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*QĀḌĪ*S COMMUNICATING: LEGAL CHANGE AND THE LAW OF DOCUMENTARY EVIDENCE*

Wael B. HALLAQ
McGill University

Dedicated to the memory of Norman Calder, a fellow scholar and friend

I

The dialectical relationship between model *shurūṭ* works and juridical practice represents one fundamental instance in which juristic doctrine and the realia of practice conflate to produce a constant modification of the law, both as an abstracted doctrine recorded in legal manuals and as practiced in a worldly social context.[1] Being an integral segment of the less specialised *adab al-qāḍī* literature,[2] the *shurūṭ*, I propose, are no less subject to the rules of this dialectical relationship than the larger textual context of which it constituted such an organic part.[3]

In this article I discuss the modalities of written communication prevalent among the *qāḍī*s, a subject that occupies space in both *adab al-qāḍī* works and the *shurūṭ* manuals.[4] The usual Arabic designation for this type of

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[1] On model *shurūṭ* works and their dialectical relationship to practice, see Hallaq, W. B., «Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice», *Islamic Law and Society*, 2 (1995), 109-134.

[2] In as much as independent works were exclusively devoted to the *shurūṭ* genre, there are a number of *adab al-qāḍī* and *furū'* works which include, as an integral part of their discourse, a section on *shurūṭ*. See, for example, Shihāb al-Dīn Ibrāhīm Ibn Abī al-Damm, *Kitāb Adab al-Qaḍā' aw al-Durar al-Manẓūmāt fi al-Aqḍiya wal-Ḥukūmāt*, ed. Muḥammad Aḥmad 'Aṭā (Beirut: Dār al-Kutub al-'Ilmiyya, 1407/1987), 367-462; Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ*, 30 vols. (Cairo: Maṭba'at al-Sa'āda, 1906-12), XXX, 167-209; 'Abd Allāh Ibn Salmūn al-Kinānī, *al-'Iqd al-Munaẓẓam lil-Ḥukkām*, 2 vols. (Cairo: Al-Maṭba'a al-'Āmira al-Sharafiyya, 1883), *passim*; al-Shaykh al-Niẓām, ed., *al-Fatāwā al-Hindiyya* (or *al-Fatāwā al-'Alamgīriyya*), 6 vols. (repr., Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1400/1980), VI, 160-389.

[3] The argument can, of course, be taken to its logical conclusion. Conceptually, *adab al-qāḍī* works also form an integral part of the much larger and less specialised literature of *furū'*, a category which is inclusive of all areas of substantive (and adjectival) law that is, in many ways, the product of the very distinct methodology and theory of law (*uṣūl al-fiqh*). But due to the enormous dimensions of *furū'*, this argument needs to be demonstrated, not merely posited, in each and every area of speciality within the *furū'*.

[4] As it is the case with other areas of the law, the positive stipulations pertaining to *kitāb al-qāḍī ilā al-qāḍī* are explicated in *adab al-qāḍī* works, while the formularies used by the *qāḍī*s in this practice are delineated in *shurūṭ* manuals. At times, both elements are elaborated in one and

communication is *kitāb al-qāḍī ilā al-qāḍī*[5] and it takes place when «a *qāḍī* of a particular locale writes to a *qāḍī* of a different locale regarding a person's right that he, the first *qāḍī*, was able to establish against another person, with a view that the receiving *qāḍī* shall carry out the effects of the communication in his locale».[6] The practical significance of this mode of writing is all too obvious, and the jurists never underestimated the fundamental need for such a practice.[7] It was by means of such a written instrument that justice could be done in a

the same work, as it happens to be the case with Ibn Abī al-Damm's *Adab al-Qaḍā'* and Muḥammad b. 'Īsā Ibn al-Munāṣif's *Tanbīh al-Ḥukkām 'alā Ma'ākhidh al-Aḥkām*, ed. 'Abd al-Ḥafīẓ Manṣūr (Tunis: Dār al-Turkī lil-Nashr, 1988).

[5] There are other designations such as *al-kitāb al-ḥukmī*, *al-mukātaba al-ḥukmiyya*, *nuṣūṣ al-takhāṭub bayna al-quḍāt* and *al-mukātaba bayna al-quḍāt*. See Ibrāhīm al-Ḥalabī, *Multaqā al-Abḥur*, ed. Wahbī Sulaymān al-Albānī, 2 vols. (Beirut: Mu'assasat al-Risāla, 1409/1989), II, 74; Ibn Abī al-Damm, *Adab al-Qaḍā'*, 343, 441, 447; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 174. However, *Kitāb al-qāḍī ilā al-qāḍī* is unquestionably the most common of all. See Ibn Abī al-Damm, *Adab al-Qaḍā'*, 242.

[6] See Abū al-Walīd Sulaymān b. Khalaf al-Bājī, *Fuṣūl al-aḥkām wa-bayān mā maḍā 'alayhi al-'amal 'inda al-fuqahā' wal-ḥukkām*, ed. al-Bātūl b. 'Alī (Rabat: Wizārat al-Awqāf wal-Shu'ūn al-Islāmiyya, 1410/1990), 269. It is to be noted that the *qāḍīs*' written communications may also be addressed to governors, witnesses or defendants. In the case of governors, the *qāḍī* must write to the governor of the province in which either the defendant or the disputed property is found; must inform him of the judgment; and must limit his request in such a way that he does not delegate to the governor judicial powers beyond his normal political and executive functions. He may also write to the witnesses in order that they enforce a judgment he rendered concerning a defendant or property in another locale. But empowering them to conduct such matters amounts to assigning them the status of deputy (*nā'ib*) for a specific assignment. Finally, the *qāḍī* may write to the defendant in order to inform him of the judgment he rendered against him. In this case, the defendant must be resident in the jurisdiction of the *qāḍī* who is writing; otherwise, the defendant would not be subject to his judicial authority. See 'Alī Muḥammad b. Ḥabīb al-Māwardī, *Adab al-Qāḍī*, ed. Muḥyī Hilāl Sarḥān, 2 vols. (Baghdād: Maṭba'at al-'Ānī, 1392/1972), II, 119-125.

[7] Abū al-Qāsim 'Alī b. Muḥammad al-Simnānī, *Rawḍat al-Quḍāt wa-Ṭarīq al-Najāt*, ed. Ṣalāḥ al-Dīn al-Nāhī, 4 vols. (Beirut & Amman: Mu'assasat al-Risāla, 1404/1984), I, 330; Kamāl al-Dīn Muḥammad b. Wāḥid Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 10 vols. (repr., Beirut: Dār al-Fikr, 1990), VII, 285-286; Abū al-Ḥasan 'Alī b. Abī Bakr al-Marghīnānī, *al-Hidāya: Sharḥ Bidāyat al-Mubtadī*, 4 vols. (Cairo: Maṭba'at Muṣṭafā Bābī al-Ḥalabī, 1400/1980), III, 105; Aḥmad b. Yaḥyā al-Wansharīsī, *al-Mi'yār al-Mu'rib wal-Jāmi' al-Mughrib 'an Fatāwā 'Ulamā' Ifrīqīya wal-Andalus wal-Maghrib*, 13 vols. (Beirut: Dār al-Gharb al-Islāmī, 1981), X, 60 ff.; Sarakhsī, *Mabsūṭ*, XV, 95; 'Abd al-Wahhāb al-Baghdādī, *al-Ma'ūna*, ed. Ḥumaysh 'Abd al-Ḥaqq, 3 vols. (Riyad: Maktabat Niẓār al-Bāz, 1415/1995), III, 1511; Ḥalabī, *Multaqā al-Abḥur*, II, 73, n. 1 (citing al-'Aynī); Muwaffaq al-Dīn Abū Muḥammad 'Abd Allāh Ibn Qudāma, *al-Mughnī*, 12 vols. (Beirut: Dār al-Kitāb al-'Arabī, 1983), XI, 458; *idem*, *al-Kāfī fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, 4 vols. (Beirut: Dār al-Fikr, 1992-1994), IV, 302; Shams al-Dīn Abū al-Faraj 'Abd al-Raḥmān Ibn Qudāma, *al-Sharḥ al-Kabīr 'alā Matn al-Muqnī'*, printed with *al-Mughnī*, 12 vols. (Beirut: Dār al-Kitāb al-'Arabī, 1983), XI, 467; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 156; Māwardī, *Adab al-Qāḍī*, II, 89; 'Alā' al-Dīn 'Alī b. Khalīl al-Ṭarābulusī, *Mu'īn al-Ḥukkām fīmā yataraddad bayna al-Khaṣmayn min al-Aḥkām* (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1393/1973), 118. See further the second part of n. 13, below.

medieval society that inhabited far-flung territories and was geographically mobile. A debt owed to a person in a remote town or village might not be paid by the debtor without resorting to the long arm of the court. Similarly, this instrument could mediate the return to the master of a slave who ran away to an outlying village. The use of this instrument, in effect, brought together what is otherwise dispersed and independent jurisdictional units into a single, interconnected juridical system. Without such a legal device, one jurist correctly observed, rights would be lost and justice would remain suspended.[8]

The very need for this particular legal device since the early period[9] became the mainstay of its own justification as a valid and an integral part of the law. As a matter of strict principle, however, the *kitāb al-qāḍī ilā al-qāḍī* would be rather unjustifiable on the grounds that the handwriting and the *qādī*'s seal are at worst liable to outright forgery and distortion, and at best may not be easily distinguishable from other, similar handwritten instruments or seals.[10] This rooted suspicion of written instruments in general has for long been a well-known characteristic of Islamic law. In fact, the suspicion cast upon *kitāb al-qāḍī* in particular was sufficient to convince the Ja'farite jurists of its categorical illegality.[11] But as a matter of practice, the Sunnite jurists could not afford to dispense with it.[12] The dire need for it compelled them to recognize this instrument to be as valid as any other evidential medium, and, as we shall see, the Mālikites even allowed for certain liberties in excess of what was already admitted by the other schools.

Evidence of the necessity and common use of this instrument is both obvious and abundant. All legal manuals of *furū'* and *adab al-qāḍī* include a chapter devoted to *kitāb al-qāḍī ilā al-qāḍī*, and the great majority of the authors of these works do state that despite the uncertainties involved in such a practice it is permitted due to its being utterly indispensable.[13] The literature is

[8] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 152-153; Baghdādī, *Ma'ūna*, III, 1511. See also sources cited in the previous note.

[9] The earliest evidence of using this type of written communication belongs to the second/eighth century. See Abū 'Umar Muḥammad b. Yūsuf al-Kindī, *Akhbār Quḍāt Miṣr*, ed. Rhuvon Guest (repr., Cairo: al-Fārūq al-Ḥadītha lil-Ṭibā'a wal-Nashr, n.d.), 407-410; Muḥammad b. Khalaf Wakī', *Akhbār al-Quḍāt*, 3 vols. (Beirut: 'Ālam al-Kutub, n.d.), I, 265; II, 11, 12, 22, 49-50, 67, 119, 416, and *passim*.

[10] Sarakhsī, *Mabsūṭ*, XV, 95; *al-Fatāwā al-Hindiyya*, III, 381.

[11] Abū Ja'far Muḥammad b. al-Ḥasan al-Ṭūsī, *al-Khilāf fī al-Fiqh*, 2 vols. (Tehran: Maṭba'at Tābān, 1382/1962), II, 595. How the Shī'ite jurists substituted this legal practice by another (if at all), would make for an interesting enquiry.

[12] Even in the modern period. See n. 21, below.

[13] See, among many other sources, Ibn Qudāma, *Mughnī*, XI, 458; *idem*, *Kāfī*, IV, 302; Sarakhsī, *Mabsūṭ*, XV, 95; Simnānī, *Rawḍat al-Quḍāt*, I, 330; al-Shaykh al-Niẓām, *al-Fatāwā al-*

also peppered with multiple references to general and particular practices connected with this mode of writing. Ūzajandī speaks of the manner in which *kitāb al-qāḍī* is addressed in his own time and locale.[14] Kurdarī mentions the jurisdictional limitations imposed upon *kitāb al-qāḍī* and argues that the practice of his day imposes no such limitations. On the authority of the Ḥanafite jurist Asbījābī, he claims that this liberal doctrine is the standard, authoritative position of the school (*'alayhi al-fatwā*).[15] Ibn Abī al-Damm states that the chapter he allocates for this topic reflects the practices of his region.[16] Wansharīsī, citing the Mālikite Ibn 'Abd al-Salām, Ibn 'Arafa, Ibn al-Munāṣif and others, attests to the fact that the practice has been widespread since early times in Mālikite domains.[17]

By far the most extensive evidence comes from the *qāḍī*'s *dīwān*, mistermed «court *sijills*».[18] Our evidence shows that this type of written instrument was regularly recorded in the judicial *dīwāns*, and that when the *dīwān* was transferred —by means of copying— from the outgoing to the incoming *qāḍī*, the *kitāb*s constituted one of the major items to be copied.[19]

Hindiyya, III, 381; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, VII, 286; Muḥammad b. Muḥammad Ibn Shihāb Ibn Bazzāz al-Kurdarī, *al-Fatāwā al-Bazzāziyya* (or *al-Jāmi' al-Wajīz*), printed with *al-Fatāwā al-Hindiyya*, vols. 4-6 (repr., Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1400/1980), V, 183. See also n. 7, above.

The justification of *kitāb al-qāḍī* on the basis of Quranic and Sunnaic evidence is rather thin, a fact providing ample proof that the *kitāb* became part of the law because it proved essential to legal operation. On textual evidence, see Aḥmad b. 'Alī b. Ḥajar al-'Asqalānī, *Fatḥ al-Bārī bi-Sharḥ Ṣaḥīḥ al-Bukhārī*, 13 vols. (Beirut: Dār al-Ma'rifa, 1980), XIII, 140-145.

[14] See Fakhr al-Dīn Ḥasan b. Manṣūr al-Ūzajandī, *Fatāwā Qāḍīkhān*, printed with *al-Fatāwā al-Hindiyya*, vols. 1-3 (repr., Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1400/1980), II, 487.

[15] Kurdarī, *al-Fatāwā al-Bazzāziyya*, V, 183.

[16] *Adab al-Qaḍā'*, 353 in conjunction with pp. 174 and 365.

[17] Wansharīsī, *al-Mi'yār*, X, 60-76, especially 60, 61. For other references to practice, see also Bājī, *Fuṣūl al-Aḥkām*, 267, 271; Qāḍī 'Iyāḍ (and his son Muḥammad), *Madhāhib al-Ḥukkām fī Nawāzil al-Aḥkām*, ed. M. b. Sharīfa (Beirut: Dār al-Gharb al-Islāmī, 1990), 34; Ibn Ḥajar al-Haytamī, *al-Fatāwā al-Kubrā al-Fiqhiyya*, 4 vols. (Cairo: 'Abd al-Ḥamīd Aḥmad al-Ḥanafī, 1938), IV, 293.

[18] Hallaq, W. B., «The *Qāḍī*'s *Dīwān* (*Sijill*) before the Ottomans», *Bulletin of the School of Oriental and African Studies*, 61, 3 (1998), 415-436.

[19] For the *qāḍī*'s practice of keeping a record of their written communications in their *dīwān*s, see Abū Naṣr Aḥmad b. Muḥammad al-Samarqandī, *Kitāb Rusūm al-Quḍāt*, ed. Muḥammad al-Ḥadīthī (Baghdad: Dār al-Ḥurriyya lil-Ṭibā'a, 1985), 46; Shams al-Dīn Muḥammad Ibn Mufliḥ al-Ḥanbalī, *Kitāb al-Furū'*, ed. 'Abd al-Sattār Farrāsh, 6 vols. (Beirut: 'Ālam al-Kutub, 1985), VI, 504. However, Shāshī seems to indicate that registering the contents of the *kitāb* in the *dīwān* is done (only) upon the plaintiff's request. See Muḥammad b. Aḥmad al-Qaffāl al-Shāshī, *Ḥulyat al-'Ulamā' fī Ma'rifat Madhāhib al-Fuqahā'*, ed. Yāsīn Darārka, 8 vols. (Beirut: Maktabat al-Risāla, 1988), VIII, 161-162. Also: Cohen, A., *A World Within: Jewish Life as Reflected in Muslim Court Documents from the* Sijill *of Jerusalem (XVIth Century)* (Pennsylvania: Centre for Judaic Studies, 1994), i, 116, case 154, where a text of a Cairene *ḥujja* may have ended up in the Jerusalem court

Thus, the pervasiveness of the practice has called upon formal sanctioning: Muwaffaq al-Dīn Ibn Qudāma and Ibn al-Munāṣif, among numerous others, go as far as to argue that the universal need for, and use of, this instrument generated nothing short of a consensus (*ijmā'*) upon its validity, both as a legal entity and as a practice.[20] There is no doubt then that *kitāb al-qāḍī* was a common practice in the Sunnite legal system,[21] and that in at least its broad outlines no gap between doctrine and the reality of practice can be posited.

A fairly detailed picture of the workings of this device can be gleaned from a careful study of *adab al-qāḍī* works. Yet, a systematic and complete study would be possible only by adding to our repertoire of sources the actual *kitāb*s that the Muslim judges wrote to each other in a particular period and region concerning a variety of matters. Only then will we be able to understand the precise nature of these written instruments, how they functioned in the legal system of a particular region, and to what extent, if any, the practice of written communication diverged from the prescriptions of model legal works authored by legists living and working in the same region. But such a comparative project would have to await the discovery of this material. For now, we must be content to look at how the practice of *kitāb al-qāḍī ilā al-qāḍī* was appropriated and prescribed by the law. But this is not all. In the course of this article, it will become obvious that our model works contain enough references to the realia of practice as to give us a valuable picture of the law, its workings, and, most significantly, the modificatory effect of practice upon legal doctrine.

sijill by means of a *qāḍī*'s *kitāb*. Similarly, *kitābs* were recorded even in twentieth-century court records, for which see n. 21, below. An early account of Kindī suggests that the *kitābs* were recorded as a matter of course. Al-Kindī, *Akhbār Quḍāt Miṣr*, 410. See also Hallaq, «The *Qāḍī*'s *Dīwān*».

[20] Muwaffaq al-Dīn Ibn Qudāma, *Mughnī*, XI, 458; Shams al-Dīn Ibn Qudāma, *al-Sharḥ al-Kabīr*, XI, 467; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 156; Niẓām, *al-Fatāwā al-Hindiyya*, III, 381; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, VII, 285-286.

[21] The practice, furthermore, survives in twentieth-century law, even in those areas which are heavily affected by tribal customary law. In a court record dating from 1951, from the Libyan town Jdābiyya, a man from the tribe of Shaykhī asked the *qāḍī* Muḥammad b. Jāziyya to record in his favour the testimony of witnesses to the effect that due to a car accident his son's leg has become dysfunctional. He needed a written record of this testimony because he could not take his son with him to Bengazi, where he launched a suit against the car's driver who, apparently, happened to live there. See Jdābiyya court records, 5/214, 5/314, in Layish, A., *Legal Documents on Libyan Tribal Society in Process of Sedentarization, I. The Arabic Documents* (Leipzig: Otto Harrassowitz, 1998 [forthcoming]). I am indebted to Aharon Layish for bringing this document to my attention.

II

For our purposes, we shall rely on mainly two contemporaneous works hailing from two different regions: *Adab al-Qaḍā'* of the Syrian Shāfi'ite jurist and judge Ibn Abī al-Damm (d. 642/1244), and *Tanbīh al-Ḥukkām* of the Andalusian/Maghrebi Mālikite judge Ibn al-Munāṣif (d. 620/1223).[22] Both of these works fall into what we have termed model legal manuals for the judges. They represent a more or less synchronic view of two regions that differ in more than one way, not the least of which are differences in social, economic and legal terms.

There is more to these two model manuals than meets the eye. As I said earlier, they are, like many other model works, replete with important references to the mundane operation of the law.[23] Ibn Abī al-Damm's treatise is intended, by his own admission, to discuss rules governing, among other things, the judge's rights and duties, legal disputes, lawsuits, and procedural and documentary evidence «current among the legists of this age.»[24] The last part of the work comprises numerous sections devoted to formularies «according to the conventions prevalent in our regions and age.»[25] In yet another section, he treats some 69 major cases pertaining to sales, property, liability, rent, preemption, *waqf*, marriage and divorce, cases which he describes as being authoritative (*madhhabiyya*) and of frequent occurrence (*kathīrat al-tadāwul*) in courts of law.[26] On the whole then his book is intended to be of «benefit to the judges...

[22] Shihāb al-Dīn Ibrāhīm b. 'Abd Allāh b. Muḥammad al-Ḥamdānī was born in Ḥamāh in 583/1187. He studied *ḥadīth* in Baghdad under Ibn Sukayna, and travelled to Cairo, Damascus and Aleppo. He was appointed to the office of judge in Ḥamdān, a small town in Bilād al-Shām, as well as in his native town Ḥamāh. See Abū al-Falāḥ Ibn al-'Imād, *Shadharāt al-Dhahab fī Akhbār man Dhahab*, 8 vols. (Cairo: Maktabat al-Quds, 1351/1932), V, 213; Salāḥ al-Dīn Khalīl b. Aybak al-Ṣafadī, *al-Wāfī bil-Wafayāt*, ed. S. Dedering, 7 vols. (Wiesbaden: Franz Steiner Verlag, 1972), VI, 33-34.

Abū 'Abd Allāh Muḥammad 'Īsā Ibn Qāḍī al-Jamā'a, known also as Ibn Aṣbagh, was born in 563/1168 in Mahdiyya, Tunis. He moved to Tlimsān where he worked as a *shurūṭī*, and probably in 608/1211, he settled for some time in Valencia, where he became a *qāḍī*. Later, he took up the same post in Murcia. Ibn al-Munāṣif is reported to have visited Egypt, and the last part of his life he spent in Morocco, where he died. For a succinct but good biographical account, see the editor's introduction to his *Tanbīh al-Ḥukkām*, 7 ff.

[23] For a sample of such references, see Ibn Abī al-Damm, *Adab al-Qaḍā'*, 37, 41, 62, 92, 108, 123, 139, 203, 211, 212, 220, 222, 232, 278, 300, 308, 310, 336, 347, 353, 365, 371, 372, 378, 419, 428 (three references), 430 (twice), 435-436, 437-438, 454, 455, 457, 463, 480, 489, 550 and *passim*; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 59, 62, 108-109, 135-136, 137, 139-140, 142, 144, 145, 156, 160, 169, 171, 174, 181, 184, 187, 201, 204, 325, 330, 332, 334, 336, 337, 338 ff. and *passim*.

[24] *Adab al-Qaḍā'*, 14.

[25] *Ibid.*, 15, 353, 365.

[26] *Ibid.*, 463-549.

notaries, legal agents and litigants.»[27] Moreover, he makes two unambiguous statements specifically related to his discussion of *kitāb al-qāḍī* vis-à-vis the practice of his own time and place: He declares that what he describes in this area of the law is both the prevalent convention (*muṣṭalaḥ*) and that which is current (*mutadāwal*) at law courts (*majālis al-ḥukkām*).[28]

Ibn al-Munāṣif speaks in the same vein. In addition to the multiple references he makes to practice, he clearly states that his book was intended to be short (*mukhtaṣar*)[29] containing, as it is, only that subject matter which the judges «need *nowadays* and on which hinge the affairs of judgeship.»[30] Like Ibn Abī al-Damm, he too makes explicit reference to the doctrine of *kitāb al-qāḍī* in relation to the practice of his time and place. He not only comments on the actual practice in this area of the law, but when he comes to *prescribe* the formulas and contents that the *qāḍīs* must use in their written communications, he in effect *describes* the practice. (The careful reader cannot but have a strong sense that the discourse of both authors on doctrine intermeshes with, and provides a formal veneer for, the ever pervasive discourse of practice). The very title Ibn al-Munāṣif gives to the section relevant to us speaks for itself: «Concerning the Forms of Writing Used Nowadays Among the *Qāḍīs*.»[31] The value of Ibn al-Munāṣif's work for the legal historian must be further appreciated due to the fact that the author considers one of his chief tasks the critique of those practices that are in discord with the law, be they outright legal errors or unwarranted leniency in applying the law.[32] In sum, then, the two works constitute important sources for the study of doctrine and practice relative to *kitāb al-qāḍī* at the turn of the 7th/13th century, in Syria, Andalusia and the Maghreb. That they also reflect the modificatory effect of practice upon legal doctrine shall also become obvious in due course.

III

With this background in mind, we shall now proceed to examine the law pertaining to the written communication between *qāḍīs*. As we have said earlier,

[27] *Ibid.*, 14.
[28] *Ibid.*, 353, 365.
[29] It was printed in 334 medium-size pages, excluding the editor's introduction and indices.
[30] *Tanbīh al-Ḥukkām*, 20-21.
[31] *Ibid.*, 174, in conjunction with p. 156: «*Fī nuṣūṣ al-takhāṭub al-musta'mala al-ān bayna al-quḍāt.*»
[32] *Ibid.*, 20-21, 171, 181, 184 187, and *passim*.

the fundamental idea behind and *raison d'être* of this communication is that geographical distance shall not be allowed to impede the realization of justice. This is in effect Ibn Abī al-Damm's and Ibn al-Munāṣif's most essential assertion.

Ibn Abī al-Damm, in an effort to gauge the legal categories concerning this type of written communication, relies heavily upon Mawārdī's rather systematic and influential discourse which the latter advanced in his work *Adab al-Qāḍī*. The entire field of discourse is organized in terms of the status of the parties involved and the *res* or debt on account of which they became parties to the litigation or dispute. This organization of the subject produces four possible situations: (1) both parties, the plaintiff and the defendant, together with the *res* in dispute are present within the jurisdiction of the presiding *qāḍī*; (2) both parties are present, but the *res* is not; (3) the plaintiff is present but the defendant and the *res* are not; and (4) the plaintiff and the *res* are present but the defendant is not. Now, only, the last three of these possibilities give the *qāḍī* cause to resort to writing to another *qāḍī*, for when the litigants are present before the *qāḍī*, and the *res*, whatever it may be, is to be found in the same locale, there would be no justification for such written communication: The *qāḍī* himself hears the case, and his decision would be enforced under his direct supervision and within his jurisdiction.[33]

If both parties are present but the *res* exists in another locale, the *qāḍī*, having found in favour of the plaintiff, writes to the *qāḍī* of that locale in order that he, the receiving *qāḍī*, carry out the judgment. If the right of the plaintiff's ownership is established by the confession (*iqrār*) of the defendant, then the *qāḍī* need not necessarily explain the evidence of his judgment. The reason for this is that confession supersedes any evidence that may have been produced by the defendant. If, however, the plaintiff takes an oath to the effect that the *res* belongs to him, and the defendant refuses (*nukūl*) to take an oath to the contrary, namely, that the *res* belongs to him not to the plaintiff, then the *qāḍī* must stipulate in his *kitāb* the fact of the defendant's *nukūl*. For if the latter were to produce evidence of his right to ownership, then the evidence may override his refusal to take the oath.[34]

The plaintiff may be able to establish his ownership of the *res* by means of testimonial evidence, in which case the Shāfi'ites hold two views as to whether the *qāḍī* must or must not specify the evidential (=testimonial) means by which

[33] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 343 ff.

[34] *Ibid.*, 344; Māwardī, *Adab al-Qāḍī*, II, 102, where the rationale for the need to write in the case of *nukūl*, in contradistinction with confession (*iqrār*), is explained.

he found in favour of the plaintiff. Those jurists who insisted that in his *kitāb* the *qāḍī* should make such a specification held this view on the grounds that the defendant may produce his own witnesses, in which case he, not the plaintiff, becomes entitled to the ownership of the *res*. The right of the defendant here rests on the doctrine that when the two testimonial pieces of evidence produced by the two parties are of equal weight, the party in possession (*yad*) of the *res* acquires the right of proprietorship. However, certain jurists held that if the *qāḍī* does proffer an explanation of the testimonial evidence on which his decision is based, he must also specify that he had established the rectitude (*'adāla*) of the witnesses.[35] Other jurists held that he need not make such a specification in his *kitāb*, for it is implied that if he had admitted their testimony, their rectitude would not, at his court, be subject to impeachment.[36]

But the defendant and the *res* may both be found in a remote locale, outside the jurisdiction of the *qāḍī* where the plaintiff resides. If the *res* is immovable property, then the only type of evidence admissible against the defendant is the testimony of witnesses. Having established the rectitude of witnesses, the presiding *qāḍī* (i.e., the *qāḍī* before whom the plaintiff brought his claim) may write to this effect to the *qāḍī* where the property is found, irrespective of where the defendant may be at the time of litigation or of writing (allowing that he may be in a yet third locale). However, procuring witnesses may not be as simple as calling upon them to attend the court of the plaintiff's *qāḍī*. In fact, this *qāḍī* does not hear their testimony if they reside in the locale where the property is found, for, as a matter of strict procedure, they should be examined by, and submit their testimony to, the *qāḍī* of their own locale, where the disputed property exists. But if they no longer reside in the locale where the property is found, and do not intend to return, the plaintiff's *qāḍī* is under the obligation to write to the *qāḍī* where the property is found to the effect that they attested before him in favour of the plaintiff and that he, the addressee, must establish their rectitude. Handing the responsibility to examine the witnesses and establish their rectitude to the receiving *qāḍī* is occasioned by the fact that they would be known to the people of that locality where they used to live but

[35] On *'adāla*, see «*Shāhid*», *The Encyclopedia of Islam*, New Edition (Leiden: E. J. Brill, 1995), IX, 207 (by R. Peters); and Farhat J. Ziadeh, «Integrity (*'Adālah*) in Classical Islamic Law», in Heer, N., ed., *Islamic Law and Jurisprudence* (Seattle & London: University of Washington Press, 1990), 73-93.

[36] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 344; Māwardī, *Adab al-Qāḍī*, 102-103. Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 34, makes the significant statement that some Mālikite judges did not insist on the requirement of the witnesses' rectitude on the grounds of necessity, and that the court system has operated, presumably during and before his time, under this concession.

unknown in the locality to which they have recently moved. In this case, the plaintiff's *qāḍī* would confine his function to hearing and registering the testimony, whereas the receiving *qāḍī* would both establish the testimonial evidence and decide in the case.

The witnesses before the *qāḍī* may be residents of a third locale, that is, one which is neither that of the defendant nor that in which the property is found. In this case, three *qāḍī*s would be involved. The *qāḍī* in the defendants' locale may hear the witnesses' testimony and may write to the *qāḍī* in their original locale with a view that the latter may establish their rectitude. Once their rectitude is established, the latter shall write back to the former to this effect. Having received this written communication, the *qāḍī* in the defendant's locale decides on the case and communicates his decision in writing to the *qāḍī* where the property is found. The latter implements the decision in accordance with the former's *kitāb*.[37]

If the *res* is a movable property (such as a horse or a slave) that possesses particular qualities which can distinguish it from other similar qualities, then the *qāḍī* hears the testimony of witnesses, and writes what is in effect an open letter (*kitāb*) addressed to the *qāḍī* of the locale in which the property is found, wherever that locale may be.[38] This doctrine, as held by Ibn Abī al-Damm, seems to be at variance with that espoused by Māwardī some two centuries earlier. The latter argues that there are two doctrines (*qawlān*) with regard to a plaintiff who, at a court of law, claims the right to a movable property which is in the possession of an *absente reo*. In his view, the less acceptable of the two doctrines is that already mentioned by Ibn Abī al-Damm. Māwardī maintains that the authoritative doctrine of the Shāfi'ites —a doctrine which, he stresses, has been put into normative practice (*ma'mūl 'alayh*)— is that the *qāḍī* shall not decide on the right of ownership of movable property unless the property is physically present before the witnesses when they render their testimony. For allowing a testimony with regard to an absent property raises the probability of error significantly because the property may be confused with another similar to it.[39]

Finally, Ibn Abī al-Damm discusses the possibility of a plaintiff who claims the right of ownership of a local property in the absence of the defendant. Since

[37] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 345; Māwardī, *Adab al-Qāḍī*, II, 105-106.

[38] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 346; Ibn al-Munāṣif (*Tanbīh al-Ḥukkām*, 173) argues that whoever receives the *kitāb*, whether he is the *qāḍī* addressed therein or not, must admit the validity of the *kitāb*'s legal effect and must act in accord with it (provided, of course, that the *kitāb* itself has met all legal requirements). The point here is that the *kitāb*'s validity is independent of who and where the receiving *qāḍī* is. *Cf.* Simnānī, *Rawḍat al-Quḍāt*, I, 332-333, for the Ḥanafite position.

[39] Māwardī, *Adab al-Qāḍī*, II, 107.

the property (even if movable) is present within the jurisdiction of the *qāḍī* before whom the plaintiff is making his claim, the *qāḍī* hears the evidence and renders a judgment —unless the *qāḍī* does not subscribe to the doctrine that a court can reach a decision against an *absente reo*.[40]

This point marks the end of Ibn Abī al-Damm's indebtedness to Māwardī, although a cursory comparison shows that the former was highly selective in appropriating the latter's discourse. At least in one important instance, we have seen that Ibn Abī al-Damm opted for a view considered weak by Māwardī, and, at the same time, ignored what Māwardī deemed an authoritative opinion constituting the foundation of practice (*ma'mūl 'alayh*) in his own time. Needless to say, this selective appropriation is emblematic of the creative recreation and reenactment of legal doctrine within the authoritative structures of the school (*madhhab*). To say that Māwardī's discourse here is used more as a mantle of authority than a real source of substantive legal doctrine is not only to state the obvious, but also to describe a common practice.

Māwardī's classification proved useful in terms of the physical presence or absence of the three constitutive elements involved in *kitāb al-qāḍī ilā al-qāḍī*, namely, the plaintiff, the defendant and the object of dispute. From a different angle, however, the *kitāb* may be regulated in terms of legal contents: that is, it may contain testimonial evidence, the establishing of a right, or the rendering of a judgment.[41] In the case of conveying only testimonial evidence (due to the hardship involved in transporting the witnesses), the *qāḍī* details the names high howsoever, nicknames and lineages of the litigants, and specifies who is the plaintiff and who is the defendant in the case.[42] He also describes in detail the object of litigation, as well as the date of this court proceeding. Then he must mention the names high howsoever, nicknames and lineages of the witnesses, and whether or not he deems them just (*'udūl*). If he records their testimony without having investigated their rectitude, he should write to this effect, so the

[40] *Ibid.*, II, 114; Ibn Abī al-Damm, *Adab al-Qaḍā'*, 346. Contrary to the Shāfi'ites, the Ḥanafites generally do not allow the *qāḍī* to decide on a case in which one of the parties, usually the defendant or his/her agent, is absent: Simnānī, *Rawḍat al-Quḍāt*, I, 190. For the Mālikites, geographical distance determines the question: if the defendant is required to travel up to several days, then he should be summoned. The *qāḍī* may decide on the case in his absence only if he or his agent (*wakīl*) fail to appear before the court. If the distance is more than ten days of travel, then the *qāḍī* may decide on the case without due notice to the defendant. For more details, see Kinānī, *al-'Iqd al-Munaẓẓam*, II, 204; *cf.* Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 257 f.

[41] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 347, 355.

[42] On determining who is a plaintiff and who is a defendant, see Burhān al-Dīn Abū al-Wafā' Ibn Farḥūn, *Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍiya wa-Manāhij al-Aḥkām*, 2 vols. (Cairo: al-Maṭba'a al-'Āmira al-Sharafiyya, 1301/1882), I, 98 f.; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 48; Ṭarābulusī, *Mu'īn al-Ḥukkām*, 53.

qāḍī in receipt of his communication will undertake such an investigation. At times, the *kitāb* contains the testimony of a sole witness, since the other witness may be found in the locale in which the *qāḍī* in receipt of the communication is presiding. In some pecuniary matters, one witness and the plaintiff's oath suffice. In such cases, the *qāḍī* in receipt of the *kitāb* containing the testimony of a single witness shall ask the plaintiff who is in his presence to take an oath. At this point, Ibn Abī al-Damm says that in these matters the judges are in the practice of composing their *kitāb*s in a variety of ways, and that in a later section dedicated to formularies he will expound those which he prefers.[43]

The *kitāb* may contain only the establishment of a right (*thubūt ḥaqq*). The *qāḍī* must address it either to a specific *qāḍī* or leave it open, with the formula: «This is my *kitāb* to whoever receives it among the *qāḍī*s of Muslims» (*hādhā kitābī ilā man yaṣilu ilayhi min quḍāti al-muslimīn*). Then follows the reason for which it is being written: «The reason for issuing is that such and such right has been established before me by means of the testimony of so and so (here he mentions the full names of witnesses, their nicknames, etc.) who are of just character». Then he mentions that this procedure has been initiated in the wake of a claim made by so and so (here he records the plaintiff's full name, nickname, etc.) against so and so (again with his or her full name, etc.). Finally, the *qāḍī* should mention the right claimed and established and the date of the proceeding. Since rendering a judgment is an immediate step after the establishment of right, the *qāḍī* may, upon the request of the plaintiff, give his judgment. If he does so, he should clearly mention it in his written communication.[44]

Some jurists, particularly the Ḥanafites, do not differentiate between the establishment of a right and the rendering of a judgment (*ḥukm*). They argued that once a right has been established by way of *valid and complete* courtroom evidence, the very mention by the *qāḍī* of the establishment of this right constitutes nothing short of a judgment.[45] Ibn Abī al-Damm does not suscribe to

[43] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 346-347; «*wa-lil-ḥukkāmi fī waḍ'i hādhihi al-mukātabāti rusūmun mutanawwi'atun, wa-naḥnu nadhkuru mā huwa al-mukhtāra 'indanā fī bābi al-shurūṭi wal-mukātabāti al-ḥukmiyya*» (p. 247, 11. 7-9).

[44] *Ibid.*, 347.

[45] Taqī al-Dīn al-Subkī makes the remark that the Shāfi'ites and the Mālikites generally consider the *thubūt* and the *ḥukm* to be two different categories, whereas the Ḥanafites deem them one and the same thing. Further on this, and on the differences between *thubūt* and *ḥukm* according to the distinguished eastern Mālikite jurist Shihāb al-Dīn al-Qarāfī, see Wansharīsī, *al-Mi'yār al-Mu'rib*, X, 73-76; Abū 'Abd Allāh Muḥammad al-Raṣṣā', *Sharḥ Ḥudūd al-Imām Abī 'Abd Allāh Ibn 'Arafa* (Rabat: Maṭba'at Faḍāla, 1992), 620-621. It is remarkable that Qarāfī here diverged from his school's doctrine and took the same position as that of the Ḥanafites. See also Ibn Abī al-Damm, *Adab al-Qaḍā'*, 109-111.

this doctrine, and deems the establishment of a right a prior and necessary step leading to, but distinct from, judgment.[46] This juristic disagreement has fundamental implications as to whether the *kitāb* can be dismissed by the receiving *qāḍī*. One of the requirements for the validity of the *qāḍī*'s *kitāb* is the hardship involved in bringing the witnesses, the defendant or the disputed object before the presiding judge. Here, considerations of geographical distance become important. It seems that the majority of jurists held that if the *kitāb* containing the conveyance of testimony or the establishment of a right is sent to a nearby locality, then the receiving *qāḍī* has the right to dismiss it if the witnesses are deemed able to travel to the court of the *qāḍī* presiding over the case. But he cannot dismiss the *kitāb* if it contains a judgment, for a judgment is irrevocable and has an impeachable sanctity.[47] The problematic that arises here is that if a judge —who considers the establishment of a right to be tantamount to a judgment— sends to another, who does not subscribe to this doctrine, a *kitāb* containing the establishment of a right, is the latter judge under the obligation to accept the legal effects of the *kitāb* or not? The jurists seem to have disagreed, some answering in the negative, others in the affirmative.

The conveyance in the *kitāb* of a judgment, as opposed to an establishment of a right, has another ramification in the context of cases subject to juristic disagreement (*khilāfiyyāt*). It is universally held that the receiving *qāḍī* must accept and implement the legal effects of the written communication if it contains a judgment, for judgments possess a finalistic force.[48] Refusing to accept and implement a judgment amounts to judicial revocation, and this is normatively inadmissible in Islamic law.[49] But the receiving *qāḍī* may dismiss a written communication that contains anything other than a judgment if he disagrees with the issuing *qāḍī* with regard to the law being applied to the case under consideration.[50]

Now, in a case where a judgment is conveyed in writing against an *absente reo*, the *qāḍī* must do everything he can to identify the defendant, including the recording of his name high howsoever, specifying any distinguishing physical qualities (*ḥulī*, pl. of *ḥilya*),[51] and stating the exact location of his residence.

[46] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 109 ff.

[47] A *ḥukm* may be overturned only under very specific and limited circumstances. See Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, I, 56-60; Raṣṣā', *Sharḥ Ḥudūd*, 626-627. Cf. David S. Powers, «On Judicial Review in Islamic Law», *Law and Society Review*, 26 (1992), 315-341.

[48] Bājī, *Fuṣūl al-Aḥkām*, 267; Haytamī, *Fatāwā*, IV, 293; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 152.

[49] See n. 47, above.

[50] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 152.

[51] On *ḥulī* and *shiyāt*, see Hallaq, «Model *Shurūṭ* Works», 119-120; Ibn Abī al-Damm, *Adab al-Qaḍā'*, 348; Niẓām, *al-Fatāwā al-Hindiyya*, VI, 248 ff.

Clearly, the purpose behind all this is that the defendant must be identified in such a way as to preclude the possibility of confusing him with another person. For if the defendant's name, nickname, and physical qualities are not fully recorded, and if he acknowledges to be the person intended in the document but denies the plaintiff's claim, the *qāḍī* is under the obligation to dismiss the case provided that the defendant takes the oath. The dismissal of the case would then be justified on the technical grounds that the identity of the defendant is vaguely described in the *kitāb*.[52]

If any part of the defendant's name appearing in the *kitāb* does not correspond to the name of the person summoned before the receiving *qāḍī*, the latter is dismissed provided that he takes an oath to the effect that he gave the *qāḍī* his correct name. Then the onus of proof rests with the plaintiff who must now establish —if he can— that that person is himself the defendant mentioned in the document. But if the alleged defendant acknowledges that his name is identical to that recorded in the *kitāb* but denies any relationship or dispute with the plaintiff, then he, the alleged defendant, must prove that he is not the defendant, by showing, for instance, that another person in his village or town carries the same name. If the namesake has died after the writing of the *kitāb*, then homonymity is confirmed and the receiving *qāḍī* must establish that the dead person is indeed the defendant. But there is disagreement among the jurists as to whether homonymity is further investigated if the namesake dies before the writing. Some jurists held the doctrine that the *qāḍī* must investigate the identity of the namesake all the same, while others rejected this doctrine.[53]

The *qāḍī* may himself write the *kitāb* or he may have his scribe undertake this task. If his scribe writes it, the *qāḍī* should, with his own hand, write between the lines (in a space intentionally left by the scribe) that he has ordered the issuance of the communication to *qāḍī* so and so (if it is not an open letter); that it was set by his own seal; and that the proceedings recorded have truly taken place at his courtroom. Then he should request the receiving *qāḍī* to implement the legal effects of the *kitāb* according to the dictates of the *shar'*. Finally, he should date it.[54]

If he himself writes the *kitāb*, he ought (1) to place his insignia[55] at the top right of the *kitāb* (as well as over the ends of the sheets where additional

[52] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 360.

[53] *Ibid.*, 358-359.

[54] *Ibid.*, 348-349. See also section V, below.

[55] The insignia (*'alāma*) consists of a short religious invocation, usually written in large script. One actual *'alāma* adopted by a certain Ibn Ḥajar reads: *al-ḥamdu li-Lāhi al-ghanī al-qawī*. Other examples: *aḥmidu Allāha bi-jamī'i maḥāmidihi; al-ḥamdu li-Lāhi al-laṭīf fī qaḍā'ihi*. The judge

documents have been glued); (2) to write in the opening part and at the back of the *kitāb* his own name and the name of the *qāḍī* to whom it is addressed; (3) to set his seal; and (4) to read the contents of the *kitāb* in the presence of two witnesses who are to convey the document to the other *qāḍī*. They should attest to the fact that they know him; that the contents of the communication are true; that the *kitāb* is his; that the proceedings he has recorded have indeed taken place at his courtroom; and that the seal is his.[56]

The Shāfi'ites insist that the legitimacy of the *kitāb* rests upon the two witnesses who attest to the authenticity of the document. Without them the document has no value, but without the document their testimony remains valid. An indication of the value of testimonial evidence lies in the very acceptance of the *kitāb* even if it has been damaged or its writing has been wholly or in part erased.[57] Generally speaking, this is the position of all the schools, to the exception of the later Mālikites (whom we shall discuss later). Mālik even went further and held the doctrine that in cases involving fornication there must be four witnesses who attest to the *qāḍī*'s writing of the *kitāb*, just as the law requires four witnesses to prove the occurrence of an act of fornication. But this doctrine remained highly controversial.[58]

The witnesses perform a double function of what may be called receiving and imparting testimony. The first function is *taḥammul al-shahāda*, literally, carrying over the testimony. In the Shāfi'ite school, but not in the Mālikite, it requires the *qāḍī*, or failing that an official of the court, to read the *kitāb* in the presence of the witnesses. The *qāḍī* then acknowledges its contents, and confirms the establishment of the right (*thubūt al-ḥaqq*) and the judgment rendered. For their attestation to be valid, the Shāfi'ites take it for granted that the witnesses' rectitude should be known to both *qāḍī*s, although many Mālikite judges do not seem to have insisted on this requirement.[59] At the courtroom of the receiving *qāḍī* they should declare that «*qāḍī* so and so, whom

should not change his *'alāma* unless it is absolutely necessary, and if he does, the change should take place between posts, never during tenure. On this and on Egyptian and Syrian practices concerning this matter around the ninth/fifteenth century, see Shams al-Dīn Muḥammad al-Asyūṭī, *Jawāhir al-'Uqūd wa-Mu'īn al-Quḍāt wal-Muwaqqi'īn wal-Shuhūd*, 2 vols. (Cairo: Maṭba'at al-Sunna al-Muḥammadiyya, 1374/1955), II, 369-370.

[56] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 349. Ibn Abī al-Damm recommends that the *qāḍī* give the witnesses who are in charge of conveying the *kitāb* to another *qāḍī* a copy of the document as a reminder to them of its contents while travelling. This document, he says, has been technically known as *maḍmūn al-kitāb al-ḥukmī*. See further, section V, below.

[57] See Ibrāhīm al-Muzanī, *Mukhtaṣar al-Muzanī 'alā al-Umm*, ed. Maḥmūd Maṭarjī, 9 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1993), IX, 317.

[58] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 349; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 154-155.

[59] Qāḍī 'Iyāḍ, *Madhāhib al-Ḥukkām*, 34. See also n. 36, above.

I know, had me testify on such and such day at his courtromm (*majlis*) in the city of Baghdad that this (the witness pointing to the document) is his *kitāb*, set by his seal, and its contents are such and such.»[60]

The Mālikites and the Shāfi'ites —unlike the Ḥanafites— allow written communication in all matters of the law, including discretionary and Quranic punishments.[61] In any area of the law, the communication may be dealing with the mere conveyance of a testimony, of the establishment of a right or of a judgment. The communication may be addressed to a certain *qāḍī*, but it may also be an open communication. Although addressed to a certain *qāḍī*, it is incumbent upon any other *qāḍī* who deems the *kitāb* valid to act upon it if the *qāḍī* originally designated in the *kitāb* was dismissed or has died.[62] Similarly, the status of the *kitāb* is in no way affected by the dismissal or death of the *qāḍī* who wrote it. As long as the *kitāb* is written and sealed before the change in the *qāḍī*'s status takes effect, it remains valid and binding, whether it is sent out immediately or after his dismissal or death.[63]

The issue of the *kitāb*'s validity upon death or dismissal becomes somewhat more complicated in the case of judges writing to their deputies (sing., *khalīfa* or *nā'ib*). For there are two conflicting doctrines which dominated the Islamic legal scene with regard to whether the deputy's status and appointment are wholly contingent upon those of the judge who appointed him. The question that became emblematic of this debate is whether the deputy would automatically be dismissed upon the dismissal or death of the appointing judge. Those who held that the deputy would be dismissed, argued that the *kitāb*'s

[60] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 349-351; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 154-155. Imparting testimony, *adā' al-shahāda*, is the procedure required when witnesses deliver the testimonial evidence which they have «carried», so to speak. On *taḥammul* and *adā' al-shahāda*, see Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 71-72; Shāshī, *Ḥulyat al-'Ulamā'*, VIII, 152 f.

[61] Saḥnūn, *al-Mudawwana al-Kubrā*, 5 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), IV, 14; Shāshī, *Ḥulyat al-'Ulamā'*, VIII, 154. The Ḥanafites allow the inclusion in *kitāb al-qāḍī* of all areas of positive law to the strict exception of Quranic and discretionary punishments. See Abū Ja'far Aḥmad b. Muḥammad al-Ṭaḥāwī, *Mukhtaṣar al-Ṭaḥāwī* (Haydarabad: Lajnat Iḥyā' al-Ma'ārif al-Nu'māniyya, 1370/1950), 330. Ibn Qudāma takes the same Ḥanafite position, and in this he probably represents the common view of the Ḥanbalites. See his *Mughnī*, XI, 458.

[62] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 352 (and p. 358 where the author seems to attribute to the Mālikites a position contradicted by Ibn al-Munāṣif's statement); Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 154, 173.

[63] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 357; Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 155, 169; Muzanī, *Mukhtaṣar*, IX, 317; Saḥnūn, *al-Mudawwana*, IV, 14. The standard Ḥanafite doctrine is rather stringent: If the *qāḍī* is dismissed or has died before the *kitāb* reaches its final destination, then the *kitāb* becomes null and void. See Kurdarī, *al-Fatāwā al-Bazzāziyya*, V, 185. Abū Yūsuf, whose doctrine does not seem to have gained wide acceptance in the Ḥanafite school, held that the legal effects of the *kitāb* become invalidated only when the change in the *qāḍī*'s status takes place *before* it is sent out: Ibn Abī al-Damm, *Adab al-Qaḍā'*, 357.

legal effect, the *ḥukm*, becomes null and void. Ibn Abī al-Damm, upholding what he declares to be an authoritative (*ṣaḥīḥ*) doctrine,[64] asserts that the *ḥukm* remains valid and binding, on the grounds that the deputy judge continues to hold the office after the death or dismissal of the appointing judge.[65]

That written communications addressed by the *qāḍī* to his deputies and vice versa are admissible by the law is not subject to dispute.[66] But are the deputies' communications to each other admissible, and can they receive such communications from *qāḍī*s presiding over jurisdictions other than those of the appointing judge? Ibn al-Munāṣif answers that the deputys' jurisdiction is determined by the appointing judge, so that if he assigns them the power to write to each other or receive written instruments from other judges, then they may operate within the terms of their appointment.[67] But the principle of delegation here does not apply to the *qāḍī*s vis-à-vis the ruler.[68] Whether the ruler stipulates —in his decree of judicial appointment (*'ahd* or *taqlīd*)[69]— his permission to the *qāḍī*s to write to each other or omits any mention of such matters, the *qāḍī*s continue to enjoy this function as part of their jurisdiction.[70]

IV

The forgoing outline of the law regulating the procedures and modalities involved in *kitāb al-qāḍī ilā al-qāḍī* suffices to show that one of the central conditions for the validity of such written instruments is the presence of two witnesses who will testify to the documentary transfer from one *qāḍī* to another.

[64] On *ṣaḥīḥ* in relation to other doctrines, see Hallaq, W. B., «From *Fatwā*s to *Furū'*: Growth and Change in Islamic Substantive Law», *Islamic Law and Society*, 1 (1994), 51 ff.; *id.*, *Authority, Continuity and Change in Islamic Law* (forthcoming), chapter 5, section IV.

[65] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 357-358.

[66] Bājī, *Fuṣūl al-Aḥkām*, 270, argues that the *qāḍī* should accept the written communications of his deputies even though they may not be attested by witnesses. The deputy's seal, provided that the *qāḍī* is familiar with it, is sufficient.

[67] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 171-172.

[68] On the principle of delegation in general, see Tyan, E., *Histoire de l'organisation judiciaire en pays d'Islam*, Deuxième édition (Leiden: E. J. Brill, 1969), 101 ff.; idem, «Judicial Organization», in Khadduri, Majid and Liebesny, Herbert J., eds., *Law in the Middle East* (Washington, D. C.: The Middle East Institute, 1955), 236 ff.

[69] For a sample of *'uhūd* (pl. of *'ahd*), see Aḥmad b. 'Alī al-Qalqashandī, *Ṣubḥ al-A'shā fī Ṣinā'at al-Inshā*, 14 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1987), X, 264-291; XII, 38-58.

[70] Ibn al-Munāṣif, *Tanbih al-Ḥukkām*, 171. The implication here being that if the Imām explicitly forbids the *qāḍī*s to communicate with each other in writing, they should heed his prohibition. However, this implication cannot be positively confirmed by the sources available to me.

This condition was the common doctrinal denominator among all the classical Sunnite schools. All the so-called founders, co-founders and their immediate followers have subscribed to, and indeed insisted upon, this requirement. The early Mālikites, such as Ibn al-Qāsim (d. 191/806), Ashhab (d. 204/819), Ibn al-Mājishūn (d. 212/827), and Muṭarrif (d. 282/895) never compromised the requirement of two witnesses.[71] It is reported that Saḥnūn (d. 240/854) used to know the handwriting of some of his deputy judges, and still insisted upon the two witnesses before whom he broke the seal and unfolded the *kitāb*.[72]

It appears that sometime during the fifth/eleventh century[73] the Mālikite school underwent a dramatic change in the practice of the *qāḍī*s' written communications, a change that had no parallel among the other three schools. At around this time, the Andalusian and Maghrebi *qāḍī*s apparently began to admit the validity of such written instruments without the testimony of witnesses.[74] Authentication through the attestation of the *qāḍī*'s handwriting (*al-shahāda 'alā al-khaṭṭ*) was sufficient to validate the document.[75] In other words, if a *qāḍī* thought he was reasonably certain that the document before him is in the handwriting of another *qāḍī*, then that would constitute sufficient proof of its authenticity.

[71] Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, II, 37; Kinānī, *al-'Iqd al-Munaẓẓam*, II, 201-202; Abū Yūsuf Ya'qūb b. Ibrāhīm, *Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā* (Cairo: Maṭba'at al-Wafā', 1357/1938), 159. A few of the «legal specialists» who predated the schools of law, such as Ḥasan al-Baṣrī and 'Ubayd Allāh b. Ḥasan al-'Anbarī, are said to have admitted handwriting, without testimonial evidence, as valid proof. See Shāshī, *Ḥulyat al-'Ulamā'*, VIII, 151. Of the later jurists, it is reported that Abū Sa'īd al-Iṣṭakhrī held, what seems to have been a unique view, that acquaintance with the *qāḍī*'s handwriting and seal are sufficient for the acceptance of the *kitāb*. Simnānī, *Rawḍat al-Quḍāt*, I, 331.

[72] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 155-156. Nevertheless, see n. 78, below.

[73] A somewhat earlier date still is not to be excluded, especially if the Ẓāhirite doctrine and practice are to be accepted as a forerunner. See nn. 75 and 77, below.

[74] The change appears with all likelihood to have taken place both in the eastern and western parts of the Muslim world. Our evidence for the west will be discussed below. For the east, see the royal decrees of judicial appointment in Qalqashandī, *Ṣubḥ al-A'shā*, XI, 192, 201, and n. 79, below. But Qalqashandī's evidence belongs to a period after the 660s/1260s, when under the Mamlūks a Chief Justice was appointed to each of the four schools.

[75] The attestation of handwriting was also admissible in two other spheres of the law: The attestation of handwriting of a witness who died or who cannot be present at court, and the attestation of the handwriting of a *muqirr*, one who acknowledges that he/she owes a right to someone else. Both of these types are deemed admissible by the great majority of Mālikite jurists: Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 160. For a detailed account of the law pertaining to *al-shahāda 'alā al-khaṭṭ*, see Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, I, 284-93.

The Ẓāhirites also admitted the *kitāb* on the basis of attestation to handwriting. In fact, they seem to have been the most lenient of the schoools on a great number of crucial matters. For example, witnesses were not required, and if they do come to play a role, their rectitude is not a necessary condition for the validity of the *kitāb*. See Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 153, for a summary of the Ẓāhirite doctrine. Ibn Ḥazm, however, discusses these issues neither in his *Muḥallā bil-Āthār* nor in *Mu'jam al-Fiqh*.

It is highly probable that the practice initially started in eastern Andalusia, and was to spread later to the west and the African south.[76] The earlier Ẓāhirite acceptance of this doctrine and practice may represent the forerunner of this Mālikite development.[77] Ibn Sahl, who died in 486/1093, reports that the Eastern Andalusian *qāḍī*s were not only satisfied with handwriting and the seal, but accepted the *kitāb* as true and authentic even if the *qāḍī* wrote nothing in it but the *'unwān*, a short statement that includes the names of the sending and receiving *qāḍī*s.[78] Although this was never the case before, it has become the standard doctrine, acknowledged to be a distinctly Mālikite entity by the other schools as well as by the ruling political power.[79] The early Mālikite scholars considered a *qāḍī*'s *kitāb* invalid if its authentication depended solely on the identification of handwriting.[80] Muṭarrif and Ibn al-

[76] For North Africa, particularly Tunis, see Ibn 'Abd al-Salām's and Ibn Rāshid's weighty statements in Wansharīsī, *al-Mi'yār al-Mu'rib*, X, 61-62. This Ibn 'Abd al-Salām, who was a Mālikite, is not to be confused with the Shāfi'ite namesake, a highly distinguished jurist who flourished in the east.

[77] See n. 75, above, for the Ẓāhirite doctrine. I am indebted to Maribel Fierro for suggesting this link.

[78] Ibn Sahl's comment on the evidence of handwriting is cited in Wansharīsī, *al-Mi'yār al-Mu'rib*, X, 61. The Mālikite Ibn 'Abd al-Salām, as quoted by Wansharīsī (*ibid.*, X, 62), reveals something about the origins of the doctrine which admits the practice of authenticating the *kitāb* through handwriting. He argues that this later doctrine and practice utterly deviate from the authoritative doctrines of the school's founding fathers, and was based on a faulty interpretation of the practice of Saḥnūn and Ibn Kināna, who used, on some occasions, to accept the written instruments of persons whom they knew intimately, and in whom they placed their personal trust and confidence. This exceptional and provisional practice, Ibn 'Abd al-Salām says, was taken by later generations of judges and jurists to constitute a general principle (*aṣl*), on the basis of which an entire doctrine has come to be constructed. It is in this sense that we should understand the statement of Ibn Hishām al-Qurṭubī (d. 606/1209), who attributed a similar doctrine to Ibn al-Mājishūn and Muṭarrif. In his *Mufīd al-Ḥukkām*, he argued that in certain (but by no means all) cases a *qāḍī* should admit the validity of another *qāḍī*'s *kitāb* if he, the former, was certain (*lam yashikk*) that the written communication was undoubtedly that of the latter. See Carmona González, A., «La correspondencia oficial entre jueces en el *Mufīd* de Ibn Hishām de Córdoba», in *Homenaje al Prof. Jacinto Bosch Vilá*, I (Granada: Universidad de Granada, 1991), 505-506. Similarly, see Arcas Campoy, M., «La correspondencia de los cadíes en el *Muntajab al-Aḥkām* de Ibn Abī Zamanīn», *Actas del XII Congreso de la U.E.A.I. (Málaga, 1984)* (Madrid: Union Européenne d'Arabisants et d'Islamisants, 1986), 62. I am grateful to Maribel Fierro for drawing my attention to these two articles.

[79] See Qalqashandī, *Ṣubḥ al-A'shā*, XI, 192, 201, where one royal decree of judicial appointment, probably issued sometime after the middle of the seventh/thirteenth century, acknowledges *al-shahāda 'alā al-khaṭṭ* as being a distinctly Mālikite institution that is beneficial and conducive to the welfare of society (*qubūlu al-shahādati 'alā al-khaṭṭi... fa-hādhā mimmā fi-hi fusḥatun lil-nāsi wa-rāḥatun mā fī-hā ba'sun... wa-huwa mimmā tafarrada bi-hi huwa* (viz. the Mālikite *madhhab*) *dūna al-baqiyya wa-fīhi maṣlaḥa*). See also 'Abd al-Raḥmān b. Muḥammad Bā'alawī, *Bughyat al-Mustarshidīn fī Talkhīṣ Fatāwā ba'ḍ al-A'imma min al-'Ulamā' al-Muta'akhkhirīn* (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1952), 266. The Shāfi'ite and Ḥanafite schools stand in diametrical opposition to the Mālikites on this issue. See Ibn Abī al-Damm, *Adab al-Qaḍā'*, 76.

[80] Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, I, 287.

Mājishūn rejected the authenticity of a *kitāb* even though two witnesses may testify that they have seen the issuing *qāḍī* write with his own hand.[81] They insisted, as did all the other jurists, that the witnesses attest to the matter by declaring that the issuing *qāḍī*, whom they know, had them testify on a certain day at his courtroom (*majlis*) in a particular city or village, that this (the witnesses pointing to the document) is his *kitāb*; and that it is set by his seal. At this point, the witnesses would be required to reiterate the contents of the document. Nothing short of this testimony would suffice.

Writing around 600 A. H. (ca. 1200 A. D.), Ibn al-Munāṣif portrays a vivid picture of the change in Morocco and Andalusia:

> In the regions with which we are in contact, the people [viz. jurists] of our age have nowadays agreed to permit the *kitāb*s of *qāḍī*s in matters of judgments and rights on the basis of sheer knowledge of the *qāḍī*'s handwriting without his attestation to it, and without a recognized seal. They have demonstrably acquiesced in permitting and practicing this [matter]. I do not think there is anyone who can turn them away from it, because it [the practice] has become widespread in all the regions, and because they have colluded to accept and assert it.[82]

That the change took place during the decades preceding Ibn al-Munāṣif's time may be inferred not only from his reaction to it as a novelty but also from the urgency with which he felt the need to justify the new practice. «We have established that Mālik's school, as do other schools, deems the *qāḍī*s' *kitāb*s which have been attested by witnesses lawful, and that these [instruments] were considered inadmissible by the sheer evidence of handwriting.» Yet, Ibn al-Munāṣif continues, «people and all judges [of our times and regions] are in full agreement as to their permissibility, bindingness and putative authority; therefore we need to investigate the matter...» by means of «finding out a good way to make this [issue] rest on a sound method and clear foundations to which one can refer and on the basis of which the rules of Sharī'a may be derived.»[83]

[81] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 155.

[82] *Ibid.*, 156: «*wa-qad asfaqa al-yawma ahlu 'aṣrinā fī al-bilād al-latī yantahī ilayhā amrunā fī dhālika ijāzata kutubi al-quḍāti fī al-aḥkāmi wal-ḥuqūqi bi-mujarradi ma'rifati khaṭṭi al-qāḍī, dūna ishhādihi 'alā dhālika wa-lā khātamin ma'rūfin, wa-taẓāharū 'alā jawāzi dhālika wal-'amali bi-hi, fa-lā yastaṭī'u aḥadun fī-mā aẓunnu ṣarfahum 'an dhālika li-intishārihi fī kulli al-jihāt wa-tawāṭihim 'alayhi bil-qabūli wal-ithbāt*». With a minor variation in the opening line, this revealing statement was cited as an authoritative attestation to the practice by Wansharīsī, *al-Mi'yār al-Mu'rib*, X, 62.

[83] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 164-165 in conjunction with p. 156, both passages having the same theme: «*wa-idhā qarrarnā min madhhabi Mālikin wa-ghayrihi jawāza kutubi al-quḍāti bil-ishhādi 'alayhā wa-man'a al-qabūli bi-mujarradi ma'rifati al-khaṭṭi, wa-anna al-nāsa*

Accordingly, the new practice is justified on the basis of *ḍarūra* (necessity), a principle much invoked to explain and rationalize otherwise inadmissible but needed legal practices and concepts, including, interestingly enough, the very concept and practice of *kitāb al-qāḍī ilā al-qāḍī*. The principle of *ḍarūra* finds justification in Quran II:185: «God wants things to be easy for you and does not want any hardship for you.»[84] Ibn al-Munāṣif argues that it is often difficult to find two witnesses who can travel from one town to another, probably quite remote, in order to attest to the authenticity of the conveyed document. Attesting to handwriting thus became the solution to this problem. For without this solution, Ibn al-Munāṣif avered, either justice would be thwarted or the witnesses would have to endure the hardship of travel; and both results would be objectionable. Furthermore, since the ultimate goal is to prove the authenticity of the *qāḍī*'s *kitāb*s against forgery and distortion, any means which achieves this end must be considered legitimate. If, therefore, the receiving *qāḍī* can establish beyond a shade of doubt that the document under consideration —written by the hand of the sending *qāḍī* and set by his seal— truly belongs to the *qāḍī* who claims to have sent it to him, then the document possesses an authenticating power equal to, if not better than (*ḍāhā*), another document that has been attested and conveyed by two just witnesses.[85]

From all this two distinct features emerge in the context of the attestation to handwriting. First, the pervasive practice on the popular and professional legal levels —as vividly described by Ibn al-Munāṣif— appears to amount to a socio-legal consensus. The practice is so entrenched that any notion of reversing it would seem utterly infeasible. True, this sort of consensus does not possess the backing of the traditional mechanisms of law, but its putative force —in its own locale and context— is nonetheless equal to that of traditional *ijmā'*. Second, the justification of the practice squarely rests on the principle of necessity, sanctioned as a means by which undue hardship and harm are

al-yawma wa-kāffata al-ḥukkāmi mutamālūna 'alā ijāzati dhālika wa-iltizāmihi wal-'amali bi-hi fa-lā budda an nuḥaqqiqa fī dhālika» (164-165); «*wa-lā budda... min al-tanqībi wal-talaṭṭufi fī isnādi dhālika ilā wajhin ṣaḥīḥin wa-aṣlin wāḍiḥin yaṣluḥu al-maṣīru ilayhi wa-binā'u aḥkāmi al-sharī'ati 'alayh*» (156). The first part of this statement was cited, with minor variations, by Wansharīsī, *al-Mi'yār al-Mu'rib*, X, 64.

[84] The textual justification of attesting to handwriting operates on two levels, one direct, the other oblique. The Quranic verse (II, 185) is indirect in the sense that it occasions a principle, *ḍarūra*, by which the practice is in turn justified. But Ibn al-Munāṣif (*Tanbīh al-Ḥukkām*, 165) also resorts to Prophetic *Sīra* to validate the practice directly on textual basis, citing the Prophet's letters to the Byzantine Emperor Hiraql (Heraclius) and the Sassanid Kisrā (Khusru Parviz). See also 'Asqalānī, *Fatḥ al-Bārī*, XIII, 140-145.

[85] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 165.

averted. Now, what is most interesting about these two features is that they both also played a most central role in injecting *kitāb al-qāḍī ilā al-qāḍī* into the realm of formal legal discourse. Consensus was emblematic of its extensive existence in the world of practice, and the principle of necessity was instrumental in bringing it to the realm of formal legitimacy.

Finally, Ibn al-Munāṣif discusses some of the rules governing the attestation to handwriting. It is obvious that once the receiving *qāḍī* identifies the handwriting in the document as being truly that of the sending *qāḍī*, then he can act upon its legal effects, and need not be assisted by witnesses. If he cannot identify the handwriting, he must procure two just witnesses who can. They should be experts in handwritten documents and knowledgeable of the handwriting of the *qāḍī* in question. Once the *qāḍī* verifies, independently or through expert witnesses, the authenticity of the document, he should implement its effects. Failing that, he should register in his record (*sijill*) that he deems the document authentic on account of the handwriting, and he should have his declaration attested by witnesses. Immediate registration and attestation of the document's validity is required in case one or both of the *qāḍī*s, the sending or the receiving, dies.[86]

We have said earlier that a *kitāb* attested by two witnesses remains valid after the dismissal or death of the sending *qāḍī* as long as it leaves his court before the change in his status takes place. This, however, is not the case with a *kitāb* attested as having been written by the sending *qāḍī*. In other words, if the *kitāb* reaches the receiving *qāḍī* after the dismissal or death of the sending *qāḍī*, without the attestation of two witnesses, then it is rendered invalid despite the fact that the handwriting of the sending *qāḍī* can be authenticated by witnesses. Here, Ibn al-Munāṣif affords us a glimpse into the legal practices of his day. At this point, he criticises a group of jurists who «nowadays went wrong concerning this sort» of written communications. They accepted the validity of *kitāb*s where the handwriting of the sending *qāḍī* is attested after his death or dismissal, and treated this type of communication in the same fashion they treated writings attested and conveyed by two witnesses. It appears that his criticism was not that of a mere observer: he declares that this criticism culminated in a serious confrontation between him and these jurists.[87]

[86] *Ibid.*, 167-168.

[87] *Ibid.*, 170-171: «*wa-qad ghaliṭa al-yawma fī hādhā al-naw'i jamā'atun min al-ṭalaba, wa-jarā fihi baynanā wa-baynahum nizā'un kathīrun.*»

V

Our discussion would not be considered complete without giving some attention to the manner in which *kitāb al-qāḍī ilā al-qāḍī* was drafted by the jurists of the early seventh/thirteenth century Syria, North Africa and Muslim Spain. What our two authors and judges provide are examples of documents used in the world of practice. As we have said earlier, both authors make general and specific references to the connections between what they expound as discursive doctrine and the actual reality on the ground. When they come to provide these documentary examples, which we call model formularies, they make it quite clear that these derive from mundane practice.[88] We have seen that Ibn al-Munāṣif puts it in the most unambiguous of terms when he titles a sub-chapter: «Concerning the Forms of Writing Used Nowadays Among the *Qāḍī*s.»[89]

We begin with Ibn Abī al-Damm who affords us an example of a written communication concerning a debt which a *qāḍī* confirmed as being owed to the plaintiff (the formulary being applicable to other cases as well).[90] First, the scribe must have at his disposal rectangular sheets of high quality, clear and glossy paper, which he should firmly glue together so as to produce a scroll. The scribe himself, in addition to being learned in the law, just and prudent, must have good handwriting and adequate knowledge of language and literature (*adab*). He should write in a neat and clear manner with a large round pen of the *thuluth* type,[91] the lines being straight and the individual words, as the lines, separated by appropriate space.

[88] See nn. 23-34, above. On the manner in which the jurists strip actual documents and *fatwās* of references to mundane matters and real names and irrelevant facts, see Hallaq, «From *Fatwās* to *Furū'*», 44 ff.; idem, «Murder in Cordoba: *Ijtihād, Iftā'* and the Evolution of Substantive Law in Medieval Islam», *Acta Orientalia*, 55 (1994), 67-83; idem, «Model *Shurūṭ* Works», 120 ff.

[89] Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 174 ff. See also n. 31, above.

[90] *Adab al-Qaḍā'*, 441-445. This model *kitāb* may also be used in other cases, such as ownership (of slave or beast), guarantee, bill of exchange, marriage, divorce, dowry, etc. *Ibid.*, 445. See also Shihāb al-Dīn Aḥmad b. 'Abd al-Wahhāb al-Nuwayrī, *Nihāyat al-Arab fī Funūn al-Adab*, 31 vols. (Cairo: Maṭba'at Dār al-Kutub al-Miṣriyya, 1351/1933), IX, 152 ff. For a somewhat earlier Ḥanafite example of a *kitāb* pertaining to debt, see Samarqandī, *Rusūm al-Quḍāt*, 245 ff. The earliest example of a *kitāb* I could find is recorded in Abū al-'Abbās Aḥmad b. Abī Aḥmad al-Ṭabarī Ibn al-Qāṣṣ (d. 335/946), *Adab al-Qāḍī*, ed. Ḥusayn Jabbūrī, 2 vols. (Ṭā'if: Maktabat al-Ṣiddīq, 1409/1989), II, 350 ff. Kindī, *Akhbār Quḍāt Miṣr*, 407-410, however, preserves an actual *kitāb* dating from 188/803. For occasional references to very early *kitāb*s, see Muḥammad b. Khalaf Wakī', *Akhbār al-Quḍāt*, 3 vols. (Beirut: 'Ālam al-Kutub, n. d.), I, 265; II, 11, 12, 22, 49-50, 67, 119, 416, and passim.

[91] One of the two largest scripts of the curvilinear category. More on this see Gacek, A., «Arabic Scripts and their Characteristics as Seen Through the Eyes of Mamluk Authors», *Manuscripts of the Middle East*, 4 (1989), 147.

Having begun by the *basmala*, he should write:

> This is my letter (*kitābī*) to whoever receives it among the judges of Muslims (*quḍāt al-muslimīn wa-ḥukkāmuhum*), may God prolong his life, and continue to support him and bestow upon him sublime knowledge...[92] Thanks are due to God for His many boons, and His prayers for our lord Muḥammad the Prophet and for his Companions and family. The reason for this writing and composition is that it has been confirmed in my honourable court in the city of _____ in which I sit to judge under the dominion of the victorious kingdom _____ , may God fortify and enhance its foundations, and may He erect and raise its structures, [I sit to judge] by virtue of sound and lawful appointment descending directly from the noble, victorious Abbasid station... before the presence of two disputing litigants. I deem lawful their lawsuit, the hearing of their claim, and admitting evidence from one party against the other. (The evidence consists) of the testimony of _____ [Here, the scribe gives the full name high howsoever and the physical description of the two witnesses]. I have established the just character of the two witnesses in the city of _____ , may God protect it. I know them and have heard and admitted their testimony together with the acknowledgement of the defendant in favour of the lender who is named in the deed of debt dated _____ , and together with the attestation to the effect that he acknowledges the entire contents of the deed, a copy of which follows:

Here, a wide space is left, followed by copying down the deed of debt. At this stage, the pen used is of the fine *naskh*.[93] The lines should be consistently adjoining each other, yet of the same length as the previous lines. The deed must be copied accurately and to the letter. Having done so, the scribe reverts to the large *thuluth* pen, continuing to write as he has done in the first part of the *kitāb*, with the same spacing.

> As the proceedings taking place at my court have been duly stated in this *kitāb*, the claimant has asked me to write of the matter to other judges, may God give them and us success. I have complied with his request, for he is entitled to it by law. I forward this *kitāb*, glued together with the aforementioned deed of

[92] For the purposes of this article, I shall not translate redundant flowery language, assigning lines for the omission. For other purposes that lie beyond the scope of this article, however, such language may prove revealing and significant.

[93] That *naskh* belongs to the rectilinear category underscores the intention to distinguish the deed of debt from the *qāḍī*'s *kitāb*, written in a curvilinear style. See n. 91, above.

debt. He who receives it, may God give him support, and he who considers it carefully, undertakes its implementation, and carries it out in accordance with the requirements of the pure Sharī'a, shall receive a great reward and kind and fine praise. May God, with His graciousness and generosity, give us success to do what He likes and approves. This writing is issued by the honourable court (*majlis al-ḥukm al-'azīz*) of the city of _____ , on the _____ [date]. God is sufficient for us, and He is our best Trustee.

The scribe must leave more space than usual between the last few lines of the *kitāb* in order for the *qāḍī* to write, with his own pen, two consecutive lines between each two of the scribe's lines:

This is my *kitāb*, issued by me and with my permission, addressed to any *qāḍī* receiving it among the Muslims —may God give all of them success. The proceedings that have taken place at my court have been duly explained and registered in the *kitāb*. He who receives it of them, and he who carries it out in accordance with the requirements of the *shar'*, shall receive, God willing, a great reward and fine praise. May God, with His graciousness and generosity, give us and him success to do what He likes and approves. The *kitāb* is set by a seal, the engraving on which reads _____ . God is sufficient for us, and He is our best Trustee.

Here, Ibn Abī al-Damm makes the significant observation that the language used by the *qāḍī*s in these interpolated lines may vary according to convention. We are given to understand that the variations are governed by geographical, and perhaps temporal, differences. (This remark is no doubt highly significant since its absence from the description of the forgoing formulary suggests that this formulary was, for all purposes and intents, identical with that used in practice.)

Once the *qāḍī* has recorded his authenticating words at the end of the document, he places his insignia, presumably unique to him, at the top right.[94] Then, he glues the deed of debt into the end of the *kitāb*, and again places his insignia over the glued ends of the sheets, and should there write: «This is the aforementioned deed of debt». At this stage, the scribe folds and sews the documents, and he, or the *qāḍī* himself, sets them by the latter's seal. On top of the seal, the *qāḍī* writes:

[94] On the insignia, see n. 55, above.

> In the name of God, whom we trust and from whom we draw help. From he who stands in need of God's forgiveness and mercy _____ [the name of the writing *qāḍī*] the judge in the city of _____ and in all its outskirts, districts and suburbs, and those adjacent to them; who has been validly and legally appointed, may God the Exalted bestow mercy upon him, to anyone who receives it (viz. this *kitāb*) among the *qāḍī*s of Muslims, may God be good to them.

In a separate sheet of paper, the scribe produces an exact copy of the document, known as *maḍmūn*, which seems to have had a double function: The first, already noted by Ibn Abī al-Damm, is to remind the witnesses of the document's contents while travelling.[95] The second appears to be safeguarding against forgery and distortion. In addition to recording the contents of the document, including the deed and amount of debt (or any other relevant document), the *maḍmūn* contains a description of the *qāḍī*'s insignia and where it was placed over the glued sheets. Furthermore, the contents of the seal are recorded, as well as the number of lines of which the entire document, including religious invocations, consists.[96] Once all this has been recorded, the *qāḍī* places his insignia at the top and bottom of the *maḍmūn*. But the *maḍmūn* did not, by Ibn Abī al-Damm's admission, always contain an exact copy of the deed of debt as that registered in the *kitāb*. Some *qāḍī*s reportedly thought it sufficient to produce only a summary of it, while others refer to it without recording any of its contents.[97]

Unlike Ibn Abī al-Damm, Ibn al-Munāṣif does not afford us a complete and composite picture of a formulaic example of *kitāb*, although what he has to say is of extraordinary value for learning about some of the practices of his day.[98] And unlike their Syrian counterparts, the Andalusian and Maghrebi *qāḍī*s appear to have recorded their communications on the margins, bottom or back of the document containing the deed or contract in question, and when that was not the case, they wrote it on a sheet of paper that was glued onto the bottom end of the document. We know this from what they wrote. When the deed was recorded at the botton, they wrote: «*qāḍī* so and so was advised, as is required, of the legal validity of the deed (or contract) recorded above»; when the *kitāb* was recorded on the back of the deed or contract, the *qāḍī* would state: «... the

[95] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 349, and n. 56, above.

[96] Nuwayrī, who lived a century later, makes the significant but general remark that recording the number of lines was neglected in the majority of documents. However, he makes no specific reference to *kitāb al-qāḍī*. See his *Nihāyat al-Arab*, IX, 8.

[97] Ibn Abī al-Damm, *Adab al-Qaḍā'*, 444-445.

[98] *Tanbīh al-Ḥukkām*, 174 ff.

legal validity of the deed recorded on the verso of this sheet»; when it was recorded on the left margin, for instance, the *qāḍī* writes: «... the legal validity of the deed recorded to the right side of this writing». But added caution was required when the *kitāb* was glued onto the deed or contract. In this case, the *qāḍī* states: «... the legal validity of the deed recorded on the above sheet that is glued onto (or «attached to» or «adjoined with»)[99] the present document, and which contains the deed of sale involving so and so and such and such». Here, a summary of the deed is given together with the full names of the parties to litigation and of their witnesses in order to ensure that no other deed, valid or not, is substituted for it with a view to achieve illegal ends. The same level of detail was also required when more than one deed was involved. Similarly, if two or three relevant deeds were recorded on a scroll together with other deeds irrelevant to the case at hand, the former deeds should be unambiguously specified in the same manner.

The basic formula used in drafting the *kitāb*, according to Ibn al-Munāṣif, is as follows: «The *shaykh*, the *faqīh*, the *qāḍī* so and so, may God give him support and success, is informed, as is required, of the validity of the deed recorded on the back of this document, by virtue of the testimony of the witnesses so and so on behalf of so and so [=name of the plaintiff]. This writing is effected by the judge so and so. Peace be upon you, as well as the mercy and blessings of God.» It is to be noted that naming the receiving *qāḍī before* mentioning the writer's own name seems to be a distinctly Andalusian and North African practice whose declared purpose was showing respect to the *qāḍī* addressed.

Unlike Ibn Abī al-Damm who takes the recording of the date of writing for granted, Ibn al-Munāṣif only recommends dating the document.[100] This is rather surprising, since the validity of the *kitāb*, in the event of the *qāḍī*'s dismissal or death, hinges on the exact time in which it was drafted and sealed. But this is only one of a number of formal and substantive differences in the documentary practices of the two regions. The Syrian *kitāb* is independent in that it is normally recorded on a separate sheet or scroll of paper, and the deeds or contracts relevant to the case are copied down as part of the *kitāb*, in a way subsidiary to it. In Andalusia and the Maghreb, on the other hand, the *qāḍī*'s *kitāb* is physically secondary, in the sense that it is an attachment to the deeds

[99] The Arabic word here is *muqarraṭa*, meaning adjoined together by means of punching holes on the side of the document where a ribbon, usually sealed with wax, is used to tie the sheets together.

[100] The Mālikite Kinānī, on the other hand, considers dating as an integral part of the document. See his *al-'Iqd al-Munaẓẓam*, II, 203 f.

or contracts in dispute. The Syrian *kitāb* is also appreciably more elaborate; the writing is more formal, lengthy, ornamental and replete with flowery language speaking of the *qāḍī*s involved, their lofty posts and the mighty dynasty and government which appointed them. But the elaborateness here also has a legal function. The Syrian *kitāb* details the particulars of the evidentiary procedure, and pays close attention to the role of witnesses in the case. On the other hand, the Andalusian/Maghrebi *kitāb* seems significantly shorter, to the point, and less concerned with evidentiary procedure. Its formulas are more flexible, allowing for a number of variations (which reflect the regional practices).[101] There is also less stress on formal requirements, such as the manner in which names are to be recorded and testimony to be transmitted. Conspicuous also is the absence of the *maḍmūn*, which seems to have been the result of the admissibility of handwriting in Mālikite adjectival law.

VI

An examination of the formal rules governing *kitāb al-qāḍī ilā al-qāḍī* in *adab al-qāḍī* works makes it immediately obvious that the very justification of these rules lies in the undeniable need for this type of written instrument and in the widespread practice that this need generated. The formalization (and even domestication) of this pervasive practice through consensus not only amounted to a powerful acknowledgment of a procedural rule that would have otherwise been inadmissible, but it also elevated the law and, consequently, the practice of it to the highest epistemic value. In other words, it transposed what would have otherwise been an unlawful popular practice into an epistemologically unshakable adjectival law. Though the epistemic leap in and by itself is somewhat irrelevant to judicial practice, it is for us significantly indicative of the coercive power of custom in penetrating formal legal discourse and in rising, within the hierarchy of that discourse, to the highest authoritative position.

It is then readily arguable that in at least its broad outlines, the legal discourse subsumed under *kitāb al-qāḍī* —even in the most morbidly formal texts— indistinguishably amalgamates the theoretical and the practical, the ideal and the real. Being formal only to some extent, our two sources, presumably model manuals, have come to reveal a great deal of information

[101] See, for instance, Ibn al-Munāṣif, *Tanbīh al-Ḥukkām*, 176.

about the legal praxis relative to *kitāb al-qāḍī* in Syria, Andalusia and the Maghreb. In their discourse is embedded a constant and fairly steady inclination to relate law to social reality, by way of open references or subtle allusions. Both references and allusions demonstrate a remarkable sensitivity to the realm of social existence that was the ultimate destination of the law. It may be tempting to argue that much of the discourse remains formally ideal, bearing little upon mundane reality. But this would be rather simplistic. The praxis-content of discourse may often be determined by positive allusions and outright declarations; but at times it can be inferred through the *e silentio* argument —and the best form of it at that. Consider, for instance, Ibn al-Munāṣif, who was widely known in professional circles as an ardent critic of his contemporaries.[102] On a number of occasions in the section he devoted to *kitāb al-qāḍī*, and generally throughout the book, he advances a number of critical statements against the practices of his peers and contemporaries. Any reader of his work will immediately sense not only the author's intimate knowledge of legal practice, but also his penchant to criticise. And here the reader must indeed wonder why Ibn al-Munāṣif would often pass in silence over cases of legal practice, whereas in other cases, he would heap his critical wrath. In light of the relatively heavy presence of discourse on juridical practice in Ibn al-Munāṣif work, it would not be entirely implausible to argue that wherever he passes in silence over a doctrine or precept relating to *kitāb al-qāḍī*, the doctrine or precept must tentatively be assumed to have a implemented analogue in the world of juridical practice.[103]

Although the similarities that the two works offer are illustrative, they are the least interesting, nonetheless. What is rather significant is the enormous difference, a difference which vehemently argues against the perception of a monolithic nature of Islamic law, and in favour of the absence of a gap between doctrine and practice. What began as fairly similar legal doctrines in the third/ninth century Mālikite and Shāfi'ite schools ended up being considerably different, and this difference, as we have seen, was due in no small part to the profound divergence of the two regional practices we have considered. But the absence of a gap must now become a forgone conclusion although a general theory of the relationship between the formal discourse of the manuals and that of practice still needs to be constructed and articulated. What is also needed now is to take a step further in identifying the manner in which the two types of discourse affected and modified one another. Our present study has shown

[102] *Ibid.*, 20-21, 171, 181, 184, 187, and *passim.*
[103] *Cf.* Hallaq, «Model *Shurūṭ* Works», 134, n. 100.

that the practice itself modified and defined legal doctrine,[104] although it is more obvious to state the opposite. The very doctrine of *kitāb al-qāḍī* is, *ab initio*, the result of an undeniably irrepressible practice, and the entire shift in Mālikite law concerning the evidence of handwriting is yet another eloquent testimony to the power of practice in transforming, shaping and modifying legal doctrine.

ABSTRACT

A study of two seventh/thirteenth century model legal manuals, one from Syria, the other from al-Andalus, show that the discourse about the modalities of written communication prescribed for judges *(kitāb al-qāḍī ilā al-qāḍī)* reflects an intimate relationship between doctrine and the realia of legal practise. One aspect of this relationship is the change that discursive doctrine had to undergo under the pressure of juridical practises of everyday life.

RESUMEN

El estudio de dos formularios notariales del siglo VII/XIII, uno sirio y el otro andalusí, muestra que el discurso sobre las modalidades de comunicación escrita preceptuadas para los jueces *(kitāb al-qāḍī ilà al-qāḍī)* refleja una estrecha relación entre la doctrina y la realidad de la práctica legal. Uno de los aspectos de esta relación es el cambio que tuvo que experimentar la doctrina discursiva bajo la presión de las prácticas judiciales cotidianas.

[104] Modifications in legal doctrine also seem to have been the lot of other schools. The early Ḥanafites, for instance, excluded all movable property from being the object of the *qāḍī*s written communications. But the later Ḥanafites changed this doctrine, and categorically allowed written communication concerning all property. See Kurdarī, *al-Fatāwā al-Bazzāziyya*, V, 183; Niẓām, *al-Fatāwā al-Hindiyya*, III, 381. Another change seems to have occurred in the middle of the fifth/eleventh century with regard to the manner of addressing the *kitāb*. Abū Ḥanīfa held the opinion that the written instrument is rendered null and void if the sending *qāḍī* does not state his name, being satisfied instead by the ambiguous «From a Muslim *qāḍī* to...» Abū Yūsuf deemed this ambiguity insufficient to nullify the instrument, but his opinion, Simnānī reports, remained within the theoretical and the unfamiliar (*gharīb*), having never been put to practice. The first to do so was Simnānī's teacher the influential Chief Justice al-Dāmghānī al-Kabīr (d. 477/1084), whose revivification of Abū Yūsuf's dead doctrine became a common practice in the Ḥanafite legal profession from Iraq to Transoxania. Simnānī observes that the new practice, as initiated and made popular by Dāmghānī, became a «*sunna ma'lūfa*». See Simnānī, *Rawḍat al-Quḍāt*, I, 333. A closer look at Ḥanafite works might well reveal more fundamental changes.