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**Custom ('*Urf*') As A Marginal
Discourse in the Formulation of Islamic Law: Myth or Reality?
With Special Reference To Ibn 'Abidin's Discourse on '*Urf*.'**

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Abstract

This dissertation primarily focuses on the problem of custom or *'urf* and its treatment as a marginal source in Muslim legal theory or *uṣūl al-fiqh*. This is done by engaging the discourse of Muslim jurists and their pronouncements on *'urf* (custom). In particular, I focus on the views of Ibn 'Ābidīn, a seventeenth century Ḥanafī scholar of Islamic jurisprudence, on custom. This is contrasted with two additional jurists to provide a comparative twist to Ibn 'Ābidīn's discourse on *'urf*.

The normative structure of Islamic law or *sharī'a*, is based on primary and secondary sources. In this scheme, the *Qur'ān* and *Sunnah* (traditions of the prophet), constitute the primary sources, whereas principles such as *Ijmā'* (consensus of jurists) and *Qiyās* (use of analogy) are deemed secondary sources. Within this context, in the discourse of Muslim jurists, *'urf* is viewed as an auxiliary source of law in the absence of evidence from the normative primary and other secondary sources.

Given the above context, that is, the hierarchy in the structure of what constitutes sources of law in Islamic jurisprudence, the crux of this dissertation is to problematise this accepted "normative" hierarchy of sources. In this instance, the dissertation engages some of the epistemological foundations of Islamic jurisprudence. My view here is that, except for a few, most works on Islamic law or jurisprudence have not extensively treated the problem of its epistemology. And where the treatment is extensive, it is usually trapped by the constraints of a conservative discourse. Such a discourse does not question the logic of the "normative paradigm" (on the hierarchy of sources) but only authenticates it, thus justifying the views of classical jurists.

In the light of the above, the study of *'urf* or custom as a source of Islamic law, is constrained by the imperative to satisfy classical legal theories on its status. Subsequently, attempts to deliberate on *'urf* as a legitimate source are mediated through this classical paradigm. Therefore, through the

vantagepoint of *'urf* or custom this dissertation highlights this epistemological crisis albeit in a limited sense.

In addition to the aforementioned, this dissertation situates the theme of *'urf* or custom within the broader theories on the study of religion. Invoking the theme of "tradition", *'urf* and how it impacts on the definition of the Islamic tradition is further nuanced. The focus here is on whether traditions are capable or incapable of inventing or reinventing themselves. In this context *'urf* is mediated through the idiom of "tradition." Here I argue that *'urf* as tradition is a dynamic and fluid concept, capable of transforming itself to meet the contextual and contemporary exigencies as opposed to an archaic and immutable concept. In particular, I try to show that *'urf* is at the centre of legal discourse of most Muslim jurists as much as they deny this. Based on this postulation, I then try to show the centrality of *'urf* as a legitimate, if not primary, source of law. This is in sharp contrast to the hitherto normative status traditionally assigned to it, that is, only viewing it as an auxiliary source, when the primary ones are silent.

CONTENTS

| | |
|---|----|
| Acknowledgements----- | i |
| Abstract----- | ii |
| INTRODUCTION | |
| ----- | 1 |
| The Problem----- | 1 |
| Motivation----- | 3 |
| Method, Methodological and Theoretical Considerations ----- | 6 |
| Chapter Outlines----- | 10 |
| CHAPTER ONE ----- | 12 |
| Custom (' <i>Urf</i>) in perspective----- | 12 |
| Defining ' <i>Urf</i> (Custom)----- | 13 |
| Defining Tradition----- | 14 |
| ' <i>Urf</i> (Custom) as Tradition----- | 18 |
| Development and structure of Islamic law: A Synopsis ----- | 22 |
| Sources of Islamic Law----- | 29 |
| ' <i>Urf</i> (Custom) as a Subject of Inquiry in Scholarship: A Survey ----- | 31 |
| Conclusion----- | 37 |
| CHAPTER TWO ----- | 40 |
| ' <i>Urf</i> (Custom) through Ibn 'Ābidīn's discourse ----- | 40 |
| Ibn 'Ābidīn: A Brief Biographical Profile----- | 41 |

| | |
|--|-----------|
| Ibn ‘Ābidīn’s works----- | 44 |
| Ibn ‘Ābidīn’s Discourse on ‘Urf: Selected Themes and Analysis----- | 44 |
| Defining Custom (‘Urf): Ibn ‘Ābidīn----- | 45 |
| Conclusion----- | 51 |
| | |
| CHAPTER THREE ----- | 54 |
| ‘Urf (Custom) in the Captivity of Tradition----- | 54 |
| The Dialectic of ‘Urf: ‘Urf Disguised as <i>Maṣlaḥa</i> ----- | 56 |
| Shātibī’s Discourse on ‘Urf----- | 58 |
| Khallāf’s Discourse on ‘Urf----- | 61 |
| A Critique: Contrasts and Comparisons----- | 64 |
| Conclusion----- | 65 |
| | |
| CHAPTER FOUR ----- | 67 |
| Reconfiguring ‘Urf (Custom) as a Legitimate Source: Methodological and Theoretical Considerations ----- | 67 |
| A Theoretical Point of Departure? ----- | 72 |
| | |
| CONCLUSION ----- | 80 |
| | |
| BIBLIOGRAPHY ----- | 84 |

INTRODUCTION

No law in any society, even in a religious one, is ever stagnant. It develops with the development of the society. Islamic law, although authoritative, is not rigid by nature. It does not, of course, change very rapidly. Its development is very slow and imperceptible.

- Ahmad Hassan¹

The Problem

Notwithstanding the above quote, that Islamic law “is not rigid by nature”, but flexible and changes with times and context, Islamic legal scholarship in most instances promotes the opposing view. In other words, most scholars writing on the subject tend to present Islamic law as static and stagnant. This is nowhere evident than in the treatment of custom, that is, ‘urf, as a source of Islamic law.

It is not an exaggeration to state that in the study of Islamic law, no other subject has received such scant attention than ‘urf (custom), alternatively referred to as ‘āda² as a source of Islamic law. The assertion that ‘urf has been treated marginally in the general discourse on what constitutes sources of Islamic law does not suggest that the impact of ‘urf has not been given attention in Islamic jurisprudence. My contention rather, is based on the fact that it has been assigned a less prominent status, than, for instance, *ijmā’* (i.e. the principle of consensus). Here, I propose to show that whilst ‘urf is

¹ Ahmad Hassan, *The Doctrine of Ijmā’ in Islam: A Study of the Juridical Principle of Consensus* (New Delhi: Kitab Bhavan, 1992).

² To maintain consistency, I will in the context of this study use mainly the term ‘Urf as implying custom. I am aware that at times most scholars use these terms interchangeably. For a more detailed definition on ‘Urf and ‘Āda see Ziya Gokalp (d. 1343 A.H.) quoted in Hassan, pp. 252- 253.

normatively treated as an “auxiliary” or extra³ source of Islamic law, it does in fact feature prominently in the formulation of Islamic law. That is why for instance, a minority of scholars has ruled that it is a primary source of law, and it is this latter view that this dissertation supports and seeks to prove. This particular view has over a period of time become “buried” and hence its non-acceptance⁴.

The problem of denying *urf* a legitimate or more prominent status as a source of Islamic law, not only gives currency to the notion that Islamic law is static, but effectively sanctions such a notion. Of course, conservative and apologetic Muslim scholarship refutes this notion, that is, the assumption that Islamic law is static. The thrust of such scholarship assumes that allowing *urf* prominence as an independent source of law is tantamount to diluting and mutilating the divine nature of Islamic law, and thus undermining its “superhuman”⁵ nature. This view is an over simplification of how Islamic law operates and functions. Furthermore, it undermines the impact of human agency and the social environment in the construction of law.

The view proposed in this study, is that although traditional scholarship has denied *urf* primacy as a source of Islamic law, it is, nevertheless, in actual practice indirectly invoked as something else, other than *urf*. Put differently, it does resurface in a disguised form wearing the garb of another legal principle. For instance, through the principle of *ijmā'* (consensus),

³ See Farhat Ziadeh, “*Urf* and Law in Islam” in *The World of Islam: Studies in honor of Philip K. Hitti* edited by James Kritzeck and R. Bayly Winder (London: MacMillan & CO LTD, 1959), pp. 60-67.

⁴ *Ibid.*, p. 64.

⁵ See Gideon Libson, “On The Development of Custom as a Source in Islamic Law”, *Islamic Law and Society*, 4, 2, 1997, p. 135.

maṣlaḥa (public welfare) or *istiḥsān* (juristic preference), customary practices are introduced into the body of the law. In such a context, '*urf*' is rendered "dependent on another principle", rather than stand independently. The problem is that legal scholars are cautious not to over step the set 'normative boundaries' of the tradition - which is the agreed upon hierarchy of primary sources (the *Qur'ān*, *Sunnah*, *Ijmā'* and *Qiyās*). Such scholarship is rather content with preserving the status quo, that is, the accepted hierarchy of sources. Given such a context, '*urf*' is then treated as a 'marginal category', and hence the title of this dissertation: 'Urf (custom) as a marginal discourse in the formulation of Islamic law: Myth or Reality.

The above title, in a sense, informs the central thesis of this dissertation. The thesis postulated here is that contrary to the normative credo of Muslim legal theory that invokes '*urf*' as a source of law, only in the absence of a clear textual evidence or *naṣṣ*, '*urf*' or custom in practice permeates legal theory as its primary informant. Furthermore, I will show that the denial of giving primacy to custom as a source of law is based on an epistemology that is trapped in its past normative history. Part of such a normative history is that it is culture-specific, and here, I imply its *Arabo-centric* and patriarchal social milieu. Arguably, it is this social milieu that has mainly served as the social base from which Islamic law has evolved.

Motivation

Arguably the reason I have chosen to focus on '*urf*', is due to the fact that this subject has not been sufficiently explored in most scholarly works on Islamic law and jurisprudence, especially in contemporary times. Moreover,

contemporary research on Islamic law and legal theory in particular, as asserted elsewhere, points out that “the evolution of the discipline and its sub- themes is still in its infancy”⁶ and as such, my thesis is a contribution to this felt need. Therefore, ‘urf as an underresearched “sub-theme” in Islamic law, provides a vantage point to further explore how Islamic law, as tradition, is constructed and formulated.

In addition, whilst other juristic principles like *istiḥsān* (juristic preference), *Ijmāʿ* (or consensus of jurists) or *maṣlaḥa* (human welfare) are dealt with extensively in some works in English, the same cannot be said about ‘urf. For instance, during this research it became clear that there is an absence of substantial works deliberating on the principle of ‘urf, at least in English. This factor alone appears to be sufficient motivation for selecting to focus on Ibn ‘Ābidīn’s work on ‘urf as a means of exposing it to a wider readership not well versed in Arabic texts.

In mentioning the above factors, I do not wish to belittle the contributions of those who have written some articles or devoted chapters on ‘urf in western languages. The point I am making, is that there is yet no substantial work in a single manuscript focusing exclusively on ‘urf. Therefore, the different articles or chapters mentioned cannot be a substitute for a work that needs to be devoted entirely to ‘urf. This further supports the motivation to choose this subject for enquiry.

⁶ See Ebrahim Moosa’s, “The Legal Philosophy of al- Ghazali: Law, Language and Theology in al- Mustasfa”, PhD thesis (unpublished), University of Cape Town, 1995, p. 1.

As pointed out (see p.2), my main contention in this dissertation is that, whilst in theory, *'urf* is accorded a marginal status, in practice it is frequently invoked by jurists to give credence to their postulations and legal rulings.

In fact, from the formative, classical, medieval and modern periods, *'urf* continued to play a prominent role, not only as a source, but also as contributing to the very growth of Islamic law, thereby displaying its “mutable”⁷ nature.

Viewed from the above context it can be contested that *'urf* continues to play a more primary function in the formulation of Islamic law than jurists and legal theorists would admit. Unless we take cognisance of the point made by Coulson, that the “the bulk of Muslim legislative practise is jurist’s law”⁸, a superfluous glimpse on the structure of Islamic law and how law functions within Muslim society can easily delude us. What is evident in Coulson’s statement, is that jurists can easily manipulate the law. In other words, through skillful manipulation of the sources of Islamic law, it is easy for jurists to “pretend” that they are confining themselves to the normative and acceptable hierarchy of sources, thereby invoking the readily accepted and less problematic sources instead of the ‘problematic’ ones. Thus, in such a context jurists are content with satisfying what they deem as the objectives of

⁷ See Khalid Masud’s *Islamic Legal Philosophy: A Study of al-Shātibī’s Life and Thought* (Delhi: International Islamic Publishers, 1977), p. 16.

⁸ See, for instance Noel Coulson quoted in Moosa’s “ ‘The child belongs to the bed’: illegitimacy and Islamic Law” in *Questionable Issue: Illegitimacy in South Africa*. Edited by Sandra Burman and Eleanor Prestonwhyte (Cape Town: Oxford University Press, 1992), p. 171.

the law or *maqāṣid*, rather than engage its epistemological foundations⁹ by dabbling with 'less acceptable' sources, such as '*urf*.'

It is in the context of these juxtapositions by legal theorists and jurists on '*urf*, that is, assigning it a marginal role, that such a practice, rather than advance Islamic law, regresses it. Given such a tendency, my argument here is that a fresh perspective on '*urf* is deemed crucial as a point of departure or paradigm for reworking the epistemology of Islamic jurisprudence.

Method, Methodological and Theoretical considerations

This is a textual study based on a critical analysis of Ibn 'Ābidīn's *Majmū'āt Rasā'il Ibn 'Ābidīn*, focussing on the section on '*urf* (*Nahsr Al-'Urf*). The rationale for selecting this text is, first this treatise provides a case study where the problem of '*urf*, as a source of Islamic law is approached. Second, Ibn 'Ābidīn's treatment of '*urf* is widely acknowledged by many scholars of note as a brilliant discussion of the subject of '*urf* within the classical context.¹⁰

⁹ Although in a slightly different context, the point about the agency of the jurists in determining the law is well captured by Tayob where he shows how through the doctrine of *talfiq* reformist jurists would go against "traditional practise" and "follow the judgement of another school...as a means of overcoming legal problems". For a detailed discussion on this see Tayob's *Islam: A Short Introduction* (England: Oneworld Publications, 1999), p. 145. See also, Abdullahi An-Na'im's *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990), p. 33.

¹⁰ To my knowledge, besides two local translations (unpublished), the work of Ibn 'Ābidīn (d. 1836) has not as yet been made available in English or received an independent scholarly study.

Methodological and theoretical considerations in this study are considered equally important for an understanding of *'urf* (custom) and its implications as a theme of study. For, if *'urf* serves as a pretext for engaging the Islamic tradition, a preliminary word about the context of this study, in relation to religious studies, is necessary.

Arguably, in the study of religion there is no finality on a definite pattern for a methodological framework. Based on contemporary writings regarding methods towards the study of religion, the broad categories in which this can be located normatively are the historical, comparative, phenomenological and the so-called "insiders'" approach. If *'urf*, in its "textual" connotation, assumes that this is a legal study anchored within the ambit of Islamic jurisprudence and legal theory, what is its relevance then to the study of religion? Put differently, what is the relationship between religious studies and law, and what are the possible methodological options open for engaging such an enquiry?

In answering the above set of questions, first, let me declare that in the context of this study, the approach I adopt implies more than just engaging legal theory and Islamic jurisprudence. In other words, the approach adopted here goes beyond speculating on purely legal and Islamic law related theories - it is in a sense inter-disciplinary. Besides, I will also focus on the socio-historical and religio - cultural concerns underpinning the subject under investigation. That is why, for instance, a section of chapter One provides a synopsis on the development and structure of Islamic law. This helps, albeit in a limited manner, to place into perspective the historicity of Islamic law and the impact of the social context in its development.

Second, on situating this study within religious studies, the methodological questions around the study of religion will be considered. For example, this particular study is under the rubric of “self- understanding”. Put differently, the perspective that permeates this study lies within the Islamic tradition itself. The study seeks to elucidate and interrogate the very foundations on which the Islamic tradition professes to be premised on. In particular, through the vantagepoint of *‘urf* the study attempts to self-critique what aspects exactly constitute sources of Islamic law?

Of course, with the concern for self- understanding of the tradition, I am conscious of the pitfalls that normally underpin such an enquiry- namely “idiosyncrasy of personal experience” (which stems from close proximity or affinity with the studied tradition). The risk here is that scholarly and scientific concerns could easily “recede very much to the background”¹¹. In other words, the “enquiry” into the subject becomes over burdened with “pedantic questions, and thus fails to provide the required results”. The required results in this case being a “rational”, relatively “objective” and a critique free of dogma and conventional dictates that emanate from the studied tradition.¹²

Surely, it is extremely difficult to maintain a balance here. In other words, to straddle between the imperative to exhaustively engage and critically examine the tradition at the plane of self understanding, and yet, to do so simultaneously by employing other human and social science methodological tools “for purposes of edification”¹³. Therefore, based on these comments,

¹¹ See John F. Wilson and Thomas P. Slaven, *Research Guide to Religious Studies* (Chicago: American Library Association, 1982), p. 13.

¹² *Research Guide to Religious Studies*, p. 12

¹³ *Ibid.*

my own approach here will cross boundaries and invoke general theories prevalent in social sciences to enlighten the discussion. This, it is hoped, will assist in steering the project away from the "idiosyncrasy", or "intensity" and subjectivity emanating from the trappings of the tradition's preoccupation with self-understanding. Naturally, this will give the method employed here the aura of "bipolarity or two dimensionality."¹⁴ By "bipolarity", in this context, I imply responding to methodological demands and yet remain critical and objective to the subject without sacrificing the empathy of an insider's perspective.

In seeking to do a critical and historical examination of how the problem of *'urf* has generally been treated in Muslim scholarship, theoretically, I will, to some extent, draw from the theories of Edward Shils, Terrence Ranger, Eric Hobsbawm and Talal Asad. These theories as expounded by these scholars are useful insofar as they help to explore how traditions are handed down from one generation to the next, and how tradition functions as a "legitimising and delegitimising" factor in human affairs. Arguably, in the context of our study on *'urf*, there is a sense in which we can say that it is through tradition that the status of *'urf* has become compromised. In other words, in reading Islamic law as "tradition" we can easily see, as I will show, how such a tradition does contradict itself in its pronouncements on *'urf*. Therefore, given this theoretical bias, in my attempt to show its relegation to a less prominent source of Islamic law, *'urf* will be mediated through the idiom of tradition. By mediating *'urf* through the idiom of tradition the aim is twofold.

¹⁴ Ibid.

First, is to attempt a comprehensive study of how religion as tradition invents and reinvents itself. Second, is to relate specifically to the problem of custom or *'urf* and how its status, as source of Islamic law, is negotiated in Islamic jurisprudence. In this instance, the internal and specific questions relating to the tradition's self-understanding are examined.

Chapter Outlines

After the introduction, which introduces the subject of inquiry and lay the theoretical and methodological considerations underpinning this study, this dissertation comprises four chapters and a conclusion. Chapter One provides a brief description on *'urf* (custom) and how it has been dealt with in legal scholarship. It looks at the main themes and ideas that permeate its treatment by different scholars with an appraisal, evaluation and critique of their expositions. The aim here is to place the theme of custom in Islamic legal theory into perspective.

Chapter Two focuses on Ibn 'Ābidīn, the juriconsult whose treatise on *'urf* is central to this study, in that, it provides a case study based on a textual perspective on the problem of *'urf* within Islamic legal theory. This chapter, also provides a biographical profile of Ibn 'Ābidīn, thus sketching the context and environment of his scholarship. This is followed by an analysis of Ibn 'Ābidīn's discourse on *'urf* which lays the foundation for chapter Three, where Ibn 'Ābidīn's discourse is used as an index for problematising the subject of *'urf* and its impact as a "formal" source of Islamic law. In order to situate Ibn 'Ābidīn's discourse, I place it within a comparative perspective. This is done by further contrasting it with al-Shāṭibī and Khallāf's discourses on *'urf*.

It is in this chapter and in the fourth, where the problem of the epistemological crisis within Muslim legal theory is probed. Also, it is in these chapters that the discussion on *'urf* is more nuanced and problematised. In particular, my postulation on how its malleability as a potential instrument for inventing and reinventing the Islamic tradition forms the bulk of the discussion.

Finally, the conclusion attempts to draw the different issues raised and places these within a contextual framework that draws the necessary conclusions and propositions.

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CHAPTER ONE

Custom ('*Urf*) in Perspective

Introduction

This chapter situates the subject of this study, that is, '*urf* (custom), by placing it within a broad general perspective. I do so by first examining its treatment in scholarship by looking at both Muslim and non-Muslim scholars. This in a sense provides a literature survey on the treatment of custom, and sets the tone for the subsequent chapters. Second, as a preliminary note, a synopsis on the development and structure of Islamic law precedes the discussion on '*urf*. However, before doing so, key terms central to this study are first defined. These terms are 'custom' and 'tradition'.

Defining the former, custom ('*urf*) is crucial, in that, it is the subject of investigation, whereas 'tradition', provides a methodological and theoretical framework for focusing the discussion. Seeking to establish a working definition of these terms helps to eliminate any ambiguities and confusion from the outset, before their actual deployment as key theoretical tools.

Defining '*urf* (custom)

Linguistically, '*urf* is derived from the Arabic verb '*arafa*, meaning to know, to be aware, or to be acquainted with. It could, therefore, be summed up as what is commonly known and socially acceptable. In the context of legal discourse, it is the unwritten law of the community, the 'customary law' as distinct from the statute law. In the Islamic legal context, customary practice is seen as the antithesis of the *sharī'a* or legal canon of Islam. As this study will show, '*urf* has, in many instances, served as the very *raison detre* in the formulation of Islamic law. For instance, Libson underpins this assertion when he writes that:

The refusal of Islamic law to grant custom status as a formal source is surprising on three counts. First, custom plays a vital role in almost every legal system as a source of law for the development of the legal practice, a bridge between legal theory and practise... Second, the practice of the Muslim community was an influential factor in shaping legal norms and contributed to the development of Islamic law. That, this was the case may be discerned from references in the classical literature to "popular" custom ... Third, assuming as held by some scholars, Roman law exerted influence on Islamic law, and further, that Jewish law and Islamic law had a mutual influence upon one another, one is struck by great difference between Roman and Jewish law- both of which explicitly recognise custom as a source

of law, and Islam does not.¹⁵

Libson goes on to point out that, in spite of the non recognition of *'urf* as “a source of law, most “Muslim jurists - in particular the Ḥanafīs and even more so the Mālikīs- refer to it with great frequency”.¹⁶ This constant reference to *'urf* notwithstanding, its status still remains “controversial” - leading to what Libson terms a “discrepancy between theory and practice”¹⁷. I will elaborate more on this latter point in the following chapters.

Second, building on what Libson states (acknowledging the status of *'urf* “as a formal source”), this dissertation seeks to move beyond pleading for the legitimacy of *'urf* as a “formal source”, to actually affirm its status as a primary source. As indicated, this will be done in chapters Two and Three (see p.9), where my hypothesis is tested by exploring and analysing Ibn 'Ābidīn's work on *'urf*.

Defining Tradition

The second term to be clarified is “tradition”. Since the term tradition features prominently in our discussion on *'urf* (custom), it is also necessary that such a term is defined. In the context of this study, tradition is used as a theoretical tool, in that, it is used in the context of defining religion generally and more specifically the “Islamic tradition”. Certainly, “tradition” is a tension-loaded term with “multiple meanings”.¹⁸ The purpose here is not to explore all of

¹⁵ Libson, 1997, pp. 135- 136.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ See Edward Shills, *Tradition* (Chicago: The University of Chicago Press, 1981), p. 12.

these meanings, but attempt a working definition for the purpose of this dissertation.

According to Edward Shills in his extensive work on *Tradition*, amongst other definitions, tradition simply means what “is transmitted or handed down from past to present ... viewed in this context tradition then does not define the parameters that constitutes it...” In other words, tradition is open to new interpretations or readings. Put differently, it is not a closed book but open-ended. Shills explains this further when he asserts that tradition “makes no statement about what is handed down... it says nothing about how long it has been handed down or in what manner, whether orally or in written form”.¹⁹ What is apparent in Shills’ definition of tradition is that it is fluid and open to new interpretations. This is in sharp contrast to the often-held notion of tradition as something fixed or static. It is perhaps useful at this point to contrast Shills’ reflections on tradition with those of Hobsbawm.

First, Hobsbawm seems to distinguish “tradition” from “custom”(p.2). “Tradition”, argues Hobsbawm, “must be distinguished from ‘custom’”, in that, what sets a tradition apart from custom is that “the characteristics of ‘traditions’ ... is invariance”.²⁰ In other words, one of the hallmarks of tradition is that “it imposes fixed (normally formalised) practises such as repetitions”, whereas, “custom” is marked by its capacity to “appear compatible or even identical with precedent... (And) social continuity”.

¹⁹ Shills, p.12.

²⁰ See Eric Hobsbawm, “Introduction” in *The Invention of Tradition* edited by Terrence Ranger and Eric Hobsbawm (Cambridge: Cambridge University Press, 1985), pp. 1-14.

What this distinction entails is that custom, as the 'natural law' of the community has to be variant. If it were to be "invariant" like tradition, it would run against the natural order of things or against the social make-up of the society whose ethos is marked by variations. So, if in this foregoing definition, tradition as opposed to custom is marked by the tendency to be "invariant", it must, nevertheless, still continue its repetitions or has to "reinvent" itself.²¹

It is in the context of these repetitions (or inventions), that I want to argue, that the differentiation is not as wide as Hobsbawm makes it to be, but a subtle one. It is in the context of this blurred division that "custom" could be metaphorically read as "tradition". For as Hobsbawm points out, that through the ritualisation that takes place through custom, "traditions" are invented or their repetition is actualised. What is discernible in this statement is a symbiotic relationship between "custom" and "tradition".

To avoid a lengthy definition of a tension-loaded term such as tradition (a term that has compelled Shills to write an entire manuscript), I settle for this definition: tradition is not a static category but is fluid and capable of subjecting itself to 'new readings' and 'interpretations'. In short, it is malleable. It is this perspective that will inform my working definition of "tradition". Accordingly, such a definition is also extended to view '*urf*' (custom) in the same light. In other words, '*urf*' invoked in the idiom of tradition, implies a dynamic and fluid concept that is an agency for legal formulation. This is in sharp contrast to the hitherto fossilised and rigid view

²¹ Hobsbawm, p. 14.

of custom- a view trapped by an epistemological paradigm that negates the independence of custom as a formal source of law.

Furthermore, notwithstanding the problematic nature of the term “tradition”, in our context, “tradition” in its general usage refers to Islam, the religion as taught by Prophet Muhammad. Therefore, moving from this premise, we will then talk of the “Islamic tradition”. Generally, in the popular sense, the notion of “Islamic tradition” connotes Islam and its various institutions. However, for this study, “Islamic tradition” is too broad a category - it needs to be narrowed down. In other words, to speak in the generic term about the “Islamic tradition” is problematic or at best “confusing”. For instance, what is implied by “Islamic tradition”?

Riffat Hassan in her attempt to answer this very pressing question observes that Islam “like other major religious traditions- does not consist of, or derive from, a single source.”²² The implication here is clear, and that is, Islam has many sources. Put differently, Islam is not monolithic but multi – dimensional. For example, could it be that this “tradition” simply implies the *Qur’ānic* text, or the prophetic practice (Sunnah) and *Ahādith* (prophet’s transmitted sayings)? Or could this tradition imply *fiqh* (Islamic jurisprudence) and the distinctive *madhahib* (schools of law)? Arguably, as singular “texts” all of these “traditions” carry their own ‘source -centred interpretation’ of Islam, as Muslim scholarship itself would show. Take, for instance, the legalists’ and scripturalists’ discourses, particularly as manifested in *Şūfism* or mysticism. If you take the latter, it is clear that its discourse (i.e. *Şūfism*) is

²² Riffat Hassan, “Muslim Women and Post-Patriarchal Islam” in *After Patriarchy*, edited by Paula M. Cooley, William R. Eakin and Jay B McDaniel (New York: Orbis Books, 1992), p. 39.

located within an esoteric and mystical dimension, and hence the presence of a tradition called “*Ṣūfī tradition in Islam*”. Given this plurality of sources, what then is the Islamic tradition -- and which one is the authoritative or the higher in this hierarchy? In offering an answer, on this question, Riffat Hassan arbitrarily provides a hierarchy of what constitutes the Islamic tradition. For example, she states that “insofar as Islam is understood theoretically or normatively -- the two most important sources are the *Qur’ān*, (Muslim divine scripture as revealed to Muhammad) and the *Hadith* (prophetic sayings....”.²³ Of course, it is not my intention here to delve into the problematic of these constituent sources as they are placed in this hierarchy. As already mentioned, my concern here is to show that it will be irresponsible to invoke “Islamic tradition” as if it were a unitary and monolithic entity.

‘Urf (custom) as Tradition

With this conceptual clarity on what is “tradition”, and what constitutes the “Islamic tradition” in particular, it is now easier to introduce and situate our theme of investigation, that is, *‘urf through* the idiom of tradition within the context of Islamic law (read as *tradition*).

Now, if law is designated as symbolic of tradition, and in this case Islamic law, surely as “tradition” it is not “wholly free from ambiguity, obscurity, and

²³ Riffat Hassan, p.39. For a detailed discussion see also the work of Daniel Brown, *Rethinking Tradition in Modern Islamic Thought* (Cambridge: Cambridge University Press, 1996).

uncertainty”.²⁴ Arguably, it is this “ambiguity” that makes law and in this case Islamic law susceptible to clarification. In the case of Islamic law, its “ambiguity” is more pronounced when one examines what constitutes its sources? To be specific, this is more evident in the investigation of *‘urf* or custom as a source of Islamic law. Therefore, problematising *‘urf* as a marginal source of Islamic law, amongst other things, seeks to further expose the “epistemological crisis”,²⁵ confronting Islamic legal theory.

It is my assertion that most works on Islamic law have tended to be theoretical and descriptive without sufficiently engaging and critically analysing the problem of epistemology within Islamic legal thought. Arguably, even works that attempt to engage the problem of this crisis (the epistemological), are marked by a conservatism that is too cautious not to unsettle the “normative paradigm” upon which Islamic legal theory and law is based. This tendency is discernible in most works dealing with Islamic law. For example, Hallaq makes reference to the highly acclaimed 14th century scholar, Shāṭibī. As if puzzled, Hallaq observes, that “Even Shāṭibī could not free himself... from the literal grip of the hermeneutic that so thoroughly permeated Muslim juristic thinking”.²⁶ Explaining this further, he notes that it was (and still is) “sufficiently right to marginalize completely, if not silence, any hermeneutic that attempted a change or restatement of the law.” In other

²⁴ Shills, *Tradition*, p. 96

²⁵ Here I am using a phrase employed by Prof. A.Sachedina where he explains and puts into perspective the problem of an epistemology that tends to be misogynist due to its patriarchal social base. See Abdul Aziz Sachedina’s “Woman, Half-the-Man? Crisis of Male Epistemology”, unpublished paper. I have nevertheless deployed this term to connote my own argument that problematises the structural hierarchy in what constitutes sources of Islamic law.

²⁶ See Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), p. 208.

words, any departure from the normative legal formulation and interpretations of Islamic law are immediately frowned upon. Hallaq, in his recent work has identified this tendency as the "literal grip of the classical hermeneutic".²⁷ As noted, this "classical grip" continues to permeate most works of modern and contemporary scholars. For instance, this tendency is again observable in a recent work by Moosagie, whose central thesis is to demonstrate the capacity of Islamic law's ability to meet "social exigencies" - and therefore capable of adapting to social change.²⁸ *Urf*, in the context of Moosagie's discourse, is invoked to demonstrate his central thesis that law in Islam can be extended and naturally has the propensity to accept change. This, he argues, is through "the vital role of extra-legal propositions and their crucial function in the judicial process". To support this argument, he unequivocally states that "a ruling that fails to take proper account of its social milieu is ... devoid of any judicial insight".²⁹

I am not so much concerned with the latter's preoccupation with the "adaptability" of Islamic law but rather wish to show the inherent contradictions in this type of work. In particular, Moosagie's approach serves as a good model of similar works characterised by apologetics based on the imperative to show "adaptability" of Islamic law. What is interesting to note, is

²⁷ Ibid.

²⁸ This particular work is relevant here in that the writer has devoted a complete section on custom (*urf*) or what he terms "prevailing norms" to bolster his thesis. See Alie Moosagie's, "Islamic law and social change", MA Thesis, university of Cape Town, 1989.

²⁹ Moosagie, pp. 47 -50.

that whilst this work is daring in its attempt to illustrate the capacity of Islamic law to meet social challenges, it is equally trapped by “the literal grip of the hermeneutic”(see p. 19). The writer, for instance, is quick to register his concern about how the results of “meeting the challenge of adaptability” can still leave Islamic law adulterated by the imperative to meet change. For example, he asks whether in the pursuit of extending itself to accommodate change, is it possible for Islamic law not to “sacrifice any of its authenticity at the altar of change”? What is clearly discernible in this last statement is an apprehension or fear that the “authenticity” of Islamic law may be lost.

Accordingly, this line of reasoning confines “authenticity” only to the “classical hermeneutic”. The logical conclusion from the thrust of such a perspective is that all other readings of Islamic law are less “authentic” since they have the potential to “adulterate” the law.

In citing the above example, my point is simply to show how works written along similar lines, despite the pretence of showing the “mutable” nature of Islamic law, they do not move beyond this point. The problem is that this tendency does not stretch the boundaries of Islamic jurisprudence any better than the classical scholars have done. In fact, it could be argued that the classical scholars were more daring in their scholarship, for they opened new frontiers than their present day counterparts.

The question begging an answer is if Islamic law was a synthesis of the text and its immediate social environment, what then stops custom from being a primary source of law? Why is there such a difficulty in accepting its primacy as a source of Islamic law?

However, before dealing directly with the question of *'urf*, it is proper that first, I provide a brief account on the development of Islamic law. Within this account a synopsis of the normative structure of Islamic law will be presented. This background is necessary, it provides a framework for contextualising the status and place of *'urf* in Islamic jurisprudence.

Development and Structure of Islamic law: A Synopsis

This is not a detailed discussion, already, there are many works dealing with this subject, that is, development and structure of Islamic law.³⁰ To start with, I affirm that to assume Islamic law is static and monolithic is a gross error. It has, over the ages, undergone noticeable changes. Innovation and creativity is clearly discernible in the early formative periods in the development of Islamic law, particularly the first three centuries. These periods can be divided into two distinguishable periods in the development of Islamic law. These are the prophetic and post prophetic periods.

The Prophetic period is the era in which Muhammad was alive and received revelation. During this period, according to Islamic history, Muhammad was the ruler, the judge and law giver.³¹ Islamic law within this context, emanated as a synthesis of Muhammad's intervention in the daily disputes of his immediate society rather than as a code or text imposed from the outside. What this implies, is that *Qur'ānic* revelation was not arbitrarily

³⁰ See, for example Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), p. 17

³¹ See also R. Stephen Humphrey, *Islamic History: A Framework for Inquiry* (London: I.B. Taurus & Co Ltd., 1991), pp. 209-226.

imposed on Arab society, but was mediated by the Prophet, taking into account the prevalent social norms and customs. In this context, these norms and customs were not invoked in the sense of being “an extra source of law” as legal scholarship claimed later, but served as a primary source of law. In other words, whilst Muhammad was the lawgiver, he did not ignore Arab customary practice, but sought to incorporate it. The purpose of law in such a context was not so much a concern about bringing in a new blue print, but to provide a mechanism for social cohesion without upsetting the existing status quo in Arab society.

It will be true to say that whilst the *Qur'ānic* guidelines sought to sanction or discredit some of the prevailing customs, the framework of early Islamic law was essentially a product of familiar Arab concepts³². A classical example is the concept of *sunna* (a precedent or normative custom). According to Schacht, Arabs “were and are, bound by tradition and precedent. Whatever was customary was right and proper”³³. That the concept of *sunna* became, according to Islamic legal theory or *fiqh*, regarded as the second most important source of Islamic law, underlies its centrality in Islamic law.

However, it is worth noting, that whilst the *sunna* has become the embodiment of Islamic law, Schacht observes that in its original context, it was used as a political ploy to sanction the political administration and policies of “the first two caliphs”(Abubakr and Umar). The point here is that it was not used as a "legal precept" but as a political tool. According to

³² Schacht, p.17.

³³ Schacht, p.18.

Schacht, *sunna* in this context provided a doctrinal link, linking the practice or rule of Abubakr and Umar with that of the *Qur'ān*. Whilst not dismissing Schacht's notion, that the concept of *sunna* was used for political ends rather than legal purposes, I find his analysis a bit problematic.

First, it seems unmindful of the fact that Islamic law is not only rooted in the "social ideals . . . *but also* . . . in the social reality"³⁴ (italics mine). In other words, the social ideal is as expressed in the *Qur'ānic* revelation and the practice of the prophet, whereas the social reality is manifested in the societal practices of Arabia or Arab custom. The prophet as well as his Successors, responded to this social reality by applying the text to the social environment.

Now if the *modus operandi* was to incorporate existing concepts already in vogue amongst the Arabs (or the *sunnah* of the Arabs), this does not in any way diminish their legal status or relevance as legal precepts as appropriated by Islamic usage. What is crucial to note here, is that *sunnah* as Arab custom or "*urf*" was relied upon as a primary source for legal formulation. Schacht's misgivings seem to underrate the genius of the early caliphs' innovative measures to apply Islamic law. It appears that these early lawgivers were acutely aware of the need to take the existing social conditions and trends as crucial building blocks for applying the divine text.

³⁴ Humphreys, p. 210.

Another distinct period in which developments in early Islamic law is manifest, is during the post-prophetic period, particularly the era in which the early schools developed. This era is historically characterised by the Iraq and Hijazi schools of Islamic law, or what became known as “the ancient schools”.³⁵ Whereas in the earlier periods there were no formal legal schools *per se*, except that, the Prophet, and later his companions, played the commentary role as immediate interpreters of the law- in other words, the law emanated from their interventions in giving rulings. In the period under discussion, formal legal schools began to emerge. Private individuals who became the living tradition of the school headed these schools. Islamic law, as seen from these schools during this period, was both “retrospective” and “synchronous”, to use Schacht’s terminology. By retrospective, it is meant that the law was based on a “ ‘well established precedent (or *sunna madiya*)”³⁶. This established practice then reflected the actual practice of the community or customs of the community. It was this concept that later distinguished the school of Mālik, the Madinan jurist, in that, the guiding principle in his legal theory was the concept of *'amal* of the practice or actions of the people of Madina.³⁷

The synchronous aspect became manifested in the notion that “it is only the opinion of the majority that counts”. According to this notion, the views of the minority were not taken seriously or did not count at all. What mattered was the consensus of the majority of scholars. The period in which this trend

³⁵ Schacht, p. 5. For a more detailed account on the emergence of early Sunni schools of law, see Christopher Melchert, *The Formation of the Sunnī Schools of law: 9th – 10th Centuries C.E.* (Leiden: Brill, 1997).

³⁶ Schacht, p. 5.

³⁷ Schacht, p. 7.

found its expression is of importance, for it marked some of the shifts in the development of Islamic law. It was during the Umayyad period that a religious class known as the '*Ulama* or learned scholars emerged.

It was the consensus of these learned scholars that was regarded as binding on all Muslims. This was also the period of conquest, an era in which "power and wealth" had gained ascendancy, and not Islamic commitment and ideals"³⁸. The concern to uphold the *ijmā'* or consensus of the scholars can perhaps be viewed from this background (i.e. the perceived decadence that was setting in), and the *ijmā'* can be seen as a mechanism to safeguard the community from further disintegration. With the growth of the Islamic Empire, the Muslim community ceased from being a homogenous culture but became a multi-cultural entity. This development did not leave Islamic law untouched; foreign practices and customs began to make their imprints felt. The end result was a gradual shift from the early practices of the prophet and the early community. This then meant that Islamic law started to incorporate more doctrinal sources in addition to established ones, that is, the *Qur'ān* and *Sunna*. Given this context, concepts such as *qiyās* (analogical deductions) and *ijmā'* (general consensus) gained currency. It was not until after the demise of Umayyad's rule, when the Abbasids gained power and political ascendancy, that the real systematic formulation of the legal doctrines began to take shape.

³⁸ John Esposito, *Islam: The Straight Path* (New York: Oxford University Press, 1988), p. 76.

First, it was Mālik (d. 795) and Abū Ḥanifa (d. 767) who commenced to initiate their respective schools. Abū Ḥanifa represented the school of Kufa, which was characterised by its reliance on human reason, or *ra'iy*, in formulation of doctrines. Mālik, on the other hand, represented the Madinan School, with its emphasis on traditions, particularly as manifested in the actions, or *'amal* of the people of Madina.

The different orientations in these two schools mentioned obviously have their foundations in the history of their times or the context from where they emerged. In particular, the social conditions or environment played a central role in influencing these jurists. It is asserted that Abū Ḥanifa was largely influenced by the cosmopolitan environment of Kufa, in which "Persian laws and civilisation" were more tolerant to the liberal use of human or personal reasoning. The Madinans on the contrary, were less tolerant, and scrupulously held that every law must be derived from the 'Qur'ān and the Prophet's *Sunna*.

Given these two extreme positions, that is, tradition and reason, Al -Shāfi'ī (d.819) emerged, and is credited with finding the desired compromise. Al-Shāfi'ī ruled that "whenever the *Qur'ān* and *Sunna* of the prophet failed to provide the jurist with explicit instructions or solutions, a similar or parallel case, for which there was a solution, could be substituted".³⁹ This is what has been referred to as analogical deduction or *qiyās*. Given this background, a third source of Islamic jurisprudence developed.

³⁹ Rahman, p. 18.

After *qiyās*, a fourth source of Islamic law, known as *ijmā'* or consensus of the scholars developed. Credit for the development of this source is given to Malik. Originally it was exclusive, and confined to the consensus of the scholars of Madina only. Later, however, taking into consideration that the Islamic Empire had grown, it became inclusive of all the scholars of different regions. The Umayyad era was then followed by the Abbasid period. The Abbasid era in particular distinguished itself as the period in which concern with the idea of making Islamic law, official law of the government, set in. Schacht writes that "in order to differentiate themselves and their revolution ... (the Abbasids) proclaimed their programme of establishing the rule of God on earth"⁴⁰. Given this context, Islamic law as taught by the scholars was recognised as the "only legitimate norm".⁴¹ This development clearly marks the secularising of earthly authority by invoking 'divine law' as a means of legitimisation.

In short then, given the periods discussed here, two trends are observable. First, in the earlier periods, that is, starting with the prophetic era and that of Prophet Muhammad's immediate companions, it is discernible that rules were developed as informed by the existing practice of the community. Put differently, the practice of the community preceded theory -- custom was the primary locus for law formulation. However, in later periods, scholars had first to have recourse to the existing body or data of learning before they could pass rulings in the process of law formulation. This practise later gave grounds for blind imitation and following, or *taqlīd*. It was against the dangers

⁴⁰ Schacht, *An Introduction to Islamic Law*, p. 49.

⁴¹ Rahman, p. 18

of this blind imitation, that later in the eighteenth century, there emerged a modernist trend calling for a return to the early practise of *ijtihād* or critical reasoning and scholarly exhaustion in attempts to interpret the law.

Sources of Islamic law

The normative presentation of what constitutes sources of Islamic law is to commonly divide these into primary and secondary or subsidiary sources. Within this hierarchy the *Qur'ān* and the *Sunnah* are its commentary through prophet Muhammad's words and deeds -- these are regarded as the primary sources. These primary sources are then followed by *ijmā'* (consensus) and *qiyās* (analogy). In addition to these there are other principles that are less pronounced or regarded as problematic or minor sources, these are namely *maṣlaḥa* (public welfare), *istiḥsān* (juristic preference), and *'urf* (custom). As pointed out in my introduction (see pp. 1-3), *'urf* arguably as it will be shown, remains amongst the highly contested principles. In other words, its status as a source of Islamic law is questionable worse when the proposition is that it is a primary source of Islamic law. According to the dominant view *'urf* cannot stand independently as a primary source of Islamic law especially when "it contravenes the *naṣṣ* (text) or what Kamali has called, "the definitive principles of the law".⁴² In this regard, all the Sunnī schools of law are in agreement. For example, the Ḥanafī and Mālikī schools support the view that *'urf* can be "recognised within limits" whilst the Shāfi'ī school totally rejects this.⁴³ Designating it as a primary source is regarded as violating the very

⁴² See Kamali, p. 359.

⁴³ See 'An-Na'im, p.26.

basis of Islamic law and uprooting its epistemological foundations. In other words, it is viewed as challenging the “supremacy of *naṣṣ*”, that is, the text of the *Qur’ān and Sunnah* (Prophetic traditions).

The fact that this hierarchization of the sources of Islamic law has been the work of jurists (see p.4) and legal theorists is usually ignored. The problem is that this normative and presumably accepted “hierarchy of sources”, promotes the idea that Islamic law, by its very nature, is stagnant and incapable of adapting to a changing environment. This naturally leads to the question of whether Islamic law as “tradition “ is fossilised or not. Of course, I am saying this fully aware of the apologists’ counter arguments offered by some Muslim legal scholars (see p.19) who argue that it is not. Based on these uncertainties, it is my strong assertion, that interrogating and challenging *‘urf* in its normative designation as a secondary source of Islamic law, helps us to appreciate and thus grapple better with the notion of changing or fixed “traditions.” As indicated, that the hierarchy regarding sources of Islamic law, as presented in Islamic legal scholarship, is one of an absolute and unchanging tradition. However, as I will attempt to show in this work, that a thorough scrutiny of Islamic legal history conveys the opposite. In other words, what has come down from past generations of scholars as being the standard norm, is itself an end product of a constantly negotiated and mediated tradition. It has, in a sense, undergone different reincarnations.

Except for a few, the problem with Muslim scholarship is the denial of these reincarnations or inventions of the tradition. Thus, in the context of this study, examining the status of *‘urf* as a source of Islamic law helps in investigating what are the hallmarks of Islamic tradition, and to what extent is

the Islamic tradition willing to accept change? Or, to what extent does it reinvent itself to meet new challenges in a constantly changing social environment.

What follows is a brief description of how the problem of *'urf* has been negotiated within both the western and traditional paradigms dealing with Islamic legal theory.

'Urf (Custom) as a subject of inquiry in Scholarship: A Survey

A significant number of scholars, both Muslim and non-Muslim Scholars (Western) on Islam have written significantly on *'urf* (custom) and its status in Islamic law. The problem, however, with these works is that they have treated the subject in a very descriptive manner, with a serious lack in analytical probing. This section examines some of these works with the aim of providing preliminary remarks on issues of theory and method in their treatment of the subject.

I have selected a few authors to illustrate my case. By selecting these, the aim is to provide a sample on the different themes, approaches and key ideas adopted by these scholars as a way of placing the present study into perspective. The selection includes perspectives by scholars anchored in both "western scholarship" as well those who treat the subject from the point of view of Muslim tradition or as "Muslim" scholars.

Farhat Ziadeh has written a useful treatise on "*'Urf* and law in Islam"⁴⁴ where, first, he provides a useful introduction by giving a detailed

⁴⁴ see Farhat Ziadeh's "*'Urf* and Law in Islam", 1959.

analysis on the “semantic progression” of the term *‘urf*. This is followed by a contextual presentation of how the term has been treated from the *Qur’ānic* perspective. Ziadeh, to illustrate legitimacy of *‘urf*, draws extensively on the discourses of prominent and classical Muslim exegetes, like al-Ṭabarī (d.922) and their pronouncements on *‘urf*. After this, he follows with a brief discussion of classical, medieval to as late as seventeenth and eighteenth century Muslim juriconsults’ positions on *‘urf* in their respective discourses. These scholars range from Abū- Yūsuf (d.798), Abū- Ḥanifa (d. 767) and al-Shaybānī (d. 804). The issue of contention amongst these classical scholars seems to have been whether “a new custom should be preferred to a text based on an old custom”⁴⁵ or not.

Whereas Abū- Ḥanifa and Al- Shaybānī (d.805) insisted on the text, on the contrary Abū- Yūsuf (d.797) said that the custom was acceptable. Ziadeh credits Ibn ‘Ābidīn (d. 1836) for dealing with “this problem extensively”⁴⁶ in the treatise, *Nashr al-‘arf fi binā’i Ba’da ‘l- Aḥkām ‘alāl ‘urf* (disseminating the essence in the formulation of legal rules based on normative practises or customs).⁴⁷ Another informative writing on *‘urf* is found in the work of Kamali (cited in the preceding discussions) on his section dealing with *‘Urf*.

Arguably, Kamali’s treatment of *‘urf* is very similar to Ziadeh’s approach. For example, he devotes adequate attention to show the relevance of *‘urf* as traced from *Qur’ānic* sources. Writing from this context, he enhances his argument by using the *Qur’ān* as a scale through which *‘urf* is mediated and

⁴⁵ Ziadeh, pp. 65-66.

⁴⁶ Ibid., p. 65.

⁴⁷ Ibn ‘Abidin, ‘Nashr al-‘arf fi bina’i’ b’adi’l-ahkam ‘alal ‘urf’ in *Majmū‘at Rasā’il Ibn ‘Ābidīn* (Beirut, 1978).

subsequently justified. For instance, he writes that “*‘urf* and its derivative, *ma’rūf* occur in the *Qur’ān* and it is the latter of the two which occurs more frequently”. He then elaborates that from the *Qur’ānic* perspective, *ma’rūf* implies the known and this is “equated with good” whereas, “its opposite, the *munkar* or strange, is equated with evil”. Basing his argument on what *Qur’ānic* commentators have ruled on *‘urf* or *ma’rūf*, Kamali then draws the conclusion that *‘urf* in its *Qur’ānic* sense does not have legal implications because it only relates to the discourse of piety. Notwithstanding his conclusion, in trying to show the relevancy of *‘urf* as a legal source, Kamali does at least concede by subscribing to the “normative” view. Such a normative view holds that as long as *‘urf* “does not contravene *sharī’a*,” it can be “rehabilitated” as a secondary source.⁴⁸

Coulson’s article, on “Muslim Custom”⁴⁹ is another exciting work on *‘urf* in Islamic law. In particular, Coulson provides useful examples displaying the context in which *‘urf* has been invoked as a source of law despite its heretofore non acceptance as a principal source. The author provides relevant historical instances where he shows brilliantly how *‘urf*, especially during the formative, classical and modern periods, was directly invoked as a source of Islamic law. In a very comprehensive fashion, Coulson provides examples from different centres of the Muslim world to illustrate his point. In the formative period, for instance, he cites examples from Madina and Kufa where the role of custom was central in the formation of law. For example, in the

⁴⁸ Kamali, pp. 359-376.

⁴⁹ Noel J Coulson, “Muslim Custom and Case Law” in *Islamic Law and Legal Theory* (New York: New York University Press, 1996), pp. 259-270.

context of these two instances, Coulson states two contrasting views on the issue of women's contract in marriage. Whereas in Kufa, for instance, Abū Ḥanīfa (d.767) ruled that an adult woman can "contract" herself in marriage; in Madina, for Mālik (d.795), the opposite held true, that "women must always be contracted in marriage". What is crucial to note about in this case is not so much the validity of either position (that is, Abū Ḥanīfa or Mālikī's view), but rather to show that both positions were informed by and were "based on local practise"⁵⁰. For instance, as Coulson observes, Mālik's view reflected the "traditional notion of marriage in the patriarchal tribal society of Madina" which was the domain of the Mālikī School. On the contrary, Abū Ḥanīfa's view reflected the social reality of Kufa with its "more cosmopolitan society" that accorded a "freer status" to women (the latter being the home to the Ḥanafī school).⁵¹

To illustrate the above point, Coulson provides other examples regarding the application of Islamic law from different African and Asian contexts. In particular, he highlights how custom (*'urf*) is constantly invoked to shape and influence the *sharī'a*. For example, he writes, "throughout almost the whole of Muslim Africa... matters of land tenure are regulated by customary rules or practises".⁵² This he compares with similar cases in the Indian subcontinent, where he mentions a special act called the "*sharī'at* act of 1937" which was imposed upon certain Muslim communities previously governed by custom, where issues relating to "agricultural land" were excluded from such act. In

⁵⁰ Coulson, p. 261.

⁵¹ Coulson, p. 260.

⁵² *Ibid.*, p. 263.

other words, the *sharī'a* in this context is subdued by existing customary practices on land. Whilst Coulson is credited for the number of practical examples he has shown, what is crucial to note is that all of this empirical evidence is shown to bolster the comparative project or bias in his study of Islamic law. As Coulson sums up, the usefulness of his project seems to be underpinned by a concern to show the “comparative lawyer” the “rich variety of stimuli, both indigenous and foreign ... - that provides such a wealth of fascinating material”.⁵³

Coulson’s approach to some extent also permeates in the recent work by Gideon Libson promptly titled, “On the Development of Custom as a source of Law in Islamic Law”⁵⁴. Perhaps the single most useful aspect about Libson’s work is how he meticulously shows through a historical account how *urf* has gradually shifted from a non-recognised source to a recognised one, albeit reluctantly. In particular, Libson shows that despite its non-recognition, classical jurists forced by “constraints imposed by practise, particularly in the economic sphere” were finally compelled to invoke custom as a legal principle. However, this recognition came through indirectly, that is, via other legal “devices”(see p.2). Accordingly, Libson credits these “various devices” for assisting to move *urf* “from the periphery of legal theory to become a focus of legal attention in the post-classical period”.⁵⁵

⁵³ Ibid., p. 267.

⁵⁴ See Gideon Libson, “On the Development of Custom as a Source in Islamic Law”, *Islamic Law and Society*, 4, 2, 1997.

⁵⁵ Libson, p. 154.

Another work of interest is that of Zuhair E. Jwaideh's, "Developments in Islamic law and its influence on African law".⁵⁶ This work in approach roughly follows the model of Coulson and Libson -- it adopts the historical, descriptive and comparative perspective in treating the subject of custom. Of course, the point of departure in Jwaideh's case is that Islamic law is treated in its relation to African legal systems. This latter context provides a framework through which *'urf* is investigated. Since most of the points in Jwaideh's work are somewhat covered in the works already mentioned, I will not dwell much on him.

The next work of importance on *'urf*, is in Subhi Mahmassani's seminal manuscript on Islamic jurisprudence⁵⁷ under the section dealing with "the extraneous sources of law". Whilst Mahmassani's treatment of *'urf* is somewhat more nuanced, nevertheless, it does so within boundaries imposed by normative Islamic jurisprudence. And that is, the status of *'urf* as a source of law is mediated in the context of an "extraneous source of law". Characteristic of the discourse on normative Islamic jurisprudence, classical authorities are invoked to make a case for *'urf* as a dependable source. For example, this line of reasoning is clear when this renowned Muslim jurist writes:

In any case the customs we have in mind and which are regarded as an extraneous source of law are those which conform to the established legal sources. The customs which are in conflict with these sources, or are in opposition to the spirit of the *shari'a*, are

⁵⁶ Zuhair Jwaideh, "Developments of Islamic Law and its influence on African Law", 1967.

⁵⁷ Subhi Mahmassani, *The Philosophy of Islamic Jurisprudence* (Leiden: E J Brill, 1961).

unequivocally rejected by the *sharī'a*.⁵⁸

After the above-mentioned statement Mahmassani then cites examples of such customs that may be rejected by the *sharī'a*. Here, in quoting Mahmassani, the intention is not to dispute his pronouncements on *'urf*, but to highlight the normative trend that prevails in juristic discourse on *'urf*. Such a discourse as noted presents *'urf* as a category subservient to the *sharī'a* and therefore, not its natural constituent component.

A Conclusion

At this juncture it is useful to put into perspective the trends observed in the sample of scholars examined thus far. As stated in reference to Libson's approach, is that all these scholarly works, whilst focusing on *'urf* (custom), have, nonetheless, failed to penetrate and analyse the status of custom as a primary source of law. Put differently, they do not sufficiently account for the problem of ambiguity in the sources of Islamic law. Whilst they are useful in showing that *'urf* (custom) is occasionally invoked in the context of an "extra source", they do not problematise the question of a fossilised epistemology in Islamic jurisprudence and its theoretical foundations. Theirs is a historical and highly descriptive account with the overriding aim of bolstering the argument that *'urf* in Islamic law is only a secondary source of law.

Accordingly, within this context, *'urf* or custom is subordinated to *sharī'a*. In other words, as long as it does not contradict the "*sharī'a*", classical legal

⁵⁸ Mahmassani, p. 134.

theory sanctions its acceptance. The point here is not to debunk the thrust of these works on *'urf*, rather, it is to allude to the gap that needs to be filled in contemporary studies on Islamic law. That felt need is the imperative to fill 'the gap' by engaging the very nature of how the hierarchies in what constitutes sources of Islamic law, have been constructed and then passed as the "unchangeable".

Finally, to sum up, three trends are observable. First is the text centred approach. Here *'urf* is evaluated and granted permissibility insofar as it is in tandem with textual authority of the *sharī'a*. For example, as seen in Kamali's case and Farhat Ziadeh, the thrust of their narratives on *'urf* is that as long as *'urf* does not contradict the textual sources, it is deemed acceptable. However, in this context *'urf* is invoked only in the category "of customary law" as to be invoked as law to fill the gap caused by the canon's inability to relate to the challenge posed by the textual ambiguity of the privileged canon, in this case the *sharī'a*.

Second, is the historical and descriptive nature of these narratives. This, for instance, is discernible in the approaches of Coulson, Libson and Jwaideh. As noted in the opening of this section, the aim here was to discern the common points in these works. The relevance of such an exercise lies in its usefulness in so far as it helps to observe points of similarity and divergence, if any, in these different narratives on *'urf* (custom). The third, is as shown throughout most of the discussion in this chapter, is that the problem of *'urf* (custom) has been treated in Islamic jurisprudence, particularly within the context of the normative paradigm. The main characteristic of this paradigm is that scholarship has not departed from the

position advanced by classical legal theory in the treatment of *'urf* or "classical hermeneutic" (I will discuss the third point more in detail in later chapters).

To put the study in context, the next chapter examines the problem of *'urf* through the discourse of a single jurist, Ibn 'Ābidīn. This in a sense provides a case study on how the problem of custom is negotiated in Islamic jurisprudence.

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CHAPTER TWO

'Urf (Custom) Through Ibn 'Abidin's Discourse

Introduction

In the previous chapter I presented a general perspective on 'urf and its status within Islamic jurisprudence. In this chapter, I begin to examine more closely the problem of 'urf as a source of Islamic law. I do so by analysing the discourse of Ibn 'Abidin (d.1836) in his treatise "*Nashr al- 'arf fi binā'i ba'da 'l-ahkam 'alā- 'urf*",⁵⁹ especially as it relates to the status of custom. Therefore, the "discourse" of this jurist on 'urf, provides a case study on how custom is mediated in Islamic jurisprudence within the context of classical legal theory.

Since this is not a biographical study *per se*, it must be noted, this chapter is not intended to offer a full biographical account as a means to comprehend Ibn 'Ābidīn, the jurist. On the contrary, the biographical sketch provided here, is only useful insofar as it helps to provide a contextual framework for Ibn 'Ābidīn's discourse on 'urf. This biographical sketch is then followed by an examination and analysis of Ibn 'Ābidīn's discourse on 'urf.

I must stress that in using the term "discourse", I take account of its "range of meanings", that is, regarding its usage.⁶⁰ However, in the context of this

⁵⁹ See Ibn 'Abidin's "al-'Urf" in *Majmū'āt Risā'il Ibn 'Ābidīn* (Beirut, 1978).

⁶⁰ See John Bowen, *Muslims Through Discourse: Religion and Ritual in Gayo Society* (Princeton: Princeton University Press, 1993), pp. 8-9.

Chapter, I use “discourse” based on Fairclough’s notion, that “discourse as a practise is not just about representing the world, but constitutes the world of meaning.”⁶¹ Borrowing this understanding of discourse, I proceed to ask the question: how is the problem of *‘urf* mediated in the discourse of this jurist? For example, what are Ibn ‘Ābidīn’s pertinent views on custom and its status? Does he, for instance, depart from the conventional and classical understandings of *‘urf* within Islamic legal discourse or not? To what extent does he challenge or endorse the dominant status quo regarding *‘urf*? In a sense, these questions indicate the line of inquiry I take in examining this jurist’s position on *‘urf*. But first, as a background to the discussion, let me provide a brief biographical profile on Ibn ‘Ābidīn.⁶²

Ibn ‘Ābidīn: A Brief Biographical Profile

The author of *Nashr al-‘arf fī binā’i b‘aḍa ‘l-aḥkām ‘alāl-‘urf*, is a seventeenth/eighteenth century Ḥanafī scholar, who lived in Damascus (*Dimashq*). Although popularly known as Ibn ‘Ābidīn, his full name is Muhammad Amin ibn ‘Umar ibn ‘Abd al- ‘Aziz ibn Muhammad Salah al-Din. He was born in 1738CE in Damascus where he spent most of his adult life. He finally passed away after a short illness in the year 1853CE.

⁶¹ See Norman Fairclough, *Discourse and Social Change*, 1992, pp. 62-65.

⁶² Here I am indebted for most of the biographical detail to the honours research done by Asma Ceres. See Ceres’ “Translation and introduction of a section of Ibn ‘Ābidīn’s *Rasm al-Mufti*” unpublished honours paper, University of the Western Cape, 1995.

Arguably, Ibn 'Ābidīn rates amongst some of the most under researched jurisconsults in Muslim legal scholarship. This observation does not imply negligence of Ibn 'Ābidīn's works - on the contrary, some of his writings, especially his treatise on *'urf* is often relied upon as representing a normative view on the subject, especially by scholars after Ibn 'Ābidīn's time. This in itself is an indication of the high regard attached to this treatise among Muslim legal scholars. However, although his works are often cited and studied, I still feel Ibn 'Ābidīn has not been studied enough.

Of course, veneration of Ibn 'Ābidīn's treatise on *'urf*, does not suggest that other scholars before him did not pay attention to the concept of custom or *'urf* in Islamic jurisprudence. Notably, 10th and 12th centuries scholars, like al-Sarakhsī (d.1097), not only acknowledged the impact of *'urf* on Islamic law but accorded it a status "on the same level as the *Qur'ān*".⁶³ Nevertheless, this view, as Libson has observed, has by and large remained a marginal one, if not "buried" in Islamic legal discourse.⁶⁴

In keeping with the old tradition of committing the *Qur'ān* to memory, Ibn 'Ābidīn, under the tutelage of his father memorised the *Qur'ān* from an early age. As was customary of Ibn 'Ābidīn's time, he was not confined to only one discipline, but studied most of the Islamic disciplines in vogue. These disciplines were studied under a number of prominent scholars or *shuyukh* who were leading authorities on these subjects, especially in his region. For example, from *Shaykh* Muhammad Sa'id ibn Ibrahim al-Himyawi

⁶³ Libson, pp. 136- 137.

⁶⁴ *Ibid.*, p. 137.

(d. 1820CE), he studied and learnt Shāfi'ī jurisprudence, Arabic grammar, morphology and other Islamic sciences.

After successfully graduating from Himyawī, he was granted a certificate of competency or *ijaza*. This meant that the young scholar could now freely quote from his teacher and stand on his own. Ibn 'Ābidīn's next teacher was a contemporary scholar of his time, *shaykh* Shakir al- 'Aqid, alternatively known as Muqaddam Sa'd.

From Muqadam Sa'd, Ibn 'Ābidīn studied *Tafsir* (Qur'ānic exegesis), *Hadith* (Prophetic sayings), *Mirath* (Principles of inheritance), *Taşawwūf* (Mysticism), Mathematics and *Mantiq* (logic). It is noted that it was while studying under this *shaykh*, (Muqadam Sa'd) that he switched to the Ḥanafī school of law. If on being a student of Muqadam Sa'd, Ibn 'Ābidīn changed to the Ḥanafī school of law, this change seems to suggest that he must have followed a different school, probably the Shāfi'ī school. This view seems to find support in the fact that his early studies in Islamic jurisprudence were mostly in Shafi'i jurisprudence (see p.42). This question is particularly relevant, especially if we are to make sense of Ibn 'Ābidīn's pronouncements on *'urf* (I will take up this point later in the discussion).

After settling in the Ḥanafī school, Ibn 'Ābidīn soon distinguished himself as an exceptionally intelligent student, launching his scholarly vocation from the early age of seventeen. From this early period, he wrote some of his popular works like *al-Baḥr al- Ra'iq* and *Radd al-Muḥtar'ala Durr al- Mukhtar*.

Within a short span of time Ibn 'Ābidīn soon became a household name in Damascus. Suddenly, as a distinguished scholar, most of his works became a source of citation. Perhaps, another factor that enhanced Ibn 'Ābidīn's

scholarly reputation was his *fatāwā* (juridical *responsa*) that became a point of reference for his contemporaries. Given the prominence attached to *fatāwā* as a prominent genre in Islamic legal discourse, this was no mean achievement. For the *fatwā* as a legal document has the power not only to legitimise, or delegitimise, but also to sacralize and desacralize.⁶⁵ If Ibn 'Ābidīn's *fatāwā* were recognised as a source of reference, it meant that his credentials as an authority on legal affairs were now firmly established. For instance, through the popularity of his *fatāwā*, he earned the reputable position as secretary of verdicts. This was a clear indication that by now Ibn 'Ābidīn's scholarly acumen and genius had matured and blossomed.

Ibn 'Abidin's Works

According to some records, Ibn 'Ābidīn is credited for writing about forty books. Nevertheless, the most recognised works that he authored, include the following: *al-Hāshiya* or *Radd al- Muḥtar 'ala Durr al- Muḥtar*, *Majmū'āh Rasa'il ibn 'Abidin*, *al'Uqūd al- Durriyyah fi Tanqih al- Fatāwā al-Hamidiyyah*, *Nuzhah al- Nawāzīr 'ala al- Ashbāh wa al- Nazāir*, *Qurrah al 'Uyyun al- Akhyār*.

Ibn 'Abidin's Discourse on 'Urf: Selected Themes and Analysis

The treatise, *Nashr al- 'Arf fi bina'i bāda 'l- Aḥkām 'alā- 'Urf*, (a section from his *Majmu'at Rasa'il Ibn 'Ābidīn*) is according to its author the best treatment

⁶⁵ For a detailed account on the significance of *fatawa* in Muslim legal discourse see the work of Brinkley Messick, David S. Powers and Muhammad Khalid Masud, Eds., *Islamic Legal Interpretation: Muftis and their Fatwas* (Cambridge: Harvard University Press, 1996).

the subject of custom in Islamic jurisprudence. In this section I begin by summarising the main points raised by Ibn 'Ābidīn's in the work under discussion. This I follow up by a critical analysis of Ibn 'Ābidīn's discourse on the subject of *'urf*.

The text has four sections. The first, which can be classified as the introduction, offers a definition on the concept of *'urf*. The second deals extensively with the theme of *'urf* versus *naṣṣ* or textual evidence, that is, the *Qur'ān* and the *Sunnah*. The third looks at *'urf* in its relation to *Zāhir al-Riwāyah*, that is, the main opinions of the Ḥanafī school. The fourth section, the concluding part, discusses two important branches or rulings established on the strength or basis of *'urf* as a legal principle.

Defining custom (*'urf*): Ibn 'Ābidīn

Ibn 'Ābidīn first defines *'urf* in general terms as "That which is derived from repetition through reiteration from time to time until it becomes known, firmly established in the heart and mind, deserving acceptability, until it becomes *'urf*".⁶⁶ To render this more intelligible, Ibn 'Ābidīn's definition can be expressed by saying that *'urf* "generally means that which a people or a section thereof have become accustomed to doing".⁶⁷

Second, is a technical definition or *ma'na istilahi*. For example, the word *ṣalāh* loses its literal meaning of supplication or *du'ā* and embraces a *sharīf* or legal definition. In its *sharīf* or legal sense its definition connotes an institutionalised pillar of faith as well as involving several postures and

⁶⁶ Ibn 'Abidin, p. 2.

⁶⁷ Mahmassani, *The Philosophy of Islamic Jurisprudence*, p. 130.

movements. And so it is with *ṣawm* or fasting. In the literal sense *ṣawm* means to abstain. However, in its legal customary usage, as a pillar of faith, it means to abstain, amongst other things, from food, water, and sex, in the month of Ramadhan (the 9th month in the Muslim lunar calendar), from sunrise to sunset. From the example of these two words, we can see that some words have double meanings- a literal and a specialised or technical meaning. In other words, *ṣalāh* and *ṣawm* employed in the context of the technical definition they immediately assume a "legal" (*sharī*) or "textual" connotation.⁶⁸ Viewed within such a context, these words cease to have simple meaning but are associated in Muslim understandings with rituals of worship. In this specialised sense within Islamic law they then fall under what is regarded as *fiqhul ibadāt* or religious duties.

Furthermore, Ibn 'Ābidīn also differentiates between what he terms practical '*urf*' (i.e. '*urf al- 'amali*) and verbal '*urf*' ('*urf al- Qawli*). According to the latter definition, and differentiation, for instance "the consumers of barley" or "raw mutton meat"⁶⁹ would constitute a practical '*urf*'. Verbal '*urf*', on the contrary is determined by a regular use of a term, that is, referring to a "specific meaning which cannot be mistaken except to mean what it is intended for".⁷⁰ One of the examples he cites here, is that of *dirham* or money. For instance, the term *dirham* in usage naturally implies a specific meaning that relates to the circulated currency of a particular country.

⁶⁸ Ibn 'Ābidīn, p. 2.

⁶⁹ Ibid., p. 10.

⁷⁰ Ibid.

After this general classification, *'urf* is then narrowed down into two distinct categories. These are *'urf al-'am* or the general *'urf*, and *'urf al-khaṣṣ* or specific *'urf*. General *'urf* implies a widely accepted custom, whereas specific *'urf* is normally confined to local or regional understandings.

To make sense of Ibn 'Abidin's typology of definitions on *'urf* the following must be observed: first, for the general *'urf* to be acceptable, Ibn 'Abidin argues, it must be consistent with the text⁷¹. In other words, as long as it does not contradict the text or *nass*, it is acceptable. Accordingly, given this status, *'urf* here acts "as a limiting factor on the text".⁷² In other words, the text is contextualised and placed within a social parameter.

The above observation is substantiated by Ibn 'Ābidīn's view that even if *'urf* is "of general application since the days of the companions", it is immaterial. In other words, "whether old or new *'urf*" as long as it is general in the country" its legitimacy as a source for legal formulation is approved. Given this understanding then, Ibn 'Ābidīn asserts that a general *'urf*, has the propensity to sanction or discredit "rules formulated by former jurists".⁷³

Now, if "rules formulated by former jurists" can be nullified on the basis of a general *'urf*, the question then is, on what basis is this achieved? Arguably, this view is premised on the notion that the very basis of these rules was in the first instance, influenced by customs prevalent in those times, and hence their limited relevancy. In fact, Ibn 'Ābidīn goes further, and argues, that such rules (i.e. formulated by former jurists) should be replaced by a "new *'urf*".

⁷¹ Ibid., p. 6.

⁷² Ibid., p.4

⁷³ Ibid.

In particular, Ibn 'Ābidīn, holds that if those previous jurists were living in the period in which he was writing they in turn would endorse the views espoused in that period. In other words, they would succumb to the logic that "a *new 'urf*" should replace rules formulated by former jurists.

The above mentioned view seems to find ample support in an earlier jurist, al-Qarāfī (d.1285) when he questions the legitimacy of *fatāwā* (legal verdicts) that "are deduced on the basis of habits and customs prevailing at the time" of their formulation. For al-Qarāfī the question simply becomes: what happens to these *fatāwā* when those customs and habits upon which these were based change over time? For instance, do these *fatāwā* become defunct or not?⁷⁴

I see the above question, that is, on the relevance of *fatāwā* established on the strength of "customs" and prevailing" habits" of the period in which the *fatāwā* are issued as a strong indicator of the significance of custom in Ibn 'Ābidīn's reading of how Islamic law operates. This point finds support in the following statement by Ibn 'Ābidīn:

Let it be known that Muhammad Ibn 'Ābidīn applied '*Urf* (custom) to justify many issues... and Fakhr al-Islam agreed...'any issue established on the basis of '*urf* is similar to that which is sanctioned by legal evidence'... And it is mentioned in *al- Mabsūt* that any issue affirmed by '*urf* is similar to that which is ascertained by textual evidence...'⁷⁵

⁷⁴ Jackson, *Islamic Law and State*, pp. 129-130

⁷⁵ Ibn 'Ābidīn, p.3.

Furthermore, Ibn 'Ābidīn's strong views on the status of *'urf*, specifically the "general" *'urf* is further strengthened by his assertion that on the basis of general *'urf* even the preferential status of analogy or *qiyās* becomes nullified. In other words, despite the fact that *qiyās* in the hierarchy of sources of Islamic law rates amongst "the primary sources", in this instance it is sacrificed for *'urf*.⁷⁶

At this point it is worth reflecting on some of the examples that Ibn 'Ābidīn provides to show how a general *'urf* can replace or supersede rules formulated by earlier jurists. For instance, amongst other examples, he cites the permissibility of hiring someone for teaching the *Qur'ān* as opposed to the view held by earlier jurists that prohibits such a practice. Accordingly, Ibn 'Ābidīn by invoking *'urf*, contextualises the views held by these jurists. For example, in the case of the former ruling, that is, prohibition of paying those who taught *Qur'ān*, Ibn 'Ābidīn argues that it was based on the fact that it was the responsibility of the state to do so. In other words, the state's duty to pay teachers of *Qur'ān* was then the prevailing "custom". Therefore, the logical conclusion according to Ibn 'Ābidīn is that in lieu of "the state" no longer responsible for paying teachers of *Qur'ān*, Islamic law does not prohibit individuals or communities undertaking the responsibility of paying those teachers.

Again the effect of general *'urf* is illustrated in the issue of business transactions. This view for example, finds support in the maxim expounded by Ibn 'Ābidīn that a "a matter recognised as customary amongst the

⁷⁶ Libson, "On the Development of Custom", p. 137.

merchants is regarded as if agreed upon".⁷⁷ In other words, since the transaction is recognised as customary amongst "merchants", it is in a sense like "a matter established on custom" and hence its legitimacy.⁷⁸ A good example here is the transaction known in those days as *al-Sabtiyya*, which entails the practice of paying on Saturdays. This was a commonly acceptable transaction in the merchant community amongst the cities of Cairo, Beirut and surrounding areas.⁷⁹ Elaborating on this, Mahmassani writes that:

if a merchant sold a commodity to a purchaser without agreement as to the time or manner of payment and if it was customary for merchants to obtain the price by weekly instalments, then the contract of sale should be interpreted to this particular custom.⁸⁰

What is clear from these examples, is that first, legal rules, especially those based on the strength *'urf* or in some other contexts, *maṣlaḥa*, can be nullified through the agency of prevailing custom or *'urf* (i.e., payment and non-payment of teachers of *Qur'ān*). In other words, by invoking the relevancy of *'urf*, jurists adapt the law to changing circumstances. Second, *'urf* in the context of these examples becomes the tool for contextualising the law or "text", for instance, the practice of *al-Sabtiyya*, is a good indication of this.

A point must be made though, regarding what Ibn 'Ābidīn has termed "special *'urf*" - here he rules that "it cannot be followed" as a general rule, but

⁷⁷ Ibn 'Ābidīn, "al- 'Urf", p.20

⁷⁸ Ibid., p. 15.

⁷⁹ Ibid.

⁸⁰ See Mahmassani, pp. 130 -135.

only as a specific rule. The point nonetheless, in either case is that *'urf* has the capacity to change rules. Arguably, this particular reading of *'urf* by Ibn 'Ābidīn, positions custom as a legitimate source of Islamic law. As pointed out before, this propensity for *'urf* "to change some rules", and to "limit the text", is what prompted some scholars like Al- Qarāfī (d. 1285) for instance to attach importance to *'urf* (custom) as a "definite source".⁸¹

In short, what is then apparent from the thrust of Ibn 'Ābidīn's discourse is that it liberates or "rehabilitates" *'urf* (to use a phrase from Libson) to a prominent status. However, I wish to point out here, that whilst this is the apparent meaning in this jurist's discourse on *'urf*, Ibn 'Ābidīn pronouncements are nevertheless, located within the normative discourse of classical legal theory on *'urf*.

Conclusion

It can be summed up that Ibn 'Ābidīn's discourse on *'urf* is pragmatic. The textual authority is subjected to the primacy of the social environment. This for example is supported by his notion that a general *'urf* has the capacity to change even some rules based on textual authority (see p.8)

In privileging the primacy of the social environment over the inflexibility of the textual influence, Ibn 'Ābidīn dispels the myth of the marginality of custom. In other words, the rules that the jurist draws are informed by the social practice of the contemporary period, rather than blind holding to tradition or "previous rulings" based on the authority of the text.

⁸¹ See Ziadeh, " *'Urf* and Law in Islam", p. 65.

What the aforementioned entails, is that in constructing rules, the text is freed from the past and read in the present moment or epoch, hence his assertion that a "new *'urf*" must replace "an old one". What is crucial to note here is that occasionally Ibn 'Ābidīn does depart from the more conservative tendencies. By this I mean tendencies that totally deny legitimacy to *'urf* as a legitimate source, like for example al-Shāfi'ī's position. What is discernible here, is that Ibn 'Ābidīn remains loyal to what Hallaq has termed the "classical hermeneutic" in Islamic jurisprudence (see pp.18-19). In other words, the jurist has not departed from the classical normative discourse on what constitute "reliable sources", but has merely manipulated the sources to his advantage for the purposes of elucidating how law is formulated. Arguably, this strategy is useful insofar as it saves the jurist from accusations of blasphemy and innovation, which eventually discredits the jurist and his postulations.

Finally, it can thus be concluded that Ibn 'Ābidīn's discourse does at least reflect pragmatism in his conceptual reading and pronouncement on custom. However, the "hermeneutic grip" of the past militates against the jurist, and hence the reluctance to assign a formal status to *'urf* as a legal principle. In short, there is a conflict between "theory and praxis". For instance, in practise Ibn 'Ābidīn amply demonstrates that *'urf* is a source of law, but fails to fully acknowledge that its status is "*de facto*" that of a primary source.⁸²

In other words, despite showing that prevailing customs can be relied upon as a substitute to text or *nass*, *'urf* in Ibn 'Ābidīn's discourse is

⁸² See Libson, p. 138.

sanctioned on the basis of the classical framework of “normative” sources of Islamic law.

University of Cape Town

CHAPTER THREE

'Urf (custom) in the Captivity of Tradition

Introduction

The previous chapter highlighted the tenacity of doctrine, or its tyranny which grips the jurist by exploring Ibn 'Ābidīn's discourse on custom. Arguably, it is this "tyranny" that has engendered a rigid formalisation of the sources of Islamic law in their hierachization and hence the reluctance to shift from such a position. This also explains the apparent inconsistency in Ibn 'Ābidīn's discourse on the status of custom ('urf). Arguably, custom mediated through such a paradigm is in the captivity of tradition. As noted, it is a tradition that does not accept the primacy of custom as an independent legitimate source.

As an extension of the argument in the previous chapter, here I seek to probe further, the assertion that Islamic law is by and large "a jurist's law" (see p. 4). For instance, I have noted that whilst Ibn 'Ābidīn amply "demonstrates that 'urf is a source of law", he nevertheless, upholds the classical view held by most Muslim jurists (i.e. the non-recognition of 'urf as a formal source).

Viewed from the latter point, it is then easier to understand the ramifications of what is implied by tyranny of doctrine - a doctrine that imprisons Muslim jurists in their postulations on Islamic law? Here, more importantly, I want to show the contradiction that permeates the discourse of Muslim jurists in their treatment of 'urf. In particular, I want to show that although the discourse of

Muslim jurists appears to show a marginal status to *'urf* (custom), when critically examined, the primacy of *'urf* is easily discernible. For instance, almost all of the jurists are in agreement that *'urf* plays a central role not only as “an extraneous source” but as a dynamic principle on which the very formulation of rules is based upon (see pp.48-50). Put differently, *'urf* provided the context on which the very ‘sacred text’ was negotiated and mediated. A critical reflection on the methodology of the founding jurists, for instance, shows that it was greatly influenced by prevailing customs or *'urf* as a central point of reference. For example, it is worth noting Khallāf’s observation that among the Ḥanafī scholars, the influence of *'urf* was so strong “that some of the differences of opinions in their rulings were solely influenced by the impact of custom (*'Urf*)”. Again, Khallāf makes another curious observation regarding the effect of custom on Muslim jurists. For instance, he argues that it was the impact of custom that compelled al-Shāfi‘ī to change some of his legal rulings he upheld strongly when he came to Egypt from Baghdad. On this he writes: “and when al-Shāfi‘ī settled in Egypt, he changed some of the rulings he upheld when he was still in Baghdad”.⁸³

The points I have cited above underpins the significance of *'urf* and its centrality in influencing the thinking of the jurist. For instance, in the context of these examples, the impact of *'urf* was so profound to the extent of shaping the very methodologies of these respective jurists (Ḥanafī and Shāfi‘ī). If the effect of *'urf* was such that it would influence the methodology of these early jurists, that Islamic legal theory has failed to acknowledge its independence as a legitimate primary source is, to say the least, puzzling. Parts of the

⁸³ See Abdul Wahhāb Khallāf, *‘Ilmul Uṣūl al-Fiqh* (Riyadh: Maktbat as-Safhat al-Dhahabiya, 1985).

problem lies in the fact that *'urf*, in spite of its appropriation by jurists, when invoked, remains hidden under other legal principles (like *ijmā'*, *istihsān* or *maṣlaḥa*). To highlight this latter point, I will refer to this problem as the dialectic of *'urf*.

The dialectic of 'Urf: 'Urf disguised as *maṣlaḥa*

By the dialectic of *'urf*, I refer specifically to the contradiction that permeates legal scholarship in its treatment of *'urf*. As noted previously, the treatment of *'urf* in legal scholarship is marked by a discourse that is steeped within the existing tradition of Islamic jurisprudence, such a tradition does not favour *'urf* as an independent formal source. This dichotomy is better expressed by the term dialectic.

I use the term dialectic here, in its philosophical sense, rather than as a Marxian nomenclature. If in the philosophical and Kantian sense, "dialectic" is a type of argument that dresses up "fallacious reasoning in pseudological garb"⁸⁴, it will not be an exaggeration to contend that the discourse of Muslim jurists on *'urf* can be explained in similar terms, that is, in the Kantian sense.

Now, if in the context of this discussion on *'urf*, we were to borrow this Kantian usage, it will not be out of place to contend that this is exactly what Muslim legal theory as articulated by the jurists has done to *'urf*.

As a way of elucidating my contentions, here, I will look at other discourses on *'urf* by two additional jurists. These will be contrasted and compared with Ibn 'Ābidīn's discourse. These two jurists are Shāṭibī (d. 1388 CE) and Khallāf (d.1956 CE). The choice of these two jurists is by no means arbitrary. First,

⁸⁴ See *Dictionary of Philosophy* (London; New York, 1984), p. 94.

these represent two distinct historical periods. For instance, if the former represents the medieval era characterised as the period of “maturation” in legal theory (represented by Shāṭibī), the latter represents the modern period. The latter is a period characterised by the challenge and imperative to formulate a “new theory of law” or more appropriately a new methodology. Such a methodology, it is argued, is aimed at making Islamic law more intelligible in order to meet the demands of the modern and contemporary period.⁸⁵

Second, the importance of selecting these two jurists is useful, in that, it provides a further case study on how the problem of ‘urf is mediated in the context of both the classical and modern periods. This helps to throw further light on my central thesis - a thesis that argues for the centrality of custom (‘urf) as an independent legitimate source, notwithstanding its hitherto marginal status.

In starting with Shāṭibī, I will not present a detailed account of Shāṭibī, for Khallid Masud's *Islamic legal Philosophy: A Study of Abū Ishāq Al-Shāṭibī's Life and Thought*, already provides a very detailed work on Shāṭibī.⁸⁶ My interest here is only on Shāṭibī's discourse on ‘urf. As noted elsewhere, Shāṭibī as a legal scholar represents the “culmination” of maturity in the formulation of Islamic legal theory. This point is well captured by Hallaq, when he observes that Shāṭibī represents the:

Culmination of an intellectual development that started as early as the fourth/tenth century. By his time, legal theory had reached such high level of maturity that it was capable of being entirely remolded...

⁸⁵ See for instance, Rahman, *Islam and Modernity*, p.18.

⁸⁶ See Khalid Masud, *Islamic Legal Theory: A Study of Abū Ishāq al-Shāṭibī's Life and Thought* (Delhi: International Islamic Publishers, 1989).

while maintaining its traditional function of discovering the law and regulating its continual creation and, to some extent, functioning.⁸⁷

It is discernible from the above quote that Shāṭibī occupies an important position in the study of Islamic law, especially in the area of its legal theory. Given this important status of Shāṭibī, our discussion on custom would have a serious gap if we were to ignore his pronouncements on '*urf*' (custom). Therefore, a focus on Shāṭibī, helps to weigh Ibn 'Ābidīn discourse against that of another jurist and scholar who represents a period earlier than his, but also a different school of thought (i.e. the Mālikī school).

Shāṭibī's discourse on '*urf*' (custom)

It must be noted here, that focus will not be on Shāṭibī's entire discourse on '*urf*', but on some of the more pertinent pronouncements that he makes regarding its status. What follows then, is a summary of Shāṭibī's views on '*urf*'.

A careful reading of Shāṭibī's legal philosophy shows that custom is very much at the centre of his legal thought, especially as it deals with legal change. I do not deny the widely accepted Shāṭibī's central thesis, which accentuates the principle of *maṣlaḥa* as the axis of his legal philosophy. However, a scrutiny of his discourse on custom ('*urf*'), uncovers the contention I have stated earlier, and that is, '*urf*' is often mediated through the garb of another legal principle. For example, in Shāṭibī's case, it is mediated through his theory of *maṣlaḥa*. In other words, through the principle of *maṣlaḥa*, the status of '*urf*' is obfuscated, with the attendant result that *maṣlaḥa* is

⁸⁷ See Hallaq, *A History of Islamic Legal Theories*, p. 162.

accentuated at the expense 'urf. In my view, naturally, this obfuscates the position of custom as a prominent source and further entrenches its marginalisation.

First, because the classical theories do not grant prominent status to 'urf, what the jurists have tended to do, is to engage in what I have called "the discourse of denial and acceptance" in so far as the status of 'urf is concerned. This discourse of "denial and acceptance" is nowhere evident than in Shāṭibī's treatment of 'urf. It is worth looking at a few examples to see exactly how this happens.

Shāṭibī in his fascination with "the relationship between *sharī'a* and 'āda, (or 'urf)", asserts that in some cases *sharī'a* can change custom and vice versa. In other words, this view implies that "when change takes place within an 'āda ('urf), it also affects a change in the rule of *sharī'a*".⁸⁸ In other words, the *sharī'a* has to adjust itself within the changing context of custom. Naturally, this entails that *sharī'a* within such a context must also admit change. Now, if change in custom can force change "in the rule of *sharī'a*", is custom in this context then not *ratio legis* and therefore, a primary source?

It is also worth noting, that Shāṭibī has emphasised the importance of "the relationship of *sharī'a* to 'āda" as opposed to "between *sharī'a* and 'aql" or reason. As a Mālikī jurist this can be understandable, in that this school has placed more emphasis on 'amal or social practice, (herein

⁸⁸ See Masud, *Islamic Legal Theory*, p.295.

read as '*urf* or custom)⁸⁹. For instance, in trivialising the notion that the rational people (*'uqala*) were able "to know good and evil by reason alone", Shāṭibī argued that "this was possible" in that these values are easily manifested in '*āda* or habitual norms, that is, customs of the society. Accordingly, he asserts that it is precisely because of this reason that "the *sharī'a* has not rejected '*ada* or '*urf* entirely". Shāṭibī also contends that the "*sharī'a*" has in fact "confirmed most of the '*āda* practiced by the people in the Pre-Islamic period"⁹⁰. For instance, laws pertaining to *diyya* (blood money), the *hajj* (pilgrimage) and interestingly the *jum'ah* (Muslim's Friday congregation) or what was then called *Arūba* (ancient Arabic name signifying the Friday sermons), are good examples of how *sharī'a* has "confirmed" and sustained most of the customs prevalent in the pre-Islamic era.

Again, in Shāṭibī's comments on *khamr* or wine, the penchant to invoke custom by this jurist is more pronounced. Masud, for example, states that Shatibi has argued that the reason *khamr* (wine) drinking was left intact and not abolished immediately by the *sharī'a* was based on the habitual practices or customs of the pre-Islamic days. The reason it was abolished only after the *Qur'ānic* verses on *khamr* were revealed, Shāṭibī contends, was influenced by the principle that it was harmful to the wellbeing and welfare of the community. In other words, *sharī'a* can also change custom and vice versa. A point to be noted though, is that when the change takes place within

⁸⁹ See Muhammad Shalabī, *Uṣūl al-Fiqh al-Islamī* (Beirut: Dar al-Nahdat al-Arabiya, 1986), p.321.

⁹⁰ See Masud, *Islamic Legal Theory*, p.295.

custom, that change also affects “a change in rule of *sharīʿa*”.⁹¹ What is discernible here, is that whilst custom has been the main point of reference in Shāṭibī’s discourse, this is, nevertheless, underpinned by the imperative to prove the validity of *maṣlaḥa* as a legal principle. That is why, for instance, Shāṭibī concludes that Islam accommodates customary practises as long as they are in the interest of community (*maṣlaḥa*).

The above point is well illustrated by Masud where he shows that *maṣlaḥa* is the pivotal principle under which much of Shāṭibī’s legal philosophy is anchored. What is discernible within such a scheme, is that ‘*urf*’ or “*āda*” is readily sacrificed, or is expressed through the idiom of *maṣlaḥa* notwithstanding its vitality. Arguably, it is such vitality that has in the first instance compelled Shāṭibī to rule that *sharīʿa* should succumb to custom. In mediating ‘*urf*’ through another legal principle, in this case *maṣlaḥa*, what Shāṭibī effectively achieves, is the dismissal of ‘*urf*’ as a prominent source. Therefore, *maṣlaḥa* is juxtaposed in lieu of ‘*urf*’ thus diminishing its prominence.

The foregoing discussion sums Shāṭibī’s views on ‘*urf*’. I will now focus on Khallāf’s discourse. Later, both Shāṭibī and Khallāf will be analysed, compared and contrasted, with Ibn ‘Ābidīn’s discourse.

Khallāf’s Discourse on ‘*urf*’

Again, as a measure to weigh Ibn ‘Ābidīn, Khallāf’s discourse on ‘*urf*’ is exceptionally important. As indicated earlier, the significance of looking at Khallāf’s discourse on ‘*urf*’ is two-fold. First, as pointed out, the purpose is to

⁹¹ Masud, p. 296.

situate Ibn 'Ābidīn within a comparative perspective. Second Khallāf's discourse serves as a good example for locating the attendant problem characterising Islamic jurisprudential discourse in its pursuit for a viable theoretical methodology.

Furthermore, the importance of Khallāf's views on 'urf, is based on the fact that he provides a modern perspective on how 'urf is mediated. This in a sense helps to examine the continuities and discontinuities characterising the discourse on 'urf in Muslim legal theory. My primary text for Khallāf's discourse on 'urf is from his work written in Arabic, *'Ilm Uṣūl al-Fiqh* (Principles of Islamic jurisprudence or Islamic legal theory), particularly the section on 'urf. This is further supported by Hallaq's references to Khallāf in his recent work.⁹²

Again, to avoid repeating the familiar debates, I will only focus here on Khallāf's pertinent pronouncements on 'urf. This is followed by a summary of his discourse. In *'ilm uṣūl al-fiqh*, the section dealing with 'urf, Khallāf writes assertively, that "in reality 'urf is not an independent or primary source and that it is, in most instances, reflected through the principle of *maṣlaḥa al-Mursala*". Based on this assumption, he then concludes that "it is not an

⁹² See Hallaq, *A History of Islamic Legal Theories*, pp. 162 - 206.

independent source of Islamic law or legal proof".⁹³

'*Urf* in Khallāf's discourse is classified into two categories. These are sound or acceptable custom or "*urf as-saḥih*" and corrupt custom or undesirable custom or "*urf al-fāsid*". Accordingly, sound custom is "what is known amongst the people and does not contradict textual evidence".⁹⁴ As for corrupt custom, it is also known amongst the people "but contradicts the *sharī'a* or makes permissible the unlawful like for example *ribā* or interest". In exploring his discourse on '*urf* this particular statement holds special significance. Arguably, it is through the simplification of this statement that most of the ambiguity around '*urf* emanates from.

First, for many jurists it is a licence to circumscribe '*urf* and limit its status as a source of law. My concern is that it does not sufficiently account for the rulings that are totally based on the strength of custom such that they nullify "*sharī'a*", as pointed out in Shāṭibī's discourse. It is crucial to note that in order to support his claim on '*urf*, Khallāf draws on Ibn 'Ābidīn, and he does so with a great sense of respect. Note, for example, how Khallāf makes his point. He writes:

and amongst important maxims are: *al-m'arūfi 'urfan ka'l-mashrūṭi Sharṭan, wa thabit bil-'urfi ka thabit bil-Naṣṣ* (What is known by custom has a legal binding, and what has the evidence of custom is similar to the certainty of the text).⁹⁵

The importance of this quote is that it unambiguously asserts the strength of custom as a legitimate source of law. Khallāf's discourse on custom is

⁹³ Khallaf, *Ilmul Uṣūl al-Fiqh*, p. 91.

⁹⁴ *Ibid.*, p. 89.

⁹⁵ *Ibid.*

perhaps well summed up by Hallaq, and I quote him in detail. Hallaq:

Khallāf's vacillation between the tenacious authority of the revealed text and the imperatives of legal change is even more evident in his discussion of customary practises (*'urf*) and of their relation to law. At first, he seems certain that those practises that conform to the law are to be accepted as valid, whereas those that contradict the law must be deemed null and void. This certainty, however, does not last; a custom that contravenes the dictates of the revealed texts may, after all, be legalised. If an unlawful contract or transaction has become widespread in a particular society, such as insurance, then necessity will override the textual norms.⁹⁶

In addition to the above detailed quote which sums up Khallāf's views on *'urf*, like Shāṭibī, Khallāf also held the view that "since customary practice does change over time, the law that governs them must change accordingly" (see pp.61-62). Now if the change in custom necessitates a change in "the law that governs them",⁹⁷ it would appear that such a statement as the jurists' discourse points, alludes to the primacy of custom as a source of law.

A Critique: Contrasts and Comparisons

This section concludes by offering a critique of both Shāṭibī's and Khallāf's discourse on *'urf*, and also compares these with Ibn 'Ābidīn's discourse.

In examining the discourses of both Shāṭibī and Khallāf, and comparing these with Ibn 'Ābidīn, a striking similarity permeates almost all of them.

Their discourse on *'urf* can be summed up as being one of denial and acceptance. It is denial in the sense that *'urf* is denied the status of a primary principle as an independent source of law, whilst, at times it is acknowledged

⁹⁶ Hallaq, *A History of Islamic legal Theories*, p.221

⁹⁷ Ibid.

as a legitimate source to the extent of changing “the law that governs” it. In other words, custom has the propensity to change a legal ruling that has the support of “textual” evidence. Custom, in this context as the *unwritten* text, replaces the *written* text. In short, the praxis of the community becomes the legitimising agent.

Second and most importantly, it is noticeable that ‘*urf*’ as expounded in these discourses plays a central role in the reasoning of the jurists particularly in their attempts to make pronouncements on novel situations, ‘*urf*’ in such instances is constantly invoked. The irony, however, is that, in spite of this prominence, it is not pronounced as a primary source or independent source, but a secondary or an appendage to aid other sources when they are “ambiguous” or “silent”. Or, as in the case of Shāṭibī, custom or ‘*urf*’ is invoked to plead the legitimacy of *maṣlaḥa*.⁹⁸

Conclusion

This chapter has explored the question of whether the inability to attach primacy to custom, that is, as a primary source is caused by ambiguity in what constitutes sources of Islamic law, or is it a problem of tyranny of doctrine in the classical legal theory of Islamic jurisprudence?

In response to the above question, I have argued that the failure to assign primacy to ‘*urf*’ or custom as an independent and primary source of law, stems from the jurists imprisonment by tradition rather than “irrationality” in sources of Islamic law. In particular, ‘*urf*’ read as a primary source, provides not only a

⁹⁸ This point is also emphasised by Muhammad Muṣṭafā Shalabī in the following words: “*wal-Imam Mālikī ‘amala bil ‘urfi wa ‘tabarahu naw ‘an minal maṣlaḥa* (and Imam Mālik utilised ‘*urf*’ and has considered it as part of *maṣlaḥa*). See Shalabi’s *Uṣūl al-Fiqh al-Islamī* [Islamic Jurisprudence] (Beirut: Dar al-Nahdat al-Arabiya, 1986), p.321.

plausible theory, but equally a methodological alternative for an intelligible reading of Islamic law (I am elaborating more on this last point in the next chapter). In short, in our context, reading '*urf*' as a primary source, implies theoretically speaking, going back to the origins, and deriving guidelines for reworking legal theory free from the trap of a fossilised methodology and epistemology.

CHAPTER FOUR

Reconfiguring 'Urf (Custom) as a Legitimate Source:

Methodological and Theoretical Considerations

The autonomy of the past had to be recognised.
But I always knew that history, in the end, is an
interpretation of 'facts' in history. It is like an old
fabric handed down to us from the past; we do not
fully understand its original pattern...

- S. N. Mukherjee

This chapter concludes the discussion on *'urf*. Here I locate the study within a broad theoretical framework that I outlined in the introduction (see pp.6-8).

This helps to highlight the central thesis underpinning this study more clearly, and that is: revisiting the status of *'urf* in Islamic jurisprudence the aim is to prove that it has always been prominent, often serving as a primary source.

Naturally, this stance negates the myth of the marginal status of *'urf* that has now become synonymous with the "authentic" and "dominant" view on the subject.

In addition to the above, at the theoretical and methodological level, it is my contention, that assigning prominence to *'urf* as a source of law, has amongst other benefits, the potential to highlight the "crisis of epistemology" within Islamic jurisprudence. Nevertheless, it is not within the scope of the present work to deal with such a subject exhaustively, but can only highlight

the areas where the problem lies.

The metaphor of an “old fabric handed down” as indicated in the opening epigraph, is a powerful one for encapsulating the treatment of *urf* in Muslim jurisprudential discourse. It is, however, as a “subtext” to this discourse that this metaphor becomes useful for stating my argument more forcefully.

The key phrase in this concluding chapter is “reconfiguring *urf*”. Reconfiguring, to cite Vernon Robbins⁹⁹, means, amongst other things, “recounting” in a manner that makes the latter event “new” in relation to the previous. In other words, what Robbins implies is that in terms of similarity, the “new event is similar to a previous one” and as such “the new replaces or outshines the previous”. It is, therefore, in the process of outshining the previous event that the new is “reconfigured” and hence its apparent newness.¹⁰⁰ Although Robbins is referring to a slightly different context, such a statement is, nevertheless, deployable in the context of my discussion on *urf*. For it is as the “reconfigured” that *urf* “outshines” its previous designation. This in turn renders any claims of its prominence in Islamic jurisprudence to appear as a “new hermeneutic”, a rupture with the past, an innovation, and therefore, untenable.

However, as I have attempted to show, *urf* “reconfigured” does not stem from an innovation or a total rupture with the past- but is located in “the previous event”- or its original status in the past. In such a past

⁹⁹ Vernon Robbins, *Exploring the Texture of Texts: A Guide to Socio- Rhetorical Guide* (Pennsylvania: Trinity Press, 1996).

¹⁰⁰ *Ibid.*

(past referring to the prophetic period and the early subsequent periods) *'urf* or custom was marked by its prominence in legal formulation. Put differently, custom then served as a primary source or determinant for negotiating and interpreting the 'sacred text' of Islam or *sharī'a* in its legalistic sense.

It can thus be seen that my reading borrows heavily on original understandings of the process of law-making in early Muslim society. Within the context of such a past, "custom" although not officially *sanctioned*, featured prominently in the hierarchy of what constituted sources of Islamic law. For example, it is a known fact that the Mālikī school, in particular, based most of its rulings and legal theory on the strength of the communal praxis of Madina- called "Madinan *'amal*". Although this point has been mentioned in previous works, the recent work by Dutton, is arguably the most eloquent to capture the centrality of custom in Islamic legal theory, especially as expounded in the Mālikī school.¹⁰¹

Thanks to this recent work, there is at least a text that lends support to the view I have put forward on the status of custom. Therefore, I am not going to offer a lengthy discussion to back my claims on the prominence of custom in Islamic law. Here the author argues forcefully, that in Mālik's *Muwatta* lies the "first written formulation of Islam in practice that becomes Islamic law". The importance of this work is underpinned by the centrality it attaches to custom or what it refers to as " *'amal* of Madina". Of course, I do not suggest that I

¹⁰¹ Yasin Dutton, *The Origins of Islamic Law: The Quran, Muwatta and Medina 'Amal* (Surrey: Curzon Press, 1999).

accept Dutton's thesis, which is an exposition of Mālikī's *Muwatta*, wholesale.

The fundamental difference is that whereas Dutton argues that '*amal* is text expressed through the practice of the community, that is, the Madinan community, my own emphasis is that the text is not only expressed or reflected upon the '*amal* (custom), but '*urf* itself (read '*amal* by Dutton) mediates and informs the text and its application, and hence a creative blending of "text and context"(see my discussion in chapter 2 and 3). Now this is different from merely over emphasising that the text is "expressed through '*amal* " (practice of the community). If this is so, the question is, to what extent is such an emphasis also not based on the notion of a "juristic device" as pointed out by Hallaq, and therefore, fall on the utilitarian paradigm? However, besides this gripe I am in agreement with Dutton insofar as his work brilliantly shows the vitality of custom as a viable alternative for reformulating Islamic law. This is what Dutton has called the "third view". He explains such a third view in the following words: "It is the contention of the present study that there is a third view which has not yet been sufficiently examined (if even recognised) by modern scholars, whether Muslim or otherwise".¹⁰²

Given this assertion by Dutton, I can therefore, argue with ease that my discourse thus far on '*urf* or custom in this dissertation is an attempt to examine "what has not yet been sufficiently examined" (to cite Dutton). In other words, in engaging the status of custom within Islamic jurisprudence, I am in a sense beginning to explore the "third view ". The question is what

¹⁰² Ibid., p. 2.

exactly does such a third view entail? For whilst Dutton points towards such a view he does not fully elaborate what are its parameters. The closest he comes to explaining such a view is to state the following:

The third view allows us a fundamentally different perspective on Islamic legal history where the true expression of the law is seen as being preserved not in a corpus of texts but in the actions, or '*amal*, of men¹⁰³

However, notwithstanding the limitation, the point about Dutton's statement is that custom ('*urf*) or '*amal* becomes "a true expression of the law" rather than being buried "in a corpus of texts" or *naṣṣ*. The value of Dutton's contribution here is that at the minimal level, at least it helps in building a case for the validity custom as a crucial principle in the development of Islamic legal theory. Informed by such a perspective, I believe my own discussion thus far (i.e., in previous chapters) on the centrality of custom in Islamic legal theory finds sufficient support in Dutton's thesis. In particular, the point I wish to stress here is that if custom did function as one of the primary sources, therefore, it can still occupy such a role in the modern period. And as Mahmassani has pointed out elsewhere that:

custom has *a/ways* played an important part in the history of legal systems among various peoples. This role, although relatively minor in the present day by comparison with the past, is nevertheless crucial and cannot be ignored by present legislation. For custom... still supports, interprets, adjust and revitalises written law.

It is a link between the past, present, and the future.¹⁰⁴

Although Mahmassani supports the view that custom is valid only as an "extraneous source", I have, nevertheless, quoted him at length here, in that

¹⁰³ Ibid., p. 3.

¹⁰⁴ Mahmassani, *The Philosophy of Islamic Jurisprudence*, p. 54.

his statement eloquently points to the continued relevance and vitality of custom as a source of law. But also more importantly, his statement underpins the fact that the view espoused in this dissertation is by no means arbitrary. Custom as shown has in practice functioned as a primary source, that is, before codification or prior to being overtaken by “written law” or *sharī'a* after its formalisation. This then, vindicates my claim that our argument here on the primacy of custom or *'urf*, is not a total rupture with the past but merely “reconfigures” custom and entrenches its status as a prominent source. This, in a nutshell, refutes the myth of its marginal status.

A Theoretical Point of Departure?

Before I proceed to state my theoretical point of departure, I deem it necessary to first sum up this study as it has progressed thus far. The aim is to allow for the discussion that follows to be placed within its proper perspective.

In examining the discourse on *'urf* in the previous chapters, I have shown that in praxis *'urf* does function as a legitimate source in the formulation of Islamic law than the jurists would admit. For example, in Chapter one, through the variety of scholars examined, it is discernible that most do allude to the utility of *'urf* as a prominent source (see pp. 30 – 40).

In chapter Two, which was a case study on Ibn 'Ābidīn's discourse on *'urf*, the attendant contradictions between theory and practice were highlighted. For example, in looking at Ibn 'Ābidīn's discourse on *'urf*, it is clear that whilst his discourse denies legitimacy to *'urf*, nevertheless, it invokes *'urf* as a means to render the law applicable to societal needs. In taking the

discussions on *'urf* (custom) forward, Chapters Two and Three in particular, have demonstrated that the reluctance to accord prominence to this source is partly due to the dominance of classical doctrine in Islamic jurisprudence. As argued, such a classical doctrine is based on an epistemology that does not recognise *'urf* as a primary source, but only as an “extraneous source”.

Accordingly, invoking the principle of “extraneous” sources, these jurists proceed to argue that Islamic law is in fact “mutable”. It is precisely at this point, that is, “mutability” or “immutability” of Islamic law, where my theoretical thrust in this dissertation makes a point of departure. Such a question I believe is sufficiently addressed in a number of works dealing with Islamic law in the modern period or in modernist discourse on Islamic law.¹⁰⁵

My particular concern is to show that whilst most works on Islamic law as far as highlighting the “flexible” nature of Islamic law, cannot be flawed, they are, nevertheless still trapped in the “classical hermeneutic”. By specifically looking at custom or *'urf* as a primary source, I am in a sense proposing an alternative approach. The stance I adopt here is that of attempting to move away from recycling old discourses that are preoccupied with proving the relevance or irrelevance of Islamic law to meet changing circumstances.

In particular, I begin to engage the very foundational epistemology of Islamic law - an area I believe that is largely neglected. By epistemological

¹⁰⁵ A similar observation is made by Moosa in a recent review essay of *Nyazee's Theories of Islamic Law: The Methodology of Ijtihad*, see *Journal for Islamic Studies*, vol. 18, 1999, pp.54-63.

crisis in the context of this study, I am referring to the arrangement of the hierarchy in what constitutes sources of Islamic law. What has been passed down as the primary sources in this hierarchy has over a period of history become unchangeable. In particular, it is this arrangement of sources and their prioritisation as “primary” and “secondary”, that has created a hierarchy of sources that has become non-negotiable. Arguably, this has contributed in putting Islamic law in an “epistemological crisis”. Subsequently, due to doctrinal tyranny, any attempt to reformulate such an epistemology does not find accommodation. A key feature of such doctrinal tyranny or “classical hermeneutic”, as we have shown elsewhere in this study (see p.18), is that, it does not recognise custom as a primary source.

Reading *urf*, therefore, as a primary source, presents a rupture with the classical hermeneutic and creatively engages this epistemological crisis. This approach has also the added potential to contribute towards an alternative methodology that can free Islamic law from its present predicament. Such a predicament is seemingly well captured by Hallaq.¹⁰⁶ To marshal my remarks here; I want to draw extensively from Hallaq’s work. He summed up succinctly the different strands underpinning calls for the need to reinterpret Islamic law. Hallaq’s work, will therefore, serve as a useful springboard from which the challenge for an alternative theoretical approach and methodology can be taken up.

I must note from the start, that Hallaq’s work does not attempt to explore alternative theories and methodologies that can be applied to Islamic law, it

¹⁰⁶ See Hallaq, *A History of Islamic legal Theories*, 1997.

only exposes the debates and the major players involved in attempts to offer alternative readings and interpretations of Islamic law. In particular, Hallaq distinguishes between two strands: These he describes as the “utilitarian” and “liberal” approaches. The difference between the two approaches is that the former rationalises the existing status quo, instead of “prescribing a new legal theory or reformulated methodology”. On the contrary, the latter, that is, liberalists “remained, and continue” in Hallaq’s view, “to stand, outside the current main stream” of law formulation in Muslim societies. In other words, the discourse of the latter, as it were, continues to be met with “stiff resistance” by Muslim orthodoxy. Hallaq’s work here is extremely useful, in that whilst it does not put forward an alternative blue print for an alternative theory and methodology, nonetheless, it does sketch a scenario that highlights the difficulties encountered in the pursuit to formulate viable legal theories for Islamic law.¹⁰⁷

To focus my discussion I want to return to Hallaq’s notion of the two strands in attempts to reinterpret Islamic law, that is, the “utilitarian” and “liberal” approaches. The problem with the utilitarian approach, as Hallaq has argued, is that the utilitarians are trapped by the classical hermeneutic of Islamic legal theory, thus their postulations are far from being new theories but instead “*perpetuate* the status quo”.¹⁰⁸ In other words, what is proposed, as new theories are simply “juristic devices” from the existing traditional legal

¹⁰⁷ Ibid., p.254

¹⁰⁸ Ibid.

theory.¹⁰⁹ Of course, this is not to deny the *creativity* and *inventiveness* of these alternative devices. The problem, however, is that these devices do not offer a methodology that can “bring into a dialectical relationship the imperatives of the revealed texts and the realities of the modern world”.¹¹⁰ On the contrary, what sets the liberals apart from the utilitarians, is that the thrust of the liberal approach “consists of understanding revelation as both text and context”. Put differently, the text is read and interpreted as located in its modern context or what Hallaq has termed the context of “modern society”.¹¹¹ It is worth citing Hallaq more at length here to get a full sense of this point. Hallaq:

The connection between the revealed text and modern society does not turn upon a literalists hermeneutic, but rather upon an interpretation of the spirit and broad interpretation behind the specific language of the texts.¹¹²

If the utilitarians, render the revealed text “subservient” to the “imperatives” of the “juristic devices”(i.e., public interest, need and necessity), it is the liberalists, whom Hallaq argues, have given Islamic law a much more “Islamically committed system of thought”. The problem with the “utilitarian” approach though, as Hallaq has shown, is that Islamic law becomes literal and “textually” submissive rather than a response or outcome of a law that is

¹⁰⁹ Ibid., p.231

¹¹⁰ Ibid.

¹¹¹ Ibid., p.249.

¹¹² Ibid., p.254. I must hasten to add at this point that in citing Hallaq in full here does not suggest that he necessarily views developments in Islamic Law in a Favourable light- but only serve to highlight the view that Islamic law lacks a viable methodology.

mediated through creative "textual/contextual analysis".¹¹³

In other words, there is a poverty of a viable methodology that can effectively negotiate and mediate between the text and its context.

Accordingly, it is this latter approach (liberalists) that Hallaq (despite its rejection by orthodoxy) credits with being a "respectable methodology" in tune with "Islamic legal values".¹¹⁴ It is not my intention to judge which of the two approaches is more committed to Islam as Hallaq has done, but to show why the alternative I propose attempts to bridge the gap between the two approaches, and why I recommend its viability. First, notwithstanding their conservative nature, the success of the utilitarians lies in the fact that their "theories" were at least implemented "practically". In other words, they have been applied and put into operation. Apparently, this is the mark of their success, to take a cue from Hallaq.¹¹⁵ However, the problem still remains, that is, their preoccupation with tradition has rendered them ineffective, hence they have not really offered any alternative methodology. And if they do offer alternative theory, it is as Moosa notes elsewhere "unsatisfactory". On the contrary, the latter, that is, the liberalists, with their "intelligible" methodology have at least offered a fresh outlook, as Hallaq puts it, one that is "legally and intellectually far more rigorous and convincing...".¹¹⁶ But here too, the challenge still is, how can the liberal perspective also receive a favourable response? To put the question differently, how can the gap between these two poles be narrowed? And also, how can the insights offered by both these poles, that is, "intelligibility" of the liberalist approach and the "loyalty to

¹¹³ *Ibid.*, p.254.

¹¹⁴ *Ibid.*, p.262.

¹¹⁵ *Ibid.*, p.254.

¹¹⁶ *Ibid.*, p.259.

tradition” of the utilitarians, be harnessed and deployed creatively to offer a relatively acceptable methodology and theory?

In responding to the above set of questions, I want to first make my position clear regarding the view taken by Hallaq. I do not believe as Hallaq has asserted that the utilitarians are less committed to Islamic legal values—hence my assertion that a common ground between the two approaches is possible. Therefore, it is in the context of this quest for a common ground that my recommendation can make sense. What I propose is that, it is in “reconfiguring” *urf* as a primary source, that the two poles can possibly be reconciled. Arguably, such a reconciliation would seek to entrench the best in both approaches, thus in the process bring a synthesis for a viable theory.

Arguably, elevating custom as a legitimate source contains both the utilitarian and liberal strands and thus holds both in a healthy tension by taking a middle path. It is through the ability to proffer this synthesis that this proposed alternative can possibly mediate and thus contribute towards addressing the epistemological crisis facing Islamic law. In so doing, the theory moves away from rigidity but renegotiates the hierarchisation of sources in Islamic jurisprudence. By so doing, it deals with the foundational epistemology. It is in this instance, I wish to argue, wherein lies the strength of the liberal strand. For custom, by its very nature, is not textually bound, but informs the text. It becomes a textual/ contextual based methodology. It does so without discarding elements of the traditional methodology, but simply “reconfigures” such a methodology. Arguably, in such a sense it is not totally new, but a return to the original framework. Of course, this is done through the prism of *urf* (custom) “rehabilitated” as a primary source.

As our narrative on *'urf* has shown, it is through the historical process that *'urf* has shifted from prominence as a reliable source to a marginal status (within the hierarchy of sources). But also, if history is an interpretation of "facts", when we interpret the process of the hierarchisation of the sources of Islamic law, we can say that we are figuratively speaking about *returning* to the original framework. Therefore, a return to such an original framework is a return to a tradition where *'urf* once enjoyed prominence (see pp. 21- 27).

Furthermore, if we still stretch the metaphor of an "old fabric" passed "from the past"(see opening epigraph) and relate it to Islamic law (particularly as it pertains to its theory and methodology), there is a sense in which we can say its "original fabric" or "pattern" has been lost, or misunderstood. In short, positing *'urf* as a paradigm for reinterpreting and reformulating Islamic law, is, arguably a quest "to understand" the original fabric or pattern (read Islamic law) and how it was originally formulated. Herein lies the thrust of my argument. It appears new in the sense in which Vernon Robbins talks about the "reconfigured" as a "new event" that outshines "the previous". However, on close scrutiny, it is a call for a return to the origins where custom featured prominently as a legitimate source.

CONCLUSION

Jurisprudence is a science of both understanding and misunderstanding of law. As the most generalised and abstract form of legal discourse it reveals the categories and concepts in which lawyers and jurists think about law.
- Valerie Kerrish¹¹⁷

If as Kerrish asserts, “jurisprudence is a source of both understanding and misunderstanding of law”, I think this is very much the case with Muslim jurists and their approach to Islamic law. In particular, “misunderstanding” is at best pronounced in the views of Muslim jurists regarding the acceptance of custom as a legitimate source of Islamic law. I have argued in this dissertation that, except for a few, the discourse of the majority of Muslim jurists’ denies custom the status of a legitimate or formal source. When they accept custom, it is only on the basis of a marginal source. Or as I have shown in chapter 3, that custom (*urf*) is often mediated through the medium of another legal principle, like, for instance, *maṣlaḥa* (and hence my assertion about the dialectic of *urf*, see p.56). Accordingly, based on such a legacy, the discourse of most Muslim jurists (see chapter 2) does not depart from this classical paradigm, that is, where custom is treated as a marginal source.

The problem with such a classical paradigm is that it obscures the capacity of the jurists to bend and constantly reformulate Islamic law to meet change.

¹¹⁷ Valerie Kerrish, *Jurisprudence as Ideology* (London; New York, Routledge, 1991), p.3.

This is what has led some scholars on Islamic law to charge that Islamic law is by and large a jurist's law. Now, if discourse connotes "a world of meaning" (see p. 41), in examining Ibn 'Ābidīn's discourse on *'urf*, (that was compared and contrasted with the discourses of Shāṭibī and Khallāf), I have then concluded that what is observable is that *'urf* as a *subtext* in the discourse of Muslim jurists, functions as a legitimate source of law. In other words, notwithstanding the seemingly conformist postulations on *'urf* that seems to yield to the classical view, a close examination of the discourse of these jurists appears to be liberal and pragmatic on the question of custom as a legitimate source. Put differently, the discourse of these jurists demystifies the myth that *'urf* (custom) is only a marginal source of law as the normative discourse in Islamic legal theory has proposed.

On the basis of the above observations, I have then argued that the cause for the denial to grant custom legitimacy can be linked to the foundational epistemology of classical legal theory in Islamic law. This is at best reflected in the hierarchy of what constitutes "legitimate sources" of such a law. Given such a status quo, my concern, besides making a case for the acceptance of custom as a legitimate source, was to highlight that part of the challenge facing Islamic law and its legal theory is the need to renegotiate the arrangement of what constitute the "legitimate" in the hierarchy of its sources of law afresh. I have then asserted that it is the unwillingness to engage in a critical evaluation of its sources that saddles Islamic jurisprudence with what I have referred to as an "epistemological crisis" (see p. 18). Therefore, in problematising the hierarchy in the sources of Islamic law, I have then argued that, *'urf* read as a primary source, moves away from the imperative to

“rehabilitate” custom as a relevant source, but begins to highlight the inherent tensions underpinning the epistemology of traditional legal theory.

In short, in “reconfiguring” *urf* as a legitimate source, I have argued, that this is not an innovation but a return to the “pre-classical” period in legal formulation. As noted, in such a context, custom was very much at the centre of legal formulation (see chapter 4).

Finally, in the light of the concerns raised in this study, at the conceptual level, I have then argued that custom “rehabilitated” as a primary source provides a useful framework towards an alternative theory and naturally a methodology for reinterpretation of Islamic law in the contemporary period. For custom read as primary source, as indicated, engages directly with traditional epistemology rather than seek accommodation as an appendage that can be discarded at any given time. This repositioning of custom in the hierarchy of sources, in a sense, responds to the challenge posed by most modern Muslim legal scholars who bemoan the lack of a viable methodology and theory for reformulating and rethinking Islamic law.¹¹⁸ In all, the crux of my argument here is that there is nothing sacrosanct about the status attached to the accepted hierarchy of sources. In fact as some contemporary scholars would show, that other sources that feature prominently “are in reality [*only*] legal instruments”(i.e. consensus or *ijmā'* and analogy or *qiyās*) on which “there is no universal agreement among jurists”.¹¹⁹

Of course, as I have indicated, that, given the limited scope of this study, I

¹¹⁸ See for instance *Rahman's Islam and Modernity*, p.18; see also, 'Alwani's “The sources of Islamic jurisprudence: Methodology of Research”, 1982, pp. 211-269. See also Moosa's “Languages of change in Islamic Law: Redefining Death and Modernity”, *Islamic Studies Journal*, 38:3 (1999), p.312.

¹¹⁹ Moosa, “Languages of Change in Islamic Law”, 1999, p. 307. See also, Abdulah An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Rights, and International Law* (New York, Syracuse University press, 1996), pp. 33-34.

do not pretend to have presented a full methodological alternative framework, but have pointed towards such a direction without being fully prescriptive.

Therefore, what I have reflected upon here is only a recommendation (a recommendation that will perhaps require a full treatment in a separate study).

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