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Written Identities: Legal Subjects in an Islamic State

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*Brinkley Messick*

WRITTEN IDENTITIES:  
LEGAL SUBJECTS IN  
AN ISLAMIC STATE

BEFORE THE NOVEL

In a branch of inquiry concerned with the advent of the nation-state outside of Europe, attention has been given to the place of local literatures, especially various receptions of the realist novel, in the elaboration of modern identities. As one starting point, the influential work of Benedict Anderson underscored historical links around the world between the appearance of the central Western literary genre, the novel, and the advent of the key political form, the nation-state. Together with newspapers, which Anderson refers to as “one-day best-sellers,” early non-Western novels entailed new imaginings of types of individualism and of community associated with the conceptual coming into existence of a national citizenry.<sup>1</sup> Building critically on Anderson’s work, in a volume called *Nation and Narration*, Homi Bhabha urges us generally to “encounter the nation *as it is written*.”<sup>2</sup> While generally welcoming his emphasis on the imagining of the nation, Anderson’s major critics have interrogated his view of nationalism as a “modular” phenomenon based on Western forms. Thus, Partha Chatterjee has sought to recover the making of “difference” that marked the imaginings of anticolonial nationalists in Bengal.<sup>3</sup> Here I consider a setting, highland Yemen, which is unusual

<sup>1</sup> Benedict Anderson, *Imagined Communities*, rev. ed. (London and New York: Verso, 1991).

<sup>2</sup> Homi Bhabha, ed., *Nation and Narration* (New York: Routledge, 1990), p. 2.

<sup>3</sup> Partha Chatterjee, *The Nation and Its Fragments* (Princeton, N.J.: Princeton University Press, 1993).

in that it did not experience direct European colonial rule. In addition, although I will repeatedly make reference to the emergence of modern political forms in twentieth-century Yemen, the thrust of my inquiry concerns the relation of local literatures, and writings generally, to the construction of a distinctive set of non-Western identities *prior* to the rise of the nation-state.

In regard to the birth of the novel, an important theme, whether in Europe or in the non-West, concerns the genres and discursive forms that preceded the appearance of what some have considered a key index of modernity. As opposed to the situation in Europe, in the non-West the “rise of the novel” (to invoke Ian Watt’s famous title) is commonly assumed to involve a nonindigenous phenomenon, at least at the outset.<sup>4</sup> In her comparative study, *Travels of a Genre*, Mary Layoun, for example, examines the imperial-era development and eventual “hegemonic” predominance of this “imported” narrative form in three settings: Greece, Japan, and the Middle East. In all three locales, in different ways, “the novel metaphorically colonized preexistent narrative production.”<sup>5</sup> Referring specifically to the Arab Middle East, the region with which I am broadly concerned, Layoun also maintains that despite the presence of a diversity of generic forms prior to the appearance of the novel, there had been “no single narrative form that was clearly preeminent.”<sup>6</sup> According to the historical and regional coverage of the *Modern Arabic Literature* volume in the Cambridge History of Arabic Literature series, the earliest prototype of this “important form” dates to 1870, in the work of the Syrian Christian Salim al-Bustani.<sup>7</sup> One candidate for the first fully realized Arabic novel is *Zaynab*, by Muhammad Husayn Haykal, which appeared in 1913.<sup>8</sup> The closest indigenous narrative form was the *maqamah*, a kind of prose genre characterized by highly elaborated rhetorical devices, including a form of rhyming in prose known as *sajc*.<sup>9</sup>

As was also the case in the closely connected sphere of Arab print journalism, beginning in the early to mid-nineteenth century, and equally in the areas of historiography and legal reform and codification, the advent of the Arabic novel required important developments in the written

<sup>4</sup> Ian Watts, *The Rise of the Novel* (Berkeley: University of California Press, 1957).

<sup>5</sup> Mary Layoun, *The Travels of a Genre* (Princeton, N.J.: Princeton University Press, 1990), pp. 10–11.

<sup>6</sup> *Ibid.*, p. 9.

<sup>7</sup> M. M. Badawi, “The Background,” in *Modern Arabic Literature*, ed. M. M. Badawi, *The Cambridge History of Arabic Literature* (Cambridge: Cambridge University Press, 1992), pp. 10, 16; and Roger Allen, “The Beginnings of the Arabic Novel,” in Badawi, ed., pp. 181–82.

<sup>8</sup> But this is disputed terrain. See Allen, pp. 181–82; and Hilary Kilpatrick, “The Egyptian Novel from *Zaynab* to 1980,” in Badawi, ed., pp. 223–69.

<sup>9</sup> Allen, p. 180; and Sabry Hafez, “The Modern Arabic Short Story,” in Badawi, ed., p. 270; see also Layoun, pp. 60–61.

Arabic language.<sup>10</sup> What occurred in the Middle East, however, was not what Anderson saw occurring elsewhere, namely, the replacement of classical languages (such as Latin), which pertained to old “sacral cultures,” by rising vernaculars, the “print-languages” of the several nation-states.<sup>11</sup> By contrast, each of the several Arabic colloquials, that is, the distinctive spoken languages of the respective Middle Eastern and North African states or regions, would remain stigmatized, experimental, or, when used, mainly confined to written dialogue, rather than undergoing a general promotion to the status of primary print language. However, important refinements did occur across the domains of new written usage in Arabic, implemented by writers such as journalists, historians, fiction authors, and law code drafters, to meet a range of newly perceived needs, especially in relation to new types of readers. Among journalists and literati (often the same individuals), the new goal was to write “in a style which the learned will not despise, and the ignorant will not need to have interpreted.”<sup>12</sup> Likewise, among late nineteenth-century central Middle Eastern legislators, newly streamlined and accessible legal language would mean that a code, for the first time, could be “composed in a manner which would be sufficiently clear so that anyone could study it easily and act in conformity with it.”<sup>13</sup> Such linguistic innovations also were premised on criticisms of what had gone before, of the ornate “artificialities” of the old prose writers as of the obscure technical usages of the legal specialists.

If such were the textual overtures of modernity in the central Middle East, that is, in the heartlands of the Ottoman Empire, which included Syria, Iraq, and especially Egypt,<sup>14</sup> in the Arabian Peninsula, as in each of the other regions of the Arab world, there is a parallel but also quite specific history in these matters.<sup>15</sup> Even the two Yemens, South and North, have their own textual histories. In the south, where the colonial British were installed from an early date (1839), the first novel is said to have been written in 1939 by a leading Adeni journalist, Muhammad ‘Ali Luqman.<sup>16</sup> In the north, where there was no direct colonial presence, critical discussion turns around books such as *al-Rahina* (The hostage), published in 1984 by Zayd Muti<sup>c</sup> Dammaj with the subtitle “*riwayah*”

<sup>10</sup> Ami Ayalon, *The Press in the Arab Middle East* (London and New York: Oxford University Press, 1995).

<sup>11</sup> Benedict Anderson (n. 1 above), p. 44.

<sup>12</sup> Cited in Pierre Cachia, “The Critics,” in Badawi, ed., p. 409.

<sup>13</sup> Cited in Brinkley Messick, *The Calligraphic State* (Berkeley and Los Angeles: University of California Press, 1993), pp. 55–56.

<sup>14</sup> See Kilpatrick.

<sup>15</sup> There is no treatment of the modern Arabian Peninsula literatures in *Modern Arabic Literature* except for a list of names on p. 328. See, however, Salma Jayyusi, *The Literature of Modern Arabia: An Anthology* (London: Kegan Paul, 1988).

<sup>16</sup> ‘Abd al-Rahman Fakhri, *Al-Kalimah* (Beirut: Dar Ibn Khaldun, 1983), pp. 75–82.

(novel).<sup>17</sup> A prominent Yemeni literary critic, ʿAbd Allah al-Baraduni (1993, p. 227), however, poses the question, “Is *al-Rahina* a novel?”<sup>18</sup> Simply put, the timing of the appearances and the specific agendas of realist fiction in the two Yemens may be seen to roughly coincide with their respective colonial-era and modern political predicaments: southern writers were concerned with the challenges and identity issues posed by the West in the form of the colonial power, while a northern author such as Dammaj imaginatively reworks, for a republican-era readership, the very different highland experience of rule by the twentieth-century Zaydi imams.

Regarding the place of the novel in the Middle East, however, a general point made in *Modern Arabic Literature* is that it perhaps was not the novel that was the most significant new narrative form adopted from the West, but rather the short story.<sup>19</sup> A Yemeni critic, ʿAbd al-ʿAziz al-Maqalih, concurs, stating that “the short story was the literary art form which responded to new needs.”<sup>20</sup> The key modern Yemen literary figure in this genre was Muhammad Ahmad ʿAbd al-Wali (1940–73), who published his first collection of stories in 1966 before his tragic death in an air crash.<sup>21</sup> In Yemen, however, perhaps a still stronger case could be made for the centrality of poetry, which underwent its own revolution in the hands of the major nationalist leader-poets such as Muhammad Mahmud Zubayri, and others. In Yemen, poetry may have been the predominant premodern genre and, transformed, it may remain the predominant modern one as well. Literary criticism (*al-naqd al-adabi*) as it is currently practiced in Yemen overwhelmingly concerns poetry, including also “popular” or vernacular poetry.<sup>22</sup> Each of the three leading Yemeni crit-

<sup>17</sup> Zayd Mutiʿ Dammaj, *The Hostage*, trans. May Jayyusi and Christopher Tingley (New York: Interlink Books, 1994).

<sup>18</sup> ʿAbd Allah al-Baraduni, *al-Thaqafa wa-l-thawra fi al-yaman*, 3d ed. printing (Beirut: Dar al-Hadatha, 1993), p. 227. In a review of Dammaj, *The Hostage* (the English translation), “Through a Duwaydar’s Eye,” in *Yemen Update* (vol. 36 [1995]), Steven Caton refers to *The Hostage* as a “novella” (p. 34). Dammaj is primarily known as a writer of short stories. Generic histories of the novel, notoriously difficult to pin down in any case, as an “imported form” must be complex. At the outset, the form has in some sense arrived but is not fully realized; subsequently, it is established but also already modified in dialogue with indigenous genres. Chatterjee (n. 3 above) remarks about popular Bengali novels that “it is often difficult to tell whether one is reading a novel or a play” (p. 8).

<sup>19</sup> Badawi (n. 7 above), p. vii; Hafez (n. 9 above), p. 270.

<sup>20</sup> ʿAbd al-ʿAziz al-Maqalih, “Introduction,” in Zayd Mutiʿ Dammaj, *al-Aqrab* (Beirut: Dar al-ʿAwdā, 1982).

<sup>21</sup> Fakhri, pp. 83–90; al-Maqalih, p. 5.

<sup>22</sup> In *Modern Arabic Literature* (n. 7 above), Yemeni literature and Yemeni critics such as al-Maqalih and al-Baraduni are taken into consideration only in the chapter, “Poetry in the Vernacular,” by Marilyn Booth. For new, unpublished work on poetry genres and identity in Yemen, see Lucine Taminian, “Poetry and the Making of Identity in Yemen,” presented at a conference in Hamburg, Germany, “Yemen in Modern Times,” September 1997; and W. Flagg Miller, “Poetic Envisionings: Identities of Person and Place in Yafīʿi Cassette Poetry,” presented at the Middle East Studies Association Annual Meeting, Providence, R.I., November 1996.

ics, al-Baraduni, al-Maqalih, and Ahmad Muhammad al-Shami, also is an important poet with major collections to his credit. For that matter, however, the three must also be considered among the leading historians of modern Yemen.

#### AN ISLAMIC STATE

The non-Western polity to be focused on here is the former Islamic state of highland (North) Yemen. In the 1950s and prior decades, Yemen was led by a classic form of Muslim ruler, an *imam*, a commander of the “pen and the sword,” a spiritual and temporal leader who was also, as a trained jurist, the final legal authority in his state. Both Imam Yahya (d. 1948) and his son Imam Ahmad (d. 1962) also were students of literature, especially poetry, and equally of history. Although chronologically part of the twentieth century, their patrimonial polity was premodern with respect to many aspects of its agrarian economy and its social and political relations. In examining several textual genres dating from before the Republican Revolution of 1962, I ask what we can learn about, to coin a provisional term, the premodern “*shari‘a* subject.” Roughly put, this *shari‘a* subject was to a state based on the implementation of Islamic law (the *shari‘a*) what the citizen would be to the succeeding republic. The late imamic period I consider is a time of transitions marking the appearance of the modern Yemeni citizen, the characteristic subject of the nation-state. This, then, is an exploratory discussion, of identities in texts, and of a non-Western, pre-nation-state polity, specifically an Islamic state, “as it is written.”

I take a cue in what follows from Raymond Williams, who argued that the disciplinary horizons of (pre-cultural studies) literary criticism and conventional notions of “literature” tended to limit our appreciation of the “multiplicity of writing.”<sup>23</sup> I have already mentioned in passing some local Yemeni examples of literature in the conventional sense—novels, short stories, and poetry—and, also in passing, such genres as journalism and history writing. After some further background on the general textual culture of the late imamic period and on the doctrinal level of the law, the remainder of my discussion concerns mundane legal documents. I consider Arabic records and legal instruments, including lists, contracts, and court judgments. Such ordinary genres of the local bureaucratic and legal “literatures” are, I argue, important sites for the imaginative construction of a specific subjectivity. I consider how names are recorded; how identity is established, inscribed, and affirmed; and also how rights in the body are defined. Later, I link these features to discursive techniques for the constitution of personal authority in written forms, especially through representations of human presence and intention. The entextualizations

<sup>23</sup> Raymond Williams, *Marxism and Literature* (New York: Oxford University Press, 1977).

of identity in such writings and their subsequent interpretation and archiving, that is, their patterns of production, use, and retention, shed light both on the nature of the *shariʿa* subject as well as on the specific scope of the old Islamic state. In examining such ordinary records and legal documents, I seek access to a far broader social stratum of subject inscription than is found in narrowly elite writings such as formal treatises of legal doctrine and histories, and later, the early novels. This wide coverage—contracts to novels—is not meant as some sort of analytic feat. Rather, my aim is to treat the several levels of Islamic legal texts, and their significance in understanding a historically specific subjectivity, within a sketched-in context of other period genres. Together such texts represent a particular local “multiplicity” of writing, a multiplicity interconnected in ways unlike their perceived separate statuses in the modern West.

What sort of textual culture preceded the advent of the Yemeni nation-state (born in the revolution of 1962) and the appearance of such imported literary genres as the novel? First, some caveats. National or regional specifications concerning literary currents and innovations must not erect or presuppose overly rigid territorial boundaries. Texts and the people who created, transmitted, and read them circulated interregionally in various ways. The highlands were in constant contact, mainly through camel caravan and (by the 1950s) truck trade links, with Aden and its colonially stimulated productions, including newspapers, law codes, and the literary genres, and, via Aden, with the world at large. Readers prior to the revolution of 1962 in the relatively isolated Yemeni north were being exposed to a few imported books from places such as Egypt, including the historical novels of Jurji Zaydan. Those in the south, studying in colonial schools, were getting, among other things, Shakespeare. The point is that the textual backdrops for the appearance of the novel and other new forms in particular locales are both quite distinct and necessarily also based on a variety of extralocal contacts. Not entirely separate is the question of the beginning of “nationalist” thinking, as distinct from the formal revolutionary institution of the new state form in 1962. The oppositional nationalist movement in the north, dating from the 1930s, entailed its own new textual activities, again, in journalism, law, and literature, and there were various responses, including co-optations and innovations, on the part of the imamic regime. In addition, the early northern nationalists spent crucial periods in British Aden and also had contacts with Arab nationalists elsewhere. In sum, despite the comparative isolation of the highlands, the last decades of the former Islamic state of the Zaydi imams must be understood discursively, in terms of its textual culture, as already hybridized, at least at the level of the elite.

A corollary I have pursued elsewhere concerns the particular Yemeni history of the facilitating modern technology of print, which in Anderson, as the compound concept “print-capitalism,” is given pride of ana-

lytic place.<sup>24</sup> A single newspaper existed in the highlands, but it was an imamic state product rather than a commercial enterprise, as was the case in Aden. In the highly politicized domain of history writing, beginning in the 1920s and 1930s and continuing until after the revolution, there were important discursive shifts, especially regarding such matters as the address of a much expanded readership, who eventually would be identified, after the revolution, in national terms as the “citizens” (*mu-watinin*) and as the “people” (*sha<sup>c</sup>b*).<sup>25</sup> Such changes were associated with the end of the manuscript era of historiography and were linked to the availability of print, although it should be noted that most Yemeni histories of the imamic era were printed overseas, mainly in Cairo.

A major and distinctively Islamic genre of history writing, one especially instructive about notions of the individual, is the biographical history (the *tarajim* or *tabaqat* works). Included in such works, for many centuries in Yemen as across the Muslim world, were biographical entries on a stratum composed of noted scholars, major religious figures, educated leaders, and literati.<sup>26</sup> This classical form of entextualization of individual biographies was highly stylized and elaborated, and frequently included excerpts of poetry, written by jurists as well as men of letters, as expressive tokens. Based as they were on premodern notions of identity, status, and knowledge, on formation in the defunct old-style school (the *madrasa*) and on a social pattern of restricted literacy, such biographical histories are no longer being written. The last of the genre in Yemen appeared after the revolution.<sup>27</sup> As a genre they have not been replaced, except by such different and quintessentially modern works as “Who’s Who in the Arab World” and by such new genres as autobiography. An important subgenre of scholarly identity, the *ijaza*, or “academic license,” the textual artifact of concluded *madrasa* study, was a personalized document issued by a particular teacher to a particular student concerning mastery of specific books, or parts of books. The *ijaza* has likewise given way, in the familiar regime of a Ministry of Education, to nation-state-issued and standardized diplomas.

#### LEGAL TEXTS

Doctrinal Islamic legal discourses, especially those of the premodern era, that is, prior to efforts at Western-style codification, the earliest of

<sup>24</sup> See Messick, *The Calligraphic State* (n. 13 above), chap. 6., Brinkley Messick, “On the Question of Lithography,” *Culture and History* 16 (1997): 158–76; and Benedict Anderson (n. 1 above).

<sup>25</sup> See Messick, *The Calligraphic State*, chap. 6.

<sup>26</sup> See Wadad Al-Qadi, “Biographical Dictionaries: Inner Structure and Cultural Significance,” in *The Book in the Islamic World*, ed. George N. Atiyeh (Albany: State University of New York Press, 1995).

<sup>27</sup> Muhammad Zabara, *Nuzhat al-nazar* (San<sup>c</sup>a<sup>?</sup>: Markaz al-Dirasat, 1979), published posthumously.



which began in the central Middle East in the late nineteenth century, involved law of a specific cultural and historical variety. The Islamic *shariʿa* or, more specifically, the humanly authored legal corpus known as the *fiqh*, pertained to a different type of political authority than the nation-state. It comprised a different range of material, including, for example, chapters on ritual matters in addition to those on contracts and criminal law, and it was different in discursive terms as well. Where some of the old law books were written in condensed or rhymed form to facilitate memorization, republican law after the revolution would take the discursive form of numbered code artifacts in the international style of legislation.

Unlike the situation in virtually all the colonial settings across the Muslim world, from North Africa to the subcontinent and Southeast Asia, in highland Yemen the *shariʿa* jurisdiction was the exclusive type of official venue, and its coverage was not limited, as elsewhere, to the narrow sphere of family law. The *shariʿa* courts were staffed by single *qadis* who heard a full array of cases concerning landed and commercial property relations and criminal matters. In the prerevolutionary period, a distinction existed between “literature” (*adab*) and “law” (*fiqh*), but there were not as yet separate tracks of academic formation. Up until 1962, there were no lawyers in Yemen in the specialized sense. Anyone who had had any *madrasa* training beyond the elementary years of Quranic school had been exposed to the basic texts of the *fiqh*, which was the principal subject of advanced instruction. This common formation in the law meant that individuals who went on to become historians or poets, for example, shared a basic “legal” knowledge with those who became notaries, judges, or provincial governors. After the revolution, by contrast, Islamic law would be displaced from its position as the centerpiece of instruction to become one among a number of separate and parallel fields of academic study that could be pursued by students at the new national university.

Tentative moves toward codification began in Yemen before midcentury, but modern codification per se did not begin in earnest until relatively late, in the 1970s. An innovative, but still recognizeably classical four-volume *fiqh* commentary, *Taj al-mudhhab*, was published in 1940.<sup>28</sup> Unlike all its many highland predecessors back through the centuries, this book first appeared and circulated as a printed work. As the critic al-Baraduni reports, the new law book was enthusiastically received.<sup>29</sup> Like the Ottoman code drafters of the late nineteenth century, twentieth-century

<sup>28</sup> Ahmad b. Qasim al-ʿAnsi, *Al-Taj al-mudhhab*, 4 vols. (1940; reprint, Sanʿa<sup>2</sup>: Dar al-Hikma al-Yamaniyya, 1993).

<sup>29</sup> ʿAbd Allah al-Baraduni, *Al-Thaqafa wa-l-thawra fi al-yaman*, 3d ed. (Beirut: Dar al-Hadatha, 1993), pp. 145–52.

Yemen jurists had begun to express their general fatigue with the long *fiqh* treatises and in particular with the difficulty of extracting applicable rules.<sup>30</sup> The *Taj* was saluted for its concision (not new in and of itself as there is a classical genre of “abridgment”) together with its simplicity of expression. Specifically, the *Taj* eliminated the former attention to contradictory positions typical of the old commentaries. It focused narrowly on the Zaydi school of the ruling imam rather than systematically citing the views of other schools, such as the Shafi‘is. In footnotes (also an innovation), the author cross-referenced the relevant opinions (*ikhtiyarat*) of the imam and he also took the unusual step of explicitly mentioning, often with a tone of resignation, the practices of custom. In all these respects, the *Taj* also contributed to redefining the categories of “author” and “reader” within the doctrinal corpus of the local legal “literature.” Later, in the fifties, with legal codification the rage all across the Middle East, there was an important effort, authorized by the ruling imam, to further reduce the perceived complexities and prolixities of the local *fiqh* literature to a concise, modern-style set of articles, but the results of this work were not published until long after the revolution. After the revolution, as in the Ottoman case a century earlier, the authorship of law generally would be removed from the hands of individuals such as imams and virtuoso jurists and made instead the collective responsibility of drafting committees and legislative bodies. At the same time, the formal identities and legal rights of the new, nation-state-era subject categories, the “citizens” and “the people,” would be enshrined in newly promulgated types of texts such as the Yemeni Constitution.

#### PAPER IDENTITY

I turn now from the early “imported” genres, and from poetry, historiography, and the doctrinal level of the law, all elite and specialist literatures, to some of the mundane state records and ordinary legal documents of the era. It may initially be observed that imamic Yemen of the 1950s (and before) was a society and state without identity papers in the modern sense. Yemen was not yet a nation of citizens, of technically “homogenous” individuals (in Benedict Anderson’s sense) differentiated by their equivalent identifying documents. There were, of course, numerous other unwritten markers of prerevolutionary identity, including, then as now, dialect (indicating, in gross terms, e.g., origins in Upper Yemen vs. Lower Yemen) and especially attire, once highly elaborated according to status and occupation and now mostly dissolved, with the old strata themselves, into the comparatively modular dress of the classes of citizen.

<sup>30</sup> See Messick, *The Calligraphic State*, p. 55.

In the imamic era people did not carry on their “persons” (which consequently did not exist as such) the commonplace contemporary pieces of personal documentation that include national identity cards, driver’s licenses, military conscription papers, or bank account cards. Such documents these days identify the Yemeni citizen by name and by one or more types of registered number, just as such individuals now have a numbered postal address, a telephone number, and a vehicle license number. With print, advancing commercialization, professionalization, bureaucratization, universal education, and international wage-labor migration, individuals also now have entire personal dossiers of documents, including certificates of birth and residence, diplomas of scholastic attainment, employment records, various sorts of attestations of marital, military, or tax status, and, for many, their passports.<sup>31</sup> Integral to this familiar modern story of identity construction is the now ubiquitous photo studio that produces the required photographs to be placed on the various documents and reproduces the necessary multiple copies of the documents themselves.

Imamic Yemen was a society without such proliferating, characteristically modern documents of personal identity, but it was not, to put it mildly, a society without written documents. The old state did keep records, and these included, for example, tax (*zakat*) and charity (*sadaqa*) lists and also simple personnel lists for the military and other administrations. This was not the massively detailed bureaucratic regime of the old Ottoman Empire, although the Ottomans in their time around the turn of the century in Yemen had tried to reform local bookkeeping practices. Imamic state record keeping generally was characterized by its informality, both in the concrete sense that its documentation practices predated reliance on printed forms and in the conceptual sense that it was not highly elaborated, rationalized, or standardized.<sup>32</sup> While the state kept several types of lists, individuals typically held no personal versions, no certificates, whether originals or copies, to retain and use for themselves. Simple, handwritten receipts were given for the in-kind collection of the agrarian tithe, texts that gave one’s name, village, and the type and amount of grain.

Names, as they appear on the charity lists, for example, are instructive in their informality. They are different in this respect from either the formal names found on the legal documents of the period or from the several types of honorifics and otherwise extended names common to

<sup>31</sup> A limited number of passports were issued by the imamic state—to diplomats, students studying abroad, and some merchants, such as those who regularly traveled to Aden or to the Hijaz.

<sup>32</sup> See Messick, *The Calligraphic State*, pp. 187–92 and 237–41.

entries on notable individuals in the biographical histories. The charity lists for the quarters of the Yemeni town of Ibb are typical, although it should be noted that this charity institution was an urban phenomenon and Yemen in the 1950s was mainly a country of villages and rural population. As opposed also to the modern legal name, which now includes a permanent, Western-style "family name" (selected and established when the first identity papers were created some years after the revolution), these names are practical and local in their identifying style and referents. One charity list includes in reference to women, for example, "the wife of Muhammad Asad," "the sister of Ahmad Nagi," "the 'family' of Faqih Ahmad Muhsin," and "the mother of Muhammad Latif." At the time the lists were compiled, many women were not publicly identified by their first names. At home, but in the presence of guests, older men still call out to their wives using a son's name. When it came time, in 1975, to conduct the first national census, under the republican government, the problem of recording the names of wives, daughters, and sisters arose. Especially in rural districts, a patriarch would be offended and perhaps violent if a census taker asked for the first name of family women. A humorous skit was put on at the time in the town of Ibb to raise peoples' consciousnesses. A young actor playing the traditional turbaned tribesman smoking his long pipe is addressed and immediately enraged by the suit-wearing young teacher inquiring about "his" women's names. But also on one old charity list, however, perhaps indexing differences of status and town residency, one reads, "the free woman Muhsina and her children," "the divorced woman Rabi'a," and, simply, "Halima daughter of al-Mubayyad."

Many other names have further pragmatic identifications prefacing their names and pertaining mainly to the various afflictions or social vulnerabilities that made them deserving of charity: "the sick ———," "the afflicted ———," "the aged ———," "the dumb ———," "the insane ———," and "the orphans ———." The local idiosyncratic practicality, as opposed to the standardized modernity of identifications on the 1950s charity lists, is further indicated by some identifications based on specified locations in specific quarters: "——— in the house of Qasim Ali," for example, as part of the individual's identifying one-line entry, or such identifying characteristics as "the son of Sinan with the cut-off leg." Such naming devices indicate a local town society of known individuals, a version of a "face-to-face" society based on gender and other social differences, rather than a modern one of theoretically equivalent citizen-strangers. The character of such lists speaks also to the limited bureaucratic reach and rationalization of the imamic state and to the limited degree of control and organization by the state of private identities. The extremely restricted, or at least informal and unelaborated sphere of

action of this state, in fact, poses a general problem for the use of such notions as “private” and “public.”<sup>33</sup> With the public sphere of the state so little elaborated, we need other language to describe the very large domain of the private.

If imamic Yemen was a society largely without identity papers pertaining to individuals as such, there was, however, a proliferation of written documents associated with property relations. To the extent that it was documented in this agrarian society, individual identity was attached to landed property. Key dimensions of identity were mediated by property relations, between legal dyads such as seller and buyer, landlord and tenant, deceased and heir. An individual who was not an owner, tenant, or heir was, by virtue of his or her noninscription in any such property relations, likely to be an undocumented individual.

The rugged mountains, valleys, and high plateaus of the Yemeni countryside are carved up into innumerable small terraces, curved and irregular in shape. Each such terrace is identified by a name, and sometimes also by collective names for sets of terraces or areas of cultivation. Some of the names are those of individuals or descent groups, but they are typically very old. None refer to living persons, except in a few instances to contemporary descendants. Each of the thousands upon thousands of terraces in any region is documented, often multiply so. As a minimum, for each piece of land, however small, ownership is established by a written deed or, more precisely, an instrument of sale and purchase (a *basira*), or else by an entry in an estate division document (a *farz*, or *fasl*) pertaining to an individual's ownership through inheritance. In addition, for all terraces that were sharecropped, which was the most widely practiced form of tenure, there usually was a further document of lease (*ijara*). In contrast to the property regime of a nation-state, however, all such documents were retained exclusively by the landlords or owners in question in their personal archives and registers. The state archived none of these documents, not even as copies or in the form of notations.

Such texts rendered such parties as a landlord and a sharecropping tenant, for example, formally equivalent on paper, as contracting individuals. At the same time, however, sharecropping leases also offered partial representations of the many technical features of subordination. This is based, in the specifics of each text, on a stated relation of a property owner, a rural tenant, and a particular plot of land. In addition to the harvest shares, such contracts specified other local obligations, including the maintenance of terrace walls, the required use of night soil, the delivering of a specified quantity of clarified butter to the landlord, and the provision to the landlord of one or more days of additional, corvée-style labor at his house. In the case of sharecropping leases, the legal contracts, the

<sup>33</sup> See Aijaz Ahmad, *In Theory* (London and New York: Verso, 1995), pp. 107–9.

*ijaras*, were important artifacts of key human identities and relationships. If each contract is a legally phased micronarrative, collectively such texts record a local history of relations of production. As opposed to the purely elite quality of works of literary art, historiography, or legal doctrine, these were texts that connected the propertied elite, and ordinary property holders as well, with the masses of cultivators, subjects whose stories were not otherwise written.

A distinctive legal form of private property (known as *milk*) was, and is, a fundamental *shariʿa* institution. With the exception of endowments (*waqf*), landed property in Yemen was individually owned, as a consequence either of purchase or through the system of partible inheritance, and it could be alienated by sale and by other means such as gift. The “modernity” of this property system is striking, as is the more than thousand-year-old (mercantile) capitalist orientation that is characteristic generally of the *shariʿa*. The modernity of this property regime was conditioned in numerous ways, however. An individual’s freedom of action in selling a property could be limited by such distinctive, *shariʿa*-based legal constraints as a form of sale preemption or by the impediment of prior conversion into an endowment. At the same time, the predominance of individual ownership in Yemen was distinctive in comparison to the property regimes common to many other parts of the Middle East. These were characterized not so much by *shariʿa*-based individual property as by either state control and lease of land, as in the *miri* property of the former Ottoman Empire, or by forms of collective holding, such as *mushaʿ* lands of the Arab Levant.

As a consequence, where an important shift in property relations and in associated legal subjectivities is clearly evident in both doctrine and documentation from about the mid-nineteenth century in the Arab provinces of the Ottoman Empire, as *miri* or *mushaʿ* lands were converted to registered individual title, in Yemen, where the property regime already was based on individual ownership, transitions in property relations (which also occurred much later) are much more difficult to recognize. Important changes nevertheless were under way in mid-twentieth-century Yemeni property relations, and these were associated with advancing commercialization and with the beginnings of large-scale wage-labor migrations out of the highlands. But because of the already existing “modernity” of the highland Yemeni property regime, such changes were not so directly reflected in, that is, they required no changes in, the legal formulations of the associated property doctrine or documentation. In the land documents, change nevertheless is subtly marked by shifts from payments in kind to cash, shortened lease periods, or shifting styles in the writing itself.<sup>34</sup>

<sup>34</sup> See Messick, *The Calligraphic State* (n. 13 above), chap. 12.

Most legal instruments of the twentieth-century imamic era were written by private notaries who operated without any form of state license or supervision. These legal specialists functioned in an institutional space that was, again, neither public nor private in the modern sense. It was located outside the purview of the Islamic state and involved serving the public with acquired legal knowledge in a marketplace-demand fashion. Notary publics, licensed lawyers, and registries of written deeds are elements of a peculiarly modern type of property regime, an “imported” version of which appeared in the various regions of the Middle East in approximately the same periods as the new literary genres. Each such genre category of “literature,” the legal and the literary, represented different textual dimensions in the development of complex local versions of the modern individual.

#### LEGAL NAMES

Unlike the informal names discussed earlier in connection with the state charity lists, *shariʿa* property documents required the use of formal legal names. I want to turn now to identity constitution in connection with such names in a different type of period legal writing, a *shariʿa* court judgment. I take as an example the text of a murder case from 1960, in the last years of the imamate.

The judgment document opens as follows:

In the *shariʿa* court of the government seat of Ibb Province, the claim was entered from Muhammad ʿAbduh Hassan and his wife, the free woman Hamda daughter of Muhammad ʿAli Saʿid, residents of the village of ʿAdan Maghraba, region of Balad Shar, after identification of the aforementioned and his woman by Hajj ʿAbud b. ʿAli and Qasim Nuʿman, against the [individual] present with them at the legal session, ʿAli Muqbil ʿAbd al-ʿAziz al-Shamali, saying (dual) in their claim, and indicating the accused, that he killed their son Ahmad b. Muhammad ʿAbduh Hassan, with intent and enmity, by a stab of his dagger, a mortal stab, on the left side of the mentioned murdered man. The murdered (man) dropped dead from it at that instant and fell upon the ground without a spark of life in him.<sup>35</sup>

In this era before family names had been chosen, registered, and entered on all manner of personal documents, individuals involved in legal contracts or in litigation were identified legally by their tripartite name (*ism thulathi*), comprising their own “first” name, their father’s first name,

<sup>35</sup> For a partial translation and analysis of the judgment document see Brinkley Messick, “L’écriture en procès: Les recits d’un meurtre devant un tribunal *sharʿi*,” *Droit et société*, forthcoming.

and their grandfather's first name, with "son of" either stated or implicit.<sup>36</sup> In contrast to the informality and practicality of the names recorded on the local charity lists, the tripartite name constituted an individual's formal identity in the law. Thus, the father of the deceased is Muhammad ʿAbduh Hassan, his wife is Hamda, and her name is followed by "daughter of," and three male first names, "Muhammad ʿAli Saʿid"; the deceased is Ahmad, followed by his father's three names. In the case of the accused, a three-part name, "Ali Muqbil ʿAbd al-ʿAziz," is followed by a type of name (a *nisba*),<sup>37</sup> indicating a regional origin, here "al-Shamali" (the Northerner).<sup>38</sup> Such *nisbas* were among the several types of old-style appended names that could be regularized as a "family name" after the revolution. In this and in all other types of legal documents, women's full names appear. Identity also was firmly territorial: the parties are identified by a named village of residence, in a named region, district, and province; that is, the unnumbered address of the era. In connection with his research on nineteenth-century homicide trials in Egypt, Rudolph Peters notes how errors concerning tripartite names could derail the legal process.<sup>39</sup> In the Yemeni case, mistakes regarding names are given emphasis in the trial record. One witness, for example, refers to the deceased's brother as Ahmad, whereas that is the deceased's name. Another witness in the case gets the claimant's name wrong, and it is noted that he corrected himself only after prompting by another witness.

How were the identities of parties to a case and those of the witnesses established in such a courtroom? In a contemporary Yemeni court, the parties would show their identity cards and the relevant numbers would be recorded in the record.<sup>40</sup> Here, however, the claimants, "the aforementioned and his woman," must be identified by individuals known to the court. The names of these two identifying individuals are only two-part, however, in a shorthand indicating both that they are not parties to the case and that they are familiar to the court. The point is that it is through spoken human linkages, rather than any sort of supporting written identification, not to mention the modern photo I.D., that the identity of unknown individuals must be established. Failures to make identifications in court are noted in the record. One witness, who had testified that

<sup>36</sup> See Rudolph Peters, "Murder on the Nile: Homicide Trials in Nineteenth Century Egyptian Shariʿa Courts," *Die Welt des Islams* 30 (1990): 98–116, p. 114.

<sup>37</sup> See Clifford Geertz, "Suq: The Bazaar Economy in Sefrou," in C. Geertz, H. Geertz, and L. Rosen, *Meaning and Order in Moroccan Society* (Cambridge: Cambridge University Press, 1979).

<sup>38</sup> I have used a pseudonym.

<sup>39</sup> Peters, p. 114.

<sup>40</sup> Compare Anna Wurth, "A Sanaʿa Court: The Family and the Ability to Negotiate," *Islamic Law and Society* 2, no. 3 (1995): 320–40.



the accused had acknowledged the crime, was asked by the judge to identify him in the courtroom. It is reported in the record that “he indicated the father of the murdered man.” Then, “‘Ali Muqbil was pointed out to the witness and the witness said, ‘that’s ‘Ali Muqbil.’”

With respect to witnesses unknown to the court, which was the typical case, further identifiers were required. The testimonies of the first set of witnesses to appear for the claimants’ side are recorded in the judgment document, and this passage is followed by one in which the identities of the witnesses are established: “The (identities) of the aforementioned witnesses were made known by Hajj ‘Abud b. ‘Ali and Qasim Nu‘man and M. Qasim al-‘Awadi and al-Faqih ‘Ali Qa’id al-‘Umal. And they testified also to the probity [*‘adala*] of the witnesses and that they did not know with respect to any of them any aspersion.”

As I have discussed in my book, witnessing, like academic instruction in the old system, was based on the ultimate authorities of human presences and the spoken word.<sup>41</sup> A “just” (*‘adl*) witness is the ideal conveyor of truth, which was anchored in his or her identity as a Muslim and in the assumed accuracy of the senses in an individual of full capacity. A witness is an individual who was both at the scene and, later, present before the court. He or she is a transmitter of the securest form of human knowledge. A local society is a community of potential witnesses with the obligation to act as a witness based on Quranic verses. The linkages of witnessing also are comparable to those engaged in the transmission of *hadiths* (traditions of the Prophet). Witnessing is horizontal and community based, while hadith transmission is historical and genealogical in nature. In the doctrine concerning witnessing, and in hadith studies, there are comparable critical methods for inquiries into the integrity of the human links: the method of *jarh wa ta‘dil*, “disparaging and declaring trustworthy,” is characteristic of both fields. In court cases, an initial stage in the validation of witnesses is their identification, by the supporting identifiers, who also declare that the witnesses are *‘adl*, or just. A potential later stage is when an opponent presents witnesses against the claimant’s witnesses, that is, witnesses of *jarh*, or disparagement.

#### LEGAL BODIES

The initial claim in the cited murder case also contains the following passage: “The aforementioned murdered man has no heirs except his parents, his father and his mother, the aforementioned accusers, and they demand shari‘ retaliation (*qisas*) from the one specified in the claim, this for his murdering of a Muslim with intent and enmity.”

<sup>41</sup> Messick, *The Calligraphic State*, chap. 11.

A distinctive feature of homicide trials prior to the revolution, and prior to the existence of an office of public prosecution, was that they were “privately” brought, by the *awaliya*<sup>2</sup> *al-dam*, those with rights to the “blood,” that is, in a period and doctrine-specific sense, rights to the person. These rights are sometimes also referred to as concerning a *nafs*, a “soul” or “person.” In any claim brought in this manner, it is important to go beyond identification of the claimants to specify their status in relation to, in this case, the deceased, and to indicate whether there are any others who might also have relevant statuses. Here the case is brought by the victim’s father and mother, who are asserted to be his only heirs. In *shari‘a* law it is the *awaliya*<sup>2</sup> *al-dam* who have the right to demand retaliation (*qisas*) if they can prove their case. Thus, the initial eyewitnesses for the claimants also support the basis of the parents’ claim: “Each of them also bore witness to the fact that the deceased’s heirs are confined to his father and his mother and that he has no heirs except for them.” The Republic of Yemen now has a state prosecutorial office (the *niyaba*) that is charged, by legislation of 1977, with a newly created public responsibility for bringing homicide cases to trial under the terms of the new penal code and the law of criminal procedure.<sup>42</sup> In the Islamic state of the 1950s, by contrast, homicides, and crimes in general, engaged not a public interest of the state (although it did provide the legal forum) but that of private victims, their heirs, and the kinspeople of the accused.

As is true to a lesser extent in all types of prerevolutionary litigation, kinship terms and arguments were commonly deployed in homicide cases. In their doctrinal works, the jurists themselves carefully distinguished between the meaning of words “in the language” (classical Arabic) versus their technical usage “in the *shari‘a*.” In the written court records, some familiar kin terms, including many important rubrics of identity specification, take on specific legal significance. In the course of the trial at hand, for example, the two sides repeatedly argued in the language of kinship. The claimants assert that “group spirit” (*‘asabiyya*, Ibn Khaldun’s famous term for kinship solidarity among tribesmen) moved their opponents to bring false testimony. Specifically, it is argued, the opponents illegally brought witnesses from their own clan, their *‘ashira*, and from those under their sway, their tenant farmers. It is further argued that the witnesses for the defense were among the potential blood-money-paying relatives of the accused, which should disqualify them. These witnesses are described as “descendant from a single grandfather,” and thus as constituting a single compensation (*ghurm*) group. Finally, it is claimed

<sup>42</sup> See Brinkley Messick, “Prosecution in Yemen: The Introduction of the *Niyaba*,” *International Journal of Middle East Studies* 15 (1983): 507–18.

that they are defending the accused as one of their agnatic cousins, one of their *awlad al-<sup>ḥ</sup>amm*.

In homicide cases tried under the auspices of a *shari<sup>ḥ</sup>a* system such as existed in Yemen, a version of the legal institution of inheritance rights is engaged, and it is in this connection that the father and mother are referred to technically as the victim's "heirs" (*waratha*). Individual identity, in legal terms, is closely bound up with the *shari<sup>ḥ</sup>a*'s renderings of familial relations, including its premodern form of individualism, based on partible inheritance; its distinctive version of the nuclear family; its particular assertions of women's rights; and its continued, but backgrounded reliance on the rights of the male-line descent group, the *ḥasaba*. The relevant *awliyya al-dam* in a homicide case, those with rights to the "blood" or to the "person," those who can bring a claim, are precisely the victim's heirs in the estate inheritance sense. On the other side in such cases a similar kin group constellation is engaged by the litigation process. The case at hand ended in a finding of guilt and gave the right of legal retaliation to the claimants, who called on the state to exercise it. Another potential outcome, however, was the acceptance of "blood money," that is, financial compensation instead of retaliation. In such outcomes two kin groups confronted each other as the payers and the recipients of the money transferred. The *ḥaqila*, a word common in colloquial discourses of "tribe," and equivalent to the male-line descendants, were the specific legal individuals who paid the blood money on the murderer's side and received it on the victim's side.

Such relations of individuals to their kin groups are potentially complex and, as the homicide case illustrates, situational. Analyses of such relations, of course, also represent one of the conventional sites for anthropological discussions of personhood and identity.<sup>43</sup> In the anthropology of the Middle East, such discussions have centered also on the applicability of the venerable theory of the segmentary lineage. It is commonly claimed that the *shari<sup>ḥ</sup>a* law of homicide served to reduce the sphere of legal retaliation to the perpetrator of the homicide alone, thus helping to combat the endless cycle of killings and the multiple retributions of feuding in the pre-Islamic past.<sup>44</sup> This further illustration of the individualism that runs through the *shari<sup>ḥ</sup>a* is attached to a concept of individual guilt, anchored ultimately in an individual intention to kill. But in the doctrine, just as egalitarian notions coexist with countervailing

<sup>43</sup> See, e.g., Clifford Geertz, "Person, Time, and Conduct in Bali," in *The Interpretation of Cultures* (New York: Basic, 1973); and Clifford Geertz and Hildred Geertz, *Kinship in Bali* (Chicago: University of Chicago Press, 1975).

<sup>44</sup> See, e.g., N. J. D. Anderson, "Homicide in Islamic Law," *Bulletin of the School of Oriental and African Studies* 13 (1951): 811–28.

concepts of hierarchy, so *shariʿa* constructions of individual identity co-exist with rights pertaining to social collectivities, including both kinsmen and the Muslim community (the *umma*).<sup>45</sup>

As is illustrated by the example homicide case, the physical body is itself understood in legal terms. Homicide falls in the general legal category of “wounds” (*jinayat*) and standard chapters are devoted to this subject in the *fiqh* works. There also were small, specialized treatises (the *urush* works), some in rhyme for easy memorization, that set levels of monetary compensation for everything from a bruise to a death. Where heirs can receive compensation for a death, wounded individuals receive compensation themselves. In addition to their elaborate conceptions of the body and its potential injuries, these written compensation rules are one of several important sites for the legal specification of social differences along the lines of gender (a woman’s murder is compensated at half the rate of a man) and, in former times, freedom versus slavery.

In the “injuries” doctrine, the identity of the body merges with that of a commodity. The *fiqh* manuals thus also discuss injuries to property.<sup>46</sup> The wound evaluation doctrine also is coupled with a premodern medical science. In the homicide case, the corpse was carried in to the town to the district officer, who made a simple examination, the only such “medical exam,” and he issued a report. He evaluated the body, not as a professional coroner or medical examiner, but using the body and wound terminology of the old treatises. The “lethal stab wound from which he died” is simply identified as “located in his side below his left ribs (and) penetrating the abdomen.” Since this historically specific regime of “bodily techniques” did not include the familiar modern technology of fingerprinting to establish identity and to connect individuals with objects, the bloody dagger that also was brought in represented a fairly simple piece of evidence. The eventual evidential import of both the corpse and the dagger rested instead with the assembled men, the witnesses of the crime who appeared before the district officer. Contemporary Yemeni law now requires modern-style medical examinations to implement its new code of criminal procedure, but the requisite expertise is lacking.

#### LEGAL INTENT

From legal identity construction in connection with formal naming and through the associated techniques of witnessing, and with respect to rights in the body, I turn now to the individual *shariʿa* subject as fundamentally constituted by intent. All *shariʿa* analyses ultimately turn on matters of

<sup>45</sup> See Messick, *The Calligraphic State* (n. 13 above), pp. 152–66.

<sup>46</sup> See, e.g., al-ʿAnsi (n. 28 above), p. 312.

intent.<sup>47</sup> Central to winning a homicide case, to continue the previous example, is the establishing of homicidal intent by means of evidence. In the case at hand, the required doctrinal formula, that the murder occurred “with intent and enmity,” is frequently quoted in the record, beginning in the opening claim. On the basis of his case materials from Muslim courts in Morocco, Lawrence Rosen has led the way in the anthropological study of legal intentionality, stressing the connection between such cultural conceptions and related concepts of the person.<sup>48</sup> Rosen has emphasized the social-contextual, namely, how overt acts and social identities are understood by judges and others as indices of the inner intentional state. By contrast, I want briefly to indicate how Muslim jurists of the Zaydi school in Yemen formally conceptualize intention and how this bears on their theoretical analyses of spoken words and writings, specifically the sorts of Yemeni legal documents discussed earlier.

In contract law, with sale as the model, Muslim jurists of the *fiqh* grounded their analyses in the existence, or not, of the requisite intention, or consent, between the parties. Among Yemeni jurists, however, there were important differences of opinion concerning the relationship of spoken contractual words to intent. One view, that of the fifteenth-century Imam al-Murtada, held that contractual words had legal significance as indicators of consent and that, as a consequence, linguistic analyses of contractual expression were required.<sup>49</sup> The opposing view is exemplified by Imam Yahya, the Yemeni ruler who died in 1948. The imam issued a concise personal opinion on the issue, which states, “[Specific] wordings (*alfaz*) are not conditions in sale, that is, in the offer and acceptance, or in lease, since the crux of authority is mutual consent (*taradi*) regarding all that is indicated.”<sup>50</sup> In the late nineteenth century, the new

<sup>47</sup> See Y. Linant de Bellefonds, *Traite de Droit Musulman Compare*, 3 vols. (Paris: Mouton, 1964). In a recent article, “The Valorization of the Body in Muslim Sunni Law” (*Princeton Papers: Interdisciplinary Journal of Middle Eastern Studies* 4 [1996]: 78), Baber Johansen contrasts two spheres of the law, the “commercial” and the “social,” the former based on analyses of intent and the latter involving a “strict formalism with very little place for intent.” In another recent article, “Intention and Method in Sanhuri’s Fiqh: Cause as Ulterior Motive” (*Islamic Law and Society* 4, no. 2 [1997] 201), Oussama Arabi discusses the work of the influential mid-twentieth-century Egyptian code drafter, ‘Abd al-Razzaq al-Sanhuri, on the issue of intent. It was Sanhuri’s modernist aim to find notions of ultimate intent in Islamic law similar to those in modern French law. Although all four Sunni schools of law agree on the importance in contracts of the specific subjective condition of consent (*rida*, *taradi*), they disagree on the legal weight of larger intentions, which Arabi refers to as “ultimate,” “ulterior,” and “driving.”

<sup>48</sup> See Lawrence Rosen, “Intentionality and the Concept of the Person,” in *Criminal Justice*, ed. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1985), pp. 52–77. *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), and Lawrence Rosen, ed., *Other Intentions* (Santa Fe, N.M.: School of American Research Press, 1995).

<sup>49</sup> Imam al-Murtada, *Kitab al-Azhar* (n.p., 1973).

<sup>50</sup> ‘Abd Allah al-Shamahī, *Sirat al-‘arifin* (San‘a’: Matba‘at al-Ma‘arif, 1937), p. 6.

Ottoman civil law code, the *Majallah*, had articulated a similar general principle: “Decisive in contracts is intentions and meanings, not wordings and forms.” According to the Yemeni commentator on the imam’s opinion, neither the particular legal “forms” (*siyagh*) nor the “wordings” of an agreement constitute conditions.<sup>51</sup> “Rather,” he states, “the crux in implementing a sale or in cancelling it is the consent of the exchangers and their [having] parted consenting.” This consent, however, is seated internally, specifically in the “heart.” For purposes of legal analysis, the existence, or not, of “consent” or, more precisely in bilateral contracts, of “mutual consent” (*taradi*), and thus of the legality of the transaction, and thus also the existence of the property rights and of whatever identities are entailed, may be established through an examination of “manifest expression” (*zahir al-khitab*) or by means of an available “sign” or “indication” (*imarah*). This determination involves any avenue of communication, “any way we can learn of the occurrence of consent, by any method we perceive it, whether act or word.” The point is to establish “consent to the exchange,” to “taking and giving” in the case of a sale contract, by means of what is known technically as “contextual evidence” (*qarina*).<sup>52</sup> A basic tension in such analyses is that “the wordings they [the parties to the contract] stipulated” represent one of the basic forms of this contextual evidence.

At the same time, however, contractual wordings represent “only the voiced word (*al-qawl*), which translates what is in the spirit (*nafs*).”<sup>53</sup> In and of itself, then, the specific wording employed in sale and related bilateral contracts is not to be considered constitutive or binding, but this same wording may serve as a principal type of contextual indicator concerning that which is constitutive and binding, namely, consent. In such analyses, in a culturally specific foundationalism, it is assumed that a bedrock of human authority and truth exists, but also that it is located at a remove from ordinary discourse, internally (in the “heart,” or in the “spirit”) in the elemental “language,” if that is the appropriate term, of human intention (*qasd, niyya*).<sup>54</sup>

In another domain of legal acts, however, this works differently. In contrast to sale and the related bilateral contracts, in the domain of unilateral

<sup>51</sup> *Ibid.*, pp. 6–10.

<sup>52</sup> See Wael Halaq, “Notes on the Term *Qarina* in Islamic Legal Discourse,” *Journal of the American Oriental Society* 108 (1988): 475–80. See also N. J. D. Anderson, *Islamic Law in Africa* (London: Frank Cass, 1970), p. 372, where *qarina* is defined as “context, indication, circumstantial evidence.”

<sup>53</sup> al-Shamahi, p. 8, where the association of consent and *nafs* is explicit.

<sup>54</sup> In the sale chapter of *fiqh* works, *qasd* frequently is used; in the *iʿbadat* (ritual) sections, *niyya* is more common. According to one definition the two are interchangeable: “*al-Niyya* is *al-qasd* and *al-irada*, which are found in the heart of the individual of full capacity, [and is] not simply *al-lafz* [wording], nor simply faith (*al-iʿtiqad*) or knowledge” (see n. 2, by an unidentified annotator, in al-ʿAnsi, p. 38).

acts, such as repudiation (*talaq*) of a wife by the husband, there is no reciprocal, dialogic form of utterances (such as the “offer and acceptance” in sale). Instead, the types of utterances evaluated in discussions of repudiation are unilateral declarations by the husband. In this legal domain, “wording” (*lafz*) can have independent weight. Furthermore, while a sale can be constituted at the level of intention alone, however, a repudiation cannot: “It cannot occur simply with intention, rather wording is required.”<sup>55</sup> In fact, unilateral repudiations become binding and enforceable if certain correct wording is spoken.

From this legal perspective, the problem of meaning within human relations is structured by a foundationalism that locates the site of meaning generation internally, within the heart or spirit, and beyond direct observation. In human relations, specifically in the legal forms of exchange, with the bilateral sale contract as the model, determinative meaning formation is understood to be situated at a crucial remove from the lived sign world of language. Analyzing mutual intentionality and consent in the complex situation involving two participants to an undertaking requires an effort to understand what Bakhtin would refer to as dialogically constituted meaning.<sup>56</sup> Given the assumed gap between intention formation and all forms of expression and signification, legal analyses amounted to attempts to erect bridges to the inaccessible from the accessible. The interpretive work of scrutinizing spoken words, rejected by some Muslim jurists such as the twentieth-century Yemeni Imam Yahya, but advocated and elaborated by others in earlier generations, represents such a bridging effort. Analytically different, as noted, is the situation of the unilateral declaration. Supposedly uncluttered by a response from an interlocutor and the latter’s intention, intentionality in unilateral acts can come closer to being directly reflected in manifest expression.

Bakhtin has written of the “authoritative word” that “we encounter it with its authority already fused to it.”<sup>57</sup> In the social and linguistic view of the Muslim jurists, human meaning constitution occurs at the level of intention formation, and it is only in the theory of the unilateral act that authoritative intentionality approaches being fused with the spoken word. Otherwise, the “authoritative word” exists in the deeper, or prior, “language” of human intentions, in relation to which the external language of contractual relations is, according to the majority view, epiphenomenal. The limit case here, I suggest, is the divine word, in which, by definition, there is no separation of intentionality and expression. It is paradigmatically the Word of God, in the Quran, that is encountered by Muslims “with its authority already fused to it.” Like the divinity, the

<sup>55</sup> Imam Al-Murtada, *al-Bahr al-Zakhhkar* (Cairo, Matba‘at al-Sa‘ada, 1947), 3:155.

<sup>56</sup> M. M. Bakhtin, *The Dialogic Imagination* (Austin: University of Texas Press, 1981).

<sup>57</sup> *Ibid.*, pp. 342–43.

source of authority in human intentions is, again in Bakhtin's terms, "located in a distanced zone." Ultimately, neither knowledge of God Almighty nor of the interiors of others' intentionalities are fully attainable by humans, but these sources of authoritative meaning, these locales of truth, remained the identified goals of interpretive effort. Meaning conceived of as constituted in "a distanced zone" activated and motivated a distinctive semiotics, a legal science of manifest signs integral to an interminable, yet always incomplete and also always contested human pursuit of understanding.<sup>58</sup>

#### WRITTEN INTENT

Thus far, my discussion of legal intent, and by extension, the fundamental constitution of the *shari'ca* subject, has referred to such manifest forms as spoken words and gestures. A further layer of problem is engaged in considering manifestations of intent in written representation, in the textual creation of what I referred to earlier as "paper identity." The issue in question is the technical status of writing itself. By "writing" (*kitabā*), Muslim jurists generally refer to something concrete and enduring: "It is necessary that it leave a trace (*athar*) which may be seen externally, and this does not occur unless it is [inscribed] writing, as in writings on paper or boards or stone, etc., on which the letters of the writing remain inscribed. This could even include writing with earth or flour, or upon them."<sup>59</sup>

Written representation has different implications in unilateral versus bilateral legal acts. As with the spoken word, writing in the context of repudiation is special because it is associated with unilateral expression (by the husband). It is the singly acting individual's proper or autograph writing. In bilateral contracts, speech is envisioned as the normal medium for the offer and the acceptance, but these reciprocal expressions may take the form of either "word or action," with the latter including writing. It is important to emphasize that the jurists speak here of "writing" as a secondary modality of possible expression by the party or parties to legal actions. At this level, they are not concerned with writing in the broader sense of the written legal instruments such as the property documents I focused on earlier.

<sup>58</sup> This legal semiotics was a simplified version of the analytic frames elaborated in the Muslim language sciences, notably in *ʿilm al-bayan*, or rhetoric. Thus, one jurist explains that among jurists the term *kinaya* means "indirect expression" in general rather than its technical meaning of "metonymy" among the language specialists. In al-Hasan b. Ahmad Jalal, *Dawʿ al-nahar*, 4 vols. (Sanʿa: Maktabat Ghamdan, 1985), 3:905–6, Jalal states, "the intention in [the use of the term] *kinaya* here is not the *kinaya* of the science of Rhetoric."

<sup>59</sup> The bracketed word is from a source text, a *matn*, located in a surrounding passage of a commentary work, a *sharh*. The word *luh* refers to the writing boards used by students. See Al-ʿAnsi (n. 28 above), 2:122.



A second opinion by Imam Yahya, however, mainly concerns such notarial texts, that is, the legal documentation (*basiras*, *ijaras*, etc.) prepared after the contract or disposition by an individual not party to it: "Reliance (*al-ʿamal bi*) on writing is acceptable if its writer is known and he has a reputation for probity."<sup>60</sup>

The focus of this formulation is on the acceptance of written legal documents as evidence in court. This opinion addressed the widespread use of such documents in Yemen. At the same time, it ran counter to the thrust of the doctrinal *fiqh* on the matter, which envisions only oral forms of evidence. Here again, however, the imam's opinion accords with a principle established in the new-style Ottoman *Majallah*. But even this late nineteenth-century principle is backhanded: "Writing and seals are not to be relied upon in and of themselves, but if they are free from suspicion of forgery and fabrication, they may be relied upon, that is, they may be the determining element of the judgment without requiring support of another type."<sup>61</sup>

Before the Turks introduced a type of noncompulsory document registry in certain of their Yemeni courts in the second Ottoman period (1872–1918), there was no state archiving of legal documents such as deeds and wills. Under the succeeding imamic state, individuals remained free to have their legal instruments entered in court registers, but most documents were not recorded, as I noted earlier. In Yemen, as elsewhere in the Middle East, legal documents figured centrally as evidence in many types of court cases, but in the *fiqh* this important social reality of documentary usage was not directly reflected. While they mention such legal writings in passing, the chapters on evidence, or "testimonies" (*shahadat*), strongly emphasize verbal witnessing as the norm. It was in the separate and specialized "stipulations" (*shurut*) literature, also authored by jurists, that documentary practice was addressed.<sup>62</sup> These *shurut* works, including a late nineteenth-century example from Yemen, provided detailed guides for the preparation of sound instruments.

According to the general *fiqh* doctrine, notarial documents could enter the realm of evidence, but only by means of accompanying oral testimony as to their authorship and contents.<sup>63</sup> Documents did not stand alone in the court forum portrayed in the doctrinal treatises. Together with the inscribing notary, the witnesses to a contract had to be present at the orig-

<sup>60</sup> I have previously addressed this *ikhtiyar* (see Messick, *The Calligraphic State* [n. 13 above], chap. 11, where I translated and discussed the commentary on it by al-Shamahī [n. 50 above], pp. 31–33).

<sup>61</sup> Art. 1736, *al-Majallah*, pp. 250–51.

<sup>62</sup> See now Wael Hallaq "Model *Shurut* Works and the Dialectic of Doctrine and Practice," *Islamic Law and Society* 2, no. 2 (1995): 109–34.

<sup>63</sup> *Al-ʿAnsi*, 4:104–5.

inary event, the contract session. But in order for information contained in a resulting document to be considered by the court, the witnesses ideally had to testify as to the document's contents and also had to "complete" their testimony by means of an "oral reading" (*qira'a*) of the text in question.<sup>64</sup> In theory, then, writings had to be converted to spoken testimony in order to have evidential value, although a participant's relation to his or her own writing represented a special case.<sup>65</sup>

Such doctrinal reservations concerning the evidential status of written instruments should give us pause as we attempt to formulate conclusions about the creation of *shari'a* subjects in legal documents. If, in the estimation of the jurists, such texts could not stand alone as evidence in court, what should their standing be for us in our effort to understand the *shari'a* subject of the period? In the first place, the doctrinal hand-wringing about the evidential character of such writings was only part of the story. As noted, there was an intermediate genre, the *shurut* works, authored by jurists and designed to provide models for correct instruments for the various types of transactions. More important, however, was the fact that in the courts of the midcentury imamate realm, sound written documents were the standard form of evidence in the great majority of cases, which mainly concerned landed property. This wide and routine reliance on such documents should buttress our interest in them as keys to some aspects of identity and agency in the period.

In the second place, however, the problematizing of such writings by jurists is crucial to understand, since it informs us about the cultural parameters of the local analytic system. Behind these ordinary written legal documents is a system of thought grounded first in intent and, second, in human presences and the related authority of the spoken word. The jurists' cautious, even suspicious, treatments of such writings were associated not just with the very real threat of forgery but also with other circumstances of the late manuscript era just prior to the rise of print culture and the nation-state. In this era, writings had yet to be secured by either the new authority of printed forms or, more important, by the backing of a state that would license notaries and lawyers and record and archive their written instruments.

<sup>64</sup> Preferably, this reading is by the document's "maker," that is, the writer, who is the principal witness or the text he has written and signed. The reading is "to" the two required witnesses to the transaction, whose names, and sometimes also signatures, appear at the bottom of the typical document text. In testifying, the witnesses must be able to say, "he read it aloud to us and we listened," or, the other way around, "we read it aloud to him and he listened to our reading." As with all evidence, this reading also must occur before the "face" of the present and listening opposing party to the litigation, and before the judge. See also the formulation of Art. 1038 in *Taysir al-maram* (San'a': High Judicial Institute, 1986).

<sup>65</sup> See my discussion of this in *The Calligraphic State*, pp. 209–11.

## CONCLUSION

I have attempted to present some elements of a local history of the legal subject as viewed through the medium of a changing culture of written representation. This has required an integration of several strands of analysis in a manner inspired, at least at the outset, by the ideas of Benedict Anderson and some of his later critics. The well-known approaches I have adopted from this tradition of scholarship include the address of the state as an imagined phenomenon and the recourse to literature as a key site for understanding such imaginings. I have departed from this tradition in three major respects. First, rather than the nation-state, I have sought to understand the less readily characterized entity that existed prior to the institution of this perhaps too readily labeled modern type of polity. In this respect, Yemen, specifically the northern highlands (the former Yemen Arab Republic), has a doubly distinct history: it never was a European colony and, in the twentieth century, it was the realm of a late agrarian-era Islamic state. Although I have emphasized the features of subjecthood in the old Islamic state of Yemen, the historical analysis I have carried out has been based on repeated comparisons between those forms and forms which appeared after the revolution of 1962.

The second major departure centers on my concern with law. Invoking Raymond Williams's notion of the "multiplicity of writing," I examined several types of texts characteristic of a local Islamic legal "literature." In these texts I have sought to understand the contours of what I proposed to refer to as the "*shari'a* subject" and, by extension, some qualities of the Islamic state of the period. Regarding subject and state, the history of the one is the history of the other, whether one refers to the *shari'a* subject and a particular Islamic state or to the modern citizen and a specific nation. Another way of understanding my approach, however, is that in delineating the *shari'a* subject of the period, I also, by necessity, undertake a genealogy of the abstract legal subject, the citizen of the succeeding nation-state.

My sketch of the *shari'a* subject is only that, a sketch. Issues connected with the *shari'a* subject were opened here only in tandem with issues connected with written representation. My examples thus portray the *shari'a* subject as something of a "common denominator" individual, engaged in a contract or in litigation. A more thorough discussion would go beyond simple invocations of such basic sociolegal categories as Muslim/non-Muslim, free person/slave, and male/female and also would delve into such important matters as capacity/incapacity, majority/minority, and sanity/insanity. Likewise, aside from a few words on the *shari'a* construction of kinship, only a fleeting glimpse was provided of a rich field of *shari'a* roles, for example, buyer/seller, husband/wife, deceased/heir, owner/tenant, and injurer/injured.

I sampled several quite different generic levels of the Yemeni legal literature, from ordinary legal instruments, to court judgments, to doctrinal treatises, and I also tried to avoid thinking of the legal literature in isolation. To this end I drew in some brief notes on Yemeni literature in the conventional sense, and on history writing and journalism. However, I have not made an attempt at the much larger task of connecting narrative structures, forms of realism, and identity issues in the various legal genres with those in other types of written works.

The third departure concerns writing itself. To avoid easy assumptions about the status of writing and written representation in my sources, I addressed the structures of identity in the Yemeni writings of the period. At every juncture I highlighted aspects of the social scope and the cultural construction of these writings. Among the important social dimensions of writing touched upon were the nonexistence of modern identity papers in the pre-nation-state polity; the very different written and archival contours in the Islamic state of what are known, in a nation-state, as public and private spheres; and the significance of ordinary property documents as popular inscriptions. I also suggested that the “modern” aspects of *shari‘a* law, including its individualism, private property constructs, and contractual orientation, especially in relation to the specific features of the private property regime of mid-twentieth-century Yemen, meant that legal texts would not be a site of dramatic changes. In a concluding discussion of the key place of intention in legal analyses, I set forth some foundational ideas in the Muslim theory of identity and agency. These ideas were then shown to inform, in theory, the evidential status of written documents, texts that had been considered earlier in terms of their genres and patterns of usage.

Since the seminal essay by Marcel Mauss on concepts of the “person” and the “self,” anthropologists and historians have been interested in writing accounts of subjectivity.<sup>66</sup> The main contribution I have intended to make to this line of inquiry is to focus specifically on representations of identity and subjectivity in written texts. In this respect my project is closely related to a broader theme in new work in linguistic anthropology. Thus, in their introduction to *The Natural Histories of Discourse*, editors Silverstein and Urban state that in various ways all the papers in their volume demonstrate that “textuality and entextualization practices turn out to be about ‘identity.’”<sup>67</sup>

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<sup>66</sup> Marcel Mauss, “A Category of the Human Mind: The Notion of the Person; the Notion of the Self,” *The Category of the Person*, ed. Michael Carrithers, Steven Collins, and Steven Lukes (1938; reprint, Cambridge: Cambridge University Press, 1985).

<sup>67</sup> Michael Silverstein and Greg Urban, eds., *Natural Histories of Discourse* (Chicago: University of Chicago Press, 1996), p. 10.