

(Note to fellow Brown workshop participants: This is a working draft (not for citation) of a chapter that opens the second half of a book in progress on sharīʿa textuality, with special reference to the Zaydī school and pre-revolutionary highland Yemen. It represents a study of a located textual formation, based on research in the town of Ibb. The key concepts, developed earlier in the Introduction, are the “library” and the “archive,” terms I use to refer to discursive contrasts, which may be summarized as those of *fulān* versus the proper name, and the cosmopolitan versus the contingent. The sharīʿa library, treated in the first half of the book, concerns the law book (notably the *fiqh* literature of the *Book of Flowers*), the commentary, and two types of freestanding opinions, the “choice” (*ikhtiyār*) of the ruling *mujtahid* imam, and the *fatwā*. This overview of the “archive” precedes chapters on the court judgment and six genres of legal instrument. Brinkley Messick)

The Sharīʿa Archive

Literature and archives seem complicit.

Gayatri Spivak¹

It is *not* permitted that a witness testify nor that a judge rule exclusively *on the basis of what is found in his archive*, among papers written in his handwriting and under his seal or signature, [whether in] a register or other than it, *if he does not remember*.

Book of Flowers / Gilded Crown

In active traditions of written law neither the library nor the archive stood alone. Dialogues between these broad categories of necessarily “complicit” texts were fundamental to local histories of the sharīʿa. Their complex divisions of discursive labor were also constitutive of cohesion in particular textual formations. As I inquire now into archival forms, I pose again the question earlier addressed to the texts of the library: What sorts of writings are these, and, by extension, what kind of law was this? To transition now from the library to the archive is to shift attention along the spectrum of the written law from the esteemed book and the formal opinion to the principal varieties of ordinary documents, including court records in the next chapter, and the main genres of written instruments in the final chapters.

It is also to shift from authors to writers, from the productions of literary jurists, muftis, and ruling imams to the work of others in the local interpretive community, notably those who served as court judges and

secretaries, together with independent sharīʿa advocates, and private notarial writers. Yet the line between individuals concerned with library-theory and those engaged in archival-practice was fluid. Recall that Ahmad Qasim al-ʿAnsī, the author of *The Gilded Crown*, the twentieth century commentary on the *Flowers*, pursued a lengthy career of service in the imamic-era judiciary, while the imam himself, the head of the polity, and the giver of formal opinions, actively immersed himself in archival paperwork. Aside from receiving petitions concerning disputes that he either handled himself or transferred to others, this ruler read capital cases and marked up drafts of appellate rulings. In provincial Ibb, a number of the court judges of the period, men responsible for an important segment of the local archive, also contributed in their own right to the period library, as either authors or teachers, or both, while some of the town’s madrasa-based scholars, men who taught doctrine in lesson circles in the mornings, supplemented their incomes by drafting legal documents in the afternoons.

In transiting to the practical genres and these specialized writers, library conceptions are not left behind. The earlier discussed strands of library thought focused on the archive, notably the general thematic of “basing practice on writing” (*al-ʿamal b-l-khatṭ*) plus such envisioned techniques as the “oral reading,” or “dictation,” of documents in court, now may be viewed from the perspective of application. In addition, I consider two further modeling genres, both closely attuned to the realities of the period archive. These treatments of library-archive relations involve the in situ dynamics of archival writings, models and *fiqh* chapter conceptions, and raise questions about the agency of the archive. In the next chapter, I analyze the textual forms of the sharīʿa court judgment in conjunction with the set of formal “Instructions” for court organization issued by Imam Yahya in 1936.² In the following chapters, I read historical instruments from Ibb in tandem with the document models of an early twentieth-century *shurūṭ* treatise. While library language occupied a central place in archival texts, this local *shurūṭ* author criticized both the skills and the motives of certain notarial writers of his era.

In addition to the possible impacts of such tutored views, the drafting of court and notarial documents also depended upon untutored, locally conventional standards of composition. The latter derived, not from formal lesson circle instruction or from explicit models, but from practical experience in the routines of archival work, from informal apprenticeships in the reading and preparation of such documents. While there were parallels from across the literary and spoken crafts for the textual methods of the judges, secretaries, advocates and notarial writers, some of their discursive techniques were specific to the sharīʿa archive. While I draw on ethnographic observations in studying the composition methods of the local archival writers, mainly it is a matter of reading their work.

From the outset I have utilized a basic distinction between the generic, or fulān-oriented discourse of the library versus the archival emphasis on the proper name. In my chapters on the archive I attend to how writers foregrounded the particulars of lives and circumstances, anchoring their work in the names of people, places and things. Their techniques for invoking particular human relations began with their use of formal sharī`a names for the parties and also included the representation of persons and words in cited passages and the roles of signatures, personal scripts and seals. In the handwritten medium of the archive, the message thus was one of specific human actors and their acts. Another distinction I have used is that between the a-temporal and non-located modes of expression characteristic of cosmopolitan authorship versus the consistent efforts to date and place their work on the part of the writers of these contingent texts. Temporality is an essential feature of practice, and thus of the archive, but beyond the relatively straightforward conventions for dating and placing, I also want to understand the marking of the intervals and sequences of textual work, the indications of procedural duration in the time of the text, and the traces of other temporalities in related texts.

In addition to the defining archival characteristics of the proper name and the emphasis on temporality, there are continuing themes to be addressed. These refer to certain discursive elements that span the library and the archive and that now may be viewed from the perspective of the latter. One concerns techniques of text building, which notably include the archival methods for quotation and citation. Another pertains to the materiality of texts, which now requires a consideration of the bound register and the rolled or folded document as distinctive physical forms. A third relates to modes of discursive orality, the archival manifestations of which include both further minor types of “dictation” and related methods for the transcription or transformative restatement of spoken words.

Sharī`a archive

Before proceeding to the following chapters, however, I want to offer some further general thoughts about the sharī`a archive. I will begin with a schematic overview that uses three rudimentary distinctions: 1-- holdings public or private; 2--genres “secondary” or “primary;” and 3--originals versus copies. In the first half of the twentieth-century, sharī`a writings were associated with two general archival formats. Public registers pertained to the courts and were controlled by judges or their secretaries, while individuals held private collections of documents, typically in cloth bags, tubes or chests. However, in a polity such as that of the Zaydī imams the nature of the “public” and the “private” must remain an open question, since these categories properly pertain to the order of a nation state. Crosscutting these basic types of holdings were the major genre-groups of archival texts. Genres, again, represent distinctive cultural forms, historically

specific institutions of thought and action. Following Bakhtin, I refer to the case records of court-contested lawsuits and their associated rulings and settlements as “secondary,” or “incorporative” genres, and to the range of documents that concerned uncontested legal acts such as bilateral contracts and the various unilateral dispositions, including wills and estate instruments, as “primary” genres. Where judges and the courts were responsible for the issuance of the former, private individuals, usually third parties, including both occasional and established notarial writers, prepared the latter. A qualification here is that in addition to these written forms, I am equally interested in the several types of “primary” oral texts, especially witness testimonies and litigant responses, but also oaths and acknowledgements, all of which also were apt to be quoted in the court transcripts. With respect to this schema of “secondary” and “primary” texts, library texts should be considered “tertiary,” which speaks to their roles in the conveyance of rules and the elaboration of models, and as the discursive sites for conceptual reflection, elaboration and argument. Finally, augmenting these contrasts of archival holdings and genres, I factor in the elementary distinction between an original and its copy. These intimately related texts were at once the “same” and different, with the difference being both conceptual and material--in a handwritten archive still based on manual rather than photo-reproduction. Court judgments, the focus of the next chapter, involved a pair of originals (sing. *aşl*) presented to, and kept privately by the litigant parties, and a version with the status of a copy (*şūra*) entered in the designated type of court register. Notarial documents, the focus of the following chapters, mainly consisted of privately held originals without copies. Yet notarial writers sometimes made and retained copies, and in some instances, normally on the initiative of the client, a copy of an instrument was entered in a court register. The situation under the preceding Ottoman regime had been more formalized as entry-notes indicating the payment of a recording fee (*rasmıyya*) and the application of revenue stamps on some local documents of that period indicate.

For all original documents of the imamic era, that is, for both court-issued judgments and the variety of privately-prepared notarial instruments, the resulting archival pattern was one of dispersal rather than of centralization, of holdings in diverse private hands rather than in a public, central or state archive or record place.³ However, in both the issuance of original judgment documents and in the keeping of copies there was a degree of centralization. Regarding the latter, that is, the retention of copies, centralization consisted in the fact that all case records and selected instrument copies were entered in the indicated types of court registers (with sequential entry numbers and separately numbered pages) and also that the keeping of such registers was a recognized state function. What made this centralization of the copy less pronounced—their desposition indexing the limited extent of the public realm in the pre-revolutionary imamic polity--was that these register-archives were kept, not in designated official places, but rather, again, dispersed, in the houses of judges or their principal secretaries. The procedural complement to to

this archival situation was that judges commonly heard cases in front of their residences. Such were the practices, I would add, despite the fact that, in the years of the Ottoman Province of Yemen, and also according to the “Instructions” issued later by the Imam, the court was meant to be an “official” (*rasmī*) place where hearings were held and registers kept. Despite the advent of such new ideas, the sort of arrangement that obtained in Ibb bore a partial resemblance to the pre-modern history of the sharīʿa in which “the Muslim qāḍī had no specific place in which to hold court sessions” and court archives “were in the possession of private individuals, not institutions.”⁴

The anthropological historian of such a judicial system thus will confront contrasting archival series. Whereas public court registers contain the records of disparate cases, or matters—e.g., murder, inheritance, sale—which were entered together in earmarked registers on the basis of a common genre identity—i.e., as initial claims (and ensuing minutes), final judgments, or copied instruments—private archival holdings typically brought together disparate documentary genres united by their substantive relevance to particular properties or issues of concern to the individual or family in question. Adding the status distinction between an original versus a copy, the relevant clusters of written sources consist of, on the one hand, genre-related copies representing different cases or matters entered in public court registers, and on the other, genre unrelated (or not necessarily related) original documents pertaining to the same cases or matters retained in private hands. These are the contrasting series, in short, of the bound and the loose.

While it is instructive to break down the larger phenomenon of the sharīʿa archive in the several indicated ways, it is equally important to recombine the discrete types of writings and their conceptual statuses. Bringing writings of these different forms and features together in the inquiry enables an understanding of the binding force of intertextuality within the sharīʿa archive as a whole. The method here is equivalent to that pursued in the preceding chapters on the interrelations of the several library genres. The larger project of this book depends, in turn, upon joining these inquiries conducted internally to both the archive and the library. To then think across these major discursive categories is to consider inter-relations at the level of the entire textual formation. At this higher level, in addition to being able to consider the dialectics of rules and modeling, one may, for example, compare and contrast the way court transcripts “absorb and digest” primary texts with how *fiqh* commentaries incorporated a basic *matn* text such as the *Flowers*, or the way annotations were added to written archival instruments with the placing of marginalia in the borders of literary works.

Ethnographic sourcing

Beyond these modes of textual analysis and the related levels of integral readings, the archival dimension of this book is distinguished by its ethnographic sourcing. Individuals I came to know in Ibb and elsewhere gave me selective access to their holdings of records and documents--written materials that had been retained by reason of a personal or family connection, or as a result of a profession. These were not "archives" in the modern senses, i.e. collections established by colonial administrations or by nation state institutions and maintained by professional archivists, nor were they formalized "family archives." By the same token, the period writings in question do not fit the profile of the contemporary "document," that is, what Annelies Riles refers to as the characteristic "artifacts of modern knowledge."⁵

Certain individuals provided access to one or more court registers or to significant numbers of archival documents, while numerous others permitted me to make copies of single judgments or particular instruments. In all cases, the individuals in question decided what to show me based, in part, on their understandings of my research interests. In no instance did I see the entirety of an individual's personal holdings. These ethnographically obtained records and documents are unlike the more familiar archival collection, which is entirely cut off from present times, sometimes by many centuries. Although the documents I accessed date from the first half of the twentieth-century (and earlier), they usually were mixed in with contemporary papers, in holdings otherwise active and engaged with ongoing affairs.⁶ I learned to be circumspect about putting the copies I had made before other local readers, sometimes including members of the same family. As I found out, a pre-Revolutionary murder case could stir sentiment among present day descendants. Likewise, access to the details of old property litigations might threaten to reopen the conflicts, while those of a hard-fought court struggle among relatives in the past also could be seen as harming the family's current reputation. Certain of the primary instruments I obtained pertained to present property relations and thus held the potential of being brought forward as evidence.

Ethnographic sourcing requires extended commitments to people and a place, and its contribution is to contextual knowledge. Such information ultimately extends to local history, social relations and political economy, although my purposes here are not those of general ethnography. I should note, however, that my early efforts on the topic of kinship and marriage, for example, resulted in family trees that later helped me to understand who was who in some complex court cases. In the absence of central archives, and despite the existence of formal administrations, the main challenge was to locate and gain access to dispersed private holdings for the first half of the twentieth-century. Such sourcing entails knowing the archive in person, as it were; it results in an unusual degree of certainty as to provenance. Individuals sometimes also offered comments about the documents they provided. As I began to study selected

documents with co-readers from Ibb, I learned things--about particular documents or about documents in general--for which I hadn't known enough to formulate a question. In later readings, different sorts of questions emerged, and I endeavored to followed-up when possible. Specifically regarding model texts, ethnographic sourcing made it possible to compare the model instruments with historical documents from the same time and place, and to consider written texts of both types with respect to my broader research on local property relations. In addition to the several modalities of ethnographic work focused on the historical archive, I also studied related forms of reading and writing that were current during the years I lived in Yemen. With proper allowance for the important intervening changes, such "present" ethnographic efforts added to my understanding of archival textuality in the imamic era.

In this connection, let me return to the jurists' term, *dīwān*, commonly translated as "archive," as in the previously discussed passage reproduced above as an epigram.⁷ I noted earlier that this standard *fiqh* usage pertains to a different institutional history (or histories) as well as to a distinctive discursive genealogy, one preoccupied with questions about the evidential status of writing. To repeat the definition provided by al-`Ansī, the twentieth-century *Flowers* commentator, the *dīwān* is "a site where the circumstances (ahwāl) of the people are entered and recorded."⁸ He adds that term "refers to the register (daftar), and to its place." Both his notion of "the people" and the indicated activity of register keeping imply a period-specific public function. While my epigram text also mentions the witness, a private individual, it is unclear whether the reference is to testifying on the basis of a document from a private archive or from that of the judge. I also commented earlier that the term *dīwān* applied to the old-style administrative circle of various levels, and, as with al-`Ansī statement concerning "place," that the word also referred to the residential workroom. In Ibb, this lower floor room in the old stone house was the everyday space for ordinary male sociality over afternoon *qat*. A flight of stairs up from the entrance, these undifferentiated lower floor rooms may be described as "semi-public" in their ready accessibility from the street. Although the late twentieth-century saw the advent of separate modern offices, which functioned mainly in the mornings, residential *dīwāns* across town continued to serve in my day as afternoon spaces for the handling of the diverse types of routine paperwork. Questioners and disputants appeared before the mufti or a judge, presenting and/or carrying away documents; functionaries (or notarial writers) made regular entries in registers of the various kinds; and individuals, parties and writers, professional or not, finalized and documented transactions, settlements and other undertakings.

Archival boundaries

How, finally, may we demarcate the sharī'a archive? As I have indicated, the approach I take in the second half of this book foregrounds the main genres of the sharī'a archive, which I classify as

“secondary” and “primary.” This chapter organization also aligns with the distinction between writings that issued from the court as opposed to those prepared by notarial writers. My key related objective is to move beyond an exclusive focus on the public archive and to give equal attention to private holdings. Absent this complementing perspective on the private archive, a number of important questions cannot be posed. Referring not only to the public-private distinction itself and that of original-copy, but especially to archive-wide matters of inter-textuality, these questions elucidate the overall nature of the sharīʿa archive as a system of texts.

To date, as is well-known, historical research on the sharīʿa archive has been based mainly on court registers, notably the Ottoman *sijill*.⁹ For my part, in the following chapters I examine three types of registers kept by the local sharīʿa courts of the period, two devoted to litigation and one to instrument copies. The ethnographic sourcing for such registers parallels that for the local loose document collections, inasmuch as the “public” character of these registers was qualified by the fact that access to them was a function of their being kept in private residences. Register keeping in Ibb was not confined to the sharīʿa courts, however. In particular, Endowments (*awqāf*) registers--the only period registers kept in contemporary offices--held copies of primary sharīʿa documents of several types. Private landlords of a certain scale also kept small registers, mainly for leases. In a further qualification of my earlier schema, I note that, unlike the court registers and the other Endowments registers, which only contained entered copies, the property leases kept in registers at the Endowments and among private landlords had the status of originals. In a section of Chapter 9, I utilize a corpus of such late imamic period agrarian and urban real estate leases from the official register of the Endowments and from the private register of a local landlord.

An additional comment is warranted about archival boundaries on the public side, i.e., that of the court archive, the sphere of the judge-controlled *dīwān*. If this archive is understood to have consisted of registers, how should we interpret the fact that judges commonly also held loose documents, which typically meant original writings? When I went upstairs in Judge al-Haddad’s just vacated house, I found not only the damaged old register but also remnants and fragments of various documents. In what sense were such loose documents parts of the judge’s archive? In this connection one is reminded of the Mamluk-era documentary trove found at the Haram al-Sharif.¹⁰ According to the plausible hypothesis of Donald Little, these roughly 900 documents “constitute the remains of archives kept by the Shāfiʿī Court in Jerusalem.”¹¹ Aside from the court process documents among them, did the presence of original instruments in this collection represent a form of deposit in a sense that would approach the status of a public archive? While “deposit” certainly existed as a technical possibility, and while notarial writers in Ibb often briefly held private documents in a fiduciary capacity,¹² my ethnographic work regarding the

situation of the judge suggests a different understanding. Original instruments turned up in an Ibb judge's possession as a result of private individuals presenting their documents in connection with a court process. The judge needed to review such writings both to consider their evidential status and to make related decisions about quotation. Normally, such documents remained in the judge's hands only temporarily and the parties eventually would retrieve them. Sometimes people did not take their documents back for one reason or another, including the fact that a fee might be involved. In such circumstances, a de facto archive of originals accumulated in the judge's hands. [R. Peters material]

In the extensive corpus of research on the Ottoman centuries, the work of Beshara Doumani represents an exception. His historical sources are both public and private, including not only local *sijills* but also collections of family "papers" from the same Palestinian town.¹³ Such sets of family "papers," however, raise questions about the boundaries of the sharī'a archive on the private side. Just as there were other sorts of records kept on the administrative, or public side,¹⁴ in Ibb and elsewhere sharī'a documents were a subset of the practical writings retained by private individuals.¹⁵ Prominent early examples of this phenomenon of the mixed retention of sharī'a and other holdings are the massive corpuses of the Egyptian papyri and, somewhat more institutionalized, the Cairo Geniza.¹⁶

A further set of boundary issues pertains to the principal archival genres themselves. These key writings were not textual isolates, even though they might appear as such in the archive, or be treated in this manner by researchers.¹⁷ For the purposes of this book the most significant context for a given text is other texts, including those of the same and of different types. I have touched on the material aspects of these contextual relations, including the physical connections between texts entered together in the same register and those of documents kept together in the same private holding. The discursive aspect of these relations began with the apparently simple act of writing in genre, which involved established patterns of language use, clause structures and subgenres. Adherence to a locally accepted textual form, to the requisite conventional statements of terms and stipulations, lent authority to the written act. Adherence to form comprised an elementary recognition of an existing textual order while at the same time initiating a fundamental dimension of the inter-textual. Other local judgments and instruments thus provided the immediate context for reading a given judgment or instrument. Yet both the doctrinal jurists and the first-instance readers such as judges and notarial writers understood that local efforts to write in genre could be more or less skilled and successful. A question remains, however, about their reactions to the discursive markers of language specific to either the Shāfi'ī or the Zaydī school. Western researchers have perceived the relatively stereotyped or formulaic character of certain types of documents as inherently uninteresting. But despite the various degrees of the constancy of form in different historical settings—the limit case

being the late modern appearance of the printed contract--archival writings remained the vehicles for an ever-changing content of personal names, locations, properties, dates, amounts, etc., that is, for the irrepressible particulars that represent the most obvious aspect of archival contingency.

In the wider textual (and thus also temporal) surround of the principal genres, the closest writings were those types directly antecedent to or utilized in their composition. Among the possibilities were extant writings of the same genre that concerned the same matter. Thus a previous ruling in a case might be referenced in a new ruling, or a notarial writer might mention that he had consulted an earlier document concerning the property right in question. Prior texts of different genres also were possible. A complaint (*shakwā*), for example, sometimes was received in an interval before the formal start of a trial. Agency contracts that took written form were apt to be referenced in judgments or in primary documents. In sizeable estates, the utilization of working documents was common. Texts of several named types were used to gather the relevant property details, distinguish the necessary shares and record the drawing of lots, all of which preceded the final preparation of the heirs' individual inheritance instruments. In ordinary contracts, an exchange of personal notes might be used to reach a preliminary understanding prior to the drafting of the written instrument, as in a marriage agreement I followed.

Especially in judgments, as I have noted, prior evidential texts of different genres could be incorporated through excerpting and other forms of quotation. This key "secondary" genre therefore was likely to contain reported texts, usually written or oral "primary" *sharī'a* genres. Occasionally, however, other genres were inventoried, such as a letter, a report, or a tax record, raising questions about the status of such writings as evidence. But for the judgment genre there was a still more fundamental text-building relationship, which concerned the litigation minutes. The reproduction of this distinct and previously completed text represented the essential first step in creating the text of the final Ibb court judgment. In the following chapter on the judgment genre, I devote extended attention to both the patterns of quotation and to the transitional role of the minutes transcript.

Concurrent writings were common as well, especially in compound undertakings and complex settlements. In a land sale I observed the final contract was predicated upon a loan agreement written at the same session, although the loan was not mentioned in the sale instrument. Such clusters of separate transactions often involved legal stratagems.¹⁸ Similarly, in an Ibb dispute settlement in which the central issue was a divorce initiated by the wife, with the focal genre a divorce instrument, three additional documents were prepared at the same session. These concerned the separate financial terms of the divorce, set down in a receipt for money paid and a promissory note for the balance, and a cancellation of

a related injury award. Although they pertained, collectively, to a single complicated event, such multiple documents usually did not reference their sibling texts, even when their own existence and terms depended upon on those of the other writings. A textual analysis may want to stress the interdependence of such sets of documents, but the notarial writers themselves purposely drafted such writings as blinkered individual texts. Both ethnographic observation and access to the relevant private holdings are crucial in such situations, especially since only the focal genre had any prospect of being entered in the public register of the local court.

Certain types of related texts also could follow the basic genres. An appeal text and an ensuing appellate ruling with a counter-signature from the Imam's *dīwān* were possible in this post-Ottoman period. A subsequent out of court settlement was another possibility in the aftermath of a court judgment. However, unlike appeal documentation, which was written directly on the original judgment document and also added to the copy entered in the court register, depending on the auspices, the text of a separate later agreement text could be found only in the parties' private holdings. Among the further possible types of post-texts were the various sorts of written annotations commonly placed on documents, especially primary instruments. Although seemingly minor, such added notes were based on a reading of the main document text and could embody a range of further acts, including affirmations, transfers, cancellations, etc.

Writing and custom

Finally, I want to connect the conventional forms taken by the main archival genres to the question of custom. These locally established forms comprised selected uses of technical language drawn from library discourse set in conjunction with, and thus altered by and grounded in, the encompassing archival discourse of the name, time and place. As they appear in local archival texts, such defining discursive composites were, in their entirety, conventional. Going beyond the earlier-mentioned simple dichotomy between fixed form and changing content, this is the more complex or total sense in which archival writings should be understood as contingent. The conventions involved reached from the material and stylistic features to the names of the genres themselves. Thus *baṣīra* was the conventional name for a land sale instrument; "*ijāra*," for several types of land cultivation contracts; and *farz*, or *faṣl*, for individual inheritance instruments. What the doctrinal jurist understood as a "contract of sale" (*'aqd al-bay'*) was a *baṣīra* in the archival language of highland judges, notarial writers and other practitioners. Yet, as I mentioned in the earlier chapters on the library texts, and will demonstrate further in discussing the local *shurūṭ* treatise, vital conventional terms such as *baṣīra* sometimes also found their way into Zaydi-tradition literary works and formal opinions.

What was the relationship of such textual conventions to custom (*`urf*, *`āda*)? Custom represents a final, but somewhat elusive discursive boundary, the geographic horizon of which extended from the heart of the imamic polity to beyond its realm and that of the sharī'a. Let me first reprise a comment I made in the Introduction where I addressed Schacht's statement that custom "coexisted with the ideal theory of Islamic law, while remaining outside its system." The approach I take in this book entails a different conception of the sharī'a as a "system," namely, a formation of texts that included both a period library and a given archive, and my particular interest is in the place of custom inside such a textual formation.¹⁹ In my earlier chapter on the law book, I briefly discussed the fact that conceptualizations of custom rather than substantive citations of it are found in *Zaydī fiqh*. These conceptualizations included such venerable cross-*madhhab* formulations as, "That which is accepted in custom is equivalent to that which is formally stipulated." I also noted that the *Flowers* literature contains passing references to the conceptual role of "custom" in specific contracts, such as sale and marriage, and that among the small innovations of al-`Anṣī's twentieth-century *Flowers* commentary was his more expansive attention of the role of custom both in his main text and in occasional footnotes.

Custom mainly figured inside a given sharī'a formation at the level of the archive. To sort out the different possibilities, a simple schema of marked versus unmarked custom will help. The marked variety refers to customary content that is indigenously recognized as such and named--as *`urf*, among other terms. The unmarked variety, in contrast, may be thought of as sharing approximately the same status—that is, as established local usage--without the content in question being explicitly recognized or labeled as "custom." Regarding explicit marking, archival sharī'a texts from Ibb occasionally mention the presence of custom. Thus a period court record refers to commercial custom.²⁰ More significant is the fact that a key local notarial genre (the *baṣīra*) regularly contains a distinction expressed using the adjectives *sharī`* and *`urfī*, while agrarian lease contracts typically have one or more stipulations identified as pertaining to "custom."²¹ Such matters become more complicated in connection with out-of-court settlements, as one shades into what amounts to an *`urfī* system. In his study of villages in the Ibb hinterland, Isaac Hollander provides an example of a type of "judgment" that characterizes itself as "customary and sharī'a-oriented" (*ḥukm `urfī wa-wajh sharī`*).²² As opposed to such explicit archival mentions of "custom," the unmarked or implicit presence of customary content played a broader, but largely unnoticed role. Part of this wider dimension of custom dovetailed with what I have referred to as the conventional forms of archival writing. Again, most of the richly elaborated archival discourse of the name and also many of the detailed features of local genre constraints, including the practices pertaining to signatures, seals, witnessing clauses, etc., down to and including the standard techniques regarding the

physical spacing of writing on paper, all may be considered conventional. This thoroughgoing but unremarked reliance upon received usages was part and parcel of the habitus of the sharīʿa archive and, as such, was foundational to the historical rooting of the particular textual formation in a specific locale.

Postscript

As a postscript to these general observations on the sharīʿa archive, I should note that Ibb is not unique in the keeping records and documents. [Mandaville on Ottoman court records; Mustafa Sayyid Salim]. Referring to a rural district near Ṣanʿāʾ, Martha Mundy remarked that documents of ownership and inheritance were “stored in the trunks of most every home.” Paul Dresch states generally that the documentary sources for the pre-revolutionary period in the highlands “remain in private hands.”²³ From the mid-century efforts of S.D. Goitein and from Isaac Hollander’s recent social history of the villages near Ibb we know that the Jewish communities of Yemen likewise kept all manner of documents.²⁴ While work by anthropologists mainly has focused on the rich documentation of tribal custom in Upper Yemen,²⁵ Mundy, whose village lies within the active region of the capital and its courts, mentions the existence of local documents of sale, lease, marriage, endowment and inheritance—that is, a representative spectrum of primary genres in the sharīʿa archive. These, she adds, were “penned in the formulae of the *fiqh*.”²⁶ Shelagh Weir’s collection of local documents from a rural district in the far north opens with four seventeenth-century land sale contracts, the paradigmatic instrument.²⁷

Yemen, it may be added, is not alone in this reliance upon private archival holdings, although anthropologists elsewhere have not been so attentive to their presence. In Morocco, for instance, French Arabist Jacques Berque conducted field research in a village in the Atlas Mountains south of Marrakesh. Having found that most individuals in this rural district retained at least a few important documents and that among leading families the holdings were in the thousands, Berque concluded, “This society is enamored of the written.”²⁸

¹ Gayatri Spivak 1999: 205, “To me, literature and archives seem complicit in that they are both a crosshatching of condensations, a traffic in telescoped symbols, that can only too easily be read as each other’s repetition-with-a-displacement.”

² In the Ottoman tradition state directives were much more significant. Not to mention “qanun.”

³ The question of the “central archive” figures prominently in comparative studies. Thus in W. Björkman, “Diplomatic,” *Encyclopedia of Islam* (Leiden: Brill, 1991), 304: “There is no evidence of the existence of a central archive, as there was in Greek times.”

⁴ Hallaq 1998: 418, 435.

⁵ Annelise Riles, ed. *Documents: Artifacts of Modern Knowledge* (Ann Arbor: University of Michigan Press, 2006). It is important to note, however, that Riles and several of her contributors “focus on questions of form,” 18-20. While most of the writings I obtained had not been thought of as sources for history, a select few had. Most of these were letters. `Alī Ismā`īl Bā Salāma, from Ibb, provided documents of this type to the historian Muhammad al-Akwa`. For an early publication of a document collection, see Sayyid Muṣṭafā Sālim.

⁶ In only one instance, involving some 112 documents, did I get to copy a self-contained, complete collection, that of al-Burayhī, held by al-Hajj `Alī `Azīz, Ibb

⁷ Chapter 3.

⁸ Al-`Ansī 1993, 4: 111, n 1. Cf. the 1950s code, al-Sarḥī, et. al. 1986 (Beirut): 213, Art. 1048, which glosses the term *dīwān* as “his register (*daftar*) or the handwriting of his secretary.”

⁹ Ze`evi, “Ottoman Sharī`a Court Records.”

¹⁰ Donald P. Little, *A Catalogue of the Islamic Documents from the al-Ḥaram ash-Sharīf in Jerusalem* (Beirut: Beirut Texts and Studies, Band 29, 1984). See now Christian Müller, *Der Kadi und seine Zeugen: Studie der mamlukischen Haram-Dokumente aus Jerusalem* (Harrassowitz, 2013).

¹¹ Little, *Catalogue*, 13.

¹² Cf. Schacht, *Introduction*, 83.

¹³ Beshara Doumani, *Rediscovering Palestine: Merchants and Peasants in Jabal Nablus, 1700-1900* (Berkeley: University of California Press, 1995), 9-12, 249-51. See also Terence Walz, “Family Archives in Egypt: New Light on Nineteenth-Century Provincial Trade,” *L’Egypte au XIXe siècle* (Paris: Editions du CNRS, 1982). [See also, J.S. Grewal, *In the By-lanes of History*. 1975.]

¹⁴ Examples: zakat registers and collection handbooks; sadaqa distribution lists; baladiyya records, iltizams; market kafalas; madrasa records. (all of this is shari`a-related.) military, plays—all of these located among individuals.

¹⁵ Book on Hadramawt papers.

¹⁶ On papyrology, see R.G. Khoury, Art. “Papyrus,” E.I. 2, 8(1995): 261-265, and Petra M. Sijpesteijn and Lennart Sundelin, eds. *Papyrology and the History of Early Islamic Egypt* (Leiden: Brill, 2004). For the Geniza, Geoffrey Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections* (Cambridge: Cambridge University Press, 1993).

¹⁷ Or treated as the historian’s “series.” Also responded to by statistical methods—see Ze`evi.

¹⁸ *Ibid.*

¹⁹ With other recent students of the sharī`a, I understand the historical sharī`a to have been actively dependent on customary materials. Johansen, “Coutumes;” Ghazzal, *Grammars*, Ch. 1; Hallaq, *Sharī`a*, 368, 376, “entwined.”

²⁰ Lit., “the custom of the merchants,” *`urf al-tujjār*. See Messick, in Masud, Peters and Powers. On the urban market code, known as Qanun San`a’, the key study is by Franck Mermier 1997.

²¹ It is usually assumed that *`urf* is unwritten. This is associated with the assumption that, while often established and authoritative as such, custom also is subject to change. In Yemen, however, as I also mentioned in the Introduction, both customary rules and specific customary settlements have been documented. While this mainly concerned the phenomenon of “tribal custom,” there also are limited examples (mentioned here) of explicit documentation that

occurred within the sharī`a archive. According to Hallaq, *Sharī`a*, 384-398, a feature of colonial modernity in some quarters involved the writing down of previously unwritten custom which caused the fixing of this previously flexible supplement.

²² Hollander, *Jews and Muslims*, 280-283. The text is countersigned with a note from a sharī`a court judge in Ibb in which he distinguishes the result from a sharī`a judgment (ḥukm sharī`ī).

²³ Mundy 1979:174; Paul Dresch (2000:65).

²⁴ Hollander XXXX. See also the period account of Gamliel 1986, 1987, which contains documents of various types. (and Mark S. Wagner, Like Joseph in Beauty guy, on this)

²⁵ Paul Dresch, *Tribes, Government, and History in Yemen* (Oxford: Clarendon Press, 1989); idem, *The Rules of Barat: Tribal Documents from Yemen* (Sanaa: Centre Français d'Archéologie et des Sciences Sociales, 2006); Martha Mundy, *Domestic Government: Kinship, Community and Polity in North Yemen*, Society and Culture in the Modern Middle East (London: I.B. Tauris, 1995); Shelagh Weir, *A Tribal Order: Politics and Law in the Mountains of Yemen*, Modern Middle East Series (Austin: University of Texas Press, 2007). As Schacht had already noted on the basis of research in the highlands by an earlier generation of scholars such as Rossi, Rathjens and Serjeant, both the elaborated general principles of tribal custom and also the specific undertakings and settlements typically took written form. In Yemen, unlike many other settings, the relation of the shari`a to tribal `urf was not one of written to oral. Tribal custom thus participated in the highly developed ambience of the written text.

²⁶ Mundy, *Domestic Government*, 63, 64. See also Mundy's argument in Chapter 3, "Law in the Locality," pp. 50-58.

²⁷ Weir, *A Tribal Order*, 17, 321.

²⁸ Jacques Berque, *Structures Sociales Du Haut-Atlas* (Paris: Presses Universitaires de France, 1955), 62, my translation. In the Moroccan context, however, see the work of Leon Bushkens, and the earlier efforts of Paul Pascon.