EVIDENCE: FROM MEMORY TO ARCHIVE*

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Abstract

This is an analysis of an evidence doctrine in Islamic law, based on a close reading of a chapter in an authoritative Zaydī school manual in conjunction with nineteenth and twentieth-century commentaries. As I follow the presentation of the doctrinal issues by these Muslim jurists, I examine concepts and procedures surrounding the witnesses and their testimony, the related role of the judge, the distinctive institution of *jarḥ wa-taʿdīl*, and the special case of written evidence.

> Carried from the witnessed event, given in case of dispute and written in the registers, witnessing among the people, concerning what is for them and against them, protects the rights of the people and their properties and their debts and all of their transactions.
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> Ibn Khaldun (*Kitāb al-ʿIbar*, vol. I, 397)

Introduction

A "just" (*ʿadl*) witness is the ideal conveyer of truth. This justness is anchored in an individual's identity as a Muslim. In an adult individual of full capacity, the integrity of what is conveyed is guaranteed by the assumed accuracies of the human senses. Such a witness, present at the original scene, apprehends and undertakes the carrying (*taḥammul*) of what is witnessed. Secured by such witnessing acts, most undertakings remain untroubled. In the event of conflict, however, the same witness may be called upon to speak the securest form of human evidential knowledge. Connecting the institution of witnessing to the maintenance of property relations, Ibn Khaldun describes a three step process: the witnessed material first is received and carried by the witness, later, it is given before the court in the context of litigation, and, finally, it is preserved in the court registers. As a trajectory of evidential knowledge, the passage of witnessing is from an initial

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sensory perception, to the spoken word produced at a hearing, to writing. From memory to archive.

Like the transmission of academic instruction in the traditional Islamic school system, that in witnessing is based on the ultimate authorities of human presences and the spoken word. There were "carriers" (*mutaḥammil*) of both formal academic knowledge and evidence knowledge (see Messick 1993, Ch. 11). Once acquired by a carrier, neither type of knowledge should be concealed.[1] The human links involved in witnessing also are comparable to those in the transmission of *ḥadīth*s, the traditions of the Prophet. Both represent crucial types of knowledge, the one concerning the recent and the other the distant past. Where testimony transmission is social and relatively contemporary, hadith transmission is genealogical and historical. In their respective doctrines an equivalent critical method of the same name inquires into the integrity of the transmission links, represented by the human relayers. This is the two-part method known as *jarḥ wa-taʿdīl*, "disparaging and declaring trustworthy," which I will examine in detail below.

I discuss the distinctive features of this regime of evidential knowledge with specific reference to the Zaydī school of highland Yemen, technically a Shīʿī school, although its principal frames of cross-reference are the doctrines of the four Sunnī schools. In the twentieth century, the Zaydī school is represented by a work originally published in the years 1938-47 by Aḥmad b. Qāsim al-ʿAnsī, *The Gilded Crown* (al-ʿAnsī 1993), which is a commentary on the authoritative fifteenth-century Zaydī manual by Imām al-Murtaḍā, *The Book of Flowers* (al-Murtaḍā 1972). In his commentary, al-ʿAnsī places the passages of al-Murtaḍā's text in parentheses, and in my discussion below I render phrases quoted from the *Flowers* in italics. As he elaborates on the fifteenth-century *Flowers* text, al-ʿAnsī draws on a lengthy history of *Flowers* commentaries, but he also reduces the overall volume of the accumulated discussion by eliminating minor points and many alternative opinions. At the same time, al-ʿAnsī adds new materials, such as remarks about prevailing legal custom in Yemen and citations of the interpretive "choices" (*ikhtiyārāt*) of Imām Yaḥyā

[1] Qurʾan (2:283): "Do not conceal the testimony. He who conceals it his heart is evil." Equivalently, for academic knowledge, there is the hadith, "He who learns knowledge and conceals it is bridled by God on Judgment Day with a bit of fire"(cited in Wensinck 1971, s.v."knowledge").

(d. 1948), which were designed to guide the rulings of judges in the sharīʿa courts of the realm. *The Gilded Crown* was the first Zaydī school commentary to be written for print publication and it comprises a number of other formal innovations, such as footnotes. Since al-ʿAnsī follows the classical commentary style of reproducing in its entirety the fifteenth century text of the *Flowers* while taking some first steps in the process of legal systematization in Yemen, his work represents both an important continuity and a discontinuity in this legal literature. Another basic feature of this doctrinal world is its contentiousness, mainly represented here by the critical commentary on the *Flowers* in the early nineteenth century by Muḥammad ʿAlī Shawkānī (1985). This corpus of doctrinal material is complemented later in my discussion by information from administrative rules (known as *Taʿlimāt*), issued in 1936, which concern, in part, the keeping of minutes in court registers. Finally, I give some supporting illustrations of the applied dimensions of this evidence regime from the records of mid-twentieth century Yemeni sharīʿa courts.

The thrust of my analysis consists of a close reading of the evidence doctrine in the relevant chapter in the *Flowers* and its commentaries, especially the twentieth century *Gilded Crown* by al-ʿAnsī. In the unfolding of the evidence doctrine as it is presented in these Zaydī school law books I seek to understand how the jurists pose the issues surrounding legal evidence and to learn about both their related analytic tools and their assumptions, explicit and implicit. Complementing the presentation in the evidence chapter is that in the chapter on the "Judgeship," which I treat elsewhere. Rounding out the overall procedural design of the sharīʿa court and its processes, a third key chapter is on "Claims," which I now turn to briefly before commencing my reading of the Zaydī evidence doctrine proper.

A key feature of the sharīʿa evidence scheme depends on a prior determination by the judge, especially if both sides appear before him with assertions. This determination involves the allocation of the litigation roles of claimant and defendant and, as a consequence, the initial distribution of the burden of proof. In the *Flowers* chapter on "Claims," the claimant is described in general terms as "*he who has the weaker of the two matters* (*amrayn*)," or legal positions. As commentator al-ʿAnsī (4:3) explains, the claimant role is assigned to "he who claims counter to the *ẓāhir*," a term that may be glossed in this connection as the apparent status quo (assuming the claim has proper legal form, discussed below). The claimant thus is the party

who "demands in his claim the taking of something from the possession of someone else or the obligating of a right not obligatory in the *ẓāhir* perspective." Once it has been determined who has the "weaker" position, or the position most counter to the apparently existing state of affairs, the opposed litigation roles are established. And, once these roles are set, the associated rule is, in the wording of the well-known hadith (quoted in al-ʿAnsī 4:3), "upon the claimant is the evidence (*bayyina*)," that is, the claimant party in litigation assumes the burden of proof. "In this Sharīʿa," al-Shawkānī (4:139) remarks in his nineteenth century commentary on the *Flowers*, thereby "turns the mill of legal actions."

At the different generic level of court judgment records, however, the opposed litigation roles appear already given. There are few documentary traces in the court judgment genre, that is, in the Yemeni *ḥukm* of the mid-twentieth century, of any prior decisions with respect to their allocation. Many, perhaps most, cases are relatively clear cut in regard to these roles. But, aside from this formal principle, which has the claimant alone as the presenter of evidence, most actual cases involved evidence presentations by both sides in the litigation. Nevertheless, in the typical court record, after the entry of the "claim," followed then by the record of the negative response, the "denial" (*inkār*) by the defendant, the litigation is formally engaged. At this point the record typically states, "the claimant was required to present evidence." In most cases, however, the defense subsequently will also present evidence.

Also in the "Claims" chapter (al-ʿAnsi 4:5), the conditions for the legality of the claim (*ṣiḥḥat al-daʿwā*) are specified. The first of these involves the determination by the judge regarding the just mentioned allocation of the litigation roles. The basic legality of the claim is predicated upon the correctness of the judge's determination of these roles. In "property" litigation (not in debts or injuries), it must be established that, in accord with the *ẓāhir* principle, the defendant actually has the property in question in his or her possession. As the *Flowers* states, the judge is required to verify the apparent property situation by "*establishment of the defendant's possession of the right*" either "*as a reality or by judgment.*" As al-ʿAnsī notes, an acknowledgement of property possession by the defendant will not suffice, since the claimant and the defendant conceivably might conspire together to dispossess a third party.

"Establishment" and "reality" are the somewhat awkward translations I give for the Arabic *thubūt* and *ḥaqīqa* to mark some distance from the conceptual entailments implicit in our words "proof" and "fact," to which these terms nevertheless may be compared. In the example offered of a case of litigation over a house, the reality established is that the defendant is resident in it, and it must be established either by "evidence"(*bayyina*), from one of the two parties, or by the judge's personal knowledge (*'ilm*). This prior dimension of evidence must be concluded before the litigation proper and its own evidential struggle may commence.

Shahādāt

I turn now to a reading of the Zaydī doctrinal chapter which bears the title "*al-shahādāt*," the singular of which is *shahāda*, the general term for both the form and the content of "witnessing." As form, *shahāda* refers both to the initiating act of witnessing as sensual perception and to the subsequent act of witnessing as verbal production, that is, as testimony in court. As content, *shahāda* refers to the substance of what is perceived, carried, conveyed and recorded. The other key term for "evidence," in the narrower sense of what is brought forward in court, is *bayyina*, as in the previously mentioned hadith-formula, "upon the claimant is the *bayyina*," a term that Brunschvig (1976:202) translates as "preuves manifestes."[2]

At the outset of this chapter four types of witnessing situations are characterized: "heavy," "intermediate," "light" and "lightest" (al-'Ansī 4:66-7). In this scheme, the "heavy" type applies only to the (rare) cases involving the Qur'anic punishment for unlawful intercourse (*zinā*), for which the exceptionally stringent rule requires four male witnesses. Matters involving claims for retaliation (*qiṣāṣ*) for intentional killing and injury, together with cases concerning the remaining four of the five Qur'anic punishments (*ḥudūd*), are considered "intermediate," the necessary and sufficient requirement being two men, and only men. For the "light" category, representing the large majority of actual cases, which concern "property and rights" (*al-amwāl wa'l-ḥuqūq*), the requirement is two witnesses, but two women are acceptable as witnesses in place of one of the males, or, as an additional

[2] Another term is *burhān*, often synonymous with *bayyina*.

possibility, a single male witness may be combined with the oath of the claimant.[3] Shawkani (4:187) dissents here, however, and maintains that the correct, Qur'an-based rule ought to be that a man and two women can take the place of two men "in everything," that is, in all categories of cases, including homicide, with the exception only of the special requirement of four males in *zinā* cases, which is set down in the Qur'an. Finally, the "lightest" type of witnessing, requiring one just woman only, concerns cases involving matters specific to women.[4]

In Yemeni court cases, these minimum requirements regarding the numbers of witnesses commonly are exceeded. As noted, it also is typical for both sides in a litigation to present evidence. In a murder case from 1960 (Messick 1998), for example, a total of forty-five witnesses appeared, twenty-three for the claimants and twenty-two for the defense. This sort of large scale evidence presentation was a common strategy in Yemeni litigation of the period and it also resulted in the ballooning of the mid-section of the trial record.

As the *Flowers* states, a basic principle of witnessing is that "*it is required of the carrier* [of evidence] *to give it*" (al-ʿAnsī 4:76). The single exception is cases concerning unlawful intercourse for which witnesses are encouraged to conceal evidence in certain circumstances (al-ʿAnsī 4:211). For the doctrinal jurists, there also is a technical issue of intent in becoming a "carrier" of evidence. On this, al-ʿAnsī quotes another commentary on the *Flowers*, which says that a witness becomes a "carrier, in so far as he hears and he intends the carrying; whereas, if he does not intend the carrying, the giving of the testimony is not required of him, except if there is a fear of loss," that is, loss of a right. The witness also must be prepared to repeat his testimony until justice is reached. Discussing the "method of carrying" (*ṭarīqat al-taḥammul*), al-ʿAnsi (4:112-14) quotes the *Flowers*: "*Seeing is sufficient for the witness in permitting the witnessing* (*shahāda*) *of an act, and [hearing] the voice for a statement with it.*" Given the presence of the witness at the scene, the human senses of perception are authoritative. The commentator goes on to consider some potentially complicating factors, such as whether the person heard is alone in a place, whether the witness

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[3] See Chapter on "Oaths" (al-ʿAnsī, vol. 3) and the section in the chapter on "Claims" (al-ʿAnsi 4:26-38).

[4] The *ʿawrat al-nisā'*. Al-ʿAnsī explains, "The *ʿawra* is what is between the knee and the navel." These cases involve matters "such as that which a man would not be informed about in women, like illnesses of the vulva and childbirth."

knows the person's name, and whether the individual's voice is known to the witness.

From a few generalities in the *Flowers*, his commented-upon source-text, twentieth century commentator al-ʿAnsī (4:69-71) then constructs and presents six conditions for the correct performance of witnessing as testimony-giving. These six conditions configure the court as an evidence-hearing forum and provide parameters for the judge regarding the evidential bases for his ruling. (Again, other important aspects of the court configuration and the principles of judging are dealt with in the separate chapter on "Judging"). The first condition for the correct performance of evidence-giving is the requirement of court presence itself; as with the oath, testimony is not legally given except if it occurs before a judge or before an individual ordered by the judge to hear it. Whereas this first of al-ʿAnsī's conditions has no basis at all in the source-text, the minimal cue for the second condition is the *Flowers* phrase, "*and proper performance, or else it is repeated.*" Exercising a standard commentator's technique, al-ʿAnsī breaks up this phrase and develops it to create the following text:

> The second condition [for testimony-giving] is its expression (*lafẓ*). Neither messenger nor writing is valid due to the absence of the expression. *And* required with its expression, as the *proper performance* (*ḥusn al-adā'*) of it, is that it occur with a verb related to the circumstance. The witness should say, "I swear that Fulān acknowledged such and such or did such and such." If the witness said, "I know, or I am certain, or with me is testimony, or I have testimony that Fulān did such and such or acknowledged such and such, this is not a proper performance. *Or else*, if he comes forward with it in the manner we [just] mentioned, *it is repeated* in a shariʿa manner.

A fundamental principle, as al-ʿAnsī (4:77n) notes, is that "it is not permitted for the witness to testify except about knowledge (*ʿilm*) or certainty (*yaqīn*)," and this second condition pertains to the correct form for the expression of such testimony. Envisioning the presence of the witness and the use of the spoken word, it rules out such intermediacies as the messenger and written form, although testimony about testimony (*shahāda ʿala shahāda*) is possible. Exhibiting a marked formalism, and also the characteristic linguistic concern of the *Flowers* (see Messick 2001), this condition of the "expression" permits only direct locutions, using verbs grounded in the acts in question. It would forbid spoken indirections, including those such as "I know," which reference the status of the testimony.

In his commentary on the *Flowers*, however, Shawkānī systematically rejects the linguistic qualifications and analyses proposed by al-Murtaḍā. As elaborated in the twentieth century by al-ʿAnsī, these linguistic concerns mainly center on issues of "expression" (*lafẓ*), as in this second condition for testimony-giving. Shawkānī writes (4:191): "I say that the object in witnessing (*shahāda*) is the information provided by what the witness knows, in litigation, before the judge, by any expression that happened, and by any description that occurred." He cites here the view of the Hanbalī jurist Ibn al-Qayyim that the stipulation of a particular "expression of *shahāda*" has no basis in the Qurʾan, the Sunna, Consensus, or analogic reasoning. Concerning the *Flowers* notion of "proper performance," which Shawkānī also rejects, he continues,

> the only object is to understand the meaning intended by his [viz., the witness'] words. [What] if he produced an improper utterance, or unfamiliar expressions? The situation is not one demanding rhetorical elegance (*balāgha*) such that one should say that he stipulates 'proper performance.' Rather, the situation is one of information concerning what the witness learned, even if by obscure lingo or non-Arabic language, so long as one is able to understand that from him. [Also] it [viz., the testimony] is valid purely by understood gesture [even] from one who can speak, and by writing.[5]

This evidential type of "knowledge or certainty," or "certain knowledge" (*ʿilm yaqīn*) in another common formulation, ideally is to be received, carried, and later recalled, unreflectively—without "premeditation," as the English lawyers say (Bentham 1827). Relying on the authoritative sense capacities of the adult and sane witness, evidence is preserved (memorized) for later reproduction. The modal witness is the ordinary, untutored individual; to carry this form of evidential "knowledge", the acquisition of academic "knowledge" is not required.

The third condition set by al-ʿAnsī is the *Flowers*-articulated principle of the "*presumption of probity* (*ʿadāla*)." This presumption must be arrived at by the judge with respect to the witnesses in a case if he is to base his judgment on their testimony. A judge is not to act on the basis of testimony from a witness of less than secure justness even if he

[5] At a later point in his "Testimonies" chapter, Shawkani (4:203) reiterates this criticism, and refers to the *Flowers'* repeated stipulations concerning "expression" as a form of "rigidity" (*jumūd*) lacking any textual support in the Qurʾan or the Sunna.

presumes that the witness is telling the truth. Further, "he should not rule on the basis of doubtful testimony in the absence of the affirming of probity (*taʿdīl*)." As is illustrated in the cases from the period, this court procedure of *taʿdīl* (from the same root as *ʿadl* and *ʿadāla*), is one-half of the two-sided method of *jarḥ wa-taʿdīl*. *Taʿdīl* involves the buttressing of a witness by means of further, specialized just witnesses brought by the same side in the litigation, individuals whose only role in the litigation is to testify to the justness or probity of the principal, evidence-producing witness. The opposite of this witness-affirming by *taʿdīl* is *jarḥ*, the discrediting, literally the "wounding," of the other side's witness. This occurs by means of just individuals whose only role, again, is to undermine the opposing, evidence-producing witness's probity. What this *jarḥ* testimony 'wounds' is that witness's "justness," his or her *ʿadāla* (al-ʿAnsī 4:73).

As a pair of opposed mechanisms involving specialized witnesses, *taʿdīl* and *jarḥ* are treated in further detail in a later section of the "Testimonies" chapter (al-ʿAnsī 4:77-81), which I discuss below. At this point the third condition of witness probity is concluded as follows:

> In general, if witnesses come before the judge and if he knows their probity by [his] experience or by [their] reputation, he accepts their testimony. [However] nothing bars the opponent from [attempting to] discredit them with just witnesses [i.e., the *jarḥ* mechanism]. If he [viz., the judge] knows [something that] discredits them, if he wants, he can exclude them, this is first; [or] if he wants, he can hear their testimony and then invalidate it. If their [viz., the witnesses'] condition is doubtful, he may hear their testimony but may not act upon it, except after the affirming (*taʿdīl*) of them, [and] provided the opponent did not discredit them with just testimony.

At issue in this condition are particular dimensions of the judge's circumstantial (as opposed to his academic) "knowledge" (both, again, termed *ʿilm*), which can be decisive (cf. al-ʿAnsī 4:193). These dimensions are developed here in connection with his evaluation of witness probity. This is prior knowledge that he possesses coming into the case rather than knowledge he may gain from the litigants' evidence or from their acknowledgements or oaths.

Sheer numbers of witnesses can have their own weight if these numbers approach the technical level of *tawātur*, which is agreement about information by a large enough number of people to preclude their having conspired together in a falsehood.[6] This may be one

[6] Cf. *al-Majalla*, Principle 1677, p. 241. Based on Ḥanafi sources, Schacht

rationale for the large numbers of witnesses who sometime appear in Yemeni cases. As he discusses his condition of the presumption of probity in witnesses, al-ʿAnsī (4:70) refers to the special circumstance "when the number of witnesses reaches the degree of *tawātur*." A form of circulating and authoritative "common knowledge" that can become known to particular individuals (cf. al-ʿAnsī 4:277 on knowledge of the infliction of injury), *tawātur* functions here from the perspective of the judge. When a sufficient number of witnesses gives the same testimony, the principle of *tawātur* "requires [that their testimony be considered secure] knowledge (*ʿilm*); it is to be relied upon [by the judge] in all matters, on the condition that it is related to that which is testified about." The claimants in the 1960 murder case, for example, explicitly asserted that their evidence had this *tawātur* character.

In connection with evidence concerning such matters as descent, marriage, death, endowments and clientage, the *Flowers* (al-ʿAnsī 4:114) presents a related, but more specialized concept of "*renown in the locale*" (*shuhra fī' l-mahalla*). Al-ʿAnsī defines this "locale" as a residential group of at least five houses, presuming three people in each house. This specificity as to the types of legal issues and the precise definition are said to constitute the difference between "renown" and *tawātur*, which is the general concept. According to the *Flowers*, this "renown in the locale" "*may give rise to knowledge or* [to] *probability,*" the former, if the numbers of individuals are sufficient, the latter, if not. Shawkānī (4:215) is more cautious:

> It is necessary for the witness in these matters to be clear that his basis in his testimony is pure renown. The reason for this is that renown is a weak basis. If something stronger is opposed to it, judgment is not given [on its basis]. For how much of renown is constructed out of pure lies of the liar, and jokes of the joker! The listener gets an impression of its widespread character but it is discovered that it is the fabrication of a liar.

Al-ʿAnsī's (4:71) fourth condition for the correct performance of testimony-giving is "*his presence*," that is, the presence of the defendant, in the ideal scheme in which it is the claimant who presents evidence. The claimant, the normative evidence presenter, by contrast, need not be present at the litigation after the entering of the claim. The defendant must be present or he or she must be legally represented in

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(1964:193) states that "a greater number of witnesses does not lend additional value to their testimony."

court. In the court records, it often is written that a segment of evidence recorded was given "to his face," that is, in the presence of the litigation opponent.

Here al-ʿAnsī parenthetically lists the four possible types of legal representation: the delegate (*nā'ib*); the personally appointed legal agent (*wakīl*); the empowered individual, or guardian (*walī*); and the judge-appointed representative (*manṣūb*). In the mid-twentieth century Yemeni cases, *nā'ib*s were judicial officials appointed by the regular judge to act for him in handling a particular case; *walī*s usually were male guardians who acted for women, often their daughters, in their first marriage contract; *wakīl*s commonly represented clients in litigation, although, as advocates, they were neither formally trained nor state-certified; and *manṣūb*s occasionally were appointed by courts to attend a hearing in the absence of one of the litigant parties. The key difference between a *wakīl* and a *manṣūb* is that a *wakīl* may both hear evidence and respond to it while the *manṣūb* may only hear it. In general, at any court presentation of evidence, the opposite party in question, whether defendant or claimant, must either be in attendance in person or must be represented by a *wakīl* or a *manṣūb*. Without such representation and in the case of "his [viz., a party's] absence or his refusal to attend, he [the judge] cannot rule on its basis," that is, on the basis of evidence thus flawed in performative terms.

For his final, fifth and sixth conditions al-ʿAnsī combines and quotes two principles drawn from the preceding chapter on "Claims" (al-ʿAnsī 4:8). In that chapter two phrases from the *Flowers* appear as conditions (three and four) for a properly legal claim (*daʿwā*). Together they read, "*Correspondence* (*shumūl*) *of the claim with what is referred to by the evidence and its evidence should be non-composite* (*ghayr murakkaba*)," that is, whole. Ideally, regarding the element of "correspondence," a physical object about which a claim is made should be brought into court to assure referential certainty in the testimony, but, if this is impossible, a description, that is, details regarding sizes and boundaries, etc., must serve. In the earlier chapter, al-ʿAnsī gives some simple examples of the lack of correspondence between claim and evidence. One is a claim for a hundred and evidence about fifty; another is, "killing is claimed and the witnesses testify to injury." The second part of the *Flowers* phrase, "*and its evidence should be non-composite*", elicits no comment from al-ʿAnsī in either his "Claims" or his "Testimonies" chapters. In his *Flowers* commentary, however, al-Shawkānī (4:144-5) pragmatically accepts the non-correspondence

of claim and evidence while forcefully rejecting the notion that evidence must be non-composite. In their rendered court decisions, mid-twentieth century Yemeni judges often begin by mentioning their having considered the basic correspondence relationship between claim and evidence.

At this juncture, al-ʿAnsī (4:71) elaborates briefly on three techniques mentioned in the *Flowers* that may allow the judge to heighten the evidential quality of the testimony. One is a special type of oath (*yamīn*) he may request of a witness he suspects of "lying, deficient probity, or partiality." On the grounds of his suspicion (*tuhma*),[7] he may ask the witness to take an oath that his testimony is the truth. If the witness under suspicion declines to take this oath the testimony is not accepted. Although rejected in doctrinal terms by al-Shawkānī (4:193) and infrequent in application, a supplementary oath administered to witnesses does occur in a mid-twentieth century case I have examined. The second technique is physically to separate the witnesses in the court session as a precaution to insure that each testifies independently. This, so that the judge may "know their truthfulness and whether their testimonies differed, or not." The obvious danger is that "being together perhaps the second will testify with what the first uttered." The underlying principle is to ascertain difference: "if they differ in the testimony he should not rule on its basis." Reading court litigation records, however, we get a sense of a court scene in which groups of witnesses often appeared together and sometimes gave testimonies so similar that the minutes simply record that the witness "testified in a manner similar to (*mithl*) the previous witness" rather than quoting the same testimony again in full. However, examples abound in the case records of detailed attention to fine points of difference in testimony, both by judges and by opponents in the litigation. A third technique, which is significant in its relative inconsequence to this evidential system, is witness questioning by the judge. In the case records, interventions by the judge to pose questions in connection with testimony are few, at least in terms of what is recorded in the trial minutes. The *Flowers* states that the judge "*should not ask,*" with the example given, "*about the legal grounds* (*sabab*) *of the property*," which the commentator then extends to, "or rights testified about." In a footnote, al-ʿAnsī revises this negative *Flowers* dictum as follows:

[7] Other instances of the role of this "suspicion" in the court process are discussed in the chapter on "Judgment" (al-ʿAnsī 4:192).

"Except for a general benefit (*maṣlaḥa*) seen by the judge in this [asking], such as where the judge presumes that the witness does not know the legal basis (*mustanad*) of the testimony with respect to the property or the right... in which case it is proper for the judge to ask him about the legal grounds...." Normally, however, according to the doctrine, testimony is given whole and is not to be interrogated or otherwise interrupted by the judge, or anyone else. This system has no institution of witness interrogation, either direct or cross, whether by judge, attorneys or litigants. What it has, in both the evidence doctrine and in court practice, is the mechanism of witness disparaging (*jarḥ*). In court practice and in the written court records, we also find an institution of pleadings, consisting of ongoing statements by the litigants entered in the course of the litigation. These are devoted, in part, to the detailed criticism of opposing testimony and other evidence, on such grounds as inconsistency, improbability and outright mendacity. Partly, also, these pleadings argue a legal point of view. Litigants typically frame their own evidence with a view to the law on the books—typically as presented in the *Flowers* and its commentaries—and as expressed by the ruling imam in the form of concise personal doctrinal "choices" (*ikhtiyārāt*).

If the profile of the just witness is that of the upright Muslim, an individual who "prays, fasts, fears God, and so on" (al-ʿAnsī 4:70, n1), the somewhat Borgesian categories of individuals not permitted to testify are twelve in number (al-ʿAnsī 4:72-77). The list begins with (1) the mute individual, who is incapable of uttering the required "expression" (*lafẓ*), and there follow (2) the minor, (3) the non-believer (of several types, including locally resident Baniyan merchants from India), and then (4) the witness confirmed through the mechanism of *jarḥ* witnessing as unjust (*fāsiq*, the opposite of *ʿadl* and a term often translated as 'sinner'), which includes the murderer, thief, drinker, and one who has committed unlawful intercourse. Then there is (5) the individual *"who would derive benefit from it,"* that is, from the testimony, and in this connection al-ʿAnsi mentions both the legal partner and members of the killer's male-line relatives (the *ʿāqila*), the potential compensation payers, if they testify as discrediting witnesses against the witnesses to the killing; then, contrary-wise, (6) the individual who thereby *"fends off harm,"* or avoids an obligation; and, finally in this group, (7) the individual whose testimony incorporates a legally complicating personal *"acknowledgement of an act or a statement."* Also not permitted to testify are (8) the individual habitually

"*inattentive*," that is, absentminded or forgetful; (9) the individual having an established "*jealousy*" (*ḥiqd*), glossed as "enmity" (*ʿadāwa*) in the commentary, or "he who is made happy by his [viz., the adversary's] sadness and is saddened by his happiness;" and (10) the individual who habitually lies. Then there is (11) the individual *"suspected of partiality"* (*muḥābā*) based on a close legal relationship, the examples to be analogized from being a slave testifying for the master or a certain type of special lessee for the lessor. Notably, however, at least for the *Flowers*' author, the forms of partiality based on relations of kinship (*qarāba*) or marriage are not an impediment to being a witness. Again, al-Shawkānī (4:199), commenting on the *Flowers,* disagrees: for him there is no difference between these and others for whom there is a possible suspicion of partiality that will cause a testimony not to be accepted. A Qur'anic injunction, not cited in this particular legal discussion, puts the kinship issue in broader terms: "...[be] securers of justice, witnesses for God, even though it be against yourselves or your parents and kinsmen" (Qur'an 4:134). Finally, (12) testimony is not permitted from the blind, or the deaf, etc. in cases in which the impaired sense is necessary to the type of evidence.

Judging evidence

In the interpretation of evidence there are two standard problem scenarios faced by the judge. One concerns the "differing of the two witnesses," that is, the differences in testimony given by the two witnesses on the same side in a case. The second concerns the "opposition of two [sets of] evidence," (lit., "two evidences"), that is, conflicts between evidence when offered by both sides in a case (al-ʿAnsī 4:93). The first scenario represents the simplest and also the doctrinally normative case in which one side, the claimant, presents evidence; the second is the compound form (characteristic of most cases) in which both sides produce witnesses. The first scenario is treated in terms of a check-list of ways in which the two witnesses may differ in their testimony and of the associated consequences. A key analytic issue raised by the *Flowers* (and contested by al-Shawkānī) for the assessment of differing testimonies concerns the relation within them between "expression" (*lafẓ*) and "meaning" (*maʿnā*). The second scenario is presented as a series of graduated analytic steps, marked "then ... then ...," to be taken in preferring one side's evidence over the

other and, finally, in resolving an evidential deadlock. As they are discussed, both scenarios treat what is assumed to be the normative case, specifically, the "light," or two-witness model associated with cases of "rights and properties."

Once the litigation roles of claimant and defendant have been allocated by the judge, the simple or normative model of litigation is the one articulated in the well-known hadith, "upon the claimant is the evidence (*bayyina*)." In this simple model, on the basis of satisfactory evidence from the claimant's side alone, judgment can be given. The sequential presumption rationales for the two stages of this simple litigation process are as follows: (1) Initially, the presumption operates in favor of the party with the stronger "matter," that is, the position deemed to be that of the apparent status quo (*ẓāhir*). This is the defendant. The claimant, who also is identified in this same initial determination, assumes the burden of proof. If the claimant brings no evidence, the defendant wins by default, since, in the absence of proof, the presumption continues to operate in favor of the defendant. (2) If proper and sufficient evidence is brought by the claimant, however, a new, approximately reversed situation obtains whereby preference is given to the sound evidence brought by the claimant. In the simple model, the defendant does not bring evidence, and the defense consists only of the denial of the claim. The outcome is that the claimant's sound evidence trumps the defendant's denial and a ruling for the claimant follows.[8]

The underlying assumption of the "differences" doctrine is that the testimony of the requisite two witnesses on a given side must be the same. As an interpretive problem, "differences" between the two witnesses presented by the claimant are treated by the jurists as part of the litigation model in which only this side presents evidence, but the analysis entailed also may be applied to each of the two sides in a compound case. As was mentioned earlier, the *Flowers* says that the judge may employ the technique of ordering the physical separation

[8] On this type of conclusion to the simple model of litigation, see, for example, Peters (1997:207), "As a rule, the qāḍī must find for the plaintiff if the latter can prove his claim by corresponding testimonies given by two male witnesses"; Johansen (1999:436), "S'il y a des témoins et si leur témoinage concorde avec la demande, le judge décide en faveur du demandeur"; and Vogel (2000:147), "[I]f she [the plaintiff] brings two witnesses who qualify in all respects and who give testimony establishing the claim, her claim is proved and she wins without further ado. The defendant has no opportunity to mount witnesses to present a contradictory version of the facts."

of the witnesses to heighten the quality of the evidence. This, again, according to al-ʿAnsī (4:71), was so that the judge could "know their truthfulness and whether their testimonies differed, or not." Later, al-ʿAnsī (4:84) elaborates on the notion of "difference" (*ikhtilāf*) between two same-side witnesses. "Difference" in testimony may concern such matters as "time" (*zamān*), "place" (*makān*), "quantity" (*qadr*), and, in connection with contracts, the "form" or "description" (*ṣifa*). There is tolerance of some types of differences based on a notion of general plausibility, but there also are discrepancies that fatally compromise the evidence. A key collateral issue, mentioned earlier, concerns the relationship of testimonies to the claim they are intended to support: this is the required "correspondence." One approach to differences in testimony is to consider the area of the two witnesses' agreement and to accept this much as evidence. Some differences subsequently may be remedied by a method involving the "completion" (*takmīl*) of the evidence, for example, by producing a further witness with testimony complementing the remaining part of the testimony of one of the original witnesses. However, some types of testimony flaws may mean that the evidence cannot be rendered complete. It is possible, also, that significant differences between witnesses' testimonies may introduce a defect such that the witnesses' credibility, their "justness," is itself put in question, disparaged, in a *jarḥ*-like manner.

Finally, as noted, the *Flowers* introduces the distinction between "expression" (*lafẓ*) and "meaning" (*maʿnā*) to analyze certain types of agreement and disagreement between different testimonies and this generates examples of possible permutations and combinations. Shawkānī (4:200, 205), however, rejects entirely the analysis of agreement on the level of "expression." He argues that such linguistic attention to questions of "expression of the testimony," which is characteristic of the privileged place of "expression" (in relation to "meaning") in the analytic regime of the *Flowers*, introduces an "inflexibility" (*jumūd*) that is entirely unwarranted. Shawkānī's view, here and elsewhere, is that analyses should attend to "meaning alone."

The relevant *Flowers* passage for all this begins as follows: "*The differing of the two witnesses, whether in the time of an acknowledgement or legal act, or their place, is not harmful, while in the quantity acknowledged the correct* [solution] *is what they agreed about in expression and meaning.*" The *Flowers* then goes on, concisely, to give two examples of such agreement, both positive, "*such as one thousand with one thousand five hundred,*" and negative, "*not*

two thousand." Al-'Ansī's commentary extends these concise lines from the *Flowers* to nearly two printed pages, which begin as follows:

> *The differing of the two witnesses* in their testimonies may be in [several] things, *whether in the time of the* information, as in *an acknowledgement,* such as if one of them says, 'I swear that he [viz., the claimant] acknowledged [on] Friday,' and the other says, 'Saturday,' *or* time of the *legal act,* in contracts and other than them, such as sale, marriage, gift, and remission of debt, such that one of them testifies that he [viz., the claimant] sold on Friday and the other says in his testimony 'Saturday', *or* in *their place,* such that one of them says that he acknowledged in such and such a place or sold in such and such a place, and the other says in another place, their differing *is not harmful* in all this.

This basic "plausibility" or "conceivability" (*ḥaml, iḥtimāl*) of such differences in testimonies is joined with the conclusion that such differences also do not constitute a disparagement of one witness by the other. For al-Shawkani (4:206), the basic principle for handling difference in testimonies is "if plausibility is possible in accord with the variation in reality, then so be it, and the difference is not harmful, but if it is not possible then it constitutes a flaw (*qādiḥ*) in the testimony until such time as the situation is clarified."

Al-'Ansī gives the example of a witness who says that an acknowledgement was in Arabic while the other says that it was in Persian, and this language difference also is not an obstacle. The commentary continues,

> *while,* if the two witnesses differ *in the quantity* of the thing *acknowledged,* such as if one of them testifies that he [viz., the claimant] acknowledged one thousand and the other one thousand five hundred, and the claimant claims one thousand five hundred or two thousand, and, likewise, if the two witnesses differ in the quantity of remitted debt, *... the correct [solution] is what they agreed about in expression and meaning.*

Quantitative differences are significant and the method given by the *Flowers* to attempt to resolve them is to find the extent of agreement of the two testimonies according to both expression and meaning, provided the corollary issue of "correspondence" with the claim is satisfied. Al-'Ansī gives an example of an "agreement about quantity in both expression and meaning." This is "if one of them [viz., the witnesses] testifies that Fulān acknowledged, or remitted a debt, or sold, or leased, to Fulān 'for one thousand,' and the other says in his testimony 'for one thousand five hundred,' then the 'thousand' [is what]

the two witnesses agreed about in expression and meaning," although he remarks that there may be a remaining problem of "correspondence" with the claim. He gives his version of this example just before quoting the same example from the *Flowers*:

> The Imam [al-Murtaḍā], peace be on him, gives the example of what they [dual] agreed about in expression and meaning when he says, *such as* if one of them testifies to *one thousand with* testimony of the other for *one thousand five hundred.* They [dual] agreed to one thousand in expression and meaning, and the thousand is necessary [to enforce, rule on, etc.].

In the case record from the pre-Revolutionary period there are instances of parties to litigation, in their pleadings, and of judges, in their rulings, using this rubric of "difference" and pointing out examples of discrepancies in testimony. In the 1960 murder case, for example, the defendant draws attention to differences in the opposing testimony. "Their testimonies," he states, "differed to the extent that some of them stated that I fled without it being verified that [a single] one of them was present in the place claimed to be that of the murder." Likewise, in one of their pleadings in the same case, the claimants stated, referring to witnesses for the defense, "and the world knows [about] the lying of their testimonies, differing as to how they lie from one to the other." In his ruling, the judge remarks that certain testimony on behalf of the defendant, which he did not accept, contained a detailed and decisive inconsistency as to the actual place—a coffeehouse versus a warehouse—where the events and words testified to occurred.

The other major scenario of evidence interpretation typically confronted by the judge concerns the "opposition of two [sets of] evidence" (al-ʿAnsī 4:93-6), again assuming the fundamental soundness of the evidence on both sides. Unlike the first scenario, which, as noted, concerns differences between the testimonies on a single side in the simple, but doctrinally normative case in which the burden of proof rests upon the claimant alone, this second scenario involves a compound type of case in which evidence is presented by both sides. It is through this second scenario of "two [sets of] evidence" that the most common type of sharīʿa court litigation, namely, an evidential struggle between two parties, enters the doctrinal landscape.

How is this compound type of litigation analyzed? Is it "compound," as I have called it, in the sense that it is composed of a doubling of the simple, or normative positions of claimant and defendant, or does it involve a shifting back and forth of these roles? Johansen (1999:438)

writes that "[t]he [Ḥanafī] jurists state that in a civil process the two parties may act simultaneously as claimants and as defendants. They underline the fact that the designation of the parties as claimant and defendant often is purely formal and says nothing about their real relations, in the process, or about their abilities to produce proofs." It may be observed, however, that this recognition of formalities and of the complexities and realities of litigation in practice is not fully reflected in the Zaydī school doctrine. Except for discussions such as that of the "opposition of two [sets of] evidence," the normative type remains the simple, or single-sided evidence model represented by the formula "upon the claimant is the evidence (*bayyina*)." At the level of actual cases, as in the Yemeni highlands at mid-century, the roles of claimant and defendant, which are fixed at the outset and which require that the claimant take the lead in presenting evidence presentation, typically thereafter give way to a situation in which both sides bring evidence. They also both make arguments, in an ongoing fashion during the litigation, in statements (which I call "pleadings"), which take the form of a "response" (*jawāb*, *ijāba*) to the other party's assertions and evidence. The model of such responses, of course, is that made initially by the defendant in denying the opening claim (*daʿwā*).

I want to pose a further question concerning the analysis implied in this doctrinal situation of the "opposition of two [sets of] evidence." Schacht (1964:195-6), also reading Ḥanafī doctrine, says that, "if both parties produce evidence," there are "two possibilities" involved: "one of the two [sets of?—BM] testimonies is given preference, in analogy with the doctrine of presumptions, or *tahātur*, the conflict of equivalent testimonies, takes place." He says that the first of these "possibilities" is based on the rule "that the evidence of the party who has not the benefit of presumption is given preference." As noted earlier, this "benefit of presumption," involving, among the Zaydīs as in the other schools, a determination of the stronger position with respect to the apparent status quo (the *ẓāhir*), is integral to the initial determination of the litigation roles of claimant and defendant and to the placing of the initial burden of proof on the claimant. Thereafter, once the roles are set on the basis of this "presumption," the rule is that preference is given to evidence produced by the claimant. This, again, is the pattern of the simple litigation model. My question is, 'How does this work if the litigation roles shift, if both parties can act as claimant and defendant?' That is, (a) how does the "benefit of presumption" work in compound litigation, and, (b) what happens to the rule of

"preference" in the weighing of opposed "[sets of] evidence" when the initial presumption shifts, alternates, or becomes "simultaneous?"

An answer to these questions may be found in the doctrinal principle that "testimony *in support of a denial is not valid*" (al-ʿAnsī 4:106). Testimony is invalid when "witnesses testify that there is no right for so and so against so and so, or that this thing is not so and so's." Otherwise put, testimony must be affirmative rather than negative. With respect to the opposed litigation roles, testimony should be in support of a claim rather than in support of the denial of that claim. This is another way of stating the basic principle that "upon the claimant is the evidence (*bayyina*)." In compound litigation it means that in order for the defendant to present evidence this party would have to assume a claimant position, which involves making an affirmative claim. The defendant who acted in this manner thus would not offer evidence as the defendant but rather as an additional claimant in the case. This situation, characteristic of an instance of compound litigation, would no longer involve a simple evidential presumption pertaining only to the original claimant, but instead it would be one of a conflict of presumptions between two sets of opposed affirmative evidence presented by two parties with counter-claims. This is precisely the problem of the "opposition of two [sets of] evidence."

Johansen (1999:441) writes that to confront the interpretive situation of opposed evidence "the jurists developed a system of presumptions (*tarajjuḥāt*)."[9] For the Zaydīs, the most important of these presumptions is the principle that "an establishment takes precedence over a denial" (*al-ithbāt muqaddam ʿalā al-nafī*).[10] At the most general level, this, again, restates what ensues once the litigation roles are established, namely, that the evidence of the affirming claimant is given precedence over the denying defendant. This principle applies in other ways as well. Some are theoretical, as I will discuss below in connection with *jarḥ wa-taʿdīl*, and some are practical, as a version of the same principle operates in court litigation. In the terminology of modern jurisdictions, *shāhid al-ithbāt* refers to the "witness for the plaintiff" and *shāhid al-nafī* to the "witness for the defense."

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[9] Johansen goes on to say, "[T]here is a large number of such legal presumptions and the manuals for muftis give more or less complete lists." The citation here is to Ibn ʿĀbidīn, the early nineteenth-century Ḥanafī jurist.

[10] Cf. Liebesny 1975:243-44, citing Mālikī texts. He also cites the Roman law principle, from the *Digest of Justinian* (22.3.2): "the burden of proof is upon him who affirms, not upon him who denies."

In Yemeni court records, in compound cases with evidence presented by both sides, we find examples of this general principle being invoked and implemented. In a 1930 Yemeni property case, for example, the judge ruled on a matter of legal capacity. His ruling specifically concerned opposing evidence as to the sanity of a woman who acted as the seller. He states that, according to the jurists of the Zaydī school, "testimony brought about the sale with her in a condition of sound mind and body is to be given precedence over testimony about the sale in a condition of [mental] possession, inasmuch as the basic principle and that which is established is the presence of mind and other than this is what is being denied." Citing the basic principle, the judge concludes, "That which is established takes precedence over that which is denied (*al-muthabbat muqaddam ʿalā al-nafī*)." Two principles actually are at work in this case. There is, first, an instance of a substantive "basic principle," namely, that sanity is the normal condition of people. This is combined, second, with that of the precedence of what is affirmed over what is denied. It is interesting to note that in the course of this compound case, with the litigation roles alternating as both sides offered evidence, it was the original defendant, the party with the formal role of denier in simple or one-sided evidence litigation, who presented evidence affirming the woman's sanity, and it was the original claimant, the party who, in the formal terms of single-sided litigation, seeks evidentially to substantiate his claim, who presented evidence to deny the woman's sanity at the time of the sale transaction.

In al-ʿAnsī's treatment of the "opposition of two [sets of] evidence," the first possibility considered, following the *Flowers*, is that both may be implemented. The example offered of such a resolution is where one person claims that an individual sold in full capacity and presents supporting evidence while the other party, the individual himself, says that he did so while suffering from a mental impairment and he, too, presents supporting evidence. If it can be shown that there were two time frames involved, and thus two acts, then the judge may rule in favor of both parties. This dual implementation approach cannot be sustained, however, if the parties insist that there was only one time and a single act. In that case, as in the just mentioned 1930 property case from Yemen, the two sets of evidence contradict one another, and the judge must find another basis for a ruling. Al-ʿAnsī suggests that this should involve a determination of the individual's normal condition, sane or not. Shawkānī (4:206), however, sees this possibility

of implementation as obvious, as "among those matters that do not need to be written [about]," since the basic feature of evidence contradiction as a doctrinal issue is precisely that the two sets of evidence cannot be reconciled.

At this point, the first type of precedence between two sets of opposed evidence is introduced. Introduced also are two characters, the "insider" and the "outsider" (Schacht's "stranger"), who are defined by their differing relations to a contested property. The "insider" is an individual who has possession (*yad*) of the property while the "outsider" does not; as a consequence, they occupy the litigation roles of defendant and claimant. This is in litigation initiated by a claim from the "outsider" of ownership (*milk*). Precedence here, which is phrased as *"give precedence to the 'outsider' evidence*," may be thought of as still another version of the now familiar model of precedence in simple litigation. Al-ʿAnsī (4:93) explains that 'outsider' evidence "is the evidence from he who did not have the apparent status quo (*ẓāhir*) on his side," that is, the claimant. The example situation al-ʿAnsī offers (simplified with ellipses) is:

> if a house is in the possession of a man [the 'insider'] and another person [the 'outsider'] claims it and presents evidence that he owns it ... and he who has it in his possession presents evidence that he is the owner of it ... the evidence of the 'outsider' is given preference and the judgment concerning the house is in his favor.

Posed here in conflict are the two major strands of property relation, possession and ownership. Possession is the strongest status quo property principle. According to a rule cited further along, "possession is the indicator of precedence" (*al-yad dalālat al-taqaddum*). So the possessor, the 'insider,' becomes the defendant in the litigation. However, in the single-sided evidence scheme of simple litigation, the subsequent presentation by the claimant of sound evidence of ownership (as distinct from possession) should, in and of itself, produce a judgment for the claimant. This evidence of ownership should trump the defendant's denial of his opponent's ownership claim. But compound litigation is assumed here, and al-ʿAnsī continues on from the model of single-sided evidence to the situation in which evidence is produced by the defendant as well. It is unclear, however, at least in terms of the schema presented in al-ʿAnsī's chapter on evidence, how or why the process continued, moving from simple litigation to compound, from one-sided to two-sided evidence. A rationale for the continuation may be found, however, in the chapter on "Judgment," in

the principle, requirement seven, that the defendant may offer a "parry" to the evidence presented by the claimant and also may bring his or her own "proof" to counter it. In the schema in the evidence doctrine, however, following the claim and evidence presentation by the claimant, we simply are told that countervailing evidence was presented by the defense.

I described the preference rule applied here as a "version" of the rule relevant to a situation of simple litigation. In simple suits the preference for the claimant works with only that side presenting evidence, whereas in this example of compound litigation it continues to work with both sides doing so. It may be assumed here, although this assumption may remain implicit, that the "defendant" in the case also made a claim and that this was the basis for this party's presentation of evidence. Or, a distinction is being made between "evidence," presented by the claimant and, if sound, the basis for the judge's judgment, and "proof," a counter to the claimant's evidence.

After al-ʿAnsī (4:94-6) presents this major principle of precedence with respect to "two [sets of] evidence," he outlines a series of four further ways of determining precedence (*tarjīḥ*). They rank "after it [viz., the just discussed major principle] in authority" (*quwwa*). In the *Flowers* text these four consist of a simple series of successive possibilities marked "then", "then," etc. According to the first "*then,*" the distinction operative in the above example of the house property between "insider" and "outsider" now does not apply: either the two parties are both insiders, or both outsiders, that is, they are both in partial possession, or neither has any. In this situation the timing of the transaction is at issue and "*the first*" in time is given precedence. As an example,"if one of them presents evidence that he bought this house from ʿAlī on Friday the second of Rajab and that he owns it, and the other presents evidence that he bought it from ʿAlī on Saturday the third of Rajab and that he owns it, he [viz., the judge] rules on the basis of the antecedent [evidence], and this is that which specified 'Friday'". Following this possibility, precedence "*then*" goes to "*the dated*" transaction over the undated. The principle cited here is that "the date is an indicator of precedence" (*al-tārīkh dalīl al-taqaddum*). Following this possibility, the third "*then*" in the series refers to the latter of Schacht's "two possibilities," mentioned above, which is that "*tahātur*, the conflict of equivalent testimonies, takes place." Quoting and elaborating on the *Flowers,* al-ʿAnsī (4:95) states, "*then,* if the two [sets of] evidence are opposed and precedence (*tarjīḥ*) was not

possible for either of them [viz., the two sets of opposed evidence] against the other by any of the perspectives previously presented here or in the "Claims" [chapter], then *they* [finally] *contradict one another and* he judges for the thing, holding *for the one with possession*, established as such, together with his [viz., the possessor- defendant's] oath." In this next-to-last situation possession figures as "circumstantial evidence of the indicator of precedence" (*qarīna li-dalālat al-taqaddum*). If none of these means of establishing precedence is possible, and if neither party has sole possession, i.e., both are "insiders" or both are "outsiders," "*then*" the final possibility is "*to divide the disputed thing*" between the parties.

Jarḥ and taʿdīl

Witness integrity is the keystone of this system of justice. Countering the multiple conditions for witnesses according to the *Flowers*, Shawkānī (4:192) states simply that justness (*ʿadāla*) "is the only condition stipulated by God Almighty in His Book."[11] "The justness of witnesses," in his metaphor, "is the condition upon which the bridges are built." He continues,

> The intended [meaning] of this *ʿadāla* is that the judge knows, or someone with insight into the circumstances of the witnesses informs him, that at the time of the giving of the testimony they were enactors of what God requires of them and abstainers from what He forbids to them, [and that] they are not among those who have the audacity to lie.

He adds,

> The greatest principle of justness is the aspiration to truthfulness (*al-ṣidq*), [together with] the avoidance of indulgence (*tasāmuḥ*) in speech, or exaggeration (*tazayyud*) in it. He who is thus is the just witness.

Out of this culturally and historically specific notion of witness integrity comes the possibility of truth, but the implementing design is other than the institutions which may be familiar, for example, from the Anglo-American system. Rather than by the common law jury, witness integrity is assessed directly by the shariʿa court judge, who uses his trained and experienced faculties of assessment, the help of

[11] Shawkānī cites here two Qurʾanic texts (65:2; 2:282): "Have testify those of justness among you," and "Of those you consent to among the witnesses."

others he trusts,[12] and his own prior knowledge.[13] Additionally, regarding the compound mode of litigation in which two sides present evidence, where the Anglo-American courtroom emphasizes the (ideally) truth-producing contest of lawyers for the two sides, who question and cross-examine their own and opposing witnesses, the shari'a system depends, but to a lesser extent, on the mechanisms of witness disparaging and confirming, *jarḥ* and *ta'dīl*. In actual court cases in mid-century Yemen, on the supporting, or *ta'dīl* side, the common usage is that each of the two required witnesses is buttressed by two individuals (for a total of four *ta'dīl* witnesses). These buttressing individuals of *ta'dīl* are known in Yemeni court practice as *mu'addilīn* or *mu'arrifīn*. As these two terms indicate, such individuals typically declare the justness (*'adāla*) of the main witness and also make this individual known to the court.

Making an unknown witness known to the court involves the fundamental task of identification. Neither the Zaydī evidence doctrine nor the practice of the imamic courts of the era envisioned any sort of documentary, technical or scientific supports for such identifications. Prior to the 1962 Revolution in highland Yemen there were no identity papers in the modern sense. Yemen was not a nation of citizens, of technically "homogeneous" individuals (in Benedict Anderson's sense) differentiated and yet also fixed by their identifying papers. There were, of course, numerous unwritten markers of pre-revolutionary identity, including, then as now, dialect 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. 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. These days such documents identify the Yemeni citizen by name and by one or more types of registered number, just as individuals now have a numbered postal address, a telephone number, and a vehicle license number. With print technology, advancing commercialization, professionalization, universal education,

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[12] In the chapter on "Judgment" (al-'Ansī 4:187) the second item on the recommended list for the judge is to consult "just and well-informed individuals." For discussion see below.

[13] *'Ilm al-qāḍī*, discussed in the chapter on "Judgment" (al-'Ansī 4:193).

and international wage-labor migration, individuals also now have entire personal dossiers of documents, including certificates of birth and residence, diplomas of scholastic achievement, employment records, various sorts of attestations of marital, military, or tax status, and, for some, their passports. 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 multiple copies of the documents themselves.

Whereas the contemporary Yemeni litigant presents his or her state identity card in court (Würth 1995, 2000), in the sort of polity assumed in the doctrine and approximated in the pre-Revolutionary highlands, legal identification occurred without recourse to such modern practices. The Islamic evidence regime also was limited in conception to the sphere of the court. Modern techniques of police work and related issues surrounding the collection and handling of "evidence" do not figure in the doctrine. For criminal cases, there were no fingerprinting technologies or blood sampling and DNA-testing laboratories to aid in identifying culprits, and there were no specialized coroners. An "investigation" in the example murder case of 1960 was conducted without specialized professional training by the general political authority. An "investigation" report was prepared by the local District Officer and later entered in the court record.

In the Yemeni courts of the imamic era, the entire weight in the identification of witnesses rested on the human links of interpersonal knowledge. In many local cases all the parties were known to the judge and, as a consequence, no identification procedures are noted in the court record. In other cases, however, typically those involving people from an outlying rural district, explicit mechanisms of identification are employed. Even in such cases, however, some individuals may be listed in the record as "known to us," that is, to the presiding judge, and thus requiring no further identification, while others, initially unknown to the court, had to be identified by individuals who were known. Rural leaders and notables, including regional shaykhs, village heads and prominent scholars, the sorts of individuals who would have business and contacts in town and who would likely become known to the local judge, typically would provide the requisite formal identifications and affirmations of probity. These identifications and affirmations were entered in the court record using the formula of *taʿdīl*.

Formal legal names appeared on shariʿa property and litigation documents. At this historical moment just before modern family names

were chosen, registered and entered upon all manner of personal documents, men and women involved in legal contracts or in litigation were identified legally by a tripartite name (cf. Peters 1990:114) comprising their own "first" name, their father's first name, and their grandfather's first name, with "son of" and "son of" either stated or implicit. In contrast to the informality and practicality of the names recorded on official state lists of the era, for example, the tripartite name constituted an individual's formal identity in the law. Identity also was firmly territorial: parties and witnesses in cases are identified by the unnumbered addresses of the period, a named town or village of residence, in a named region, district and province. In connection with his research on nineteenth century homicide trials in Egypt, Peters (1990) notes how errors concerning tripartite names could derail the legal process. In Yemeni cases of the period, mistakes regarding names are given special emphasis in the trial record.

On the doctrinal level, the rule complex of *jarḥ wa-taʿdīl* is the site of a significant difference within the Zaydī school. Simply stated, it is a difference as to the status of what is imparted and, as a consequence, of the status of those who impart it. The fifteenth-century *Flowers* (al-ʿAnsī 4:77-81) holds that "*jarḥ and taʿdīl are information (khabar), not testimony (shahāda).*" That is, what the judge learns from these individuals is not itself evidence and they are not considered witnesses. Even though the individuals who convey it still must be just, "information" cannot attain the certain status of (just) "testimony," which is a type of "knowledge" (*ʿilm*). In this position Imām al-Murtaḍā, the author of the *Flowers*, follows the still earlier Zaydī Imām and jurist al-Muʾayyad bi-Allāh. Al-ʿAnsī also identifies this view as that of the Hadawī subgroup of jurists within the school, jurists named after al-Hādī, the first Zaydī imam in Yemen. Al-ʿAnsī notes that this Hadawī position also is held by Abū Ḥanīfa, eponym of the Sunnī Ḥanafī school, among others.

The opposite position, that material presented in court about witnesses has the status of testimony and that the individuals who impart it are witnesses, is said to be held by the eponyms of other major Sunnī schools, such as al-Shāfiʿī and Mālik. Further, according to commentator al-ʿAnsī, this opposing position is to be considered the correct view of the Zaydī school. In this assertion al-ʿAnsī enters into a rare sharp difference with the authoritative text of the *Flowers* he is commenting upon. This also requires some contortions in his

discussion, as the diametrically opposite position of the *Flowers* is incorporated in full quotation into his commentary text.

This key concept of *khabar*, or "information," figures centrally in two significant doctrinal disputes, the first illustrated by the just presented analytic differences in the rules on *jarḥ wa-taʿdīl* within the doctrine of evidence. Another involves opposed positions in the Zaydī school concerning the doctrine of intent (Messick 2001). In the evidence doctrine, *khabar* is opposed to *ʿilm*, or "knowledge," with the relations in question being human-to-human transmissions. In the intent doctrine, by contrast, the relation involves a single human and concerns differences as to the legal status of an individual's manifest expression (*lafẓ*). In this instance *khabar* is opposed to *inshāʾ*, "creative or performative legal act." That is, such an expression by an individual may be considered either "information" that is not in itself constitutive of a legal act or as a legal act in itself. In both instances the positions taken within the Zaydī school—the Hadawīs on the one hand, represented by the *Flowers*, and that of the later jurists of the school, notably including Shawkānī, on the other—echo lines of difference among the several Sunnī legal schools. As I mentioned earlier, in the matter of *jarḥ wa-taʿdīl*, al-ʿAnsī explicitly cross-references the relevant Sunnī positions. As he states, the *Flowers* position that such individuals give "information" not "testimony" is in accord with the Ḥanafī school while that of the dominant later position of the Zaydī school, which holds that what they give is "testimony," coincides with the views of the Shāfiʿī and Mālikī schools.[14]

The main consequence of considering these individuals who appear in *jarḥ* and *taʿdīl* as witnesses is that all the rules of witnessing apply to them as well, including their required use of the "testimony" expression (*lafẓ*), that is, the *shahāda* formula, when they give evidence in court. Also, whereas the opposed position (that they are not witnesses) requires of the informants only general statements as to

[14] Viewed across the two problem areas of evidence and intent, the concept of *khabar* is not simply a leitmotif such that one set of Zaydī jurists consistently frames their views in its conceptual light. The opposite is the case: whereas the *Flowers* (representing the classical Hadawī position) comes down on the "information" side in the evidence doctrine, it is on the other side in the doctrine of intent; while Shawkānī and other later Zaydī jurists center their intent arguments around the notion of *khabar*. Similarly, alignments with the Sunnī schools are not consistent: the early *Flowers* position on *jarḥ wa taʿdīl* is similar to that of the Ḥanafīs, but its position on intent is similar to that of the Shāfiʿīs, and vice versa for Shawkānī and the predominant later Zaydī view.

whether a witness is *ʿadl* or its opposite, *fāsiq*, the Zaydī school's majority position, according to al-ʿAnsī, is that the *jarḥ* and *taʿdīl* witnesses must provide details. The technical basis for *jarḥ* testimony against an individual witness is defined as the existence of *"any forbidden act or omission,"* according to the school or beliefs of the individual attacked. At this juncture, al-ʿAnsī (4:79-80; cf. the similar Shāfiʿī view as articulated by al-Nawawī, discussed in Messick 1993) discusses some detailed social indicators of the lack of probity, ranging from chess playing to urinating in a public street.

A corollary of these rules is a pair of views as to the necessity of the judge's reliance on just and well-informed individuals (*ʿudūl dhawī khibra*), a topic raised both here, in the "Testimonies" chapter, and later in the "Judgment" chapter (al-ʿAnsī 4:187). According to the *Flowers*, the judge is required to make use of such informed individuals. He "asks them about the circumstances (*ḥāl*) of individuals about whom he is ignorant," including, al-ʿAnsī notes, both parties to the case and their witnesses. In his commentary, however, al-ʿAnsī reduces this *Flowers* requirement to a recommendation. This difference may be explained by positions taken concerning the status of *jarḥ wa-taʿdīl*. If these individuals are not considered witnesses (the Hadawī position of the *Flowers)*, then the judge has need of the supplementary information provided by such just and well-informed individuals; if they are considered witnesses (the majority position of the Zaydī school and that of al-ʿAnsī), then this supplementary institution is of reduced significance. Concerning his demotion of the institution from required to recommended, al-ʿAnsī remarks "it is only recommended since, if the judge is ignorant of the circumstances of the witnesses, he asks for their *taʿdīl* from the claimant."

A final important feature of this two-sided mechanism is the rule privileging the critical testimony of *jarḥ* over the supporting testimony of *taʿdīl*. The basic *Flowers* principle, which also is quoted verbatim in a pleading in the 1960 sharīʿa court murder case, holds that *"the disparager takes precedence, even if those who declare trustworthy are many."* Al-ʿAnsī (4:80) expands on this phrase as follows: "If two, or more, just individuals testify to the *ʿadāla* of a witness and a single just male or female testifies in *jarḥ* of him, the testimony of *the disparager takes precedence* over the testimony of the one who declares [him] trustworthy *even if those who declare [him] trustworthy are many*." He explains that the rationale for this weighting in favor of the *jarḥ* witness is that this witness "testifies on the basis of a substantiation

(*taḥqīq*) of the circumstance of the witness [whereas] the *taʿdīl* witness [does so] on the basis of his [viz., the primary witness's] apparent (*ẓāhir*) circumstance." The way the *jarḥ* witness gains this disparaging knowledge involves the hearing or seeing of bad acts, or via reputation (*shuhra)* or widespread common knowledge (*tawātur*) of the same, or by an acknowledgement.

In his *Flowers* commentary Shawkānī (4:200-01) links this privileging of *jarḥ* over *taʿdīl* to the general principle of evidential precedence, mentioned earlier. As he explains, the typical *muʿaddil* who declares a primary witness trustworthy testifies to the fact "that he does not know of a perpetration [by the primary witness of an illicit act] that would disparage the testimony of the witness." According to the court record from 1960, this is precisely how *taʿdīl* witnesses in the murder case testified. Shawkānī pointedly observes, however, that "the non-existence of knowledge [of something] does not constitute knowledge of its non-existence." That is, as evidence, such *taʿdīl* testimony constitutes a denial of knowledge rather than evidential knowledge itself. The testimony of the disparaging *jarḥ* witness has the opposite character: "he testifies to the perpetration by the [primary] witness of that which disparages his justness." "This," Shawkānī concludes, giving the phenomenon an analytic label, "is an establishment" (*ithbāt*). This analytic identification leads him to cite the relevant general principle of precedence, mentioned earlier, namely, that "an establishment takes precedence over a denial [*al-ithbāt muqaddam ʿalā al-nafī*]. Since testimony asserting knowledge trumps testimony denying knowledge, *jarḥ* testimony trumps *taʿdīl* testimony.

A closely related formulation of the difference between *taʿdīl* and *jarḥ* witnessing uses the distinction between "knowledge" (*ʿilm*) and "probability" or "probable knowledge" (*ẓann*). Ordinarily, as noted earlier, the general rule is that witnessing must occur only on the basis of knowledge. There are seven exceptions, however, instances or topics in which it is permitted for a witness to testify on the basis of probability, or probable knowledge (see al-ʿAnsī 1:29-33). One of these seven is in *taʿdīl* witnessing. By contrast, the *jarḥ* witness always must testify on the basis of knowledge. Using the same analytic language employed by Shawkānī, al-ʿAnsī (1:30) writes that "the difference between them is that *taʿdīl* [witnessing] is a denial of matters that are presumed not to obtain and *jarḥ* [witnessing] is an attestation of matters that are presumed not to obtain." "Therefore," for *jarḥ* witnessing, "knowledge

and certainty are stipulated." In terms of knowledge and certainty as well, the *jarḥ* witness trumps the *taʿdīl* witness.

While it is typically the parties to the litigation who take the initiative to bring witnesses in *jarḥ* and *taʿdīl*, according to the chapter on "Judgment" (al-ʿAnsī 4:188) the judge also may intervene. Listed as one of the *Flowers'* twelve requirements of judging is the "*demand*" addressed by the judge to the claimant, as the normative evidence presenter, to provide "*taʿdīl of evidence unknown* as to its justness by the judge." Al-ʿAnsī explains that this should occur, "even if the litigation opponent does not demand [this] since it is a right pertaining to God."

Written evidence

Certain types of sharīʿa cases, such as those involving murder and injuries (criminal cases in our classification), usually are based evidentially on spoken testimony by witnesses. In such cases it is possible to closely examine how Yemeni courts handled oral evidence, the normative type in doctrinal theory. It also is in such cases, especially when there are witnesses unknown to the judge, that the mechanism of *jarḥ wa-taʿdīl* is most prominent. By contrast, in other types of cases, including the great majority of cases which concern the landed property relations of the late agrarian era in the highlands, the handling of documentary evidence is central to the litigation. As I have discussed at some length elsewhere (Messick 1993), whereas the doctrine assumes the spoken modalities of testimony to be the evidential norm, written legal instruments of many varieties commonly were presented as evidence in court cases and entered into the court records. Tyan (1959) described how an institution of recognized notaries, producers of written evidence, eventually was given doctrinal legitimacy in the nineteenth century, but Johansen (1997) has demonstrated that jurists had established criteria for considering written documents as proof by the eleventh century.

Zaydī jurists have their own views regarding the admissibility of written documents as evidence. Writings are mentioned only briefly in the *Flowers* chapter on evidence, the title of which, "*Shahādāt,*" may be translated as "Testimonies." Following the initial negative reference in al-ʿAnsī's commentary on the second condition ("Neither messenger nor writing is acceptable due to the absence of

expression"),[15] writing is next mentioned in the chapter in connection with the issue of notarial evidence concerning two properties, which, it is noted, may be set down in two documents or together in one. The *Flowers* uses the classical term *sakk* (whence the English "check"), which al-ʿAnsī (4:91) immediately glosses by saying, "This is the written document (*kitāb*)." However, nothing is said at this point about the evidential value of the document itself.

Like the Mālikīs and other Sunnī schools, the Zaydīs had manuals in the separate subgenre of works known as the *shurūṭ*, which provided notaries with practical models for bilateral contracts and other types of legal instruments such as wills and endowments. Standing between the doctrinal *fiqh* and actual documents, such manuals represent the effort by jurists to create a link between legal doctrine and legal practice. An important aspect of the manuals is that they detail the evidentiary requirements for the writing of a variety of legal instruments, such as the notary's need to ascertain the parties' identities and the woman's prior consent before drafting a marriage contract. There are thus two levels of evidentiary issues that may be involved in such contracts: there are "first order" requirements in the making of the written legal instrument itself and "second order" issues engaged when such an instrument is presented as evidence in court. The first level of issues is in the purview of the notary, the second that of the court judge.

Returning now to the doctrinal chapter (al-ʿAnsī 4:104-5), a more instructive passage on written evidence concerns oral testimony given in connection with such a "second order" event. This is testimony about the contents of legal documents presented to the court, including both "transaction papers" and documents written by judges. Such writings may enter the realm of evidence, but only by means of accompanying testimony as to their authorship and contents. In the doctrinal design of the court forum, documents do not stand alone. In order for information set down in a document to be considered at a later date by the court, witnesses present at the original event, such as a contract session, must not only testify to the document's contents but also "complete" their testimony with an "oral reading" (*qirāʾa*) of the text

[15] Consistently contrary, Shawkānī (4:192) permits testimony by signs and by writing. Later, in connection with his discussion of testimony about testimony (4:201-3), about which he has reservations, he envisions, among other things, "that the witness write his testimony in his script, if his script is known, or have it written in the script of someone whose script is known, and [then] witness this." This "testimony in writing" is to be used only in exceptional circumstances.

in question. Ideally, this is a reading by the document's "maker," the notarial writer, who is the principal witness for the text he has written and signed. It is a reading "to" the two required contract witnesses. In their following court testimony, 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 and he listened to our reading." As with all court evidence, this must occur before the present and listening opposing party and before the judge.

In this doctrinal view, then, writings must be converted to spoken testimony to have evidential value, and this only by certain individuals and using certain carefully specified techniques. This conversion from written to spoken, that is, to the required oral form of "expression" (*lafẓ*), accords with the general auditory format of the court hearing. Earlier on, what the notary had done was to convert spoken contractual expression into a written instrument. Once converted back to the spoken medium and accepted as evidence, however, such orally "read" instruments immediately would be converted back to documentary form as they were inscribed as written entries in the court minutes.

With the passage of time, it was understood, both writers and contract witnesses could forget details. Again using the term *lafẓ*, al-ʿAnsī says that writers and contract witnesses tend to forget the precise "expression," the wording or formulation of the contract, while retaining the "gist," or general meaning (*maʿnā*).[16] Central to all court witnessing is an act of remembering. A special version of this necessary remembering by a witness concerns the reliance upon the witness's own writing. Al-ʿAnsī (4:110-11) discusses the situation of giving testimony in relation to one's autograph documents that have been deposited with the judge. The basic principle, again a *Flowers* rule expanded by al-ʿAnsī's commentary, is that "a witness may *not* testify, nor a judge rule, purely *on the basis of what is found in his archive* (*dīwān*),[17] as papers written in his handwriting and under his seal or signature, whether in a register or elsewhere, *if he does not remember*."

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[16] On the relation of *lafẓ* and *maʿnā*, see the use of these terms in connection with Zaydī analyses of intent (Messick 2001).

[17] Al-ʿAnsī (4:111, n1) provides a footnote to identify the *dīwān*. "It is a site," he says, "in which the circumstances of the people are entered and recorded." He continues, the word "refers to the register (*daftar*) and to its place and to the book." This last, he notes, in customary usage is specifically associated with poetry. He also mentions the related words *sijill* ("register") and *qimṭar*, which he defines as a "container for papers."

However, this remembering need only be of the general (*jumla*) aspects, not of the detail (*tafṣīl*). With an individual's identifying signature (*ʿalāma*), which consists of three features, "his name, the name of his father and his lineage (*nasab*) or family name (*laqab*)," appearing on it, the document may be relied upon, provided the writer remembers its contents generally, even if the details are forgotten. If the document is not remembered beyond the writer's simple recognition of his own script, however, neither reliance upon it nor reference to it in testimony are permitted.

After these discussions of "completed" testimony and the special situation of autograph texts, "writing" (*khaṭṭ*) appears as, literally, the last word in the fifteenth-century *Flowers* chapter on "Testimonies." Where, at the beginning of the chapter, writings remained securely hedged with the spoken words of witnesses, here, at the end, it is suggested that certain types of authoritative writings, in certain situations, might begin, albeit tentatively, to stand alone as evidence. Here there enters the all-too-human figure of "the forgettor," a fallible witness whose failing is redressed by reference to writing. I now quote the chapter-concluding passage from the *Flowers* as it is prefaced by the lines introducing it in al-ʿAnsī's commentary (4:115). Again, it is the situation of a witness to an earlier act, such as a contract, who now appears as a litigation witness in court.

> The witness [in court], if his [prior] witnessing [act] is written in his writing or in the writing of one trusted by a judge, or other than him, but he forgets the detail of what he bore witness to on the matter, then *sufficient for the forgettor, where he knows the general but is in doubt about the detail, is writing.*

Witnessing, conveyed in the spoken words of present individuals, remains the emphasis. Predicated on the general memory of a prior legal act, however, questions of detail may be established by, as al-ʿAnsī puts it, the witness's "consulting of" or, more literally, "return to" (*rujūʿ ilā*) a written text. Referring in this manner to a document that meets other requirements, such as bearing an upstanding third-party's recognized signature, a witness to a prior undertaking can testify, in the example given, to the details of a sale, such as the amounts, prices and boundaries of the property in question. Such documents also must be materially free of any evidence of alterations, whether additions or deletions, and must not be blotted or effaced (al-ʿAnsī 4:116).

Addressing this final dictum from the *Flowers* as he closes his own commentary chapter, al- ʿAnsī indicates that this fifteenth-century phrase—*sufficient for the forgettor, where he knows the general but is in doubt about the detail, is writing*—is the specific doctrinal trigger for a twentieth century "choice" (*ikhtiyār*) of Imām Yaḥyā, which he quotes at the bottom of the same page in a footnote (4:115, n1). Imām Yaḥyā's *ikhtiyār* on written legal documents is: "Reliance on writing is acceptable if it is known and its writer is known for justness."[18] In his commentary on Imām Yaḥyā's "choices," al-Shamāḥī (1937: 31-33; cf. Messick 1993, Ch. 11) first renders this *ikhtiyār* in verse: "The evidence of writing, we know, is accepted/ It is humanly transmitted, in an unbroken chain." In his following prose analysis al-Shamāḥī attempts to graft writing onto established techniques for the authoritative relating of spoken words. Using the terms *muʿanʿan*, "humanly transmitted," and *musalsal*, "linked in a chain," he associates writing with the secure mechanisms of hadith transmission (see EI^2, s.v. Muʿanʿan). The Imām's *ikhtiyār* also resonated with a principle established late in the nineteenth century in the new, code-style Ottoman *Majalla* (1888:250-1, Art. 1736):

> Writing and seals are not to be relied upon in and of themselves, but if they are [determined to be] free from suspicion of forgery and fabrication, they may be relied upon, that is, they may be the determining element (*madār*)[19] of the judgment without requiring support of another type.

In his concluding comments, as the prime example of such a writing, al-ʿAnsī (4:115) mentions by its colloquial name the Yemeni sale-purchase contract document, known as the *baṣīra*. This is the basic and ubiquitous instrument for the sale of immovable, landed property, whether residential or agrarian. Speaking of this sale document, al-ʿAnsī cites a jurist whose view comes close to that of the Imām: if a document's witnesses and its writer are known for their "religious character and trustworthiness" (*diyāna wa-amāna*), then the document can be relied upon in sharīʿa terms.

Immediately, however, this scenario is qualified in terms of the typical real world situation in which the writer and the witnesses, the potential givers of testimony in subsequent litigation, are deceased. With the passage of time, as writers and witnesses either forget or die,

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[18] *Al-ʿamal bi' l-khaṭṭ muʿtabar idhā ʿurifa al-khaṭṭ wa kāna kātibuhu maʿrūfan bi' l-ʿadāla.*

[19] On this term among hadith specialists see Juynboll (2001).

a text is gradually, then decisively, deprived of the legitimation of human memory. When such a document has been held in a private archive, it is a matter of whether the individual presenting the document as evidence also has possession (*yad*) of the property in question, or not. The first possibility is that "weak" is joined to "strong," as the evidence of the written document, although diminished in its evidential potential by the deaths of writer and witnesses, is joined to that of possession, one of the highest levels of support for a property claim. Together, they produce evidence that is stronger still. The second possibility is that "weak" is joined to "weak," as the documentary evidence is paired with the fact that the presenter does not have possession, resulting, in theory, in no evidential value at all.

Minutes

> It is to the art of writing that testimony is altogether indebted for the quality of permanence.
>
> Bentham

As Ibn Khaldun (quoted at the outset) noted, writing intervenes in a final way in this evidence regime. The keeping of minutes of evidence is not explicitly treated in the Zaydī doctrine, except insofar as mention of the judge's archive (*dīwān*) might include this activity. In the Shāfiʿī manual studied in Lower Yemen (al-Nawawī 1884:373, 375), by contrast, the writing of minutes (*maḥḍar*) is explicitly mentioned. Nawawī makes a distinction between such minutes, written in connection with court activity that does not culminate in a judgment, versus judgment registers (*sijill*, pl. *sijillāt*), the means of record keeping when judgments have been rendered. He notes that two copies eventually should be produced, "one for them [viz., the parties], and one to be retained in the archive (*dīwān*) of the court."

While not discussed in the Zaydī doctrinal chapter on evidence, the keeping of written minutes is an important topic in the imamic-era court "Regulations" (*Taʿlimāt*) of 1936. According to this administrative text (Point 2), the court secretary (*kātib*), who is appointed directly by the Imām (rather than by the judge), is responsible for keeping two types of court registers (Points 4, 5). The first, the *daftar al-ḍabt*, contains the accumulating record of what is known informally as the "take-and-give" (*al-akhdh wa'l-radd*) of the court process, that is, formally, the *muḥākama*, the litigation proper, up to,

but not including the judge's ruling. The record in this register comprises the claim and the response, the minutes of evidence presented by each side, including entries of legal documents, and any other submissions, such as reports, statements or pleadings. The second, the *daftar qayyad al-marāqīm*, contains a record of the final judgments issued by the court. These incorporate the records of the *muḥākama* proceedings, which, after approval by the judge, are taken from the first type of register and combined with the judge's appended ruling.[20]

Yemeni court records have a character quite different from that noted by the students of Ottoman sharīʿa court records. The difference, specifically regarding evidence, is that the Yemeni records have the form of verbatim records rather than of summaries. Unlike the typically brief and summarized Ottoman entries, the Yemeni records contain lengthy reports of evidence formally brought before the court, including both extensive quotation of *viva voce* testimony and of written documents, reports, statements and pleadings. When testimony is entered, standard devices in the record indicate whether the report is of direct or indirect quotation, or a summary, and, as noted, there are special indications when there is testimony "similar to" that of a preceding witness. When written legal instruments are entered as evidence, there are other devices relative to different types of quotation or excepting and there also are reports of court examinations of detailed features of an evidential document, such as witnessing clauses and appended texts.

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[20] Distinct from either of these types of paged registers, the final texts given to and retained by the two parties to the litigation take the physical form of a (vertically) rolled judgment record (a document known as a *ḥukm*). It is notable that the two rolled copies presented to the litigants are considered the "originals" of which a single "copy" is placed in the court register of the second type. Individuals held the two original rolled court documents while the state organ, the court, retained the copy. These three categories of court-produced litigation texts, those appearing in the two types of court registers and that in the rolled documents, represent distinct, named genres of legal records. While these types of records may be distinguished in terms of their material form (paged versus rolled), their pattern of archivization (public versus private) and their chronology of inscription (initial versus final), their most distinctive feature remains their close intertextuality. Thus the rolled texts, the "original" texts provided to and retained by the parties also should exist in the form of an exact copy in the second type of court register. Except for the lines of the judge's ruling at the end, all of the text that appears in the rolled document should consist of the (corrected) *muḥākama* record, that is, the text of the minutes, as initially set down in the first type of register.

Some case records from pre-Revolutionary Yemen also contain internal references to the keeping of minutes. In the 1960 murder case, for example, at the close of each session in which witnesses appeared, the record states that the testimony written down was "dictated," that is read back, and that the signatures of the witnesses, and after some sessions, the parties to the litigation, were placed in the court register.[21] This same case record also is notable for its attention to testimonial detail and for its direct quotation, including attempts to render colloquial Arabic expression. In other cases from the period there are instances of a contract document being retrieved from an entry in a court register and also of the integrity of the court minutes being argued by the litigants.

At first glance, such records appear similar to the verbatim transcript of an American court, which, in addition to introductions of written materials, attempts to reproduce all the pauses and colloquialisms of spoken exchanges. But an American transcript is an independently authoritative text backed by transcribing technology and by the certified expertise of a professional "court reporter." Repeated mentions of signatures placed in the register may index the general activity of inscribing and confirming testimony, but we lack information about the three-way interchange (witness, judge, secretary) through which written minutes were created. Unlike an American transcript, which contains the words of the judge, attorneys and witnesses, these judgment records consist nearly exclusively of entered testimony, documents and pleadings, spoken and written.

What was the referential or evidentiary value of such archival records? Again, the previously cited principle from the *Flowers*, as augmented by commentator al-ʿAnsī, is that "a witness may *not* testify, nor a judge rule, purely *on the basis of what is found in his archive* (*dīwān*) in the way of papers written in his handwriting and under his seal or signature, whether in a register or elsewhere, *if he does not remember*." The late nineteenth century Ottoman *Majalla* (1888:251),

[21] Vogel (2000:152) notes that modern Saudi courts also have the practice of having the parties sign the record at the end of each court session. Although written documents may be entered verbatim, these records do not have a general verbatim character. The record opens with the parties' statements: "After each party's oral statement, the qadi will dictate the statement into the record, but distilled greatly into concise briefs of the party's position." However, a distinctive feature of this Saudi shariʿa court litigation is that "[c]ases that proceed to final judgment are rare; most are settled by agreement of the parties, usually with the qadi's assistance."

Art. 1738, states that court registers (*sijillāt*) may be relied upon in evidentiary terms if it is certain that they are free from imperfection (*fasād*) and subterfuge (*ḥīla*). Twentieth century imamic regulations evince an effort to regularize record keeping, but court archives themselves remained in the personal control of the judge or his secretary. After the Revolution, such archives would become more fully "public" as, shortly after distinct court offices themselves were instituted, it was for the first time required to keep the court registers in these offices.

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