



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

CUSTOM ('*URF*) AS A SOURCE OF ISLAMIC
JURISPRUDENCE IN THE WORKS OF IBN 'ĀBIDIN
AL-SHĀMI (D.1252/1836)

BY

MOHAMMED FARID ALI

INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA

2006

CUSTOM (*'URF*) AS A SOURCE OF ISLAMIC
JURISPRUDENCE IN THE WORKS OF IBN 'ĀBIDIN
AL-SHĀMI (D.1252/1836)

BY

MOHAMMED FARID ALI

A dissertation submitted in partial fulfilment of the
requirement for the degree of Master of Arts (Islamic
Civilization)

International Institute of Islamic Thought and
Civilization
International Islamic University
Malaysia

SEPTEMBER 2006

ABSTRACT

Fatawa issued presently by shari'ah scholars and muftis occasionally fall short of meeting the challenges of modern society. Ibn Abidin's concept of *'urf* and its application provide a basic guide towards meeting the modern challenges in their totality. The present thesis refers to his three works—*Sharḥ 'Uqūd Rasm al-Mufti*, *Nashr al-'urf fi binā ba'ḍ al-aḥkām 'ala al-'urf*, and *Radd al-Muhtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār (Al-Ḥāshiyah)*—written in 13th century A.H. that present *'urf* as a practical instrument for muftis and jurists. His first work is used as an overall framework, while the later two offer commentaries on the first one, providing details and cases of application. The present work enunciates that Ibn 'Ābidin identifies custom as effective in Islamic law only if it fulfils the condition to specify (*takḥīṣ*) *naṣṣ*, without opposing it completely. The variations of *'urf* in society will only affect those legal issues that are custom-related and not directly based on *naṣṣ*. Moreover, all custom-related issues in manifest rulings (*zāhir al-riwāyah*) are subject to change as custom changes. Given that the nature of custom-related issues is always communal, a mufti, prior to dispensing his *fatwa*, must assess the local conditions, capacity of the people to bear the consequences of the ruling, and the lifestyle of the people. It then becomes evident that the application of *'urf* is a complex endeavor requiring expertise in legal theory that only a qualified mufti ought to undertake.

ABSTRAK

Fatwa-fatwa yang dikeluarkan pada masa kini tidak memenuhi kehendak. Konsep Ibn Abidin mengenai 'urf menyelesaikan masalah yang timbul. Tugas ini merujuk kepada tiga hasil kerja beliau yang ditulis dalam kurun ke 13 selepas Hijrah.; Sharḥ 'Uqūd Rasm al-Mufti, Nashr al-'urf fi binā ba'd al-aḥkām 'ala al-'urf, dan Radd al-Muḥtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār (Al-Ḥāshiyah) dalam mengemukakan 'Urf sebagai asas amalan para mufti dan pakar undang-undang. Hasil kerjanya yang pertama digunakan sebagai garis panduan dan dua kemudiannya digunakan sebagai komentar. Berlandaskan matlamat ini, kerja ini menemui: 'Urf hanya berkesan di dalam undang-undang Islam, hanya apabila ianya memenuhi syarat-syarat untuk mengkhususkan nass dan bukan bertentangan dengannya. Perubahan-perubahan tersebut hanya akan mempengaruhi isu-isu yang berkaitan dengan 'Urf yang tidak berasaskan secara terus dengan nass. Semua isu yang berasaskan 'Urf di dalam zahir al-riwayat adalah tertakluk kepada pindaan memandangkan "urf akan berubah. Sebelum mengeluarkan fatwa, seorang Mufti haruslah membuat kaji selidik di dalam memahami situasi dan cara hidup masyarakatnya. Pada kebiasaannya isu-isu yang berdasarkan 'Urf adalah mengenai isu negara atau isu masyarakat, dan pakar undang-undang yang menyelesaikannya haruslah berada di dalam kedudukan di mana beliau boleh melihat sesuatu masyarakat atau negara itu sebagai satu perkara, iaitu seorang mufti.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Masters of Art (Islamic Civilization).

.....
Muhammad Hashim Kamali
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Masters of Arts (Islamic Civilization).

.....
Ustaz Muhammad Uthman
El-Muhammady
Examiner

This dissertation was submitted to the Kulliyah of International Institute of Islamic Thought and Civilization (ISTAC) and is accepted as a partial fulfillment of the requirements for the degree of Masters of Arts (Islamic Civilization).

.....
Torla Hj. Hassan
Dean, Kulliyah of ISTAC.

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Mohammed Farid Ali

Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

**DECLARATION OF COPYRIGHT AND
AFFIRMATION
OF FAIR USE OF UNPUBLISHED RESEARCH**

Copyright © 2006 by Mohammed Farid Ali Bin Anwar Ali. All rights reserved.

**CUSTOM ('*URF*) AS A SOURCE OF ISLAMIC JURISPRUDENCE IN
THE WORKS OF IBN 'ĀBIDIN AL-SHĀMI (D.1252/1836)**

No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the copyright holder except as provided below.

1. Any material contained in or derived from this unpublished research may only be used by others in their writing with due acknowledgment.
2. IIUM or its library will have the right to make and transmit copies (print or electronic) for institutional and academic purposes.
3. The IIUM library will have the right to make, store in a retrieval system and supply copies of this unpublished research if requested by other universities and research libraries.

Affirmed by Mohammed Farid Ali Bin Anwar Ali

.....
Signature

.....
Date

ACKNOWLEDGEMENTS

This work could not reach its end if I was not assisted in number of ways by a number of persons. I am heartfully grateful to Prof. Dr. Mohammad Hashim Kamali, who not only supervised this work, but enriched it with his experienced guidance. His advices and solutions were milestones whenever I felt lost or jammed. Secondly I am obligated to thank Naushad Razak, Saiyad Riyaz Dean, M. Anis, Mohammed Aiyub Khan, Abdul Hafiz and other people who assisted me to further my studies, elevating me to a level which was not possible on my own. Special thank also goes to my wife Umi Fadhilah, her parents and my daughter Mariyah who eased my domestic responsibilities, sparing me ample of time to write. I appreciate Prof. Dr. Ajmal, Puan Mar'iyah, Adnan Rahman and Diwi Abbas in giving me hand technically. Lastly I owe sincere thanks to all of my teachers who taught me in Madrasah Arabiyah Raiwind, Jamia Ashrafia Lahore and International Institute of Islamic Thought and Civilization, IIUM, Malaysia. May Allah accept all these people's assistance and bestore His Mercy and Blessings on their life in this world and the life hereafter. *Amīn.*

TRANSLITERATION

TABLE 1: CONSONANTS

	'		Kh		Sh		Gh		N
	B		D		ṣ		F		H
	T		Dh		ḍ		Q		W
	Th		R		ṭ		K		y
	J		Z		ẓ		L		
	ḥ		s		'		m		

TABLE 2: VOCALISATION SIGNS (REPRESENTING ARABIC VOWELS)

Short Vowels	
	a
	i
	u

Long Vowels	
+	ā
+	ī
+	ū

CONTENTS

Abstract	i
Abstract in Arabic	ii
Abstract in Bahasa Malaysia	iii
Approval Page	iv
Declaration	v
Copyright Page	vi
Acknowledgements	viii
Transliteration	ix
CHAPTER ONE: INTRODUCTION1	1
CHAPTER TWO: <u>IBN</u> ‘ĀBIDIN’S LIFE, WORKS, AND 18TH CENTURY DAMASCUS	10
His Life	10
His Works	13
His Published Works	13
Published Treaties	15
Treaties On ‘urf	15
Unpublished Manuscripts (<i>Makhūūāt</i>)	16
Extant Works (<i>Kutub Mafqūdah</i>)	16
A Brief Scenario of 18 th	17
Role Of Scholars And Muftis In 18 th Century Damascus	18
CHAPTER THREE: DEFINITION AND THE TYPES OF ‘URF IN THE WORKS OF IBN ‘ĀBIDIN	23
The Definitions	23
Types of ‘urf	26
First Classification	26
Second Classification	26
Values of General and Special Customs	27
Values of Verbal and Actual Customs	31

CHAPTER FOUR: <u>RECOGNITION AND ROLE OF ‘URF IN ISLAMIC JURISPRUDENCE</u>	33
Argumentations of Recognizing Custom.....	33
The Legal Ruling Varies because of Variation of Custom	35
Custom In Opposition Of Text (<i>Nasṣ</i>) Or Manifest Rulings (<i>Zāhir Al-Riwāyah</i>).....	37
The Objection.....	37
Answer To The Objection.....	39
 CHAPTER FIVE: <u>FATAWA, MUFTI AND CUSTOM (‘URF)</u>	42
Importance of Following Recent Custom	43
Importance of Following the Accepted Custom	44
Observation of Public Interest (<i>al-Maṣlahah</i>) in <i>al-Iftā</i>	45
Importance of Knowing the People, Time and their Situations (<i>al-Aḥwāl</i>).....	47
Observation of Custom in <i>al-Ifta</i> until it Does Not Oppose the Islamic Law.....	49
 CONCLUSION.....	52
 BIBLIOGRAPHY	56
 APPENDIX A: <u>SUMMARY OF ‘URF IN AL-ASHBĀH WA AL-NAZĀIR</u>	62
 APPENDIX B: <u>SUMMARY OF ‘URF IN AL-NAZRIYĀT AL-FIQHIYAH</u>	63
 APPENDIX C: <u>THE HIERARCHICAL LEVELS (<i>TABAQĀT</i>) OF HANAFI JURISTS</u>	64

CHAPTER ONE

INTRODUCTION

Wa al-'urf fi al-Shar' lahu I'tibār

Lidhā 'alaihi al-hukm qad yudūr

(And custom in *sharī'ah* law possesses consideration)

(Because of which on it legal norms sometimes turn)¹

Generally, custom denotes “a practice characteristic of a society or social group” derived from the Latin *suescere* meaning to be accustomed or to be used to. The Greeks use the term *ethnos* rooting from *ethos* meaning “a group of people accustomed to live together, a nation”². In Islamic Law, “custom and habit are that which become constant in the people compatible to their rational and received with acceptance by the people considered to be of good nature”³. In every period of time, people tend to use various methods to regulate their social and financial behavior or conduct towards each other. At certain point, they mutually agree on a specific method and start to consider it as correct and appropriate, rectifying every matter on it. Such customs and habits are considered as sources (*uṣūl*) in Islamic jurisprudence, as the Prophet—peace be upon Him—said, “What Muslims behold as good is good before Allah”. In other words customs are only those, which are “sound and

¹ Mohammad Amīn Ibn 'Ābidin al-Shāmi, *Sharh 'uqūd rasm al-mufti*, (Islamabad: Maktabah Bayt al-Qalam), 80. These are the two lines from the poetic work of Ibn 'Ābidin written on the methodology of Ifṭā known as *'Uqūd Rasm al-Mufti*.

² Robert H. Winthrop, *Dictionary of concepts in cultural anthropology*, (New York: Greenwood Press, 1991), 70.

³ *al-'urf wa al-'ādah mā Istaqarra fi al-nufūs min jaht al-'uqūl wa talaqat hu al-ṭibā' al-salīmah bi al-qabūl*. Mohammad Amīn Ibn 'Ābidin al-Shāmi, *Majmū'ah rasāil Ibn 'Ābidin*, (Beirut: Dār Ahyā al-Turāth al-Arabi), 112, vol.2.

reasonable” and practices that are devoid of benefit or “which partake in prejudice and corruption” will not be included in the definition of *‘urf*⁴.

Custom always had an influence in the history of legal systems of different societies, as Mahmassāni says “for custom, which preceded written law and actually fulfilled its functions before codification, still supports, interprets, adjusts, and revitalizes written law. It will still act as a link between the past and the present and between the present and the future”⁵. Paul Vinegradoff distinguishes custom as the fountainhead of legal observance as he writes, “It is not conflict that initiates rules of legal observance, but the practices of everyday directed by the give-and-take consideration of reasonable intercourse and social cooperation”⁶.

Hence, custom firstly is needed by the jurists and muftis to understand the sources (*nusūṣ*) of the *sharī’ah* by contemplating the custom of Arabs which existed in the time of revelation (*nuzūl al-wahyi*), for without that knowledge, it is impossible for them to escape from the cloud of doubt and complication⁷. An ancient dictum braces this notion, which says *consuetude est optima legume interpres* (custom is the best interpreter of law). To interpret and illustrate Islamic law prevalent custom of the time of revelation is most relevant as Ibn Nujaym (d. 970 A.H.) says “the relevant custom to interpret the language of law is that which is contemporary to the period of revelation and not the later one”⁸. Secondly: custom is needed by the jurists and the muftis while they are dealing with the manifest rulings and books related to *fiqh*,

⁴ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2nd ed, (Kuala Lumpur: Ilmiah Publishers, 1999), 283; Imam Muhammad Abu Zahra, *Usūl al-Fiqh*, (al-Qāhirah: Dār al-Fikr al-Arabi, 1928), 216.

⁵ S. Mahmassani, *Falsafat al-Tashrī’fī al-Islam tr. Farhat J. Ziadeh*, (Kuala Lumpur: The Open Press, 2000), 131.

⁶ Imtiyaz Hussain, *Muslim Law and Customs*, (Kashmir: Srinagar Law Journal Publications), 135.

⁷ ‘Adil Ibn ‘Abd al-Qādir Qūtah, *al-‘Urf; hujjiatuhu, wa athruhu fī fiqh al-mu’āmalat al-māliyah ‘ind al-Hanābilah*, (Makkah al-Mukarramah: al-Maktabah al-Makkiyah, 1997), 59, vol.1.

⁸ *Al-‘urf al-ladhī taḥmilu ‘alaihi al-alfāz innamā huwa muqārīn al-sābiq dūna al-muta’akkhir*. See Riaz al-Hasan Gilani, *The reconstruction of legal thought in Islam*, (Delhi: Markazi Maktaba Islami, 1994), 186.

because every jurist deduces (*yastambitu*) only for their contemporary time according to their customs, habits, and needs. Not knowing the relation of a decision with its time will lead to obscurity in preference of more than one opinion⁹. Thirdly, custom is needed by the jurists and muftis to know their contemporary events, because unless they understand their contemporary event, they cannot implement any legal norm on it¹⁰.

This can be well understood when Imam Abu Yusuf (d.182/798) declared lawfulness of selling things by weighing which was previously declared for selling things by measurement (*bi al-kail*). The later made this decision because he could clearly observe the custom of selling things by measurement, was replaced by weighing¹¹. Fourthly, custom is needed by scholars/muftis to know the people of their time, because unless they know their people, their habits, ways of dealing, lifestyle, social behavior, transactions, dialects etc, the scholars/muftis cannot facilitate the people according to the time, place, and need¹².

These four crucial roles played by *'urf*, projects that a scholar/*mufti* without its knowledge cannot understand the needs of the people and would be unable to build a bridge between the society and themselves. Perhaps this is one of the dilemmas of the contemporary time. Scholars and people are just like walking on single train tracks hoping to connect at one point, but after accomplishing vast distances, they still find themselves unconnected. *'urf* is a source which can lighten the burden and looking at it through the eyes of Ibn 'Ābidin will cast more light. In his time, the Ottoman Empire went through major changes leaving scholars facing waves of new inventions

⁹ 'Ādil Ibn 'Abd al-Qādir Qūtah, *al-'Urf*, 60, vol.1.

¹⁰ Ibid., 69, vol.1; Abu Zahra, *Usūl al-Fiqh*, 218-219.

¹¹ Riaz al-Hasan Gilani, *The reconstruction of legal thought in Islam*, 188; S.A.A. Rizvi, "Social ethics of Muslim shurafā in India: customary law in the fatawa of Shah 'Abd al-'Aziz Dihlawi," *Islamic and Comparative Law Quarterly*, vol. 3, no. 1 (1983): 5; Abu Zahra, *Usūl al-Fiqh*, 217.

¹² 'Ādil Ibn 'Abd al-Qādir Qūtah, *al-'Urf*, 71, vol.1.

and lifestyles just similar to our time trying scholars with modernization of everything¹³. In that particular period Ibn ‘Ābidin used ‘urf to accommodate many of the needs of his time which can again be a great help in similar situations and circumstances.

Ibn ‘Ābidin wrote a treaty on ‘urf with the topic “*Nashar al-‘urf fi binā’ ba’ḍ al-ahkām ‘ala al-‘urf*” dated 1827, which is referred to frequently by the contemporary scholars¹⁴. Around his time ‘urf was elevated from the “periphery of legal theory” towards virtually becoming an independent source and principle in Islamic jurisprudence, especially in the legal thought of Hanafi School¹⁵. This elevation can be well pictured when seen at *al-Ashbāh wa al-naẓāir* of Ibn Nujaym Zain al-Dīn Ibn Ibrāhīm (d.970 A.H.) in which he included a chapter on custom. One of his passages says “the reflection of *al-‘ādah* and *al-‘urf* is so constant on legal issues (*masāils*) that the scholars made it a principal source (*aṣal*)”¹⁶. Now when coming back to Ibn ‘Ābidin, it shows that his treatise is basically moving the work of Ibn Nujaym to upper level by giving it extensive elaboration theoretically and practically. Usage of ‘urf as an important source in Ibn Abidin’s time can also be pored over when we open another work of his, *Sharḥ ‘Uqūd Rasm al-Mufti*, where he wrote, “and it is important for the mufti to know the ‘urf and the situation of the people of their time, and graduated from the discipleship of a distinguished experienced teacher in its study”¹⁷.

It is significant to see a thirteenth century Hanafi jurist giving such importance to ‘urf in Islamic jurisprudence, which was not adequately explored by the earlier

¹³ Khalil Mardam Bik, *A’yān al-qarn al-thālith ‘ashar fi al-fikr wa al-siyāsah wa al-ijtimā’*, ‘Adnan Mardam Bik, (Beirut: Muassisah al-Risalah, 1977), 6.

¹⁴ Mohammad Amīn Ibn ‘Ābidin al-Shāmi, *Majmū’ah rasāil Ibn ‘Ābidin*, (Beirut: Dār Ahya al-Turāth al-Arabi), 112, vol.2.

¹⁵ *The Encyclopedia of Islam*, Edition 2000, “‘urf”.

¹⁶ Zain al-Dīn Ibn Ibrāhīm Ibn Nujaym, *Al-Ashbāh al-Naẓāir*, (Beirut: Dār al-Fikr al-Mu’āsir, 1985), 101. For the summary of the chapter see Appendix: A.

¹⁷ Mohammad Amīn Ibn ‘Ābidin al-Shāmi, *Sharḥ ‘uqūd rasm al-mufti*, (Islamabad: Maktabah Bayt al-Qalam), 84. For more detail of this work please see page. 13.

Hanafis. Although, *'Urf* came into picture in the time of Abu Yusuf (d.182/798), for some reason it could not strengthen its root, until the post-classical period when scholars started to confer special status on *'urf* and composed special chapters on it in legal literature¹⁸. In this vein Ibn 'Ābidin's treaties played the role of reviving and rejuvenation¹⁹. Looking into this, there must be some reason or situation that fortified his resolve to take such a step, inconsistent with the early predecessors of Hanafī legal school implicating the importance of studying and understanding the subject from the latter's work. Another reason to study *'urf* in Ibn 'Ābidin's works is that constant references to his works have been observed in the works of contemporary scholars while discussing *al-'urf*²⁰ depicting him as an authority on *'urf* for the scholars concerned. This implicates that there is a need to unwrap and exhibit his complete concept of *'urf* in English for the scholars seeking to embark on its research.

Thus this work unveils the concept and theory of *'urf* of Ibn 'Ābidin while referring to his poetic work *'Uqūd Rasm al-Mufti* (chaplets relating to *uṣūl al-iftā'*) composed on seventy (74) lines of which sixty ninth is on *'urf*), *Sharḥ 'Uqūd Rasm al-Mufti* (a later work which he wrote as the commentary of his mentioned legal-poetic work), *Nashr al-'urf fi binā' ba'd al-aḥkām 'ala al-'urf* (a special treatise emphasizing *'urf* extensively) and *Radd al-Muḥtār 'alā Durr al-Mukhtār sharḥ Tanwīr al-Abṣār*²¹. In this work *Sharḥ 'uqūd rasm al-mufti* is used as the outline and the latter two works are used as its commentaries.

¹⁸ Gideon Libson, "On the development of Custom as a source of Law in Islamic Law," *Islamic Law and Society*, vol. 4, no. 2, (1997): 154.

¹⁹ Wael B. Hallaq, Authority, *Continuity, and Change in Islamic law*, (Cambridge: Cambridge University Press, 2001), 216.

²⁰ Some of the works embodying the reference to Ibn 'Ābidin are enumerated in literature review.

²¹ This is one of his commentary work done on *al-Durr al-Mukhtār* written by 'Ala' al-Din Mohammad Ibn Ali al-Haskafi (d. 1088), Ibn 'Ābidin's this work is considered as the last word in the authoritative interpretation of Hanafite Law. "It shows originality in attempting to determine status of present practical situations, as a rule, shunned by others. Author shows a complete mastery of his subject". See Nicolas P. Agnides, *Mohammedan Theories of Finance*, (New York: AMS Press, INC, 1916), 183.

The work starts with Ibn ‘Ābidin’s biography covering his student life to his occupation of the position of mufti and a brief scenario of 18th century Damascus to give an idea of the challenges opposed him attracting his interest towards custom. Secondly, the work discusses the definition, types, comparison and distinction between ‘urf and ‘ādah and the value of each type as elucidated in his works. Thirdly, the work goes towards the recognition and the role, ‘urf plays in Islamic jurisprudence, opening a discussion of ‘urf opposing *naṣṣ* and ‘urf opposing manifest rulings (*zāhir al-riwāyah*). Fourthly, the work stretches on the importance of ‘urf for the muftis in their *fatawas*. Finally the conclusion brings together the issues discussed in preceding chapters and assesses its worth.

Previously some works have shown discussion of Ibn ‘Ābidin and his works but somehow they were fragmented, not portraying his perspective of ‘urf as a whole²². His name only came as an evidence for the writers in argumentation of their own theses, but never his work was unveiled directly as complete module for the scholars to pursue and neither was any of his work translated except for his *Sharḥ ‘Uqūd Rasm al-Mufti*. This work was translated into Urdu by Mufti Sa‘īd Ahmad Pālan Puri of Dār al-‘Ulūm Deoband, India and frequently used in Subcontinent by scholars specializing in *fiqh* and *Ifṭā*²³ or countries where scholars are familiar with the language. Following are some of the works which refer to Ibn ‘Ābidin and his works while discussing ‘urf:

²³ Sa‘īd Ahmad Pālan Pūri, *Āp Fatwa Kaise Dein Urdu translation and commentary of sharḥ ‘uqūd rasm al-mufti of Ibn ‘Ābidin*, (Karachi: Maktabah Nu‘maniyah, 1425 A.H), 111. This work is an Urdu translation and commentary of Ibn ‘Ābidin’s *Sharḥ ‘uqūd Rasm al-Mufti* written by Mufti Sa‘īd Ahmad Pālan Puri. A passage of this book relates to ‘urf which the writer translates and emphasizes following the same outlines set by Ibn ‘Ābidin.

1. **Islamic Law and Culture 1600-1840.** Haim Gerber on chapter six of this work “‘*urf*-secularization of the law” refers to two famous scholars, among whom one is Ibn ‘Ābidin²⁴.
2. **Authority, Continuity, and Change in Islamic Law.** Wael Hallaq in chapter “the jurisconsult, the author-jurists, and legal change” (part eight) of this work refers to *Nashr al-’urf*, *Sharḥ Manẓūmah/Sharḥ ‘Uqūd Rasm al-Mufti*, and *Hāshiyah* of Ibn ‘Ābidin constantly²⁵.
3. **‘urf as a Source of Islamic Law.** Mohammad Zain Othman devotes two pages of this paper to Ibn ‘Ābidin and his work on explaining the types of ‘urf according to the later²⁶.
4. **On Development of Custom as a Source of Law in Islamic Law.** Gideon Libson on fifth part of this paper “The changing Perception of Custom in Post-Classical Literature” while discussing the transmission of ‘urf from legal theory to legal attention appreciates some of the post-classical scholars and their legal literature. One of them is Ibn ‘Ābidin²⁷.
5. **The Encyclopedia of Islam.** F.H. Stewart, while discussing the status of ‘urf in Islamic Law gives a quote of Ibn ‘Ābidin as one of the early producers of treaties on ‘urf²⁸.
6. **The Principles of Islamic Jurisprudence According to the Hanfi, Maliki, Shafi’i and Hanbali Schools.** ‘Abd al-Rahim in section two “customs and

²⁴ Haim Gerber, *Islamic Law and Culture 1600-1840*, (Leiden: Brill, 1999), 105. The other scholar whom the author aims is Khair al-Dīn al-Ramli.

²⁵ Wael. B. Hallaq, *Authority, Continuity, and Change in Islamic law*,(Cambridge: Cambridge University Press, 2001), 215.

²⁶ Mohammad Zain Othman, “‘Urf in Islamic Law”, *Islamic Studies*, vol. 20, no. 4, (1981): 346.

²⁷ Gideon Libson, “On the development of Custom as a source of Law in Islamic Law”, *Islamic Law and Society*, vol. 4, no. 2, (1997): 131.

²⁸ *The Encyclopedia of Islam*, New edition, “‘urf”.

usages” refers to Ibn ‘Ābidin with “the author of *Radd al-Muḥtār*” while explaining the nature of custom which can have a force in Law²⁹.

7. **Islam and Public Law: Classical and Contemporary Studies.** This work includes a paper by Besim S. Hakim who refers to Ibn ‘Ābidin while enumerating the authors of four well-known and extensive studies on ‘urf chronologically³⁰.
8. **Athar al-’urf fi Fahm al-Nuṣūṣ: Qadaya al-Mar’ah Anmūzajan.** Ruqayyah Taha Jabir al-‘Alwani in Chapter 1 (part three) of this work “*Hujyah al-’Urf Bayn al-’Ulamā*” refers to Ibn ‘Ābidin frequently³¹.
9. **Al-Nazriyāt al-Fiqhiyah.** Dr. Muhammad al-Zuhayli on chapter three of this work “*fi nazriyyat al-’urf*” frequently refers to *Rasāil Ibn ‘Ābidin*³².
10. **Usūl al-Fiqh al-Islami.** Dr. Wahbah al-Zuhayli on chapter two, part three of this work “*al-’urf wa al-’Ādah*” refers to *Rasāil Ibn ‘Ābidin* constantly³³.

Amongst all these mentioned works the reference of first two, Haim Gerber and Wael B. Hallaq to Ibn ‘Ābidin and his works are vast and comprehensive, but their objectives are not directly him. In case of Haim Gerber’, his reference to the latter is only to strengthen his statement that “an important measure of innovative legal activity entered Islamic Law via the gate of ‘urf or local custom”³⁴. He emphasizes Ibn ‘Ābidin’s method of differentiating between types of ‘urf that customs either accord with the explicit sources (*naṣṣ*) i.e. *Quran*, *Sunnah*, and *Ijmā’* or discord. He

²⁹ Abdur Rahim, *The Principles of Islamic Jurisprudence*, 2nd ed, (New Delhi: Kitab Bhavan, 1994), 131-32.

³⁰ Chibli Mallat, *Islam and Public Law: Classical and Contemporary Studies*, Arab and Islamic Laws Series, (London: Graham & Trotman), 143.

³¹ Ruqayyah Taha Jabir al-‘Alwani, *Athar al-’urf fi fahm al-nuṣūṣ*, (Beirut, Dār al-fikr al-Mu’āsir), 51.

³² Muhammad al-Zuhayli, *al-Nazriyāt al-Fiqhiyah*, (Beirut: al-Dār al-Shāmiyah), 163. For the summary of the chapter see Appendix: B.

³³ Wahbah al-Zuhayli, *Usūl al-Fiqh al-Islami*, 2nd ed, Beirut, (Dār al-Fikr al-Mu’āsir, 2004), 828, vol.2.

³⁴ Haim Gerber, *Islamic Law and Culture 1600-1840*, (Leiden: Brill, 1999), 105.

utilizes this distinction to prove that Islamic Law was both “a sacred manifesto and a practical and socially useful code”³⁵. Although Haim Gerber’s work is one of its kind to unveil Ibn ‘Ābidin and his treatise to some extent, but again as mentioned above it was only for the purpose of argumentation of one’s own thesis.

In the case of Wael B. Hallaq, because he opens a discussion on custom and the approach of early and later scholars towards it and stretches that custom in early Hanafi School emerged but for some reason couldn’t reach the surface until Ibn ‘Ābidin who not only revived his interest in it, but took the concept to its zenith.³⁶ Here Hallaq finds an opportunity to refer to the later to synergize his discussion. Compared to Haim Gerber, Hallaq’s work is discussing the custom and its status in chronological stages and Ibn ‘Ābidin fits perfectly in the portion when *‘urf* reached its highest peak opening a window for the writer to collect some part of the latter’s works and life.

The review of works mentioned distinguishes previous works and this work, in that the latter combines and studies the entire range of Ibn ‘Ābidin’s works on *‘urf*, instead of partially. Moreover, the present work assembles it as a complete independent work for the reference of interested readers, to reach a verdict according to their people’s needs, time, situation and their capacity.

³⁵ Ibid., 110.

³⁶ Wael. B. Hallaq, *Authority, Continuity, and Change in Islamic law*, 219.

CHAPTER TWO

IBN ‘ĀBIDIN’S LIFE, WORKS, AND 18TH CENTURY

DAMASCUS

This chapter covers the biography of Ibn ‘Ābidin in detail, starting from his birth and student life to his position as a mufti of Damascus. The chapter also lists down his published, un-published, available and extant works. It also provides a historical landscape of 18th century Damascus, discussing its political system and the role played by its scholars and muftis. The chapter is arranged as such to infuse in readers’ mind the situation and challenges faced by Ibn ‘Ābidin that prompted him to give due importance to ‘urf in his *fatwas* and treatises.

HIS LIFE

Muhammad Amīn Ibn ‘Umar Ibn ‘Abd al-‘Azīz, was well-known as Ibn ‘Ābidin al-Ḥusayni or al-Shāmi³⁷. Born on 1198 A.H/1784 A.D. in the alley (*zuqāq*) of al-Mublat, section (*ḥay*) of al-Qunwāt, Damascus where he grew up, learnt the holy Quran and memorized it from al-Sheikh Sa‘īd al-Ḥamawi (d.1236 AH. /1820 A.D.)³⁸.

³⁷ Ibn ‘Ābidin’s lineage links up to Ali (May Allah Be pleased with him) the Companion, cousin and the son in Law of Prophet Muhammad (peace be upon Him) which is as follows: Mohammed Amin, Ibn ‘Umar, Ibn ‘Abd al-‘Azīz, Ibn Ahmad, Ibn ‘Abd al-Rahim, Ibn Mohammad Salah al-Din, Ibn Najm al-Din, Ibn Mohammad Salah al-Din, Ibn Najm al-Din, Ibn Mohammad Kamal, Ibn Taqiyy al-Din al-Mudarris, Ibn Mustafa al-Shihabi, Ibn Husayn Ibn Rahmat Allah Ibn Ahmad al-Fani, Ibn ‘Ali, Ibn Ahmad, Ibn Mahmud, Ibn Ahmad, Ibn ‘Abd Allah, Ibn ‘Izz al-Din ‘Abd Allah, Ibn Qasim, Ibn Isma‘il, Ibn Husayn al-Natif, Ibn Ahmad, Ibn Isma‘il, Ibn Ahmad, Ibn Mohammad, Ibn Isma‘il al-‘A‘raj, Ibn al-Imam Ja‘ar al-Sadiq, Ibn al-Imam Mohammad Baqir, Ibn Imam al-Zayn al-Din al-‘Ābidin, Ibn al-Husayn Ibn ‘Ali. See Muhammad Mutī‘al-Hāfiz & Nazar Abāzah, ‘*Ulamā’ al-Dimashq*, 406, vol.1.

³⁸ He was *Sheik al-Qurrā* (the authority of Qur’anic recitations) of Damascus, born in Hamāt in 1145

He also studied *al-Maydāniyah*, *al-Juzriyah*, *al-Shātibiyah* and other *fiqh* works of shafi‘ī school from the latter.

He was a follower of shafi‘ī school until he met Sheikh Shākir al-‘Uqqād (d.1222 A.H./1807 A.D.)³⁹, who urged him to switch to Hanafi school. From the latter he studied law of inheritance (*al-farāiḍ*), arithmetic (*al-ḥisāb*), Islamic jurisprudence and its methodology (*al-uṣūl*), prophetic traditions (*al-ḥadīth*), Qur‘anic exegesis (*al-tafsīr*), Islamic mysticism (*al-taṣawwuf*) and rational sciences (*‘ilm al-ma‘qūl*) and in *fiqh al-Multaqā*, *al-Kanz al-Daqāiq*, *al-Baḥr al-Rāiq*, *Sadr al-Sharī‘ah*, *al-Dirāyah*, *al-Hidāyah* and *al-Durr al-Mukhtār*⁴⁰. The last book which Ibn ‘Ābidin studied from al-‘Uqqād was *al-Durr* with a group of students/scholars amongst whom was sheikh Sa‘īd al-Ḥalabi (d.1259 A.H./1843 A.D.)⁴¹. Al-‘Uqqād passed away before the completion of *al-Durr*, which was later continued by sheikh Sa‘īd al-Ḥalabi as the senior member of the group⁴².

From a general perspective, Ibn ‘Ābidin went through three stages of his education; first under al-Sheikh Sa‘īd al-Ḥamawi (d.1236 AH.), where he strengthened his foundation, second stage of education under Sheikh Shākir al-‘Uqqād (d.1222 A.H.) for seven years till the latter’s death, where he learned to write legal issues (*masāil*) and epistles (*rasāil*), constructing his experience (*al-mumārasah*) in

A.H, moved to Damascus in 1168 A.H and died there on 1236 A.H. See Muhammad Mutī‘ al-Hāfiz & Nazar Abāzah, *‘Ulamā’ al-Dimashq*, 260, vol.1.

³⁹ He was Mohammad Shākir Ibn ‘Ali Ibn Sa‘d Ibn Sālim al-‘Umri. He was well-known with the name “al-‘Uqqād”, born in Damascus in 1157 A.H, came from a Hanbali family, later switched to Hanafi school and gained his knowledge from scholars like ‘Abd al-Rahmān al-Kazbari. He died on 14th Friday, al-Muḥarram, 1222 A.H. Ibid., 188, vol.1.

⁴⁰ Khalil Mardam Bik, *A’yān al-qarn al-thālith ‘ashar fi al-fikr wa al-siyāsah wa al-ijtimā’*, 36.

⁴¹ He was Sa‘īd Ibn Hasan Ibn Ahmad well known with the name al-Halabi. Born in Halab in 1188 A.H. and gained his knowledge from al-Sheik Isma‘īl Ibn Muhammad al-Mawāhibi, al-Sheik Muhammad Makki al-Qal‘ī, Sheik Muhammad al-‘Umri al-‘Uqayli and Sheik ‘Abd al-Rahmān al-‘Umri al-‘Uqayli. Then migrated to Damascus and stayed there rest of his life in 1208 A.H. He also studied from the scholars of Damascus and started lecturing.

⁴² Khalil Mardam Bik, *A’yān al-qarn al-thālith ‘ashar*, 37.

writing. Third stage of education was under sheikh Sa‘īd al-Halabi (d.1259 A.H.)⁴³, where he gained proficiency and depth in knowledge exhausting himself in delivering, unfolding and solving intricate issues. In this stage Ibn ‘Ābidin wrote his *magnum opus*, *al-Hāshiyah* presently known as *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār* in the presence of his teacher. Beside their relation of student and teacher, they also enjoyed the relation of friendship.

He was endowed with the position of *amīn al-fatawa/nāib al-mufti* by Mufti Sheik Hussein al-Murādi son of Mufti Ali Efendi al-Muradi (d.1183 A.H./1769 A.D.)⁴⁴. Inquiries of issues (*al-as‘ilah*) were addressed to him from different provinces (*al-bilād al-mukhtalifah*), and the locals and foreigners both harvested the usufructs of his answers. He was the authority to take refuge to on the occasions of conflict of opinions in *fatāwa* and thus achieved fame in his lifetime and after⁴⁵.

He died on Wednesday 21st of Rabī‘ al-Thāni, 1252 A.H/1836 A.D. completing 54 years of age and was buried in the graveyard of al-Bāb al-Ṣagīr beside the grave of ‘Alā al-Dīn al-Ḥaṣkafī the writer of *al-Durr al-Mukhtār*. He was a man of tall height, fair color, black hair, joined eyebrows, beautiful face, clean clothes and body, and used to wear the attire of the scholars of his time i.e. *al-jubbah*, white turban (*al-imāmah*) coiled around red *ṭarbush* and caftan (*qufān*)⁴⁶.

⁴³ Muhammad Mutī‘ al-Hāfiz & Nazar Abāzah, ‘*Ulamā’ al-Dimashq Wa A’yānuha fi al-Qarn al-Thālith ‘Ashar al-Hijri (1201 A.H./1746-1260A.H./1844)*, (Beirut: Dār al-Fikr al-Mu’āsir, 1991), 409, vol.1.

⁴⁴ Ibid., 410, vol.1; Dick Douwes, *The Ottomans in Syria: a history of justice and oppressions*, (London: I.B. Tauris Publishers, 2000), 109. For detail of Murādi Family in Damascus see The Encyclopedia of Islam, New Edition 1993, “al-Murādi”.

⁴⁵ Muhammad Mutī‘ al-Hāfiz & Nazar Abāzah, ‘*Ulamā’ al-Dimashq*, 415, vol.1.

⁴⁶ Ibid.