

and bad if rejected and disapproved by it. For example, covering private parts of the body is a good practice affirmed by the *Shari'ah*. It will always be regarded as a rule of the *Shari'ah* which never accepts any change even if the custom of covering the private part is changed in some parts of the world. Nakedness is always regarded as a bad habit, and dressing properly is a good tradition. The second category comprises those types of traditions prevailing among the people which are neither confirmed by the *Shari'ah*, nor rejected. They are considered as *mubāh* (permissible). The *fuqahā'* consider them during the process of reaching the judgement, but they are not binding. For example, Al-Shāṭibī discusses a practice that was prevalent during his time in his area; covering one's head is a custom of well-mannered people in the Eastern countries. He relates that this is regarded as against manly virtue (*muru'ah*). Conversely, the custom in the Bilād al-Maghrib (North-Western Africa) is the opposite. The ruling of the *Shari'ah*, therefore, is different in both areas. The bareheadedness is objectionable in the Eastern countries which vilifies the honourable record of character (*adālah*), but it is not so in the Bilād al-Maghrib. Uncovering the head is not detrimental to the proper conduct of a person in North Africa.<sup>60</sup> It is worth mentioning here that al-Shāṭibī, who was a scholar of the eighth century of *hijrah*, cites examples of customs existing in his times.

Al-Shāṭibī stands for a close relation between the doctrines of *maṣlahah* 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 *maṣāliḥ*; they serve an important purpose of the *Shari'ah*.<sup>61</sup>

<sup>60</sup> Al-Shāṭibī, *al-Muwāṭa'iqāt*, vol. 2, 209-10.

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

most authoritative legal argument in Mālik's legal theory.<sup>55</sup> 'Allāl al-Fāsī suggested that Mālik looked upon the 'amal of ahl al-Madīnah as a sure criterion to follow in those matters of law upon which there had been difference among the *fuqahā'*. This hypotheses is supported by 'Umar Fārūq in his analysis of Mālik's terminology in *al-Muwattā'*.<sup>56</sup> There are certain differences between 'Urf and Mālik's doctrine of 'amal. 'Urf does not command any spiritual authority while 'amal embodies it, to Mālik it is like a *nass*.

Traces of Mālikī doctrine of 'amal are found in the early history of Islam. Al-Ṭabarī states that the people differed on the issue of *Khilāfah* after the murder of 'Uthmān. A group of the Companions said that they would wait and observe what the people of Madīnah did, and then would follow them.<sup>57</sup> 'Alī b. Abī Ṭālib is also reported to have said that the matter belonged to the people of Madīnah.<sup>58</sup> Wakī' mentions that Abū Bakr b. Muḥammad b. Ḥazm (d. 177 A.H.) was the *Qādī* in Madīnah. Someone who was designated as *amīr*, mentioned his difficulty in arriving at decisions when there was differences of opinion among the *fuqahā'* on a particular issue. Abū Bakr b. Ḥazm advised him that he should pronounce judgement according to the practice of the people of Madīnah, if it was available on that particular issue as their 'amal was sound and valid.<sup>59</sup>

However, the later *fuqahā'*, such as al-Shātibī and Ibn Farḥūn explicitly mention it an effective force in the formation of law. Al-Shātibī (d. 790 A.H.) discussing custom and usage of the people, divides it into two categories: the first class of customs comprises those which are either approved by the *Sharī'ah*, or approved by the *nass*, or by other *Sharī'ah* evidence. These are discussed as rule of the *Sharī'ah*, and not as customs. These customs are good if approved by the *Sharī'ah*,

<sup>55</sup> Ibid. 380.

<sup>56</sup> Ibid. 382.

<sup>57</sup> Al-Ṭabarī, *Tārīkh*, vol. 4, 442.

<sup>58</sup> Al-Ṭabarī, *Tārīkh*, vol. 4, 456.

<sup>59</sup> Wakī', *Akhhār al-Qudāt*, vol. 1, 143-44.

Coulson, developed from the centre of Qairawān, and was consistently in practice by the *qādī*.<sup>51</sup>

Although all the major schools of *fiqhī* thought give consideration to local customs, Imām Mālik and the Mālikī *fuqahā'* who follow his legal principles, give extensive role to the practice of the people of Madīnah in their legal theory. The Mālikī *fuqahā'* call it '*amal*' of the people of Madīnah, and it has been so strong a source that it supersedes the *ḥadīth* which is transmitted by a single reporter. In other words, the agreed upon practice of the people of Madīnah is a very strong source of law which has the same force as that of *ijmā'*.<sup>52</sup> According to the analysis of Mālik's concept of '*amal*' by Aḥmad Ḥasan, Mālik refers to three types of agreed upon practices: the practice of the people of Madīnah *musāqāt* (share-cropping contract over the lease of a plantation, limited to one crop period) is allowed on the basis of this. The second type is the practice of the scholars of Madīnah. Mālik regards the observation of six fasts during the month of Shawwāl as innovation since it was not practised by the scholars of Madīnah (*ahl al-'ilm wa al-fiqh*). The third category is the practice of political authorities. Mālik, for example, says, "And, what is agreed upon by the authorities in the past and present is that the taking oath will begin from the plaintiff."<sup>53</sup>

'Umar Fārūq 'Abd Allah worked comprehensively in his Ph.D. thesis on Mālik's concept of '*amal*' in which he dealt separately with local customs and usages and the concept of Mālik's '*amal*' of Ahl al-Madīnah. According to his conclusion, the custom of any nation is given due consideration in legislation.<sup>54</sup> But the '*amal*' of the people of Madīnah is not like the customs of other people or countries; it is, in fact, the

<sup>51</sup> N.J. Coulson, "Muslim Custom and Case Law", *The world of Islām*, Vol. 6. Nr. 1, 2 (1959): 22.

<sup>52</sup> Al-Bājī, *al-Minhāj*. (Paris, 1978) 142-43.

<sup>53</sup> Aḥmad Ḥasan, *The Early Development*, 167-70.

<sup>54</sup> 'Abd Allah, *Mālik's Concept of 'Amal*. (Ph.D. thesis, Chicago University, 1978) 380.

while entering into contract. The rule is applicable in a society where the custom prevails that the merchants provide transport upto the residences of buyers.<sup>48</sup>

Similarly, Muḥammad al-Shaybānī gives consideration to custom, as a source, particularly in international law. Some of his words he speaks of 'urf became very popular among *fuqahā'*. They adopted them as legal maxims. For examples: "'Urf is decisive"; "Evidence from custom is like the one from *nass*"; "What is known by 'urf is like the condition laid down by the *nass*"; "A general statement may be specified by the evidence of custom"; "The usage is decisive when there is no contrary statement in the text"; and, "The usage is valid to particularise a general rule".<sup>49</sup> Ibn 'Ābidīn repeats these maxims in his work on 'urf and 'ādah, *Nashr al-'Arf fī Binā' ha'd al-Ahkām 'alā al-'Urf*, in which he deals with most of the *fiqhī* issues based on 'urf and 'ādah. Perhaps Ibn 'Ābidīn was the first Hanafī *faqīh* who discussed this subject exclusively. Ibn Nujaym, another Hanafī *faqīh* also discussed 'urf at length, but he followed al-Suyūṭī in style and methodology.<sup>50</sup>

The Mālikī *fuqahā'* also accept custom and usage as a decisive authority. This is reflected in Mālikī treatises, *al-Muwattā' al-Mudawwanah* and *Fath al-'Alī al-Mālik (Fath al-'Alī)* is a collection of *fatāwā* according to Mālikī school of thought, compiled by Muḥammad Aḥmad 'Ullaysh) (d. 1299 A.H.). The early Mālikī scholars did not give conscious attention to the admission and discussion of the legal role of custom and usage.

The Malikīs in North Western Africa (al-Maghrib) applied 'amal in a broad sense; they included 'urf and 'ādah of all nations and areas. This concept of 'amal, according to

<sup>48</sup> Al-Sarakhsī, *al-Mabsūt*, vol. 12, 199.

<sup>49</sup> Ḥamīdullah, *Muslim Conduct of State*, 35, taken from al-Shaybānī, *Sharḥ Siyar al-Kabīr*, (Hyderabad) vol. 1, 194-198; vol. 2, 296; vol. 4, 16, 23-25.

<sup>50</sup> Ibn 'Ābidīn, *Nashr al-'Arf*, 114-47. See al-Suyūṭī, *al-Ashbāh* and Ibn Nujaym, *al-Ashbāh*.

the original or literal meanings.<sup>43</sup> For example if a person swears that he will not drink water, then drinks *nabīdh* (dates or raisins put into a skin of water and left for long for the water to become sweetened), he is not dishonouring his oath as, according to *'urf*, the word water is not applied to *nabīdh*, no matter any amount of water may have been included in it.<sup>44</sup> The expenditures of the active partner (*mudārib*) when he travels for business purposes, are decided according to the custom prevailing, if it was not settled by them both, the sleeping and active partners (*rabb al-nāil and mudārib*), when the contract was signed.<sup>45</sup>

The list is long containing such rules of *fiqh* where the custom or usage has served as a source of law. The decisive role of custom appears, particularly in the chapter on sales (*buyū'*), contract, representation and agency (*wakalah*), marriage, divorce, oath, share-cropping contract (*muzāra'ah*) etc. detailed by the *fuqahā'*.<sup>46</sup> In the words of Schacht, a custom is recognized as a restrictive element in dispositions and contracts and as a principle in interpreting declarations. He cites examples whereby the contract of manufacture (*istiṣnā'*) and the hiring of the services of a wet-nurse are valid in so far as they are customary. Objects of *waqf* were mostly immovable property, but moveable things, such as books, are also accepted to be thus in so far as this is customary.<sup>47</sup>

There are occasions when Abū Ḥanīfah gave up *qiyās* only in preference of *'urf*. For instance, if a person buys a camel-load of fire-wood, the merchant is responsible, by custom, for transportation to the home of the buyer. The *qiyās* does not allow such dealings unless it was agreed upon by the parties

<sup>43</sup> Ibid. vol. 8, 135.

<sup>44</sup> Ibid. 186-88.

<sup>45</sup> Ibid. vol. 22, 62-63.

<sup>46</sup> See examples in *al-Mabsūt*, vol. 8, 135-36; vol.12, 142-43; vol.17, 90; vol.18, 190; vol. 19, 39, 77, 78, 93, 100, 117, 118; vol.22, 62-63; vol. 23, 18-36; vol. 24, 30; vol. 30, 199.

<sup>47</sup> Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982) 62, 126, 155.

time of the contract or commercial transaction. The 'urf that came into being after the contract has no consideration.<sup>38</sup> The fuqahā' have recognized custom which is general and universal, not the 'urf which belongs to a particular country or people.<sup>39</sup> Although al-'urf al-khāss is generally disputed; we find that while some of the fuqahā' refused to consider it as authoritative, others, particularly Abū Yūsuf and some other Ḥanafī fuqahā' regarded it as authoritative.<sup>40</sup>

The fuqahā' of the Ḥanafī and Mālikī schools of thought in particular understood the social and political significance of 'urf. They stressed it more than the fuqahā' of other schools of thought. The fuqahā' of both these schools applied the doctrine of istihsān and al-maṣāliḥ al-mursalah to accommodate proper customs and usages, for the interest of the people. Al-Āmidī, while discussing the principles of 'urf and ūdah, refers particularly to the Ḥanafī doctrine of istihsān which has often been applied to endorse customs and conventions. He cites the example of public baths where people go and take a bath on payment, according to prevailing custom, without mentioning formally the exact amount of water, period of time and even the charges. According to qiyās, all these things should be decided before taking a bath in a public bath. All these conditions, according to the Ḥanafī fuqahā', are known by tradition and custom. Therefore there is no need to describe them before entering a public bath.<sup>41</sup> Abū Ḥanīfah is reported to have said that 'urf determines and interprets the actual meanings of terms commonly used in a society. However, a custom has no legal effect if there is a naṣṣ against a custom.<sup>42</sup> The rules (ahkām) of oath are based on this principle of Abū Ḥanīfah. The 'urf determines the meaning of words used in oath-taking, and not

<sup>38</sup> Ibn Nujaym, *al-Ashbāh*, 1010; al-Suyūṭī, *al-Ashbāh*, 96.

<sup>39</sup> Al-Suyūṭī, *al-Ashbāh*, 92; Ibn Nujaym, *al-Ashbāh*, 99.

<sup>40</sup> Ibn Nujaym, *al-Ashbāh*, 102-103; Ibn 'Ābidīn, *Nashr al-'Arf*, 116.

<sup>41</sup> Al-Āmidī, *al-Ihkām*, (Cairo: Maṭba'ah al-Ma'ārif, 1332/1914, vol.4, 212.

<sup>42</sup> Al-Sarakhsī, *al-Mabsūt*, vol. 9, 17.

## 5.2. VIEWS OF THE *FUQAHĀ'*

The *fuqahā'* fully understood the need for reconciling the requirements of space-time of the *Sharī'ah*. They developed elaborate methods of *ijtihād* that provided a vast scope of flexibility within the normative framework provided by Islam. As a result *ijtihād* acted as a mechanism for generating continuous progress and development in all spheres of life. It was, nevertheless, a development that arose in order to cope with the circumstances and emphasized the fact that Islam encourages development and progress, and discourages inertia and stagnation.

The *fuqahā'* applied *'urf* and *'ādah* as guiding principles to settle legal issues. They were not considered to be original sources of law, but were considered secondary ones to provide a natural source. The *fuqahā'* regarded them as subsidiary sources which could be applied only when the original sources were silent on any matter.

The term *'urf* has been defined by the *fuqahā'* as a recurring practice which is established among the people and is acceptable to the people of sound nature (*al-ṭabā'ī' al-salīmah*).<sup>34</sup> The *fuqahā'* use different words for the similar meanings such as *'urf*, *'ādah*, *ta'āmul*<sup>35</sup> and *'amal*.<sup>36</sup>

The *fuqahā'* prescribed some conditions to be fulfilled for the consideration of *'urf*. The first condition is that the *'urf* should not be against or violate any naṣṣ. For instance, usury or the drinking of wine, even if they become very common in a society, can never be lawful. The *fuqahā'* do not consider such *'urf* for the formulation of rules.<sup>37</sup> The *'urf* should exist at the

<sup>34</sup> Ibn Nuja'ym, *al-Ashbāh wal-al-Nazā'ir*, 93.

<sup>35</sup> Al-Shātibī, *al-Muwāfaqāt*, vol. 2, 211-15, 225, 226; al-Suyūṭī, *al-Ashbāh*, 91; Ibn Nuja'ym, *al-Ashbāh*, 92-93; Ibn Farḥūn, *Tafsīrat al-Ilukkām*, (on the margin of 'Ullaysh, *Fath al-'Alī al-Mālik*) (Cairo: Mustafā al-Bābī, 1378/1958) vol. 2, 57.

<sup>36</sup> Al-Bukhārī, *Ṣaḥīḥ*, vol. 1, part 3, 103. The *fuqahā'* do not use the word *Sunnah* when they discuss *'urf* as a principle as the *Sunnah* came to be used exclusively for the practice of the Prophet (p.b.u.h.).

<sup>37</sup> Al-Sarakhsī, *al-Mabsūṭ*, vol. 9, 17; vol. 23, 18; Ibn 'Abidin, *Nasḥ al-'Uf*, 115.

Abū Hilāl al-‘Askarī (d. 295 A.H.) mentions a custom of the *Jāhili* times that was adopted by the *Khulafā’* as it was useful for the people at that time. He describes how the Arabs in *Jāhiliyyah* used to lit a fire at Muzdalifah, the ceremonial station east of Makkah, during the rites of *Hajj*. The object of this tradition, according to al-Qalqashandī, was to direct the people (pilgrims) who proceeded from al-‘Arafah to the right way towards Muzdalifah. This custom was upheld by the *Rāshidūn Khulafā’* and even after them it continued for a long time.<sup>32</sup> This was a good way to guide the people to their destination. The Prophet (p.b.u.h.) and the *Rāshidūn Khulafā’*, therefore, allowed it to continue. The custom of lighting the torch-fire at Muzdalifah was not important from a strict *Sharīah* point of view. However, it exemplified the idea that public interest was important even in the observance of purely religious rites. It was the very idea behind the adoption of this custom.

Similarly, the seasonal markets held by the Arabs during the days of *Hajj* continued in the early Islamic period. Some Companions themselves stopped trading with those traditional markets because of their association with *Jāhili* custom. The verse was revealed to the Prophet, (p.b.u.h.) "It is not an offence for you to seek (by trading) the bounty of your Lord" which made it clear that there was nothing wrong with trade and the seasonal markets, even if they are practised during the days of *Hajj*.<sup>33</sup> The trade carried out at the markets of ‘Ukaz, Majannah and Dhū al-Majaz had tremendous economic significance and was a great means to increase the prosperity of the people. There was, therefore, no reason to forsake such a useful custom. Islam, on the contrary, encouraged trade and merchandise, hence it upheld these practices.

<sup>32</sup> Al-‘Askarī, *Kitāb al-Awā’il*, 28; al-Qalqashandī, *Sabīh al-Ashā’*. (Cairo: al-Mu‘assasah al-Misriyyah al-‘Āmmah, 1383/1963, vol. 1, 499.

<sup>33</sup> Qur‘ān, 2: 198; al-Fabarī, *Tafsīr*, vol. 2, 164-66; al-Qurtubī, *Tafsīr*, vol. 2, 413; al-Bukhārī, *Sabīh*, vol. 1, part 3, 82.



rules of *qasāmah* and the payment of blood-money. He, introduced the *dīwān* system; imposed the blood-money on the people sharing in the *dīwān* in which the murderer had been registered.<sup>28</sup>

'*Ushūr* was another traditional tax which was practised in *dār al-harb*. Abū Yūsuf relates that Abū Mūsā al-Ash'arī wrote to 'Umar that the Muslim merchants travelling to *dār al-harb*, are charged taxes there. 'Umar directed him to collect tax from the merchants of *dār al-harb* coming to *Dār al-Islam*.<sup>29</sup> The merchants of Manbij were interested in finding a market for their merchandise in Islamic territory. They sought permission of 'Umar and offered that if allowed they would pay '*ushūr*. 'Umar consulted the Companions on this issue and they agreed to the proposal of the merchants of Manbij. They recommended to 'Umar to enforce the rule of '*ushūr*. 'Umar permitted their merchants and appointed Ziyād b. Huḍayr al-Asadī as '*ushūr* collector in Iraq and Syria.<sup>30</sup> Thus, 'Umar introduced this Persian custom for the first time in Islamic territory.

*Dīwān* or public registries were also introduced according to the Persian tradition. Al-Māwardī states that when 'Umar received large amount by way of *sadaqāt* from Bahrayn, he consulted the Companions on the management of such wealth. The person who was well aware of the Persian *dīwān* system explained to 'Umar how the Persians administered their wealth. According to a report, the person who gave this proposal to 'Umar, was Hurmuzan, the Persian. Khālid b. al-Walīd also mentioned his observations about what he saw in Syria, where apparently the *dīwān* system was also organized by the Byzantine rulers. 'Umar approved these proposals and established the *dīwān* system in Madīnah.<sup>31</sup>

<sup>28</sup> Al-Sarakhsī, *al-Mabsūt*, vol.26, 110; Ibn al-Humām, *Sharḥ Fath al-Qadīr*, vol.8, 402-03.

<sup>29</sup> Abū Yūsuf, *al-Kharāj*, 145-46; Yahyā b. Ādam, *al-Kharāj*, 125-126.

<sup>30</sup> Abū Yūsuf, *al-Kharāj*, 146.

<sup>31</sup> Al-Māwardī, *al-Ahkām al-Sultāniyyah*, 199-200.

with the precept that the rules are changed when 'urf is changed, or when the 'urf is decisive.<sup>22</sup>

We also have evidence that the *Rāshidūn Khulafā'* not only used local customs and traditions as bases for the formulation of rules, but also adopted the useful customs of other communities. The introduction of 'ushūr and *dīwān* systems are good examples of utilizing the 'urf of foreign people. Most Islamic sources agree that 'Umar was the first *Khalīfah* who introduced the system of *kharāj* in Islam.<sup>23</sup> Before 'Umar, there was no *kharāj* in the sense of land tax as it has been discussed by the *fuqahā'* of the medieval period. The *kharāj* as land tax was the custom of the Persians and Romans.<sup>24</sup> Ṭabatabā'ī mentions from various Islamic sources that the pattern of land tax followed by the *Khulafā'* in the eastern provinces was generally that of the Sasanids. Morony says that the Sasanian financial bureau like *dīwān al-kharāj* and *dīwān al-naḥaqāt* were maintained in Iraq after the conquest.<sup>25</sup> Abū 'Ubayd also relates that during the times of the *Rāshidūn Khulafā'* the people of the conquered lands were allowed to live in their own territories and to lead their lives according to their own faith and traditions.<sup>26</sup>

The practice of *qasāmah* was also a *jāhili* custom which was adopted by the early *Khulafā'*.<sup>27</sup> It was paid by the 'āqilah (male members of the tribe) of a murderer in the times of the Prophet and of Abū Bakr. However, 'Umar changed the

<sup>22</sup> Al-Qarāfī, *al-Furūq*, (Beirut: 'Ālam al-Kutub, n.d.) vol.3, 288; Ibn 'Ābidīn, *Nashr al-'Arf* (in *Majmū' Rasā'il*, (Lahore: Suhail Academy, 1396/1976) 120, 122, 125; *Majallah al-Ahkām al-'Adhiyyah* (Civil Law of Ottoman Caliphate, article 39).

<sup>23</sup> Abū Yūsuf, *al-Kharāj*, 26, 28, 30; Ibn Ṣallām, *al-Amwāl*, 59-60.

<sup>24</sup> Qudāmah b. Ja'far, *al-Kharāj*, (Irāq: Dār al-Rashīd, 1981) 8; Yahyā b. Ādam, *al-Kharāj*, 7-8; He mentions that the *Nabāt* were subjugated by the Persians to whom they paid *Kharāj*.

<sup>25</sup> H.M. Ṭabātabā'ī, *Kharāj in Islamic Law*, (London, 1983) 28-29; M.G. Morony, *Irāq After the Muslim Conquest*, (Princeton, 1984) 51-52.

<sup>26</sup> Ibn Ṣallām, *al-Amwāl*, 102.

<sup>27</sup> Al-'Askarī, Abū al-Ḥilāl, *Kitāb al-Awā'il*, (al-Madīnat al-Munawwarah, 1385/1966) 36-37; al-Sarakhsī, *al-Mabsūṭ*, vol.26, 107-109; al-'Aynī, *Umdah*, vol.24, 59; Ibn Ḥajar, *Fath*, vol.15, 259; al-Shawkānī, *Nayl*, vol.7, 183-85.

of cows (*ahil al-baqar*), and two hundred dresses for the people dealing in dresses (*ahil al-hullah*).<sup>20</sup>

Before 'Umar, during the times of the Prophet (p.b.u.h.) and Abū Bakr, blood-money was paid only in the form of camels, according to the custom existing at that time. However, at the time of 'Umar, in towns where society was rather urbanised, people started using gold or silver coins as their currency in commercial dealings. 'Umar observed this change of custom which took place in towns and cities, he, therefore, amended the rule with regard to blood-money accordingly. In rural areas the bedouin traditions remained the same as were at the times of the Prophet (p.b.u.h.) and Abū Bakr. 'Umar, having regard for their customs, did not change their rules of payment of the blood-money.

Abū Ḥanīfah says that 'Umar first fixed blood-money payable in five things, as we have discussed above, because these were regarded as their wealth (*amwāl*). But when 'Umar introduced the *dīwān* system and prescribed stipends for the people from the *bayt al-māl* (treasury), he made the blood-money payable in the form of dirham, dīnār and camels.<sup>21</sup> It appears from the description of Abū Ḥanīfah that the change in custom took place after the great conquest during 'Umar's period, when he instituted the *bayt al-māl* and *dīwān* systems. He then fixed blood-money payable in gold, silver and camels as, according to Abū Ḥanīfah, they emerged as the real wealth of the people. This is a very clear example of 'Umar's consideration of '*urf* and '*ādah*.

The Ḥanafī and Mālīkī *fuqahā'* might have taken the idea of using '*urf* as a guiding principle for legislation together

<sup>20</sup> Al-Shaybānī, *al-Asl*, vol. 4, 451-52. There is a variation in amount of *dirham* in both reports related by Mālīk and al-Shaybānī. Mālīk's report tells twelve thousand *dirhams* and al-Shaybānī mentions it ten thousand. The latter seems to be more accurate as the proportional relation between *dirham* and *dinar* was of one to ten. The *fuqahā'* describe it in the chapter on *Zakāh* that the *niṣāb* for *zakāh* is twenty *dinārs* or two hundred *dirhams*. See Ibn Qudāmah, *al-Mughnī*, vol. 7, 760.

<sup>21</sup> Al-Shaybānī, *al-Asl*, vol. 4, 452.

Imām Mālik narrates some of the judgements of 'Umar based on *'urf*. For example, 'Umar's decision regarding blood-money was based on the prevailing custom. He made a distinction between the people who used gold and those who used silver as their currency. He imposed blood-money in *dīnārs* which was estimated equal to one thousand *dīnārs* on the people who used gold, and in the form of *dirhams* (silver coin), which was reckoned twelve thousand *dirhams*, on the people who used silver in their dealings. *Dīnār* and *dirham* were both in practice among the people of urban areas. The coins might have been moulded in some neighbouring country. The Persian coins might have also been in use. The Arabs called gold coin as *dīnār* and silver coin as *dirham*. *Dirham* and *dīnār* are often referred to in *fiqhī* literature as well as in early *hadīth* literature.<sup>18</sup> According to Mālik it was the tradition of the Syrians and Egyptians to use gold in their commercial transactions, while the Iraqis used silver in their dealings and trade. These people might have been influenced by the traditions of the Persian and Byzantines. Imām Mālik, while discussing the practice and decisions of 'Umar, generalizes the rule on the basis of custom; that in respect of the people of the cities who used gold or silver as their currency, blood-money was to be accepted from them only in the form of gold or silver. However, from the people of rural areas whose real wealth was in the form of camels, payment in camels as blood-money was fixed.<sup>19</sup> Muḥammad al-Shaybānī reports this practice more clearly. According to his account, 'Umar laid down, as blood-money, one hundred camels for the people of camels (*ahl al-ibil*), ten thousand *dirhams* for the people of silver (*ahl al-wariq*) and one thousand *dīnārs* for the people of gold (*ahl al-dhahab*); two thousand sheep (of one year) for the people of sheep (*ahl al-shūt*), two hundred cows for the people

<sup>18</sup> Abū Dāwūd, *Sunan*, vol. 2, 277-78, 292-93; al-Tirmidhī, *Sunan, Hadīth* No. 650; Ibn Mājah, *Sunan, Hadīth*. No. 1840; Nasā'ī, *Sunan, Hadīth*. No. 2593; Ahmad b. Hanbal, *Musnad*, vol. 1, 53, 101; vol. 2, 90, 180-200.

<sup>19</sup> Mālik, *al-Muwattā'*, vol. 2, 181.

امام محمد بن ادریس شافعی فرماتے ہیں: فقہ میں مجھ پر سب سے زیادہ احسان امام محمد بن حسن کا ہے۔

'Abd al-'Azīz, according to Abū 'Ubayd, employed Yazīd b. Abī Mālik al-Dimishqī and al-Ḥārith b. Yamjud al-Ash'arī to teach the people of rural areas. 'Umar b. al-Khaṭṭāb employed thirty teachers of the Qur'ān in Madīnah and fixed their monthly remunerations.<sup>11</sup> Thus, we find a gradual development from custom to legal institution. The *fuqahā'* discussed the rules and regulations regarding *ijārah*, and described lawful and unlawful forms of it.<sup>12</sup>

*Al-Mudārabah* was another customary contract in the sphere of commercial transactions. The *Rāshidūn Khulafā'* not only regarded it as lawful but also used it to run their partnership enterprises. Imām al-Shāfi'ī relates that 'Umar b. al-Khaṭṭāb preferred the practice of investing orphans' wealth in *mudārabah*.<sup>13</sup> 'Alī b. Abī Tālib is also reported to have invested orphans' property in *mudārabah*.<sup>14</sup> Both *Khulafā'* considered it a better way of management of orphans' wealth. Perhaps on the basis of this practice of the *Rāshidūn*, Ibrāhīm al-Nakha'ī recommends the guardians (*wasī*) of orphans to invest their wealth in *Mudārabah* or in some other profitable business.<sup>15</sup> 'Uthmān b. 'Affān, an experienced trader, had entered into a *Mudārabah* agreement with 'Abd Allah b. 'Alī. Another prominent Companion, 'Abd Allah b. Mas'ūd, is reported to have entered into a contract of *Mudārabah* with Zayd b. Khulaydah.<sup>16</sup> The *fuqahā'* developed *mudārabah* from a customary traditional sale into a legally defined institution, and discussed all terms and conditions relating to its different branches.<sup>17</sup>

<sup>11</sup> Ibn Sallām, *al-Anwāl*, 243-44; Ibn Ijāz, *al-Itihād*, vol.8, 195.

<sup>12</sup> Saḥnūn, *al-Mudawwanah*, vol.4, See *Kitāb al-Ijārah*, 402-59; al-Sarakhsī, *al-Mabsūt*, vol.15, 74-184.

<sup>13</sup> Al-Shāfi'ī, *al-Umm*, vol.7, 108; al-Sarakhsī, *al-Mabsūt*, vol. 22, 18.

<sup>14</sup> Al-Shāfi'ī, *al-Umm*, vol.7, 20.

<sup>15</sup> Ibid. 19.

<sup>16</sup> Ibid. 108.

<sup>17</sup> Al-Shāfi'ī, *al-Umm* (Ch. *al-mudārabah*); al-Sarakhsī, *al-Mabsūt*, (Ch. *al-Mudārabah*) also Ibn Qudāmah, *al-Mughnī*.

فقہ واحد اشد علی الشیطان من الف عابد ☆ ایک فقہ شیطان پر ہزار عابدوں سے زیادہ بھاری ہے۔

and raisins.<sup>6</sup> The transaction of *salam* sale was sanctioned on the basis of 'urf. The *fiqhahā*, however, differ in the details and different types of transactions.<sup>7</sup>

Hiring and renting had also been an ancient custom which was also practised by Abū Bakr and 'Umar.<sup>8</sup> Wakī' mentions that 'Umar hired a horse on the condition that one of his friends would also ride. The owner demanded compensation for the damage when the horse was injured 'Umar asked to nominate someone as *hakam* (arbitrator) who would settle the case between them.

Referring the disputes to *hakams* for arbitration is another example of retaining customs. In *Jāhiliyyah* it was a common practice that the people used to refer their disputes to *hakams* who were trusted by the people. The *hakams* had no authority to implement their decisions. Both parties, however, were morally bound to accept them. This traditional judicial practice was also maintained by the *Rāshidūn Khulafā'*. 'Umar himself asked the person from whom he had hired the horse to suggest someone as *hakam* to decide the matter. The person proposed the name of Shurayh to be the *hakam* between them. 'Umar agreed with him. Shurayh asked 'Umar to pay the damage to the owner of the horse.<sup>9</sup> The historical record shows that the Prophet and Abū Bakr hired a guide to lead them on the way to Madīnah, during the Migration.<sup>10</sup> During the time of 'Umar, *ijārah* (hiring) was very common; people used to hire homes, lands and animals for travelling, and they hired skilled people also to get the articles manufactured for them. 'Umar b.

<sup>6</sup> Qādī Zādah, *Natā'ij al-Afkār*, (with Ibn al-Humām, *Sharh Fath al-Qadīr* (Maktabah, Rashīdiyyah, Pakistan, 1985) vol. 5, 324).

<sup>7</sup> Ibn al-Humām, *Sharh Fath al-Qadīr*, vol. 5, 327 and Qādī Zādah, *Natā'ij*, vol. 5, 324); Ibn Hazm, *al-Muḥallā* (Cairo: Maktabah al-Jumhuriyyah, 1387/1967) vol. 10, 55-59 (article 1819).

<sup>8</sup> Al-Shawkānī, *Nayl*, vol. 6, 35; Ibn Qudāmah, *al-Mughnī*, vol. 5, 397.

<sup>9</sup> Wakī', *Akhbār al-Qudāt*, vol.2, 189 (this was before Shurayh was appointed as judge).

<sup>10</sup> Bukhārī, *Ṣaḥīh*, vol.1, part 3, 116; Ibn Hajar, *Fathī*, vol.5, 349-50; al-'Aynī, *Umdat al-Qārī* (Beirut: Dār Ihyā; al-Turāth, n.d.) vol. 12, 80-82.

were regarded as *kaylī* (what is measured by scale of capacity), and gold and silver were considered *waznī* (what is measured by weight). The same custom and usage were followed in commercial transactions made by the Prophet and the *Rāshidūn Khulafā'*.<sup>1</sup> The *fuqahū'* later based many rules of *zakāh* (poor-due), *ṣadaqāt* (charity) and *kaffārūt* (expiations), in *fiqh* literature, on customary practice of measurement by the Prophet and the *Rāshidūn Khulafā'*.<sup>2</sup> Similarly, there were several categories of commercial transactions (*buyū'*) that were prevalent in the peninsula of Arabia. Many of these were retained in practice during the *Rāshidūn* times. Only those transactions were prohibited which dealt with usury or which involved an element of risk (*gharar*) for either party. Other transactions remained in practice as they were. *Bay' al-salam*, for example, was practised by the people of Madīnah, according to al-Bukhārī, before the *hijrah*,<sup>3</sup> and it continued throughout the *Rāshidūn* period. However, 'Umar forbade the practice of *salam* in the sale of fruits that had not yet appeared on trees.<sup>4</sup> 'Alī, the fourth *Khalīfah* is reported to have personally practised *al-salam*. He sold his camel, 'Usayfir, with twenty camels to be paid after a certain period, as was agreed upon by both parties. 'Abd Allah b. 'Umar is also reported to have made dealings in animals by way of *salam*.<sup>5</sup> Qādī Zādah records on the authority of 'Abd Allah b. Abī Awfā that sale of *salam* was in practice in the times of the Prophet; Abū Bakr, and of 'Umar. People used to enter into the contract of *salam* for selling wheat, barley, dates

<sup>1</sup> Al-Dārimī, *Ṣunan*, vol. 2, 257: there is mention of Wazzān who were professionals, see al-Dārimī, *Ṣunan*, vol. 2, 260; Ahmad b. Ḥanbal, *Musnad*, vol. 3, 310.

<sup>2</sup> See relevant chapters in Mālik, *al-Muwatta'* and Sahnūn, *al-Mudawwanah*; al-Shāfi'i, *al-Umm*, al-Shaybānī, *al-Jāmi'*; (Beirut: Dār Ihyā' al-Turāth al-'Arabī, 1399 A.H.) al-Sarakhsī, *al-Mabsūt*.

<sup>3</sup> Bukhārī, *Ṣaḥīḥ*, vol. 1, part 3, III Ismā'il b. Yahyā al-Muznī, *al-Mukhtaṣar*, 90.

<sup>4</sup> Ibn Ḥajar, *Fath*, vol. 5, 338-39 ('Umar prohibited it because there was risk, the buyer might suffer a loss).

<sup>5</sup> Al-Sarakhsī, *al-Mabsūt*, vol. 12, 122; Mālik, *al-Muwatta'* (Cairo: Muṣṭalā al-Bābī al-Ḥalabī, 1370/1951) Vol. 2, 69; *al-Mudawwanah* (Baghdad: Maṭba'ah al-Muthammā, 1970).

## CONSIDRATION OF URF

By: Dr. Muhammad Yousuf Faruqi

### 5.1 JUDGEMENTS OF THE *KHULAFĀ'*

'*Urf* and '*ādah* have constituted a very ancient and important source of law. The Arabs did not possess any written document or script. It was their customs and traditions that regulated their social systems. According to the available historical account, the *Rāshidūn Khulafā'* retained many customs and traditions which existed in society. Not only this, we find evidence that the *Khulafā'* adopted some useful customs of other people and introduced them to the Islamic society. By doing so the *Rāshidūn Khulafā'* followed the practice of the Prophet who himself acknowledged some of the *Jāhili'* customs which were not incompatible with the letter and spirit of the Revelation. When Islam was promulgated by the Prophet (p.b.u.h.) in Arabia, different customs and traditions prevailed there. The Arabs mostly worshipped idols, and, therefore, many of their customs reflected their idolatrous attitudes. However, at the same time, religious teachings, particularly the remnants of the legacy of Prophet Ibrāhīm (p.b.u.h.) also influenced the socio-religious activities of the Arabs. They practised some of the traditions of Prophet Ibrāhīm (p.b.u.h.) pertaining to religious rites. Ceremonies related to the *Ka'bah* and the rite of circumcision, for example; reflect Ibrāhīm's conspicuous influence on the *Jāhili'* society of Arabia. This, in fact, provided the basis for the establishment of social traditions.

During the period of the *Rāshidūn Khulafā'*, many Arab customs continued to be practised in Islamic society. For instance, grain, wheat, barley, etc., according to Arab customs,