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Customary Implications in Islamic Law: The Development of the concept of *'urf* in the Islamic Legal Tradition

A dissertation submitted in partial satisfaction of the requirements for the degree Doctor of Philosophy in Islamic Studies

By

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PUBLICATIONS AND PRESENTATIONS

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ABSTRACT OF DISSERTATION

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by

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This dissertation explores the development of the concept of custom in the Islamic legal tradition. Within this tradition the concept has been associated with the two terms of *'urf* and *'ādah*. After a review of modern scholarship on the subject, the dissertation examines the roots of the concept in the founding texts of Islamic law: the Qur'ān and the sunnah of the Prophet. It also explores the theological foundations of the concept in the early debates on causality. The development of the concept until the 5th/11th century is explored within the literature of the two major schools of jurisprudence: the theoretical school and the applied school. In the post 5th/11th century the development of the concept is explored in the light of the wider expansion of legal theory. More particularly, it is explored in the area of sources through the themes of *qiyās* and *istidlāl* and in the area of legal hermeneutics through the theme of *takhṣīṣ*. With the emergence of

disparate genres of jurisprudence such as legal maxims, *qawāʿid fiqhiyyah*, and legal objectives, *maqāṣid al-sharīʿah*, the concept was further consolidated. The last chapter focuses on the role of custom in the area of legal application through the examination of the two genres of legal respnsa, *fatāwā*, and judicial verdicts, *aḥkām*. It is argued that in the Islamic legal tradition, legal sources are arranged in a hierarchical order. Within this order, custom can be a source of law as long as it does not conflict with a higher source. Moreover, the role of custom in the Islamic legal tradition is not limited to the area of sources, but it permeates the different stages of the legal process.

Introduction

1. Custom in the Islamic Legal Tradition: Past and Present

A quick glance at most of the modern works of Islamic legal theory will reveal the importance of the legal concept of custom. Following the legal reforms that were undertaken in the majority of modern Muslim nation states, the status of custom as a source of law has been consolidated. Most of these reforms have listed custom as one of the main sources of law even sometimes before sharī'ah itself. The majority of these legal reforms were inspired by modern Western legal codes and they echoed the theoretical paradigms that shaped these legal codes.[1] When we turn to the primary sources of Islamic law, however, we find that custom had traditionally played a more supportive role in the construction of sharī'ah-based rulings. Eventually, custom was recognized by Muslim jurists as one of the sources of Islamic law, yet as a secondary source rather than a primary one.

This shift in the status of custom is mainly seen as a function of the pressure that was exercised on Muslim jurists to recognize the important role that actual practice played in shaping legal theory. According to this view, Muslim jurists initially incorporated custom under other generic concepts such as the tradition

[1] Traditionally, custom has been considered one of the most important sources of law in addition to legislation, precedent, and equity. See Harold Berman, *Law and Revolution, the Formation of the Western Legal Tradition*, Harvard University Press, 1983, p. 11. See also Christoph Kletzer, "Custom and Positivity: an examination of the Philosophic ground of the Hegel-Savigny Controversy" in Amanda Perreau-Saussine and James Bernard Murphy eds. *The Nature of Customary Law*, Cambridge University Press, 2007, p. 130-4. Despite the modern misgivings about the legal status of custom, some would argue that custom is at the very foundations of ethical principles, written laws, and philosophical views because they, ultimately, are nothing but reformulations of pre-existing customs. See Ibid, p. 1.

(sunnah) of the Prophet, consensus of the jurists (*ijmāʿ*), or even juristic preference (*istiḥsān*), but they had to recognize custom as an independent source of law when such *ad hoc* recognition proved increasingly insufficient. The shift in the status of custom raises the question of whether it was precipitated externally by the modern legal reforms that were imposed on the tradition from without or internally by other factors from within.

Undoubtedly, modern legal reforms have drastically expedited this shift and even pushed it beyond the limits that the legal tradition would allow. Still, however, it would be inaccurate to attribute the causes of this shift solely to the Western-inspired legal reforms.[2] Below, I argue that the concept of custom underwent an internal, gradual, and incremental process of evolution which, in turn, was a part of a larger process that shaped the entire legal tradition. Moreover, I argue that although on the surface this tradition seemed static, fixed, and immutable, at a deeper level it was subject to constant change and reconstruction depending on the numerous variables that the jurists confronted. Otherwise, how can one explain the extended history of sharīʿah and its various patterns of localization? Despite the apparent rigid structure consisting of the four

[2] It may be argued that these legal reforms codified the role of custom in civil law systems but not in Islamic law proper. The fact remains, however, that these civil law systems did not renounce sharīʿah altogether. In fact, sharīʿah was often listed as one of the main sources of these laws. These legal reforms turned sharīʿah from the sole source of the legal system into a source, among others. In the present context, I am mainly concerned with the impact that this development had on the modern reconstructions of the Islamic legal tradition in general and Islamic legal theory in particular.

cardinal sources (Qur'ān, sunnah of the Prophet, consensus of the jurists, and juristic analogy), the actual construction of the law relies also, in addition to these basic sources, on a number of secondary sources, built-in mechanisms, as well as various other nuances that permeate the different stages of the legal process. It is through these multiple sources that the law secures a degree of flexibility that allows it to maintain its currency.

This flexibility, however, can potentially undermine the distinctive identity of a legal system, to the extent that the resultant law becomes completely unpredictable. It was legal theory that preserved the distinctive identity of the Islamic legal system. Regardless of the particular conclusions that a jurist may reach, these conclusions will be acceptable as long as the jurist remained bound by the main prescriptions of the legal method. These conclusions, however, are not considered final or unquestionable. They remain subject to revision and critique by fellow jurists, and through this system of peer review the identity of the system is preserved. Over time, Islamic law was developed within an interpretive legal tradition that was governed and bound by its own regulations. Those regulations determined important factors such as criteria of membership, guidelines for lawmaking, and hierarchy within the tradition.

Due to the cumulative and dynamic character of that tradition, it is difficult to study particular concepts in isolation. Because concepts do not exist in a vacuum, they can only be understood in particular contexts. Analyzing the

concept of custom in the Islamic legal tradition, therefore, entails the study of other related concepts within the tradition, and ultimately the study of individual concepts sheds light on the development of the entire tradition.

2. Custom and Religion

The relationship between custom and religion is as old as religion itself. One of the primary goals of religion, in the Prophetic tradition, is to combat the erroneous practices and customs that conflict with its core principles and teachings. In its constant struggle against later accretions, religion is constantly in need for renewal and reform to regenerate itself and to preserve its pure essence. The famous historian of religion Max Mueller notes:

> If there is one thing which a comparative study of religions places in the clearest light, it is the inevitable decay to which every religion is exposed. It may seem almost like a truism that no religion can continue to be what it was during the lifetime of its founder and its first apostles. Yet it is but seldom borne in mind that without constant reformation, i.e. without a constant return to its fountain-head, every religion, even the most perfect, nay the most perfect on account of its very perfection, more even than others, suffers from its contact with the world, as the purest air suffers from the mere fact of its being breathed.[3]

This dialectical relationship between custom and religion is particularly relevant in the case of Islam. Islam does not consist only of an orthodoxy that defines a certain belief system but, and even to a larger extent, an orthopraxy which defines

[3] Ivan Strenski, *An Historical Introduction to Theories of Religion – Readerbook*, Blackwell, 2006, p. 51.

normative practice. Custom, by definition, relates more to actions and practices than to thoughts, ideas, or beliefs. If this holds true for the formative period of Islamic history, it also holds true for the subsequent periods, because the encounter between Islam and custom in the different regional contexts never stopped. In a sense, the history of the Islamic legal tradition can be seen as a documentation of the encounter between shari'ah and the different regional customs. Through renewal and reform, the jurists strived to accommodate agreeable customs and combat disagreeable ones.

The primary focus of this study is the legal concept of custom and the extent to which it influenced the process of lawmaking - or more particularly thinking about lawmaking - as reflected in legal theory. It is important, nonetheless, to keep in mind the distinction between the religious and legal senses of custom. These two senses may appear to be inseparable, but, in fact, their interconnectedness may account for the confusion that the term often evokes. From the religious perspective, custom is perceived as a negative construct that corrupts the original and pure essence of religion. From the legal perspective (as a legal tool), on the other hand, custom is perceived positively as a means that enables the legal system to adapt and adjust to different contexts. By incorporating custom within the larger framework of legal theory, the jurists turned custom from a rival of sharī'ah into a legal instrument that allows the legal tradition to adjust itself to different social and cultural settings. The jurists strived

to balance these two considerations where, on the one hand, they aimed to purify the law and rid it of the accretions that gradually creep into it over time and, on the other, they sought to incorporate the customary elements that do not clash with the fundamental principles of the law. In other words, the jurists aimed to adjust the law to insure its applicability but not at the expense of its normativity

3. Custom and the Problem of Definition

In dealing with a loaded and historically rich concept such as custom, it is important to start by separating its different meanings. Custom as a social norm is probably the most obvious meaning of the term. All societies, past and present, develop common normative systems as well as criteria that govern their interpretations and applications in terms of acceptability and unacceptability. Common values and practices derive either positive or negative connotations from the normative system of the society. This notion of normative system comes close to the concept of *'urf* in the Islamic legal tradition. The juristic discussions on the concept of *'urf* can be seen as an effort to determine the criteria that characterize a good custom within the Islamic legal system. This collective meaning of custom may be contrasted with its individual counterpart. Custom as an individual norm refers to the habits that the individual acquires or develops. Custom in this sense corresponds with the Arabic term *'ādah*, which is often translated as habit. As the subsequent discussion will explain, the relationship between *'ādah* and *'urf* can not

always be reduced to the difference between the collective custom and the individual habit.

We can distinguish at least three main domains within which "custom" was used in the Islamic intellectual tradition: the philosophical domain, the theological domain, and the legal domain. In both the theological and philosophical discussions, custom is used as a universal norm that includes the fixed or semi-fixed laws that govern the entire universe and the human experience of it. In this context, we can distinguish two different meanings of custom. The first refers to a natural or cosmic norm that regulates the relationships between the different components of the physical world. According to the divine plan, the universe is designed to follow regular and recurrent laws which, in turn, account for the order that people observe in the different natural phenomena. The second refers to a universal moral code that governs human relationships, in spite of the numerous variations that suggest otherwise. The Qur'ān repeatedly invokes the concept of *sunnat Allah* (God's way) which neither changes nor alters.[4] It includes, for example, provisions that emphasize values such as justice, mercy, and moderation, and guard against injustice, cruelty, and excess. Muslim jurists argue that sharī'ah embodies this universal moral code and seeks to infuse it into the legal rulings on the different substantive issues.

[4] Qur'ān [35:43]. In this sense, the concept of custom is closer to the concept of nature or established order than to the concept of a customary practice. I shall elaborate on this point further in chapter 3 and in the conclusion.

Muslim theologians sought to address the philosophical questions from the Islamic point of view. They employed the concept of custom in their investigation of various questions of metaphysical and natural philosophy. For example, the concept of "custom" is associated with the concept of nature; accordingly, nature does not function on its own and in accordance with its own independent laws. It is, rather, created by God, and our experience of it is based on the custom that He instituted and which He can break at will. Similarly, custom is used in theological debates on important issues such as divine existence, need for prophethood, and the scope of religious responsibility (*taklīf*), among many others. I will explore this point further in chapter 3.

Within the legal domain, we can distinguish, at least, three ways in which custom was used. The first is custom in substantive law, where it is used to signify concrete examples of regional and temporal variations. This includes what the jurists used to refer to as linguistic convention, *ʿurf qawlī*, or practical custom, *ʿurf ʿamalī*. The second is also in substantive law, where it is used in comparison with the other two categories of devotional deeds and transactions. The category of custom in this sense, *ʿādāt*, consists of the regular human actions that are not, in themselves, associated with legal prescriptions. Custom here refers to a wide array of activities that the individual undertakes by virtue of being human, such as eating, drinking, or sleeping. In principle, custom, in this sense, falls under the category of *mubāḥ* (allowed), unless proven otherwise on the basis of strong

evidence. The third, and most important sense, is custom as an abstract tool in legal theory. It is in this sense that the concept was used to abstract the numerous examples of customary practices in substantive law. In this study, the term custom is used primarily to refer to this last sense.

4. The Purpose of the Study

The treatment of custom in legal theory is particularly important for its direct connection with the critical issue of social change. Jurists used this generic concept to account for different regional practices from the perspective of sharīʿah and its sources. Custom (referred to as *ʿurf* or *ʿādah*), in this sense, is a neutral concept; it is not intrinsically antithetical to sharīʿah. It does not, by itself, carry either a positive or negative connotation. This also means that, in principle, shariʿah neither condones nor condemns custom. In order for such determination to be made, the custom in question needs to be analyzed and scrutinized in the light of the general principles of sharīʿah. Eventually, the jurists developed systems of evaluation which define the conditions and criteria for such evaluation. Arguably, customs could be studied as an evaluative measure of the legal system's tolerance for change and flexibility to adapt to different contexts over time.

The study of custom is also important for its rich interpretive potential. Custom offers an illustrative example of a crucial dynamic that connects legal theory (*uṣūl al-fiqh*) and substantive law (*furūʿ al-fiqh*) in the Islamic legal tradition. I refer to it as the abstraction factor. As the discussion below will

illustrate, this factor was not exclusive to the concept of custom but was also critical for the development of other important concepts in legal theory, such as *ijmāʿ*, *istiḥsān*. The abstraction factor governs the development of a certain concept out of countless concrete examples of real-life incidents, questions or events. When the jurists repeatedly encounter a particular theme either in their own investigations or in similar precedents, they abstract the common features in those questions into principles that can be easily extrapolated without the need to refer to particular examples. The payment of a dowry, for example, is one of the conditions of a valid contract of marriage. Different procedures developed in different places for the fulfillment of that condition. It may be paid at the conclusion of the contract in full, or may be paid in two or more installments, depending on the customary practice in a particular region. Similarly, it may be paid in cash, gold or other valuable items. While the condition (payment of dowry) itself does not change, its application may vary depending on the common custom in particular contexts. These varying practices were incorporated under the abstract legal tool of custom or *ʿurf*.

The concept of custom also serves as an indicator of the different roles that Muslim jurists assumed. As will be explained in subsequent chapters, Muslim jurists saw their primary task to be adapting their social contexts to the guidelines of sharīʿah. At the most elemental level, sharīʿah stands for God's way, which is believed by Muslims to provide guidance on different aspects of human behavior.

The history of the concept of custom offers numerous concrete examples of how the jurists strived to accomplish this goal both when sharīʿah supplies clear instructions and, even more importantly, when it does not. Tracing the history of the concept of custom, therefore, can reveal the jurists's understanding of both sharīʿah and sharīʿah-based rulings.

Researchers have grappled with the exact definitions of the two terms of sharīʿah and Islamic law and whether they are synonyms. For the purpose of the present context, sharīʿah is used to refer to the divine instructions of legal import which are embodied in divine or divinely inspired texts. Islamic law, on the other hand, is used to refer to the human articulations of these instructions, as expressed by Muslim jurists. Islamic law, therefore, corresponds more to *fiqh*i than to sharīʿah; it aims to approximate sharīʿah, but it is never its literal expression. While Muslims believe that sharīʿah is divine, the law remains human because it is the product of a legal theory which is human in every sense of the word. Nonetheless, in view of its connection with sharīʿah, Islamic law is believed to be anchored in divine guidance. As such, it does not only aim to regulate human affairs but also to adjust them in accordance with the divine expectations. Divine revelation, as a carrier of religious truth, is perceived as an ultimate source of guidance. Humans, therefore, are expected to submit to its authority even if they fail to understand or rationalize its commands fully. Custom, on the other hand, lacks such unquestionable authority. It is rather an expression of social and

cultural norms whose normative value remains always in need of additional validation by means of either legal or religious sanction. Therefore, the dialectic relationship between custom and sharīʿah, as manifested in different discussions and debates, remained fundamentally marked by one particular tension. This tension had to do with the precise role that should be assigned to custom in guiding, constructing, and reconstructing the sharīʿah-based laws.

But, if Islamic law, through its emblematic connection with sharīʿah, claims a divine origin, the question of the role and the extent of human agency becomes pertinent. After all, human agency is indispensable for the interpretation, construction, and application of divine commands. Similarly, if Islamic law claims continuity over time, several questions arise about the feasibility of maintaining such continuity on the basis of fixed texts. Religious norms imply fixity, permanence, and immutability. Human law, on the other hand, implies change, flexibility and temporality. Studying the historical development of the concept of custom serves as a significant starting point to clarify several dynamics within the Islamic legal tradition, such as the relationship between the divine and the human, the fixed and the changing, and the goals and means.

This study seeks to trace the evolution and development of the concept of custom in the Islamic legal tradition with a special focus on legal theory, (*uṣūl al-fiqh*). The conventional narrative, both by Muslims and Orientalists, indicates that by the 5th/11th century, the Islamic intellectual tradition in general and the legal

tradition in particular entered into a long phase of *taqlīd* (blind imitation). Building on the findings of recent scholarship, I will indicate that, although it is true that the main configurations of the Islamic legal tradition in terms of intellectual currents and major schools of thought were developed prior to the 5th century, the creative engagement with this tradition did not simply die out after this period. Close examination of the treatment of the concept of custom in the works of major legal theorists such as al-Shāfiʿī, al-Shirāzī, al-Juwaynī, al-Ghazālī, Ibn ʿAbd al-Salam, al-Qarāfī, and al-Shātibī, should reveal that it was used as an important medium through which they negotiated the divide between legal theory and practice as they continued to reconstruct the legal tradition for their own respective contexts. Through their works and careers, these legal theorists, among others, represented major turning points in the history of the legal tradition. They were able to achieve major breakthroughs only after studying, absorbing and synthesizing the contributions of their predecessors, particularly how the latter were able to adjust the law to their own social contexts.

The incorporation of the concept of custom within the sharīʿah paradigm reveals that the jurists did not treat sharīʿah as a theoretical enterprise that was meaningful only for the elitist culture of sophisticated scholars. It was rather the cornerstone of the only system of justice that Muslims knew up until at least the 18th century. The history of the ideas and theories related to custom should

illustrate the interrelationship between theory and practice in the Islamic legal tradition as reflected in the different legal genres.

In studying past ideas, one has to guard against the influence of the present. One has to insure that in studying these ideas, he is not projecting modern understanding and sensibilities on the past; one should seek to understand such ideas in their own context and avoid anachronistic constructions. But since history is always written in the present, it seems impossible to escape its influence completely. Nonetheless, one has to be aware of this dilemma and seek to interrogate the motives that drive one's work. In this vein, one may wonder why we should study the development of the concept of custom in the Islamic legal tradition. In a way, this question applies to the study of historical phenomena in general. Without a deep grasp of history, it would be difficult to understand or explain the present. This is particularly important in the case of literary traditions, where authority is constructed around important texts and the communities of interpretation that produced these texts. Within each tradition there are a number of key ideas that constitute the deep structure on the basis of which most of the debates are constructed. The present study seeks to illustrate that custom was one of the concepts that formed the deep structure of the Islamic legal tradition.

But the study of the concept of custom is not only important for understanding the history of the Islamic legal tradition, it is equally important for