tied by the hair to the tail of a donkey (*ikdīsh*) and dragged around Cairo. The *makāriyya* (donkey drivers) were forced to sell their donkeys and to purchase mules and carriages with rugs for the women to sit atop. And that persisted, writes Ibn Iyās, as donkeys disappeared, and women rode in the traditions/style of Istanbul. This is one of the best examples of a 'culture clash' between Ottomans and Egyptians and of the antagonistic *sharī'as* they embraced. Unbeknownst to the residents of Cairo, the

[129] Ibid., p. 290.
[130] Ibid., p. 332.

custom in Istanbul was to punish prostitutes by placing them on the back of donkeys and parading them through the streets. It struck Anatolians as unseemly that the women of Cairo rode donkeys of their own free will.

But a total prohibition on women appearing in public places seems to suggest that beyond differences over preferred modes of travel, the Ottomans had more general concerns about the outward conduct of Egyptian women. Ibn Iyās links the ban on women appearing in public to a day when the *qādī 'asker* ascended the citadel and saw a group of local women chatting with a group of *aṣbahāniyya* (soldiers) in the middle of the market. This affected him deeply and he complained to the governor that, "the women of the people of Egypt have corrupted the soldiery of the *khundikār*" and that the troops were no longer good for anything.[131] This, concludes Ibn Iyās, troubled the governor to such an extent that he was persuaded to ban the women of Cairo from public spaces. The ban appears to have been rigorously enforced for soon after the governor's order a woman found riding a donkey on a desert road was forced down, beaten and had her "buttons broken," escaping the fury of the soldiers only through the "intercession" of "others" and the payment of a fine in the amount of two *ashrāf*.[132]

Chaffing at this policy, the people of Cairo appealed to the *qāḍī 'asker* to relax the ban by allowing women to visit the *ḥammāms*, relatives and graveyards. Eventually, he agreed but with stipulation that only elderly women were allowed to visit the graves, and that all other women were to be accompanied by their

[131] Ibid., pp. 461-462.
[132] Ibid.

husbands to visit relatives or the baths.[133] A poem satirizing this Ottoman judge accuses him of putting *qānūn* above the *shar'* of Aḥmad. Once again, the direct criticism made is that the Ottomans had exceeded the bounds of *fiqh* and Prophetic example to banish women from public space. When this chief judge departed, the women of Cairo (presumably the professional class of dancers, entertainers and prostitutes) sang in a public display of revelry: " Come to whoring (*quḥb*) and intoxication (*sukr*), the *qadī 'asker* has left us."[134]

While Ibn Iyās writes that donkeys disappeared from Cairo, this phenomenon was far from permanent. By the late sixteenth century, the practice was revived and the courts were plainly unconcerned. When he visited Cairo, Muṣṭafā 'Alī, the late sixteenth Turkish chronicler, described his horror at this custom:

> Their women, all of them, ride donkeys. Even the spouses of some notables ride on donkeys to the Bulāq promenade...This unbecoming behavior constitutes a serious defect to the city of Cairo, because in other lands, they put prostitutes on donkeys as punishment. In Cairo the women mount donkeys of their own free will and expose themselves to the public; therefore, it appears appropriate that as a punishment, they be put on camels.[135]

Evidence of further schism in the cultural attitudes of Egyptian and Anatolians is found in the writing of another Turkish chronicler who visited a local hospital, the Bimāristān al-Manṣūrī (named after the Mamluk Sultan al-Mālik Qalāwūn) which "included a department for mental patients and one for women, with attendants who were also women. He was astonished that the male doctors

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[133] Ibid., p. 467.
[134] Ibid., p. 469.
[135] Muṣṭafā, 'Alī, *Muṣṭafā 'Alī's Description of Cairo, 1599,* ed. and trans. A. Tietze (Vienna: 1975), p. 102.

entered the women's quarters in the hospital 'without shame' to treat them."[136] Reflecting local attitudes to the issue, the Egyptian writer Sha'rānī dismisses the opinion that women should not receive male guests at home in the husband's absence as a "Bedouin custom" unworthy of emulation.[137]

The relaxation of the Ottoman *qānūn*, reflected in *sijills* from the late sixteenth century, portray a judicial system in which the bounds of morality, especially for women, have been considerably modified. In other words, the moral pendulum had swung. This is most evident in the freedom of movement and to some extent association, which the courts allowed women. In all cases, however, it must be noted that local custom was not represented by either extreme in the pendulum's swing. While an absolute ban on women appearing in public had been at variance with the customs of the Cairo's communities, so too were some of the newly expanded boundaries of morality.

There are two *sijill* cases touching on the issue of women and their freedom of movement/access to public space. In 1045/1635, document number 66, the chief judge of the Bāb al-'Ālī demonstrated an entirely different attitude from that of his predecessors to women, their right of movement and their right to legitimate association with members of the opposite sex. A woman by the name of Ḥijāziyya boldly challenged the imprisonment of her suitor Jum'a, initiated at her brother's request. What is notable about this case is that at no time does the brother appeal to custom in resolving his dispute with his sister. This is important because the

[136] Winter, *Egyptian Society*, p. 238.
[137] Winter, *Society and Religion*, pp. 292-293.

brother has accused his sister of unchaste conduct, a charge that is customarily punished within the family.

The document begins by identifying the Ḥanafī judge and the woman as Ḥijāziyya bint Zaynab bint ʻAṭiyya.[138] The latter testified that her brother Ḥijāzī Ibn ʻAṭiyya, the stock-keeper at the bakeries, had attacked her and blocked an opportunity for marriage (*wuqūf ʻarḍiha*) to an interested suitor. He had also maligned her honour by accusing her of having an illicit meeting with a 'strange' (*ajnabī*) man named Jumʻa, and had called upon the *muqadim* to arrest them both. The record indicates that Jumʻa was arrested and that Ḥijāziyya appeared in court to appeal his incarceration as well as to affirm her right to "keep hold of him" (*lil-tamassuk bih*) as a potential suitor. Furthermore, she asked the court for a *sharʻī* ruling prohibiting her brother from engaging in similar behaviour in the future.

After hearing her appeal, the judge questioned her brother Ḥijāzī. The latter confessed that he had indeed called the *muqaddim* when "news reached him" that a man named Jumʻa was sitting (*jālis*) with his sister in her "private quarters." Prior to calling the *muqadim*, Ḥijāzī testified that he rushed to her home to confirm the truth of the rumour. On arriving, he witnessed the two seated alone in her rooms. He then "closed the door upon her," and called the *muqadim* who arrested Jumʻa in her rooms.

Responding to his allegations, Ḥijāziyya challenged her brother's claims, denying that she had ever met Jumʻa in her home. Rather, she testified, Jumʻa had met with her in public (in the alley in which she lived) for the express purpose of

[138] Al-Bāb al-ʻĀlī, *Sijill* no. 124, Doc. 65.

making her a proposal of marriage. Furthermore, and contrary to her brother's claims, she continued, the *muqadim* had not arrested Jum'a in her home but "in the middle of the road."

The record then indicates that the court placed the burden of proof on Ḥijāzī, who was unable to produce "witnessed proof" (*bayinat shahd*) of his charge, and that the judge was unwilling to accept his claims without *shar'ī* witnesses to the event. Ḥijāziyya then asked the judge to enforce (*ijrā'*) the honourable *shar'* and "he responded to her request" by informing the brother that his testimony lacked corroborative evidence, and closed the session until such time as one or the other of the claimants could bring witnessed proof of their claims.

After an unspecified interval of time, both Ḥijāziyya and her brother Ḥijāzī returned to the court accompanied by witnesses from her quarter, among them Aḥmad al-Jāwīsh and Shaykh 'Abd al-Bāṣit b. Badr b. al-Faqīr Aḥmad from the *ahālī* of Saqt Maydūm? and Aḥmad b. 'Alī from Kūm Abū Khilla and b. 'Alī b. Muḥammad. All of the men testified that the *muqadim al-shubāshī* had arrested Jum'a "on the road," near the hospital (*bimāristān*), and that he was not arrested in Ḥijāziyya's home. Moreover, they served as character witnesses for Ḥijāziyya, informing the judge that she was "among the virtuous and the upright of worldly women and that they know of nothing but that," and that her brother's charge had no voracity and lacked the status of a *shar'ī* report. "And when the matter (*amr*) was found to be thus, this was precisely recorded," reads the *maḥdar*. But the case does not appear to be closed as the document concludes by requesting a *ṭalab wa su'āl*, "to be reviewed as need dictates [at some future point]." The terms *ṭalab* and

su'āl indicate the court's request for a final *fatwā* on the subject. Until such time as Ḥijāziyya obtained one, her case was unresolved.

There are several points established by this case that warrant comment and elaboration. First, Ḥijāziyya's right to meet with a suitor in a public venue for the purpose of discussing the details of her potential nuptials is clearly affirmed, and is the crux of her defense. Second, Ḥijāziyya is obviously an adult, not a minor who requires a *wālī* to contract a marriage on her behalf. It is well documented that Near Eastern patriarchal customs generally delegated such authority to male relatives, a prerogative that Ḥijāzī, her brother, seems bent on preserving. The fact that he would give false testimony, i.e. allege that his sister had been meeting with Jum'a in an illicit setting, suggests that Ḥijāzī was attempting to deflect the issue away from her *fiqh*-based rights to choose her own marriage partner, and towards her 'moral conduct.' In effect, this implies that he was aware of the fact that the courts would uphold her right to, a) conclude her own marriage contract and, b) meet potential suitors in a *shar'ī* setting, i.e. in public.

Finally, it will be noted that Ḥijāzī at no time took the law into his own hands, as is want to happen in cases of family honour, but rather, approached the *muqadim* and acted within the limits of both *qānūn* and *sharī'a*. Most importantly, therefore, this document indicates that all claims, no matter how private or sensitive, brought before the court were settled according to the criterion of Islamic legal theory rather than through customary arbitration. In addition to demonstrating the limited reach of custom in these matters, this case also reveals an expanded

moral boundary in which women are free to associate with men, provided they have legitimate reasons for doing so and a legitimate venue in which to meet.

Another example of the expanding bounds of morality is found in S. A. I. Milād's article on the *sijills* of the Ṣāliḥiyya al-Najmiyya in Cairo. In 1036/1627 Zayna bint Muḥammad b. Shams al-Dīn, known as bint Ṭurābī, alleged that her husband al-'Allālī 'Alī b. 'Abd Allāh, a *qaṣṣāb* frequently beat her and locked her within the house by "closing the door upon her," intending by such behavior "to do her harm." When he was questioned, al-'Allālī justified his actions by claiming that "she had a long tongue," that is, was verbally abusive. The judge commanded both of them to refrain from wronging one another, and further instructed the husband to "refrain from closing the door upon her."[139] Clearly, the husband is forbidden from interfering with his wife's freedom of movement and access to public space. Again, it bears repeating that this is a far cry from the early days of the conquest when women were officially prohibited from leaving their homes unless accompanied by their husbands.

If this transformation in the 'ideal' is not a sign of 'vernacularization' (i.e. the triumph of custom) in the Islamic court, is it a sign of 'Islamization' as argued by some? As argued in the Introduction, this term breeds confusion because it assumes the existence of a 'normative' Islam and, even more problematically, a normative Islamic law that the Ottomans belatedly discover. It precludes us from asking how this normative Islam is constructed and with what aim. Below, the sections on marriage and divorce illustrate the ways in which a new legal orthodoxy

[139] S. Mīlād, "Registres Judiciares Du Tribunal De La Ṣāliḥiyya Naǧmiyya," *Annales Islamologiques*, xii (1974), p. 235.

was manufactured and subsequently enforced through *qānūn* and Ḥanafī jurisprudence with the aim of standardizing practice. It also demonstrates the legal strategies by which locals circumvented some, though not all of the new laws targeting their local customs.

Section iii
Marriage Under the Ottomans

An imperial decree issued in the time of Abū al-Su'ūd, made the registration of marriage before court officials compulsory.[140] This was a marked departure from Islamic legal tradition that required no more than the signing of a document between the couple in the presence of two witnesses.[141] With a single stroke of the pen, however, marriage was brought out of the informal sector and placed squarely within the domain of the courts, leaving jurists in a position both to manage and control the institution. As shown in below, this control is manifest on multiple levels and works to ensure the convergence of legal theory with legal practice, a movement that entails the eradication of custom. As mentioned in the introduction, the courts worked to eliminate customs that eroded women's *fiqh-based* rights to consent to marriage and to secure their financial rights *within* marriage. In addition to standardizing such practices, the courts also unified the law produced by standardizing the practice of the deferred dowry and giving it the force of a *qānūn*. What variation existed was due in large part to the conditional clause in marital

[140] "Now that a Sultanic decree has been issued commanding that no marriage be concluded without the cognisance of a judge, is a marriage [concluded] without such a cognisance valid? *Answer*: No, lest it give rise to dispute and litigation." Imber, *Ebu's-Su'ud*, p. 165. G.-H. Bousquet and J. Prins, "Ādā," *EI*, CD ROM Edition.
[141] See, J. Schacht, "Nikāḥ," *EI*, CD Rom Edition.

contracts, a device which allowed women to skirt the authority of both *qānūn*s and custom.

(a) The Rights of the Bride

In Rajab, 928/1521, it was rumored that the *qāḍī 'asker* said, " I wish to make the women of Egypt follow the ways of the women of Istanbul in dealing with their husbands. It is our custom that when a husband enters marriage, the wife returns to him half her dowry, and he is not responsible for providing a *kiswa* (wardrobe) or *nafaqa fi-ṣadāqihā* (marital maintenance) but provides her with a *jawkha* (credit ledger) and two blouses once a year, and feeds her as little or as much as he sees fit." Naturally, writes Ibn Iyās, this had the effect of making the men of the *a'wām* happy and the women miserable.[142]

It is highly doubtful that the courts were successful in making brides return half of their dower, unless of course husbands were inclined to petition the courts in this regard. None of the documents used in this research contain such a case. The *sijill*s also indicate that neither the *kiswa* nor the *nafaqa* were ever replaced by the *jawkha*. The third clause, that he may feed her as little or as much as he likes, was, judging by the following documents, still on the books almost forty years after it was first issued in 928/1521. Two marital contracts, from the court of Ibn Ṭulūn in 965-66/1557-58, state that it is incumbent on the husband to ensure that his wife enjoy a wide variety of foods corresponding to the variety he consumes. In the first document, the Ḥanafi judge ratifies a contract of 'return' (spousal reconciliation)

[142] Ibn Iyās, *Badā'i'*, p. 461.

conditional upon the wife "eating a variety of foods with him [the husband]."[143] The second is a *khuṭūba* conditional upon the same.[144] Based on these two documents alone, it is impossible to speculate on the level to which people adhered to, or ignored, the judicial order of 928/1521, only to establish that there were *fiqh*-based devices limiting the state's reach into the marital domain, should people choose to avail of them. Judging by the number of marital contracts that employ a conditional clause, people availed of these strategies quite often, with the effect that they negated not only state custom but also community custom that trespassed on *fiqh*-based rights.

Every marital contract, numbering thirty eight in total, lists the amount of the bride price and, if the woman is absent from court and represented by a *wakīl*, names the person who received the dowry on her behalf. In effect, this ensured that in the event that the agent failed to deliver the bride price, he could be held accountable. There are four documents pertaining to women and their financial rights in marriage that support the argument that a system which encouraged documentation and registration, was well positioned to diminish the force of customary practice.

The case of Tufāḥa, first presented in Chapter Two, is illustrative of the ways in which popular practices could diminish the *fiqh*-based rights of women.[145] It will be remembered that two men, Dāwūd and 'Abd al-Masīḥ, claimed to have wed Tuffāḥa, one through her father's *wikāla* and the other through her brother's.

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[143] Maḥkamat Ṭūlūn, *Sijill* no. 165, Doc. 1310.
[144] Maḥkamat Ṭūlūn, *Sijill* no. 165, Doc. 1303.
[145] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 82.

In the end the case was settled because of the strength of the written documentation that Dāwūd was able to produce, a document of *khuṭūba* signed by Ilyās Effendī the Ḥanafī judge and ratified by Muḥammad al-Maghribī the Mālikī judge. While the court concluded that 'Abd al-Masīḥ's testimony was "not believed," it is also not unlikely that 'Abd al-Masīḥ had indeed paid the brother a dower which the latter appropriated. Notably, the brother is absent from the proceedings.

In the second document, the freed concubine of al-Ḥājj 'Alī the Qahwajī (also her legal *walī*), Khātūn bint 'Abd Allāh, "of white complexion," charged al-Zaynī 'Abd al-Rab al-Ḥāqān with "confronting her" and demanding that she cohabitate with him, "as wives do... without legal justification."[146] At issue in this case is a woman's right to consent to marriage. The defendant admitted to making such demands, but claimed that he had "married her" through al-Zaynī Muḥammad Ibrāhīm al-Yankasharī's *wikāla* and produced a written document indicating that he had paid the advance dower and indicating the amount of the deferred portion. He also claimed that she had received her dower in hand. When the judge sent a court appointed witness to take Khātūn's testimony (outside of court), however, she swore under oath that she had not authorized al-Zaynī Muḥammad to act as her *wakīl*, nor received any dower in hand. Ḥāqān's case was summarily dismissed for, as far as the court was concerned, his dispute was now with al-Zaynī Muḥammad to the exclusion of Khātūn bint 'Abd Allāh.

In the third document, a woman's economic rights within the marriage are at issue. A husband is jailed for failure to provide his wife with the *kiswa* agreed upon

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[146] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 771.

in their marital contract. Shaykh Naḥiyat al-Basātīn, the woman's father (who also happens to be the husband's cousin), charged that the husband had defaulted on the stipulated *kiswa* over a three-year period and produced the original marital contract signed in 1051/1641, from the court of the mosque of Qawṣūn (?).[147] Several witnesses corroborate the father's testimony and, finally, the husband himself confesses to the charges. What follows is a physical description of the husband - a blond man, clean shaven, medium build with a space between his brows (*mafrūq al-ḥājibayn*). Only two types of people were physically described in court - slaves/former slaves and those about to be jailed or released from prison.

In the fourth and final document, a father sues his daughter's husband for appropriating the money and jewelry that he had entrusted to the latter for his daughter. The husband denies the charge but witnesses confirm the father's testimony.[148] He is ordered to return the possessions and money to his wife.

Where presented with complaints lodged by wives or their families, therefore, the courts appear to have worked to delimit custom in accordance with the dictates of Islamic legal theory by safeguarding an adult woman's rights to consent, to the dower as well as other financial dues within the marriage.

b) The Deferred Dower

The case of the deferred dower make it clear that Ottoman courts were not wholly opposed to custom, so much as preoccupied with enforcing one custom above all others. Its incorporation into Ottoman law also demonstrates that Ottoman jurists were less concerned with universalizing Turkish or Anatolian

[147] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 10.
[148] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 827.

customs than with standardizing legal practice on the basis of one custom, regardless of its regional origins.

The dowry (*mahr* or *ṣadāq*) is the only marriage gift required by Islamic law, although the actual amount of the marriage settlement is decided on the basis of custom. In the earliest Islamic marriage contracts found in the Egyptian papyri, the groom gave a *ṣadāq* that was divided into advance and deferred portions, payable on the husband's death or divorce, and brides brought to the marriage a counterpart dowry (*jihāz* or *shiwār*). Rapport speculates that the practice originates in Byzantine law,[149] a conclusion drawn from the fact that the practice was common to Muslims, Copts and Jews, and resembled the Egyptian marriage contracts of late antiquity.[150]

The Islamic legal literature preserves the objections of classical jurists, including Mālik, to what they term objectionable, 'Egyptian' innovations. But eventually, concludes Rapport, "the local traditions were incorporated, albeit with modifications, into the legal discourse."[151] The Andalusian jurist al-'Utbī (d. 869) relates that "the *ṣadāq* in the marriage of the Egyptians is deferred to the time of death or divorce. And Mālik used to invalidate it before consummation."[152] In the ninth century, the jurists from Medina ruled that a woman could demand the deferred portion of her dowry at any time. But the Syrians and the Egyptians ruled

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[149] Y. Rapport, "Matrimonial Gifts in Early Islamic Egypt," *Islamic Law and Society*, vol. 7, no. 1 (Feb. 2000), p. 30.

[150] Rapport finds no difference between marriage contracts signed by Copts or Muslims on the matter of the deferred *ṣadāq* in the 9th century. But the practice he concludes, must have been prevalent in the 8th century judging from Mālik Bin al-Nās' explicit references to the practice. Ibid

[151] Ibid., p.1.

[152] Ibid., p. 6

that she could do so only in the event of death or divorce. Other prominent jurists apart from the Mālikīs condemned the practice, including Sufyān al-Thawrī and Shāfi'ī.[153] Between the ninth and eleventh centuries, however, Rapport shows that a compromise was attained such that the deferred dower was accepted in modified form. All marriage contracts from that time forward refer to the deferred *sadāq* and all include a specific time, usually ranging from one to ten years (although one contract specifies five nights), in which the remainder would be paid to the wife.[154]

But the compromise may have been more official than real, Reinhart reasons, as there is nothing to indicate that wives demanded the deferred *ṣadāq* within the specified time.[155] In his view, the custom was designed to give women leverage over their husbands and so prevent careless divorce. Shaybānī considered it a "fine or penalty on husbands and a deterrent against violations of the marital arrangements that were not formally inserted in the marriage contract."[156]

Over time the deferred *ṣadāq* would become fully incorporated in its original form such that specific dates for its payment were dropped by the Ottoman period, if not long before. Rapport suggests that this may be explained by the fact that it replaced the *mut'a*, a Qur'anic gift of an unspecified sum given to women on divorce. "Consolation payments disappear from the divorce deeds of the third/ninth

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[153] This practice is neither referred to in the Qur'an nor in the Sunna of the Prophet. Ibid., p. 9.

[154] Ibid., p. 9.

[155] The Qayrawānī jurist al-Qābisī (d. 403/1012) says that in his time it was common to pay the deferred *ṣadāq* on death or divorce. The twelfth century Maghribī scholar Abū Isḥāq al-Gharnāṭī (d. 579/1183) instructed notaries to set a fixed and definite date by which the *ṣadāq* would be payable. Ibid., p. 11. Two Caliphal edicts were issued by Hishām 'Abd al-Mālik b. 'Abd al-Mālik to the chief judge of Egypt instructing, "[i]f a wife claims her deferred *ṣadāq* (*al-mu'akhar*) from her husband, she should receive it under a specific condition," i.e., if he takes another wife or if he moves her from her local. Ibid.

[156] Ibid., p. 13.

century through the fifth/eleventh century...at least in Egypt, the *mut'a* payment became obsolete when it became common practice to defer a portion of the *ṣadāq* until death or divorce."[157] Thus here we have an example of a *fiqh*-based ruling being displaced by the customs of the urban centres of Egypt and Syria such that:

> It became the custom, seemingly throughout the Islamic world, to divide the dower into two portions, the advance dower payable on marriage, and the more substantial deferred dower payable to the wife on widowhood or divorce, or to her heirs if she pre-deceased the husband.[158]

It is worth noting how this 'heartland custom' comes to represent official Ottoman policy by the latter half of the sixteenth century.

In the beginning, the Ottomans appeared to abjure the practice, repeatedly warning court officials to ensure that the *mahr al-mithl* (full dowry) was delivered to women.[159] Eventually, however, Abū al-Su'ūd, often credited with harmonizing between the 'secular' laws and the *shar'*, incorporated this practice into Ḥanafī *fiqh*, calling for its implementation in Anatolian cities. Referring to the giving of gifts upon betrothal or engagement, and outlining what happens to the money in the event of the couple's separation, Abū al-Su'ūd goes through a variety of legal opinions before redacting them into one 'correct' opinion. When asked, "can Hind, in law, demand and receive her deferred dower when her husband is alive?" he replied, "[i]n the custom of this land, if the term is not fixed, she does not receive it

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[157] In Sunnī jurisprudence it was transformed from an obligatory payment to a recommended payment. Ibid., p. 21.
[158] Imber, *Ebu's-Su'ud,* p. 175.
[159] "The wife's claim to the full *mahr* or the full *mahr al-mithl* arises only when the marriage has been consummated; if the marriage is dissolved by the man prior to then, the wife can only claim half the *mahr* or a present (*mut'a*) fixed arbitrarily by the man; these regulations go back to *sūra* II, 237-8 (cf. XXIII, 48)." A Layish and R. Shaham, "Mahr," *EI,* CD Rom Edition.

before death or divorce."[160] In Imber's view, "Ebu's-Su 'ud is here redefining and regularizing a popular custom. *Kalin,* the earnest-money which the husband pays on betrothal, is refashioned [in the juristic language of the Egyptians and Syrians] as an advance dower, making it part of the marriage contract itself."[161]

In the *sijills* of Cairo, all marriage contracts, without exception, contain the same formula stipulating the deferred and advance portions of the *ṣadāq* and clearly stipulating that the payment of the former is contingent upon death or divorce. A typical example reads:

> ...a dowry, in the amount [stipulated] by custom (*qadrahū min al-'urf*) amount X received (*maqbūḍ*) by brother/father on her behalf by way of *wikāla*, amount Y paid up front, and the [deferred] remainder lawfully hers (*taḥilu lahā*) in the event of divorce or husband's death.[162]

The case of the deferred dower aptly illustrates that the Ottomans were not simply imposing Anatolian or Sultanic customs on others. Rather, they were motivated, for economic, political and ideological reasons, to unify the law produced. And while they may have been unsuccessful in making Egyptian brides adhere to Ottoman custom in retuning half the dower, or in giving husband's the prerogative to feed their wives as little or as much as they liked, they did manage to unify dowry practices by appealing to non-Anatolian custom.

But not all of their attempts were as successful in unifying practice. As mentioned, people availed of *fiqh*-based devices, such as the conditional clause to overcome state laws and to assert their own community customs. This often meant that they also used such devices to combat customs deemed harmful, such as wife

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[160] Imber, *Ebu's-Su'ud*, p. 183.
[161] Ibid., p. 177.
[162] Qisma 'Askeriyya, *Sijill* no. 5, Docs. 6, 7, 8, 9, 10.

beating. More importantly, however, 'harm' was so broadly defined as to encompass certain *fiqh*-based prerogatives, such as the husband's right to practice polygyny.

c) "Harm," Polygyny and Spousal Abuse

Out of thirty eight marriage contracts, six contain the conditional clause that: "if he marries other than her, or purchases a concubine of any race, by direct action or through the agency of another, she is pronounced divorced through one *talqa*."[163] Beyond this basic formula, the writing and elaboration of such clauses vary considerably from document to document. Some empower the woman to dissolve the husband's new marriage, others to dissolve only her own, while others still allow her to penalize the husband monetarily. Salameh has noted much the same phenomenon in the Jerusalem *sijill*, concluding, "repetition in the conditions of marriage that the husband should not marry another woman indicates that the practice of polygamy [sic] was common in Jerusalem."[164] Assuming that polygyny proved too costly for the lower classes, however, the practice would have been restricted to the upper classes. This suspicion is confirmed by the documents. None of the contracts for people of modest backgrounds (thirty) include such a condition. On the other hand, out of eight contracts stipulating large dowries for the daughters of notables (and in some cases the concubines of deceased notables) six include a pre-condition against polygyny. Given that a full six out of eight elite marriages contain this provision, can it still be assumed that polygyny was common, even

[163] Qisma 'Askeriyya, *Sijill* no. 5, Docs. 6, 8, 23; Al-Bāb al-'Ālī, *Sijill* no. 96, Doc 1023; *Sijill* no. 66, Doc. 32, 34,
[164] Salameh, Aspect of the *Sijills*, p. 136.

among the elite? A much larger sample of documents would need to be quantified before we can answer this question, but the sheer prevalence of this clause, whether in Jerusalem or Cairo, indicates that monogamy was judicially enforced in many elite marriages.

Given that polygyny and concubinage pre-date the rise of Islam, one may count them among the many pre-Islamic customs that were modified, incorporated into and regulated by Islamic law. The use of the conditional clause, a device which allows for the abrogation of such practices (even though neither is proscribed by the law), is a vivid example, however, of how jurists continued to modify 'morality as it is' to reflect 'morality as it should be.' In other words, while polygyny was sanctioned for men, it was hardly viewed as an absolute right. Rather, the courts appear to have treated it as a privilege conditional upon the first wife's consent.

'Harm' was not, of course, limited to the practice of polygyny but included more basic concerns such as spousal abuse. Concerns for the physical welfare of women compelled the families of two to insist on the conditional clause that she is divorced by one *ṭalqa* "if he should beat or mark her." Class is not a factor in these two particular documents, as one is an elite marriage and the other lower class.[165] Like the conditional clause prohibiting polygyny, therefore, this clause serves to censor customary practice in line with a 'perfected ideal.'

As we have seen, however, when it came to marriage, the 'ideal' pursued by the *sharī'a* courts of the Ottoman Empire could be circumvented through the conditional clause. So too, however, could customs which sanctioned polygyny or

[165] Elite marriage in al-Bāb al-'Ālī, *Sijill* no. 96, Doc 1023; subaltern marriage in *Sijill* no. 124, Doc. 27.

physical abuse. Furthermore, The attempt to unify practice, based on 'the best of customs,' was most evident in the example of the deferred dowry while the attempt to eradicate custom was most evident in the area of women's financial rights in marriage. Similarly, the trend towards universalization is nowhere more evident than in the area of divorce laws, especially those pertaining to annulment (*faskh*). Here, we witness not only the movement to eradicate customary practice, but also to redact the legal opinions of the various schools to one.

Section ii
Divorce (*ṭalāq*) and Annulment (*faskh*)

Question: "Hind's husband disappears, and she is unable to obtain maintenance. Is it permissible for her to acts as a Shafi 'i and marry another man?"
Answer: "it is permissible, so long as there is a need for maintenance." [166]

Probably after 1552, Imber writes that a Sultanic decree "rendered this solution impossible,"[167] and that Abū al-Su'ūd the original author of the above, revised his responsa to state, "there has been a Sultanic prohibition, forbidding the practice of acting as a Shāfi'ī in the lands of Rumelia and Anatolia."[168]
Shortly after this ruling, however, the chief Ottoman judge of the *qisma 'askeriyya* ratified a written document (*ḥujja shar'iyya*) of an annulment issued to the abandoned wife of a *'askerī* prisoner of war by an unidentified court. The woman had come to court to make a testamentary bequest, listing her worldly possessions and naming a guardian for her three sons by her ex-husband. The *ḥujja* of her

[166] Imber, *Ebu's-Su'ud,* p. 187.
[167] Ibid.
[168] Ibid.

annulment, presented by way of contextualizing the stipulations of the will, begins by citing a "sound *shar'ī ḥujja* issued publicly (*ṣadara al-'ishhār bi-ha*)," by the *qassām al-'askerī* of the Egyptian lands (*diyār*) annulling Maryam bint 'Abd Allāh's marriage to a Muslim prisoner of war.[169] The soldier, from the area of Sullāla, is "known as a trustworthy individual in the Egyptian lands," and it believed to held prisoner "in the Christian lands." Given the circumstances, reads the document, "God had made permissible for her divorce from him." As mentioned, the *ḥujja* was a preamble to Maryam bint 'Abd Allāh's will and, as such, the remainder of the document lists her earthly possessions and names her new husband, Bin 'Abd Allāh al-Rūmī "a worthy guardian" over her three sons, Muḥyi, Ḥasan and Ramaḍān, "in the event that she meets her fate." The latter, it reads, is also responsible for meeting both her and her sons' financial needs during the marriage while concluding "it is in her best interests and in her aforementioned sons' best interests that this should happen (*aḥsan mā yuf'al*)."[170] This is the last annulment presided over by a Ḥanafī judge in the documents at hand. From that time forward all other records of annulment from the Bāb al-'Ālī reflect a very different procedure.

While one could only obtain an annulment on the basis of abandonment from the Ḥanafī chief judge's court, the Bāb al-'Ālī, no annulment was delivered by the Ḥanafī judge himself, after the above case. Rather, such cases, numbering four in total, were delegated to a Ḥanbalī judge. In the year 1005/1596, a perfunctory formula delegating permission to the Ḥanbalī deputy is provided and mimicked in all other documents of annulment. The shortest period of absence found in this

[169] Qisma 'Askeriyya, *Sijill* no. 5, Doc. 3.
[170] Ibid.

collection of documents is eight months and the longest is four years.[171] One from the year 1055-56/1645-46, grants a woman permission to declare herself divorced, after providing proof of harm (*ḍarrar*) stemming from her husband's yearlong absence.[172] In the same *sijill,* another *faskh* is granted after a two year absence, on the basis of *ḍarrūra shar'iyya* (*shar'ī* necessity)[173]

Below a partial translation of an annulment document from the year 1055-56/1645-46, based on the longest period of absence - four years – is provided:

1. With the kind permission of his eminence the Shaykh al-Islām [extended] to our lord the Ḥanbalī judge; established (*thabat*) before him [was] knowledge (*ma'rifat*) of the woman 'Asākir, the lady bint Muḥammad al-Bannā and knowledge of her husband Khāṭir b. Sulaymān and of his absence from Miṣr and its suburbs, a *shar'ī* absence
2. which permits the hearing of a motion (*da'wa*) and a ruling on the absentee (*al-ḥukm 'alā al-ghāyib*) *shar'an,* a period of four years."

During these four years, it continues, 'Asākir had been without maintenance (*nafaqa*) or a *shar'ī* provider as her husband left naught and sent naught from which she could spend on herself "and there is naught which obligates her to remain under his protection (*'alā dhimmatih*), and he has no special status (*martab khāṣṣ*) for his continued absence to date." After the perfunctory testimony of several witnesses who corroborated this state of affairs, 'Asākir took a *shar'ī* oath "upon God almighty" that her claim was true and requested the aforementioned judge "to enact (*yaf'al*) the *shar'* and enable her to annul (*faskh*) her marital contract (*nikāḥ*) from her husband's *'iṣma,*

[171] Al-Bāb al-'Ālī, *Sijill* no. 124, Docs., 47, 58, 118,
[172] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 12.
[173] Al-Bāb al-'Ālī, *Sijill* no. 124, Docs. 47, 58.

for her harm." Thereafter, the judge enabled her to utter (*taṣrīḥ lafẓiha*) the phrase "I have annulled my marriage from my indicated husband."[174]

It is unknown why Abū al-Su'ūd, referred to the practice as Shāfi'ī when only Ḥanbalī judges granted such annulments in the Cairo *sijill.* Nonetheless, it is interesting that a *qānūn* consciously prohibited the practice only in the "lands of Rumelia and Anatolia." The fact that courts in Cairo continued to grant annulments is not evidence of the triumph of Egyptian custom, however, but of the principle of judicial *ikhtilāf.* Nonetheless, the procedural steps followed in such cases demonstrate the degree of control exercised by the courts of the chief Ottoman judge over these variant practices. No motion for *faskh* could be filed outside of the Bāb al-'Ālī, indicating that the state judiciary continued to oversee, if not grant annulments, thereby ensuring that the practice met the strictest of criteria.

A last point to be made is that custom plays no role in the Ḥanbalī judge's decision, formulated on the basis of 'lifting the harm' or 'necessity.' The fact that the period of absence ranges from eight months to four years suggests that the length of time a woman took before deciding to file for an annulment has something to do with community-based custom or even individual sensibilities. But once the case was before the court, such considerations were moot. It mattered not which *ṭā'ifa* these women belonged to, nor what their community's sense of propriety may have been.

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[174] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 12.

Maryam bint 'Abd Allāh, it will be remembered, was the wife of a prisoner of war. No doubt, community pressure would have been brought to bear on such women, at least some of the time, to remain steadfast in their marriages. But the courts entertain no sentimentality for the personal circumstances of the absent husband. The only issue of concern appears to be the degree of harm, largely economic, suffered by the woman as a result of her husband's absence. Judicial tools such as 'lifting the harm' or 'necessity' (based on considerations of *maṣlaḥa* and *istiḥsān*) could, therefore, be used to overcome customs that frowned upon such options. The very fact that the practice was banned in Anatolia is indicative of such cultural attitudes.

In summation, all aspects of marriage and divorce were strictly managed and diligently streamlined. But as demonstrated, the courts were often more successful at streamlining custom than redacting *fiqh*. Indeed, it is only where legal theory makes explicit caveats for it, as in the determination of the amount of the bride price, that custom asserts itself in marriage. The same can be said of the administration of religious endowments (*waqf*).

Section iv: *Waqf*

One of the many justifications given for the Ottoman conquest was the alleged abuse of the sacred tenets governing *waqf* under the Mamluks. Al-Damīrī wrote that Sultan Selīm invaded the Mamluk state in order to correct the abuses resulting

from the exchange of *waqf*. Even if based in some vague historical truth, the account relayed by al-Damīrī lacks credibility. Before the Ottomans, he writes, the violation of *waqf* through 'exchange' (*istibdāl*) had reached dangerous levels under the Egyptian Mamluks. As a concerned Muslim, Sultan Selīm sent a delegation of ministers to Cairo to investigate the voracity of these reports. When they met with the "*Shaykh al-Islām*" of Cairo, the Ottoman ministers asked him if it was permissible for them to 'lease' the most sacred *waqf* in Egypt –the mosque of al-Azhar, telling him that it "impressed us more than anything in the rest of Egypt and [that it] is airy and close to other residences." They were astonished to hear him say: "This is a simple matter,"[175] as, he explained, the *waqf* had yet to be legally registered (*yuthbat*) and was considered the property of the state treasury (*bayt al-māl*). When the ministers relayed this conversation back to Selīm, his outrage was such that he resolved to conquer Ghūrī's state, then and there.

The above narrative paints the Mamluk state as a degenerate polity where nothing, not even the revered *waqf* of the mosque of al-Azhar, was beyond the state's rapacious grasp. Even worse, the corruption is so widespread it extends beyond the state to include the country's *'ulamā'*, for even Egypt's top Islamic scholar, the *Shaykh al-Islām*, is complicit. But writing in 924/1517, Ibn Iyās described the Ottomans as the rapacious ones, who meddled in *awqāf* and brought impoverishment to its benefactors; men, women and even orphans and widows. [176] One thing on which both al-Damīrī and Ibn Iyās agree, however, is that the

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[175] Al-Damīrī. *Quḍāt Miṣr*, p. 47.

[176] They descended on the province of Sharqiyya, he writes, and interfered with every mode of agricultural production, extorting money from the local populace amounting to more than 100,000 *dīnārs*. Ibn Iyās, *Badā'i'*, p. 263.

Ottomans brought all large *waqf* under the jurisdictional and administrative authority of the Ottoman chief judge. Only he could make appointments to *awqāf*, introduce changes or sanction existing practices. [177]

The chroniclers provide detailed accounts of some of the conflicts that erupted between state jurists and local jurists over the administration of *waqf*. In one prominent dispute, the Ottoman chief judge, Nūr al-Dīn al-Ṭarābulsī, was challenged by the Mālikī chief judge Muḥyi al-Dīn Yeḥyā Ibn al-Damīrī, when he overturned a judgment made by 'Abd al-Bir b. al-Shuḥna (Mālikī chief judge under al-Ghūrī), concerning the *waqf* of Amīr Yashbek b. Mahdī al-Diwidār. The latter had stipulated that control of his *waqf* should go to Amīr Taghribirdī, but when the latter died, Yashbek's daughter received a judgment from judge Shuḥna overturning the previous judgment and surrendering control of the *waqf* to her. When she died, some of Yashbek's men petitioned to have the *waqf* ruling, which effectively placed it in the hands of her descendants, overturned and 'restored' to the militia. Ṭarābulsī granted their wish, leading judge Shuḥna's relatives as well as other local judges to openly denounce his ruling during an assembly. The former quickly recanted and withdrew his ruling, for which Ibn Iyās derides him.[178]

Again the *sijills* shed more light on such disputes, revealing the core issues at stake, while confirming the general thesis of this work. At its heart, the conflict over *waqf* hinges on the control of vast sums of money. Sultanic decrees or *qānūns* which sought to eradicate many of the practices derived from local custom, did so

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[177] Ibid., pp. 453-454; N. Hanna, "Administration of Courts in Ottoman Cairo," in *The State and it Servants,* ed. N. Hanna (Cairo: AUC Press, 1995), p. 46.
[178] Ibid., pp. 281-2.

for the purpose of maximizing taxation. Exceptions to the strict management of religious endowments were garnered at the highest level of state and entered into the *sijill.* This is demonstrated in document 33 from the year 1055/1645, which begins by proclaiming that an, "honourable Sultanic order was issued," publicly proclaimed and "complemented by the honourable scholars." The contents "which are directed by the hand of the eminent Sultan...champion of the *sharī'a* of the lord of the messengers, the greatest of the sultans of 'Uthmān," it instructs, "should be enacted," such that none "violate" its tenets. In the presence of eminent jurists and state officials, including the chief Ottoman judge and Ibrahīm Aghādār al-Sa'āda, the "honourable sultanic decree" was read. Explicitly permitting what prevails (*jārī*) in the *waqf* of the deceased Muṣṭafā Aghā Qullār Aghāsī in Bulāq, the decree licensed the "custom of selling comestible products from the northern and southern *wakāyil.*"[179] None of the products, it stresses, should be sold outside of the mentioned *wakāyil,* and no one should confront them on this from the *ḥisba* or the *shubāshī*'s office nor from among *ḥukām al-siyāsa* in conformity with the "honourable sultanic decree pertaining to such and the guidelines of the honourable *qanūn* prohibiting confrontation or interference in such." The current practice, it continues, of selling such products outside of the indicated *wakāyil* in Bulāq and its outskirts was strictly prohibited. Such transgressions had been verified and summarily condemned by the decree, "which demanded acceptance, obedience and enactment, without deviation. Nothing," it continues, "of the varieties [of products]

[179] These include *ḥālūm,* ox cheese, licorice root, oil, ghee, bees honey, leather products, Upper Egyptian birds, vegetables, dates, cotton, bulger, *shi'riyya* (type of thin wheat noodle), fruit, Fayūmī apples, and a gamut of other products.

mentioned, not even some of them, are to be sold except through the indicated *wakāyil*." The decree, directed to state and judicial officials, "obliges compliance and is conveyed by means of the indicated honourable, respected, *buyuruldī*, that the indicated products are to be sold through the indicated *wakāyil* and that no challenger should challenge, and no intruder should intrude upon the indicated honourable decree, dated twenty eighth Sha'bān of [that] year, and the indicated *buyuruldī* dated the twentieth of the month... its contents are to be followed without exceeding it linguistic meaning or deviation from its text." A final sentence justifies the decree on the basis that it provides "benefit, and no harm to the *waqf*."[180]

The above document is perhaps an exemplar of the kind of evidence scholars employ to argue for the 'triumph' of custom and the declining authority of the Ottoman judge. However, rather than suggesting a declining Ottoman authority, the document highlights the 'exceptional' nature of the customary practice (*'amal*) tolerated in this particular case. We can only speculate why the exemption may have been granted, but we can confirm the lengths to which the decree warns officials from both the *ḥisba* and *shubāshī*'s offices to refrain from interfering with the practice. In other words, the institutions of state appear to be functioning well, so well in fact that the decree finds it necessary to repeatedly warn state officials from challenging the practice. It is also notable that the challenge posed by state officials had been so effective that the products were "now sold throughout Bulāq and beyond."

[180] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 33.

That said, there were other ways in which *waqf* practices could be used to promote custom, in a manner the Ottomans were unable to control. In the case of Mālikī *waqf,* A. Layish has shown how 'familial' *waqf* was used to circumvent the 'laws of succession' in Mālikī *waqfiyyāt.*[181] Because Islamic legal theory allowed the revenue from any holdings to be bequeathed as the founder sees fit, there was little the state could do to prevent the former from circumventing the rules of *sharī'a* inheritance to bestow all, some, or none of the benefits on one or more individuals. In theory and in practice, therefore, the benefactor could disinherit his daughters, or at the other extreme, use it to exceed the portion allotted to women under the *sharī'a.*

A case from the Bāb al-Ali in the year 1055-56/1645-46, documents the process by which the founder of an endowment disinherits all his female descendants. Before the Ḥanafī judge, Fatma bint Ḥasan 'Alā' al-Dīn alleged that the legal overseer for a her familial *waqf,* her paternal uncle Muṣṭafā bin 'Alā' al-Dīn bin Qāsim, had dispossessed her of a *shar'ī* share of her deceased father's portion of the *waqf* proceeds, over a period of four years. The defendant responded to the charge by explaining that the original founder of the *waqf* had stipulated that the proceeds should go to "his indicated children, excepting the female children of the womb and that the plaintiff was not included [among the beneficiaries] of the mentioned *waqf* on account of her female gender, and he produced in hand a copy of the *waqf* contract, written in the Ṣāliḥiyya and dated the 13th of Jamād al-'Awwal, 934/1527." The original document had been subsequently ratified in the court of the

[181] Layish, "The Mālikī Waqf," pp. 9-10.

Bāb al-'Āli by the Ḥanbalī judge on the 27th of Rabī' al-Thānī, in the year 1027/1618. The original document, read aloud by the plaintiff, asserted that the founder endowed the property for the benefit of "his children's, children's children, specifically the males to the exclusion of females." Once the contents of the original document were verified, and "the truth of the motion (*ṣidqat al-da'wa*) was established," the plaintiff asked the judge "to implement the honourable *shar'* in his favour. And the judge responded [to his request] and prevented the plaintiff [Fāṭima] from challenging the defendant on this account, because she is not one of the sons of the aforementioned and because daughters are not included (*lam yadkhulūn*) in the *'amal* of the conditions of the founder."[182] Obviously, the courts were unable to reverse the clauses governing the administration of this *waqf*, even if it circumvented the 'intentions of the law' (*maqāsid al-sharī'a*), by disinheriting women.

Diametrically opposed to the conditions stipulated in the above *waqf* are those stipulated in another *waqf*, that of Amīr Muṣṭafā Aghā son of the former head of *ṭā'ifat Qāli Qūllī* in Egypt. Recorded in the same year as the document above, this document occupies a page and a half in the *sijill*, recording every detail of the *waqf*'s founding, including references to numerous associated documents from 1053, the year of its founding. It was ratified by both the Ḥanafī chief judge and a Mālikī judge, indicating that the founder belonged to the Mālikī school. The conditions of the founder were that the proceeds from the *waqf* be distributed among his daughter and two wives. Future generations of male and female

[182] Al-Bāb al-'Āli, *Sijill* no. 124, Doc. 5.

descendants, however, were to receive their *shar'ī* share, such that "one male would receive the shares of two females."[183]

It is unclear whether Mustafa Agha had any male progeny at the time of his death. But judging by the stipulation that later generations of descendants would receive a portion of the *waqf* revenues based on the *shar'ī* division of inheritance, one can assume he did not. Nonetheless, unlike the last founder, Muṣṭafā Aghā bequeathed his female descendants a share of the benefits which corresponded to their share under the Islamic laws of inheritance. The differences between the two highlight the variation that existed in practice stemming from variation in customs and individual commitment to the 'divine laws.'

In the final analysis, it is the theory of the legists which allowed the founders of endowments to dispose of their wealth in a way that conformed with, or violated the *shar'ī* rules of inheritance. Otherwise, as indicated by the first case, the administration of *waqf* was a well-monitored business. Moreover, extensions in the chief Ottoman judge's jurisdiction meant that judges from the other schools of law were constrained to act within the limits established by the former. Ḥanafī chief judges presided over every *waqf* document, often times alongside one or more judges from the other schools of law.[184]

Thus, while the Ottomans were unable to eliminate other schools of law, or to eradicate customs explicitly protected by legal theory, they did ensure that

[183] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 12.
[184] In cases of large *waqf*, it is not uncommon to see judges from all the schools of law presiding.

variations in the interpretation of the rights of God in the areas of marriage, divorce, public morality and endowments, were strictly managed.

Conclusion

Chapter one illustrated how the rhetoric of *tajdīd* and *takfīr* allowed the Ottomans to justify their conquest and rule. This chapter demonstrates how the appeal to *nāmūs* allowed the state to legitimate its judicial policies - to unify the law produced - by diminishing variation arising from custom. As shown in Parts I, and II, however, the boundaries of this unified moral ideal were never static on either the theoretical or practical level. While 'acts' in Islam were assigned a definitive value based on the criterion of 'ugliness' and 'beauty,' this value was never fixed. Moreover, this value was not simply developed for the sake of legitimating custom, as implied by Libson, but equally, for controlling it. The discussion provided in part I illustrated that the judicial attempt to define/regulate 'acts' arising from custom was an endeavor to delimit the latter's broad scope in the classical period. The pre-occupations of *fiqh* with the limits of *siyāsa* and popular religious customs in the fourteenth and sixteenth centuries, stemmed from a judicial apprehension that 'negative innovation' (*bid'a*) based in custom would eventually infuse and distort Islamic doctrines. The architect of the theory of *maṣlaḥa*,' the Mālikī, Andalusian Shāṭibī, was especially concerned that custom would influence *'ibādāt*. Shāṭibī argued that 'innovation' could only occur in the rights of God, whereas Ibn Nujaym who lived in a state which purported to apply "the best *niẓām* in God's way" argued that innovation could also occur in the rights of man

(*mu'āmalāt*). He and others viewed the Ottoman attempt to define and apply a 'perfected moral law' (*nāmūs*) stemming from a 'higher *siyāsa*,' as invalid innovation. As such, his development of the theory of custom was meant to invalidate the 'universal' customs contained within Ottoman *qānūn*. The arguments of various Egyptian jurists confirmed that this was a shared concern for many as well as a source of tension manifest, not between *sharī 'a* and *qānūn*, but between *qānūn* and local custom. In other words, 'local custom' was asserting itself **vis-à-vis** 'imported' and 'perfected' *qānūn*.

'Perfection' was, however, imperfectly defined. As shown in Part II, the Ottoman ideal was neither static nor immutable and continuously shifted to reflect a 'new moral ideal.' The state which oversaw the public humiliation, and sometimes torture of women accused of unchaste conduct in the early sixteenth century, was not the same state which officiated over Ḥijāziyyas's case in the mid seventeenth century. At the very least, it was a state with a new moral compass. An expansion in the bounds of Muslim moral conduct, in particular regarding women, their freedom of movement and their rights in marriage was evinced. Similarly, the codes governing criminal penalties and the use of intoxicants expanded and contracted, as shown by the example of coffee.

As the Ottomans attempted to regulate what are arguably the most regulated of Muslim institutions – *waqf*, marriage and divorce- they did so with the understanding, at least for the better part of the sixteenth century, that this was a right delegated to them as institutors of a perfected moral order. The rights of God could never be changed in and of themselves, but they could be refined where

informed by custom. Attitudes to women and public space were a good example of this. Where jurisprudence generally permitted local custom to determine certain thresholds of modesty (e.g. whether to cover the face or not, whether to practice seclusion or not etc.), the *qānūn* codified morality by banishing women from public, or conversely guaranteeing their access to public space. Customs, and the variation in standards they foster, were virtually ignored in both cases. As shown in Ḥijāziyya's case, the conduct of her brother never fell outside the bounds of the law. He never confronted her or her consort Jum'a, instead he notified the *muqadim* who made the arrest and detained the latter. In this example, local customs which extend to males authority over their female relatives in matters of marriage and 'honour,' are in direct conflict with a woman's *fiqh*-based right to choose her own marriage partner. As argued, this demonstrated the limited scope of custom in the *sharī'a* courts of the late sixteenth century in the most sensitive areas of family law. This was also true of women's *fiqh*-based financial rights in marriage, which the courts worked vigilantly to protect.

Neither the zeal, one might even say extreme conservatism, of the Ottomans in the first quarter of the sixteenth century, nor the relative liberalism they display later in the century, left much room for custom. As argued, the state and its courts remained committed to one 'ideal' law, no matter how the 'ideal' was (re)defined. This was demonstrated in the case of *waqf,* where little room for deviation, except that guaranteed by sultanic writ, was countenanced even in the mid-seventeenth century. The only areas in which custom features prominently, albeit stealthily, are in the conditional stipulations naming the benefactors of *waqf,* entirely the

prerogative of the founder. As shown, this was one of the few areas in which the standards of a community or family consistently influenced the function of an important Islamic institution.

The argument that custom was a diminishing source of influence should not suggest, however, that the Ottoman state was opposed to custom altogether or even pre-disposed to a particular category of customs, so much as it favored a universal law that strove for legal standardization or, in their religious rhetoric, the moral perfection of society. Custom could never be excised, given that *fiqh* had allotted it an important role, but the 'best' of customs could be universalized to establish a singular standard of 'correct conduct.' If a custom from any region conformed to the perfected ideal, it was embraced and universalized, not just as the 'best' of customs but, as the best law on which to base a single, valid jurisprudential view. This form of legal redaction was amply demonstrated in the example of the deferred dower, and the abandoned wife's right to an annulment.

We may now examine these issues from the perspective of the rights of man, or *mu'āmalāt*, no less redacted or innovatively interpreted by the Ottoman courts.

Chapter Four

Mu'āmala as it is and *Mu'āmala* as it Should Be:
Custom & the Rights of Man (*Ḥuqūq al-Ādamiyyīn)*

Introduction

If the Ottoman *nāmūs* served to promote a unified standard of Muslim moral conduct in the area of *'ibādāt,* it was no less instrumental in the unification of *mu'āmalāt.* The relationship of *mu'āmalāt* to custom is well established. As the main body of laws pertaining to the 'rights of man,' the *mu'āmalāt* stand in contrast to the *'ibādāt,* or ritual associated with the rights of God in Islamic law.[1] *Mu'āmalāt,* in M. Bernard's words: "preside over the relations of men among themselves"[2] by defining "juridico-human relations" to ensure that Muslim transactions conform to "juridico-moral theories."[3] In its original meaning, "*mu'āmala* reflected the community's way of life at the beginning of Islam." With the development of Islamic civilization, the concept evolved, became diversified, was woven into various disciplines (notably *kalām, fiqh* and *'amal*) and applied in a range of models. As a concept, however, it would never lose its original connection with the community's way of life.[4] *Mu'āmalāt,* therefore, retain an even more direct

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[1]According to M. Bernard, *mu'āmalāt* brings us into the fields of *kalām fiqh* and, more precisely, *'amal.* In *fiqh,* it deals with problems of conduct, as opposed to *kalām* which is the branch that deals with dogmatic theology. In its strict and first sense *mu'āmalāt* refers to transactions of credit granted by a donor to a beneficiary. M. Bernard, "Mu'āmala," *EI,* CD Rom edition.

[2] Ibid. Also see, H. Laoust, *Essai sur les doctrines sociales et politiques d'Ibn Taimiyya* (Cairo: 1939).

[3] Ibid. Also see, R. Brunschvig, *Études d'Islamologie* (Paris: Maisonneuve et Larose, 1976).

[4] In the formative period, the term *mu'āmala* included contracts of cultivation (*mizāra'a*) as well as a "body of rental transactions governing employer-employee relations. Al-Jāḥiẓ (255/869) gave the concept "a psycho-social significance" and "a cultural colouring." With him, the word designated the broad "behaviour dictated by a body of moral rules." In the *Iḥyā'* of al-Ghazālī (d. 505/1111), the study of *mu'āmalāt* is contained in that of *fiqh.* The rights and obligations of created beings forms the basis for the "customs (*al-'adāt*) that can be looked at from two viewpoints: (a) exchanges, such as buying, selling, association, giving, lending, debt, etc. (b) contracts, such as marriage, divorce, emancipation, slavery, rights of succession, etc." Bernard, "*Mu'āmala.*" Taken from, L. Gardet, *Introduction à la théologie musulmane* (Paris: J. Vrin, 1948), p. 119.

link to customary law than *'ibādāt. Fiqh* forms part of the *'adāt* - that is, the expression of the concept of *adāb* into concrete form - by integrating *mu'āmalāt* into a rigorously structured body of ethics.[5]

Under the Ottomans, an extensive and popular network of courts fostered an environment in which *mu'āmalāt* was ever more closely scrutinized and ever further assimilated to this body of ethics. In turn, the records of the *sharī'a* court reflect the core principle at the centre of these ethics - the unification of the legal process and, to a large extent, the law produced. A detailed examination of the documents will demonstrate that while references to custom are not rare, they are both qualified and limited. Thus, without implying that custom plays a minimal role in the courts, the examples culled highlight the insufficiency of the argument that custom is a prolific source of legislation in all categories of law. As demonstrated in Sections i and ii, the courts clearly regarded some customs as benign and others as subversive, that is in opposition to *fiqh* or *qānūn*. It is also significant that the language of the documents is highly differentiated and precisely delineated when referring to custom. Thus, the records speak in terms of the custom of a given *ṭā'ifa*, a particular region, locale, or even *ḥayy* (*al-jārī fī al-mulk*). It speaks of "old customs" (*'urf* or *'āda qadīma*), "prevalent custom" (*al-'āda al-jāriyya*) and new customs (*tajdīd*). It also speaks of fiscal practice (*mu'āmala māliyya*) as historic fiscal practice

[5] Ibn Khaldūn stressed the sociological aspect of the question, insisting on the fact that this problematic is dependent on reasoning. To him, the science of *mu'āmalāt* represented a branch (*far'*) of *'ilm al-Ḥisāb* which forms part of rational, positive (*'aqliyya ṭabī'iyya*) knowledge as opposed to traditional, scriptural (*'aqliyya waḍ'iyya*) knowledge. These two types of knowledge are diversified and refined in proportion to the development of civilizations. In this sense, Ibn Khaldūn opens the door to innovation. Bernard, "Mu'āmala."

(*mu'āmala tārīkhiyya*), or as fiscal practice in the Egyptian lands (*mu'āmala bil diyār al-Miṣriyya*). But, the language of the *sijills* can often be misleading as the various terms used to denote custom often indicate non-local practices. As shown ahead, when the registers use the term "old customs," they are often referring to Ottoman rather than to pre-Ottoman practices. Hence, a careful reading of the text easily dismisses the assumption that all references to custom are expressive of 'grassroots' legislative trends.

Beyond the conceptual brackets generated by the variegated lexical tropes above, two more conceptual brackets are generated by this research, that between the public and private *mu'āmalāt*. More often, custom is encountered in the latter area, the subject of Section ii, and is invariably defined by the courts in relation to a specific community or guild in matters of taxation, metrology and *iltizām*. In the private domain, custom is defined in relation to the individual's community and is generally encountered in customary arbitration (*ṣulḥ*) or marriage.

Technically speaking, marriage falls under the rubric of *'ibādāt*, but it also has an element that is pure *mu'āmalāt*, wherein the conventions regulating the relationship between two individuals, between the individual and the community, or between two communities, are outlined. An examination of these documents sheds light on such conventions by revealing the number of marriages that occur both within communities and across ethnic and class lines. Moreover, it clarifies the *sharī'a* court's view of the individual's linkages to, and autonomy from, the 'normative' practices of a given community. What is revealed is a consistent pattern of arbitration that seeks to relax the bonds between the individual and the

community in favour of enhancing the ties between the individual and the state. *Ṣulḥ* documents, containing the terms by which a private dispute is settled, will also help us to scrutinize the means by which customs arising in private *mu'āmalāt* are co-opted within a defined moral-juridical paradigm and assimilated to *sharī'a*.

There are similarities, as well as differences, in the courts' view of the customs arising from public and private *mu'āmalāt*. While the latter regulate relations between individuals or communities, the former regulate those between community and state. The definition of a benign and a subversive custom is, however, generally the same in both cases. Public law, the subject of Section iii, demonstrates a more pointed attempt to streamline or redact custom by assimilating community practice to *qānūn*. Thus, while one encounters a good deal of tolerance for custom in the field of municipal law (where a community's normative values are allowed to define that which constitutes one person's breach of another's privacy) the majority of documents dealing with fiscal practices, particularly metrological systems, convey hostility. This is not to imply that such policies were absolute or that they brooked no exceptions, for the *sijill* indicates otherwise, rather it is to argue that, in most cases, the exception proves the rule. Together, the combined evidence of the *sijills* and historical chronicles supports the conclusion that exemptions from this general policy were granted on a conditional basis and subject to periodic review.

Ultimately, the legal system under investigation precariously balanced questions of community control, individual autonomy and state dominance. The ambiguity this implies in relation to custom is never incoherent however. When

expedient or irrelevant from the court's perspective, custom is regarded as benign (*'āda murḍiyya*) and treated with lenience by the courts. The courts appear willing, for example, to legitimate or annul a custom, if perceived as 'benign,' at the individual's request, effectively granting the latter a measure of legal autonomy from his/her community. Also, when customs arising from public *mu'āmalāt* threatened to undermine the universalizing agenda of the *qānūn* or the tenets of the *sharī'a,* they were expunged, as far as possible, from legal practice. In the final analysis, this level of engagement between the jurist and local practice is possible only when supported by two pre-requisites, the need for legal documentation and an accessible court. Without the latter, it would not have been possible for jurists to penetrate the informal legal sector or to modify its practice. In other words, the degree to which the court records cite custom is also indicative of the degree to which the latter had already been assimilated into a dominant state-juridical paradigm. If this claim is shown to be valid, there are two unavoidable implications: one, that community bonds were undermined in favour of strengthened ties between the individual and state; and two, that the autonomy of the community was eroded.

As the community is at the root of most of the customs we consider, an understanding of the integrity and self-sufficiency of these social units is essential to any work which presumes to assess the role of custom in the *sharī'a* courts of Ottoman-Cairo. Section i provides such an introduction as well as a review of the major scholarly contributions to the study of Islamic law, urbanism and society by broaching the debate on whether communities in this urban landscape were autonomous from, or bound to, the state and its courts.

Section i
The Empire in the City; Multiplicity and Conformity

Any study of law and society is indebted to scholarship on the history of the Islamic city. The earliest scholars, W. Marçais[6] his younger brother G. Marçais, J. Weulersse and R. Tourneau, all of whom attempted to define the general characteristics of the Islamic city, have since been critiqued for viewing the Arab urban centre as a parasitic entity, artificially grafted onto the countryside, a mere "gathering of individuals with conflicting interests who, each in his own sphere, acts on his own account."[7] S. Humphreys writes they paid little heed to "Islam per se as a determining factor in urban life."[8] When it was considered as by G. von Grunebaum, Islam's relationship to urbanism was framed within an ideal, but static urban typology, formulated on the basis of the 'classical city.'[9]

Further research, particularly by H. Gibb and H. Bowen, I. Lapidus, C. Cahen and C. Geertz, paved the way for research into the institutional and economic life of the Islamic city.[10] Cahen argued that the Islamic city essentially

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[6] See, W. Marcais, "L'Islamisme et la vie urbaine," *Comptes-rendus de l'Académie des Inscriptions et Belles-Lettres* (1928): 86-100.

[7] In his *Alepp*, Sauvaget concluded that "the Muslim era...is unaccompanied by any positive contribution....the only thing we can credit it with is the dislocation of the urban centre...the work of Islam is essentially negative." J. Sauvaget, *essai sur le développement d'une grande ville syrienne, des origines au milieu du XIX siècle* (Paris: Geuthner, 1941). Quoted from A. Raymond, "Islamic City, Arab City: Orientalist Myths and Recent Views," *Arab Cities in the Ottoman Period*, Variorum Collected Studies Series (Ashgate: Variorum, 2002), p. 54.

[8] They also argued that there was a specifically urban population existing parasitically, and in isolation from the countryside. Weulersse used the phrase "encysted like a creation imposed on the countryside it dominates and exploits." R. S. Humphreys, *Islamic History: A Framework for Inquiry*, revised ed. (Princeton: Princeton University Press, 1991), p. 229. Also see, A. Raymond, "Islamic City, Arab City," p. 3

[9] G. von Grunebaum, "The Structure of the Muslim Town," *Islam, Studies in the Nature of a Cultural Tradition*, (1955): 141-58.

retained the same features as the cities of late antiquity until the eleventh century while Lapidus employed a sociological approach emphasizing the study of the social groups that made up the urban populace.[11] However, O. Barkan's first studies on the tax system and demography of Anatolian towns, based on extensive Ottoman archival documents at the end of the 1930s, dispelled some of the more flagrant misconceptions of the Islamic city as did J. Abu Loughod's "devastating expose" of Orientalist analysis.[12]

None of the above would have been possible, however, without the ample documentation contained within the Ottoman archives, documentation which "called into question the conception of generalized Ottoman decadence."[13] The *qāḍī*'s registers (*sijill*) made clear the role of the judge in the urban administration of the city and underscored the sophisticated institutional structure needed to maintain the elaborate legal network over which he presided. Among the first to address the relationship between law and the Islamic city, R. Brunschvig demonstrated that later Mālikī jurists addressed urban issues quite explicitly.[14] Giving new impetus to the study of urbanism and Islamic law, B. Johansen and

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[10] See, H.A.R. Gibb and H. Bowen, *Islamic Society and the West*, 2 vols. (London: Oxford University Press, 1957); I. Lapidus, *Muslim Cities in the Later Middle Ages* (Cambridge: Cambridge University Press, 1984); C. Cahen, "L'Histoire économique et sociale de l'Orient musulman médiéval," *SI*, ii (1955): 93-15; O. Grabar, "The Architecture of the Middle Eastern City from Past to Present," ed. E, Richard, and O. Grabar. *The Art and Architecture of Islam, 650-1250* (New York: Pelican History of Art, 1987): 26-46; and "Cities and Citizens," ed. B. Lewis, *The World of Islam* (1976): 89-116.

[11] Humphreys, *Islamic History*, p. 230.

[12] See Raymond, "Islamic City Arab City," pp. 7-8; He writes that, "a variety of things account for this phenomenon: historical reasons (artificial settling by foreign masters), a... variation on the often repeated theme of the incapacity of the Arabs to govern themselves and their submitting to 'foreign' dynasties." Ibid.

[13] Ibid., p. 8.

[14] R. Brunschvig, "Urbanism médiéval et droit musulman," *REI*, xv (1947): 127-155.

others were encouraged to explore what had, until then, been considered the 'silence of Islamic law on Islamic urbanism' to argue that the administration of the city was based on clear Islamic intellectual doctrines.[15] H. Gerber, R. Jennings, U. Heyd, must be credited for devoting considerable energies to identifying and quantifying these doctrines in practice through their examinations of the *sijill* and *qānūnāmas*.[16] In the case of Cairo, the collective research of A. Raymond, M. Winter, S. Shaw, N. Hanna, and G. Nahal must be given special mention for their exploration of the institutional, economic and cultural features of Cairo in the Ottoman period.[17]

While he does not address the issue of urbanism and law directly, Raymond was among the first to delineate the urban geography of Cairo and to construct a framework for the study of its communities. Ottoman administration, he concluded, was delegated on the local level as the state came to an arrangement that allowed local autonomous structures to function, saving them the trouble of direct administration.[18] It is an indicator of the relative autonomy and self-sufficiency of

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[15] Raymond, "Islamic City Arab City ; Orientalist Myths and Recent Views." *British Journal of Middle Eastern Studies*, 21, 1 (1994) p. 8.

[16] U. Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Menage (Oxford: Clarendon Press, 1973); R. C. Jennings, "Kadi Court and Legal Procedure in Seventeenth Century Ottoman Kayseri," *Studia Islamica*, 48 (1978): 133-72; and, "Limitations on the Judicial Powers of the Kadi in Seventeenth Century Ottoman Kayseri," *Studia Islamica*, 50 (1979); H. Gerber, "Sharia Kanun and Custom: the Court Records of 17th-century Bursa," *International Journal of Turkish Studies*, 21 (1981): 131-147; and *State, Society and Law in Islam* (New York: SUNY Press, 1994).

[17] N. Hanna, "The Administration of Courts in Ottoman Cairo," *The State and its Servants; Administration in Egypt from Ottoman times to the Present*, ed. N. Hanna (Cairo: American University Press, 1995); G. Nahal, *The Judicial Administration of Ottoman Egypt* (Chicago: Bibliotheca Islamica, 1979).

[18] This policy he argues "could only strengthen these communities and give them free reign in order to carry out their activities, under the watchful eye of the Ottoman political and judicial authorities." A. Raymond, "The Role of the Communities (*tawa'if*) in the Administration of Cairo in the Ottoman Period," *The State and its Servants:*

the communities in their internal governance, he argues, that each community was placed under the authority of its own chiefs/shaykhs. The Jews of Cairo, for example, had their own closed quarter and their own judge, called a "Momaraia," while seven Coptic quarters existed in and around the suburbs of Cairo.[19] Beyond religious communities, various ethnic, linguistic and professional communities also congregated in fixed neighborhoods.[20]

Raymond argues that the self-sufficiency of these ethnic groups was an important element in their strength, as "their influence depended on their national and geographic cohesion."[21] Winter confirms this cohesion, writing that even:

> The *riwaq*s, [student apartments] were divided ethnically or regionally. Thus, there were the *riwaq*s of the Turks (*Arwam*), Syrians, Maghribis, Upper Egyptians, natives of the Sharqiyya province and so on.[22]

Administration in Egypt from Ottoman Times to the Present, ed. N. Hanna (Cairo: American University in Cairo Press, 1995), p. 236.

[19] Ibid.

[20] Physically, the various ethnicities, religious groups and residential and trade guilds that formed the subject of the law were physically divided into "geographical communities gathering inhabitants of a given quarter together." The Turks were known to reside in the Khān al-Khalīlī district, where they established a merchant community trading in tobacco for the most part, but later also coffee. Cairo's large Maghribī community established itself in trade on the pilgrimage route and was clustered into neighbourhoods around al-Ghūriyya and al-Faḥḥāmīn and around the mosque of Ibn Ṭulūn. The Syrian community, which was smaller than the others and traded in fabric, coffee and in soap, lived around Khan al-Ḥamzāwī and in the Jamaliyya quarter. Finally the Europeans lived along the Khalīj banks. M. Winter, *Egyptian Society Under Ottoman Rule, 1517-1798* (New York: Routledge, 1992), p. 228.

[21] "Obvious linguistic and cultural reasons," he argues, facilitated the assimilation of Syrians and North Africans into the local population, rendering their communities "less visible in the geography of the city." Not so the Turks, who "because of the linguistic difference, stood out very noticeably." A. Raymond, "The Role of the Communities," p. 240; Winter concurs, writing that as far the Maghribīs went, " family groups such as the Shadhilis, the Wafa'is or the Sha'ranis, lost their Maghribi traditions and became wholly Egyptianized. More recent newcomers, however, retained their Maghribi clothes, dialect and custom." Winter, *Egyptian Society*, p. 160.

22 Ibid., p. 119.

Even the Sufi orders, he continues, "as a general rule...were not ethnically mixed," as there is evidence that points to separate orders for Turks and Arabs.[23] The *waqf* document for the *zāwiyya* (Sufi convent) of Ḥasan Ibn Ilyās al-Rūmī al-Istānbūlī, for example, established in 933/1526 by Sulaymān Pasha, governor of Egypt, stipulated that it was exclusively reserved for non-Arab residents and that "all functionaries from the shaykh down to the manual workers, had to be non-Arab."[24] The *takiyya* (convent) established for the Sufi Ibrāhīm Gü lshenī, did not have a similar stipulation and yet all indications are that most residents, if not all, were Turks, he concludes.[25]

Because of the physical cohesion of the communities, a degree of cultural cohesion and ethnic consciousness could be fostered.[26] Clashes, both cultural and physical, were not uncommon and illustrate the complexity and delicacy of maintaining social harmony in a cosmopolitan city. Examples of 'culture clash' between resident Egyptians and the newly arrived 'Turks' abound. In Iyās devotes a full page to an Ottoman custom that shocked and revolted the residents of Cairo. In the year of the conquest, Khayrbek called on "anyone who sees a dog to kill it and

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[23] Ibid., p. 156.
[24] Ibid.
[25] This is corroborated by Evliya Celebī's description, written 150 yrs after its founding. Ibid., p. 157.
[26] As far as the Sufi guilds went, Winter wrote: "If there was friction between Turkish and Arab Sufis in Ottoman Egypt, the sources do not mention it. Yet it is significant that the most serious incident between Turkish-speaking and Arabic-speaking Muslims in Ottoman Egypt started as an attack on Sufism." Ibid. Followers of the Turkish fundamentalist writer, Birgilī Mehmet (d.1573), the preacher known as al-Wā'iz al-Rūmī, rioted in October 1711 when he put out a list of 'blameworthy innovations' and incited his all-Turkish audience to denounce and remove them from Cairo.[26] Winter interprets this as, in part, a confrontation between 'pre-Wahhabites' or 'neo-Ḥanbalites' but also between Egyptians and Turks. Ibid., p. 159.

hang it above their shops," as per the customs of the new rulers.[27] The strong revulsion which this 'slaughter' engendered, led people to implore the *muḥtasib*, Zaynī Barakāt b. Mūsa, to ask the governor to put a halt to the practice. This "strange" custom, explains Ibn Iyās, originated in Istanbul, where stray dogs were culled during the *Khamāsīn* (spring windy season) in efforts to avert the outbreak of plague. Such episodes provided fodder for the ethnic denigration of the Turk, a sport relished by Ibn Iyās:

Ponder what has happened to Egypt,
an event draped in torture.
When the Turk cared not for spilled [human] blood,
would they spare the blood of dogs?[28]

Another custom which provoked Khayrbek himself to intervene was the looting of Zuwayla alley, a Jewish neighborhood, by the Inshikāriyya troops. As it turned out, this was the first sign of Selīm Shah's death as it was customary for Ottoman militias to loot Jewish alleys when a sultan died. A crisis was averted only when Khayrbek offered the soldiers monetary compensation in lieu of the raid.

Cultural and ethnic tensions could also end in violent conflict, as in the reign of Uways Pasha 994-999/1581-1590, when a Sipāhī *fitna* assumed racial and sectarian overtones. The Sipāhīs attacked the governor's *dīwān* and harassed the local populace, calling on *awlād al-'Arab* to relinquish their white Mamluks and on Jews to relinquish their concubines. Offenders, they warned, faced execution within

[27] Muḥammad Ibn Aḥmad Ibn Iyās, *Badā'i' al-Zuhūr fi Waqā'i' al-Duhūr*, ed. Muḥammad Muṣṭafā, vol. 5 (Weisbaden: E.J. Brill, 1975), p. 246.
[28] Ibid., pp. 248-9, 366.

a three-day period.[29] The Sipāhīs were rioting over monetary remittances they felt were owed to them by the treasury and were, eventually, violently suppressed, but little else is known of the context in which this episode occurs. The fact that it assumed 'ethnic' overtones, however, suggests the existence of such tensions beneath the surface.

The anonymous Egyptian author of a manuscript known as the Gotha manuscript, describing the guilds of Egypt in the late sixteenth or seventeenth century, "accuses the Ottomans of having caused the decline of the guilds and discriminating against the Arabs," conveying "the anti-Ottoman attitude prevalent among Egyptian artisans."[30] Ethnic tensions were not, therefore, uncommon and could occasionally erupt into violent conflict. The state's need for mediating such conflicts, as well as the need to project an image of impartiality, is an important underlying motive for standardizing the law produced. One means of accomplishing this was to weaken community bonds in favour of stronger ties between the individual and the state.

Raymond, however, argues that apart from the obvious physical/cultural cohesion of Cairo's ethnic groups into distinct communities, there was a high degree of control exercised within the communities over the conduct of inhabitants.

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[29] 'Abd al-Razzāq 'Abd al-Razzāq 'Īsa ed., Shaykh al-Islām Muḥammad b. al-Surūr al-Bakrī al-Ṣiddiqī, *al-Nuzha al-Zahiya fī Dhikr Wulāt Miṣr wal-Qāhira al-Mu'izziya* (Cairo: al-'Arabī lil-Nashr wal-Tawzī',1998), pp 163-65. This chronicler (b. 988/1589, d. 1087/1676) writes that their demands were met when they kidnapped 'Uways' Pasha's son. No one, not the chief judge, the Pasha, the *daftardār* or other *akābir*, could dissuade them from disobeying the sultan. The Sipahīs were eventually subdued by the next governor, Aḥmad Hāfiẓ al-Khādim, who reigned for five years. Ibid.

[30] G Baer, *Egyptian Guilds in Modern Times* (Jerusalem: Israel Oriental Society, 1964), p. 14. He also describes a seventeenth century struggle between guild shaykhs and the Governor over the control of the guilds.

While he says little about the courts in this regard, he does imply that arbitration and censure formed the basis of an informal legal system rooted in community customs. For that reason, *ḥārā*s were narrow and usually gated for the purposes of security. Arbitration and censure flowed from the customary laws/norms of that particular group, he concludes, as illicit behaviour was "noted and acted upon by neighbors."[31] But P. Ghazaleh has cautioned against postulating terms such as 'autonomy' or 'state control' too freely, writing "the guilds' internal organization," for example, "further demonstrates the guilds' complex relationship with the state and society on the one hand, and the scope of their independence concerning decision-making, on the other."[32] When examining the relationship between the communities and the courts, one must heed such caution.

To assume that the communities were autonomous, particularly in legal matters, is problematic. First, we must distinguish between *dhimmī* communities and Muslim ethnic or professional communities. The former enjoyed a degree of legal autonomy that their Muslim counterparts did not. Whether their *ḥara*s were gated or not, Muslim communities did not have the prerogative of establishing independent *sharī'a* courts serving the interests of a particular ethnic or vocational group. Thus, while there is a measure of truth to Raymond's assertion that neighbours acted upon 'illicit conduct' within their communities, this did not, we saw in Chapter Three, preclude individuals from challenging such intervention in

[31] Raymond, "The Role of the Communities," p. 243.
[32] P. Ghazaleh, "The Guilds: Between Tradition and Modernity," *The State and its Servants*, ed. N. Hanna (Cairo: AUC Press, 1995), p. 65.

the *sharī'a* court.[33] In applying these insights on the nature of the Islamic City to this Chapter's central discussion on *mu'āmala*, therefore, we must be cognizant of the court's role in consciously modifying community behaviour in line with a dominant, juridico-moral, state paradigm.

Section ii
Mu'āmala in the Private Domain

a) Marriage & the Boundaries of Community

Among the first observations that can be made is that the cohesion of which Raymond spoke is notable at the level of marriage, though it is far from absolute. More often, people tended to marry within their ethnic or professional communities, but as a general rule, it is class, as opposed to ethnicity, which is the more insurmountable barrier. Out of thirty eight marriage (*zawāj*/*nikāḥ*) and engagement contracts (*khuṭūba*), twenty six unite people from the same professional or ethnic community. Nonetheless, almost a third demonstrate that 'mixed' marriages were far from uncommon. Ten inter-ethnic marriages are registered: six between *'askerī*'s and women from Cairo, usually the daughters of local merchants (e.g. the *Sukkariya*) or scholars;[34] one between a *'askerī* from the Mutafarriqa militia and the daughter of a *Khawāja* (generally signifying a Persian trader from the Safavid Empire);[35] one between a man from the Fayūm and the daughter of a *khawāja*;[36] and

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[33] Hijāziyya's case amply demonstrated this in Chapter Three. Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 65.
[34] Maḥkamat Ṭūlūn, *Sijill* no.165, Doc. 1303; Al-Bāb al-'Ālī, *Sijill* no. 66, Docs. 45, 47; *Sijill* no. 96, Doc. 1023; Qisma 'Askeriyya, *Sijill* no. 5, Docs. 6, 8
[35] Al-Bāb al-'Ālī, *Sijill* no. 66, Doc. 32.
[36] Ibid., Doc. 191.

one between a local man and a "white" former slave.[37] Intermarriage, particularly between *'askerīs* and *ra'āya,* was doubtless facilitated when "the distinction between the Ottoman military and Egyptian civilians broke down. Probably from about the middle of the 10th/16th century, merchants and artisans of Cairo enrolled increasingly in the Janissaries and 'Azbān."[38]

That said, a majority of the marriages contracts indicate less heterogeneous unions. Among the *ra'āya,* ten Cairene men wed Cairene women,[39] while one *khawāja* wed his own cousin.[40] Fifteen *'askerīs* stayed within their professional class by marrying the daughters,[41] or ex-slaves/concubines (referred to as *bint 'Abd Allāh*) of other *'askerīs*.[42] The question raised is, are such unions expressive of ethnic solidarity or of class/professional solidarity? Can it be assumed that because these marriages were inter-*'askerī,* they were not also inter-ethnic?

As previously mentioned, the documents always mention the skin colour of a former slave and in the cases above, every woman is described as "white" (*bayḍā'*). "One had to be fair-skinned," writes Ayalon, "to be (in most cases) an inhabitant of the area stretching to the north and to the north-east of the lands of

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[37] Ibid., Doc. 962.
[38] "Their military service was only nominally required," writes Holt, "[but] their financial contributions bought them the protection of their corps..." P. M. Holt, "Miṣr," *EI,* CD Rom Edition.
[39] Al-Bāb al-'Ālī, *Sijill* no. 134, Docs. 6, 27, 66, 93; *Sijill* no. 66, Docs. 2, 12, 218, 219, 238; *Sijill* no. 96, Doc. 2820.
[40] Al-Bāb al-'Ālī, *Sijill* no. 66, Doc. 961.
[41] Qisma 'Askeriyya, *Sijill* no. 5, Docs. 7, 23, 24, 29, 31; Al-Bāb al-'Ālī, *Sijill* no. 66, Docs. 958, 954. In the latter case, the freeborn daughter of a freed Circassian *'askerī* marries a freed member of the Muttafariqa militia.
[42] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc. 2823. Qisma 'Askeriyya, *Sijill* no. 5, Docs. 9, 10, 11, 14, 18, 19, 22.

Islam; to be born an infidel; to be brought into the Mamlūk sultanate."[43] The Ottoman Empire recruited most of its "*kullar* from the Christian peoples living within its boundaries," or the Balkans and the Black Sea regions[44] Given the above, there is, of course, no way of telling whether the bride and groom in an intra-*'askerī* marriage share the same linguistic or ethnic background.[45] There is no way of identifying the ethnic origins of *'askerīs* described as "*Rumīs*," as members of the Mutafarriqa or the Inshikāriyya, or the ethnic origins of the "white...daughter[s] of the slave of Allāh" they are wedding.

Assuming that many of these marriages united people of various origins, it must be concluded that class and ethnicity, or a convergence of both, play equally important roles in such marital patterns. Class stratification is evident even within the *'askerī* class. For example, seven marriage contracts between *'askerī* men and the freeborn daughters of other *'askerīs* indicate high dowries. We may infer, therefore, that class plays a decisive role in determining whether one married a free woman or a former slave. Throwing into relief the convergence of class and ethnic solidarity, the latter documents substantiate the argument that profession, in this case the military caste, and one's status within that profession, generally determined the social pool from which one drew a spouse. The same class solidarity is evident in non-*'askerī* marriages. For example, seven documents indicate

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[43] D. Ayalon, "Mamlūk ," *EI*, CD Rom. edition.
[44] Ibid.
[45] Only the Circassians are referred to by their ethnicity. This is a remnant of their Mamluk-Egyptian roots and of the military system into which they were recruited. Ottoman soldiers, it will be remembered, were discouraged from adopting non-Arab names and were identified in the *sijills* by their regiment or battalion rather than by ethnicity. See, Chapter One.

marriages between local subalterns groups, such as that of the local butcher to the coppersmith's daughter,[46] or the carpenter to the coffee shop proprietor's (*qahwajī*) daughter.[47] Three document the marriages of local elites.[48]

There is only one exception to the stratification described above – a case which cuts across both class and ethnic lines - that of an Arab Bedouin married to a Circassian *'askerī* who declares herself as "the poorest of Muslim women."[49] Significantly, however, this is not a *shar'ī* marriage, but a customary (*'urfī*) one. Given the above, there is no marriage contract per se, certainly not one that would have been registered with the courts. The marriage only comes to light in the context of a document that appears to be an inventory of the woman's belongings. Suffice it to say, none of the contracts for 'official' marriages in this selection demonstrate a similar disposition to cut across class boundaries, let alone class and ethnicity together.

It is impossible to determine the extent to which customary marriages were prevalent, only to establish that they did enter the pages of the *sijill*, however infrequently. This, in spite of the fact that none of the rights guaranteed wives in Islamic law apply to wives in customary marriages. In the case above, the Bedouin woman came to court, in the presence of her husband the *'askerī*, to list her meager possessions and to renounce any claims to his personal wealth. The court simply filed the inventory and her disclaimer to any future rights, without further modification. Lifting their hands of such cases (neither legitimating nor

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[46] Al-Bāb al-'Ālī, *Sijill* no. 134, Doc. 6.
[47] Al-Bāb al-'Ālī, *Sijill* no. 134, Docs. 27, 93; *Sijill* no. 66, Docs. 12, 218, 219, 238.
[48] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc. 2820; *Sijill* no. 134, Doc. 93; *Sijill* no. 66, Doc. 2.
[49] Qisma 'Askeriyya, *Sijill* no. 5, Doc. 27.

condemning the practice) the courts merely recorded its existence, failing to extend to the woman in question a single right accorded to wives under Islamic law. Indeed, the reference to the woman as the *'askerī*'s "wife by custom" (*zawja bil-'urfiyya*) is mentioned only in passing, a secondary footnote in the principle transaction at hand – the writing of a witnessed inventory. It would appear that the harsh terms meted out to wives in a customary marriage stood as a deterrent against such unions in the eyes of the court.

In the final analysis, the rate at which people married within their communities indicates a high level of ethnic or linguistic solidarity, but the number of marriages across community lines, suggests that this solidarity was far from absolute.[50] One's class appears as a surer obstacle to marriage than one's ethnic or linguistic identity. Nonetheless, cultural barriers could be difficult to overcome, as evinced by the textual language of marriage contracts ratified for mixed couples. For example, three documents in which women from Cairo marry non-Cairenes include custom-based conditional clauses. In both, it is stipulated that if the husband should move his wife from "Cairo and its surrounds," she is pronounced divorced through "one *ṭalqa*."[51] Such conditions allowed women to ensure that they would not be estranged from their families and absorbed into their husband's community. Much like the conditional clause preventing husband's from exercising the right to take other wives, this condition pre-empted husbands from exercising

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[50] Chroniclers, writes 'Īsā, often refer to them as Yanjiriyya or Yankijriyya. Al-Bakrī al-Ṣiddīqī, *al-Nuzha al-Zahiyya*, p. 25. This militia came to Egypt with Selīm and took residence in the citadel. It became known as the *awjāq al-ṣulṭāniyya* because they represented sultanic authority. Eventually, members of this group took control of *dār darb al-nuqūd* (the mint). Ibid., p. 26.

[51] Maḥkamat Ṭūlūn, *Sijill* no. 165, Doc. 1303; al-Bāb al-'Ālī, *Sijill* no. 66, Docs. 2, 191.

absolute authority on the most basic of matters, such as the family's place of residence. Such clauses did not merely neutralize the husband's *fiqh*-based prerogatives, but also neutralized the authority of his community.

One particular contract, documenting the marriage of a Fayūmī man to the daughter of a Persian merchant is replete with several conditional clauses negating the authority of the husband, and his community, in a number of spheres. Document no. 191 registers what is obviously an elite marriage.[52] The large dowry, 100 *dīnār*s, 70 given upfront and 30 deferred until such time as "the husband's death or divorce," as well as the bride's substantial *kiswa* (clothing, allowance), indicate as much. The first of several conditions stipulates that the wife will be divorced through one *ṭalqa* when and if the husband takes a second wife, "through his own or through another's agency (*wikāla*) by any means or route," or "purchases a concubine" (*ishtarā 'alayhā*). The contract also prohibits the husband from moving his bride from Cairo, precluding him from contemplating a permanent return to the Fayūm. It should be noted that the Fayūm, an oasis barely forty miles to the south of Cairo, cannot be considered distant even by the standards of the day.

The fourth and most interesting clause, however, prohibits the husband from imposing the customs of his community on his bride. "If," the contract reads, "he should mark/create incisions (*ḥaz*) upon her body (*jasadiha*) as ordained by the command (*bi-amr*) of his community," she retains the right to divorce him. It is unclear what is meant by *ḥaz* in this context (incisions, tattoos or other forms of decorative body art) but the prohibition is unambiguous, demonstrating the manner

[52] Al-Bāb al-'Ālī. *Sijill* no., Doc. 191.

in which *fiqh*-based devices enabled the courts (and the individual) to decide, based on considerations of class, ethnicity or even personal preference, whether to retain or annul a given custom. It also demonstrates how those same *fiqh*-based devices are employed to expunge other *fiqh*-based rights. For example, a husband's right to move his wife from Cairo without her consent or to impose the authority of his community upon her.

Apart from the conditions encountered in the marital contracts of 'mixed couples,' one also finds spouses from the same community fighting to pre-empt given customs. In one *maḥdar*, Aḥmad b. Abī al-Ḥusn b. Muḥammad, known as al-Ādamī al-Mu'azin, alleged that his wife Nūr, the woman b. Sulaymān b. Aḥmad, whose father is known as al-Ḥumuṣānī was refusing to move with him to an "abode of [domestic] obedience" (*ṭā'a*) in a "*shar'ī* residence."[53] When questioned by the judge, Nūr responded that she was prepared to move to a *shar'ī* residence with her husband, on the condition that the martial home *not* be located in the same *zuqāq* (alley with a single gateway) as her in-laws' home. It is apparent, therefore, that Nūr could not abide the proximity, and the interventions it may have invited, of her husband's family. As a *maḥdar*, the case does not include a judgment, making it impossible to speculate on the court's view of such complaints. Nonetheless, the fact that the courts would go to the lengths of recording this complaint and giving it due consideration indicates, at the very least, that they did not dismiss such cases lightly.

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[53] S. Mīlād, "Registres judiciares du Tribunal de la Ṣāliḥiyya Naǧmiyya," *Annales Islamologiques*, xii (1974), pp. 235-36.

The marital cases above are illustrative of the legal means by which individuals could challenge customs, originating in their own or their spouse's community. As far as the courts were concerned, a benign custom was mediated according to the wishes of the individual parties, who could accept or reject its judgment at their discretion. While we cannot dismiss the possibility that custom continued to thrive in the shadow of the formal *sharī'a,* the accessibility of the *sharī'a* courts and the need for documentation suggests that the informal legal sector was shrinking. Amicable settlements (*ṣulḥ*) are another area in which customary law and *fiqh* converge to support this claim.

b) Amicable Settlements (Ṣulḥ) and Judicial Intervention

Derived from the abstract noun from the verb *ṣaluḥa* or *ṣalāḥ,* (to be sound, righteous), *ṣulḥ* denotes the concept of reconciliation in Islamic law. The purpose, of *ṣulḥ* is to end conflict through a contract of settlement, "consisting of offer (*ijāb*) and acceptance (*qabūl*)."[54] M. Khadduri views the process as a "form of contract (*'aqd*)" which is regulated by Islamic law, "legally binding on both the individual and community levels."[55] Explaining how a divorce could be negotiated as part of an amicable settlement, however, A. Layish contradicts Khadduri's basic approach, positioning *ṣulḥ* outside the limits of the *sharī'a* by defining it as a form of customary arbitration, "that is, a settlement not involving legal proceedings."[56]

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[54] M. Khadduri, "Ṣulḥ," *EI,* CD Rom Edition.

[55] Ibid. "The objects of the *ṣulḥ* are essentially the same as those in contracts of sale, consisting of material and non-material objects and are subject to the same limits and prohibitions as other Islamic legal contracts." Ibid.

[56] A. Layish, "Sharia and Custom in the Cyrenaican Family," *The 7th Stanford-Berkley Law and Colonialism Symposium; Muslim Family Law and Colonialism in Africa,* Stanford

Settlements such as these, he concludes, were "negotiated according to the rules of customary law," for at times it is "expressly stated that the settlement was reached out of court."[57] R. B. Serjeant shares Layish's understanding of *ṣulḥ* when assessing the latter's role in nineteenth century Yemeni courts.[58]

If Khadduri is guilty of downplaying the importance and relevance of custom to *ṣulḥ* agreements, Serjeant and Layish can be accused of inflating it. Serjeant and Layish underestimate the assimilative powers of *sharī'a* over documents of customary arbitration, even those "reached out of court" for they, like other documents, were notarized by trained jurists (even out of court) and formulated in language that records and modifies practice to bring the latter in line with theory. In other words, the preponderance of *ṣulḥ* contracts registered with the *sharī'a* court, and filed among its archival records, is not only an indication of the preponderance of customary arbitration, but a symbol of the considerable judicial authority exercised in the production of such documents.

It is true that the terms of a *ṣulḥ* agreement were decided out of court, either bilaterally or through the intervention of "a number of good Muslims."[59] However, it was the notaries, the scribes and the judges who formulated, recorded and legitimated these agreements, ensuring that the very mold in which they were cast

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University, (11-12 May 2001), p. 174. Nonetheless, he does concede that in other areas, a complex relationship between *sharī'a* and custom may be "divided into two main categories: one in which custom reigns almost absolutely, outside the control of the *sharī'a*, with slight concessions in deference to the venue where the cases are heard, and one prominently displaying the impact of the *sharī'a*, which yields assimilative power over the custom." Ibid., p. 172.

[57] Ibid.

[58] See, R. B. Serjeant, *Custom and Shari 'ah Law in Arabian Society* (Vermont: Variorum, 1991); and *Studies in Arabian History and Civilization* (London: Variorum, 1981).

[59] Al-Bāb al-'Ālī, *Sijill* no.124, Doc. 780.

served not only to record, but to modify practice. In the two documents below, this was accomplished by the inclusion of an *iqrār*. Significantly, this is not a procedure followed in non-*ṣulḥ* documents, or in cases arbitrated in court. Another discrepancy between 'formal' arbitration and *ṣulḥ* arbitration is revealed however. Documents for the latter do not disclose the details of the terms of the agreements whereas cases arbitrated in court do.

In the first *ṣulḥ* document, a dispute between Al-Sharīf 'Awaḍ b. 'Alī b. Ḥusayn, a soldier from *jamā'at al-qal'a al-'ulūfiyya*, and al-Shaykh Shihāb al-Dīn Aḥmad b. al-Shaykh Shihāb al-Dīn Aḥmad al-'Uthmānī over inheritance and *waqf*, was finally mediated, after a prolonged period of "conflict and confrontation" (*nizā' wa takhāṣum*), by "a number of good Muslims."[60] Significantly, the document does not disclose the terms of the agreement, merely relaying that the conflict, over thirty *qurūsh* left over from the sale of a dagger and other items, was finally settled. By contrast, a similar case (monetary debt between two *'askerīs*, a Rūmī from the Mutafarriqa corps, and a Yankasharī) that is arbitrated in court, discloses the full terms of the agreement while demonstrating the open place of custom as a source of arbitration.[61] The debtor, it reads, has agreed to make payments by surrendering his agency (*wikāla*) over Jibāyet al-Ḥawānīt in the areas of Miṣr (Cairo), Bulāq and old Cairo "as per the old custom."[62]

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[60] Al-Bāb al-'Ālī, *Sijill* no.124, Doc. 763.
[61] Maḥkamat Ṭūlūn, *Sijill* no. 165, Doc.1306.
[62] Ibid. Here, the term 'old custom' is ambiguous at best. It does not tell us whether it is Mamluk or Ottoman *'askerī* practice and underscores the problems inherent in viewing all references to custom as denoting 'local' practice.

While the *ṣulḥ* document fails to illuminate the details of the settlement, it does have an *iqrār* (acknowledgment), interjected toward the end of the document negating any, and all, potential future claims: "each has acknowledged (*aqar*), a *shar'ī* acknowledgment, that they have no rights/claims upon the other in relation to the indicated debt or for any other [such] cause..." The document proceeds to list and negate the right/claims – monetary, gold, silver, and otherwise – of each party. Significantly, the court arbitrated settlement does not include an *iqrār*. A second *ṣulḥ* document confirms this procedure.

A settlement pertaining to homicide includes an *iqrār* obligating the two families involved to forego future claims once the obligatory blood money has been paid.[63] Muḥammad b. Muslim al-Wāḥī al-Ballāṭī charged Muḥammad al-Hindāwī with stabbing his brother Aḥmad in the shoulder with an arrow, "with the intention of causing his death (*qatlah*)."[64] The injury was indeed fatal and the dying man's last words were "none other than Muḥammad al-Hindāwī killed me." For his part, Hindāwī confessed to the slaying and a *ṣulh* agreement was reached wherein he agreed to pay a half million pieces of silver in compensation to the deceased's brother. The *iqrār* at the end of the contract cautions against any violation of this agreement, even warning the family of the deceased, and his descendants once they reach the age of maturity, against killing (*qatl*) Muḥammad al-Hindāwī. Blood feuds, a customary form of retribution, violate the tenets of Islamic law and as such, the *iqrār* in this document is geared to its prevention. Such cases demonstrate that

[63] Milād, "Registres Judiciares," pp., 242-43.
[64] Ibid., p. 242.

endorsing customary arbitration did not mean that the courts were forsaking legal theory but rather, superimposing the guidelines of the latter upon the former.

In conclusion, whether mediating between a married couple or between two parties in conflict, the courts arbitrated, modified and expunged custom in private *mu'āmalāt*, in a manner which interjected *fiqh*–based guidelines into such cases and delimited community authority. By employing the conditional clause, for example, a bride could neutralize the authority of a custom arising in her husband's community. On the one hand, this demonstrated the court's willingness to loosen the woman's bonds to the spouses' community/clan, and on the other, to reinforce those between her and her own community. But it also underscores the fact that it was the link between the individual and the state *shar'ī* court which made this possible. In effect, this meant that the bond between the individual and the state was nurtured by means of judicial discretion.

Judicial discretion was also reflected in *ṣulḥ* documents, where *iqrār*s were interjected into the textual body of a contract stemming from customary arbitration as a means of assimilating the latter to legal theory. In both cases, the laws which made it compulsory for couples to register their marriages in court, as well as the importance of documentation in cases of *ṣulḥ*, combine to suggest that, in the sphere of private *mu'āmalāt*, customary law was declining as a source of law independent of the *sharī'a* court. The rights of the individual were thus balanced against the customs of the community through a system of judicial intervention, a process duplicated in the area of public *mu'āmalāt*.

Section iii
Public Mu'āmalāt;
The Community in the Empire

Below we consider public transactions in the areas of municipal law, taxation, metrology and agriculture, evaluating their impact on Cairo's various communities, professional, ethnic and residential. In all areas, a broadly defined 'custom' was upheld when, and if, it was expedient for the state or when, and if, it served to alleviate a gross injustice arising from *qānūn*. In all cases, however, references to 'old custom' should be treated with caution as few are actually rooted in popular 'local' practice or, as often suggested in the secondary literature, representative of local interests.

a) "Old Custom" in a New State

In Ottoman Cairo, members of professional as well as ethnic communities had to negotiate a legal system in which the practices of old were 'nothing and everything.' This is demonstrated by the lexical tropes encountered in the *sijill* and the confusion they can breed. 'Old custom' (*'āda qadīma*), a term frequently encountered in the records, often means something quite different from that implied by the literal wording. The most striking examples of this are found in taxation and *iltizam* (tax-farming) documents.

First considered are the 'old customs' which were linked to *iltizām* and used to justify the binding of the peasant (*fellāḥ*) to the land. The term *multazim* denoted a tax-farmer who, "from mid-16th century on," had his previously wide jurisdiction reduced to the collection of taxes and dues on behalf of the Ottoman

state.[65] "Although they were not empowered to exact more than the amounts authorized by law from the inhabitants," writes F. Müge, "their contracts allowed them a sufficiently wide margin of profit and some exercise of authority over the peasantry."[66] Among the prerogatives of this 'authority' was a *multazim*'s right to bind the peasant to the land and, as shown ahead, to go so far as to pursue 'deserters' to Cairo, often decades after the alleged 'flight.' This practice, upheld across the Empire, occurred in H. Inalcik's view because the Ottoman Empire suffered from a shortage of labour, "and it is probably for this reason that the peasant was bound to the soil."[67] While chronicling the practice in Anatolia, H. Inalcik does not explain how it was justified, a matter which is resolved by the *sijill*. As shown below, the practice was assimilated to *qānūn* and justified on the basis that it represented "old custom." But the 'old customs' cited in such cases are not the kind normally associated with 'grassroots legislative trends.' The 'old custom' in question was indeed ancient, probably originating in Roman imperial practice, but neither 'local' nor representative of the so-called authority of 'rising capital classes.' Indeed, the emphasis that this theory places on the growing legislative authority of the latter is brought into question by the cases below.

There are two cases which, for lack of a better term, I shall refer to as *iltizām* documents. In both, the *multazim* filed charges against persons accused of abandoning farming (*filāḥa*). In the first case, a resident of Cairo, al-Shaykh Sha'bān b. al-Shaykh Ghānim b. al-Shaykh Najm al-Dīn, identified as a merchant in

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[65] F. Müge Göçek, "Multazim," *EI*, CD Rom Edition.
[66] Ibid.
[67] H. Inalcik, "Filāḥa," *EI*, CD Rom Edition.

the Ḥanafish [?] market, was apprehended.[68] The accused, it reads, appeared in the company of Amīr Yūsuf *al-Jawīsh bil-Dīwān*,[69] bearing a written document undersigned by the grand vizier. Certifying that he had resided in Cairo for fifteen years, the document was, asserted Najm al-Dīn, authoritative over both the *multazim* and the Amīr ʿĀbidīn of Munūfiyya, who "were bound by the [*wazīr*'s] *nāmā*." Nonetheless, he complained, both had ignored the decree and persisted in demanding his relocation to the province of Munūfiyya to commence farming (*zirāʿa*). Najm al-Dīn also brought forth a slew of witnesses, most of whom were merchants from his quarter, testifying that he was known to them and that he was an old resident of Cairo who had "nothing to do with farming." He also produced written *fatwās*, one from each of the four schools of law, stipulating that the *multazim* could not force him into farming nor fine him. We can explain the need for this extensive collection of documents and witnesses by the fact that Najm al-Dīn was not merely asking for a court ruling on the matter, but petitioning for a decree (*buyuruldī*) to block the *multazim* from confronting him at any point in the future. The judge, ruling in accordance with the Grand Vizier's orders and the opinions of the four *muftīs*, granted his request.

Notably, the defendant in the above case was a merchant of some standing who could procure a personalized document from the Grand vizier while receiving

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[68] Al-Bāb al-ʿĀlī, *Sijill* no. 124, Doc. 743.

[69] Under the Ottoman Turks, the *Jāwīshes* (Turkish *čā'ūshes*) of the *Dīwān* were part of the official ceremonial escort for the Sultan in public, or when he was receiving dignitaries. As well, the Sultan or Grand Vizier "used them as ambassadors and envoys to convey or carry out their orders." The *jawīsh bāshī* of the *Dīwān*, "acted as deputy to the Grand Vizier, particularly in the administration of justice; being a court official." R. Mantran, "Čā'ūsh," *EI*, CD Rom Edition.

the support of the *Jāwīsh al-Dīwān*, a representative of the latter, in court. In other words, Najm al-Dīn is a member of the very local capital classes said to be asserting their influence on the law produced in this period. The fact that the defendant had been absent from Munūfiyya for over fifteen years and that he was a prosperous merchant did little to protect him from the harassment of the province's governor or his *multazim*. Moreover, the fact that he successfully argued his case should not diminish the fact that he needed to obtain four *fatwā*s, a written statement from the *wazīr* and the testimony of a host of witnesses to garner such immunity, even after a fifteen-year period of residency in Cairo.

It is possible that an individual's wealth may have encouraged, rather than deterred *multazim*s. Another case, also involving a merchant from Cairo, raises the possibility. The accuser in this case is not the *multazim*, but the Shaykh of Minya, Muḥammad b. 'Ulwān, who apparently sent a soldier to apprehend Muḥammad b. al-Ḥajj Hinaydī. The latter complained that he had been mistreated and abused at the hands of this individual, and that he had refused to abide by the "old custom in the payment of debts" (*al-'āda qadīma bi-daf'i al-gharāma*) for abandoning the land. Hinaydī's refusal was based on the argument that he had resided in Cairo for twenty years and had never engaged in farming (*filāḥa*).[70] For his part, 'Ulwān insisted that the accused had "*āthar* (traces of) *al-filāḥa*" about him and defended his actions by claiming that the individual who had apprehend the accused was an emissary of the *multazim*. Supporting Hinaydī's claims, however, were a number of witnesses who testified that the latter had lived in Cairo for twenty years, that he had no "trace of

[70] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 784.

filāḥa (farming) about him," and that they had never known him to engage in such. The judge ruled in Hinaydī's favour, preventing the aforementioned from confronting or fining him.

It is interesting that Shaykh 'Ulwān is not demanding the accused return to farming, only that he pay a customary fine, suggesting that monetary extortion may have been the latter's intent. In the context of *iltizām*, therefore, the term 'old custom' denotes old state practices which could, as such, be employed to pressure a segment of the merchant classes or to deny a large percentage of the rural population freedom of movement. Thus, while the case above demonstrates that 'old customs' often encompassed ancient imperial practices, the next case, confirms that they could also indicate Ottoman rather than pre-Ottoman practices.

In 1028/1619, an *amr* (decree) registered in the *sijill* of the Bāb al-'Ālī, establishes the rights and obligations of the gypsy community vis-à-vis taxes, determined on the basis of "old prevailing custom."[71] A heading atop the text of the document reads: "A copy of the decree relevant to the community of Gypsies." After the introductory protocol, the document states that a sultanic order, delivered "into the hand of the esteemed, kind and glorious Governor...informs you that the community of Shashtajiyya Gypsies has let us know that in the customs which prevailed of old (*al-'āda jarat fī al-qadīm*), the governor of the Ḥijāz collected a sum of 10 *aṣnāf* for each person." The Shashtajiyya, it continues, had disclosed that the sum was eventually raised to 25 *aṣnāf* per person, payable once a year, and that the community had never challenged this custom. This changed when the "new

[71] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc. 2826.

governor of the Ḥijāz assailed them, coercing and forcing each person to pay 40 *niṣf* and dispensing receipts [for the money] with incorrect dates, causing great harm to befall them. The Sultanic order states, "such as this we will not abide and we have issued a decree (*rasm*) ordering each party (*wāqif*) to come forward according to the old and abiding custom (*'āda al-qadīma al-mustammira*); and what was owed by virtue of custom (*'āda*), is what is owed by them to the aforementioned [*amīr*], who is forbidden to oppose them, cause harm or take anything above that stipulated by *'āda* and *qānūn*...such that none should complain to us."

Notably, the 'practices that prevailed of old,' cited above, are obviously Ottoman in origin as they refer to that which prevailed under a previous Ottoman governor of the Ḥijāz. By 1028/1619, therefore, the term 'old customs' referred, in matters of taxation, to the taxes established in accordance with *qānūn* and the practice of former Ottoman, as opposed Mamluk, governors. Whether speaking of cases of *iltizām* or taxation, therefore, we must be careful not to assume that 'old customs' are necessarily pre-Ottoman in origin. The authority of the 'old customs' described above, derive from Ottoman practice, whether issued by the office of the *multazim* or by sultanic order.

Thus far, we have considered the courts' approach to 'old custom' in relation to two rural/nomadic communities, the *fallāḥīn* and Gypsies, but they also dealt with professional, urban guilds by reference to customs that prevailed of old. However, there is a marked terminological difference in the language used below and that used above. The discrepancy is explained by the fact that the customs described below are not state sponsored. Document 774 registers the appointment

of a new shaykh, or guild head, to oversee (*mubāsharat*) the sultanic slaughterhouse (*madhbaḥ al-ṣulṭānī*).[72] The appointment is said to have followed the protocol associated with "known custom" (*al-'āda al-ma'rūfa*), where the outgoing head appointed his successor and willingly vacated his post. Unlike the 'old customs' described above, the 'known customs' described in this case refer to local, guild practices. [73] Another case, dealing with two disputants from a single guild, the camel traders, employs the phrase "what prevails in both their domains" (*al-jārī fī mulkihimā*) when referring to the practices of each man's community. The dispute, centering on the contested ownership of an animal, is eventually settled by reference to the community practice of branding. In the court's eyes, the identifiable markings on each animal determined ownership.[74]

'Old customs,' 'known customs' and 'prevailing customs' are thus used discriminately to delineate various categories of custom, with the principle distinction centering on customs that are rooted in state practices and those that are rooted in local practices. Such examples also highlight the state's approach to 'old customs' deemed expedient, such as those assimilated to *iltizām*, and 'known/prevailing customs' deemed benign, such as those relating to certain guild practices. The neutrality of the courts to customs that contravened neither *fiqh* nor *qānūn*, was also apparent. A general acceptance for 'that which prevails' is made

[72] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc. 774.
[73] While such an example supports Raymond's general argument that local institutions functioned autonomously, we must be aware that this was not always the case. As mentioned by the authors of the Gotha manuscript, guild members often complained harshly at what they perceived to be Ottoman interference in their internal management. In the case of the butchers' guild we may, at least, confirm that appointments followed the customs of the guild in that year. No doubt, the level of intervention was determined by many factors such as the vitality of the industry in question to the state economy.
[74] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc 817.

most freely, however, in the area of municipal law, although never to the exclusion of the courts' regulating influence.

b) Municipal Law & "What Prevails (Jārī)" in the City

Supporting the works of Johanson and Brunschvig on Islamic law and urbanism, the municipal sphere under study, with its broadly Islamic and delimited local influences, is revealed to be a heavily regulated industry. Nonetheless, while it is never referred to directly, custom does play a vital, albeit well regulated, role in all such cases. But given the technical expertise required in the settlement of building disputes, the obvious need for documentation and, most importantly, enforcement of the judgment (often involving demolition), the courts' pre-eminent role in mediating such cases cannot be underestimated.

Document 785, dated 1045/1635, identifies two state officials entrusted with overseeing building policies, the *muḥāfiẓ al-mamālik al-Islāmiyya bil-diyār al-Miṣriyya* (the grand vizier Ayyūb Bāsha) and the *mi'mār bāshī bi-Miṣr al-Maḥrūsa* (al-Amīr Yūsuf of the Mutafarriqa of the Dīwān). It reveals that residents from two quarters, one predominantly Christian and the other predominantly Muslim, filed a joint complaint against the construction of a new passageway between their respective alleys.[75] The passage between al-Darb al-Wāsi', and Darb al-Qabbānī, had exposed a Muslim women's bath located in the latter quarter. As such, those entering/leaving al-Darb al-Wāsi' had a clear view into the bath each time its doors were opened, exposing the women inside in various states of "nudity" (*'āriyāt*). The door to the bath did not open onto the bathing area directly, but onto a hall

[75] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 785.

connecting the latter to the area where the women's clothes were kept. To ascertain the validity of the residents' complaint, the courts drew on the expert testimony of the "engineers" (*ahl-khibra al-handasiyya*), a local body of experts with two functions. First, it was their role to corroborate the complaint and second, to provide the court with an alternative location for the passage, for which purpose they identified the affected surrounding properties, providing exact measurements of the distance of each from the suggested new passage. Having procured the agreement of the owners' of the affected properties, the new passage was approved and the old passage ordered "sealed" in support of the "rights of the residents" (*ḥuqūq al-sukān*).

Custom plays an important, albeit unspoken role in this case. The engineers who are called upon to ascertain the correctness of the placement of the door are formulating their report on the precepts of local architectural practices. But they are also state officials, presenting their findings in the language of an Ottoman metrology, for example using the *dhirā'* (cubit) outlined by Ottomn *ḥisba*.[76] In the final analyses, however, there would be no case were it not for cultural attitudes rooted in custom. It was, after all, the normative values of Muslim and Christian residents that motivate the complaint in the first place. Local standards of moral decorum thus define that which constitutes a breach of privacy.

In the second case, the above point is made even more explicitly. A Christian man challenged his brother when the latter opened a door on his side of their shared inherited property, exposing the women's quarters (*ḥarīm*) of the

[76] For more on Ottoman metrology see *section c* below.

former.[77] Notably, the complaint is based on the claim that the construction contravened "what is practiced in the mentioned [plaintiff's] quarter" (*al-jārī fī mulk al-maẓkūr*). Even though the brother who initiated the construction did not trespass on the other's property (i.e., opened the aperture on the side he owned) the judge ruled against him, concluding that the latter's actions could "harm" the plaintiff. The reference to "what is practiced in the mentioned quarter" is an explicit nod to normative customary values. Raymond's assertion, that arbitration flowed from the confines of the neighborhood or community is, therefore, lent credence by such cases. The role of the residents in raising the court's attention to such 'infractions' is the very thing that generates the court proceedings. But, ultimately it is the *sharī'a* venue where such cases are arbitrated and, indeed, where customary standards of moral conduct are sustained. Normative practice is, therefore, allowed a principal role in cases of municipal dispute, as demonstrated by a third document.

The construction of a *riwāq* belonging to Amīr Aḥmad of the Mutafarriqa is finally allowed to proceed after his neighbour, Nāẓirīn, daughter of the deceased Shaykh Aḥmad al-Ḥubaybī, vows to refrain from interfering with the project.[78] The woman is explicitly made to state that she will "not prevent the builders or engineers" from undertaking the necessary demolitions, suggesting that she may have done so in the past. Additionally, she agrees to assume responsibility for "blocking" the top floor of her home so as to 'prevent harm' befalling her property. It is unclear why Nāẓirīn, who had apparently opposed this construction project in

[77] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 114.
[78] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 59.

the past, had a change of heart. We can rule out the possibility that she was summoned by the court and ordered to undertake these promises, for the case would have included a *maḥḍar* of previous sessions, beginning with an initial complaint by the *amīr*. More likely, therefore, Naẓirīn came willingly after being mollified, or sufficiently compensated out of court by the *amīr*. While not a formal *ṣulḥ*, the text of the document suggests, nonetheless, that a customary agreement was reached out of court by both parties. Like a *ṣulḥ* document, however, it contains an *iqrār* deterring the woman from reversing her position. After listing a string of claims that Nāẓirīn has renounced, the court outlines the penalties which will befall her in the event that she defaults on a single term.

While the similarity between the three cases is evident, the differences warrant comment. In the second case, involving two *dhimmī*s, the document refers to custom, or common practice, quite explicitly. On the other hand, the two documents involving an all-Muslim group in one case and a mixed group of Christians and Muslims in the other, make no such direct reference. A larger sample of cases would need to be contrasted before any firm conclusions can be made, but assuming that such anomalies are not random, one may tentatively suggest that the court is exhibiting an easiness citing the customs of *dhimmī*s, that it is loathe to do in the case of Muslims. This is as one might expect given the provisions that Islamic legal theory makes for the legal autonomy of religious minorities.

The ease with which the courts admitted custom in the municipal sphere, even where they fail to cite it directly, is a product of the benign nature of the customs in question. Frankly speaking, the court was dependant on the complaints

of residents to pursue violations of given standards of modesty, and was not in a position to enforce a uniform code, replete with rules identifying that which constituted a breech of privacy. It was, however, in a position to enforce a standard of conduct in which Islamic and local cultural values converged to shape the urban landscape.

c) "The Honourable Ḥisba" & the Customary Economy

We may now turn our attention to those customs considered 'subversive' from the perspective of a unifying state – those governing metrological systems. As previously argued, the Ottoman Empire, famed for its massive internal trade, could not have achieved this stature without remolding certain fiscal practices. To do so, and to unify the system underpinning this vast trading enterprise, it sought to reduce variation arising from custom, particularly when associated with the system of weights and measures.

The bulk of Ottoman trade, writes Faroqhi, was internal. Istanbul, she continues, was "supplied through interregional trade, involving the shores of the Black Sea, the Aegean and even Egypt."[79] Periodizing the development of

[79] A third period begins with the political and economic crisis of the 990s/1580s, when northern European merchants enter the Mediterranean in force. Their demands change patterns in the spice and silk trades and have an impact on production in certain regions, such as Syria or the Aegean seaboard. After the crisis of the late 10th/16th and early 11th/17th centuries, there is some recovery, but it is soon interrupted by the Habsburg-Ottoman war of 1095/1683 to1110/1699. Down to 882/1477-78, when the first Ottoman gold coin was minted, roughly corresponding in weight and fineness to the Venetian ducat, the Ottoman mints turned out silver coins only, the *aqçe.* Before the devaluation brought about by Mehmed the Conqueror, it weighed 1.01 gr. and .83 gr. thereafter. Throughout most of the 10th/16th century, the *aqçe* stood at 0.73 gr.; a new wave of devaluation occurred at the end of the 10th/16th century, at a time when imports of silver from the New World had also resulted in a price rise. The latter was viewed as a major calamity, affecting not only trade, but also the legitimacy of the state. In spite of several currency reforms, in

commerce, Faroqhi identifies three stages of evolution. First, the formative period lasting until the middle of the 9th/15th century, and which is "characterized by limited regional and local trade and concentration of international commerce in a few centres, principally Bursa."[80] The second period lasts to the end of the 10th/16th century, "and its salient feature is the development of Istanbul into a giant city, by far the largest in both Europe and the Mediterranean region, providing a proportional stimulus to internal trade."[81] What facilitated this movement away from international trade and toward intraregional trade? Better yet, would such a move have been possible without the semblance of a unified metrological and legal system? A review of the evidence of the *sijill* will confirm that the Ottomans pursued this objective, seeking and succeeding in introducing a measure of fiscal unity. Before we discuss that body of evidence, however, a review of Ibn Iyās' reports will both contextualize and corroborate the evidence of the *sijill.*

In Ramaḍān of 924/1518, a public proclamation in the markets of Cairo ushered in the Ottoman coin or *aqçe* and Egyptian merchants were ordered to use the coins bearing the name of Selīm in lieu of their Mamluk currency.[82] Ibn Iyās explains that 16 Ottoman coins were deemed equivalent to "half a piece of silver," but that they were in fact too "light" for such a rate, effectively devaluating the

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the course of the 11th/17th and 12th/18th centuries the *aqçe* was devalued to such an extent that it disappeared from the market and only survived as a money of account. S. Faroqhi, "Othmānlī: II Social and Economic History," *EI,* CD Rom Edition.

[80] Ibid.

[81] Ibid.

[82] Ibn Iyās, *Badā'i'*, p. 214

local currency.[83] The losses incurred as a result of the switch caused great hardship for the merchant classes, forcing the closure of many a shop and provoking the *muḥtasib* Zaynī Barakāt to intervene by overruling the sultanic decree. A holdover from the Mamluk era, Barakāt called on merchants to treat the half piece of silver as equivalent to 24 of the new coins. His actions did not go unanswered, however, provoking a visit from Ottomans officials who demanded; "Has Selīm Shāh died that his *mu'āmala* should end in Egypt?"[84] Physically intimidated (beaten according to Ibn Iyās), the venerable *muḥtasib* was forced to recant. In retaliation, the merchants of Cairo called a strike.

Panic spread among the residents of Cairo as the merchants carried out their threats and pulled their products from the market. In an attempt to regain control, Khayrbek announced that he had manufactured a number of iron stakes for the express purpose of impaling rebellious merchants after the *'Id* celebrations.[85] Fear, concludes Ibn Iyās, and fear alone, compelled the merchants to return to trading. When they did, it was at the rate of sixteen Ottoman coins for a half piece of silver. In the final analysis, the introduction of the Ottoman currency spelled a de-evaluation in the price of silver and gold, both of which constituted the basis for the

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[83] Ibn Iyās, *Badā'i'*, p. 214. Meaning "small white," it was the name given in Turkish to the Ottoman silver coin habitually referred to by European writers as the *aspre* or *asper*, from the Greek *aspron*. The term was already in use under the Saljukids of Iraq during the 12th century (see al-Rawandī *Rāḥat al-Ṣudūr*, 300, where a gift of 1,000 *aqçes* is recorded) and was applied to the first Ottoman coin to be struck, under Orhān in 727/1327. During the 14th and 15th centuries the Ottoman coin was usually called simply 'Uthmānī, but from the reign of Selīm I onwards, it came to be known simply as the *aqçe*. Ibid.

[84] Ibn Iyās, *Badā'i'*, p. 214.

[85] Ibid., pp. 244, 358-9.

official Muslim monetary system and which required a measure of stability to maintain economic growth. [86]

But the markets must have remained unstable judging by the fact that two years later, in 926, the Porte saw fit to issue a decree (*marsūm*) calling for a readjustment in the *mu'āmala*.[87] Soon after, the governor of Egypt announced that the exchange rate for a half piece of silver would remain unchanged, but cancelled the half piece of copper. That same year, news of Selīm's death arrived and in 927, the new Sultan Suleymān, again informed the *diftirdār* that the Governor of Egypt should initiate "*iṣlāḥ*" (reform) with respect to the *mu'āmala* measurements of gold and silver. But the governor apparently refused declaring, "I will not change the *mu'āmala* of Selīm Shah, nor will I exceed what was [decreed] in his day: that the *ashrafī* gold is exchanged in the *mu'āmala* for a half piece as is the custom."[88] Conflict ensued between the two until the merchants were summoned. The latter informed the governor that "none of the people" would agree to his decision and, true to their word, called another strike.

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[86] A.S. Ehrenkreutz, "Dhahab," *EI*, CD Rom Edition. This was secured by the exploitation of gold mines located in the Muslim Empire, and the importation of bullion from adjacent countries. Although mediaeval sources refer to many mining areas (see, D. M. Dunlop, "Sources of Gold and Silver in Islam According to al-Hamdani (10th Century A.D.)," *Stud. Isl.* viii (1957): 29-49), the region of Wādī 'Allaqī was particularly famous for intensive mining activities, while that of Ghāna for the excellent quality of its ore. War expenditures connected with the operations of the Crusaders, a gradual re-establishment of European hegemony in the Mediterranean balance of trade, and a later absorption of West Sudanese gold by the Portuguese, led to a drastic draining of Near Eastern gold reserves. M. Lombard, "Les bases monétaires d'une suprématie économique. L'or musulman du VII e au XI e siecle," *Annales* [*Économies, Sociétés, Civilisations*], 2, (1947): 142-60; Also see, F. Braudel, "Monnaies et civilisations. De l'or du Soudan a l'argent d'Amérique," *Annales* [*Économies, Sociétés, Civilisations*], i (1946): 9-22.

[87] Ibn Iyās, *Badā'i'*, p. 354.

[88] Ibid.

It took two days for the *muḥtasib* Zaynī Barakāt to convince the Governor that the Ashrafi gold should be exchanged for 45, not 50 *aqçes*, and in cases of wholesale buying and selling, to 46. Only then did the markets resume trading. One *maḥḍar*, from the court of Ṭulūn in the year 965/1557, provides evidence of an attempt to curtail, if not abolish, the production of non-Sultanic silver and gold standards. The Shaykh of a *ṭā'ifa* (guild), gives a witnessed oath to refrain from the production of gold and silver, except for that which is equivalent to the "sultanic Rūmī" standard. Any violation, the document reads, will subject the offender to the discretionary punishment of the deputy governor.[89] While there may have been a limit on the production of non-sultanic standards, the *sijill*'s dismiss the possibility of a complete ban on such. The *sijill*'s commonly refer to local standards of gold and silver, always termed "*mu'āmala bil-diyār al-Miṣriyya*." Generally found in marriage contracts, where the dowry is often given in gold and silver coins, the *mu'āmala Miṣriyya* is found in nineteen out of twenty three such marriage contracts, indicating its popularity over the Ottoman "'*ashrafi*' gold or "*dhahab jadīd*" found in the remainder. In effect, the persistence of non-sultanic standards allowed for the first of many devaluations to the *aqçe* and for the defacto persistence of a separate Egyptian currency, the *pārā*. It has been argued that the *pārā* was only introduced in 1045/1635-6.[90] But relying on the *Qānūnāma* of 1524, Shaw has disproved this thesis to establish that the *pārā* was coined soon after the conquest.[91]

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[89] Maḥkamat Ṭūlūn, *Sijill* no. 165, Doc. 17.
[90] See, Gibb and Bowen, *Islamic Society in the West*, Vol. I, part 2.
[91] Shaw, *The Financial and Administrative Organization of Egypt, 1517-1798* (New

But, even as the Porte conceded to local *mu'āmala* in terms of the standards of gold and silver (i.e. devaluing the *aqçe*) it was preparing to initiate another set of reforms unifying metrological systems. Discounting such a scenario, E. Ashtor writes:

> In the history of Oriental metrology, the spread of Islam meant no abrupt break. Whereas Charlemagne imposed in his empire a uniform system of weights and measures and introduced a much heavier pound than the Roman libra of 327.45 g, neither Muḥammad nor 'Umar made such a reform; and as later rulers could not claim canonical character for their systems of weights and measures, their bewildering diversity was in the Muslim countries even greater than in mediaeval Europe, where Charlemagne's system remained as a firm basis.[92]

When the Arabs conquered the lands of the Near East, he explains, a variety of names were already used for different weights and measures, such that "the diversity of the weights and measures called by the same name was a phenomenon common to all Muslim countries."[93] Most districts had their own system of weights and measures, and "in some countries those used in the capitals were different from those of the countryside."[94] Furthermore, different weights were used for various commodities.[95]

Jersey: Princeton University Press, 1962) p. xxii. He writes that "[i]t was a direct descendant of the silver mu'ayyidī used in the Māmluk Empire in Egypt since Sultan Mu'ayyad and first minted 818/1415-16."

[92] E Ashtor, "Mawāzīn," *EI*, CD Rom Edition.

[93] The *muḍḍ*, a measure of capacity, was used in Iraq equaling about 1.05 liters, 3.673 liters in Syria and 2.5 liters in Egypt. Ibid.

[94] This is what the Arabic geographers tell about Jibāl and its capital Rayy, about Khūzistān and about Aleppo and its province. In many provinces meat was weighed by a *raṭl* different from that of other articles. In all provinces of Upper Egypt there was a *raṭl* for meat and bread and another for other commodities. Ibid.

[95] In many countries there were particular *raṭls* for pepper, silk, etc. For grain, one used in all Arabic countries measures of capacity; for liquids one had other measures of this kind. One learns from the sources, however, that in course of time there was a trend in several countries to use weights for liquids, and to replace weights (and measures of capacity) by bigger ones. Despite the mutual influence between the metrological systems of the Near Eastern countries, there remained through the Middle Ages (and also later) a marked

Nonetheless, concedes Ashtor, there were rulers who attempted to establish a fixed system of weights and measures, "just as they built up an administration different from that of their predecessors." He credits the Būyid prince 'Aḍud al-Dawla, the Fatimids, the Il-Khān Ghāzān and the Turcoman Uzun Ḥassan with such ambitions, but not the Ottomans.[96] K. Salameh confirms Ashtor's general observations, writing that in the Ottoman period, weights and measures "varied from city to city and region to region."[97] Listing the various measures of weight found in the Jerusalem *Sijill*, he gives the following breakdown: the Jerusalem *raṭl*, the *qinṭār* at 100 times the *raṭl* (used for weighing large quantities of seeds, rice and flour), the *muḍḍ* (weight used for quantities of wheat, barley, semolina and sesame) and the *mann* (mentioned once as equivalent to 2.5 Egyptian *raṭls*). While Salameh's observations are not erroneous, his analysis and conclusion are somewhat cursory, failing to compare the degree of variation that existed under the Ottomans with its predecessor states, or to entertain the possibility that whatever variation existed was considerably redacted in view of what came before.

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difference between the Persian and Arab countries (although there was some overlapping). From Roman-Byzantine rule over the Near East, "a two-sided structure of the metrological systems of all the Muslim countries" emerged - sexagesimal and decimal - also a feature of the metrological system of the Greco-Roman world. The survival of the metrological systems of antiquity, argues Ashtor, overshadows "the almost insignificant influence of the weights and measures of Arabia upon the newly-conquered countries." E Ashtor, "Mawāzīn."

[96] Ibid.

[97] K. Salameh, "Aspects of the *Sijills* of the *Sharī'a* Court in Jerusalem," *Ottoman Jerusalem the Living City*, 1517-1917, ed. A. Hillenbrand, p. 114.

Ashtor writes that among various weights and measures of capacity the most common is the *raṭl*.[98] In the Fatimid period, several variant *raṭl*s were used. According to the sources, they included the following: the "*raṭl* called *Miṣrī* of 144 *dirhams*, i.e. 444.9 gr., used for weighing bread, meat and other articles; that of 150 *dirhams*, i.e. 463 gr., used for spices, and also cotton, called *fulfulī*, or pepper *raṭl*; the *raṭl layithī* of 200 *dirhams*, i.e. 617.96 gr., used for flax; and the *raṭl jarwī* of 312 *dirhams*; i.e. 964 gr., used for honey, sugar, cheese and metals."[99] In the Ottoman period, however, there are no references to these varieties of *arṭāl*, only to two - one the local "Egyptian *raṭl*" and a more generic *raṭl*. Even in Jerusalem, Salameh notes the existence of the "Jerusalem *raṭl*" and the occasional reference to the "Egyptian *raṭl*" but not the numerous *arṭāl* cited by Ashtor.

Retracing the history of Ottoman metrological policy after the conquest will clarify the argument. In 927/1520, a *qāṣid* arrived from Istanbul bearing a decree from Suleymān, issuing a new iron *dhirā'* (the measure of the cubit of length) be used in lieu of the Hāshimī cubit heretofore used in Egypt and the Syria. [100] Originally known as the Persian "king's" cubit (*dhirā' al-malik*), and known as the

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[98] Originating in the Aramaic from Greek, "the (100 *raṭl*s) is obviously the Latin *centenarius*; and the *qāfīz* is the Persian name of a measure of capacity." Ashtor, "Mawāzīn."

[99] Ibid.

[100] Ibn Iyās, *Badā'i'*, p. 414. The legal cubit, *al-dhirā' al-shar'iyya*, is the same as the Egyptian hand cubit, *dhirā' al-yad*, also called *al-dhirā' al-qā'ima*; the Joseph cubit, *al-dhirā' al-yūsufiyya*, called after Qāḍī Abū Yūsuf, who died in 182/798), the post cubit, *dhirā' al-barīd;* the "freed" cubit, *al-dhirā' al-mursala;* and the thread cubit *dhirā' al-ghazl*, measuring 49.8 cm. In Abbasid times, a cubit measured only some 48.25 cm. This may be traced back to the Calip al-Ma'mūn (170-218/786-833) who reorganized surveying. The "black" cubit (*al-dhirā' al-sawdā'*, fixed as above at 54.04, is identical with the "common" cubit (*al-dhirā' al-'āmma*), the sack-cloth cubit (*dhirā' al-kirbās*), and the cubit in common use in the Maghrib and in Spain, *al-dhirā' al-Rashshāshiyya.* E. Ashtor, "Mawāzīn. W. Hinz, "Dhirā '," *EI*, CD Rom Edition. Also see, S. Shaw, *The Financial and Administrative Organization*, p. 72.

great Hāshimī cubit (*al-dhirā' al-Hāshimiyya*) since the caliph al-Manṣūr (136/754-158/775), it equaled an average 66.5 cm.[101] It is the latter which was known in Egypt and which was replaced by the new *dhirā'*, equivalent, writes Ibn Iyās, to five *qarārīṭ* (from *qirṭās*, a measurement based on the size of parchment or papyrus roll). There are two examples to support the claim that the new cubit was successfully applied, even if there is none indicating that the Hāshimī cubit disappeared. One document uses the term *dhirā' al-'amal* in reference to the surface of a building's hall,[102] while another simply uses the term *dhirā'*.[103] It is unknown whether the former refers to the Hāshimī cubit or to a variation on the new Ottoman cubit. Suffice it to say, where the word *dhirā'* appears alone, it refers to the new Ottoman cubit.

Something that may have helped affect the required transformation in local practices was the deportation of thousands of Egyptians to Istanbul. Ordered by Selīm himself, the deportation targeted members of the elite as well as artisans, builders, craftsmen, etc. In their stead, people from Istanbul were brought to Egypt. Ibn Iyās writes that this was Selīm's "customary" conduct upon conquering a new city.[104] The reason behind this policy appears twofold. For one, a need to import the best artisan's from across the Empire to service Istanbul's architectural projects. Two, and more importantly from our perspective, such a policy ensured that

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[101] W. Hinz, "Dhirā '."
[102] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 785. This appears to be the architectural cubit measuring 79.8 cm. Ibid. Hinz, "Dhirā '."
[103] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 742.
[104] Ibn Iyās, *Badā'i'*, p. 188. Ibn Iyās considers this the greatest atrocity committed by Selīm against Egypt, writing that there were women and children among the exiles who were forced into "mixing/consorting with nations other than their own." Ibid., p. 229.

artisan's trained and accustomed to Ottoman standards, would facilitate the switch to the new metrological system.

But the reforms did not end at the measurement of the cubit for the *qāṣid* had also come bearing new *arṭāl* (weights) and brass *sināj* (weights placed as a counterpoise on the scales of a balance; sing. *sanj*) following the customary weights of Istanbul.[105] Suleymān had abolished the Egyptian *sināj* and *dhirā'*, forbidding merchants and traders from using them. The governor responded by "hearing and obeying," commanding Zaynī Barakāt, the *muḥtasib*, to publicize the new laws. Together they approached the merchants, making each sign a written oath to abjure purchasing or selling products by any weights other than the Istanbūlī. This was a source of great strain on the merchants but again, dissenters were threatened with immediate hanging without appeal, in their own shops. On the heels of this order, the *muḥtasib*'s aides raided the markets, confiscating the old scales and weights and publicly destroying them. So successful were these tactics, concludes Ibn Iyās, that the new weights "are used to this day."[106]

Ibn Iyās' conclusions may have been premature, however, for a year later, in 928/1521, another decree was issued instructing the people of Cairo to abandon the weights and measures they had used since "olden times" (*qadīm al-zamān*). Notably, however, the language is markedly different from that of previous decrees in that it speaks of Egyptians assimilating their practices, not to 'Istanbūlī weights'

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[105] Weights of balance (in full *sanajāt al-mīzān* [sing.*sanja*] also applied to balances, steelyards and the weights of a clock. There are two recognized plural forms, *sinajāt* and *sināj* (in modern Egyptian Arabic *sinag*, plural of *singa*). J. Walker and D.R. Hill, "Sanadjāt," *EI*, CD Rom Edition.

[106] Ibn Iyās, *Badā'i'*, p. 415.

or 'Istanbūlī custom,' but to the "*shar'ī* standards outlined in the works of *ḥisba*."[107] The change in language signals an important shift in the symbolism, Islamic rather than Ottoman, used to bolster the state's claims to legitimacy.

There is no more written on the subject by Ibn Iyās, but the *sijill*'s fill in important gaps. In the case considered below, the *arṭāl* of which Ibn Iyās spoke, are revealed as a source of contention between merchants and state well into the seventeenth century. Contrary to Ibn Iyās' report, the *sijill* reveals that the Egyptian *raṭl* at 144 *dirhams*, continued to be used in Ottoman Egypt. There are, however, no documents to suggest that anything other than the 'Egyptian *raṭl*' was in use, alongside the generic Ottoman '*raṭl*.' Already, therefore, there appears to have been a reduction in the sheer variety of *arṭāl* used by comparison with previous eras. Moreover, the Egyptian *raṭl* was not used indiscriminately, but limited to comestible products. And even within this limited sphere, the *muḥtasib* periodically challenged its usage.

The case below, involving the guild of the sugar merchants, sheds great light, not only the evolution of metrology systems in Ottoman-Egypt, but on the latter's attempts to transform '*mu'āmala* as it is' to reflect '*mu'āmala* as it should be' from the perspective of a unifying state. On the face of it, the document appears to exemplify the triumph of custom. It records the victory of the sugar merchants against the chief *muḥtasib* (market inspector), upholding the formers' right to use the *raṭl Miṣrī* - as per Egyptian custom - in lieu of the *raṭl* stipulated by the 'honourable *ḥisba*' (Ottoman custom). As Shaw has shown, the *muḥtasib*'s duties

[107] Ibid., p. 444.

in Ottoman Egypt were "limited principally to the enforcement of standards of weights and measures, and prices in the comestible markets of Cairo."[108] A close examination of the case confirms this role. Furthermore, rather than exemplifying the triumph of custom, it illustrates its exceptionalism and demise in important sectors of the market economy.

A *maḥḍar* and *ḥukm* from the year 1001/1592, transcribed into the text of another document from the year 1045/1636 allows us to follow the travails of the sugar merchants as they strive to retain an exemption from Ottoman *ḥisba*.[109] The original document begins by identifying the presiding judge as Shaykh al-Islām Qayd Allāh Efendī, before identifying the plaintiffs before him as Governor Aḥmad Pasha, "pride of the merchants" (*fakhr al-tujjār*) al-Shaykh Nūr al-Dīn ibn al-Sharafī Yiḥyah, from the guild of the sugar merchants (*Jamā'at al-Sukkariyya*), and Zaynī 'Abd al-Raḥmān al-Ḥākimī, Shams Muḥammad b. Shams al-Dīn al-Zayn, al-Nūrī 'Alī al-Ṭūlūnī, 'Alī al-Ḥalawānī, al-Zaynī Ibrāhīm and a large number of other members of the guild from Bayn al-Qaṣrayn and Bāb Zuwayla.

The aforementioned merchants complained of the harm which befell them at the hands of the *qāsim amīn al-ḥisba* (officer of the treasury) of Egypt, when he attempted to "impose the *siyāsa* upon them," because they sell sugar, and other commodities, at the customary *raṭl* of 144 *dirhams*. The *muḥtasib* demanded they take an oath to sell at the *ḥisba*'s rate, equivalent to 150 *dirhams*. Such demands, they argued, constituted a violation of the "honourable *sharī'a* and of the old customs" (*'āda qadīma*). By switching to a *raṭl* of 150 *dirhams*, they continued,

[108] S. Shaw, *The Financial and Administrative Organization*, p. 118.
[109] Al-Bāb al-'Ālī, *Sijill* no. 124, Doc. 68.

great harm would befall them as it would entail a rise in production costs, an unreasonable request given that the weight of the *qabbān* (wholesale weight of comestible products), with which commodities are weighed in the honourable sultanate, was equivalent to their weight. The *muḥtasib*, they accused, was imposing his will on them and setting the measurements (*al-'iyār*) in accord with "his own knowledge" (*bi-ma'rifatih*). Finally, they argued that the *muḥtasib* could only impose the standard weights and measurements upon them with the knowledge of the governor (*ḥākim al-shar'i*). Such, concludes the case, was the underlying cause of this long running dispute.

For his part, the head of the *ḥisba*, "*al-qāsim* the aforementioned," defended his actions by claiming that in the time of the deceased wazīr Uwāys Bāsha, an unknown official (*shakhṣ*) had calculated the Egyptian *raṭl* at 150 *dirhams*. While he insisted on adhering to this precedent, the record indicates that the *qāsim* could produce no witness or evidence to this effect and had nothing "in hand;" i.e., produced no corroborative document to support this claim. The matter then appears to have been referred to the "eminent *'ulamā'* of the four *madhāhib* in the Egyptian *diyār*, may their favours persist." The indicated *'ulamā'* are described as the most prominent scholars of their time including: "Mawlāna al-Shaykh Nūr al-Dīn 'Alī --? al-Ḥanafī and Mawlāna Nūr al-Dīn 'Alī al-Ziyādī al-Shāfi'ī and Mawlāna al-Shaykh 'Abd al-Raḥmān al-Khaṭīb al-Zaynī al-Shāfi'ī and Mawlāna Wālī al-Dīn al-Ḥanbalī and Mawlāna al-Shaykh Yūsuf al-Damīrī al-Mālikī and others from among the community of scholars in Egypt. Each of them gave the following *fatwā*: "What is known among scholars is that the Egyptian *raṭl* is 12 *awqiyya* and the *awqiyya* is

[equal to] 12 *dirhams*, and becomes 144 *dirhams*. That is in their custom." Not a single scholar dissented in this view, notes the text of the document.

The above is conveyed in a *maḥḍar,* while the decision that follows is given following the lapse of an unspecified interval. The record states that, after perusing the opinions of the scholars, the judge affirmed that the Egyptian *raṭl* is, according to prevailing ancient custom (*al-jārī bih al-'āda...min qadīm*), 144 *dirhams* no more and directed the "current *muḥtasib*'s deputy, al-Zaynī," to summon the merchants once again. On arrival, they conveyed to the court their belief that the "eminent current *wazīr* ['Uways] had breached (*anhā*) the prevailing state of affairs (*al-wāqi' al-ḥāl*)." They also demanded an official *buyuruldi* that would explain their case and express an intolerance for the occurrence (*iḥdāth*) of *bida'*, "as there is no license for such" (*lā rukhṣa fī dhālik*), while also affirming that matters should remain constant with the "old customs" (*al-'āda qadīma*). The judge responded by ruling that legitimate (*shar'ī*) weights cannot be tampered with and that the indicated customary weights must remain as they are based on the position of the *sharī'a* (as conveyed in the *fatwās* of the scholars) and old custom, prohibiting any intervention with the Sukkariya, "a *shar'ī* prohibition." Sometime thereafter, the head of the comestible markets (*qabbāniyya*), Shaykh Muḥammad, was summoned and informed that the weight of the *qabbān,* and its various commodities, should correspond to the Egyptian *raṭl* at 144 *dirhams* throughout the honourable sultanate and beyond. The transcript of the original case ends here, and is dated 20th Ṣafar, 1001/1601.

There are two points to be made with regard to the contextual and linguistic features of the above text. First, while the *sijill* never defines what is meant by "honourable *sharī'a*," the case exemplifies the manner in which such references are used to bolster various claims, either those of the imperial centre when imposing state custom, or the community when it is defending local custom. In this case, custom is upheld on the pretext of "preventing the harm," upholding "old custom" and the "precedent of the *sharī'a*." But once again, the reference to 'old custom' refers not to pre-Ottoman practices (although in this case they are pre-Ottoman in origin), but to the practices that had already been condoned by former Ottoman officials. Similarly, the phrase 'the precedent of the *sharī'a*' refers to the precedents set by former Ottoman jurists who sanctioned the local practice. At no time, therefore, is the pre-Ottoman practice legitimated through references to non-Ottoman sources. Rather, it is the rulings of previous Ottoman officials which establish both "old custom" and the "precedent of the *sharī'a*."

Second, the judge justified his ruling on the grounds that – in this case - the Ottoman *ḥisba* constituted "oppressive renewal" (*tajdīd muẓlim*) and negative innovation (*bid'a*). Negating it, therefore, was an act of 'lifting the harm.' In this particular case, however, the potential for 'harm' is not limited to the sugar merchants alone, but extends to the state itself. The comestible markets were an invaluable source of revenue and economic growth. In particular, sugar was a vital staple, exceeding the importance of other commodities in the late sixteenth and early seventeenth centuries.[110]

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[110] See, Shaw, *The Financial and Administrative Organization*, Chapter One.

In the final analysis, the document does not indicate wide endorsement of the Egyptian *raṭl*. The drawn out procedure, involving prominent scholars and a minister as well as the number of sessions held, is a testament to the layers of official bureaucracy in which the exemption is wrapped. Most importantly, the exemption is subject to periodic review. We know this because the *ḥujja* from 1001/1592 appears in the body of another court *maḥḍar*, dated 1045/1636, when the sugar merchants again confronted the *muḥtasib*.

The document from 1045/1636 begins by introducing the guild of sugar merchants (*jamā'at al-sukkariyyīn*) of Bāb Zuwayla and Bayn al-Qaṣrayn, who appeared before the chief judge to assert their right to weigh their sugar and other products according to the "old customary weights." Merchants who presented themselves in court included the head of the merchant's guild, (*Shah Bandar al-Tujjār*), the Khawāja Muḥammad al—(?) and Shaykh Ibn al-Shaykh Yūsuf and the Shaykh 'Abd Allāh Ibn al-Ḥājj Muḥammad and "others from Ṭāyifat al-Sukkariya." Collectively, they had come to file a complaint against the *muḥtasib* for attempting to make them conform to the Ottoman standards in weights. They conceded to the judge that their *raṭl Miṣrī* amounted to 144 *dirhams*, and did not conform to the weight of the *raṭl* indicated in the honourable sultanic *ḥisba* (*al-ḥisba al-sharīfa*). When asked to explain the discrepancy between their *raṭl* and the standard Ottoman *raṭl* of 150 *dirhams*, they responded with the justification that "in their old customs their *raṭl* amounted to 144, not more."

But the strength of the merchants' case rested on more than the virtues of 'old custom.' They also defended their right to use the *raṭl Miṣrī* on the basis of the

original document (*ḥujja shar'iyya*) from 1001/1592, exempting them from adhering to the standards of the *bayt al-ḥisba*.[111] The document, they explained, prohibited any party from confronting or challenging their practices. Moreover, it clearly stipulated that the "measures" (*i'yār*) of the sultanic *ḥisba* could not be imposed upon them without the knowledge of Egypt's chief judge. The *muḥtasib* was not authorized to impose these measures of his own accord. The document was undersigned by the former chief judge, Mawlāna Shaykh al-Islām Qayd Allāh Efendī, as well as the former governor of Egypt, Aḥmad Pasha. At the judge's request, a copy of the original document was faithfully transcribed into the new record.

When the judge familiarized himself with contents of the original written instrument (*maḍmūn al-ḥujja*), he found it to be in agreement with the *sharī'a Muḥammadiyya* and with "acceptable" (*murḍiyya*) custom, ruling that the Sukkariya should retain, as per their customs, the Egyptian *raṭl* at 144 *dirhams*. Moreover, he warned against any intervention in their affairs, categorically stating that they could only be made to replace their weights and measures by the chief judge, "and none other." Significantly, the ruling is justified on the grounds that the original *ḥujja*, as well as the testimonies of the *'ulamā'*, condemn "oppressive renewal" (*tajdīd muẓlim*) or any action conflicting with the honorable *shar'*. A "total prohibition of such in the year 1045/1644" was thus decreed.

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[111] A term used to denote two ideas: 1. the duty of every Muslim to "promote good and forbid evil;" and, 2. the function of a person entrusted with the application of this rule in the supervision of moral behaviour and more particularly of the markets. The person entrusted with the *ḥisba*, meaning "calculation", or "sufficiency," was called the *muḥtasib*. See, C. Cahen and M. Talbi, "Ḥisba," and R. Mantran "Ḥisba: ii Ottoman Empire," *EI*, CD Rom Edition.

We cannot say how often, in the forty-four years that lapsed between the document issued in 1001 and the one in 1045, the merchants had to defend their practices in court. We can, however, corroborate the merchant's claim that they had used these weights prior to 1001. An *iqrār*, witnessed by the Ḥanbalī judge in the court of Ṭūlūn, that dates from 965/1557, thirty six years prior to the *ḥujja* above, records the following.[112] A member of the soldiery confesses to having defaulted on the payment of a debt and promises to pay it back in produce, predominantly sugar but also including other comestibles, in an amount fixed in tandem with the "Egyptian weights" (*bil-wazn al-Maṣrī*).

A third reference to Egyptian weights is found in a rental contract for *a waqf madrasa* in Ḍumyāṭ, dated 1023/1614. Describing the property and the instruments/tools which accrue to the renter, it lists "all twenty four antique (*'atīq*), lead (*ruṣāṣ*) *qinṭārs*, used in the Egyptian weights" and for which there is a "*shar'ī* decree and [stipulating that] such [customs] prevail (*jārī*) in the indicated *waqf*."[113] Although the product that is to be weighed in tandem with the Egyptian weighs is never identified, the tools listed (agricultural implements) indicate that it was a comestible product. It is probably no coincidence either, that the document also places the *madrasa*, and its lands, near the "*khaṭṭ al-Qaṣṣābīn*," or line of sugarcane growers.

Apart from the three cases culled from this sample of documents, there are no references to Egyptian weights or measures in any of the other commercial, rental, purchasing or selling contracts. Nonetheless, in the absence of further

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[112] Maḥkamat Ṭūlūn, *Sijill* no. 165, Doc. 1305.
[113] Al-Bāb al-'Ālī, *Sijill* no. 96, Doc. 2822.

research, only a tentative conclusion can be offered - that only comestible products were exempted from the 'honorable *ḥisba*' of the Ottoman state, to the exclusion of other commodities. Moreover, such variation as existed was significantly redacted from that which existed under previous regimes.

Conclusion

Our examination of the public and private domains of *mu'āmala* shed light on the manner in which a given community's customs were legitimated or de-legitimated, raising a distinction between two clusters of customary laws – those perceived as benign from the perspective of *sharī'a* and *qānūn*, and those perceived as subversive from the perspective of the state's universalizing agenda. The conditional clause in marital contracts showed the court's neutrality towards certain practices. It also revealed the court's proclivity to regard the individual as a distinct entity from the community, hence enforcing conditional marital clauses that diluted the authority of the latter by, for example, prohibiting husbands from moving their brides. Concurrently, it also revealed a tendency to strengthen the bonds between the individual and the state and to temper the absolutism of the community as a primary unit of identification. The porous boundaries of community identity were further demonstrated by marriage contracts, which revealed that almost a third represented mixed couples hailing from diverse communities. Even marriages that united couples from the same professional community (as in *'askerī* marriages) could not be termed ethnically homogenous and reinforced the conclusion that class, rather than ethnicity, played the determining role in one's choice of marital

partner. In such an environment, the individual, particularly the bride, was in a position to challenge customs originating in her own, or her spouse's community with the aid of the courts.

In its dealings with community blocs rather than individuals, the state and its courts exhibit an ambiguous, but not incoherent approach to custom. On the face of it, the language of the documents suggests the courts were willing to accommodate 'old customs,' as in the decree concerning the taxation of the Gypsy community. On closer examination, however, it became evident that such terms referred to old Ottoman rather than pre-Ottoman customs. Nonetheless, the reference to 'old custom' could at times indicate a pre-Ottoman practice. However, as demonstrated by the cases of *iltizām*, pre-Ottoman customs did not necessarily denote modes of 'grass-roots legislation.' Such cases problematize the assumption, found within much of the secondary literature, that pre-Ottoman customs are necessarily rooted in local popular practice or that they represent 'grassroots' legislative trends. Rather, the *sijill*'s validation of 'old customs,' demonstrates the manner in which the courts incorporated ancient state practices into a Muslim juridico-moral paradigm when it was expedient to do so.

Likewise, documents pertaining to *ṣulḥ*, it was argued, did not support the thesis that they represent extra-judicial forms of customary arbitration. Rather, the preponderance of such documents in the *sijills* points to the triumph of legal documents and the *shar'ī* court as the supreme legal venue. By registering such documents the Islamic court was effectively controlling practice, for *ṣulḥ* agreements were not merely registered with the courts, they were also framed in

formulas designed to mediate custom, as in the example of the attached *iqrār*. Thus, far from merely registering these settlements, the courts transcribed the agreement in such a way as to expunge custom or assimilate it to *sharī'a*.

Except in limited areas, when it came to public *mu'āmala*, the registers revealed a consistent disposition to expunge rather than accommodate local custom. For example, in municipal matters, the courts often depended on local custom in constructing its cases and appealed to the expert testimony of local engineers in reaching its judgment. However, when laws governing taxation, or market weights and measures were at stake, the picture was entirely different. A policy to unify metrological systems was, for example, pursued under the legitimating banner of *shar'ī ḥisba*. Thus, not only was the financial administration of Cairo centralized, but so too were the market laws governing fiscal practices *within* Cairo. To a large extent, the policy appears to have been successful as, out of tens of documents containing a bill of purchase or sale only a few exemptions appear – gold and silver standards as well as the measurements used to weigh comestible products such as sugar. Nonetheless, this does not mean that custom was gaining ground in the *sharī'a* court. To the contrary, the lengthy and complicated lobbying processes by which merchants retained such exemptions, demonstrated that the exception proves the rule. Furthermore, not only was the exemption limited to comestible products such as sugar, it was also conditional upon periodic review.

Cumulatively, therefore, the evidence supports the conclusion that the variegated customs at play in Ottoman courts do not justify the claim that the latter is a prolific or for that matter, always 'local' source of law. Rather, the customs

cited represented a combination of local and imported practices, some Roman codes from an ancient past and others only introduced in the century prior by the Ottoman state. In all cases, it was the expedience of a given custom, or alternatively its benign or subversive status, that determined its fate in the courts of the Ottoman Empire.

Conclusions

Inevitably, the argument that the Ottoman state bureaucracy sought to promote a new legal orthodoxy in Cairo raises several questions. What was the motivation behind such a project? Were the state and its bureaucracy moved by genuine religious convictions or by socio-economic expedience? While it may not be possible to determine the state's religious sincerity, it is possible to identify the numerous political, economic and social benefits of such a project to a universalizing state. On the social level, orthodox notions of correct outward conduct promote one social ideal and thus minimize the risk of ethnic and sectarian differences in a vast, multicultural, multi-lingual empire by minimizing differences. On the political level, such a policy loosens the bonds between the individual and the community and fosters greater affinity between the individual and the state, or a nebulous concept of proto-citizenship. On the economic level, it facilitates intra-empire trade, opening borders and enhancing the flow of commercial and human traffic. The cosmopolitanism of Cairo, and indeed smaller cities throughout the empire, is testament to this phenomenon. Moreover, the tractability of a vast, standing army rotated throughout the empire, was well served by a centralized court and by a systematic archive that provided a necessary paper trail. Indeed, it is arguable whether such an empire could have sustained the economic supra-structure for which it is lauded, let alone forged a unified political landscape, in the absence of this policy.

One of the principal means by which orthodoxy was manufactured was through the rhetorical instrument of religious renewal. This was amply demonstrated through the filter of the intra-Muslim *jihād* as well as the rhetorical devices of *takfīr* and *tajdīd*. Such were the legitimating devices by which both the legal process and the law produced were reformed. The 'new orthodoxy,' composed of codified Ottoman customs in the form of *qānūn* and a redacted version of Islamic law under the stewardship of Ḥanafī legists, helped to streamline the local customs of the communities of Cairo as well as to curb the traditional pluralism of Islamic legal theory. The judicial conflicts that often marred the relationship between members of the Egyptian judiciary and representatives of the imperial bureaucracy in the sixteenth century, revolved around these core issues.

The emphasis placed on the 'tension between *sharī'a* and *qānūn*' by the secondary literature, was found wanting as a paradigm by which to assess the dynamics of this conflict. The juxtaposition of *qānūn* and *sharī 'a*, as two competing systems of law, obscures the real source of conflict - the existence of two 'antagonistic *sharī'as*.' Both the Ottoman judicial bureaucracy and its Egyptian counterpart, held two distinct definitions of *sharī'a*, each with its own formula for the accommodation of the 'local' and its own limitations upon that which may be considered 'universal.'

Islamic legal theory, and the *sharī'a* derived therefrom by Egyptian jurists, envisioned parity/equity between the schools of law, a principle enshrined in the concept of judicial *ikhtilāf* (disputation). Reconfiguring this balance, the Ottomans privileged one of the four *Sunnī* schools of law, the Ḥanafī *madhhab*, with

administrative and judicial authority over the other schools, effectively making it the supreme *madhhab* of the state. To suppress *ikhtilāf*, state edicts curbed *ijtihād* and called for the 'renewal' of religious doctrines among the Egyptian judiciary. In sum, local custom, an important element in the legal mosaic, was moderated through the twin instruments of a redacted *fiqh* and a codified *qānūn*.

The imposition of Ottoman *qānūn* in the sensitive areas of *waqf*, family law, taxation and commercial law, provoked virulent local opposition on the grounds that it represented the 'customs' of the 'Turks' or '*mawlā*.' In actuality, much of the *qānūn* did embody 'Turkic' customs, and many more were the accumulated *fatwā*s of prominent *shaykh*s *al-Islām* (chief *muftī*s of Istanbul). One represented a threat to the *fiqh*-based pluralism of the legal schools, and the other a threat to local customary laws - the two ingredients of a 'local *sharī'a*.'

The call for 'religious renewal' meant that recalcitrant judicial officials, including judges, *muftī*s, notaries and witnesses, were often purged from office. The biographies of the people who staffed these courts provided insight into the substantive conflicts that ignited these conflicts, principally opposition to: (1) the dominance of the Ḥanafī school; (2) the limitations imposed on the judicial independence of local jurists; (3) the imposition of *qānūn*; and finally, (4) the organization of the '*ulamā*' into a salaried class of civil bureaucrats. For its part, the state demanded that local jurists: (1) keep the number of deputies judges and witnesses down to a minimum; (2) enforce the *qānūn*; (3) refrain from *ijtihād*; and, (4) "renew" their "*dīn*."

As part of the above argument, Chapter Two considered the changes overtaking the 'institutional *sijill*,' arguing that transformations in the status of the written document invariably changed the law produced. Without cognizance of this shift in the status of the document, scholars often misread the evidence of the 'narrative *sijill*' as, for example, when they posited custom as a vibrant, if not dominant, source of law.

To avoid this pitfall, I began by asking what was innovative and what was commonplace in Ottoman attitudes to the written legal document. What was revealed was that the least innovative policies were those relating to the formula and composition of the legal document, which exhibited remarkable stability from the Mamluk to the Ottoman period. The most innovative initiatives were those pertaining to the legal status of the document and its system of storage and archiving. As shown, the traditionally ambiguous place of written documents in Islamic law was overturned and replaced with a system in which documents now served as sound/certain legal proofs, or *ḥujja*s. This transformation was possible because of the establishment of an archival system and a re-orientation in the spatial definition of the Islamic court. Such measures enabled the state to invest the document with formal authority, not by ignoring legal theory, but by attempting to meet its demands in practice.

The need for a modicum of adherence to the bounds of legal theory was reflected in the birth of systematic archives devised to preserve and guard the 'written word' against corruption or forgery, a criterion of its reliability according to Islamic jurists. A judicial process that encompassed fixed courts complemented such a policy by generating

a spatial distinction between the judge, traditionally the embodiment of the court, and the physical courthouse. By extension, the judge lost sole custodial rights to the *sijill,* now collected and stored by bureaucrats who helped preserve the 'chastity' of the legal document for contemporaneous and future generations.

Apart from the archive, other textual and administrative devices were used to minimize the risk of forgery. More affinity between the institution of notary and witness, the use of textual devices offsetting the risk of interpolation, the simplification of the process of authenticating a judge's seal as well as the continued emphasis on the primacy of witnessing, all contributed to the production of the authoritative written *ḥujja.* These truncated procedures facilitated the circulation of documents in Ottoman courts by allowing judges to recognize written instruments issued outside of their courts, eschewing the need for witnesses to the document's original composition. For all the above reasons, the *sijills* reveal a marked tendency on the part of judges not only to recognize documents in the absence of secondary witnesses but also to reject oral testimonies that contradicted a 'sound' document.

As mentioned, such developments carry enormous implications for any researcher interested in quantifying the evidence of the narrative *sijill* to identify 'spikes' or 'declines' in Muslim legal trends. A system in which people could and did obtain written proofs of their legal claims spurred people to use the courts, not merely because the courts were accessible, but because the possession of legal documents was an imperative. Judging by the law requiring all marriages to be registered with the *sharī'a* courts, Ottoman judicial policy was active in the promotion of this trend. Sequentially, the need for legal documents had profound consequences on the law produced by coaxing

customary law out of the shadows and into the formal light of the *sharī'a* courts. As shown in Chapters Three and Four, this development served to bring custom under the watchful, modifying gaze of the court.

Chapter three explored this new judicial landscape, and its impact on the law produced in relation to the 'rights of God' (*'ibādāt*), in two parts. Part I explored the intellectual backdrop against which these developments unfolded. Part II examined the effects of this discourse in practice. As the state's jurisdictional claims over *'ibādāt* could not merely be asserted - they had to be justified by means of a philosophical adjustment in the very definition and reach of state laws – state bureaucrats appropriated and transformed the ancient concept of *nāmūs*. Transforming the original definition of *nāmūs*, from 'divinely inspired laws' to 'divinely inspired state laws,' political philosophers elevated the role of the state in the production of law and effectively licensed the codification and application of *qānūns* across the empire. Often representing little more than "codified" Ottoman customs, the *qānūn*, in the guise of sultanic *nāmūs*, was thus well positioned to displace the customary laws of the various communities that inhabited Cairo.

To curb such legislative claims, Egyptian jurists like Ibn Nujaym responded by elaborating the theory of custom to argue that a particular custom could never be universalized. While the *qānūns* were not uniformly applied across the empire, and a degree of variation was tolerated in areas of taxation and metrology, many more were universalized. Examples of the latter were provided in Part II in the areas of public morality, marriage, divorce and the management of *waqf*.

As shown in Ibn Iyās' early sixteenth century work, Ottoman conceptions of female modesty were imposed upon the local populace through public edicts, such as those banning women from appearing in public. Ideals of modesty were far from static however, as evinced by the case of Ḥijāziyya, a woman who asserted her right, not only to appear in public, but to meet her male suitor in public by the early seventeenth century. Such rights were asserted at the expense of her brother, who had attempted to impede her engagement and marriage to her suitor, Jum'a, by accusing the two of committing moral improprieties in private. Cases such as this reveal several things of import. Namely that it was common for women to appear in public and to mingle with males for legitimate reasons, including courtship for the purpose of marriage. The conduct of Ḥijāziyya's brother, including what appeared to be a false testimony leading to Jum'a's arrest, was an assertion of customary patriarchy. In such cases, the legal institutions of state functioned to temper the force of custom in two ways; one, by dissuading males from acting outside the bounds of law; and, two, by giving women a venue in which to challenge patriarchal claims. The basis of Ḥijāziyya's challenge rested on her legitimate right to meet with a member of the opposite sex in a public setting for the purpose of arranging her own marriage. The right of women to appear in public was substantiated by another case where the husband was forbidden to 'close the door' upon his wife. In these two cases, therefore, one witnesses a dramatic re-alignment in 'ideal' doctrines, from a ban on women appearing in public to a state in which that right was asserted and enforced by the courts.

In the case of marriage, we witnessed similar attempts to enforce a singular ideal diluting the force of custom in the giving of the dowry. For example, a concerted effort was made by the courts to acquire the *mahr al-mithl* for women, or full dowry, in opposition to the Egyptian custom of dividing the dowry into advance and deferred portions. Eventually, however, the practice of the Egyptians was deemed the best of customs and incorporated into Ḥanafī *fiqh* at the expense of Anatolian practice. What this particular issue revealed, therefore, was that far from attempting to eradicate all custom, or to impose strictly Anatolian customs, the judicial bureaucracy was interested in unifying practice by reducing the many customs of the inhabitants of the empire to one.

At other times, we witnessed the courts' adamant refusal to allow customary practices to temper the fundamental rights granted women by Islamic legal theory. Thus, husbands who neglected their economic obligations were reprimanded or jailed, male *wakīl*s who absconded with the dowry were prosecuted and adult women unknowingly married by a *wakīl* (i.e., without their consent) were awarded their freedom. In other words, the alignment of legal practice and legal theory, to the exclusion of custom, was most evident with respect to economic rights and marital consent.

With regard to divorce, a peculiar exemption was made. Annulments, or *faskh*, based on the criterion of a husband's absence or abandonment, were banned "in the lands of Rumelia and Anatolia," but not elsewhere. In Egypt, annulments continued to be granted, but only by the authority of the Ḥanbalī judges, to the exclusion of judges from the other schools of law. This, in itself, invited further

speculation. Why were Shāfi'ī judges not officiating over annulments when Abu al-Su'ūd forbade the practice in Rumelia and Anatolia on the grounds that 'acting as Shāfi'ī' in this matter was not permitted? Is it possible that the Ottoman judicial bureaucracy had limited the practice to the Ḥanbalī school out of conviction that the latter would apply more stringent criteria? Whether this is true or not, the fact that all cases of annulment were only granted in the Bāb al-'Ālī court, the seat of the Ottoman chief judge, sends the message that while the practice was tolerated, it remained closely monitored.

The vigilance of the judicial bureaucracy was also evident in the area of *waqf*. The example culled showcased the close censorship exercised by state officials affiliated with the office of *iḥtisāb* over any violation of *qānūn* in the administration of endowments. While the case examined represented a victory for the defendants, who secured exemptions against the office of *iḥtisāb*, it also illustrated its exceptional nature. In the first place, nothing short of a sultanic decree was necessary in order to secure such an exemption. Furthermore, the text of the decree indicated that intervention by the office of *iḥtisāb* had not been infrequent in the past, and was to be anticipated in the future. It is not unlikely, therefore, that the administrators of this *waqf* had their exemption challenged and periodically re-evaluated over the years. Once again, the point to be emphasized is that such a case was exceptional and subject to period review. As such, it cannot be interpreted as a blanket endorsement of customary practices in the administration of Cairo's *awqāf*.

Indeed, the administration of endowments exhibits a consistent disposition to custom in one area alone - the laws of succession associated with familial *waqf*. As shown, Islamic legal theory allowed the revenue from any endowment to be distributed as the founder saw fit, permitting the latter to circumvent the rules of *sharī'a* inheritance by bestowing all, some, or none of the benefits on one or more individuals. Such a prerogative could be manipulated to disinherit female descendants or to exceed the portion allotted them by the *sharī'a* rules of inheritance. Again, it is worth emphasizing that Islamic legal theory, rather than Ottoman judicial policy, authorizes this practice and opens the door for discretionary decisions based on individual preference or community customs. Thus it is the triumph of the principle of judicial *ikhtilāf*, rather than custom per se, that is illustrated by such cases.

The fourth and final Chapter, on the rights of man, came to similar conclusions with respect to the redefinition of social rights and obligations. In many instances, the cases culled demonstrated the argument that the state was weakening communal ties between individuals in favour of strengthened ties between the individual and the state. This argument contradicts the prevailing view propounded by Raymond and others that the community retained a large degree of self-sufficiency under the Ottomans. Given that almost a third of the marriage contracts represented inter-ethnic unions we may infer that while community bonds were strong, they were far from absolute. Moreover, the number of marriage documents utilizing the conditional clause to abrogate customs originating in one's own community or in the community of a spouse, confirms the argument that the courts

mediated relations within communities and, in the process, fostered the ties between the individual and the state. For example, the myriad conditional clauses ratified and enforced by the court and its judicial bureaucracy- preventing husbands from moving their wives out of the city limits; or subjecting them to the peculiar customs of their community; taking a concubine or second wife; or physically abusing them – ensured that state institutions remained the venue of last resort for individuals who were unwilling to suffer the dictates of community practice.

Beyond standardizing the rights of man in the private domain, the state and its courts also standardized them in the public sphere. As such, we witnessed many innovations pertaining to the system of weights and measures, taxation, *ṣulḥ* and municipal law. Two principal conclusions were derived about the court's lexicon and its categorization of the customs it encountered. In the first place, the lexicon of the *sijill* can be misleading for as demonstrated by documents pertaining to the taxation of the Gypsy community and *iltizām*, references to that which is "customary" did not always reflect that which was local or pre-Ottoman in origin.

It the second place, a conceptual distinction was generated between customs deemed expedient and customs deemed subversive. The courts exhibited a willingness to recognize benign customs while working to offset those it deemed subversive. Examples of benign customs included appointments of guild heads, which in one document, proceeded according to known practice. In municipal law, as well, the courts allowed the normative, community-based standards of privacy and convenience to inform its understanding of the rights of the

individual/community. Even with respect to benign customs, however, the modifying hand of the court was always in evidence.

In *ṣulḥ* documents, even in the case of municipal disputes settled by customary arbitration, the courts modifying hand can be seen in the form of *iqrār*s appended to the bottom of the document. The *iqrār* was the judicial mechanism by which the courts assimilated customary arbitration to *sharī'a* and appended their own conditions onto the original document. Where necessary, they also pre-empted any reversion to customs that could be deemed subversive, such as the blood feud. An example of this regulatory process was seen in the case of a homicide where the victim's underage sons were prohibited from seeking blood retribution at any point in the distant future.

From the courts' perspective, however, the most subversive of the customs considered were those pertaining to metrological systems. A new orthodoxy promoting an Ottoman metrological system, particularly in relation to weights and measures, meant that any exemptions from the office of *iḥtisāb* were won with great difficulty. The travails of the sugar merchants in retaining the right to use the 'Egyptian *raṭl*' were amply illustrated. Moreover, their exemption from the weights imposed by the office of *ḥisba* was granted provisionally and subject to periodic review. In this case, therefore, the exception proved the rule.

The success of the new Ottoman metrology is to be measured by the fact that, contrary to previous eras, there are only two *arṭāl*, or units of measurement, mentioned in the *sijill* – the standard *raṭl* and the Egyptian *raṭl*. This is in stark contrast with the Fatimid and Mamluk eras, where many *arṭāl* were in circulation.

Thus while, the state may not have eliminated all forms of deviation from the standard Ottoman metrological system, it considerably redacted them. It is also worth repeating that this exemption applied only to a specific group, and was routinely re-evaluated. It is also no coincidence that the group in question traded in one of the most important commodities of the seventeenth century. In all, therefore, while the new orthodoxy was pragmatic in its reach, making exceptions for vital comestible products, it was never lax in the quest for universalization.

A vital objective of a multi-cultural, multi-ethnic, multi-religious and multi-lingual empire is to enhance relations between the individual and the state at the expense of community bonds. Above and beyond the need for realignment in the social contract, a unified legal system is also a vital pre-requisite of a unified Ottoman market. After all, the mechanism by which intra-empire trade and spectacular commercial growth could be maintained was a system that upheld contracts; between cities and provinces and between merchants and migrants.

In summation, while custom was negotiated and to some extent sustained in the *sharī'a* courts of Ottoman Cairo, we are confronted with the unavoidable conclusion that, from the early sixteenth to the mid-seventeenth centuries, custom was declining as a source of law independent of the *sharī'a* courts.

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