Arendtian triad (or Degrees of freedom: Against 'Islamic Law')

Draft paper prepared for the workshop on 'Sharia, government and development', April 4-5th 2014, Brown University: not for citation or wider distribution

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Introduction

In a tragedy the ludic may seem absurd. So, an academic discussion of the traditions of Islamic jurisprudence which embrace popular law-making appears a trivial diversion against the background of the defeat of states and the dismembering of societies at the hands of imperialism. The basic conditions for political society – that men (and women) make their world – are so damaged by oil rent, finance capital and war that the exercise of finding Islamic sources for law-making by political society may appear yet another academic exercise in bad taste. There is moreover no shortage of Islam amidst the rubble: can the broadcasts of virulent *fatwa*s across the land be met decently by anything but silence? America's Islam, as many a Syrian is wont to describe it, is everywhere.

Yet, the great unification under (America's) Brothers in the slip-stream of Recep Tayyib Erdoğan has proved surprisingly short-lived. Their recipes – popular orthopraxis and God-given modern sovereignty – included none for the economy save the Washington Consensus.

Perhaps incompetence did prove a problem. Perhaps ideas of the political do matter. In the below, after a brief sociological sketch, we shall consider two Islamic juridical thinkers. For them, the world was made by God in his justice – His Word in revelation being transcendent – but their own legal judgements and the body of norms of different sources with which they work are changing and fallible human acts. Law-making is coterminous with human history; conceptually it requires neither a founding social contract from a state of nature nor the threat of return to foundational violence.

Against 'Islamic Law'

When we translate *shar'* or *fiqh* as 'Islamic law' it is difficult not to bundle in with the term the modern project of state sovereignty common today to 'Muslim polities' as to all other states. By Islamic law we intuitively understand – and this vision can be easily supported by

many a statement of modern Islamists – that 'Islamic law' provides the higher normative framework while 'custom' indicates the circumstances on which norms are brought to bear. Of course, if we are versed in the sociological schools of 'law in culture' or 'legal pluralism' we may note that custom exhibits normative properties – something we shall see discussed below in Ibn 'Abidin's review of definitions of custom (*'urf*, *'adah*) as a phenomenon of reason (*'aql*) or of habituation and of verbal (*qauli*) as against practical ('*amali*) knowledge – but not for that shaking our sense that Islamic law remains the overlord within a project of state sovereignty.

In this paper I examine material that unsettles this modern frame of understanding. In this I am not advancing an argument about universal characteristics of Islamic normativity (be it, the *shar'*, *fiqh* or *madhhab*) but examining certain of the degrees of freedom which Islamic jurists have accorded to the production of norms and their historicity in the body of 'society' within an Islamic social and political order. In this we shall move away from the frightening dyad of modern sovereignty (the people versus the state/the law) to start instead from the more classical Islamic dyad of custom/legal text. This dyad can subsume a triad wherein custom embraces both the customs of people/s and the custom of government, each productive of norms to be judged within an Islamic juridical textual tradition. This tripartite understanding of legitimate normativity allows degrees of freedom within the Islamic tradition to resist dominant modern understandings of law wherein the ultimate power of law-making lies outside society, be they European, theorized from Karl Schmitt to Giorgio Agamben, or Islamic, as *al-hakimiyyah li-'llah* from Sayyid Qutb to Maududi and Khomeini.

Degrees of freedom

The material drawn together in this essay does not form a unified intellectual genealogy. It is composed of three sketches: the first a sociological one, the second analysis of an essay from the late 18th – early 19th century, and the third a reading from a late 20th- beginning of the 21st century book of essays. In this we shall move between three *madhhab*s (Zaydi, Hanafi and Ja'fari) and a juxtaposition of a sociological reconstruction with textual readings.

The choice is happenstance arising from my own trajectory within the worlds of Islam. The sociological sketch is of North Yemen as I observed it in the early 1970s. There the provisions of the *shar'*, the Zaidi *madhhab* in essence, structured the fundamental domains of

daily life – property and the making of persons and goods. With the texts, we turn not to Zaidi jurists but to two major figures from larger juridical traditions. The first is the Hanafi Muhammad Amin Ibn ‘Abidin (d. 1836) in *Nashr al-‘arf fi-bina’ ba‘d al-ahkam ‘ala ’l-‘urf* (*The wafting of perfume in the construction of judgement on the basis of custom*).[1] The second and last text is of the Ja‘fari *marja‘* Muhammad Hussain Fadlallah (d. 2010) *al-Ijtihad bain asr al-madi wa-’afaq al-mustaqbal* (*Juridical innovation between past eras and future horizons*).[2] In closing, invoking Arendt in *On Revolution*, I shall explore the argument that in abstract terms, the common conceptual construction of the sources of law in terms of a triad of Islamic jurisprudence, popular and governmental normativity, is potentially less constraining of societal, even revolutionary, law-making, than is the dyad central to conceptions of modern sovereignty, be they secular (people/state) or Islamic (God/state).

Shar‘ **and the custom of government in *bilad al-yaman***

North Yemen was a region only very partially incorporated into Ottoman order in the 16th and again late 19th/early 20th centuries. It remained a polity where *fiqh* (the *shar‘*, as embodied in a community of scholars) was deeply and unquestionably – almost un-ideologically, one might say – recognized as the ‘law of the land’. This historical experience contrasts with the long colonial history of Aden and South Yemen which led to the coming to power of the resistance in the only Marxist state of Arab history – a fitting response to 125 years of British rule – during the years 1967-1990.

In the early 1970s when I began my doctoral work in highland North Yemen, the outlines of an older political order were still evident.[3] *Fiqh*, and thereby true literacy, was transmitted through learned houses and mosque circles. In San‘a’ the Ottomans introduced a reformed school, *al-madrasa al-‘ilmiya*, which continued after the re-establishment of the Imamate, but the more prominent scholars continued to hail, for the most part, from recognized ‘houses of learning’.

[1] Muhammad Amin Ibn ‘Abidin, *Majmu‘at rasa’il ibn ‘Abidin*, Beirut: Dar Ihya’ al-Turath al-‘Arabi, n.d., vol. 2: pp. 114-147.
[2] Muhammad Husain Fadlallah, *al-Ijtihad bain asr al-madi wa-’afaq al-mustaqbal*, Beirut: al-Markaz al-Thaqafi al-‘Arabi, 2009.
[3] M. Mundy, *Domestic Government: Kinship, community and polity in North Yemen*, London: I.B. Tauris, 1995.

Property itself was understood in very classical Islamic terms. While pasture and waste land were under communal ownership, all agricultural land was privately owned. The rights and ownership of irrigation water were also expressed in terms close to the concepts of *fiqh*. So, too, inheritance of rights to land, water and built property followed the terms of the *shar'*. Marriage and other central traditions of family were conducted according to *fiqh* principles, and these rules, in their broad outlines, were known by everyone. Everyday patriarchal domestic authority was disciplined and legitimated by the *shar'i* judge, 'the woman's judge', the legitimacy of the Imamate also ultimately partaking in this chain of validation.[4] The Imamate was overthrown in 1962, but lest it be claimed that the description here represents only the freedom of an interregnum, we may recall that in jurisprudence the Zaidi Imamate required the recognition of the Imam as the most learned scholar of his generation. The very theory contained elements of social contract in the selection of the ruling Imam.

The house (a large physical house and a genealogically named family line) formed the basic building block of the political economy. In the countryside (but also in times of trouble in the cities) it was the union of these houses that composed the primary unit of political society. It was at this level that a shaikh could rule on everyday disputes and keep the peace. But to put the matter in this way is to obscure two salient facts about the relation of *shar'* and *'urf* (*man'*). First, many of the rulings of shaikhs were written, and penned by the local document writer (in my experience a figure doubling as a school teacher, modest in the event, but trained and distinguished by dress as a man with an Islamic education). In short, any time local rulings were written they were drafted and inflected by the *fiqh* tradition. Second, the heads of houses, structured into wards and wards into the primary local political unit of *qabila* (or as the pre-Islamic and Qur'anic phrase had it, *sha'b*) shared an understanding that ultimately they acted as guarantors of political order and had to assent to, indeed bound themselves to and thereby made, the rules of their place. This was so in the face of the tension between the ethos of egalitarian and shaykhly power, the former evident during the early years of the Republic and valorized in the years of President Ibrahim al-Hamdi (1974-77) but overruled after his assassination by the marriage of military and shaykhly power in the persons of President 'Ali 'Abdullah Salih and the late paramount shaykh of Hashid 'Abdullah al-Ahmar. Fuelled by oil rent, both Saudi and Yemeni, this Wahhabi-backed alliance strove to break the Mu'tazilite and egalitarian traditions of both North and South

[4] M. Mundy, 'Women's inheritance of land in Highland Yemen', *Arabian Studies*, London, Vol. 5, 1979, pp. 161-87.

Yemen within an autocratic, internationally backed regime of patronage, military employment and security. Over the decades, the systems of rain-fed farming that had been the context of rural collective self-government were damaged or abandoned.[5] ‘Abdullah al-Ahmar died in 2007; after sustained protests, in 2012 Salih handed the reins of government to his Vice-President of eighteen years, General ‘Abid Rabbuh Hadi Mansur. But little structural change has occurred; the 2014 budget gives an even larger share to the military and security apparatuses of the state.[6]

But let us set aside the present, when one would be hard pressed to say that Yemen as a whole is self-governing let alone its internal components, and return to the not so distant past. Then, the political and social world of North Yemen had been eminently Islamic and with the ‘government’ of houses providing the context for an Islamic ordering of person and property. Restricted literacy notwithstanding, both men and women knew the basic terms of the legal traditions governing their lives in a manner that I surely did not at the time with regard to those governing my own. In this most *shar‘i* of societies, to paraphrase Brinkley Messick, [7] men understood that they ultimately made the rules which bound them and by which they kept the peace. There were only restricted moments of demonization or political confrontation between Imamic and shaikhly authorities, when on occasion the local political rules could be described as *taghut* by Imamic authority. Indeed doctrinal confrontation with other Islamic sects, notably the Isma‘ilis, was far more likely to degenerate into such ideological formulations than the everyday cohabitation of *shar‘* and *‘urf*. So, as literacy itself was Islamic (education moving from the Qur’an to a basic primer in Zaidi *fiqh*, *Kitab al-azhar*) political contracts between men were inevitably written by those who were the bearers of the Islamic learned tradition. The ground rules of place and political organization did not, in general, contest the terms of Islamic jurisprudence but ordered the politics of space and political participation in a manner that the Islamic tradition neither prescribed nor prohibited. The *fiqh* tradition cohabitated with local law-making. This was true even in

[5] See M. Mundy, A. Al-Hakimi, F. Pelat, ‘Neither security nor sovereignty: the political economy of food in Yemen’, in Z. Babar and S. Mirgani (eds.) *Food Security in the Arab World*, London: Hurst & New York: Oxford University Press, forthcoming April 2014, pp. 137-159.
[6] See Muhammad ‘Abduh al-‘Absi, ‘Dirasah fi muwazanat al-daulah li-‘amm 2004 miladi’, http://mohamedalabsi.blogspot.com/2014/01/2014_2298.html
[7] B. Messick, *The Calligraphic State: Textual domination and history in a Muslim society*, Berkeley: University of California Press, 1993.

areas, such as Jabal Razih documented by Shelagh Weir, [8] where parallel to the genealogies of learned houses were genealogies of shaykhly houses known for their special knowledge of the norms of *man'* (keeping the peace) unlike the area not far from Sanaa that I came to know where rural leadership was not such a privilege of particular houses. Seen from this perspective what European scholars have wanted to see as 'customary law' is quite rightfully conceived by Islamic jurisprudence as custom. The virtue of this conceptualization is that both regional variation and change over time do not pose a problem doctrinally but are negotiable by Islamic jurists. Furthermore, custom can be everywhere, i.e. a taken-for-granted context of political action, unlike a colonial conceptualization of 'customary law' as an objectified set of norms applicable to certain ethnic groups within a project of modern state sovereignty. Lastly, at the level of intellectuals and popular politics of Yemen of the 1970s, the bridges were many between the egalitarian principles of the Marxists and Islamic readings of justice.

Hanafi Islam of the late 18th - early 19th century

With the first text we go back in time to the juridical tradition of an empire and to the last great scholar of the Hanafi manuscript tradition, the Damascene Muhammad Amin ibn 'Abidin in his essay *Nashr al-'arf fi-bina ba'd al-ahkam 'ala 'l-'urf*. The reading proposed here takes Ibn 'Abidin's essay as a reflection on the Ottoman Hanafi legal order within which he was so distinguished a scholar and not, as in the reading of Wael Hallaq, 'a prelude to Ottoman reform'. [9]

Ibn 'Abidin's essay consists of an introduction and two parts: the introduction concerns the definition of *'urf* and its conventional division into three, *al-'amma*, *al-khassa* and *al-shar'iya*; part 1 examines cases when the *shar'i* stipulation (*al-dalil al-shar'i*) is in part or in whole contrary to *al-'urf*,[10] and part 2 when custom runs contrary to the dominant doctrine of the *madhhab*, itself less closely delimited by a *nass* or binding text from the Qur'an or *hadith*.

[8] See S. Weir, *A Tribal Order: Politics and law in the mountains of Yemen*, Austin: University of Texas Press, 2007.
[9] Wael Hallaq published an analysis of the essay as Wael B. Hallaq, 'A prelude to Ottoman reform: Ibn 'Abidin on custom and legal change' in I. Gershoni, H. Erdem, and U Woköck (eds.) *Histories of the Modern Middle East: New directions*, Boulder: Lynn Reinner Publishers, 2002, pp. 37-61. In *Governing Property* I followed Hallaq in his transliteration of the title of the essay as *Nashr al-'urf* but it is properly *Nashr al-'arf* as I have given it here.
[10] Ibn 'Abidin, *Majmu'at rasa'il*, vol. 2, p. 116.

The introduction and the first part build closely upon the treatment of the topic in Ibn Nujaim's *Al-ashbah wa-'l-naza'ir*,[11] section 1 general rules, principle 6: *al-'adah muhakkama* (like many other jurists Ibn `Abidin wrote a commentary on the work, *Nuzhat al-nawazir 'ala 'l-ashbah wa-al-naza'ir*).[12] There are no real surprises here in relation to other scholars, the basic distinctions being respected and a review of a number of fundamental problems conducted: this is true in regard to the identification of relevant 'custom' and to the integration of custom with doctrine. Following other scholars Ibn 'Abidin discusses (a) the interpretation of binding *nass* in terms of the specification of its application (*takhsis al-nass*)[13] and in the light of custom (*ta'lil al-nass bi-'l-'adah*);[14] (b) the relation of binding *nass* to *madhhab* doctrine; and (c) the requirement that *madhhab* doctrine not be applied literally without regard to custom by judges and muftis (*laisa li-'l-mufti wa-la li-'l-qadi an yahkuma 'ala zahir al-madhhab wa-yatruka 'l-'urf*). [15]

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

But it is part 2 of the essay where Ibn `Abidin reveals to us the distance traversed during the three centuries of Ottoman rule since Ibn Nujaim and where, from the outset, he speaks in the first person from the text: [16]

فيما اذا خالف العرف ما هو ظاهر الرواية فنقول اعلم ان المسائل الفقهية اما ان تكون ثابتة بصريح النص وهى الفصل الاول واما ان تكون ثابتة بضرب اجتهاد ورأي وكثير منها ما يبنيه المجتهد على ما كان في عرف زمانه

[11] Zain al-Din Ibrahim b. Muhammad al-shahir bi-ʾIbn Nujaim, *al-Ashbah wa-ʾl-nazaʾir ʿala madhhab Abi Hanifa al-Nuʿman*, Beirut: Dar al-Kutub al-ʿIlmiyya, 1999.
[12] I have not found a copy of this work to date.
[13] Ibn 'Abidin, *Majmu'at rasa'il*, vol. 2, p. 116.
[14] *Ibid*, p. 118.
[15] *Ibid*, p. 115, see also p. 131.
[16] *Ibid*, p 125. *Fi-ma idha khalaf al-`urf ma huwa zahir al-riwaya, fa-naqul i'lam anna l-masa'il al-fiqhiyya imma an takun thabita bi-sarih al-nass wa-hiya al-fasl al-awwal wa-imma an takun thabita bi-darb ijtihad wa-ra'y wa-kathir min-ha ma yubni-hi al-mujtahid 'ala ma kan fi 'urf zamani-hi bi-haith law kana fi-zaman al-'urf al-hadith la qal bi-khilaf ma qala-hu awwalan wa-li-hadha qalu fi-shurut al-ijtihad anna-hu la budd fi-hi min ma'rifat 'adaat al-nas fa-kathir min al-ahkam takhtalif bi-'ikhtilaf al-zaman li-taghayyur 'urf ahli-hi au li-huduth darura au fasad ahl al-zaman bi-haith law baqiya al-hukm 'ala ma kan 'alay-hi awwalan la-lazima min-hu al-mashaqqa wa-l-darar bi-'l-nas wa-la-khalafa qawa'id al-shari'ah al-mabniya 'ala 'l-takhfif wa-al-taysir wa daf' al-darar wa-'l-fasad li-baqa' al-'alam 'ala atamm nizam wa-'ahsan ihkam*.

بحيث لو كان في زمان العرف الحادث لقال بخلاف ما قاله اولا ولهذا قالوا في شروط الاجتهاد انه لا بد فيه من معرفة عادات الناس فكثير من الاحكام تختلف باختلاف الزمان لتغير عرف أهله او لحدوث ضرورة او فساد اهل الزمان بحيث لو بقي الحكم على ما كان عليه اولا للزم منه المشقة والضرر بالناس ولخالف قواعد الشريعة المبنية على التخفيف والتيسير ودفع الضرر والفساد لبقاء العالم على اتم نظام واحسن احكام

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

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

Judges and muftis need to know the conditions and customs of those for whom they would write rulings; in the phrase of a jurist (al-Zahidi citing a fatwa) *man lam yakun 'aliman bi-ahl zamani-hi fa-huwa jahil*[17] and in Ibn 'Abidin's own words: *inna al-mufti laysa la-hu al-jumud 'ala l-mankul fi kutub zahir al-riwaya min ghair mura'at al-zaman wa-ahla-hu wa-illa yudi' huquq kathira wa-yakun darar-hu a'zam min naf'i-hi*.[18] There flows from this, reflection on the difficult issue of the nature of a jurist's knowledge of persons and customs.[19] As Tim Murphy reminds us with regard to the common law, what 'the law' knows of 'society' is in no sense an obvious matter.[20] In the common law also, the central context for 'knowing' was that of judgement, at least prior to the importation in recent years of specialized technical or social knowledge to which the law becomes subject. So Ibn 'Abidin here discusses a judge's recognition of intent, acknowledgement of different forms of speech,

[17] Ibn 'Abidin, *Majmu'at rasa'il*, vol. 2, p. 130.
[18] *Ibid*, p 131.
[19] Hallaq translates *al-nas* by society, something of a neologism. It is with Fadlallah that we find *al-mujtama'*. Ibn 'Abidin's *nas* is better translated as 'people'.
[20] Timothy Murphy, *The Oldest Social Science? Configurations of law and modernity*, Oxford: OUP, 1997.

and admission of types of evidence. He expresses well the fragility and conditionality of judgement.

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

It is with taxation, notably the practice whereby the lessee of agricultural land and not the owner pays the tax (*‘ushr wa-kharaj*), that Ibn ‘Abidin turns in detail to the custom of government. This issue lies at the core of the problem faced in legitimating the Ottoman (and indeed the Mamluk and Mughal also) legal structure of property rights, which was long recognized as in clear contradiction with the early doctrine of the school and legitimated by fiscal necessity. Here the ‘custom’ extends from government to the people and to that central institution of Islamic jurisprudence *waqf*: [21]

انه جرت العادة في زماننا ان اصحاب التيمار والزعماء الذين هم وكلاء مولانا السلطان نصره الله تعالى يأخذون العشر والخراج من المستأجرين وكذا جرت العادة ايضا ان حكام السياسة يأخذون الغرامات الواردة على الاراضي من المستأجرين ايضا وغالب القرى والمزارع اوقاف والمستأجر بسبب ما ذكرناه لا يستأجر الارض الا بأجرة يسيرة جدا....

As a result, and following other late Hanafi scholars, notably Shaikh Khayr al-Din al-Ramli, the mufti of Damascus and student of ‘Ala’ al-Din al-Haskafi Shaikh Isma’il al-Ha’ik, Shaikh Zakariya Efendi, ‘Ata’allah the Efendi of the muftis in *Dar al-saltana al-mahmiya*, and lastly

[21] Ibn ‘Abidin, *Majmu‘at rasa’il*, vol. 2, p.142. *inna-hu jarat al-‘adah fi-zamani-na anna ashab al-timar wa-l-zu‘ama alladhina hum wukala’ maula-na al-sultan nasara-hu allah ta‘ala ya’khudhuna ’l-‘ushr wa-kharaj al-waridah ‘ala ’l-aradiy min al-musta’jirin wa-ka-dha jarat al-‘adah aydan anna hukkam al-siyasa ya’khudhuna al-gharamat al-waridah ‘ala l-aradiy min al-musta’jirin aydan wa-ghalib al-qura wa-l-mazari‘ awqaf wa-l-musta’jir bi-sabab ma dhakarna-hu la yasta’jir al-ard illa bi-ujratin yasira jiddan….*

Hamid Efendi al-‘Imadi the mufti of Damascus, Ibn ‘Abidin views it as necessary to legitimate the custom.

This in turn leads Ibn ‘Abidin to the topic of documentation where he will explicitly differ not only with classical Hanafi doctrine but also with Ibn Nujaim and go on to recognize the legal validity as proof not only of the records of traders, which earlier jurists had judged licit as not subject to forgery and as a source to be relied upon on the grounds of both custom and necessity (‘*urf wa-darura*), but above all the instructions and registers held by government. Ibn ‘Abidin discusses the Sultanic letters of appointment and dismissal of officials, *berat* documents from the Sultan, promissory notes (especially between *al-umara’ wa-l-a‘yan alladhina la yutamakkan min al-ishhad ‘alay-him*)[22] and the registers of taxation and rights for all manner of land. Ibn ‘Abidin notes that if security against forgery was considered as a reason for the legal validity of certain commercial records by the classical scholars al-Bazzazi, al-Sarakhsi and QadiKhan, then the principle applies even more so (and in accordance with the judgements of the shaikh al-islam Abdullah Efendi and in the commentary of Hibatullah al-Ba‘li) to the registers of the government.

Ibn `Abidin writes: [23]

> ان هذه العلة في الدفاتر السلطانية اولى كما يعرفه من شاهد احوال اهاليها حين نقلها اذ لا تحرر اولا الا بإذن السلطان ثم بعد اتفاق الجم الغفير على نقل ما فيها من غير تساهل بزيادة او نقصان تعرض على المعين لذلك فيضع خطه عليها ثم تعرض على المتولي لحفظها المسمى بدفتر امينى فيكتب عليها ثم تعاد أصولها الى امكنتها المحفوظة بالختم والامن من التزوير مقطوع به وبذلك كله يعلم جميع اهل الدولة والكتبة فلو وجد في الدفاتر ان المكان الفلاني وقف على المدرسة الفلانية مثلا يعمل به من غير بينة.

In this manner is what we would call the bureaucratic order assimilated to the custom of government. At stake is not merely the internal custom of the ‘people of the state’ (in Ibn

[22] *Ibid*, p.144.
[23] *Idem. wa inna hadhihi ’l-‘illa fi-’l-dafatir al-sultaniya awla kama ya‘rifu-hu man shahad ahwal ahali-ha hina naqli-ha idh la tuharrar awwalan ’illa bi-idhn al-sultan thumma ba‘d ittifaq al-jamm al-ghafir ‘ala naql ma fi-ha min ghair tasahul bi-ziyada aw nuqsan tu‘rad ‘ala l-mu’ayyan li-dhalik fa-yada‘ khatta-hu ‘alay-ha thumma tu‘rad ‘ala l-mutawalli li-hifzi-ha al-musamma bi-defter emini fa-yaktub ‘alay-ha thumma tu‘ad usulu-ha ila amkinati-ha al-mahfuza bi-’l-khatm wa-’l-amn min al-tazwir maqtu‘ bi-hi wa-bi-dhalika kulli-hi ya‘lam jami‘ ahl al-dawlah wa-’l-kataba fa-law wujid fi-’l-dafatir al-makan al-fulani waqf ‘ala al-madrasa al-fulaniya mathalan yu‘mal bi-hi min ghair bayyinah.*

‘Abidin’s words *ahl al-daula* or in the Ottoman Turkish phrase *ehl-i örf*) but government documentation of most basic property rights and tax obligations in general.

Ibn `Abidin ends his essay with a discussion of the long debated questions of how a jurist and judge should interpret the words of a person who states that s/he is endowing a *waqf ‘ala ’l-farida ’l-shar‘iya*.[24] Should the jurist give weight to the intention of the endower and the customary understanding of the phrase in the mind of the endower (when that is to grant the male the part of two females) or should he follow the more proper and established juristic argument that *waqf* being a pious act it is fitting to respect equal division between male and female. We may be disappointed to learn that Ibn ‘Abidin tends to give the legal power to the intention of the endower over the lofty principle of equal division well established in different schools, not least the Hanafi. But that he treats this issue so extensively and with a certain hesitation in his essay may well speak to its contemporary importance: Ibn ‘Abidin was to die eleven years before his former student then shaykh al-islam Ahmed ‘Arif Hikmet al-Hüseyni (Ahmad ‘Arif Hikmat al-Husaini) as to issue the instructions accompanying the sultanic *irade* granting equal rights to daughters as to sons in the devolution of usufructuary rights to *miri* land. The widening of the circle of rights to *miri* land (and which was also to apply to usufructuary rights to *waqf* agricultural land) was justified as evidence of ‘the justice, concern and compassion of the sultan and the splendid effect of his imperial presence working for an age of equity’. [25] In this manner the juristic debate was resolved by the application of the higher order of justice of the *shari‘a*, in an argument not so very different in its terms from Ibn ‘Abidin’s ‘the rules of the *shari‘a* [are] built on [the principle of] easing [life] and warding off harm and corruption so that the world remain in most perfect order and finest balance’.[26]

[24] Ibn ‘Abidin, *Majmu‘at rasa’il*, vol. 2, pp. 146-47.
[25] See M. Mundy & R. Saumarez Smith, *Governing Property, Making the Modern State: Law, administration and production in Ottoman Syria*, London: I.B. Tauris, 2007, p. 44 for the full citation.
[26] Ibn ‘Abidin, *Majmu‘at rasa’il*, p. 125.

Ja'fari Islam of the late 20th – early 21st century

Al-Ijtihad bain asr al-madi wa-'afaq al-mustaqbal is a book of essays and interviews rather than a text written in one flow.[27] It is composed of four parts. The first is a long essay on the bases of Qur'anic interpretation and juristic thought, only the last section of which entitled *Hawl al-ta'ayush bain al-sulta wa-'l-akhlaq al-diniyya*, concerns the political sphere; part 2 concerns the relation of time, place, culture and linguistic science in textual and Qur'anic interpretation; part 3 covers much of the same ground in the form of dialogues; and part 4 after a section on textual interpretation moves to reflections on the systems or schools (*manahij*) of *ijtihad*. That begins with an essay on the Imam Khomeini as example; from there it widens into a discussion of the relation between jurists and government (*al-fuqaha' wa-'l-sultan, al-islam wa-qadaya 'l-sulta wa-'l-wilaya, fi qadaya 'l-hukm wa-'l-dimuqratiya wa-'l-'adala al-ijtima'iya*, and finally *qadaya 'l-mar'ah fi 'l-ijtihad al-islami al-mu'asir*).

Muhammad Hussain Fadlallah strives to embrace, not merely to recognize social change. The historically changing nature of knowledge, the world and society not only poses new questions to the jurist (*faqih*) but also new opportunities. If for Ibn 'Abidin custom changes with history, for Fadlallah the entire structure of society changes with time and so does the objective reality within which it exists in time.

As we have seen, Ibn 'Abidin sees in the classical category of custom norms originating from both the people and government. By contrast Fadlallah rarely discusses custom. He does so when criticizing Islamists and ill-trained jurists who take the (presumed) customs of the Prophet's day or more generally of the past, which have been canonized in judgements, as normative and binding for all time.[28] For Fadlallah the unchanging in Islam is God's word in the Qur'an; that alone is universal and beyond time.[29] The Qurʾan was necessarily communicated to the Prophet in a form intelligible to those about him. It is in this sense that Fadlallah discusses the 'historicity of the text' (*ta'rikhiyat al-nass*).[30] So too, the interpretation of Qurʾanic truths changes with the learning, culture, context and even

[27] The compilation and date of composition of the components of the volume is not documented, nor does the volume contain an index. I have not attempted to place the essays in Fadlallah's life-history as they portray a coherent vision for the purposes here.
[28] Fadlallah, *al-Ijtihad*, p. 152-56.
[29] *Ibid*, pp. 188-89 where Fadlallah notes that religion (*din*) like justice (*ʿadl*) is a truth beyond temporality yet exists in the movement of time.
[30] *Ibid*, pp. 80-82.

character of scholars and readers.[31] Hence the search for particular binding customs from the time of the Prophet or of the Imams is irrelevant.[32] The Qur'anic truth needs to speak to the changing realities of the believers and to be explored by the *faqih* openly embracing new exegetic disciplines.[33] At times long established custom and tradition, associated by the society of Muslims with the faith, may be difficult for a *mujtahid* to challenge, even if there is no binding text to support the customary interpretation and practice. This is an issue Fadlallah discusses in relation to the question of whether Islamic jurisprudence allows women to serve as *qadi*s or rulers.[34] And it follows from his dictum – which will scarcely come as a surprise after our discussion of Ibn 'Abidin – that the *faqih* must understand the nature of the society in which he lives and acts: [35]

ان المجتهد لا بد له من انه يدرس الواقع في حركة الاجتهاد فمعرفة المصالح والمفاسد تحتاج الى مجتهد يفهم عصره، ويفهم الناس الذين يعيشون في عصره، بحيث يكون خبيرًا بأهل زمانه.

But it is not only the sociological and modern idioms that Fadlallah employs, while remaining within the juridical tradition, but also his concern with structured social law-making that leads Fadlallah not to foreground custom as an analytical term. As we have seen, for Ibn 'Abidin government was a fact of life, its form and broadly Islamic genealogy taken for granted and not in itself an issue. As governmental custom, the regulations and practices of government were binding, yet just as were popular customs, so they too were ultimately to be judged by the *shar'*. By contrast, for Fadlallah social normativity (more often referred to as 'the context' or 'the given', *al-maudu',* than 'custom') is taken for granted as a changing historical reality.[36] But the right ordering of government empowered to legislate and its relation to popular production of norms forms a central object of debate. This question is for Fadlallah a challenge, both because of the history of Shi'i jurisprudence, where compared to Sunni jurisprudence there is very little jurisprudence of the state (*fiqh al-daulah*)[37] and because of juristic debate between, on the one hand, Khomeini and the proponents of his theory of *wilayat al-faqih*[38] and other jurists who consider this formulation impermissible in

[31] *Ibid*, p. 88.
[32] *Ibid*, pp. 62-3, 83-4 and 218-19.
[33] *Ibid*, pp.90-91 and 193-94.
[34] *Ibid*, pp. 377-78.
[35] *Ibid*, p. 165.
[36] *Ibid*, p. 155.
[37] *Ibid*, pp. 360-61.
[38] For Fadlallah's discussion of the theory of *wilayat al-faqih*, see *Ibid*, p. 102 and pp. 329-31.

the absence of the Imam, indeed a usurpation of the place of God (*ightisab li-'l-mansib al-ilahi*).[39]

Fadlallah is critical of the literalism of the latter judgement. In his closing note on Khomeini, Fadlallah praises how, as a *mujtahid* trained in older textual traditions, Khomeini had developed a wider understanding of Islam as a whole and expresses admiration for his revolutionary juristic interpretation, all within the bounds of Islam.[40] Yet however sympathetic his account of Khomeini's thought, particularly its embrace of a revolutionary role for the jurist, he adopts a different vocabulary to the theological terms of modern sovereignty deployed by Khomeini: *siyadat al-qanun al-ilahi*, *hukumat al-qanun al-ilahi*, the claims for the supreme authority of the jurist (*hajm hadhihi 'l-wilayat*) as 'all that enjoyed by the prophets and imams' (*li-'l-faqih al-'adil jami' ma li-'l-rusul wa-'l-a'immah*) ; and Khomeini's totalizing understanding of Islamic law – and here one surely should use the word law just as Khomeini does *qanun* – that leaves nothing ungoverned by the *shar'*.

In the following three sections in the form of an essay and two dialogues, Fadlallah elaborates his views on the role of the *faqih* in the political order. His starting point is that while there are Qu'ranic verses which make one think that the community is responsible for the making of government (*al-umma hiya al-mas'ula 'an sina'at al-hukm*) no mechanism at all is specified for this. Hence it becomes a question of logical construction. Fadlallah notes that this is what the martyred [Muhammad Baqr] al-Sadr described as the empty zone (*mantiqat al-faragh*).[41] Fadlallah then discusses the notion that the *ummah* is self-governing (*nazariyat wilayat al-umma 'ala nafsi-ha)*[42] through contract, but he finds the concept of contract inept here as a contract requires two parties, noting that when the community agrees within itself on a system of rule, the issue is not one of contract but of law-making (*tashri'*).[43] Fadlallah is true to the juridical tradition in positing the necessity of a leader to preserve the wider order (*nizam*). He cites [Abu 'l-Qasim] al-Khu'i who did not accept any divine sanction for the

[39] *Ibid*, p. 331: فيما رأى البعض من العلماء أن السعي للحكومة الاسلامية في غياب الامام (عج) غير مشروع، حتى لو كانت النتيجة تطبيق الاسلام على مذهب اهل البيت؛ لأن ذلك يمثل اغتصابًا للمنصب الإلهي.

[40] *Ibid*, p. 332:
لقد كان (قدس سره) مجتهدًا منفتحًا على الإسلام كله، على أساس منهج الفقهاء الأقدمين، ولكنه كان يحرك هذا المنهج في وعيه الشامل للإسلام كله، الأمر الذي يفرض علينا التوافر على دراسته في كل مجالاته الفقهية، لنكتشف فيه الثائر الذي لا يتجاوز حدود الإسلام في ثورته، والمجتهد الذي لا يتجمد عند نظريات القدماء في فتاواه.

[41] *Ibid*, p. 352: الامر متروك للصيغ العقلانية، فهي قد تتخير الصيغ العملية المناسبة لترجمة تلك المبادئ، وهذا ما عبّر عنه السيد الشهيد الصدر بمنطقة الفراغ.

[42] *Idem*.

[43] p. 355: ان الامة تتعاقد في ما بينها على ان يكون نظام حكمها كذا، فهذا تشريع وليس تعاقد.

authority of the jurist (*wilayat al-faqih*) but argued that the jurist could be the best choice as leader. Here a clarification is in order, notably that the holder of authority does not have the right to legislate in systemic matters but only in the zone of absence, i.e. the laws ordering everyday government.[44] Fadlallah then invokes al-Sadr who wrote that after the liberation of power from the hand of the unjust, the role of the *faqih* is oversight, while the community administers its affairs.[45] Fadlallah is then pressed to say whether it is the jurist (*faqih*) or the community which holds ultimate authority and to give his own opinion beyond his citations of Muhammad Baqr al-Sadr.[46]

Fadlallah's response is that he finds appropriate a mixture of the theories of *wilayat al-faqih* and *shura* (the authority of the jurist and the authority of popular counsel): the jurist should oversee the general operation of the state but apply consultation in all its aspects.[47] Elsewhere Fadlallah expresses his concern lest injustice be perpetrated by a formally Islamic government; [48] hence his solution appears to aim at a double source for just government: both the doctrinal morality of the *faqih* and the popular drive to justice and basic needs.[49] The jurist thus has the right to oppose decisions he finds erroneous, but not to appoint officials.[50] Such a median position is, he emphasizes, not dictated by any binding text but is derived from principles that should protect the interests of people. [51] Consultation is not *ipso facto* binding – as in a full theory of popular sovereignty – but it has the virtue of giving voice to dominant opinion which a jurist cannot ignore since by so doing, he would speak without knowledge.[52] Islam is, moreover, a universal overarching faith where there is no place for

[44] *Ibid*, pp. 206-07 and 356.
[45] *Ibid*, p. 356: بعد تحرير السلطة من يد الظالم، يكون دور الفقيه المراقبة، بينما تقوم الامة بإدارة امورها.
[46] *Ibid*, p. 346.
[47] *Ibid*, p. 357.
[48] *Ibid*, p. 102: Discussing the errors, faults, and wrong doing discussed by people in the Islamic Republic of Iran, Fadlallah remarks that these resulted from the harsh conditions experienced by both the revolution and the state, the absence of purity, the failure to complete the process of change in society, and the blockade which impious arrogance imposed on the new Islamic Republic.
[49] *Ibid*, p. 348.
[50] *Ibid*, p. 357.
[51] *Ibid*, p. 358.
[52] *Ibid*, p. 358 Fadlallah writes of his combination of *nazariyat al-shura* and *wilayat al-faqih:*
والصيغة، هذه المختارة، لا نقولها باعتبار أن الدليل الاجتهادي الاصولي عينها، بل باعتبار انه لا بد للنظام الواجب الحفظ من أسس سليمة ومن قواعد تحفظ للناس سلامة امورهم الحيوية، وبرأيي أن صيغة جمع ولاية الفقيه والشورى يحفظ المجتمع؛ فالفقيه يتولى امور الناس بواسطة الشورى، والشورى تكون ملزمة له، لا بلحاظ ان طبيعة الشورى تقتضي الالزام، بل باعتبار ان الشورى تفيد الظن الغالب، ولا يستطيع الفقيه رفض مؤداها، لأنه يصبح من باب القول بغير علم.

differing in the name of the faith itself about the daily life of people and the application of secondary jurisprudential principles.[53]

For Fadlallah it is the role of ruling power to institute justice; Islam is before all else the religion of justice.[54] Thus with regard to the concept of *al-amr bi-'l-ma'ruf wa-l-nahiy 'an al-munkar* (commanding right and preventing wrong) Fadlallah responds that better than any correction of individual wrongdoing is 'the word of justice before the oppressive *imam* (ruler): no religious community (*umma*) can be revered in which the right of the weak is not seized from the strong without stammering hesitation.'[55] Citing Qur'anic verses and Alid *hadith*, Fadlallah interprets the injunction to mean that society as a whole has the responsibility to change a corrupt reality by all practical means, even violent, within the limits fixed by the *shar'*, or by a revolt against an unjust ruler and impious law. Change is not restricted to the specific acts where people fail to behave responsibly or to individual wrong actions but includes the entirety of public reality.[56] By interpreting the principle in terms of change in public affairs and opposition to unlawful power so as to bring about

[53] *Ibid*, p. 364.

[54] *Ibid*, pp. 276-77 Fadlallah finds notions of justice in no sense restricted to Islamic interpretations. The section merits citing in its entirety:

العدل بين التشريع والعقلاء

وفي هذا المجال إن بإمكاننا أن نبحث مسألة العدل، وقد أشرتُ في بدية المداخلة إلى أنّ علينا ان نبحث مسألة العدل من خلال المفهوم الشامل للعدل، او المفهوم الانساني العام للعدل، لأن النظرة الموجودة لدى الفقهاء هي أن قصة العدل تتأطر بإطار الموارد التشريعية التي وردت في قضايا الناس التي وضع الشارع فيها موازين معينة للعدل، ولكننا لا نعرف أن الشارع وضع موازين مطلقة وشاملة للعدل، وإنما تحدث في القضايا بشكل عام مع بعض التفاصيل، كحق المؤمن على المؤمن مثلاً، وكحق الأب على الأولاد...إلخ، ولكنه لم يتحدث عنها بشكل مطلق. على سبيل المثال قد نستفيد من أية (ولهنّ مثل الذي عليهنّ بالمعروف وللرجال عليهنّ درجة). [البقرة/228]، أنّ الشارع أطلق مقولة أنّ كل ما للرجل هو للمرأة إلاّ في بعض التفاصيل الصغيرة جداً التي حددها الشارع بالدرجة.

إننا انطلاقاً من ذلك، يمكن لنا أن نأخذ من إطلاق كلمة العدل بمفهومه الشامل في القرآن الكريم فكرة مفادها أن العدل قاعدة، وإذا كان الشارع لم يحدّد ميزاناً مطلقاً للتفاصيل لتخضع له كل مفردات العدل بصفة شرعية، كما هو المعنى المصطلح عليه للكلمة الشرعية الإسلامية، فإننا نستطيع أن نقول إنَّ الشارع عندما أطلق كلمة العدل ولم يحدد لها خطوطاً تفصيلية، فإنّ معنى ذلك أنه أراد منها المعنى العقلائ [أي العقلاني؟] العام، والمعنى الإنساني العام الذي يلتقي عليه كل الناس، بحيث يمكن لك في أية حال أن تقول إن فلاناً ظلم فلاناً، وإن فلاناً عدل مع فلان، كما أنَّ من الممكن جداً أن تتطوَّر مسألة حركية العدل في تفاصيل الحاجات الإنسانية. وهنا أشعر بأن مثل هذه الأمور لا بدّ لها أن تبحث بشكل جديد بعيداً عن ذهنية الاستبداد في التعامل مع القضايا واعتبار أفكارنا من المسلّمات التي لا مجال للبحث فيها، لأننا نعتقد أن كل شيء قابل للبحث، فإمّا أن تقرّ الشيء الموجود الموضوع بين يديك، وإمّا أن ترفضه، لأن بحث الآخرين له بالطريقة التي أصبح فيها واضحاً عندهم، لا يعني أن من الضروري أن يكون واضحاً عندنا.

[55] *Ibid*, p. 100 where Fadlallah is citing *Nahj al-Balagha*:

و"لن تقدس أمة لا يؤخذ للضعيف فيها حقه من القوي غير متعتع".

[56] *Idem*: إن هذه النصوص – من الكتاب والحديث – توحي بأن المجتمع كله مسؤول عن تغيير الواقع المنحرف بكل الوسائل العملية، ولو بالعنف في نطاق الضوابط الشرعية المرسومة، أو على مستوى الثورة على الحاكم الظالم، والقانون الكافر، والحكم المنحرف عن الحق والعدل، فلا يقتصر على الأفعال الجزئية التي يترك فيها النا واجباتهم الفردية، أو يرتكبون فيها المحرمات الذاتية، بل يشمل الواقع العام كله.

Fadlallah is elsewhere critical of the restriction to individual rights in al-Shatibi's formulation of the *maqasid* and his failure to extend the concept to the wider order, see *ibid*, p. 276.

legitimate authority, Fadlallah accepts that recourse to force may be 'the harsh guarantee of keeping governing power on the just path'.'[57]

Throughout Fadlallah emphasizes that just as the jurists are not set apart from society, so too Muslims are not apart from the wider societies in which they may live (*ninha lasna mun'azilin 'an al-mujtama'*).[58] When asked what Muslims living in societies of non-Muslims should strive for, Fadlallah recalled an earlier response where he argued that in that case it was appropriate that the humanity of mankind be the highest value (*insaniyat al-insan ahamm qimah*) governing rights, political action and social relations – a phrase for which he had been criticized by the Islamists.[59] While here it is possible to read Fadlallah through European spectacles, as if humanism were somehow only Europe's slogan, this too would be to forget the very long history of invocation of common humanity in discussions of morality and justice by the *fuqaha'*.[60]

Conclusion

I began this essay by demonstrating how, practically in one polity and conceptually in another, much of the principles and practices of government had fallen under the broad definition of *'urf*. The understanding of *'urf* as essentially changing is quite different to the treatment or conception of custom in European anthropology, where imbued with a state sovereign model of knowledge and law, colonial ethnography and administration treated custom as an object of classification and knowledge or at times recast it as a binding yet reified 'customary law'.[61] Both procedures freeze in its tracks the rule-making of daily and political life by living men and women, a process that Arendt called 'the lost treasure' of the

[57] *Ibid*, p. 101. The passage from which this phrase is drawn reads:
إنَّ هذا النص الحسيني المرتكز على النص النبوي، يعني انفتاح الأمر بالمعروف والنهي عن المنكر على الخط التغييري في القضايا العامة على مستوى مواجهة السلطة غير الشرعية لمصلحة السلطة الشرعية، لتكون هذه المسؤولية في المواجهة بالقوة هي الضمانة الحادة لانسجام السلطة الحاكمة في خط الاستقامة.

[58] *Ibid*, p. 370ز

[59] *Ibid*, p. 369:
اطلقتُ مرةّ شعارّا وانتقدت فيه من قبل الاسلاميين، عندما قلت انه اذا لم نستطع ان نقيم دولة الاسلام، فعلينا ان نقيم دولة الانسان، وان تكون انسانية الانسان هي القيمة التي تمثل حقوقه وحراكيته والعلاقات في المجتمع وما إلى ذلك.

[60] Compare M. Mundy, 'Ethics and politics in the law: on the forcible return of the cultivator', in S. Kenan (ed.) *İSAM Konuşmaları · Düşüncesi · Ahlak · Hukuk · Felsefe-Kelâm* [*İSAM Papers: Ottoman Thought · Ethics · Law · Philosophy-Theology*] Istanbul, İSAM Yayıncılık, 2014: pp. 66 -75.

[61] For this reason I find misguided Hallaq's argument concerning the absence of inclusion of 'custom' as one of the 'sources of law' in *usul al-fiqh*, just as I do his ahistorical programmatic reading of Ibn 'Abidin's essay on custom. But this is not the place to respond to that systematically.

revolutionary tradition.[62] In an Arendtian mode of law-making, political persons who live and work in established social groups, in towns and villages, come together to assert and debate the rules by which they would associate and form political units. Thus 'custom' does not dictate but provides material out of which a social group fashions norms. This rational aspect of custom (*'urf*) is what colonial administration sought to discipline. So indeed, to return to the contemporary tragedy invoked at the beginning of this essay, we may recall that L Paul Bremer III forbade the face-to-face political law-making within villages, towns and regions of Iraq which people initiated in the wake of the 2003 invasion and, in a further step in an Arendtian nightmare, imposed an electoral law rendering the whole of Iraq one circumscription at the same time as stripping (in the constitution) the central government of almost all of the powers of a modern state save the monopoly on military violence.

But let us return to the jurists. With Ibn 'Abidin the mechanisms of change in custom among the people or in government were taken for granted but not explored. His concern lay elsewhere, with the manner that the *faqih* could act as judge in terms of the tradition (what Fadlallah would term *muraqaba*) of this dynamism of change. The tripartite nature of normativity is clear – Islamic tradition (*nass, shar', madhhab*), popular custom (*'urf al-nas*) and state practice (*'urf ahl al-daulah*) – and the right relation between them is to be worked out for particular problems so as to assure the best ordering of the world. With Fadlallah one again finds three interacting loci of *tashri'* (law-making): *faqih/mujtahid*, *umma*/*mujtama'*, and *wali/qa'id*. In Fadlallah's more constitutional discussion, his ultimate criterion remains not so different to that of Ibn 'Abidin: the best distribution of authority between these law-makers to assure the well-being and justice of the social world.

Perhaps this exercise may help one to think forms of government and state outside the unitary frame of modern sovereignty and to imagine forms of self-rule and law-making, from smaller councils towards the ruler, in keeping with the tradition of the Islamic jurists. As Arendt argued half a century ago in *On Revolution*, this remains a task of political gravity today.

[62] Hannah Arendt, *On Revolution*, London, Faber and Faber, 1963, p. 217.