

Ibn al-Qayyim illustrates some cases of claims in which customary evidences are taken into consideration.⁹⁸ He goes further and says that the consideration of *'urf* in some cases is an obligation (*wājib*).⁹⁹ Ibn al-Qayyim knew more than one hundred issues, as he mentions, in which the *'urf* is effective and decisive.¹⁰⁰

It is clear that the *Shari'ah* is the major norm which regulates the conduct and governs all aspects of individual and collective life. Its basic sources are the Qur'ān and the *Sunnah*. There are also secondary sources, but they are not independent; they are based on the primary sources of *Shari'ah*. Further, all methods of *ijtihād* including the *'urf* and *'ādah* are derived from the original sources. Moreover, the *Shari'ah* permits the application of appropriate and constructive customs and usages that fit in the framework of the *Shari'ah*.

The *Khulafā'* employed such customs as were compatible with the teachings of the Qur'ān and the *Sunnah* to keep the development of the early Islamic society, as has already been discussed. The *fuqahā'*, in the later period, continued to follow this practice. They provided legal and rational grounds for the acceptance of *'urf*. It was indeed the enduring wisdom of Islam to recognize and accommodate useful customs that were prevailing in a civilized society. It was perhaps the *hadīth* of the Prophet (p.b.u.h.) "Wisdom is the lost property of the Faithful who deserves it most wherever it may be found". It encouraged the Muslim scholars to accept useful knowledge and all such good things of life as were consistent with the general scheme of the *Shari'ah*.

⁹⁸ Ibn al-Qayyim, *al-Turuq*, 87-92.

⁹⁹ Ibid. 88-89, 91, 114.

¹⁰⁰ Ibn al-Qayyim, *I'lām*, vol. 2, 393-94; vol. 3, 3-9.

Ibn Taymiyyah and Ibn al-Qayyim, however, accept 'urf and 'ādah in theory and practice. Ibn Taymiyyah divides names of things into three categories; the first is what is often called 'urf shar'ī, such as *īmān*, *ṣalāh*, *zakāh*, *kufr*, *nifāq*, etc. The meaning of these terms are determined and explained exclusively by the *Shari'ah*. Then, there are those names that have literal meanings, and generally are known and understood within the context of custom and usage. According to Ibn Taymiyyah, the *Shari'ah* does not confine these words to certain limits. That will be as numerous and different as they occur in different societies. The third category comprises those words which are understood in their literal sense.⁹⁵

Another example of consideration of 'urf discussed by him, is *al-safar* (travelling). The traveller, according to the *Shari'ah*, is permitted to shorten his prayer, but what the *safar* is, is left to the 'urf of the people. The person is allowed to shorten his prayer when he is regarded as traveller according to his 'urf. There is no geographic limit indicated in the *Shari'ah*. Sometimes a person goes on a long journey, such as the postman, but he is not considered a *musāfir*. Similarly, the people who come from the suburbs of a big city for work are not regarded *musāfir*, and, therefore, they are not permitted to shorten their prayers. The people of Makkah, on the other hand, when they go to Minā and 'Arafāt during *Hajj* days, and where they stay over night are considered *musāfir* and, therefore, resort to *qasr* in their prayers. The rule of shortening prayer is to be applied when a person is regarded as *musāfir* according to his 'urf.⁹⁶ He cites some other examples to which the *Shari'ah* rule is applicable in the context of 'urf. For example, the *kaffārah* (expiation) for dishonouring oath is feeding ten poor people with the average food that a person provides to his own family. The average food is decided according to the 'urf.⁹⁷

⁹⁵ Ibn Taymiyyah, *Fatāwā* vol. 19 (*Uṣūl al-Fiqh*) 235.

⁹⁶ *Ibid.* 19, 243-47.

⁹⁷ *Ibid.* 252-53; also see Qur'ān, 5: 89.

We do not have any clear and definite opinion from Aḥmad b. Ḥanbal on 'urf. Mostly, the early *fuqahā'* discussed only the sources which have religious significance or are sanctioned by the religious sources. However, Aḥmad b. Ḥanbal recognized the principles of *isteḥsān* and *al-masāliḥ al-mursalah*, as we have discussed in "Early *Fuqahā'* on the Development of *Ijtihād*."⁹⁰ Both principles cover 'urf and 'ādah.

Abū Dāwūd (d. 275 A.H.) compiled a book, *Masā'il al-Imām Aḥmad*, comprising the legal opinions of Aḥmad b. Ḥanbal. Abū Dāwūd discusses in this book several issues in which 'urf and 'ādah have been considered. For example, Aḥmad b. Ḥanbal was asked about hoarding (*ḥukrah*). He said that it can only be applied to what people use as food. He left the details of people's food up to the 'urf and 'ādah. People in different areas of the world have use different kinds of food. The case of hoarding, therefore, is decided according to the 'urf in every society.⁹¹ Abū Dāwūd expressed Aḥmad b. Ḥanbal's views on many other *fiqhī* issues relating to commercial transactions without referring to *naṣṣ* or *ijmā'*. Obviously, in those cases, he could not neglect the 'urf and *ijmā'*. Obviously, in those cases he could not neglect the 'urf; he has accommodated it considering the interest of the people.⁹²

Ibn Qudāmah (d. 620 A.H.) the most prominent *faqīh* of the Ḥanbalī school of thought, describes his own opinion and that of Aḥmad b. Ḥanbal in his work, *al-Mughnī*. He mentions that Aḥmad b. Ḥanbal accepted a weak report if he found it corresponding to the 'urf of the people.⁹³ Ibn Qudāmah himself recognizes 'urf and 'ādah as a source and refers to it in many rules of *fiqh*.⁹⁴

⁹⁰ M.Y. Farūqī, "Early *Fuqahā'* on the Development of *Ijtihād*", *Hamdard Islamicus*, vol. No.

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

⁹² Abū Dāwūd, *Masā'il*, see the issue of hiring a skilled person for a particular work. 206.

⁹³ Ibn Qudāmah, *al-Mughnī*, vol. 6 485, see the issue of *Khaṣa'ah*.

⁹⁴ *Ibid.*, vol. 3, 561-62; vol. 6, 485; vol. 7, 18.

For example, if a person swears that he will not offer *ṣalāh* (prayer), his oath is not undone by uttering some words of prayer or supplication, unless, he does perform *ṣalāh* by standing, bowing, prostrating and sitting as prescribed by the *Shari'ah*, and this is understood by the word *ṣalāh* by the people.⁷⁹ In case of a social transaction, if there is conflict between literal meaning and customary meaning, the customary meaning, according to al-Baghawī, is given consideration as the '*urf*' is decisive in such cases.⁸⁰ And, if there were some particular conditions established and known in society with a particular social transaction, they will be considered even if they were not mentioned when the contract was entered into. In such transactions, Al-Suyūṭī explains, '*urf*' is decisive.⁸¹ He also mentions that whatever the *Shari'ah* states as general and there is nothing in the *Shari'ah* source to limit it nor does the language restrict the meaning, the '*urf*' may fix the limits. He cites the example of *hirz*, discussed above, in case of theft; it is in the context of '*urf*', that the condition of *hirz* is to be decided.⁸²

In his discussion, al-Suyūṭī refers to many prominent *fuqahā'* who gave due consideration to '*urf*' and '*ādah*' in the formulation of rules of the *Shari'ah*, such as, Qādī Ḥusayn (d. 462 A.H.),⁸³ al-Subkī (d. 771 A.H.),⁸⁴ al-Shaykh Abū Zayd,⁸⁵ al-Baghawī (d. 516 A.H.),⁸⁶ Ibn al-Salaḥ (d. 642 A.H.)⁸⁷ al-Isnawī (d. 772 A.H.),⁸⁸ and al-Rafī'ī (d. 623 A.H.).⁸⁹

⁷⁹ Al-Suyūṭī, *al-Ashbāh*. 93.

⁸⁰ *Ibid.* 94.

⁸¹ *Ibid.* 95.

⁸² *Ibid.* 98.

⁸³ *Ibid.* 93.

⁸⁴ *Ibid.* 97.

⁸⁵ *Ibid.* 95.

⁸⁶ *Ibid.* 90-99.

⁸⁷ *Ibid.* 92.

⁸⁸ *Ibid.* 92.

⁸⁹ *Ibid.* 91.

This has already been discussed how al-Shāfi'ī and the Shāfi'ī *fuqahā* accepted the authority of *ijmā'*⁷¹. Al-Ghazālī confines his discussion to lexicography in which he divides words into two categories; the words spoken and understood in a literal sense, and the words which are used in a customary sense. Al-Ghazālī does not explain the role of '*urf*' and '*ādah*' in forming legal rules.⁷⁵

Jalāl al-Dīn al-Suyūṭī (d. 911 A.H.) is, perhaps, the first Shāfi'ī *faqīh* who acknowledges the momentous impact of '*urf*' and '*ādah*' on social life. He discusses them theoretically as a source of law and mentions their practical application to legal issues. He refers to the *fiqhī* maxims discussed by Qādī Husayn b. Muḥammad (d. 462 A.H.) upon which the whole Shāfi'ī *fiqh*, according to him, is based. The fourth principle, according to al-Suyūṭī, is: "Usage is decisive". Al-Suyūṭī explains that this principle has been derived from the saying attributed to the Prophet. "Whatever the Muslims see as good is good unto Allah."⁷⁶ Under the heading of this maxim, al-Suyūṭī discusses '*urf*' and '*ādah*' at length. He affirms that there are countless issues in *fiqh* which are solved by referring to '*urf*' and '*ādah*'.⁷⁷ He further explains that if there is conflict between customary usage of a word and its literal meaning, the usage is to be preferred, even if it is against the *Shari'ah*. For example, al-Suyūṭī explains that if a person swears that he will not eat meat, he will not dishonour his oath by eating fish as people are not accustomed to applying the word *lahm* (meat) to fish. However, the Qur'ān calls it *lahm*, "It is He Who has subjected to you the sea so that you may eat fresh *lahm* from it".⁷⁸ Another example he cites is that if the word is used by the *Shari'ah* in a particular sense, then mere literal meaning has no consideration.

⁷¹Muḥammad Yūsuf Fārūqī, *Development of Ijmā'*, *Practices of the Rāshidūn Khulafā'*, and the Views of the Classical Fuqahā', 177.

⁷⁵ Al-Ghazālī, *al-Mustasfā*, vol. I, 325-26.

⁷⁶ Al-Suyūṭī, *al-Ashbāh*, 7-100; Qādī al-Husayn was a leading Shāfi'ī *faqīh* of the 5th century of Hijrah who states four principles on which the Shāfi'ī *fiqh* is based.

⁷⁷ Al-Suyūṭī, *al-Ashbāh*, 90.

⁷⁸ Qur'ān, 16:14; al-Suyūṭī, *al-Ashbāh*, 93.

argument. Discussing the offence of theft, for example, ⁶⁷ describes *al-hirz* (normal safe-keeping or protection) which is an essential condition for the enforcement of *hadd* punishment in case of theft. What constitutes *al-hirz* may be decided by '*urf*'. He cites an example of a case of goods left lying in an open market-place and were stolen from there. The custom will determine whether they were in *hirz* or not. If they were habitually left by the owner in the same place and were regarded safe by them, it means that the condition of *hirz* is fulfilled.⁶⁷ He also says that *jarīn* (the place in which dates or grain are kept) is regarded as *hirz* while *hā'it* (fence or railing around the garden or field) is not regarded as *hirz* as the people accepted *jarīn* as *hirz* and not the *hā'it*.⁶⁸ Al-Shāfi'ī was speaking about the custom and usage as it existed in his time.⁶⁹ The fence was not regarded proper protection for the garden and fruit trees. However, the special place prepared to dry dates or to store grain was regarded as a protected place. This '*urf*' was to be considered when a case of stealing from these places was submitted to the court of a *qādī*. It also appears from the discussion of al-Ramlī that '*urf*' and '*ādah*' help to determine the *hirz*.⁷⁰

Al-Māwardī (d. 450 A.H.) who may be considered an early *Shāfi'ī faqīh* discusses *uṣūl al-fiqh* in the context of practical judgement, considers both reason and '*urf*' equally important in the process of decision-making and in settling matters. All legal systems (*Sharā'ī*), al-Māwardī explains, take reason and '*urf*' into consideration.⁷¹

One can understand the importance of '*urf*' and '*ādah*' to the *Shāfi'ī fuqahā'* by the fact that al-Khaṭīb al-Baghdādī insists that the *muftīs* and *qādīs* must be aware of the customs and traditions of the people in order to understand the cases in proper perspective, and then to give legal opinion or judgement accordingly.⁷²

Imām al-Ḥaramayn, al-Juwaynī (d. 478 A.H.) points out the significance of customs and traditions in his discussion on *ijmā'*. He says that *ijmā'* is proved by uninterrupted '*urf*'.⁷³

⁶⁷ Al-Shāfi'ī, *al-Umm*, vol. 6, 148-49. ⁶⁸ Ibid. 148.

⁶⁹ Al-Ramlī, *Nihāyat al-Muhtāj* (Cairo: Muṣṭafā al-Bābī al-Jalabī, 1386/1967) vol. 7, 439-48.

⁷⁰ Al-Shāfi'ī, *al-Umm*, vol. 6, 5-7. ⁷¹ Al-Māwardī, *Adab al-Qādī*, vol. 1, 135-36.

⁷² Al-Khaṭīb al-Baghdādī, *al-Faqīh*, vol. 2, 135-36. ⁷³ Al-Juwaynī, *Ghiyāth*, 39.

CONSIDERATION OF 'URF

(Continuation from May 2015 Fiqh Islami)

Al-Shātibī stands for a close relation between the doctrines of *maslahah* and *urf* on one hand and maintains their integration with the other sources of law on the other. He further maintains that the preservation of public interest is inherent in the general objectives of the *Shari'ah*. The preservation of the five necessities is based on this doctrine. Customs and traditions which are helpful in achieving the common welfare of the community are included in *masalih*; they serve an important purpose of the *Shari'ah*.⁶¹

Ibn Farhūn (d. 799 A.H.), another Mālikī *faqīh* and contemporary of al-Shātibī, discusses law cases in which '*urf*' is decisive.⁶² He makes it clear that if there is contradiction between literal meaning of the word and its usage in society, the court should uphold what is determined by '*urf*', and not the literal meaning.⁶³ In commercial transactions also we find the *fuqahā'* giving due consideration to customary law and practice. In case of commercial dealings, if the currency is not specified when the contract is made, the custom will determine it; i.e., the currency in use in the market. However, if there are different currencies prevailing in a country, the dominant currency that is commonly acceptable among the traders shall be deemed as applicable.⁶⁴ Whenever '*urf*' is changed, the legal effect is also liable to change. The cases of marriage, divorce, will, oath and dealings in which the customary practice is significant have received due legal consideration.⁶⁵ Ibn Farhūn explains another dimension of the significance of '*urf*'. If a *muftī'*, for example, goes to a country where different traditions and customs are in force, he should not give legal opinion unless he is well aware of the customs and conventions of that country.⁶⁶

Imām al-Shāfi'ī does not discuss '*urf*' and '*ādah*' as a source, or as an authentic legal argument when he explains the legal sources in *al-Risālah* or in *al-Umm*. However, there are evidences that al-Shāfi'ī did accept '*urf*' in practice as a valid

⁶¹ Ibid, 220-233. al-Azmeh, "Islamic Legal Theory and the Appropriation of Reality in Islamic Law", 260-61.

⁶² Ibn Farhūn, *Tabsirat al-Hukkām*, on the margin of *Fath al-'Alī al-Mālik*, vol.2, see *Bāh fī al-Qadā' bi al-'Urf wa al-'Ādah*, 75.

⁶³ Ibid, 67. ⁶⁴ Ibid, 64-66. ⁶⁵ Ibid, 66-67. ⁶⁶ Ibid, 71.