Consideration of *'Urf* in the Judgments of the *Khulafā' al Rāshidūn* and the Early *Fuqahā'*

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Consideration of *'Urf* by the *Khulafā' al Rāshidūn*

'Urf (custom) and *'ādah* (tradition) are very ancient and important sources of Islamic law. As the pre-Islamic Arabs had no written documents or script, their social systems were regulated by custom and tradition. According to the available historical accounts, the *khulafā' al rāshidūn* retained many pre-Islamic social customs and traditions and also adopted and established some useful nonindigenous customs. Such borrowing was quite acceptable in their eyes, for the Prophet himself had acknowledged the validity of some pre-Islamic customs that were compatible with the letter and spirit of the revelation.

At the time of the Prophet, the Arabian peninsula was the home of many different customs and traditions. The Arabs were mainly idol worshippers, and this outlook was reflected in their customs. However, they had also retained a portion of the legacy of Ibrāhīm: ceremonies related to the Ka'bah and circumcision. These ceremonies provided the basis for the establishment of social traditions.

Many pre-Islamic customs were still practiced during the period of the *khulafā' al rāshidūn*. For instance, grain (i.e., wheat, barley) continued to be regarded as *kaylī* (measured by capacity) and gold and silver were considered *waznī* (measured by weight). The same custom and usage were followed in commercial transactions made by the Prophet and his four immediate successors.[1] The *fuqahā'* later based many of the rules concerning zakah (poor due), *ṣadaqah* (charity), and *kaffarah* (expiation)

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[1]Al Dārimī, *Sunan*, vol. 2 (Beirut: Dār al Kutub al Islāmīyah, n.d.), 257; there is a mention of Wazzān, who were professional weighers, see Ibid., 260; Ibn Ḥanbal, *Musnad*, vol. 3 (Beirut: al Maktab al Islāmī, n.d.), 310.

on the customary practice of measurement by these five individuals.[2] In addition, all types of pre-Islamic commercial transactions (*buyū'*) that did not violate any Islamic principle were kept. For example, Bukhārī states that *bay' al salam* (futures) was practiced in Madīnah before the *hijrah*[3] and throughout the Rāshidūn period. While 'Umar ibn al Khaṭṭāb did not allow this practice when it came to selling fruits that had not yet appeared on trees,[4] 'Alī ibn Abī Ṭālib is reported to have personally engaged in this practice. For example, he sold his camel, 'Usayfir, with twenty other camels on the understanding that he would be paid after a certain period fixed by both parties. 'Abd Allāh ibn 'Umar is also reported to have used this procedure when dealing with animals.[5] Qāḍī Zādah relates, on the authority of 'Abd Allāh ibn Abī 'Awfā, that *bay' al salam* was practiced during the time of the Prophet, Abū Bakr, and 'Umar as regards the selling of wheat, barley, dates, and raisins.[6] These were allowed on the basis of *'urf,* despite the fact that the *fuqahā'* differ on the details and the different types of transactions.[7] The only specifically forbidden customary transactions were those involving usury or risk (*gharār*) for either party.

Abū Bakr and 'Umar also practiced the pre-Islamic customs of hiring and renting.[8] Wakī' mentions that the latter hired a horse on the condition that one of his friends would also ride. When the owner's horse was injured, he demanded that 'Umar pay compensation. 'Umar asked

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[2]See relevant chapters in Mālik, *al Muwaṭṭa'* (Cairo: Muṣṭafā al Bābī al Ḥalabī, 1370/1951) and *al Mudawwanah* (Baghdad: Maṭba'at al Muthannā, 1970); al Shāfi'ī, *al Umm* (Beirut: Dār al Ma'rifah, 1393/1973); al Shaybānī, *al Jāmi'*; al Sarakhsī, *al Mabsūṭ* (Beirut: Dār al Ma'rifah, n.d.).

[3]Bukhārī, *Ṣaḥīḥ*, vol. 1 (Cairo: Dār wa Maṭābi' al Sha'b, 1378/1959), part 3, 111; Ismā'īl ibn Yaḥyā al Muznī, *al Mukhtaṣar*, 90.

[4]Ibn Ḥajar, *Fatḥ*, vol. 5 (Cairo: Muṣṭafā al Bābī al Ḥalabī, 1378/1959), 338-9 ('Umar prohibited it because there was risk, and the buyer might suffer a loss).

[5]Al Sarakhsī, *Al Mabsūṭ*, vol. 12, 122; Mālik, *Al Muwaṭṭa'*, vol. 2, 69 and *al Mudawwanah*.

[6]Qāḍī Zādah, *Natā'ij al Afkār* (with Ibn al Humām), *Sharḥ Fatḥ al Qadīr*, vol. 5 (Pakistan: Maktabah Rāshidīyah Pakistan, 1985), 324.

[7]Ibn al Humām, *Sharḥ Fatḥ al Qadīr,* vol. 5, 327; Qāḍī Zādah, *Natā'ij*, vol. 5, 324; Ibn Ḥazm, *Al Muhallā*, vol. 10 (Cairo: Maktabat al Jumhūrīyah, 1387/1967), 55-9 (article 1819).

[8]Al Shawkānī, *Nayl al Awṭār*, vol. 6 (Beirut: Dār al Jīl, 1973), 35; Ibn Qudāmah, *al Mughnī*, vol. 5 (Cairo: Dār al Manār, 1386), 397.

him to nominate an arbitrator (*ḥakim*) to settle the dispute in accordance with the common pre-Islamic practice. Although a *ḥakim* had no authority to implement the decision, both parties were morally bound to accept it. The owner nominated Shurayḥ, a suggestion which 'Umar accepted. And, when the verdict went against 'Umar, he complied and paid the amount requested.[9]

The historical records show that when the Prophet and Abū Bakr migrated to Madīnah, they hired a person to guide them.[10] During the time of 'Umar, *ijārah* (hiring) was very common. People used to hire homes, lands, and animals for traveling as well as skilled people to manufacture their necessities. 'Umar ibn 'Abd al 'Azīz, according to Abū 'Ubayd, employed Yazīd ibn Abī Mālik al Dimashqī and al Ḥārith ibn Yamjud al Ash'arī to teach the people of rural areas. 'Umar employed thirty teachers of the Qur'an in Madīnah and fixed their monthly salary.[11] Thus we find a gradual development from custom to legal institution. The *fuqahā'* discussed the rules and regulations related to hiring and then outlined its lawful and unlawful forms.[12]

The customary practice of setting up a limited partnership (*muḍārabah*) was also considered legal. Imām al Shāfi'ī relates that 'Umar[13] and 'Alī[14] preferred to invest the wealth of orphans in such an undertaking, as they viewed it as a good management technique. This might be why al Nakha'ī recommends that the guardians of orphans invest their wards' wealth in either a *muḍārabah* undertaking or in some other profitable business.[15] 'Uthmān ibn 'Affān, an experienced trader, made a *muḍārabah* agreement with 'Abd Allāh ibn 'Alī, and 'Abd Allāh ibn Mas'ūd is reported to have made one with Zayd ibn Khulaydah.[16] The *fuqahā'* soon

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[9]Wakī', *Akhbār al Quḍāt*, vol. 2 (Beirut: 'Ālam al Kutub, n.d.), 189 (this event took place before Shurayḥ was appointed as judge).

[10]Bukhārī, *Ṣaḥīḥ*, 116; Ibn Ḥajar, *Fatḥ*, 349-50; al 'Aynī, *'Umdat al Qārī*, vol. 12 (Beirut: Dār Iḥyā' al Turāth, n.d.), 80-2.

[11]Abū 'Ubayd, *al Amwāl* (Cairo: Maktabat Kullīyāt al Azharīyah, 1395/1975), 243-4; Ibn Ḥazm, *al Muḥallā*, vol. 8, 195.

[12]Mālik, *al Mudawwanah*, vol. 4 ("Kitāb al Ijārah"), 402-59; al Sarakhsī, *al Mabsūṭ*, vol. 15, pp. 74-184.

[13]Al Shāfi'ī, *al Umm*, vol. 7, 108; al Sarakhsī, *al Mabsūṭ*, vol. 22, 18.

[14]Al Shāfi'ī, *al Umm*, vol. 7, 20.

[15]Ibid., 19.

[16]Ibid., 108.

developed this traditional practice into a legally defined institution with the necessary terms and conditions for its different branches.[17]

Imām Mālik narrates some of 'Umar's *'urf*-based judgments. One example is the payment of blood money, which continued to be based on the prevailing custom. He made a distinction between people who used gold and those who used silver. Those who used gold had to pay a fine of approximately one thousand dinars (a dinar was a gold coin), while those who used silver had to pay approximately twelve thousand dirhams (a dirham was a silver coin). These coins, mentioned quite often in both *fiqhī* and early hadith literature,[18] were in circulation in the urban areas and were probably minted in such neighboring countries as Persia. According to Mālik, the Syrians and Egyptians used gold in their commercial transactions, while the Iraqis used silver. Such usage might have been influenced by the traditions of the Persian and Byzantine empires.

Mālik also elaborates on the payment of blood money. He says that payment is to be made in the currency used by the people. For those who still deal in a cashless economy, namely those in the rural areas, payment is to be taken from their real wealth: their camels.[19] Al Shaybānī relates that 'Umar laid down the following payments: one hundred camels for those whose wealth was in camels (*ahl al ibil*), ten thousand dirhams for those who used silver (*ahl al waraq*), one thousand dinars for those who used gold *(ahl al dhahab),* two thousand one-year-old sheep for those whose wealth was in sheep *(ahl al shā'),* two hundred cows for those whose weath was in cows (*ahl al baqar*), and two hundred dresses for those whose wealth was in clothing *(ahl al ḥullah).*[20]

Under the Prophet and Abū Bakr, blood money was paid only in the form of camels, as that was the existing custom. At the time of 'Umar, however, urbanized people had started to participate in a monetary economy. Observing this change, 'Umar amended the blood-money payment

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[17]Ibid., chapter "al Muḍārabah"; al Sarakhsī, *al Mabsūṭ*, chapter "al Muḍārabah"; Ibn Qudāmah, *al Mughnī.*

[18]Abū Dāwūd, *Sunan*, vol. 2 (Ḥims: M. 'Alī al Sayyid, 1388/1969), 277-8; al Tirmidhī, *Sunan*, no. 650; Ibn Mājah, no. 1840; al Nasā'ī, *Sunan*, no. 2593; Ibn Ḥanbal, *Musnad*, vol. 1, 53, 101 and vol. 2, 90, 180, 200.

[19]Mālik, *al Muwaṭṭa'*, vol. 2, 181.

[20]Al Shaybānī, *al Aṣl*, vol. 4, Hyderabad Dakkan: Dā'irat al Ma'ārif al 'Uthmānīyah, 1386/1966), 451-2. There is a variation in the reports related by Mālik and al Shaybānī concerning the amount of dirhams. Mālik's report mentions twelve thousand dirhams, while al Shaybānī's says ten thousand. The latter seems to be the more accurate, because the proportional relation between a dirham and a dinar was one to ten. In the chapters on zakah, the *fuqahā'* say that the *nisab* for zakah is twenty dinars or two hundred dirhams. See Ibn Qudāmah, *al Mughnī*, vol. 7, 760.

rule to fit the new conditions. Recognizing the validity of the traditional way for those who were still conducting their business affairs on a non-monetary basis, he allowed the traditional method of payment to continue.

Abū Ḥanīfah says that 'Umar initially determined the currency in which the payment was to be made on the source of a person's wealth. But after he established the *dīwān* system and prescribed stipends for the people from the *bayt al māl* (treasury), he ruled that such payments would thereafter be payable only in dirhams, dinars, and camels.[21] It appears that the reason for this change was that these three items had by that time emerged as the real wealth of the people.

The Ḥanafī and Mālikī *fuqahā'* might have taken the idea of using custom as a guiding principle for legislation along with the understanding that when the prevailing custom changes, the rules must also change. If the particular custom does not change, it remains decisive.[22]

We also have evidence that the *khulafā' al rāshidūn* accepted useful practices and customs from outside of their own communities. An example of this is the implementation of the *'ushūr* and the *dīwān* systems. Most sources agree that 'Umar introduced the system of *kharāj,*[23] for before his rule there was no *kharāj* in the classical *fiqhī* sense of land tax. This was a custom borrowed from the Persians and the Romans.[24] Ṭabaṭabā'ī says that after its introduction and adoption, it generally followed the Sassanid practice, especially in the eastern provinces. Morony says that the Sassanid financial bureaus, *dīwān al kharāj* and *dīwān al nafaqāt*, were maintained in Iraq after that area's incorporation into the Muslim realm.[25] Abū 'Ubayd relates that the *khulafā' al rāshidūn* allowed the inhabitants of these conquered lands to live in their own territories and to conduct their affairs according to their own faith and traditions.[26]

Another pre-Islamic custom sanctioned by the early Muslim rulers

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[21]Al Shaybānī, *al Aṣl*, vol. 4, 452.

[22]Al Qarafī, *al Furūq*, vol. 3, 288; Ibn 'Ābidīn, "Nashr al 'Arf," in *Majmū' Rasā'il* (Lahore: Suhail Academy, 1396/1976), 120, 122, 125; *Majallat al Aḥkām al 'Adlīyah* (Civil Law of the Ottoman Caliphate), article 39.

[23]Abū Yūsuf, *al Kharāj* (Cairo: Maktabat al Salafīyah, 1976), 26, 28, 30; Abū 'Ubayd, *al Amwāl*, 59-60.

[24]Ibn Qudāmah, *al Kharāj* (Iraq: Dār al Rashīd, 1981), 8; Yaḥyā ibn Ādam, *al Kharāj* (Beirut: Dār al Ma'ārif, 1399/1979), 7-8. He mentions that the Nabāṭ were subjugated by the Persians, to whom they paid *kharāj*.

[25]H. M. Ṭabaṭabā'ī, *Kharāj in Islamic Law* (London: 1983), 28-9; M. G. Morony, *Iraq after the Muslim Conquest* (Princeton: 1984), 51-2.

[26]Abū 'Ubayd, *al Amwāl*, 102.

was that of *qasāmah*.[27] This penalty was paid by the male members of the tribe in the case of murder. Under 'Umar and his new *dīwān* system, the blood money was to be paid by the people sharing in the *dīwān* in which the murderer had been registered.[28]

'Ushūr, a traditional tax levied on merchants in non-Islamic lands, was implemented by 'Umar after he was informed of its usage in other lands by Abū Mūsā al Ash'arī.[29] The merchants of Manbij wanted to market their merchandise in Islamic lands and so asked 'Umar for permission on the ground that they would pay *'ushūr*. 'Umar consulted the Companions, and they agreed to accept the proposal and recommended that 'Umar implement this tax throughout the empire. 'Umar allowed the merchants of Manbij to market their wares and appointed Ziyād ibn Huḍayr al Asadī as tax collector in Iraq and Syria.[30]

Dīwāns (public registries) were also established according to the Persian tradition. Al Māwardī states that once when 'Umar received a large amount of *ṣadaqah* from Bahrain, he consulted the Companions on how it should be managed. One Companion, Hurmuzan the Persian in one report, was familiar with the Persian *dīwān* system and explained it to 'Umar. Khālid ibn al Walīd, who was also at this meeting, related what he had seen in Syria, where apparently the Byzantine rulers had their own *dīwān* system. 'Umar approved these proposals and established the *dīwān* system in Madīnah.[31]

Abū Hilāl al 'Askarī (d. 295 AH) mentions another pre-Islamic custom that survived due to its usefulness to the people: the lighting of a fire at Muzdalifah, the ceremonial station east of Makkah, during the rites of pilgrimage. The object of this tradition, according to al Qalqashāndī, was to direct the pilgrims from 'Arafah to Muzdalifah. This custom was maintained by the *khulafā' al rāshidūn* and their successors for a long time.[32] The custom of lighting a fire at Muzdalifah was not impor-

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[27]Al 'Askarī, *Kitāb al Awā'il* (Madīnah: 1385/1966), 36-7; al Sarakhsī, *al Mabsūṭ*, vol. 26, 107-9; al 'Aynī, *'Umdah*, vol. 24, 59; Ibn Ḥajar, *Fatḥ*, vol. 15, 259; al Shawkānī, *Nayl*, vol. 7, 183-5.

[28]Al Sarakhsī, *al Mabsūṭ*, vol. 26, 110; Ibn al Humām, *Sharḥ Fatḥ al Qadīr*, vol. 8, 402-3.

[29]Abū Yūsuf, *al Kharāj*, 145-6; Yaḥyā ibn Ādam, *al Kharāj*, 125-6.

[30]Abū Yūsuf, *al Kharāj*, 146.

[31]Al Māwardī, *al Aḥkām* (Cairo: Muṣṭafā al Bābī al Ḥalabī, n.d), 199-200.

[32]Al 'Askarī, *Kitāb al Awā'il*, 28; al Qalqashāndī, *Subḥ al A'shā*, vol. 1 (Cairo: al Mu'assassah al Miṣrīyah al 'Āmmah, 1383/1962), 409.

tant from a strict legal point of view; what was important was that it exemplified the significance of taking care of the public interest even in the observance of purely religious obligations.

Similarly, the seasonal markets held by the Arabs during the pilgrimage were also maintained during the early Islamic period. Some Companions had stopped trading in these traditional markets because of their association with pre-Islamic customs. But such a precaution was made unnecessary by the revelation of the verse, "It is not an offense for you to seek the bounty of your Lord (by trading)," which made it clear that there was nothing wrong with engaging in trade and the seasonal markets during the *ḥajj*.[33] The trade carried out at the markets of 'Ukāẓ, Majannah, and Dhū al Majāz had tremendous economic significance and was a major means of increasing the people's prosperity. As Islam encourages trade and the sale of merchandise, there was therefore no reason to forbid this useful pre-Islamic custom.

Views of the *Fuqahā'*

The *fuqahā'* fully understood the need to reconcile the space-time requirements of the Sharī'ah. They developed elaborate methods of ijtihad that provided a great deal of flexibility within Islam's normative framework. As a result, ijtihad acted as a mechanism for engendering continuous progress and development in all spheres of life. This practice arose in order to cope with existing realities and due to Islam's emphasis on development and progress and opposition to inertia and stagnation.

The *fuqahā'* defined *'urf* as a recurring practice that has been established among the people and is acceptable to those of sound nature (*al ṭabī'ah al salīmah*)[34] and used it as a guiding principle in their deliberations. These customary principles were seen as secondary, as opposed to primary, sources of law that could be applied only when the primary sources had nothing to say about the issue in question. Several others were also used as synonyms: *'ādah, ta'āmul,*[35] and *'amal.*[36]

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[33]Al Ṭabarī, *Tafsīr*, vol. 2, 164-6; al Qurṭubī, *Tafsīr*, vol. 2 (Beirut: Dār al Ma'rifah, 1392/1972), 413; Bukhārī, *Ṣaḥīḥ*, vol. 1, part 3, 82.

[34]Ibn Nujaym, *al Ashbāh wa al Naẓā'ir* (Cairo: Mu'assassah al Ḥalabī, 1387/1968), 93.

[35]Al Shāṭibī, *al Muwāfaqāt*, vol. 2 (Cairo: Matba'ah M. A. Sabih, 1969-70), 211-5; al Suyūṭī, *al Ashbāh*, (Cairo: Muṣṭafā al Bābī al Ḥalabī, 1378/1959), 91ff; Ibn Nujaym, *al Ashbāh*, 92-3; Ibn Farḥūn, *Tabsirat al Ḥukkām*, vol. 2 [on the margin of Ulaysh, *Fatḥ al 'Alī al Mālik*] (Cairo: Muṣṭafā al Bābī al Ḥalabī, 1378/1958), 57.

The *fuqahā'* laid down several conditions that had to be met if the *'urf* in question was to be acceptable: a) It must not contradict and violate any *naṣṣ* (text). For example, usury or the drinking of wine, even if found throughout a given society, can never be legally valid. The *fuqahā'* do not consider such *'urf* when they are formulating the rules;[37] b) It should exist at the time of contract or commercial transaction. If it came later, it cannot be considered;[38] and c) It should be general and universal instead of belonging to a particular locality or people (*'urf al khāṣṣ*).[39] This last condition is subject to dispute, for Abū Yūsuf and some Ḥanafī *fuqahā'* regarded it as authoritative.[40]

The Ḥanafī and Mālikī *fuqahā'* understood the social and political significance of *'urf* and thus stressed it more than the other schools. They applied the doctrines of *istiḥsān* and *al maṣāliḥ al mursalah* to accommodate pre-existing *jāhilī* customs that were in accordance with Islamic principles. While discussing the principles of *'urf* and *'ādah*, al 'Āmidī specifically refers to the Ḥanafī doctrine of *istiḥsān*. For example, in the case of using public bathhouses, there is no discussion or formal mention of the exact amount of water to be used, the period of time, or how the payment is to be made, for, according to the Ḥanafī jurists, all of these are known to the patrons. As this is the case, there is no need for *qiyās* (analogy) or to spell out such rules before entering the facility.[41]

Abū Ḥanīfah is reported to have said that *'urf* determines and interprets the actual meanings of terms commonly used in a society. However, custom has no legal effect if it is contradicted by a *naṣṣ*.[42] The taking of an oath is based on this principle, for *'urf*, not the original or the literal meaings,[43] determines the meaning of the words used when taking an

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[36]Bukhārī, *Ṣaḥīḥ*, vol. 1, part 3, 103. The *fuqahā'* do not use the word "sunnah" when they discuss *'urf* as a principle, because this term came to be used exclusively for the practice of the Prophet.

[37]Al Sarakhsī, *al Mabsūṭ*, vol. 9, 17 and vol. 23, 18; Ibn 'Ābidīn, *Nashr al 'Arf*, 115.

[38]Ibn Nujaym, *al Ashbāh*, 1010; al Suyūṭī, *al Ashbāh*, 96.

[39]Al Suyūṭī, *al Ashbāh*, 92; Ibn Nujaym, *al Ashbāh*, 99.

[40]Ibn Nujaym, *al Ashbāh*, 102-3; Ibn 'Ābidīn, *Nashr al 'Arf*, 116.

[41]Al 'Āmidī, *al Iḥkām*, vol. 4 (Cairo: Maṭba'at al Ma'ārif, 1332/1914), 212.

[42]Al Sarakhsī, *al Mabsūṭ*, vol. 9, 17.

[43]Ibid., vol. 8, 135.

oath. For example, if a person swears that he/she will not drink water and then drinks *nabīdh* (dates or raisins left in a waterskin long enough to produce sweetened water), he/she has not broken his/her oath, because, according to *'urf,* the word "water" is never applied to *nabīdh.*[44] Another example is seen in the case of business partners. The travel-related expenditures of an active partner *(muḍārib)* when he/she travels for business purposes are determined, in the absence of a signed contract, according to the prevailing custom.[45]

Fiqh literature is full of examples where custom has served as a source of law. Its decisive role is particularly apparent in chapters dealing with sales, representation and agency, marriage, divorce, oath-taking, and sharecropping contracts.[46] In the words of Schacht, custom is recognized as a restrictive element in dispositions and contracts and as a principle in interpreting declarations. He cites contracts related to manufacture and the hiring of the services of a wet nurse as being valid insofar as they are customary. The same is true in the case of determining what items are suitable for *waqf* donations. Such donations usually involved immovable property, but movable property (i.e., books) was also accepted if it was in line with the prevailing custom.[47] Abū Ḥanīfah would give up *qiyās* only in preference for *'urf.* For instance, if a person bought a camel-load of firewood, the merchant is responsible, by custom, for transporting it to the buyer's home. *Qiyās* would allow this only on the condition that it had been specifically mentioned in the purchase contract. If such were not the custom, *qiyās* would be required.[48]

Similarly, al Shaybānī considers custom to be a source of law, particularly in the realm of international law. Some of his assertions became very popular and were widely adopted by the *fuqahā'*. For example: "*'urf* is decisive:" "evidence from custom is like that from *naṣṣ*"; "what is known by *'urf* is like the condition laid by the *naṣṣ*"; "a general statement may be specified by the evidence of custom"; "the usage is decisive when there is no contrary statement in the text"; and "the usage is valid

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[44]Ibid., 186-8.

[45]Ibid., vol. 22, 62-3.

[46]See examples in al Sarakhsī, *al Mabsūṭ*, vol. 8, 135-6; vol. 12, 142-3; vol. 17, 90 ff; vol. 18, 190 ff; vol. 19, 39, 77, 93, 100, 117, 118; vol. 22, 62-3; vol. 23, 18-36; vol. 24, 30; vol. 30, 199.

[47]Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982), 62, 126, 199.

[48]Al Sarakhsī, *al Mabsūṭ*, vol. 12, 199.

to particularize a general rule."[49] Ibn 'Ābidīn, perhaps the first Ḥanafī jurist to deal specifically and exclusively with this subject, repeats these maxims in his *Nashr al 'Arf fī Binā' Ba'ḍ al Aḥkām 'ala al 'Urf*, in which he deals with most of the *fiqhī* issues based on *'urf* and *'ādah*. Ibn Nujaym, another Ḥanafī *faqīh*, also discussed *'urf* at length, but he followed al Suyūṭī in both style and methodology.[50]

The Mālikī jurists also accept custom and usage as sources of decisive authority. This is reflected in such Mālikī treatises as *al Muwaṭṭa'*, *al Mudawwanah*, and *Fatḥ al 'Alī al Mālik* (a collection of Mālikī *fatāwā* compiled by Muḥammad Aḥmad 'Ulaysh [d. 1299 AH]). The early Mālikī scholars did not pay a great deal of attention to the admission and discussion of the legal role of custom and usage. Those in North Africa applied *'amal* in a broad sense; they included the *'urf* and *'ādah* of all nations and areas. According to Coulson, the concept of *'amal* developed from the center of Qayrawān and was consistently applied in practice by the *qāḍī*.[51]

All of the major legal schools take local custom into consideration. The Mālikī school, however, emphasizes the practice of the people of Madīnah and say that it is such a strong source that it takes precedence over a hadith that has been transmitted by a single person. In other words, it has the same force as *ijmā'*.[52] According to Ḥasan's analysis of Mālik's concept of *'amal*, Mālik refers to three types of agreed-upon practices: a) The practice of the people of Madīnah. Mālik allows *musāqāt* (a sharecropping contract over the lease of a plantation, limited to one crop period) because the people of Madīnah practiced it; b) The practice of the scholars of Madīnah. Mālik regards fasting for six days during Shawwāl as an innovation, because the scholars of Madīnah *(ahl al 'ilm wa al fiqh)* did not observe these fast days; and c) The practice of political authorities. Mālik, for example, says, "and what is agreed upon by the authorities in the past and present is that taking oath will begin from the plaintiffs."[53]

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[49]Hamidullah, "Muslim Conduct of State," in al Shaybanī, *Sharḥ Siyār al Kabīr* (Hyderabad: n.d.), vol. 1, 194-8, vol. 2, 296, vol. 4, 16, 23-5.

[50]Ibn 'Ābidīn, *Nashr al 'Arf*, 114-47; al Suyūṭī, *al Ashbāh* and Ibn Nujaym, *al Ashbāh*.

[51]Coulson, "Muslim Custom and Case Law," in *The World of Islam*, vol. 6, (1959) no. 1-2, 22.

[52]Al Bājī, Abū al Walīd, *al Minhaj* (Paris: 1978), 142-3.

[53]Ahmad Hasan, *Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970), 167-70.

'Abd Allāh, who has studied Mālik's concept of *'amal,* states that Mālik opined that the customs of any nation are to be given due consideration in formulating legislation.[54] However, the *'amal* of the people of Madīnah is unique and not like the customs of other people or countries, for Mālik uses it as the most authoritative legal argument in his legal theory.[55] Al Fāsī suggested that Mālik looked upon the *'amal* of the people of Madīnah as a sure criterion to follow when trying to reconcile differences in opinion among the *fuqahā'*. This hypothesis is supported by 'Abd Allāh in his analysis of Mālik's terminology in *al Muwaṭṭa'*.[56] There are also certain differences between *'urf* and Mālik's doctrine of *'amal*. For example, *'urf* does not command any spiritual authority, while *'amal* embodies spiritual authority. Mālik also sees it as a *naṣṣ*.

Traces of the Mālikī doctrine of *'amal* are found in the early history of Islam. Al Ṭabarī states that the people differed on the issue of who should succeed 'Uthmān after his assassination. A group of the Companions said that they would wait, observe what the people of Madīnah did, and then follow them.[57] 'Alī is also reported to have said that the matter belonged to the people of Madīnah.[58] Wakī' mentions that Ibn Ḥazm (d. c. 120 AH) was a *qāḍī* in Madīnah at a time when someone who had been designated *amīr* mentioned his difficulty in making decisions when the jurists themselves held different opinions on a specific issue. Ibn Ḥazm advised him to issue his decision based on the practice of the people of Madīnah, if it were available on that particular issue, because their *'amal* is sound and valid.[59]

However, such later *fuqahā'* as al Shāṭibī and Ibn Farḥūn explicitly mention this specific *'amal* as an effective force in the formation of law. Al Shāṭibī (d. 790 AH) divides the custom and usage of the people into two categories. The first class consists of those which are either approved by the Sharī'ah, a *naṣṣ*, or other *shar'ī* evidence. They are discussed as rules of the Sharī'ah, not as customs. Their acceptability depends upon how well they conform to the Sharī'ah. For example, covering one's pri-

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[54]U. F. 'Abd Allah, "Mālik's Concept of 'Amal," Ph.d. diss., University of Chicago, 1978, 380ff.

[55]Ibid., 380ff.

[56]Ibid., 382.

[57]Al Ṭabarī, *Tārīkh,* vol. 4, 442.

[58]Ibid., vol. 4, 456.

[59]Wakī', *Akhbār al Quḍāt*, vol. 1, 143-4.

vate parts is affirmed by the Sharī'ah as a good and proper practice. This practice is not susceptible to change, regardless of prevailing custom, which might be quite different, or location. The second category is made up of those prevailing traditions that are neither confirmed nor rejected by the Sharī'ah and are therefore *mubāḥ* (permissible). These are taken into consideration during the process of reaching a judgment, but they are not binding. For example, al Shāṭibī discusses a practice that was prevalent during his time and in his area: covering one's head. He relates that this is a custom of well mannered people in eastern countries, for leaving one's head uncovered was seen by the inhabitants as against manly virtue *(murū'ah).* But at the same time, the inhabitants of North Africa thought the opposite, i.e., that leaving one's head uncovered is not viewed as detrimental to a person's proper conduct.[60]

Al Shāṭibī also upholds a close relation between the doctrines of *maṣlaḥah* and *'urf* on one hand and maintains their integration with the other sources of law on the other. He further maintains that preserving the public interest is inherent in the general objectives of the Sharī'ah. The preservation of the five necessities (religion, self, family, property, and intellect) is based on this doctrine. Customs and traditions which help to achieve the community's common welfare are included in *maṣāliḥ,* and they play an important role in fulfilling the purposes of the Sharī'ah.[61]

Ibn Farḥūn, a Mālikī jurist and contemporary of al Shāṭibī, also discusses several rulings in which *'urf* is decisive.[62] He states that if a jurist has to choose between the literal meaning of a word or how it is used in the society, the latter meaning must take precedence.[63] In commercial transactions, we find jurists taking customary laws and practices into consideration. For example, if the currency to be used in a commercial dealing is not specified when the contract is made, it will be determined by custom—the currency in use in the market. However, if there are several currencies in circulation, the currency that is most commonly used and accepted by the traders shall be deemed as the proper one to use.[64]

Whenever *'urf is* changed, the legal effect is also liable to change.

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[60]Al Shāṭibī, *al Muwāfaqāt*, vol. 2, 209-10.

[61]Ibid., 220-33. See also Al Azmeh, "Islamic Legal Theory and the Appropriation of Reality," in *Islamic Law*, 260-1.

[62]Ibn Farḥūn, *Tabṣirat al Ḥukkām;* on the margin of *Fatḥ al 'Alī al Mālik*, vol. 2, see "Bāb fī al Qaḍā' bi al 'Urf wa al 'Ādah," 75ff.

[63]Ibid., 67.

[64]Ibid., 64-6.

The cases of marriage, divorce, will, oath-taking, and dealings in which customary practice is significant have received due legal consideration.[65] Ibn Farḥūn explains another dimension of the significance of *'urf*. If a mufti, for example, goes to a country where different traditions and customs are established, he should not give any legal opinion unless he is well aware of the customs and conventions of the country.[66]

Imām al Shāfi'ī does not discuss *'urf* and *'ādah* as legal sources or as authentic legal arguments in *al Risālah* or in *al Umm.* However, there is evidence that he accepted *'urf* as a valid argument. On the matter of theft, for example, he lists *ḥirz* (normal safe-keeping or protection) as an essential condition for the implementation of the requisite punishment. The exact definition of *ḥirz*, however, may be decided by *'urf*. He mentions the example of a case of goods left lying in an open place. To determine whether or not it enjoyed sufficient *ḥirz*, one would have to determine if the owner habitually left it in that same place and whether he regarded it as protected. If so, the condition of *ḥirz* would be fulfilled.[67] He also says that the *jarīn* (the place in which dates or grain are kept) is regarded as protected, while a fence around a garden or a field is not, because people accepted the former as being protected and the latter as being unprotected.[68] According to al Shāfi'ī, this was the custom in his time.[69] This *'urf* had to be considered when a case of stealing from these places was brought before a judge. It also appears from the discussion of al Ramlī that *'urf* and *'ādah* help to determine *ḥirz*. [70]

Al Māwardī (d. 450 AH), who may be thought of as an early Shāfi'ī jurist, discussses *uṣūl al fiqh* in the context of practical judgment. He maintains that both reason and *'urf* must be used when making decisions and settling matters. All legal systems, he says, follow this procedure.[71] Al Khaṭīb al Baghdādī, another Shāfi'ī jurist, insisted that the muftis and *qāḍī*s must be aware of the people's customs and traditions. He

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[65]Ibid., 66-7.

[66]Ibid., 71.

[67]Al Shāfi'ī, *al Umm*, vol. 6, 148-9.

[68]Ibid., 148.

[69]Al Ramlī, *Nihāyat al Muḥtāj*, vol. 7 (Cairo: Muṣṭafā al Bābī al Ḥalabī, 1386/1967), 439-48.

[70]Al Shāfi'ī, *al Umm,* vol. 6, 5-7.

[71]Al Māwardī, *Adab al Qāḍī*, vol. 1 (Baghdad: Maṭba'at al Irshād, 1391/1971), 135-6.

maintained that without this knowledge, they would be unable to understand the cases in the proper perspective and would therefore run the very real risk of making inappropriate legal rulings.[72] Al Juwaynī (d. 478 AH) points out the significance of customs and traditions by saying that *ijmā'* is proved by uninterrupted *'urf*.[73] As was shown earlier in this paper, al Shāfi'ī and the Shāfi'ī *fuqahā'* accepted the authority of *ijmā'*.[74] Al Ghazzālī confines his discussion to lexicography, in which he divides words into two categories: those spoken and understood in a literal sense, and those used in a customary sense. He does not explain the role of *'urf* and *'ādah* in forming legal rules.[75]

Al Suyūṭī (d. 911 AH) is perhaps the first Shāfi'ī jurist to acknowledge the momentous impact of *'urf* and *'ādah* on social life. He discusses them theoretically as sources of law and mentions their practical application to legal issues. He refers to the *fiqhī* maxims discussed by the *qāḍī* Ḥusayn ibn Muḥammad (d. 462 AH), upon which, he claims, the Shāfi'ī school of *fiqh* is based. According to al Suyūṭī, the fourth principle—usage is decisive—is derived from a saying attributed to the Prophet: "Whatever the Muslims see as good is good with Allah."[76] Under the heading of this maxim, he discusses *'urf* and *'ādah* at length and affirms that there are countless legal issues which have been or can be solved by referring to these two sources.[77]

He shares the opinion, mentioned above, that the customary meaning of a word has priority over the literal meaning, even if it contradicts the Sharī'ah. For example, if a person swears that he/she will not eat meat, he/she would not break his/her oath if he/she were to eat fish, because people are not accustomed to applying the word *laḥm* (meat) to fish. This is despite the fact that the Qur'an considers fish to fall under this category: "It is He Who has subjected to you the sea, so that you may eat

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[72]Al Khaṭīb al Baghdādī, *al Faqīh wa al Mutafaqqih*, vol. 2 (Beirut: Dār al Da'wah al Sunnah, 1395/1975), 135-6.

[73]Al Juwaynī, *Ghiyāth al Umam* (Alexandria: Dār al Da'wah, 1402/1979), 39.

[74]Muhammad Y. Faruqi, "Development of *Ijma'*: The Practices of the *Khulafā' al Rāshidūn* and the Views of the Classical *Fuqahā'*," *American Journal of Islamic Social Sciences* 9, no. 2 (Summer 1992):173-87).

[75]Al Ghazzālī, *al Mustaṣfā*, vol. 1 (Cairo: al Maṭba'ah al Amīrīyah, 1322), 325-6.

[76]Al Suyūṭī, *al Ashbāh wa al Naẓā'ir*, 7-100; Qāḍī al Ḥusayn was a leading Shāfi'ī *faqīh* of the fifth century AH.

[77]Ibid., 90.

fresh *laḥm* from it."[78] Another example concerns the usage of a word by the Sharī'ah in a specific sense, which would make the literal meaning irrelevant. For example, if a person swears that he/she will not perform *ṣalāh* (prayer), his/her oath would not be broken by uttering some words of prayer or supplication, but only by performing the ritual standing, bowing, prostrating, and sitting as prescribed by the Sharī'ah, for this is how the people understand *ṣalāh*.[79]

The customary meaning is also given precedence in social transactions, for *'urf*, according to al Baghawī, is decisive in such cases.[80] If there are particular conditions in a given society associated with social transactions, these must be considered even if they are not mentioned in the contract. This is also true of local customs, for *'urf* is decisive.[81] He says that whatever the Sharī'ah states as being general and not limited or restricted in meaning, the prevailing *'urf* may fix the limits. To make his point, he cites the above-mentioned example of *ḥirz*.[82]

In his discussion, al Suyūṭī refers to many prominent *fuqahā'* who took *'urf* and *'ādah* into consideration while formulating their legal rulings: Qāḍī Ḥusayn (d. 462 AH),[83] al Subkī (d. 771 AH),[84] al Shaykh Abū Zayd,[85] al Baghawī (d. 516 AH),[86] Ibn al Ṣalāḥ (d. 642 AH),[87] al Isnāwī (d. 772 AH),[88] and al Rāfi'ī (d. 623 AH).[89]

We do not have any clear and definite opinion from Ibn Ḥanbal on *'urf*. Generally speaking, the early *fuqahā'* discussed only those sources that have religious significance or are sanctioned by the religious sources.

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[78]Ibid., 93 (Qur'an 16:14).

[79]Ibid.

[80]Ibid., 94.

[81]Ibid., 95.

[82]Ibid., 98.

[83]Ibid., 91-3.

[84]Ibid., 91-7.

[85]Ibid., 95.

[86]Ibid., 90-9.

[87]Ibid., 92.

[88]Ibid.

[89]Ibid., 91.

However, he recognized the principles of *istiḥsān* and *al maṣāliḥ al mursalah,* as we discussed in "Early Fuqahā' on the Development of Ijtihad."[90] Both of these principles cover *'urf* and *'adah.*

Abū Dāwūd's (d. 275 AH) work, *Masā'il al Imām Aḥmad,* comprises the legal opinions of Ibn Ḥanbal. In it, he discusses several issues in which *'urf* and *'ādah* were considered. For example, when Ibn Ḥanbal was asked about hoarding (*ḥukrah*), he answered that it can only be applied to what people use as food, the exact definition of which was left up to the local inhabitants. Therefore, hoarding can be defined differently in every society.[91] Abū Dāwūd also related Ibn Ḥanbal's views on many other *fiqhī* issues concerning commercial transactions without refering to either *naṣṣ* or *ijmā'.* Obviously, in those cases he could not neglect the *'urf,* he accommodated it by considering the interest of the people.[92]

Ibn Qudāmah (d. 620 AH), the most prominent Ḥanbalī jurist, describes both his opinion and that of Ibn Ḥanbal in *al Mughnī.* He mentions that Ibn Ḥanbal accepted a weak report if he found that it corresponded to local custom.[93] Ibn Qudāmah himself recognizes *'urf* and *'ādah* as sources and refers to them in many *fiqhī* rulings.[94]

Ibn Taymīyah and Ibn al Qayyim accept *'urf* and *'ādah* in both theory and practice. Ibn Taymīyah divides names of things into three categories: a) *'Urf shar'ī,* by which he means such Islamic practices as *īmān, ṣalāh,* zakah, *kufr,* and *nifāq.* The meanings of these terms are determined and explained exclusively by the Sharī'ah; b) Names having literal meanings but which are generally known and understood within the contexts of custom and usage. According to Ibn Taymīyah, the Sharī'ah does not confine the meanings of such words within certain limits; and c) Words possessing only a literal meaning.[95]

Another example of taking custom into consideration occurs when he discusses traveling.[96] As one is allowed to shorten his/her prayers while

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[90]Muhammad Y. Faruqi, "Early *Fuqahā'* on the Development of Ijtihad," *Hamdard Islamicus.*

[91]Abū Dāwūd, *Masā'il al Imām Aḥmad,* 191.

[92]Ibid. On the issue of hiring a skilled person for a specific job, see ibid., 206.

[93]Ibn Qudāmah, *al Mughnī,* vol. 6, 485. See the issue of "khafā'ah."

[94]Ibid., vol. 3, 561-2; vol. 6, 485; vol. 7, 18.

[95]Ibn Taymīyah, *Fatāwā,* vol. 19 (Makkah: 1399), 235.

[96]Ibid., vol. 19, 243-7.

traveling, the definition of "traveling" must be determined. Such a definition is provided by the prevailing *'urf* of the people, as there is no limit indicated in the Sharī'ah. For example, a postman walks a great deal but is not regarded as a traveler. The same is true of people who commute to work. The people of Makkah, on the other hand, were considered to be travelers when they went to spend the night at Mina and 'Arafah during the *ḥajj*. They could therefore shorten their prayers. Other examples in which custom is applicable within a legal ruling is seen in the case of the *kaffārah* (expiation) for breaking one's oath. Here, one must feed ten poor people with the average food that he/she provides to his/her family. What is "average food" depends upon the local custom.[97]

Ibn al Qayyim illustrates some cases in which customary evidence can be taken into consideration.[98] He further states that the consideration of *'urf* in some cases is an obligation (*wājib*).[99] According to him, it is effective and decisive in more than one hundred issues.[100]

Conclusion

It is clear that the Sharī'ah is the major norm which regulates the conduct and governs all aspects of Muslim individuals and their societies. Its basic sources are the Qur'an and the Sunnah, while *'urf*, *'ādah*, and all other methods of ijtihad are secondary (i.e., nonindependent, derivative) sources. Rulings based on these secondary sources are allowed, provided that they are in accordance with Islamic principles and norms.

The *khulafā' al rāshidūn* made use of local customs and practices whenever it was possible to do so. The *fuqahā'* continued to follow this practice and provided legal and rational grounds for its acceptance. The wisdom of the early Muslims in recognizing and accommodating useful customs from the surrounding civilizations is evident. It is also in accord with a prophetic hadith: "Wisdom is the lost property of the faithful who deserve it most wherever it may be found," a saying that encouraged Muslim scholars to accept useful knowledge and the other good things of life which were consistent with the Sharī'ah.

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[97]Ibid., vol. 19, 252-3. See also Qur'an 5:89.

[98]Ibn al Qayyim, *al Ṭuruq al Ḥukmīyah*, reprint (Cairo: Maktabat al Atharīyah, n.d.), 87-92.

[99]Ibid., 89-9, 91, 114.

[100]Ibn al Qayyim, *I'lām al Muwaqqi'īn,* vol. 2, 393-4; vol. 3, 3-9.