

**THE THEORY AND APPLICATION OF *URF*
IN ISLAMIC LAW**

BY:

MOHAMAD AKRAM LALDIN

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BI ISM ALLAH AL-RAḤMĀN AL-RAḤĪM

**IN THE NAME OF GOD THE MOST BENEFICIENT THE
MOST MERCIFUL**

DECLARATION

I hereby declare that this thesis has been written by myself and does not represent the work of any other person.

Mohamad Akram Laldin

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ABSTRACT

This study aims particularly to demonstrate two important facts: (i) The *Sharī'ah* for the Muslims is compatible with the change of place, time and circumstances. (ii) The possibility of utilising *'urf* (custom) in various aspects of life and incorporating them into the Islamic legal system. The introductory notes deal with some aspect of the origins of Islamic law which covers *Sharī'ah* and *uṣūl al-fiqh*. The important sources of Islamic law which are the *Qur'ān*, *Sunnah*, *ijmā'* and *qiyās* are also discussed briefly. Chapter One discusses the legal background to the theory of *'urf* which covers the definition of *'urf* and *'ādah*, the proofs of *Qur'ān*, *Sunnah* and *ijmā'* indicating the authority of *'urf* and the influence of *'urf* in Islamic Jurisprudence. The different types of *'urf* and the conditions of valid *'urf* were also discussed here.

The relationship between Islamic law and the pre-Islamic Arabs customary practices are discussed in Chapter Two. This discussion covers four major fields of law namely the criminal and evidence law, family law, inheritance law and commercial law. Chapter Three examines the development and application of the theory of *'urf* throughout the period of the development of Islamic law. This includes the Prophetic period, the era of the *Khulafā' al-Rāshidūn* and the major Companions, the era of the formation of *madhāhib* (schools of law) and the period from the drafting of *Majallat al-Aḥkām al-'Adliyyah* to the present. The opinion

of the four major schools of law and the literatures written on this subject are also discussed in this chapter.

The conflict between *ʿurf* and other sources of law has been discussed in Chapter Four. This covers the conflict between *ʿurf* and the text (*naṣṣ*), the conflict between *qiyās*, *istiḥsān* and *maṣlaḥah* and *ʿurf* and the conflict between *ʿurf* and the views of scholars (*mujtahidīn*). In addition, the subject of conflict between *ʿurf* and language was also discussed in this chapter. Chapter Five deals with the legal maxims related to the theory of *ʿurf*. A number of legal maxims are examined here including the importance of revising legal rulings with the passage of time and change in circumstances.

The relationship between *ʿurf* and other sources of Islamic law is discussed in Chapter Six. This section examines the relationship between the theory of *ʿurf* and *ijmāʿ*, *istiḥsān*, *istiḥāb*, *maṣlaḥah al-mursalāh*, *sadd al-dharāʿiʿ* and *ʿamal ahl al-Madīnah*. Finally, the appendix examines certain aspects of the customary practices of the people of Malaysia and analyses the conflict between Islam and these practices. The discussion focused on two major customary practices in Malaysia, namely: *adat temenggung* and *adat perpatih*. In addition, certain aspects of *adat kampung* are also discussed here.

Note of Transliteration and the Translation
of the *Qur'ān*

A) Transliteration

This study follows the system of transliteration of the United States Library of Congress as outlined in the Cataloguing Service Bulletin No. 49, November 1958. However, the *tā marbūṭah* has been written as "h" at the end of a word when it is not part of the *idāfah* construction, in which case it is written as "t". The transliterated Arabic words have been italicized.

B) Translation of the *Qur'ān*

In translating verses of the *Qur'ān*, the writer relies generally on two widely circulated translations, i.e., (Abdullah Yūsūf 'Alī's *The Holy Qur'ān, Text, Translation and Commentary*, (Maryland, U.S.A, 1989) and Marmaduke Pickthall's *The Meaning of the Glorious Qur'ān*, (Delhi, n.d.). However, slight modification have sometimes been made where considered appropriate.

INTRODUCTION

Before any detailed discussion of *ʿurf* in Islamic law can take place, it is necessary to discuss the background in which it was developed. Islam believes that God created mankind and therefore it is necessary for them to have laws and regulations governing their life. Generally, there are two different conceptions of law. The first may be considered to be of divine origin such as the Islamic law, and the second is the man-made law. The latter conception is the basis of most of modern legislation. The Islamic concept of law can be understood when the question of how to understand Good and Evil is asked. Human beings in their weaknesses cannot understand what Good and Evil are unless they are guided in the matter by an inspired Prophet¹. These two concepts which technically named by the Muslims scholars as *ḥusn*, beauty and *qubḥ*, ugliness, are to be taken in the moral sense of the term. What is morally beautiful, must be done; and what is morally ugly must not be done. That is *Shariʿah* or Islamic legal doctrine.

But the other question that arises here is, what is absolutely and indubitably *ḥusn* and *qubḥ*. This important legal question certainly cannot be answered by man. But the *Qurʾān*, which is the very words of God, and supplementary to it is

¹ Wherever the word 'Prophet' is mentioned this author follows the ordinance of the *Qurʾān* which call upon Muslims to pronounce blessing for him. However, the usual phrases has been omitted but it should be understood that whenever this word is mentioned, the author follow the spirit of the *Qurʾānic* injunction.

the *Sunnah*, which are the records of the actions and sayings of the Prophet, are the tools which must be referred to and implemented in order to determine what is *ḥusn* and *qubh* and thereby the above legal questions can be resolved. However, if the answer is not found in the *Qur'ān* or in the *Sunnah* then the dictates of reason in accordance with certain definite principles have to be followed. These principles give assistance to the realisation of the *Sharī'ah* as the Muslims jurists understand it. In order to understand Islam, it is very important to understand the *Sharī'ah* as it is the nucleus of Islam.

The Sharī'ah

The word *Sharī'ah* is derived from the root of *shin ra 'ayn* which literally means the road to the watering place, the path to be followed. As a technical term, it means the canon law of Islam, all the different commandments of God to mankind.² Each one of such commandments is called *ḥukm* (pl.*aḥkām*). The law of God and its inner meaning is not easy to grasp; and *Sharī'ah* regulates all human actions. This is why it is not 'law' in the modern sense as it contains a comprehensive set of dogmas, legal and ethical doctrines. It is basically a doctrine of duties³, a code of obligations. For this reason, legal considerations and

² Al-Qurtubī, *Al-Jāmi' li Aḥkām al-Qur'ān*, vol.16, p.10, Zaydān, *Al-Madkhal li Dirāsāt al-Sharī'ah al-Islamiyyah*, p.38

³ Cf. Snouck Hurgronje, *Encyclopaedia of Islam* (old edition), vol.2, p.105

individual rights have a minor place in it; above all, the tendency towards a religious evaluation of all the affairs of life is absolute.

Islamic jurists deduced that the religious injunctions according to *Shari'ah* are of five categories, *al-ahkām al-khamsah*. Those strictly commanded acts are called *farḍ* (pl. *farā'id*), and those strictly forbidden acts are *ḥarām*. Between these two groups there are two middle categories, namely, acts which are recommended to do which are called *mandūb* or *mustahabb* and acts which are recommended to refrain from which are called *makrūh*, and finally there are acts about which the law is indifferent which is called *jā'iz*. The five daily prayers are *farḍ*, adultery is *ḥarām*; the additional prayers, like those before and after the five prescribed prayers are *mandūb*; certain kind of food, like those which give bad odour are *makrūh*; and there are thousands of *jā'iz* acts, such as playing sport games. The above classifications must be carefully noted in order to understand the distinction between matters which are only morally enjoined and that which are legally binding. Obviously, moral obligations are different from legal necessities. Therefore, if these distinctions are not observed, error and confusion are most likely to take place. Thus, the study of the theory of *'urf* helps to comprehend those distinctions and make demarcations between moral obligations and legal necessities.

The *Shari'ah* which contains all the different commandments of God to mankind, can be further divided into three fields. The first is *al-ahkām al-*

i'tiqādiyyah (the sanctions relating to beliefs) such as the belief in God and the Day of Judgement. The second is *al-aḥkām al-akhlāqīyyah* (the sanctions relating to moral and ethics) such as the injunction to tell the truth, be sincere, be honest etc. The last category is *al-aḥkām al-'amalīyyah* (sanctions relating to the sayings and doings of the individuals and his relations with others) which is also called *fiqh*.⁴

Fiqh: The Classical Theory

Fiqh is the name given to the whole science of jurisprudence because it implies the exercise of intelligence in deciding a point of law in the absence of a binding text (*naṣṣ*) of the *Qur'ān* or *Sunnah*. *Fiqh*, literally means 'comprehension'. As a technical term it is defined by Abū Ḥanīfah (d.767CE)⁵ as 'the knowledge of what is for a man's self and what is against a man's self' (*ma'rifat al-nafs mā lahā wa mā 'alayha*)⁶. This is a general definition of *fiqh* as it includes all the knowledge of Islam. However, Al-Ghazālī (d.505 AH) has confined the word *fiqh* to the science of the rules of law.⁷ The majority of Islamic authorities, however,

⁴Zaydan, *Al-Madkhal*, p.67

⁵ C.E. (i.e Common Era) is used instead of A.D. (Anno Domini, lit. in the year of our Lord) because Muslims do not recognise Jesus the son of Mary as the Lord, but as a Prophet of God.

⁶ Zaydān, *Al-Madkhal*, p.62, citing *Al-Tawdīh fī Uṣūl al-Fiqh*, vol.1, pp.10-11

⁷ Al-Ghazālī, *Al-Mustasfā min 'Ilm al-Uṣūl*, p.5

define it in terms of its four basic components⁸ and it can, therefore, be defined as follows:

"*Fiqh* or the science of Islamic law is the knowledge of one's rights and obligations derived from the *Qur'ān*, or *Sunnah* of the Prophet, or the consensus of opinions among the learned (*ijmā'*), or analogical reasoning (*qiyās*)."⁹

This is the classical definition of *fiqh* and is said to be founded on the famous tradition of Mu'ādh. The Prophet was reported to have sent Mu'ādh b. Jabal, one of his companions, as a governor to Yemen and also appointed him as the judge. Before sending him the Prophet asked him: "According to what will you judge if a problem is brought to you?" He replied, "According to the Scriptures of God". "And if you did not find anything in it?" According to the *Sunnah* (tradition) of the Messenger of God". And if you did not find anything in it?" "Then I shall strive to interpret with the exertion of my reason". And thereupon the Prophet said: "Praise be to God who has favoured the messenger of His Messenger with what His Messenger is willing to approve of".¹⁰ Although this *Hadith* has been questioned by Western scholars, it gives expression to what

⁸ For further discussion see, Abd al-Rahīm, *Muhammadan Jurisprudence*, pp.48-50

⁹ Shāfi'ī, *Al-Risālah*, p.78. *Fiqh* is not only limited to the knowledge of one's rights and obligations that was deduced for the prescribed sources, but it also includes the laws itself.

¹⁰ Abū Dāwūd, *Sunan Abī Dāwūd*, vol.3, p.412-3, Ḥadith no.3592

actually must have taken place during the time of the Prophet. It explains the Islamic perception of the methods of deriving legal solutions. It demonstrates that in this process, independent judgement, within certain limits is not only permissible but even praiseworthy.

It is important to notice that the science of *fiqh* has been divided into two main divisions: (a) The *uṣūl*, which literally means the roots or foundations and the *furūʿ*, the branches of the law.¹¹ The science of *uṣūl* deals with the methods by which the rules of *fiqh* are deduced from their sources and (b) the science of *furūʿ* which deals with particular injunctions (*aḥkām*) which are the results of the science of *uṣūl*. It is, therefore, necessary to realise that in Islamic law there is a very clear distinction between the principles in the first division and the rules deduced from their application.

The above discussion has demonstrated what the *Sharīʿah* is and what the definition of *fiqh* is. Now, what is the distinction, if any, between them? The *Sharīʿah* is the wider circle, it includes all human actions; but *fiqh* is confined to what are commonly understood as human acts as far as their legality and illegality are concerned. The *Sharīʿah* is based on revelations in which the knowledge is only obtained from the *Qurʾān* or *Sunnah*. In *fiqh*, the power of reasoning is stressed, and deductions based upon knowledge are continuously referred to with

¹¹ Al-Qarāfī, *Kitāb al-Furūq*, vol.1, pp.2-3

approval. In *fiqh*, an action is either legal or illegal but in the *Shari'ah* there are various degrees of approval or disapproval. However, it must be noted that the line of distinction is not clearly drawn, and very often the Muslims scholars used the two terms interchangeably; for the criterion of all human actions, whether in the *Shari'ah* or in *fiqh*, is the same, i.e. the seeking of the approval of God by complying with His commandments.

Usūl al-Fiqh

Uṣūl al-fiqh or the origins of Islamic Law, explain the indications and methods by which the rules of *fiqh* are deduced from their sources. These indications are found mainly in the *Qur'ān* and *Sunnah* which are the principal sources of Islamic law. The rules of *fiqh* are derived from the *Qur'ān* and *Sunnah* and other sources which are collectively known as *uṣūl al-fiqh*. In fact, the *Qur'ān* and *Sunnah* contain very little of methodology, but they provide the indications and general principles from which the rules of *fiqh* can be deduced. The methodology of *uṣūl al-fiqh* refers to *ijtihād* (methods of reasoning) such as *qiyās* (analogy), *istiḥsān* (juristic preference), *istiṣlāḥ* (public interest), *istiṣḥāb* (presumption of continuity), *'urf* (customary practice), *'amal ahl al-Madīnah* (practice of al-Madīnah people) and *sadd al-dharā'i'* (blocking the means to evil). These are all considered as an assistance to the correct understanding of the sources and tools of *ijtihād*. Thus, *fiqh* as such, is the end product of *uṣūl al-fiqh*. However, the two

are separate disciplines. The importance of *uṣūl al-fiqh* is irrefutable as it examines the sources of Islamic Law, the methods that must be used to deduce the rules and the person who is legally qualified and equipped to deduce these laws. Ibn Khaldūn (d.808AH/1406CE) emphasised the importance of *uṣūl al-fiqh* when he said: "(It is) one of the greatest sciences of the *Shari'ah*, the most powerful and beneficial science."¹² Fakhr al-Din al-Rāzī (d.606AH/1209CE) also stressed the importance of this science in his work *Al-Maḥṣūl* when he said that it is the most important science for the *mujtahid*. Al-Zuhailī, a prominent modern scholar of *uṣūl al-fiqh* has mentioned several advantages of this science in his book of *Uṣūl al-Fiqh*.¹³

The Sources of Islamic Law

One of the important constituents in *uṣūl al-fiqh* are the sources that are relied upon to deduce the rulings. The *Ḥadith* of Mu'adh has explained the most important methodology that should be followed in deducing the rulings, i.e. the *Qur'ān* and *Sunnah*. Indeed, there are four main sources of Islamic law including the *Qur'ān* and *Sunnah* in which all the scholars have not challenged their authority and advantage over the other subordinate sources. These sources according to their authority are *Qur'ān*, *Sunnah*, *ijmā'* and *qiyās*.

¹² Ibn Khaldūn, *Muqaddimah*, vol 3, pg. 1061

¹³ Zuhaylī, Wahbah, *Uṣūl al-Fiqh al-Islāmī*, vol.1, pp.29-32

The Qur'ān

The Qur'ān is the first source of Islamic law. The importance of Qur'ān to the Muslims is religious and spiritual, no less than legal, as the Muslims believe that it is the Word of God. The Qur'ān is not a legal nor a constitutional document as only a small portion of the text consists of legal sanctions. In fact, out of over six thousand and two hundred verses, less than one-tenth relate to law and jurisprudence. Most of the verses are concerned with matters of beliefs and morality, and a variety of other themes. The Qur'ānic sanctions of economic and social justice, including its legal topics, are on the whole supplementary to its religious call. In order to understand and interpret the Qur'ān, it is important to observe certain matters such as the *Makkī* and *Madanī* chapters of the Qur'ān as this helps to explain the context and circumstances in which certain verses were revealed. This is particularly relevant to the understanding of the occurrence of *al-naskh* (abrogation) in the Qur'ān. To distinguish *al-nāsikh* (the abrogating) from *al-mansūkh* (the abrogated) of the text, one should know the chronological order of the revelation of the Qur'ānic verses. Similarly, most of the *'āmm* (general) rulings of the text have been specified either by the text itself or by the *Sunnah*. Thus, the knowledge of the *Makkī* and *Madanī* revelations assists towards better understanding of some of the Qur'ānic legislation. It must be observed that Qur'ān takes precedence in all the aspects of a Muslim's life.

The Sunnah

The second source of Islamic law is the *Sunnah*, i.e. the practice of the Prophet. In pre-Islamic Arabia, the Arabs used the word '*Sunnah*' in reference to the ancient and continuous practice of the community which they inherited from their forefathers. Thus, it is said that the pre-Islamic tribes of Arabia had each their own *Sunnah* which they considered as a basis of their identity.¹⁴ Later the term was applied to the practice of the Prophet. The word *Sunnah* should be distinguished from the term *Ḥadīth*, for a negligent use of the two terms sometimes leads to confusion. *Sunnah* is the example or the law that is deduced from a *Ḥadīth* whereas *Ḥadīth* is a narration of the conduct of the Prophet. *Ḥadīth* in this sense is the vehicle or the carrier of *Sunnah*. As for the role of the *Sunnah* with regards to the *Qur'ān*, it is explanatory to and integral with the *Qur'ān* as stated by Shāfi'ī in his *Risālah*:

"I know of no scholar who does not agree that the *Sunnah* of the Prophet falls in three categories two of which were agreed upon unanimously. These two categories agree (on certain matters) and differ (on others). First, for whatever acts there is textual (legislation) provided by God in the Book, the Apostle (merely) specified clearly what is in the Book. Second, as to any

¹⁴ Hasan, Ahmad, *The Early Development of Islamic Jurisprudence*, p.85, citing, Guraya, Muḥamad Yūsuf, *Origins of Islamic Jurisprudence (with special reference to Muwaṭṭa of Imām Mālik)*, p.8

(ambiguous) communication in the Book laid down by God, (the Prophet) specified the meaning implied by Him. These are the two categories on which scholars do not disagree. The third category consist of what the Apostle has laid down in the *Sunnah* and concerning which there is no text in the Book."¹⁵

Ijmā'

The third source of Islamic law is *ijmā'* (consensus). Unlike the *Qur'ān* and the *Sunnah*, *ijmā'* does not directly partake in the divine revelation. As a principle and proof of Islamic law, *ijmā'* is basically a rational proof and it is also a binding proof. *Ijmā'* is the verbal noun of the Arabic word *ajma'a* that has two meanings. The first meaning is to determine and to agree upon something as an example, the expression *ajma'a fulān 'alā kadhā*, means that so and so decided on such and such. The other meaning of *ajma'a* is unanimous agreement. Therefore the phrase *ajma'a al-qawm 'alā kadhā* means that the people reached unanimous agreement on such and such.¹⁶ In this context the second meaning of *ajma'a* often incorporate the first, i.e. whenever there is a unanimous agreement on something, there is also a decision on that matter. *Ijmā'* is defined by al-'Āmidī (d.615AH/1218CE) as the unanimous agreement of the *mujtahidūn* of the Muslim community of any period

¹⁵ Al-Shafi'i, *Risālah*, pp.120

¹⁶ See Al-'Āmidī, *Al-Aḥkām fi Uṣūl al-Aḥkām*, vol.1, p.280

following the demise of the Prophet Muhammad on any matter.¹⁷ From this definition it is clear that *ijmā'* can only occur after the demise of the Prophet as he was the highest authority of *Shari'ah*. *Ijmā'* has played a significant role in the development of *Shari'ah*. In fact, the existing body of *fiqh* is the product of a long process of *ijtihad* and *ijmā'*. Finally, *ijmā'* represents authority. Once it is established it tends to become authority in its own right, and its roots in the primary sources are gradually weakened or even lost. It then becomes common to quote the law without mentioning the relevant sources. This is partly due to the significance of *ijmā'* that the incentive to quote the authority tends to weaken. Indeed, a tradition of the Prophet briefly summarises the significance of this principle: "My *ummah* shall never agree upon an error."¹⁸

Qiyās

The fourth and last main source that is agreed on by the scholars in Islamic law is *qiyās*, analogical reasoning. Literally *qiyās* means measuring or ascertaining the length, weight or quality of something. This is why the scales are called *miqyās*. Technically *qiyās* is the extension of a *Shari'ah* value from the original case, or *aṣl*, to a new case, because the latter has the same effective cause (*'illah*)

¹⁷ Ibid, vol.1, p.167, However, the modern scholar Abū Zahrah has narrowed this definition of *ijmā'* to confine it to *Sharā'i'* matters only. See Abū Zahrah, *Uṣūl*, p.156

¹⁸ Related by Ibn Mājah, *Sunan Ibn Mājah*, Ḥadīth no.3950, vol.2, p.1303, See also, Al-Ghazālī, *Al-Mustasfā*, vol.1, p.175

as the former. The original case is ruled by a given text and *qiyās* aims to extend the same ruling to the new case. Being an extension of the existing law, *qiyās* discovers and develops the existing law but does not create a new law. In fact, it widens the application of law contained in the text. *Qiyās* like *ijmā'* is a secondary source of the *Shari'ah* and, is therefore, a subordinate of the *Qur'an* and *Sunnah*. Finally, *qiyās* is of the same nature as *ijmā'*, for it is also an opinion of the learned based on analogy. The difference between these two principle is that *ijmā'* is a consensus of the opinions of the learned whereas *qiyās* is an opinion based on the similitude of circumstances.

The exercise of opinion, the drawing of conclusions, and the use of discretion were used in Islamic law from the earliest day, and indeed the method of deductions forms the fourth source of Islamic law which is *qiyās*. The other sources that used the same principle, often in the nature of judicial discretion on matters of public policy is *istihsān* (juristic preference)¹⁹, *istiślāh* (consideration of public interest), *istişhāb* (presumption of continuity)²⁰, and *sadd al-dharā'i'* (prohibition of evasive legal devices) which will be discussed later on. They mainly reflect the difference of opinion among jurists in matters where discretion

¹⁹ Some of the scholars describe it as equity in Islamic Law.

²⁰ The continuation of both the positive and negative rule until the contrary is established by evidence.

can be exercised and lead to refinements and distinctions which have become arguments among the followers of various schools of law.

In addition to the above sources, there are others which may be termed as the material sources of law which are also of great importance in Islamic law. This source is the custom of the people such as the pre-Islamic custom. There are significant evidences that indicate that beneficial customs although ancient and pre-Islamic, are to be retained. However, it is important to bear in mind that those customs which are directly or indirectly in conflict with a binding statute from the *Qur'ān* or *Sunnah* will not be considered as material sources of Islamic law. Indeed, the custom of different peoples and countries also should be retained and considered as a source of law as long as they comply with the *Qur'ān* and *Sunnah*. This consideration of custom is known as *'urf* or *'ādah* in Islamic law.

CHAPTER ONE

The Background to the Theory of 'Urf

1.1 Introduction

One of the characteristics of Islamic Law is that some of its rulings can change according to the changes of circumstances, i.e. place, time and 'urf. This is why it is possible for this law to be practised at any time and place. However, there are some laws which were fixed and cannot be changed. These are held to be unchangeable because they are immutable and suitable to be implemented in all situations.

'Urf or customary law, is one of the most important supporting sources in Islamic Law. This can be seen through many legal rulings (*aḥkām*) in Islamic law which were based on 'urf in which most of these *aḥkām* will change according to the change of circumstances, place and time.

As for the basis of 'urf or custom, it is the product of the nature of the people and their culture. It grows in strength and popularity by means of imitation which transfers and implants it in the lives of people. Normally, these customs

will be inherited by generations until there come other customs that can overrule the earlier ones.

‘*Urf* has played a significant role in the formation of Islamic law. There are many cases that indicate the change of law when the ‘*urf* of people has changed. For instance, Mālīk b. Anas (d.179AH/795CE), the founder of the Mālīkī school, has considered the practice of al-Madīnah people (‘*amal ahl al-Madīnah*) as a source in making law. This indicates the importance of the ‘*urf* of al-Madīnah people to him. Similarly, Al-Shāfi‘ī (d.204AH/820CE) has made *ijtihād* on many problems that arose when he was in Iraq, but when he moved to Egypt he changed some of his earlier opinions because of the different circumstances and customs in Egypt.¹ Indeed, the *Qur’an* has also considered some of the ‘*urf* of the early Arab community as a legal basis in its law. As an example, the doctrine of *qisās*, which was practised in the early community, has been approved by the *Qur’an*, albeit with some modification in terms of evidence and amicable settlement.

The ‘*urf* of people should not be ignored in making any decisions as there are many undeniable advantages and benefits for the society in general. Among the advantages of the legal ruling derived from ‘*urf* are:

¹ See Abū Zahrah, *Uṣūl al-Fiqh*, p.128, Khāllaf, *‘Ilm Uṣūl al-Fiqh*, pg. 90. Kamali, *Principles of Islamic Jurisprudence*, pg. 361.

1. Less contradictions will occur when implementing the rulings because the people have knowledge about it.
2. Normally the legal rulings that were based on *'urf* are acceptable and familiar to the people, so, it is easy for them to implement them.²

Before going into further discussion on this topic, the meaning of the words *'urf* and *'ādah* must be defined. Most of the scholars regard these two as synonymous.³ Therefore, they have given a similar definition for them. However, there are others who distinguish between these two terms as they maintain that *'ādah* is more general than *'urf*. Therefore these two terms were defined separately. Consequently, the following discussion will examine the meaning of *'urf* and *'ādah*.

1.2 The Roots and Meaning of 'Urf and 'Ādah.

'Urf is a noun of *'ayn, ra, fa*, which literally means 'to know'. *'Urf* also has a similar meaning to *al-i'tirāf* or *iqrār*.⁴ It is also said that the meaning of *'urf* is similar to *al-ma'rūf* as also *'ārif*⁵ of which the plural is *'awārif*. *'Urf* is the

² Al-Zarqa', *Al-Madkhal al-Fiqhī al-'Āmm*, vol.1, pg.132.

³ Lane, *Arabic-English Lexicon*, book 1, part 5, pg. 2191

⁴ Hence you say *'lahu 'alaiya alf 'urfan'* meaning *i'tirāfan*, (i.e. a thousand is due to him on my part by acknowledgement or confession). See Lane, *Arabic-English Lexicon*, Bk.1, part 5, pg.2014.

⁵ Ibn Manzūr, *Lisān al-'Arab*, vol 9, pg. 239, Al-Fairūzabādi, *Qāmūs al-Muḥīṭ*, vol 3, pg. 179.

contrary of *nukr* which means difficult, hard and severe and *ma'rūf* is being the contrary of *munkar* which means anything pronounced to be bad, evil, hateful, disapproved or a saying not accepted by God. It is mentioned in Lane that *'urf* in lexicology signifies the commonly-known, commonly received or common conventional, language; common parlance or common usage, mostly meaning that of a whole people; in which case, the epithet *al-'āmm* is sometimes added; but often meaning that of a particular class; as for instance for the lawyers.⁶

As a conventional term various definitions of *'urf* have been given by the Muslim jurists. Al-Nasafī (d.710AH/1310CE) defined *'urf* and *'ādah* as "what is established in life from the point of view of reason which a sound natural disposition accepts".⁷ Al-Jurjānī (816AH/1413CE) in *al-Ta'rīfāt* defined the words in a way close to that of al-Nasafī.⁸ The definition by Ibn 'Ābidīn (d.1252AH/1836CE) which is not much different from the above definitions said that "*'Ādah* is derived from *mu'āwadah* (sic!) and because it is frequently practised, it became well known and established in life and reason. So it was accepted without any other association until it became *'urf* in reality".⁹

⁶ op. cit. pg. 2014

⁷ This definition is attributed to Al-Nasafī by Ismā'īl in *Al-Adillah al-Mukhtalaf fiha wa Atharuhu fi-al-Fiqh al-Islāmī*, pg. 388, Citing, *Al-Mustasfā*, Nasafī, vol, 1, pg, 17.

⁸ Al-Jurjānī, *Ta'rīfāt*, pg. 154

⁹ Ibn 'Ābidīn, *Majmū'ah Rasā'il*, pg. 112

The above definitions indicate several important elements of *'urf*. Among the important elements in *'urf* is that it must be the practice that is established and known among the people. This excludes the practice which is uncommon among the people. According to these definitions, *'urf* only includes what is accepted by people and regarded as sound behaviour. Therefore, the *'urf* that is not accepted by people and not considered as sound behaviour (*'urf fāsid*) is excluded. It is obvious that those scholars who defined *'urf* in the above sense did not differentiate between *'urf* and *'ādah*.

Beside the mentioned classical definitions, there are several other definitions of *'urf* given by the modern scholars. Amongst these definitions is the one given by Khallāf who said, "*Urf* is what is established and practised by people from their sayings and doings, or not doing".¹⁰ The other definition is propounded by Badrān who defines *'urf* as, "What is established and common in a group of people (*jumhūr*) from their sayings and doings, and is consistently repeated until it influences them and is therefore accepted by their reason". He further quoted that not all that is established and common can be considered as *'urf*, but it is that which is established and common to the people with wise reason and sound behaviour.¹¹ Al-Zarqā' has defined *'urf* as "the behaviour of a group of people in

¹⁰ Khallāf, *Ilm.* pg. 89

¹¹ Badrān, *Uṣūl al-Fiqh*, pg. 224.

their sayings or doings".¹² Hence, it can be said that the definition presented by Khallāf and Zarqā' is more general than the others because it includes all types of *'urf*.

From all the above definitions, it can be concluded that *'urf* is a kind of *'ādah* and in order to constitute a valid basis for legal decision *'urf* must be the consistent practice of a group of people. Accordingly, the practice of an individual, is not *'urf* but it rather is a personal habit (*'ādah fardīyyah*). *'Urf* must also be acceptable and reasonable. Hence, the practices that are devoid of benefits or involve disadvantages are not considered as legal *'urf*. The above definitions also indicate that there are two main categories of *'urf*. The first one is the doings of the group of people (*'urf amalī*) and the second is the sayings of the group of people (*'urf lafzī*).

The other point that can be inferred is that there is a close relationship between the meaning of *'urf* literally and the meaning of *'urf* as a conventional term. It can be noticed that the meaning of *'urf* literally is that 'which is known', and *'urf* as a conventional term also includes the habits of a group which are well known and the habits that are not known to the group of people is excluded from the definition of *'urf*.

¹² Zarqā', *Al-Madkhal al-Fiqhī al-'āmm*, vol.1, pg.131.

Having discussed the meaning of *'urf*, the following discussion will examine the roots and meaning of *'ādah*. *'Ādah* is a derivation from *'ayn, waw, dal*, the basic meaning of which is "return". *'Ādah* means custom, manner or habit and is synonymous to *da'b* and *watīrah* or *daydanah*, so called because if one returns to a thing time after time, it becomes a natural disposition.¹³ According to some scholars, *'urf* and *'ādah* are synonymous.¹⁴ The plural of *'ādah* is *'ādāt*.

'Ādah as a technical term was defined by the Muslim jurists as "the repeated matter which has no connection with reason"¹⁵ (*al-amr al-mutakarrir min ghair 'alāqah 'aqliyyah*). This definition excludes the repeated matter which is caused by reason as it cannot be considered as *'ādah* because it is the requisite of reason (*al-talāzum al-'aqlī*). As an example the movement of the watch effected by the movement of the hand is not considered as *'ādah* even though it is a constant occurrence because it is a mechanical effect and not an effect that arises from natural disposition.

The above definition indicates that *'ādah* accommodates a very wide meaning because it includes most repeated matters. It includes the repeated matters that are done by a person such as the routine of a person before going to bed or

¹³ See Al-Iṣfahāni, *Al-Mufradāt*, pg.302.

¹⁴ Lane, *Arabic-English Lexicon*, book 1, part 5, pg. 2191

¹⁵ Al-Zarqā', *Al-Madkhal*, vol, 2, pg.838

after taking lunch and other doings that are repeated. These are called *‘ādah fardīyyah* or personal habits. It also includes the behaviour of a group of people which arises from their way of life, whether they have good habits or the opposite. The latter is also known as *‘urf* which has been used as a supporting source in Islamic law.

As a conclusion, it is obvious from what is described above that the term *‘ādah* is much more general and wider than *‘urf*. These two terms can be distinguished in the sense that *‘ādah* means repetition or a recurrent practice which can be used with regard to both individuals and groups while the word *‘urf* is the practice of a large number of people. To make clear this point it can be said that all *‘urf* is *‘ādah* but not all *‘ādah* is *‘urf*.

1.3 The Influence of ‘Urf in Islamic Jurisprudence

‘Urf or customary practice is considered as a source in many laws before Islam and is also an important source for man-made law in the past and present times. As it obvious, man-made law has given priority to custom as a source of law. There are five major sources of the man-made law which are, custom, religion, the opinion of jurists and the interpreter of law, the independent judgement

(*ijtihād*) of a judge and, lastly, the principles of justice and equity.¹⁶ This indicates the significant role of custom as a source in man-made law.

Some of the laws that exist at the present time are originally derived from the customary law which was practised among mankind in certain places. As an example in Malaysia, the customary law is still being practised officially in certain parts of the country such as in the state of Negeri Sembilan in which the 'Adat Pepatih' is still being practised. In England and the United States the common law is one of the sources of law.

The Arabs before the advent of Islam considered their traditions and customs as the basis of their social life in all aspects of life including religion, morality and others. Their system was not codified as far as is known. When Islam came, texts based upon the *Qur'ān* and *Ḥadīth* became the basis of legislation. In this period, many of the pre-Islamic Arabian customs were still being practised by the Muslims inasmuch as they did not contradict Islamic teachings. The customs which were practised during the lifetime of the Prophet and were not expressly overruled by him are considered to have received his tacit approval and became part of what is known as *Sunnah taqrīriyyah*. In fact, there are many of the pre-Islamic Arabian customs that have been approved by Islam whether through the clear text of *Qur'ān* or through the *Sunnah*. It seems that at

¹⁶ Al-Zarqā', *Al-Madkhal*, vol. 1, pg. 132

this period the term *ʿurf* was not extensively used to describe the customary practices of the people, but it was categorised under the category of clear texts of *Qurʾān*, or as *Sunnah* of the Prophet, but in reality it was part of the customary practices that had been approved by Islam.

ʿUrf has infiltrated into the *Shariʿah* by several ways and the most important ways are:

1. The recognition of certain practices of the pre-Islamic Arabs by the *Qurʾān* or *Sunnah* which were regarded as part of Islamic law.¹⁷
2. The jurists of Islamic Jurisprudence have adopted some of the customs which were practised in earlier years as a source of law in their respective schools of law.
3. When the conquest of Islam took place, many of the customs which were practised in the conquered countries found their way into the *Shariʿah* by means of the consensus of jurists or other sources of law such as preference (*istihsān*) or public interest (*maṣlahah*).

¹⁷ For detail see chapter two

In addition, one of the main reasons why customary law has influenced Islamic jurisprudence is because customary law is capable of providing solutions to satisfy the interest of the community in many cases. It is by the principles of public interest (*maṣlahah*) that all customary practices are to be measured. To deny this means exposing people to hardship and this contradicts the *Qur'ānic* statement, "God has not laid upon you any hardship in religion"¹⁸. Furthermore, the aim of *Sharī'ah* is to provide benefit and prevent hardship from mankind.

1.4 *Urf* in the *Qur'ān*

The majority of the scholars (*jumhūr*) recognised *urf* as a supportive source of the *Sharī'ah*¹⁹. The following discussion will examine the *Qur'ānic* evidences which are regarded as the basis of recognising *urf* as a supporting source in Islamic law. We will also observe the usages of the word *urf* and its derivative *ma'rūf* in the *Qur'ān*.

Some of the scholars have attempted to locate the direct textual proof of *urf* in the *Qur'ān*. However, it seems that there is no verse that can be referred to as a direct proof of *urf* in the *Qur'ān*. Nevertheless, there are usages in the *Qur'ān*

¹⁸ *Qur'ān* 22/78

¹⁹ Badrān, *Uṣūl*, pg. 226. Ismā'il, *Al-Adillah*, pg. 396

which give an indication of *ʿurf*, even though *ʿurf* is not used in its technical legal sense.

The word *ʿurf* and its derivative *maʿrūf* occurs in the *Qurʾān* and it is the latter of these two which occurred more frequently. The word *ʿurf* is only mentioned on two occasions in the *Qurʾān*. The first is in *Surat al-Aʿrāf* (7) in which the verse says, "Keep to forgiveness, enjoin *ʿurf* (*waʿmur bi al-ʿurf*) and turn away from the ignorant (*jāhilīn*)."²⁰ Indeed, this is the verse which is normally quoted by the scholars as an indirect *Qurʾānic* evidence of *ʿurf*. Although it actually uses the word *ʿurf*, it is hard to suggest that this verse is a clear and explicit authority for *ʿurf*. Many *mufasssirūn* suggested that the meaning of *ʿurf* in this verse is synonymous to *maʿrūf* which means anything that is good. Ibn Qutaybah (d.276AH) said that, "*ʿurf* means fear of God, doing good to people, guarding the tongue against lying and avoiding looking at forbidden things". He then holds, "These and what is similar to them are called *ʿurf* and *maʿrūf* for every spirit knows (*taʿrīf*) them and every heart is pleased with them".²¹ Al-Ṭabarī (d.310AH) in interpreting the same verse holds that "*ʿurf* in the speech of the Arab is an infinitival noun (*maṣdar*) of *maʿrūf*. It is of *maʿrūf* to befriend the friendless, to give to the needy and to forgive the transgressor. All deeds enjoined or recommended by God are of *ʿurf*". He further maintains that God did not specify

²⁰ *Qurʾān*, 7/199

²¹ Ibn Qutaybah, *Taʿwīl Mushkil al-Qurʾān*, pg.4

a certain meaning of *ʿurf* in this context and the truth is that God has ordered His Messenger to enjoin what is right with full meaning and not with specific meaning".²² Ibn al-ʿArabī (d.543AH/1148CE) states that there are four opinions in the interpretation of *wa' mur bi al-ʿurf* which are:

1. That *ʿurf* is similar to *al-ma'rūf*
2. It means there is no God but God
3. It means everything that is known as part of the religion
4. It means everything good that is not rejected by mankind and it is endorsed universally by all laws (*Sharā'i*).²³

Fakhr al-Dīn al-Rāzī (d.606AH/1209CE)) said that "*ʿUrf*, *ʿarifā* and *ma'rūf* are all that is known and must be performed and that whose existence is better than its non-existence."²⁴ In explaining the same verse al-Qurtūbi (d.676AH) said that "*ʿUrf*, *ma'rūf* and *ʿarifā* is anything that is good and is approved of by reason and accepted by mankind".²⁵ Al-Bayḍāwī (685AH/1282CE) in his *tafsīr* has also interpreted *ʿurf* as *ma'rūf*.²⁶

²² Al-Ṭabarī, *Jāmi'*, vol.13, pg.331

²³ Ibn al-ʿArabī, Abū Bakr Muḥammad, *Aḥkām al-Qur'ān*, vol.2, p.823

²⁴ Al-Rāzī, *Miftāḥ al-Ghaib*, vol. 4, pg. 338

²⁵ Al-Qurtubī, *Jāmi'*, vol. 7 pg. 344

²⁶ Al-Bayḍāwī, *Tafsīr*, vol. 1, pg. 372

From the above account of the interpretation of *'urf*, it can be observed that there is no direct connection between the word *'al-'urf* in this context with the technical term of *'urf* in *uṣūl al-fiqh*. However, there is another explanation which can suggest the relationship between this verse and the technical term of *'urf* in *uṣūl al-fiqh*. This can be noticed in the light of the definition of *'urf* in which *'urf* must be the habit that is accepted by reason and mankind. Thus, the meaning of *'urf* as a technical term can be incorporated into the meaning of *'urf* in the mentioned verse. Furthermore, the word *'urf* in the verse can have a variety of meanings as suggested by al-Ṭabarī. Therefore, the meaning of *'urf* in *uṣūl al-fiqh* can be included as one of these meanings. In addition, any customary practice accepted into Islamic law, must be regarded as a practice which is beneficial to society. It is possible that in their various interpretations, the *mufasssirūn* have overlooked the basic meaning of the word and concentrated on the good customs which would be accepted by Islam.

According to the Mālikī jurist, Shihāb al-Dīn al-Qarāfī (d.684AH/1285CE) this verse is explicit and provides a clear authority for *'urf*. He has quoted this verse and said that anything in it that is identified as *'ādah* must be considered as an order (in making judgement).²⁷ Beside al-Qarāfī, al-Ṭārabulsī also regards this verse as an explicit proof of *'urf*.²⁸ Those who held this view suggested that the

²⁷ Al-Qarāfī, *Kitāb al-Furūq*, vol.3, pg.149.

²⁸ Abu Sanah, *Al-'Urf wa al-'Ādah fī Ra'y al-Fuqahā'*, p.29

meaning of the word '*al-urf*' in the above verse is the custom of the people. Therefore, it can be considered as a clear proof of '*urf*'. Thus, according to these views '*urf* is clearly held in the *Qur'ān* as a source of the *Sharī'ah* and is an integral part of it, bearing in mind that these views were held by prominent specialists of *uṣūl al-fiqh*.

Muṣṭafā al-Zarqā', in discussing the proof of '*urf*', maintains that the word '*urf*' in the verse mentioned can be taken as a proof of '*urf*' through its literal meaning which is "the good deed which is acceptable", albeit the meaning of the word '*urf*' here is different from its meaning as a technical term in *uṣūl al-fiqh*. He further argued that it could be a proof of '*urf*' (as a technical term) in the sense that the customary practice of people, whether in their doings or their transactions, is normally the practice that is good to them and acceptable by reason.²⁹

The other modern scholar who agrees with Zarqā's interpretation is Kamali. He held that the literal or the *Qur'anic* meaning of '*urf*', corroborates its technical meaning and the two usages of '*urf*' are in complete harmony with one another.³⁰ However, the famous commentator of the *Qur'ān* al-Ṭabarī, has been overlooked by these modern scholars. He argues because '*urf*' in this verse could be interpreted

²⁹ Al-Zarqā', *Al-Madkhal*, vol.1, pg.133

³⁰ Kamali, *Principles*, pg.371

according to a wide variety of meanings, it cannot be quoted as textual authority for *ʿurf* in its technical legal sense.³¹

Indeed, the same argument also applies to some other verses in the *Qurʾān* in which the *Qurʾānic* meaning of *ʿurf* is claimed to corroborate its technical legal meaning. These verses are sometimes mentioned in the books of *uṣūl al-Fiqh* as *Qurʾānic* proofs of *ʿurf*. Among these verses are the sayings of God which means, "Ye are the best of people evolved for mankind, enjoining what is right (*maʿrūf*), forbidding what is wrong".³² The other verse with the same function means, "Let there arise out of you a band of people inviting to all that is good, enjoining what is right (*maʿrūf*) and forbidding what is wrong (*munkar*)".³³

The above discussion on the verse can be concluded by saying that, although this verse does not provide clear cut evidence as a direct textual authority of *ʿurf*, the various meanings of *ʿurf* given by the scholars have included the meaning of *ʿurf* as a technical term in *uṣūl al-fiqh*. Therefore, this verse can generally be considered as a secondary textual evidence of *ʿurf*.

³¹ Al-Ṭabarī, *Jāmiʿ al-Bayān*, vol.13, pg.331.

³² *Qurʾān*, 3/110

³³ *Qurʾān*, 3/104

The second occasion on which *ʿurf* is mentioned in the *Qurʾān* is in *Sūrat al-Mursalāt* (77) which says, "By the (winds) sent forth one after another (to man profit) *wal mursalāti ʿurfā*."³⁴ The commentators are in agreement that the word *ʿurf* in this verse means 'what is continuous'.³⁵ This indicates that this verse has not given any meaning that is related to *ʿurf* as a technical term in *uṣūl al-fiqh*. Indeed, it only gives one of the various literary meanings of *ʿurf*, yet the meaning given here preserves the meaning from which the technical legal term is derived.

The most frequent word that is mentioned in the *Qurʾān* is *maʿrūf*. This word has been mentioned in more than thirty places in the *Qurʾān*. The commentators have generally interpreted *maʿrūf* in the *Qurʾān* as faith in God and His Messenger and adherence to God's injunctions. However, on several occasions, when this term is applied to a particular situation or problem, the *mufasssirūn* have interpreted it as "good practice", "kindness", "justice" and "acceptable practice". It can be noticed that the interpretation of *maʿrūf* as 'an acceptable practice' is synonymous with *ʿurf*. It is only when *maʿrūf* or *ʿurf* is mentioned generally without referring to a particular situation or problem that it gives the meaning of adhering to God's injunctions. It must also be understood that for Islam adhering to God's injunctions will always involve doing good and avoiding evil.

³⁴ *Qurʾān*, 77/1

³⁵ Al-Qurṭubī, *Jāmiʿ*, vol. 19, pg. 152

The various meanings of *ma'rūf* when applied to a particular situation and problem occur in many verses in the *Qur'ān*. This can be observed in the following examples:

1. The usage of *ma'rūf* with the meaning of "good practice" can be noticed in the verse that says, "When you divorce women and they fulfil the term of their *'iddah*, either take them back according to good practice (*ma'rūf*) or set them free according to good practice (*ma'rūf*)".³⁶ The meaning of *ma'rūf* in this verse can be interpreted as good practice when a man wanted to take back his wife or free her. Perhaps acceptable practice might be another translation.

2. *Ma'rūf* with the meaning of "kindness" is clear in the verse that means, "Kind words (*qawlun ma'rūf*) and the covering of faults are better than charity followed by injury".³⁷

3. *Ma'rūf* with the meaning of "justice" can be noticed in the verse which means, "And women shall have rights similar to the rights against them,

³⁶ Qur'ān, 2/231

³⁷ Qur'ān, 2/263

according to what is just (*ma'rūf*)".³⁸ The word *ma'rūf* in this context gives the meaning of justice. However, acceptable practice might be another translation for it.

There are several verses that give the obvious meaning of "acceptable practice" for the word *ma'rūf*. These verses are seldom quoted by the scholars in their discussion on the proof of *'urf* but they could only be, at best, indirect evidence for *'urf*. The reason for this is the interpretation of the content of these verses has been left to be judged by *'urf*. The example of this is clearly elaborated in a verse on the responsibility of the father to bear the cost of food and clothing of his divorced wife and his child while the mother of the child breast feeds their infant. The meaning of this verse is, "The mother shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms (*ma'rūf*)".³⁹ Al-Jaṣṣāṣ (d.370AH) in interpreting this verse, held that to interpret this kind of verse, the customary practice must be used in order to know the value of the cost. He further commented on the other part of the same verse which means, "No soul shall have a burden laid on it greater than it can bear", and said that, *'ādah* is the mechanism

³⁸ Qur'ān, 2/228. This verse reveals about the right of husbands to take back their divorced wife in the period of *'iddah* if they wish for reconciliation.

³⁹ Qur'ān, 2/233

that determines 'the burden that the soul can bear'.⁴⁰ Whereas Al-Qurtubī (d.676AH) said that, "*Al-ma'rūf* is what is known in *'urf shar'* without negligence and exaggeration".⁴¹ Ibn Kathīr (d.774AH) in interpreting the same verse said that *al-ma'rūf* in this verse means, "What is common and practised in a place without waste and stinginess".⁴²

As it is obvious from the above interpretations, the word 'equitable terms' or '*ma'rūf*' in this verse has been left to be interpreted according to the customary practice of people. This means that the amount which the father should bear for the cost of food and clothing of the child's mother should depend on the customary practice of the people. Although *'urf* is not mentioned directly in this verse, it has been given the authority to be the source to fix the cost that must be paid by the father. Therefore, it can be said that in one way or another this verse can be considered as an indirect *Qur'ānic* proof of *'urf*.

Similarly, there is another verse which gives the same role to *'urf* according to its general purport. The verse means: "Let the man of means spend according to his means, and the man whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what He

⁴⁰ See al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol.1, pp.478/9

⁴¹ Al-Qurtubī, *Al-Jāmi'*, vol. 3. pg. 163

⁴² Ibn Kathir, *Tafsīr*, vol. 1 pg. 283

has given him."⁴³ Ibn al-ʿArabī in interpreting this verse emphasises that there are no fixed amount of sustenance that must be provided by the husband but God has left this matter to be decided by convention (*ʿādah*). He further elaborated that this is the *uṣūl* principle which was the basis of many rulings and matters pertaining to lawful and unlawful respectively (*ḥalāl* and *ḥarām*).⁴⁴ Al-Jaṣṣāṣ in his comments on the same verse stated that the amount of maintenance is to be determined by the custom of people. If the divorced wife asked for more than the normal maintenance, the husband would not be obliged to fulfil such request. Similarly if the husband provided less than the normal maintenance, he would be required to give the normal conventional amount. This indicates the role of *ʿurf* in determining the amount of maintenance that is due in cases of divorce. Again, this verse can be considered as an indirect proof of *ʿurf*'s authority as it highlights the role of *ʿurf* in the above circumstance.

Another verse that give the obvious meaning of "acceptable practice" for the word *maʿrūf* is the verse that means, "Wed them with the leave of their owners and

⁴³ *Qurʾān*, 65/7. This verse addresses the responsibility of a man towards his divorced wife. The previous verse means, "Let the women live in (*ʿiddah*) in the same style as ye live, according to your means: annoy them not, so as to restrict them. And if they carry (life in their wombs) then spend (your substance on them until they deliver their burden: and if they suckle your offspring, give them their recompense and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf."

⁴⁴ Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, vol.4, p.1842

give them their dowers according to what is acceptable practice (*ma'rūf*)".⁴⁵ In this context, the reasonable dowers are normally valued according to the acceptable practice of the people in a place and it might be different from one place to another. Therefore, the evaluation of the dower should be based on the local custom. Besides what has been mentioned, there are some other similar verses that indicate the meaning of *ma'rūf* in the above context⁴⁶. Finally, it can be concluded that the word *ma'rūf* has been used in the *Qur'ān* with association with what is understood to be the more technical legal meaning of *'urf*.

Other than the mentioned evidences from the *Qur'ānic* text to support *'urf*, there is another verse which is often quoted by the scholars which means, "God has not laid upon you any hardship in religion".⁴⁷ This is obviously not a direct and clear proof of *'urf*, but it is argued that ignoring the prevailing *'urf* which does not conflict with the *Sharī'ah* is likely to lead to inflicting hardship on the people which must be avoided.⁴⁸ Therefore, *'urf* must be considered in making judgement in order to prevent hardship from people.

⁴⁵ Qur'ān, 4/25. The meaning of the verse before this is, 'If any of you have not the means wherewith to wed free believing woman, they may wed believing girls from among those whom your right hand possess and God had full knowledge about your faith, Ye are one from another....'

⁴⁶ See Qur'ān, 4/19, 4/25 and 65/2

⁴⁷ Qur'ān 22/78

⁴⁸ Kamali, *Principles*, pg. 370

In fact, the verse mentioned above is very general in its meaning. It can give many other connotations relevant to several aspects of Islam in which God made it easy for mankind whereby the implementation of *'urf* may be considered as a way of preventing hardship from them. Actually, the only proof that can be inferred from this verse and many other similar verses from the *Qur'ān*, which shall be mentioned later, is of a very general nature. This is because these verses are considered as a general principles (*qawā'id kullīyah*) in Islam, and accordingly they can be, generally practised in all spheres of Islamic teaching including the legal ones. The verses with similar meanings and relevance in this connection are the verses such as, "God do not wish to place you in difficulties"⁴⁹ and that, "He does not want to put you in difficulties".⁵⁰

This discussion on *'urf* in the *Qur'ān* can be concluded by saying that there is no verse in the *Qur'ān* that directly demarcates the meaning of *'urf* as a technical term in *uṣūl al-fiqh*. Having discussed the topic of *'urf* in the *Qur'ān*, we shall now look at this subject in the second source of Islamic law which is the *Sunnah*.

⁴⁹ *Qur'ān* 5/6

⁵⁰ *Qur'ān*, 2/186

1.5 'Urf in the Sunnah

There are some sayings and deeds of the Prophet which can be regarded as evidence to support 'urf. Among the familiar proofs that are quoted by the scholars as an indirect evidence in support of 'urf is the following saying of the prominent Companion, 'Abd Allah b. Mas'ūd: "What the Muslims deem to be good is good in the sight of God".⁵¹ Some of the scholars have suggested this saying to be a direct *Ḥadīth* from the Prophet Himself.⁵² However, it is more likely, as al-Suyūṭī mentioned in *al-Ashbāh wa al-Nazā'ir* (d.911AH)⁵³, to be the saying of 'Abd Allah b. Mas'ūd. The proof that can be deduced from this *Ḥadīth* is that 'urf, if not against Islamic teachings, is normally considered as good practice to the Muslims and acceptable by people and reason. Therefore, such a practice is accepted by God. So, it can be regarded as a source of law for Muslims. The critics have, however, suggested that this *Ḥadīth* refers to the approval of the Muslims, meaning all Muslims, whereas 'urf varies from place to place and the approval of all Muslims in its favour cannot be taken for granted. In response to this it has been

⁵¹ This *Ḥadīth* was related by Aḥmad b. Ḥanbal in his *Musnad* and is considered as *mawqūf* because the chain (*sanad*) stops at 'Abd Allah b. Mas'ūd. *Mawqūf* means the sayings of a Companion which is not attributed to the Prophet. However, if this type of saying contains matters of *Sharī'ah*, it is considered as a *Ḥadīth* that is attributed to the Prophet. This is because the Companions have no authority to say anything about *Sharī'ah* without referring to the Prophet.

⁵² Al-Āmidī has quoted it as a *Ḥadīth*, See Al-Āmidī, *Al-Aḥkām*, vol.1, pg.305.

⁵³ Al-Suyūṭī has quoted the saying of al-'Alā'ī in which he said, "I did not find in any book of *Ḥadīth* that it (this *Ḥadīth*) is attributed to the Prophet, not even with the weakest *sanad*, after a long investigation, search and questioning. But it is the saying of 'Abd Allah b. Mas'ūd. It was related by Aḥmad in his *Musnad*. See Suyūṭī, *Al-Ashbāh*, pg.89.

further suggested that Muslims in this context only refer to those among them who possess sound intellect and judgement, and not necessarily every individual member of the Muslim community.⁵⁴ However, according to Kamāl b. Humām (d.861AH/1457CE) the prominent Ḥanafī jurist, this *Ḥadīth* gives explicit authority to *ʿurf*.⁵⁵

Although this *Ḥadīth* does not give a clear indication of *ʿurf*, it can be included in the general principles which provide indication and it could be an indirect evidence for *ʿurf*. In fact, this *Ḥadīth* has been invoked by many scholars as evidence for *ijmāʿ* (consensus of opinion) and not for *ʿurf* as such. However, if the *ijmāʿ* was based on the customary practices, then this *Ḥadīth* could be the proof of *ʿurf*, but it would refer to one kind of *ʿurf* and not to *ʿurf* in general.⁵⁶ Eventually, this *Ḥadīth* can be used as an indirect evidence for the authority of *ʿurf* but cannot be regarded as a textual authority for it.

Besides the above *Ḥadīth*, there is another *Ḥadīth* that can be regarded as an indirect evidence for *ʿurf*. Again, as the case in some of the *Qurʾānic* verses, *ʿurf* in this context assumed the role of elucidating the contents of the *Ḥadīth*. This *Ḥadīth* was reported by ʿĀʾishah. She said: "Hind, the daughter of ʿUtbah, wife

⁵⁴ Kamali, *Principles*, pp.371/2

⁵⁵ Badran, *Uṣūl*, pg.226

⁵⁶ Zaydān, *Al-Wajīz fī Uṣūl al-Fiqh*, pg.254

of Abū Sufyān, came to God's Messenger and said: "Abū Sufyān is a miserly person. He does not give adequate maintenance for me and my children, but (I am constrained) to take from his wealth (some part of it) without his knowledge. Is there any sin for me?" Thereupon God's Messenger said: "Take from his property what is customary (*ma'rūf*) which may suffice you and your children".⁵⁷ Ibn Ḥajar al-ʿAsqalānī (d.975AH/1567CE), the famous commentator on *Sunnah*, comments on this *Ḥadith* saying that *al-ma'rūf* in this *Ḥadith* means the amount that is known to be enough by *ʿādah*. He further held that this *Ḥadith*, too, indicates that *ʿurf* should be relied upon in matters where the *Sharʿ* did not give the exact details.⁵⁸ Another famous commentator on *Sunnah*, Al-Nawāwī (d.676AH/1277CE) said that one of the lessons that can be drawn from this *Ḥadith* is that *ʿurf* must be utilised in order to resolve the problems which the *Sharaʿ* did not specify.⁵⁹ What Al-Nawāwī meant in this context is that the Prophet did not delimit any amount for Hind to take from her husband. Therefore, this matter has been left to be decided by Hind according to what is customary which may suffice her and her children.

The above *Ḥadith*, signifies that one of the methods of solving the cases in which the *Sharaʿ* did not give precise details is by depending on the common

⁵⁷ Bukharī, *Ṣaḥīḥ al-Bukharī*, Kitāb al-Nafaqāt, 9 and 14. Muslim, *Ṣaḥīḥ Muslim*, Kitāb al-ʿAqdiyyah, 7. It is also related in Abū Daud, *Nasaʿī*, Al-Dārimī and Musnad Aḥmad Ibn Ḥanbal.

⁵⁸ See Al-ʿAsqalānī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, vol.9, pp.419/20

⁵⁹ Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Nawawī*, vol.12 pg.8

practice of people, i.e. *'urf*. This means that, through this *Ḥadīth* the Prophet has approved the usage of *'urf* in judging and determining certain matters which the *Shara'* did not determine nor quantify.

Other than the sayings of the Prophets (*al-Sunnah al-qawliyyah*), there are evidences from *al-Sunnah al-taqrīriyyah* which indicates the permission to utilise the *'urf* of the people. *Al-Sunnah al-taqrīriyyah* is the silence of the Prophet towards a practice and his silence indicates his endorsement of the practice. Indeed, there are many instances in which the Prophet has silence on the practices of the people at his time such as the practice of *salam* as mentioned by al-Bukhārī (d.256AH) in his book. The acceptance of the practice of the pre-Islamic Arabs also indicates the permission to utilise *'urf*.⁶⁰ Furthermore, the Prophet himself practiced some of the Arab's customs, which can be regarded as his approval of utilising *'urf*.

The other important piece of information from the Prophet which indicates the importance of *'urf* is what is stated in the Constitution of Medina. In this document the Prophet has used the word *'ma'rūf*' frequently when describing the responsibilities of the tribes towards each others. Among the examples from the text is the excerpt which says, "The *Muhājirūn* of Quraysh are in charge of the management of their affairs, paying jointly among themselves their blood-money,

⁶⁰ See chapter two for detail.

and they will ransom a prisoner of them in accordance with what is customary (*ma'rūf*) and by fair sharing among the *mu'minūn*".⁶¹ The word *ma'rūf* in this context can be translated as 'what is customary' among the people at that time. Serjeant in his translation of the Constitution of Medina regarded the word *ma'rūf* in this context to mean *shar'*, a word used in south-west Arabia for customary laws.⁶² This is another evidence which indicates the Prophetic approval of utilising *'urf* where possible.

The previous discussion, on *'urf* in the *Qur'ān* and *Sunnah*, indicates that there are no direct textual evidences from these two sources that can be suggested as explicit authority for *'urf*. However, the role that is given to *'urf* suggested the importance and significance of this source in making judgements.

1.6 *'Urf* in *Ijmā'*

Earlier and more recent scholars of Islamic law have agreed that *'urf* is an important source in Islamic law. They have not objected to the role of *'urf* in solving the problems that arise in Islamic law.⁶³ This is obvious in the past and

⁶¹ See Serjeant, R.B., *The Sunnah Jāmi'ah, Pacts With the Yathrib Jews, and the Tahrīm of Yathrib: Analysis and Translation of the Documents Comprised in The So-Called 'Constitution of Medina'* p. 16, in the Bulletin of School of Oriental and African Studies, University of London, vol. 41, 1978.

⁶² Ibid, p.21 note (2b). For further detail on the usages of *ma'rūf* see this document pp.16-21

⁶³ Badrān, *Uṣūl*, p.226, Kamalī, *Principles*, p.372, Zaydān, *Al-Wajīz*, p.254

present literature of *fiqh* in which *ʿurf* has been utilised by the jurists to solve many problems of *fiqh*.⁶⁴ Furthermore, there are many legal maxims in *fiqh* formulated by the jurists which have described the role of *ʿurf* that can effect the decision on certain cases. Among the relevant legal maxims in this context is that which reads, "A matter recognised by *ʿurf* is regarded as if it were a contractual obligation" (*al-maʿrūf ʿurfān ka-al-mashrūt shartān*) (Majallah 43)⁶⁵, "Custom is an arbiter" (*al-ʿādah muḥakkamah*) (Majallah 36)⁶⁶ and "A matter established by custom is like that established by text" (*al-thābit bi-al-ʿurf ka-al-thābit bi-al-naṣṣ*) (Majallah 45). In addition to the mentioned legal maxims, there are many other maxims that give prominence to the role of *ʿurf* in Islamic legislation.⁶⁷ Indeed, this endorsement of *ʿurf* by the scholars can be regarded as *al-ijmāʿ al-ʿamalī* (practical *ijmāʿ*) as it is also a form of *ijmāʿ* as mentioned by al-Qarāfī.⁶⁸

The above mentioned points indicate that *ʿurf* has been recognised by the scholars as an important source in Islamic law. Indeed, the utilisation of *ʿurf* by the scholars can also be regarded as silent consensus of opinion among them (*ijmāʿ*)

⁶⁴ This can be notice in the discussion on The Development of *ʿUrf* From the Prophetic Period to the Present Time, in chapter three

⁶⁵ This refers to the article number in the Majallat al-Aḥkām al-ʿAdliyyah, the Ottoman civil code

⁶⁶ This means that custom, whether public or private, may be invoked to justify the giving of judgement. See Hooper, *The Civil Law*, vol.1, p.20

⁶⁷ See chapter five for detailed discussion.

⁶⁸ See Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, p.322

sukūti). This is because the scholars admits the importance of considering the practices of the people in making legal judgements.

* * *

The result of this whole debate over the authoritativeness of *urf* seems to be that notwithstanding the significant role that it has played in the development of the *Sharī'ah*, it is not an independent proof in its own right⁶⁹. In fact, the arguments for the scholars in recognising *urf* as a proof, have been partly due to the circumstantial character of *urf* that it is changeable with the change of circumstances, time and place. This means that the rules of *fiqh* that have been formulated according to the prevailing custom at one time can be changed if the prevailing custom is no longer being practised. This is the reason why we can find the different *fatāwā* given by the scholars on particular issues due to the changes of customs on which an earlier *fatwā* was founded.

The instances of the usages of *urf* in the *Qur'ān* and *Sunnah* also indicate that it is not being used as a main source to deduce the rule of *fiqh* or to solve a problem that arises, but it is only depended upon to make clear the matter which is not clear. This signifies its role as a supportive source and not as a main independent source of legislation.

⁶⁹ Kamali, *Principles*, pg.372. Badrān, *Uṣūl*, pg.233. Zāydān, *Al-Wajīz*, pg.254.

1.7 Types of 'Urf.

Islamic jurists have developed a classification of the different types of 'urf and have divided them into two main types, namely verbal (*al-qawli*) and practical (*al-'amali*). It can be further divided according to its ambit into general (*al-'āmm*), which is practised everywhere by all people, and particular (*al-khāṣṣ*) which is practised by certain group of people of particular backgrounds. 'Urf whether verbal or practical, general or particular can be further divided into two categories, namely valid 'urf (*al-'urf al-ṣaḥīḥ*) and invalid 'urf (*al-'urf al-fāsid*). These kinds of 'urf will be discussed as follows:

1. The Qawli and 'Amali 'Urf

Qawli 'urf consists of the general agreement of the people on the usage and meaning of words for purposes other than their literal meanings. As a result of such agreement, the customary meaning tends to become dominant and the original or literal meaning is reduced to an exception. There are many instances in the *Qur'ān* and *Sunnah* whereby certain words have been used in other than their literal meanings and this has been commonly accepted by the people. As an example the word *ṣalāh*. The literal meaning of this word is *al-du'ā'*⁷⁰ which means supplication or request, which has, however, been used in the *Qur'ān* to describe

⁷⁰ Al-Rāzī, *Mukhtār al-Ṣiḥāh*, p. 368

the obligatory ritual prayers of the Muslims. This second usage eventually became dominant insofar as the literal meaning of this word is reduced to obscurity.

There are also instances in the *Qur'ān* in which the literal meaning of a word is applied regardless of the customary meaning. As an example the word *walad* in the verse that means "... for parents, a sixth share of the inheritance to each, if the deceased left children (*walad*); if no children ...".⁷¹ *Walad* in this context refers to its literal meaning that is offspring whether a son or daughter; but in its popular usage among the Arabs *walad* is used for sons only. Similarly the word *lahm* which is mentioned in the verse that means "It is he who has made the sea subject, that ye may eat thereof flesh (*lahm*) that is fresh and tender...".⁷² The word *lahm* in this verse includes fish but in its customary usage, it is only applied to meat and not fish.

The other common example of *'urf qawli* is the usage of certain words among certain groups of people such as the usage of the word 'doctor'. In the Universities normally this title refers to a person who holds a Phd degree but in the hospital this word normally refers to a medical practitioner.

⁷¹ *Qur'ān* 4/11

⁷² *Qur'ān* 16/14

One important point about this type of *'urf* is that it has a strong effect on making judgements. Whenever these words which have a different meaning in customary usage occur in contracts, oaths and commercial transactions, the customary meaning prevails. The reason for this is that if the literal meaning is considered without taking into account the customary connotation, this will lead to an understanding that is not meant by the people and the word might cause confusion. In fact, the legal maxim that reads: In the presence of custom no regard is paid to the literal meaning of a thing, (*al-ḥaqīqat tutrak bi-dalālāt al-ʿādah*) (Majallah, 40) confirms the customary meaning that must be followed as mentioned above.

Among the examples of the customary usage that prevail over the literal meaning which occurs in oath is as follows: when a person takes an oath that he will never 'set his foot' in so and so's house, what is meant by this expression is the customary meaning which is, actually entering the house. In this sense, the person will have broken the oath if he enters the house while never 'setting his foot' such as entering the house while riding. But if he only technically sets his foot in the house without entering it, he will not be liable to expiation (*kaffārah*) for flouting the oath.⁷³

⁷³ Zarqā', *Al-Madkhal*, vol.2, pg.853. Kamali, *Principles*, pg.368.

The effect of the customary meaning of a word is significantly strong in this type of *ʿurf*. This is the reason why the customary meaning of a word will prevail if it contradicts the literal meaning or the *Qurʾānic* meaning. This point is agreed on by the scholars who have formulated a general principle that states: The words of person who swears an oath, makes a vow, makes a bequest or makes a charitable endowment is understood (binding) according to his language and the customary meaning thereof, even though it contradicts the literal meaning or the *Qurʾānic* (technical) meaning.⁷⁴ Accordingly, the scholars have made many judgements on various problems. For instance, if a person swears that he will not eat meat (*lahm*), he would not violate his oath by eating fish even though in the verse previously cited⁷⁵ in the *Qurʾān* the word *lahm* includes fish. This is because the customary usage of *lahm* refers to meat not fish. So, in this case the customary meaning prevails even though it contradicts that meaning in the *Qurʾān*.

As for *al-ʿurf al-ʿamalī*, it consists of commonly recurrent practices of the people in daily life and in civil transactions. Recurrent practices in normal daily life means the private practices in life which have nothing to do with other people, such as eating, sleeping, cultivating and other such matters. The recurrent practices in civil transactions refers to the practices that are meant to avoid causes for legal

⁷⁴ Ibn ʿĀbidin, *Majmūʿah Rasāʾil Ibn ʿAbidin*, pg.131.

⁷⁵ See page 46

disputes. This would normally involve two contracting parties, i.e. sales, rents, marriages and other similar contracts.⁷⁶

An example of *al-ʿurf al-ʿamālī* which occurs in normal daily life is the practice of people in certain places of taking vacations on certain days, e.g. the New Year day. So, taking vacation on this day is considered as an *ʿurf* for a certain group of people and can be used by such a group every year. An example for *al-ʿurf al-ʿamālī* that involves transactions is the sale of offering and accepting, or *bayʿ al-taʿātib*, which is normally concluded without the utterance of offer and acceptance. Similarly, customary rules regarding the payment of dower in marriage may require a certain amount to be paid at the time of contract and the rest at a later date.

This type of *ʿurf* also has played an important role in being the element that will effect the judgement in making the rule of *fiqh* in Islamic law as long as it does not contradict a clear text. It is also considered as the first step of reference in many subjects in Islamic law where there are no clear texts on the problem. This point is stated in the legal maxim that reads: A matter established by custom is like a matter established by text (*al-thābit bi-al-ʿurf ka-al-thābit bi-al-nāṣṣ*) (Majallah, 45). Consequently, many rules of *fiqh* are based on this type of *ʿurf*

⁷⁶ Zarqāʾ, *Al-Madkhal*, vol.2, pp.846/7.

whether it is the *'urf* of the people in private daily life or the *'urf* that involves civil transactions.

The effect of *al-'urf al-'amalī* in private daily life in making the rules of *fiqh* can be noticed in the following examples. If the common practice of a certain group of people is eating mutton and one of them takes an oath that he will never eat meat without mentioning any type of meat, the type of meat in this case must be referred to the common types which are eaten in that specific place, i.e. mutton. So a person does not break his oath if he eats beef or any other kind of meat except mutton. The juristic justification of this case is that *al-'urf al-'amalī* can be used to specify a general matter. This point is mentioned in the legal maxim that reads: *al-'ādah al-muḥakkamah* (custom is an arbiter) (Majallah 36). This legal maxim gives *'urf* the authority to specify a matter that is not clear. Similarly, it is not permissible for a property holder to spend his property to the extent that he harms others. Otherwise, he would be liable to compensation and persecution. The criteria used for judging the overspending in property must be according to *'urf*. As an example, if a person starts a fire on his land and the fire spreads and damages anything on his neighbour's property, he is not liable to pay compensation if the fire was set alight according to proper safe practices. But if he started the fire in a dangerous and abnormal way or in a strong wind, he would be liable to pay compensation.

The effect of *'urf al-'amalī* that involves transactions can be seen in the following examples. It is mentioned in a *Ḥadīth* that the silence of a virgin when told of her impending marriage is deemed as consent to that marriage. This is because it is commonly accepted by the jurists that a girl may be too shy to express her willingness to get married. So, silence as consent for marriage is valid *'urf* in a marriage contract. Another example is in a sales contract such as in the selling of a car where the seller cannot charge extra charges for the accessories that are regarded as ordinary fixtures in the car. In this case, the seller cannot charge extra costs on the accessories as the cost of the accessories are included as part of the car price customarily.

2. The *'Āmm and Khāss 'Urf*

'Urf, whether verbal or in practice is once again divided into two types, namely; general (*al-'urf al-'āmm*) and particular (*al-'urf al-khāṣṣ*). The general *'urf* is the common custom which is prevalent everywhere among all people in a matter regardless of the passage of time. The example of this is the contract of *istiṣnā'*⁷⁷ in many matters such as clothing, furniture etc. This type of contract is a necessity

⁷⁷ *Istiṣnā'* means the order for the manufacture of goods at an agreed price. According to a *Ḥadīth*, "The Prophet prohibited sale of non-existing objects but he permitted *salam*. The general prohibition in this *Ḥadīth* would equally apply to *istiṣnā'* as in this case too the object of sale is non-existent at the time of contract. But since *istiṣnā'* was commonly practiced among people of all ages, the jurists have validated it on the grounds of general *'urf*. See Zarqā', *Madkhal*, vol.2, pg.896.



and is commonly practised everywhere. Similarly, the customary practice of charging a fixed price for entry to public bath which is anomalous to a strict requirements of sale (as it entails consuming an unknown quantity of water) but the people have accepted it and it is therefore valid.⁷⁸

Particular custom is *'urf* which is prevalent in a particular locality, profession or trade. This type of *'urf* is accepted by the people in a particular place and not in all places. The example for this type of *'urf* is such as the practices of certain people in certain places to offer food to those who offer a prayer for a dead person. The usage of certain terms among a certain group of people also can be included in this type of *'urf* such as the usage of the word 'doctor' as mentioned earlier.⁷⁹

3. The *Sahīh* and *Fāsid 'urf*

Finally, custom is once again divided into valid (*al-'urf al-ṣahīh*) and invalid custom (*al-'urf al-fāsid*). The valid custom is the *'urf* that is practised by the people, which does not contravene the *Shari'ah* and deny the interest of people and at the same time does not bring corruption.⁸⁰ Many of the examples mentioned

⁷⁸ Zaydan, *Al-Wajīz*, pg.252. Kamali, *Principles*, pp.368/9.

⁷⁹ See page 46

⁸⁰ Zaydān, *Al-Wajīz*, pg. 253

above come within the scope of this type of *'urf*. On the other hand, the invalid custom is the custom that is practised by the people but there is evidence to show that it is against the principles of *Shari'ah* or it denies the interest of people or it brings corruption. An example of this type of *'urf* is the practice of usury in transactions. Although it is common among many people, it clearly contradicts the clear text of the *Qur'an* and *Sunnah*. Therefore, such transactions are invalid and must be avoided by Muslims.

1.8 Conditions of Valid 'Urf

It is obvious that not all the customary practices of the people can be validly taken as supportive sources in Islamic law. The scholars have, however, set the conditions that must be fulfilled in a customary practice in order to consider it as valid *'urf*. Beside being reasonable and acceptable to the people with wise reason and sound behaviour, *'urf*, in order to be authoritative, must fulfil the following requirements:

1. *'Urf* must represent common and recurrent phenomena⁸¹. This means that the *'urf* must be practised by the people commonly and frequently in their daily life. The practice of a few individuals or a limited number of people within a large community will not be authoritative. In addition, the

⁸¹ Suyūṭī, *Al-Ashbāh wa al-Nazā'ir*, pg.92

practices which are commonly mentioned in the book of *fiqh*, and not practice by the people cannot be the basis of a legal decision. The substance of this condition is mentioned in The *Majallat al-Ahkām al-Adliyyah* (article 41) which reads: Effect is only given to custom where it is of regular occurrence or when universally prevailing (*innamā tuṭabar al-ādah idhā ittāradat aw-ghalabat*). Article 42 explains the matter further: Thus effect is given to what is of common occurrence, not to what happens infrequently (*al-ṭibrah li-al-ghālib al-sha'ī' lā li-al-nādir*). An example is that if a sale is concluded in a city where two or three currencies are commonly accepted and the contract in question does not specify any, the one which is the more dominant and common will be deemed applicable.⁸²

Custom, in order to be authoritative, must also be dominant in the sense that it is observed in all or most of the cases to which it can apply. If it is observed in some cases but not in others, it is not authoritative. Similarly, if there are two different customary practices on the same matter, the one which is dominant is to be upheld. In the occurrence where a customary practice is practised by some people and not by some others, and the amount of both are equal, it cannot be the basis of judicial decisions.⁸³ The reason for this is, that, this practise is uncommon to the whole society,

⁸² Suyutī, *Al-Ashbāh*, p.92

⁸³ Zarqā, *Al-Madkhal*, vol.2, pg. 875

therefore, it will only benefit part of the society and not the rest. Furthermore, this kind of *'urf* must not be imposed on the society that is not familiar with such practices as they will not benefit it. This type of *'urf* is called *'urf mushtarik* or collective *'urf*.

One important point that should be mentioned here is that, this particular condition must be fulfilled by both the *'āmm* and the *khāṣṣ 'urf*. This is because the common and recurrent *'urf* is not always considered as *al-'urf al-'āmm*. *Al-'urf al-'āmm* although prevailing everywhere, is sometimes not practised by many people. Accordingly, it cannot be a sound basis for judicial decisions. On the other hand, *al-'urf al-khāṣṣ* though prevalent in a particular locality or profession, is sometimes common and recurrent in certain places or among certain groups of people. Therefore, it can be a strong basis for judicial decisions.⁸⁴

2. The custom must be in existence at the time the transaction is concluded. This means in order for *'urf* to be considered as a basis for judicial decisions, the practice must be prevalent at the time the transaction is concluded and not an extinct customary practice. This condition is particularly relevant to the interpretation of documents or sayings which are to be understood in the light of the custom that prevailed at the time they

⁸⁴Zarqā', *Al-Madkhal*, vol.2, p.875

were written or uttered. Furthermore, this condition is also significantly related to *'urf qawli* and *fi'li*. In *'urf qawli* the saying of a person is understood as being based on the customary meaning and not on the linguistic meaning of the word as mentioned earlier.⁸⁵ In this respect, if the customary meaning changes after the transaction has been concluded and if there arises a problem concerning the interpretations and implications of the transaction, it must be referred to the customary meaning when the transaction was concluded and not the customary meaning that occurs later. As an example: if a person said that he intends to make a bequest (*waṣīyyah*) of part of his property to an *'ālim* (scholar), and the customary meaning of this word at that time refers to those who are experts in religious matter, part of his inheritance must be given to those who are experts in religious matters, albeit, the same word might be used, customarily, for people who are expert in any field and not necessarily to the experts in religious matters.⁸⁶

Indeed, the *Shari'ah* text also must be understood according to their customary denotations at the time they were revealed and not according to the customary meaning which occurred later on. For instance, the customary meaning of the word *'ibn al-sabil'* (the wayfarer) which was

⁸⁵ See the discussion on *al-'urf al-qawli*

⁸⁶ Zaydān, *Al-Wajiz*, pg.257

mentioned in the verse that described the group of people who are qualified to receive *zakāh* money⁸⁷, referred, when the text was revealed, to strangers who were stranded in journey because of not having enough money.⁸⁸ However, if the customary meaning of this word changed later on to another meaning, e.g. a child without parents or some other meaning, the first meaning must prevail regardless of the word's new purport. This is because the first meaning is the meaning that was meant by that specific text.⁸⁹

Similarly in *al-'urf al-fi'lī* the customary practice considered is the practice that exists at the time the transaction was concluded. An example is that the determination of the date of a transaction is considered according to the practice of the place, whether the *Hijrī* date is used or the Christian one. If the Christian calendar is used when the transaction is concluded, that must be referred to, although, after that it can be changed to the *Hijrī* calendar.

3. The custom must not contravene the clear stipulation of an agreement. This pre-requisite clearly has specified the legal maxim that reads: "A matter recognized by custom is regarded as though it is a contractual

⁸⁷ See *Qur'ān*, 9/60

⁸⁸ See Ibn Kathīr, *Tafsīr*, vol.2, pg.366

⁸⁹ Zarqā', *Al-Madkhal*, vol.2. pg.877,878

obligation", (*al-ma'rūf 'urfan ka-al-mashrūṭ shartan*) (Majallah, 45) and also: "A matter recognized by merchant is regarded as being a contractual obligation between them", (*al-ma'ruf bayna al-tujjār ka-al mashrūṭ baynahum*). Although this legal maxim gives the authority for *'urf* to be as a stipulated agreement, it can only be applied if there is no contractual agreement made in the transaction. This is because a custom is only an equivalent of an implied condition. It will not be valid if it is contrary to an explicit condition. The general rule is that contractual agreements prevail over customs. Should there arise a conflict between them, it will normally be determined in the favour of the former. An example is that the costs of formal registration in the sale of a real property are customarily payable by the purchaser. But if there is a stipulation in the contract that specifically requires the vendor to bear these costs, then the custom would be of no avail and the purchaser would not be required to pay these costs.⁹⁰

4. *'Urf* must be conceived as of a necessary obligation (*mulzaman*) by the member of a community in its application. The Mālikī and Ḥanafī schools have given a special condition for the application of such custom. This condition can be seen in the practice of presenting gifts by neighbours to the bride or groom in the marriage ceremony (*'urs*). On divorcing, this gift must be returned to them by the bride or the groom with approximately the

⁹⁰ Kamali, *Principles*, pg. 364

same value only if the custom of the people requires such practice to be made.⁹¹

5. Finally, the custom must not be in conflict with *Qur'ān* or *Sunnah* (*naṣṣ*). The opposition of custom to the *naṣṣ* may be absolute or partial. In cases of absolute conflict, the custom will have no effect because texts override customs. Examples of such conflicts are the practices of usury (*ribā'*) and of disinheriting female heirs. Although they are widely practised, they have no legal validity, because they contradict explicit *nuṣūṣ* (pl. of *naṣṣ*). However, if the conflict between the custom and the text is not absolute, where custom opposes only certain aspects of the text, then the custom is allowed to act as a limiting factor on the text.⁹²

⁹¹ Abu Sanah, *Al-'Urf wa al-'Ādah*, pp.86-7

⁹²See chapter four for detail

CHAPTER TWO

The Relationship Between Islamic Law and the Customary

Practice of the Arabs of the *Jāhiliyyah*¹

2.1 Introduction

Before any further discussion into this subject can take place, it is appropriate to understand the conditions of the Arabs before the advent of Islam. When Islam came, the Arabs' society was generally nomadic. The population consisted of two classes: first, there were the desert nomads who led a more or less roving life and were called Bedouins, and, second, there were the town-dwellers who to some extent led a more settled form of existence. The *Qur'ān* describes the Bedouins as follows:

"The Arabs of the desert are the worst in unbelief and hypocrisy and most fitted to be in ignorance of the command which God hath sent down to His Apostle, but God is all-Knowing, all-Wise".²

¹ *Jāhiliyyah* is a term that was used after the emergence of Islam to describe the situation before Islam. See Muhammad Kurd 'Ali, *Al-Islām wa al-Ḥadārah al-'Arabiyyah*, vol.1, p.119

² *Qur'ān*, 9/97

The Qur'ān has further described the condition of the Arabs in other verses. Among these verses is the verse which describes their customs when a female child is born:

"When news is brought to one of them of (the birth of) a female (child), his face darkens, and he is filled with inward grief, with shame does he hide himself from his people because of the bad news he has had! shall he retain it on (sufferance and) contempt or bury it in the dust?. Ah! what an evil (choice) they decide on?".³

Another verse describes how they sometimes married their fathers' wives after they died:

"And marry not women whom your father married except what is past it was shameful and odious, an abominable custom (*sabīl*) indeed".⁴

In addition, there are many *Qur'ānic* verses that describes some aspects of the Arabs' life before Islam.⁵

Ibn Ishāq (d.150AH/767CE) reported in his book of *Sīrah* some practices of the Arabs. In one account, he mentioned the Muslims who emigrated to Abyssinia in order to save themselves from the Makkan pagans. The Makkan

³ *Qur'ān* 16/58-59

⁴ *Qur'ān*, 4/22

⁵ See *Qur'ān*, 17/31, 4/23, and 33/4,37.

pagans sent two messengers to the King of Abyssinia to bring back those Muslim emigrants. The King refused to return them to the Quraysh and when the King asked the Muslims about their new religion for which they had forsaken their people, without converting to his religion or any other religion, Ja'far b. Abī Tālib, the leader of the Muslims, answered him, saying:

"O'King, we were an uncivilized people, worshipping idols, eating corpses, committing abominations, breaking natural ties, treating guests badly and our strong devoured our weak. Thus we were until God sent us an Apostle whose lineage, veracity, trustworthiness and clemency we all acknowledge".⁶

The above account of Ja'far b. Abī Tālib indicates some of the customs and conditions of the *jāhiliyyah* Arabs. Indeed, Jawād 'Alī has described the mentality of the *jāhiliyyah* Arabs as:

"An aggressive people who attacked and killed each other, they also attacked the trade convoys, robbed, captured and enslaved them. Then they might sell them in the slave market or they might take them as their servants".⁷

R.A. Nicholson further elaborated the above point in his book, while discussing the subject of the Legends of the Pagan Arabs:

⁶ Ibn Ishāq, *The Life of Muhammad*, p.151.

⁷ 'Alī, Jawād, *Al-Mufaṣṣal fī Tārikh al-'Arab Qabl al-Islām*, Vol.1, p.262.

"The pre-Islamic history of the Bedouins is mainly a record of wars, or rather guerillas, in which a great deal of raiding and plundering was accomplished as a rule without serious bloodshed. There was no lack of shouting; camels and women were carried off; many skirmishes took place but few pitched battles: it was an Homeric kind of warfare that called forth individual exertion in the highest degree, and gave ample opportunity for single-handed deeds of heroism".⁸

Among the other practices that were common among the Arabs was the marriage of a woman to several men. It seems that this was a normal practice among them at that time. W.M. Watt described this point in his book, 'Muhammad Prophet and Statesman' as follows:

"One report says that in pre-Islamic times there were some woman who had one husband at a time, some who had up to ten, and some who had sexual relations with any man who came to them----. What is clear, however, is that in such a system it was not important for most purposes to know who a child's father was; it was sufficient to know his mother. The child belonged to his mother's family and lived in her family house (or tent)".⁹

⁸ Nicholson, *A Literary History of The Arabs*, pp. 54-55.

⁹ Watt, *Muhammad Prophet and Statesman*, p.153

As far as the judicial system is concerned, there was no proper legal system practised by the Arabs. They were observed to have followed the customary practices that were known among the majority of the Arabs. There was no single executive body that had the authority to issue any judgment; instead, most of the problems were referred to the leader of the tribe or to the priest. As we are aware, the tribe was the principal unit and was very important in the life of the Arabs. As such, the tribal chief exercised great power and influence. These leaders or priests would judge according to their knowledge of the existing customary practices at that time¹⁰. Once the judgement was issued, they might be obeyed or ignored as there was no executive body that had the power to enforce the judgement. These judgements issued were not standard and could vary from one person to another.

It is obvious from the above quotations that the life of the Arabs was disorganised and indeed, it was not an easy task to change the system and way of life in which they were living. Consequently, when Islam came, it recognised some of the Arabs' customs and approved some of them as part of its law. One of the various reasons for this was to make it easy for them to accept Islam. Furthermore, because the Islamic legal system is well known to have its origin from Arabia and to have been developed by Arab jurists, we should therefore, naturally expect to find in it the impress of Arabia's social history and of the Arab

¹⁰ Zaydān, *Al-Madkhal*, p.25

mind and character. Moreover, it is incorrect to assume that Islam professed to revoke the entire customary practices of Arabia, and to replace them with a new law altogether. This is because, the groundwork of the Islamic legal system, similar to many other legal systems, is to be found in the customs and usages of the people among whom it grew and developed.¹¹ This led to Islamic law including some rules of pre-Islamic customary practices which have been embodied in it by express or implied recognition.

As far as the sources of the practices are concerned, they were known through the pre-Islamic and early Islamic poetry and through the tales of the tribes.¹² Some of these practices were mentioned in the *Qur'ān* and *Sunnah*. One point that should be noticed is that most of the practices of the Arabs are not known in complete detail.

In the following discussion we will examine the similarities and differences between the Islamic law and the pre-Islamic Arab practices in several fields namely, the criminal and evidence law, the family law, the inheritance law and the commercial law. In addition, this section will also examine the practices which Islam has recognised and altered.

¹¹ Abdur Rahim, *Muhammadan Jurisprudence*, p.1

¹² Schacht, *Introduction*, pg.6

2.2 Comparison Between the Islamic Law and *Jāhiliyyah* Criminal and Evidence Practice

There are several similarities and differences in the criminal law of the *jāhiliyyah* and Islam and many of these *jāhiliyyah* customary practices were adopted, with modification, by the law of Islam. Among the most obvious *jāhiliyyah* criminal practices that were adopted by Islam is blood revenge (*al-tha'r*). The original idea of *al-tha'r* is retaliation for a slain man or one who has been wounded. If we read the stories of the *jāhiliyyah*, we will find that the practice of *al-tha'r* is more dominated by the notion of vengeance¹³. This means that the loss of a tribal member must be avenged by the infliction of a similar loss on the culprit tribe which is collectively responsible for the deeds of one of their members. Until sufficient vengeance had been made, the soul of the victim could not rest in peace; and since the natural inclination was for a tribe to set an exaggerated value on the member it had lost, two or more lives might be claimed in revenge for a single victim.¹⁴ In this case of blood-revenge, the ultimate kindred group must always act together and this group was not only the family and relatives of the victim but encompassed all those who are members of the same tribe.¹⁵ This is because all the members of a group regarded themselves as of one blood. There is a well

¹³ A story of this kind is stated in Nicholson, *A Literary History of The Arabs*, pp.94-7.

¹⁴ Coulson, *History of Islamic Law*, p.18

¹⁵ Smith, *Kinship and Marriage in Early Arabia*, p.26

known maxim of the desert that described the responsibilities of the tribal members to help their fellow tribesman. This maxim read, *unṣur akhāka zālīman aw-mazlūman* which means 'help your brother, (i.e.fellow-tribesman) whether he is an oppressor or an oppressed one'¹⁶. On the other hand, if a man kills one of the member of his own tribal group, he will find no one on his side. Either he is put to death by his own people or he becomes an outlaw and must take refuge with another tribe.¹⁷

Blood-revenge was considered as a peremptory matter in the *jāhiliyyah* community because there was a principle established among them which reads, '*al-dam lā yughsal 'illa bi-al-dam*' which means blood cannot be cleansed except with blood.¹⁸ If the victim's family was willing to accept compensation in the form of money or property, this would be considered as a disgrace and was not accepted by anyone other than those who were weak at heart. The other important point concerning the blood-revenge was that they would kill a person who was equivalent in rank and status to the victim. For instance, if a commoner or a slave of a tribe kills the leader of another tribe, the killer will not be killed in revenge

¹⁶ See Izutsu, *Ethico-Religious Concepts in the Qur'ān*, pp.45-6. This maxim is also a *Ḥadith* of the Prophet. But the meaning of this maxim is different in *jāhiliyyah* and Islam. Its meaning in Islam is elaborated in the same *Ḥadith* in which the Prophet said, "Help your brother, whether he is an oppressor or he is oppressed one". People asked, "O, God's Apostle ! It is all right to help him if he is oppressed but how should we help him if he is an oppressor?". The Prophet said, "By preventing him from oppressing others". See, al-Bukhārī, *Ṣaḥīḥ* vol.3, pg.374.

¹⁷ op.cit, p.25

¹⁸ (Alī, Jawād, *Al-Mufaṣṣal*, vol.4, p.398

as he is not at par with the victim. Instead, the victim will be avenged by killing the leader of the tribe to which the killer belongs or a person who is considered to be of equal status to the slain leader, even if the leader is not a direct blood relative of the killer. This is because, to them, a leader is equal to a leader, and as such, none could be a substitute for the leader.¹⁹ In some cases, if a tribal clan (*ḥayy*) was numerous and powerful, and one of their slaves was killed by the slave of another *ḥayy*, they would take revenge by killing a free man from the other tribe, because, they felt they were better than the others. Similarly, if a women was killed, they would take revenge by killing a man from the culprit's tribe.²⁰

In addition, in the *jāhiliyyah* period they also differentiated between two types of murder. The first is the intentional killing (*qatl al-ʿamd*) and the second is the unintentional killing (*qatl al-khaṭaʿ*) which means that the killing occurred accidentally without their being any intention to kill. The punishment that was fixed for these two types of killing differed insofar as vengeance for unintentional killing was lighter than for intentional killing. To determine whether a murder is intentional or unintentional, it is normally decided by the leader or a person appointed to be the arbitrator. In fact the leader or arbitrator has the right to sentence the killer with other punishment if he does not want the killer to be

¹⁹ Ibid, vol.4, pg.399 and vol.5, pg.581

²⁰ Al-Ṭabarī, *Tafsīr*, vol.2, p.103. See also Al-Qurṭubī, *Al-Jāmiʿ*, vol.2, p.245.

condemned to death.²¹ This point is mentioned in one of the clauses of the Qaṭabāni²² law which stated, "If anyone murdered a member of Qaṭabān or its branches or its alliance, he would be killed, unless if the leader (*Mālik*) decided another punishment which is deduced from the law followed by other groups namely the group of Tamna³ and 'Allān and Ṣayram."²³

On the other hand, this law of Qaṭabān also gave an exemption from killing a person who murdered other and try to escape from the punishment imposed on them. For instance, if the ruler has judged that A should be killed because he murdered B, but before the punishment is carried out A ran away and was murdered by C. In this case C is not liable for the charge of killing A because A tried to avoid the punishment that was imposed on him. This was also applied to a person who committed a serious offence or did something which disturbed the security of the public or someone who did not obey the rulers.²⁴

In the *jāhiliyyah* customary practice the avenger of blood (*walī al-dam*) is a person who has more right than the right of the whole tribe to take blood revenge

²¹ See 'Ali, Jawad, *Al-Mufaṣṣal*, vol.5, pp. 581-2

²² Qaṭbān is a group of pre-Islamic people who lived in south-west Arabia. For details see *Encyclopedia of Islam* (new edition) under Qaṭbān, vol.4, p.746.

²³ op.cit, vol.5, p.582. Citing: Glaser 1397, SE 80, Arabien, S 132, REP. EPIGR. 3878, 6,2, P.330, Rhodokanakis, Die Inschriften Kohlan, S. 14, Glaser 1394, 1401, 1416, 1400, 1606, 1607, 1608, WZKM, 31, 1924, 22, Glaser 1397

²⁴ See *ibid*, vol.5, p.582

on the slayer. There was no executive power that had the right to implement the sentence. It was only the oath taken from the disputing parties that guaranteed that the sentence would be implemented. That was the reason why the arbitrator had to take an oath from both the disputing parties that they would obey his judgement before he made any decision.²⁵ However, according to the laws that were practised by the tribe of Qaṭabān, the responsibility to enforce the punishment lay on the leader of the tribe²⁶. Therefore the guardian (*walī*) of the slain could not take the law into his own hands. The slain was normally killed with a sword. Other means of killing such as hanging and crucifixion were seldom practised by the *jāhiliyyah* people.²⁷

The above mentioned points are the practice of *tha'r* among the *jāhiliyyah* people. Now we shall examine the Islamic practice of *qiṣāṣ* and its differences and similarities from the *jāhiliyyah* practice.

The main difference which is also the most obvious between *qiṣāṣ* in Islam and *tha'r* in the *jāhiliyyah* is that Islamic law has incorporated the principle of equality into the framework of the law of retaliation. This is mentioned in the *Qur'ān* when this law was adopted by Islam:

²⁵ Ibid, vol.5, p.506

²⁶ Ibid, vol.5, p.584

²⁷ Ibid. vol.5, pg.585

"O ye who believe! The law of equality is prescribed to you in cases of murder: The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty".²⁸

Al-Ṭabarī (d.310AH) in interpreting the above verse stated that if a free man murdered another free man, the slayer's blood is equal to the slain's blood, and the slayer himself should be killed and not others. Do not exceed by killing others who did not kill because it is forbidden to kill those who are innocent.²⁹ Clearly he is taking into account the verse (2/194) which says, "...there is the law of equality, if then any one transgresses the prohibition against you, transgress ye likewise against him" in his interpretation of this verse. Thus the two verses combined, first limit the *tha'r* to *qiṣāṣ* and then make the *qiṣāṣ* applicable only to the person who has committed the offence. From the above quotation, it is clear that Islam has limited the concept of *tha'r* so that only one life may be taken for another, namely the life of the killer himself. In other verse the *Qur'ān* has further elaborated the same subject in which God says, "We ordain therein for them: Life

²⁸ Qur'ān 2/178

²⁹ Al-Ṭabarī, *Tafsīr*, vol.2, p.102

for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal....".³⁰

There are also some other minor differences between the practice of *jāhiliyyah* and the Islamic *qisāṣ*. Among the minor differences are that in Islamic law the jurists have categorised killings into several types and not all types of killings must be punished by *qisāṣ*. Certain types of killing require the slayer to pay blood-money (*diyyah*). There are three main types of killings in Islamic Law. First is the premeditated murder (*qatl al-'amd*) which means the killing is carried out by a person intentionally on a person who is immune (*ma'ṣūm*) in Islam. This type of killing involves the following different consequences:

1. The slayer may be forgiven altogether. However, a minor punishment would be expected for such a crime.
2. The slayer cannot inherit from the slain if the slain is one of his or her relatives.
3. The slayer may have to pay expiation (*kaffārah*) if the heirs of the slain have forgiven him.
4. The slayer must be killed (*qawd*) if the heirs of the slain require it.

Secondly, the indirect killing (*qatl shibh 'amd*). This means that a person intended to kill another person by using a means which is normally not a lethal

³⁰ Qur'ān 5/45

one. For instance, throwing a small stone or a short stick at the victim. The punishment for this type of killing is that the killer has to pay a considerable amount of blood money (*diyah mughallaḥah*) and also pay an atonement (*kaffārah*)³¹. He is also considered to have committed a serious sin. *Qiṣāṣ* is not applicable in this case.

The third type of killing is accidental killing (*qatl khata'*) in which a person kills another accidentally without any intention to kill. The punishment for this type of killing is a lesser amount of blood money (*diyah mukhaffafah*) and also paying an atonement (*kaffārah*)³². *Qiṣāṣ* is also not applicable in this case. If we compare the types of killing in *jāhiliyyah* and Islam we will see some similarities in so far as the first and the third types are also mentioned in the *jāhiliyyah* law. However, they differ in the punishments in that Islamic law has adopted more than one kind of punishment in these types of killings as mentioned above, whereas in the *jāhiliyyah* practice the punishment was the same for these types of killing except what was practised by certain tribes which had made the punishment of accidental killing lighter than premeditated murder.

The other obvious difference between these two laws is that Islam has encouraged the heirs of the slain to forgive the slayer. This is mentioned in the

³¹ Zuḥaylī, *Al-Fiqh al-Islāmī*, vol.6, p.316

³² Sābiq, Sayyid, *Fiqh al-Sunnah*, vol.2,p.519

Qur'ān in the verse that treats *qiṣāṣ* which rules that: "...but if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a mercy from your Lord".³³ Ibn Qudāmah (d.620A,H) the prominent Ḥanbalī jurist said that the scholars have agreed that it is permitted and better for the heirs to forgive the slayer. He quoted the above verse and a *Ḥadīth* as the proof of what he said. The *Ḥadīth* was related by Abū Dāwud from Anas b. Mālik who said, "I did not see any case of *qiṣāṣ* that was brought to the Prophet except that he would advise the heirs to forgive the slayer"³⁴. This point is obviously different from the *jāhiliyyah* practice which has not adopted the principles of forgiveness in the case of murder. In Islamic law, the person who has the right to forgive the slayer is only the heir of the slain and not any other. The ruler has no right to forgive the killer in Islamic law unless the slain has no heirs. In this case the ruler is considered as the heir of the slain according to the principles (*qā'idah*) of *Sharī'ah* which state that the leader is the heir of him who has no heirs. In such cases, the ruler can forgive the killer but this must be based on a strong reason.³⁵

Among the other minor differences is that *tha'r*, as mentioned above, is more dominated by the notion of vengeance whereas *qiṣāṣ* sets out to limit this

³³ *Qur'ān*, 2/178

³⁴ Ibn Qudāmah, *Al-Mughnī*, vol.9, p.463

³⁵ 'Awdah, 'Abd. al-Qādir, *Al-Tashrī' al-Jinā'ī al-Islāmī*, vol.1, p.81

vengeance. Thus, one of the purposes of *qiṣāṣ* as mentioned in the *Qur'ān* is to prevent other lives from being taken. The verse that describes this point is that which says: "In the law of equality (*qiṣāṣ*) there is (saving of) life to you, O ye men of understanding; that ye may restrain yourselves".³⁶ Commenting on this verse, al-Ṭabarī said that this law that was revealed will prevent a person from killing another.³⁷ In other interpretation of the same verse it is said that the meaning of the word 'life' (*ḥayāh*) in this verse is that with this law no other person will be killed except the person who committed the crime in the first place. This means that other lives would be saved by the implementation of the rules of *qiṣāṣ*.³⁸

As for the similarities, there are several similarities that occur between these two laws. Among the similarities are the rights of the heirs to ask for the blood of the killer. In both laws the heirs (*walī*) is the person with most right to ask for the blood of the killer. Another similarity is found in the power to implement the punishment. This is common in the Islamic and the Qaṭabān laws, in which the ruler or he who is appointed by him is the only person who has the power to implement the punishment on the slayer. This is to prevent any problems in the future between the heirs of the slain and the slayer, in which if any problem occurs

³⁶ *Qur'ān*, 2/179

³⁷ Al-Ṭabarī, *Tafsīr*, vol.2, p.114

³⁸ *Ibid*, vol.2, p.115

it will be referred to the person that implements the law. This rule is also found in many legal systems today.

Diyah (blood money) is another practice of the *jāhiliyyah* that was approved by the law of Islam with certain modification. *Diyah* is a specified amount of money or goods due in cases of homicide or other injuries to physical health unjustly committed upon the person of another, or in a restricted sense *diyah* means the compensation which is payable in cases of homicide, the compensation payable in the case of other offenses against the body being termed more particularly *arsh*.³⁹ Islam did not interfere too much in the basic system of *diyah*. In fact, the Qur'ānic texts⁴⁰ and *Ḥadith*⁴¹ even expressly confirmed it. Among the important modifications introduced by Islam is the rule which made *diyah* obligatory in the case of accidental killing (*qatl al-khata'*) and indirect killing (*shibh 'amd*). But in the case of intentional killing (*qatl 'amd*) *diyah* is to be paid if the heirs of the victim forgive the culprit.

³⁹ *Encyclopedia of Islam* (new edition), vol. 5, pg.

⁴⁰ See *Qur'ān*, 4/92 which means, "Never should a believer kill a believer; but (if it so happens) by mistake, (compensation is due); if one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation (*diyah*) to the deceased's family, unless they remit it freely..... If the deceased belong to a people with whom you have a treaty of mutual alliance, compensation (*diyah*) should be paid to his family...."

⁴¹ One of the *Ḥadith* that mentioned about *diyah* is that which was related by 'Amr bin Ḥazm which means: The prophet has written to the people of Yemen in which he discussed about their inheritance, the practices and *diyah* and he wrote in his letter: "Whoever kills another Muslim without any reason he must be killed unless the heirs of the victim forgive him, than he has to pay one hundred camels for the life". This *Ḥadith* was related by Mālik and al-Nasā'ī.

The other modification is in the amount and goods payable as *diyah*. As for the amount payable by the killer, in the *jāhiliyyah* period it was different according to the status of the victim. If the victim was a person who had higher status among his tribe, than his *diyah* would be more than an ordinary tribesman. The amount varied from ten camels to one thousand camels. It is reported that the amount of *diyah* for an ordinary tribesman was ten camels. But if the victim was a person who was an ally (*ḥalīf*), his *diyah* would be half the *diyah* of an ordinary tribesman.⁴² The *diyah* of a woman is also half the amount of a man's *diyah*.⁴³ Some of the tribes fixed the amount of *diyah* for their people so that sometimes it was twice the normal amount or more. This was normally done by the tribes which were strong. For instance, the tribe of Ḥārith b. 'Abd Allah, took double the amount for the *diyah* of their people and they would give the normal amount to others if they had to pay.⁴⁴ In Islamic law, there is no difference in the amount payable between one free man and another. This was fixed at one hundred camels of different ages and sexes, but Islam preserves the idea of half of the *diyah* for a woman and a slave. The *diyah* for the *dhimmī* and *musta'min*⁴⁵ according to the Ḥanafī school is equal to the *diyah* of the Muslims. However, the Mālikis and

⁴² Al-Aṣbahānī, *Kitāb Al-Aghānī*, vol.2, p.170

⁴³ 'Ali, Jawad, *Al-Mufaṣṣal*, vol.5, p.593

⁴⁴ *Ibid*, vol.5, p.593

⁴⁵ A-non-Muslim foreigner, temporarily admitted to Muslim territory. In the case of the foreigner who is not *musta'min* nothing is due.

Ḥanbalis held that their *diyyah* is half the amount of *diyyah* of a Muslim.⁴⁶ The *diyyah* of the premeditated murder, according to the Ḥanafī and Mālīkī schools, is not limited. The two parties involved are to decide the amount. On the other hand, the Shāfi'ī's and Ḥanbali's held that the amount must be one hundred camels as ordinary *diyyah* but the *diyyah* must be *mughallazah* which means that among the hundred camels forty of them must be pregnant. In the *jāhiliyyah* period camels were used as pecuniary matter to pay *diyyah*. In the Islamic law besides camels, gold and silver are also acceptable items in this respect.⁴⁷

Another aspect of similarity between these two laws is that the responsibility to pay the *diyyah* lies on the whole tribe (*ʿāqilah*) and not the killer. This is for the *diyyah* for accidental homicide and it must be paid in three years. But for the premeditated murder the killer alone has to pay it immediately (*muʿajjalah*). The *ʿāqilah* does not take the burden in paying the *diyyah* for the murderer. The same practice is recognised by Islamic law.⁴⁸

There are also similarities between the *jāhiliyyah* practice and Islamic law in the punishment of those who are accused of theft. The punishment for this crime in Islamic law is to cut off the hand of the thief whether male or female.

⁴⁶ Zuhaylī, Wahbah, *Al-Fiqh al-Islāmī*, vol.6, p.311

⁴⁷ *Ibid*, vol.6, p.302

⁴⁸ See Zaydān, *Al-Madkhal*, p.37

This is mentioned in the *Qur'ānic* verse which says, "As to the thief, male or female, cut off his or her hands, a punishment by way of example, from God, for their crime, and God is Exalted in Power."⁴⁹. Al-Qurṭubī (d.676AH) in interpreting this verse mentioned that in the *jāhiliyyah* period the thief was punished by having his hand cut off. He claimed Al-Wālīd b. Mughīrah was the first to receive this punishment and then God has prescribed the same punishment in Islam.⁵⁰

After discussing the criminal law, we shall now look at the procedural and evidence side of the criminal law. In the *jāhiliyyah* period, if the two parties were willing to submit their dispute to arbitration, than an acceptable arbitrator would be appointed between them. The arbitrator would then take an oath from the involved parties that they would obey his decision without any objection. This procedure was followed because at that time there was no executive power that could enforce the judgement issued. Thus, when they took the oath they could not escape from the judgement that would be imposed on them. If both parties agreed on this point, the arbitrator would call the plaintiff to present evidence in support of his claim. If he had no evidence and if the defendant denied the charge, the later would be required to take an oath, and on taking it he would be released thereby from all liabilities. Sometimes the parties would go to a diviner and abide by his decision. If a suspected person was a slave, torture was sometimes resorted

⁴⁹ *Qur'ān*, 5/38

⁵⁰ Al-Qurṭubī, *Al-Jāmi'*, vol.5, p.160, see also 'Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.82

to in order to extort a confession.⁵¹ From the procedure followed, we can notice that the *jāhiliyyah* people had considered the oath as a form of evidence. Normally they would make an oath in the name of their idol or their leader or others.⁵² As for the place, they would normally go to a holy place for them such as in front of idol or at the grave to take the oath. They also has established the maxims that read *al-bayyinatu 'alā man 'idda'ā wa al-yamīnnu 'alā man ankar* which means evidence is for him who claims, the oath is for him who denies.⁵³ This maxim indicates that, primarily, all human beings are free from liability. If anyone charges another with any crime, the plaintiff had to give evidence for what he claims and; if the defendant (or the accused) denied the charges he had to take an oath.

In Islamic law, oath is also a form of evidence that is acceptable and the maxim mentioned above is one of the *jāhiliyyah* maxims that is used in Islam. In fact, the maxim above was embodied in a Prophetic *Ḥadith*. The only difference in the oath is that the Muslims are not allowed to take their oath with the names of other than God. The oath can be taken at any place and not at the holy places as practised by the *jāhiliyyah* people.

⁵¹ Rahim, Abdur, *Muhammadian Jurisprudence*, pp. 5,6

⁵² 'Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.508

⁵³ *Ibid*, vol.5 p.508

The other important procedure of evidence that has its origin in the *jāhiliyyah* is *qasāmah*. *Qasāmah* is an oath repeated fifty times either by the (*aṣaba*)⁵⁴ of the victim of a murder according to the Māliki, Shāfi'ī and Ḥanbalī school, or by the inhabitants of the place of the crime according to the Ḥanafī school. Thus, the objective of *qasāmah* according to the majority of schools is to prove the innocence of the accused but according to the Ḥanafīs it is to prove that the killer is unknown to the inhabitants.⁵⁵ With regards to this, if a member of one tribe kills a member of another tribe, whether it is wilful or otherwise, the heirs or chief of the tribe that had suffered is entitled to demand that the offender should be surrendered to them, so that he might suffer the penalty of death. But if the tribes were friendly, the matter might be compounded by payment of a fine or compensation amounting to a hundred camels, or if the person accused denied the charge, then, on a number of men belonging to his tribe pledging their oaths to his innocence, the matter would be dropped.⁵⁶ Normally this procedure is followed, if the two tribes involved are friendly or they are not willing to fight or sometimes if the victim's tribe is not strong enough to fight with the culprit's tribe. This practice is found in the *jāhiliyyah* according to the *Ḥadīth* that was narrated by Ibn 'Abbās which he said that the first event of *qasāmah* was practised by Banī

⁵⁴ (*Aṣabah* are the paternal male relative of the person concerned.

⁵⁵ *Encyclopedia of Islam* (new edition), vol.4, p.689

⁵⁶ Rahim, Abdur, *Muhammadan Jurisprudence*, p.4. See also Fyzee, *Outlines of Muhammadan Jurisprudence*, p.7

Hāshim. A man from Banī Hāshim was hit by his Qurashī employer with a stick which caused his death. But before he expired, the dying labourer spoke to a passing by Yemeni man that he was hit by his employer for losing a camel's fetters, and requested the latter to inform his near relatives in Makkah of the incident that caused his death. When the Yemenī man reached Makkah, he called for Abū Ṭālib and conveyed the message of the labourer. Abū Ṭālib then went to the Qurashī employer and put forward three alternatives for compensation for killing his relative. The three alternatives were to give one hundred camels or get fifty of his tribesman to swear that he have not committed the murder or to be killed. The Qurashī went to his people and they agreed to swear that he did not kill the labourer. Than a woman from Banī Hāshim, the tribe of the deceased, who was married to the tribe of the accused came and requested Abū Ṭālib to allow her son to withdraw as one of the fifty and forgo his oath. Abū Ṭālib acceded to her request. Next, a man from the tribe of the accused came to Abū Ṭālib and offered two camels in lieu of his oath. He accepted that too, and forty-eight men came and took the oath.⁵⁷

Ibn ʿAbbas claimed that this is the first event of *qasāmah* in the *jāhiliyyah* period. Ibn Ḥajar al-ʿAsqalānī (d.975AH/1567CE)⁵⁸ in commenting on this *Ḥadith*

⁵⁷ Al-Bukhārī, *Ṣaḥīḥ*, vol.5, pp.115-8. This *Ḥadith* was also related in *Sunan Abū Dāwūd*, *Kitāb al-Diyāt* and *Al-Nasāʿī*, *Kitāb al-Qasāmah*.

⁵⁸ Ibn Ḥajar is the famous commentator on *Ṣaḥīḥ al-Bukhārī*

said that the three options given by Abū Ṭālib might be the practice that was common to them or might not be so. He further quoted the saying of Ibn al-Ṭīn who said, "It was not reported that they had discussed such matter and this may indicate that it was a common practice among them at that time".⁵⁹ From the above *Ḥadith*, we can conclude that Abū Ṭālib has made his decision based on the report that came from the Hāshimī man in order to request an oath from the Qurashī. He also willingly forwent one of the oaths and at the same time accepted two camels in the place of an oath. This is because the oath was taken instead of one hundred camels, meaning each oath is equal to two camels.

In Islamic law, the Mālikī, Shāfi'ī and Ḥanbalī schools kept the characteristic of the *qasāmah* which it had in the *jāhiliyyah* period, that is to say, those of the procedure of accusation. It is also a fact that in the hypothetical case of a murder of which the author is unknown, the (*asabah*) relatives of the victim swore a total of fifty oaths (the same person could swear several times provided that this was not more than twenty-five times) that such an individual, against whom is weighted serious presumptive evidence, was the one who committed the murder. The notion of serious presumption (*lawth*) has been adapted in these schools, and in those that have followed the same conception of *qasāmah* as of fundamental importance. Serious presumptive evidence was held to be not only the fact that the victim, before dying, had accused the presumed murderer, but also the

⁵⁹ Al-Asqalanī, *Fath al-Bārī*, vol.7, p.193

presence of this last person, with his blood-stained clothing, not far from the victim, or even the testimony of a single witness to the murder. With this conditions combined, the *walī al-dam* would have right of retaliation against the one presumed guilty, such that he could then, as a result, have him put to death.⁶⁰

The Ḥanafī jurists have some different opinions from the majority of jurists in certain points in which they have formulated certain conditions for the conducting of *qasāmah*. The conditions are:

1. There should be indications on the victim such as signs of being beaten or hanged.
2. The killer must be unknown. If the killer is known by way of confession or testimony, than *qiṣāṣ* or *diyah* is due on him.
3. The killer is a human being, if there is a sign that indicates the killing was carried out by an animal, then *qasāmah* is not liable.
4. The heirs must submit the case to the authority because *qasāmah* is considered as a judicial oath (*yamīn*), and it is not an obligatory without the initiation of judicial proceedings.⁶¹
5. Denial of the accused of the allegation. This is because oath is to be asked from those who deny the allegation.

⁶⁰ Ibn al-Rushd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*, vol.2, p.431, also see *Encyclopedia of Islam* (new edition), vol.4, p.689

⁶¹ For the other three jurists, they said all the heirs must agree to the allegation against the defendant. If they disagree on this point than *qasāmah* is not liable. Zuḥaylī, *Al-Fiqh al-Islāmī*, vol.6, p.401

6. The claimant must request *qasāmah*, because that is his right.

7. The place the victim is found must be owned by someone. If it is owned by the government, then *diyah* is liable from *bait al-māl* (public treasury).

The Ḥanafī argument on this point is that the owner is responsible to take care of his property, but if there is no owner for the land, no one is responsible for it.⁶²

The conditions set by the Ḥanafīs showed some alteration from the original practice of *qasāmah* in the *jāhiliyyah* period. Although some alteration has been made, the original framework of *qasāmah* remains in Islamic law.

One important point that should be noticed with regard to the law of evidence is that in Islamic law the witness must be drawn from the people of probity and piety in cases of homicide. However, in the *jāhiliyyah* practice this point is not emphasised.

2.3 Comparison Between the Islamic Law and *Jāhiliyyah* Family Practice

The basic framework of the family law of Islam has similarities to many aspects of the *jāhiliyyah* family practice. These similarities are more obvious in this respect than in any other field of law. At the same time, on many occasions Islam has modified most of the practice of the *jāhiliyyah* without neglecting the

⁶² Ibid, vol.7,pp.400-2

original practice. We shall first look at the most important point in family law, i.e. marriage contract. One of the most important aspects of a marriage (*nikāḥ*) in Islam was that it was the only instrument that enabled a man to have sexual intercourse with a woman, apart from his concubines, i.e. female slaves. A *Ḥadith* is generally reported as giving the different types of marriage (*nikāḥ*) in the *jāhiliyyah*. Perhaps this would be better understood as giving the consequences of sexual relationship in the *jāhiliyyah*. This *Ḥadith* was reported by 'Urwah who said that 'Ā'ishah told him: "There were four types of *nikāḥ* in the *jāhiliyyah*. The first type was as practised at present in which a man will engage a woman through her guardian (*walī*), then he will pay the dowry to her and marry her. The second type was that a man will tell his wife when she finished her menstruation to go to a certain man and sleep with him. The husband would not make love with his wife until it was confirmed that she was pregnant from that man. They did this in order to get a child. This type of *nikāḥ* is called *nikāḥ istibdā'*. The third type of *nikāḥ* was when a group of less than ten men would sleep with a woman which may result in pregnancy. After giving birth, she would call those who slept with her and she would say to one of them, "This is your child". Therefore, that person had to take care of the child without any excuse. The fourth type was similar to prostitution where a woman would sleep with any man that comes to her. This woman would put flags on her door as a sign. If she became pregnant and after giving birth, she would call a physiognomist (*qā'if*) to affiliate the child to the father. When Muhammad was sent as a Prophet, with the truth, all the kinds of

nikāh were forbidden except the system of marriage which is practised by the people today".⁶³

The above *Ḥadith* demonstrates the different types of *nikāh* known in the *jāhiliyyah* period. Among all the above mentioned types of *nikāh* the most common type was the first type which is recognised by Islam.⁶⁴ There were other types of *nikāh* practised during the *jāhiliyyah* period besides what was mentioned above. *Nikāh dīzan* is one of these types. This type of *nikāh* is also known as *nikāh al-maqt*. It is called so because when a man died and left a wife, the deceased son or relative would have the right to marry her. This occurred if the deceased has more than one wife and thus meant that the deceased's son had the right to marry his step-mother or prevent her from getting married to others until she died so that he would be able to inherit her property. This normally took place unless she redeemed herself with the redemption accepted by her step-son. Al-Ṭabarī described this type of *nikāh* when interpreting verse 4/19 which says, "O, ye who believe! ye are forbidden to inherit women against their will, nor should ye treat them with harshness...." He said the word inherit (*tarithu*) in this verse describes the practice of the inheritance of a woman in the *jāhiliyyah* period in which if a woman's husband died, her step son or relative had the right over her more than she had over herself. The step son or relative may marry her or prevent

⁶³ See Al-Shawkāni, *Nayl al-Awṭār*, vol.6,p.300

⁶⁴ See 'Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.533

her from getting married until she dies. He further stated that God has forbidden this action and He has also prohibited them from marrying their father's wife and the action of preventing their step-mother from re-marrying.⁶⁵ This type of *nikāh* is absolutely forbidden in Islam by the *Qur'ānic* verse that rules: "And marry not women whom your fathers married, except what is past, it was shameful and odious, an abominable custom indeed".⁶⁶

The other type of *nikāh* that was practised among the *jāhiliyyah* people was *nikāh al-mut'ah* or temporary marriage⁶⁷. *Nikāh al-mut'ah* means the marriage is contracted for a short period for a fixed remuneration. This type of marriage is normally practised while one goes on a journey or when people are at war in a foreign land. The child born as a result of this marriage would normally be attributed to the mother because the mother will have a direct contact with the child while the father might go away after the marriage contract has finished.⁶⁸ *Nikāh al-mut'ah* was allowed in the earlier period of Islam. This is stated in the following saying of 'Abd Allah b. Mas'ūd in which he said, "We used to go on *ghazawāt* (battles) with the Messenger of God and we did not take our women with us. We asked (the Prophet) if we could get ourselves castrated. The Messenger

⁶⁵ Al-Ṭabarī, *Al-Jāmi'*, vol.4, p.305

⁶⁶ *Qur'ān*, 4/22

⁶⁷ 'Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.536

⁶⁸ *Ibid*, vol.5, p.537

of God refused to let us do so and allowed us to marry women for a certain period by giving them clothes."⁶⁹ This type of marriage was then forbidden. This is stated in the *Ḥadith* which was narrated by (Alī b. Abī Ṭālib in which he said, "I said to Ibn (Abbās during the battle of Khaybar: the Prophet forbade the temporary marriage and the eating of the flesh of the donkey."⁷⁰ In another *Ḥadith* it is stated that the temporary permission for *nikāḥ al-muṭ'ah* given by the Prophet was lifted immediately after the conquest of Makkah. This *Ḥadīth* was narrated by Ṣabrah al-Juhanī from his father from his grandfather who said, "The Prophet permitted *muṭ'ah* marriage on the occasion of the battle for the conquest of Makkah and the Prophet declared it unlawful even before leaving that place"⁷¹. According to yet another narration, the Prophet declared, "Undoubtedly, God made it unlawful until the day of judgement".⁷² As far as orthodox Islam is concerned, the above traditions are accepted as forbidding this type of marriage. However, some Shī'ite jurists consider it lawful even today, and it is still being practised.

Nikāḥ al-badal (exchange marriage) was also practised by the *jāhiliyyah* people.⁷³ This type of *nikāḥ* occurs when two men are willing to exchange their

⁶⁹ Al-Nawawī, *Saḥīḥ Muslim Sharḥ Nawawī*, vol.9, p.182

⁷⁰ Al-Bukharī, *Saḥīḥ*, vol.7, p.36 and *Ibid*, vol.9, p.189

⁷¹ *Ibid*, vol.9, p.187

⁷² *Ibid*, vol.9, pp. 186 and 189

⁷³ (Alī, *Jawād, Al-Mufaṣṣal*, vol.5, p.537

wives without any payment of dowry. This type of *nikāḥ* is clearly against Islam as it does not fulfil the requirement of marriage in Islamic law.

Another type of *nikāḥ* that was practised in the *jāhiliyyah* is *nikāḥ al-shighār*⁷⁴ (free marriage). *Nikāḥ al-shighār* is offering one's daughter or sister in marriage as an exchange for taking in marriage the other man's daughter or sister without paying any dowry. This type of *nikāḥ* was forbidden by the Prophet after the advent of Islam because this form of marriage deprives women of their rights.

It was reported that in the *jāhiliyyah* period, they practised type of polyandry called Tibetan⁷⁵. In this type of marriage a whole family of brothers share one wife among themselves. Strabo mentioned this type of marriage when describing Arabia Felix as follows:

"All the kindred have property in common, the eldest being lord: all have one wife and it is first come first served, the man who enters to her leaving at the door the stick which it is customary for every one to carry; but the night she spends with the eldest. Hence all are

⁷⁴ Ibid, vol.5, p.537

⁷⁵ It is called Tibetan because first studied in Tibet. See *Encyclopedia of Religion*, vol.8, p.467

brothers of all; they also have conjugal intercourse with their mothers".⁷⁶

This type of marriage is known as fraternal polyandry to the sociologists. It obviously contradicts the Islamic law which does not allow one woman to marry more than one man at a time.

Another type of marriage which was famous in the *jāhiliyyah* is that a man would marry two sisters at the same time⁷⁷. This type of marriage is the opposite of the type mentioned above. It is also forbidden in Islam as mentioned in the *Qur'ān*: "Prohibited to you (for marriage) are : your mothers,.....and two sisters in wedlock at one and the same time".⁷⁸

Polygamy was also known among the *jāhiliyyah* people but there was no limit to the number of women they could marry. This is mentioned in a *Ḥadith* which says that Ghaylan b. Salamah converted to Islam and he had ten wives whom he married in the *jāhiliyyah* and all of them converted with him. The Prophet ordered him to choose four of them and divorce the others."⁷⁹ In Islam

⁷⁶ Ibid, vol.8, p.467, citing Strabo XVI.4. The reference to conjugal intercourse with mothers is probably not to be taken literally, but it is to be explained by *Qur'ān* 4/23, where it appears that men had married wives of their fathers.

⁷⁷ (Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.541

⁷⁸ *Qur'ān*, 4/23

⁷⁹ Shawkānī, *Nayl al-Awṭār*, vol.6, p.160. This *Ḥadith* is related in *Sunan Abū Dawūd* and *Sunan Ibn Mājah*

polygamy is allowed but it is limited to only four wives. This is according to the verse that rules, "... marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), than only one..."⁸⁰

Nikāh al za'īnah is also a type of marriage that was known among the *jāhiliyyah* people⁸¹. This type of *nikāh* is that a man had the right to marry women whom he captured, and the women could not refuse him. This type of *nikāh* takes place without contract and dowry. In Islam a man can take his slave as his wife, but and no one is allowed to capture other human being without legitimate reason, (i.e. in war).

However, in Arab society by the time of the Prophet, it had become the practice to forbid marriage with mothers, children, aunts and uncles. They were also forbidden from marrying one of the descendants or ascendants of the latter⁸². Marrying adopted children was also forbidden. Islam has recognised the first prohibitions but has allowed marriage with adopted children. This is mentioned in the verse which rules, "God has not made for any man two hearts,...nor has he

⁸⁰ *Qur'ān*, 4/3

⁸¹ (Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.546

⁸² Zaydān, *Al-Madkhal*, pp.27-28

made your adopted sons your sons, such is only your (manner) of speech by your mouths...." ⁸³.

If we review all the mentioned types of marriages that were practised during the *jāhiliyyah* period, we will find that most of what was practised is not recognised by Islam. This is because Islamic law has ordained the institution of marriage sanctioning thereby sexual relationship between two members of the opposite sexes with a view to the preservation of the human species, the fixing of descent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and the wife and of mutual help in earning a livelihood.

After looking at the marriage contract in the *jāhiliyyah* period, we shall now look at divorce and other matters related to family law. Like marriage, the *jāhiliyyah* people also practised divorce in a certain way. The divorce practised among the Makkan people when Islam was revealed was to divorce the woman three times. This type of divorce has been attributed to the Prophet Ismā'il. According to this practice, a man is allowed to divorce his wife with one, two or three *ṭalāq's*. After the first and second *ṭalāq* the husband has the right to return to the wife. But after the third *ṭalāq*, the husband has no right to return to his wife

⁸³ *Qur'ān*, 33/4

unless she has married another man and that man divorced her⁸⁴. The third *ṭalāq* is called *ṭalāq ba'in*. In the *jāhiliyyah* practice a man was permitted to pay another to marry the woman he divorced with *ṭalāq ba'in* on the condition that the man would divorce her. This would enable the first husband to return to his wife. Although this practice was permitted among them, it was considered as a bad practice.

If we examine the Islamic point of view in this matter, we will find that this practice of *ṭalāq* by the Makkan people has been taken into consideration. This is because in Islamic law a person can only divorce his wife three times. If a person divorced his wife three times, he cannot remarry her unless she marries another man and the latter voluntarily divorces her without any intention of *tahlīl*.⁸⁵ This practice of *tahlīl* is totally denounced in Islam. The Prophet is reported to have said in a *Ḥadīth* that: "The curse of God be on the man who practices *ḥalālāh* and the man for whom the *ḥalālāh* is committed".⁸⁶

In addition, it was also reported that some of the *jāhiliyyah* people would divorce their wife as many times as they liked. Furthermore, they could return to

⁸⁴ Al-Iṣbahānī, *Al-Aghānī*, vol.8, p.80

⁸⁵ *Tahlīl* or *ḥalālāh* means legalising or making a thing lawful. When the husband wanted to take his divorced wife back, he will arrange this marriage with another man on condition that he would divorce her after having sexual relationship with her.

⁸⁶ Al-Shawkānī, *Nayl al-Awṭār*, vol.6, p.275. This *Ḥadīth* was related by *Ibn Mājah*

her as many times as they liked without any limitation. It was related that a man of al-Anṣār got angry with his wife and said to her: "I will not be close to you and nor will I leave (divorce) you". She asked, "How can that be?". He answered, "I will divorce you but before you finish your waiting period (*iddah*)⁸⁷ I will return you to my possession and I will divorce you again and return to you".⁸⁸ After saying that the man did what he said. This was to make his wife suffer because her position between being married and divorced made her unable to do anything to force her husband to divorce her forever, nor could she marry another man.

In Islamic law, not more than three *ṭalāq* are allowable. After the third *ṭalāq* the husband cannot remarry his divorced wife unless she marries another man and that man divorces her willingly. The following verse describes the number of *ṭalāq* that is allowable: "A divorce is only permissible twice, after that the party should either hold together on equitable terms or separate with kindness."⁸⁹ In the following verse God said: "So, if a husband divorces his wife (irrevocably), he cannot after that, re-marry her until after she has married another husband and he

⁸⁷ Legally prescribed period of waiting during which a woman may not remarry after being widowed or divorced.

⁸⁸ Ṭabari, *Tafsīr*, vol.2, p.456

⁸⁹ *Qur'ān*, 2/229

has divorced her....".⁹⁰ The above verses clearly described Islam's position concerning *ṭalāq*.

In Islam, the right to divorce is given to the man. A woman has no right to take divorce proceedings against her husband, although she may be allowed to ask him to grant her a divorce as will be discussed later. However, in the *jāhiliyyah* some of the women could include the right to divorce as one of the conditions in their marriage contract. This means that the power to divorce is left to the women instead of the men. Thus, women could divorce their husbands whenever they liked. This was normally practised among those women who were from rich and noble families. When the woman intended to divorce her husband, she would move the door of her tent to the opposite direction from the original direction. By this the husband would know that he had been divorced by his wife. Therefore, he would not come again to her tent. He would also normally migrate to another area.⁹¹ In Islamic law, it is not allowed for a women to include such a condition in a marriage contract even if it is agreed on by both parties. This is because, it is considered to be against the command and rules set by the *Qur'ān*.

One of the normal practices in the *jāhiliyyah* was that a man could be forced to divorce his wife and when he divorced her it was considered valid even

⁹⁰ *Qur'ān*, 2/230

⁹¹ *Al-Iṣbahānī, Al-Aghānī*, vol.16, p.102

though it was against his wish. Sometimes the wife's family wanted the husband to divorce her and therefore they would threaten or hurt him so that he would divorce his wife⁹². In addition, a divorce pronounced by a person who was very angry or intoxicated was considered valid in the *jāhiliyyah* period. This is because to them as long as the divorce word is pronounced by the husband it is considered valid.⁹³ In Islamic law, if a divorce is given without an intention or choice, i.e. through compulsion, it is not valid according to Mālīk, Shāfi'ī, Aḥmad b. Ḥanbal and others. But Abū Ḥanīfah considered it to be valid. Similarly, if a divorce is pronounced by an intoxicated person, it will not be valid according to all schools of law in Islam except the Ḥanafis. The *ṭalāq* given in a situation of anger would be considered unintentional and therefore regarded as invalid by the majority of Muslim jurists.⁹⁴

Islam also condemned the practice of *ẓihār* (injurious comparison) in a marriage. This practice was common among the *jāhiliyyah* people⁹⁵ whereby they would sometimes utter the common wording of *ẓihār* to their wives which is: "*anti 'alaiya ka-ẓahrī ummī aw ukhtī aw 'ammātī*", i.e. you are to me as the back of my mother or sister or aunt. With these words the sexual relationship between

⁹² (Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.554

⁹³ Ibid, vol.5, p.554

⁹⁴ Doi, *Sharī'ah*, p.174

⁹⁵ (Ali, Jawād, *Al-Mufaṣṣal*, vol.5, p.551 citing *Tafsīr Naysabūrī*, 7/27

them would come to an end. When the husband uttered the words of *zihār* to his wife, he put her in the position of not being able to leave his house but having to live in it as without any of the rights of a wife and without being able to remarry.⁹⁶ Such a custom humiliates woman. It has been denounced by Islam in the strongest terms and punishment is provided for committing it. In fact this happened to one of the Companions (Aws b. Şāmit who treated his wife Khawlah in a similar manner. Khawlah went to the Prophet and complained to him about what had happened. The Prophet did not answer her at that time until he received the following revelation which condemns this practice, "If any man among you divorce their wives by *zihār* (calling them mothers) they cannot be their mothers, none can be their mothers except those who gave them birth. And, in fact, they use words (both) iniquitous and false, but truly God is one that blots out (sins) and forgives (again and again)."⁹⁷ In yet another revelation the *Qur'ān* condemns this practice of *zihār*, "God has not made any man two hearts in his own body, nor has He made your wives whom you divorced by *zihār* your mothers, nor has he made your adopted sons your sons. Such is only your manner of speech by your mouths. But God tells you the truth and He shows the right way."⁹⁸

⁹⁶ Doi, Abdur Rahman, *Shari'ah*, pp.184-5

⁹⁷ *Qur'ān*, 58/2

⁹⁸ *Qur'ān*, 33/4

In Islamic law if someone is guilty of *zihār*, that person has to pay *kaffārah* (atonement) as mentioned in the following verse: "But those who practice *zihār* against their wives then wish to go back on the words they uttered, (it is ordained that such a one) should free a slave before they touch each other, this are ye admonished to perform and God is well-acquainted with (all) that ye do."⁹⁹ If one is not able to free a slave as the *kaffārah*, then he should fast for two months consecutively or if unable to do so, he should feed sixty indigent people as mentioned in the next verse.¹⁰⁰

'Ilā' is another form of divorce in the *jāhiliyyah*. *'Ilā'* which literally means swearing, signifies technically the taking of an oath that one shall not have a sexual relationship with his wife.¹⁰¹ In the *jāhiliyyah*, the Arabs used to take such oaths frequently, and it would continue for a period which extended to several months or years.¹⁰² Ibn 'Abbās was reported as saying, "The practice of *'ilā'* in the *jāhiliyyah* period was prolonged to one or two years or sometimes more, but God has limited this period to four months".¹⁰³ In this period the wife has neither the position of a wife nor that of a divorced woman free to remarry someone else.

⁹⁹ *Qur'ān*, 58/3

¹⁰⁰ See *Qur'ān*, 58/4

¹⁰¹ Doi, Abdur Rahman, *Sharī'ah*, p.186

¹⁰² See 'Ali, Jawad, *Al-Mufaṣṣal*, vol.5, p.551, Zaydān, *Al-Madkhal*, p.30

¹⁰³ Al-Kāsānī, *Badā'ī' al-Ṣanā'ī' fī Tarīb al-Sharā'ī'*, vol.3, p.171

This was done with the intention of hurting the wife. Islam disapproved of this practice and put a limit to it such that if the husband did not resume conjugal relationship within the period of four months, the wife is considered divorced. This is stated in the following verse which says, "In the case of those who swear that they will not go into their wives, the waiting period is four months; then if they go back, God is surely Forgiving, Merciful. And if they resolve on a divorce, then God is surely Hearing, Knowing."¹⁰⁴ This verse explains that during the four months after the oath was taken, both of them remain as husband and wife but practically live separately without any conjugal relation between them. At the end of the four months, they either return to a normal relationship with their wife or a final divorce (*ṭalāq bā'in*) will take place. If, however, he breaks his oath within four months and resumes his relationship with her, then he has to pay *kaffārah* for breaching the oath. This is the opinion that was held by most of the scholars. Some of them said God will forgive the breach of his oath and nothing is due from him.¹⁰⁵

Khulu' was another form of divorce being practised in the *jāhiliyyah* period. *Khulu'* is a divorce granted by the husband at his wife's request. She would undertake either to give up her dowry or to make some other payment to induce him to set her free. During the *jāhiliyyah* period, *khulu'* was also sometimes a

¹⁰⁴ *Qur'ān*, 2/226-7

¹⁰⁵ Doi, Abdur Rahman, *Sharī'ah*, p.187

friendly arrangement between the husband and his wife's father in which the latter would repay the dowry and take back his daughter.¹⁰⁶ This form of divorce has been recognised by Islamic law with certain modifications. Among these modifications are that *khulu'* must only be asked in extreme circumstances. The following *Ḥadith* of the Prophet gives a warning to those women who ask for *khulu'* without any reasonable cause, "If any woman asks for a divorce from her husband without any specific reason, the fragrance of paradise will be unlawful to her."¹⁰⁷ In addition, the husband is prohibited to do something intentionally so that his wife will hate him and ask for *khulu'*. If this happens then the *khulu'* is not valid according to some scholars.¹⁰⁸

After a woman is divorced, there is the consequence of divorce on her which is called *'iddah*. *'Iddah* means a period of waiting for a women before remarriage after the death of her husband, separation or divorce. During the *jāhiliyyah*, this practise was known but it was only applied to a woman whose husband died. The waiting period for her is one year from the time her husband has died. There is no such waiting period for her if she is divorced or separated as mentioned in a *Ḥadith* which says. "There was no such waiting period for a

¹⁰⁶ Smith, *Kinship*, p.92

¹⁰⁷ Ibn Qudāmah, *Al-Mughnī*, vol.8, p.174. This *Ḥadith* was related by Abū Dāwud

¹⁰⁸ See Sābiq, Sayyid, *Fiqh al-Sunnah*, vol.2, pp.299-300

divorced women, therefore God has ruled it in Islām.¹⁰⁹ During this waiting period the wife is forbidden from wearing nice clothes. In Islamic law, there is a waiting period for a woman who is divorced or separated as well as for widows. The different kinds of *‘iddah* in Islam can be summarised as follows:

1. *‘Iddah* of women who still menstruate: three menstruations.¹¹⁰
2. *‘Iddah* of women who have menopause: three months.
3. *‘Iddah* of widows: four months and ten days.
4. *‘Iddah* of pregnant women: until childbirth.

Islam does not forbid widows from wearing nice clothes during the waiting period as practised by the *jāhiliyyah* people.

Mahr or dowry is an obligatory gift from a husband to his wife. This gift is compulsory according to the *jāhiliyyah* practice in a marital contract. It is also considered as a condition for the validity of the marriage, in which if it is not fulfilled by the bridegroom than the contract of marriage is considered invalid.¹¹¹ In Islamic law, *mahr* is considered a required condition payable by the bridegroom and if it is not paid the marital contract becomes invalid (*bāṭil*). During the *jāhiliyyah* period, the dowry which was supposed to be given to the bride, was

¹⁰⁹ Ibn Manzūr, *Lisān al-‘Arab*, vol.3, p.284

¹¹⁰ According to the Ḥanafis the period covered by three menstrual courses and according to the Shāfi‘is and Mālikis the period covered by three intervals. See Rahim, Abdur, *The Principles of Muhammadan Jurisprudence*, p.341

¹¹¹ ‘Alī, Jawād, *Al-Mufaṣṣal*, vol.5, p.530

normally taken and spent by the guardian according to his own will. In Islam, the dowry is the right of the bride and the guardian is not allowed in any case to take it from her unless she willingly gives it to the guardian or gives it back to the husband later on. If the husband divorces her at his own discretion before the full amount of dowry is paid to her, she has the right to claim it from the husband.

In the *jāhiliyyah*, if a women died before the husband, he had the right to claim back the dowry which he had given her from the wealth which she had left or if she had none from her family.¹¹² In Islamic, law if the wife died before the husband, the dowry is still hers and he has no right to claim it back. However, the husband has the right to inherit his share of his wife's inheritance.

In the *jāhiliyyah* practice and Islamic law there is no limit to the amount of *mahr* payable by the husband. It all depends on the agreement by the two parties involved. But Islam encourages its followers to ask for a small amount of dowry.

The status of the man in relationship to the woman whom he would marry was important during the *jāhiliyyah* period. The concept established among them is *kafā'ah fī al-zawāj* which means that the man must have equal status with the woman in terms of lineage (*nasab*), wealth, and other considerations. Islam also considers this as an important concept which should be observed in looking for

¹¹² Ibid, vol.5, pg. 531

partners in marriage. There is a Prophetic tradition on this matter which rules, "A woman is chosen for four factors which are, wealth, beauty, high lineage, and religion but chose the best in her religion, and you will succeed."¹¹³

* * *

These are some of the similarities and differences between Islamic family laws and *jāhiliyyah* practice. Once again, as we noticed in the discussion on criminal law, we can also observe that in most of the practices mentioned above Islam has modified certain aspects to suit the basic principles of Islam. The role played by custom and its effect in the formation of Islamic law is proven by the recognition of some of the *jāhiliyyah* practices which are not against the principles and message of Islam.

2.4 Comparison Between the Islamic Law and *Jāhiliyyah* Practice of Succession

There are several similarities and differences between the Islamic law of succession and the *jāhiliyyah* customary practices on this matter. *Waṣiyyah* (bequest) is a practice that was common among the *jāhiliyyah* people. *Waṣiyyah*

¹¹³ Shawkānī, *Nayl al-Awṭār*, vol.6, pp.232-3. This *Ḥadith* was related by Muslim and Tirmidhi

means a gift of property by its owner to another person on the giver's death.¹¹⁴ It could be expressed by a person either verbally or in a written form. During the *jāhiliyyah* period a person was free to make a bequest in favour of anyone, including those who had no share in the bequest according to the normal practices. Sometimes they deprived their own parents, children and wives. In addition, the bequest was made in favour of rich and influential members of the tribe. There was also no limitation to the amount of property to be bequested to others,¹¹⁵ one could give all his property to others as a bequest. The owner of the property had all the right to spend and make decisions on his property.

Islam allowed a bequest to be made but it altered certain practices of the *jāhiliyyah*. Although some modifications have been made and the concept of bequest was changed, Islam has preserved the original idea of *waṣiyyah* as practised during the *jāhiliyyah* period. Islam did not allow a bequest to be made to the heirs that have their share fixed in the *Qur'ān*. This is mentioned in a Prophetic tradition which says that, "God has allocated to everyone (of the heirs) their share, so there is no bequest for the heirs."¹¹⁶ The reason of excluding the heirs from bequest is that there will be injustice if one heir is given more shares than others when he already has a fixed share in the inheritance.

¹¹⁴ Doi, Abdur Rahman, *Sharī'ah*, p.328 citing: *Al-Durr al-Mukhtār* 4/397, *Hidāyah* 4/466

¹¹⁵ Zaydān, *Al-Madkhal*, pg.31, Doi, *Sharī'ah*, pg.328

¹¹⁶ Al-Dārimī, *Sunan al-Dārimī*, vol.2, p.419

Islam put a maximum limitation to the amount of property that can be bequeathed which is one third of the whole property. It is not allowed for anyone to make a bequest of more than that amount. This is stated by a *Hadith* that was reported on the authority of Sa'd b. Abi Waqqas in which he said,

"I was taken very ill during the year of the conquest of Makkah and felt that I was about to die. The Prophet visited me and I asked: "O Messenger of God I own a good deal of property and I have no heir except my daughter. May I make a will, leaving all my property for religious and charitable causes?" He (the Prophet) replied, "No." I again asked, "May I do so in respect of two thirds of my property?" He replied, "No". I asked, "May I do so with one half of it?" He replied, "No". I again asked, "May I do so with one third of it?". The Prophet replied, "Make a will disposing of one third in that manner because one third is quite enough of the wealth that you possess". Verily, if you die and leave your heirs rich, it is better than leaving them poor and begging. Verily the money that you spend for the pleasure of God will be rewarded, even a morsel that you lifted up to your wife's mouth."¹¹⁷

¹¹⁷ Bukhari, *Sahih*, vol.4, p.3

This *Hadith* clearly states that the amount of the bequest must not exceed one third of the wealth of the deceased. However, if a person makes a bequest of more than one third of his property, it will not be executed except where the heirs give their consent.¹¹⁸ If the deceased is indebted, the debt must be paid first before the bequest is executed. This is according to the consensus of the jurists¹¹⁹

As far as the law of inheritance is concerned, there were three reasons which made a person qualified to inherit from someone else according to the *jāhiliyyah* practice. These three reasons were:

1. Consanguinity
2. Adoption and
3. Clientage (*Muwālāt*)

With the first class of heirs the priority is given to the sons, grandson, father, grandfather, brothers, agnatic cousins, uncles and nephews. Then come the adopted sons who would enjoy the same rights as the natural sons. The third class of heirs arose out of the custom by which two Arabs used to enter into contract of clientage in which if one of them died, the surviving party would be a heir of the deceased and would have his share from the deceased's property.¹²⁰ The general principles of inheritance established among the *jāhiliyyah* people was to exclude both women

¹¹⁸ Qayrawānī, *Al-Risālah*, pg 484

¹¹⁹ Doi, *Sharī'ah*, pg.329

¹²⁰ Darādkah, Yāsīn Aḥmad Ibrāhīm, *Al-Mīrath fi al-Sharī'ah al-Islāmiyyah*, pp.37-46

and children from inheriting the property left by their deceased relatives. This is because those who are able to go to the battle field in order to defend the tribe are particularly qualified to inherit¹²¹. As far as women are concerned, they were to be included in the property of their husbands. This is alleged to have been a common practice among most of the *jāhiliyyah's* tribes. However, some tribes did allow women to inherit.¹²² It was mentioned that the first man who gave women their share in the *jāhiliyyah* was (Āmir b. Jusham who bequeathed his property to his sons and daughters. He made the share for his son double the share of the daughters¹²³ and this is similar to the shares that were fixed by Islam.

In Islamic law the reasons which qualify a person to inherit are also three which are :

1. Consanguinity (*al-qarābah*)
2. Marriage relationship (*al-zawjiyyah*)
3. Clientage (*muwālāt*)¹²⁴

As for consanguinity, Islam has specified and given the shares to those who have blood relationship with the deceased.¹²⁵ The marriage relationship means the two

¹²¹ Al-Qurtubī, *Al-Jāmi'*, vol.5, pg.46

¹²² (Ali, Jawad, *Al-Mufaṣṣal*, vol.5, pg.563

¹²³ Ibid, vol.5, pg.565

¹²⁴ Zuḥaylī, *Al-Fiqh al-Islāmī*, vol.8. pp.249-51

¹²⁵ For details see Ibid, vol.8, pp.249-50

parties (husband and wife) who made the legal marriage contract. Finally, clientage (*muwālāt*) is a kind of non-blood relationship that was carried over by Islam from the *jāhiliyyah* period. It is a relationship of two person in which if one of them died, the surviving party will have his share from the deceased's property. This type of relationship is called *walā' al-muwālāt*. The other type of relationship of the same kind is between a freed slave and his patron in which Islam has gave the right to the patron to inherit from his client if the later died without any heirs. However, if the patron or master died the client will have no share in his property.¹²⁶ This last reason which qualified a person to inherit was later abrogated by the *Qur'ānic* verse which rules:

"And those who believed afterwards, and emigrated and strove hard along with you, (in the cause of God) they are of you. But kindred by blood are nearer to one another regarding inheritance in the decree ordain by God, Verily God is the All-Knower of everything."¹²⁷

The first reason that qualifies a person to inherit is similar between Islamic law and *jāhiliyyah* practice. However, the other two reasons in *jāhiliyyah* are not considered in Islamic law. Although in the beginning of Islam, the *muhājirīn*¹²⁸

¹²⁶ Ibid, vol.8, p.251

¹²⁷ *Qur'ān*, 8/75

¹²⁸ *Muhājirīn* are those who migrated from Makkah to Medina following the Prophet.

would inherit the wealth of their *anṣār*¹²⁹ brothers, it was later abolished. As for the clientage (*muwālah*), it was also abrogated in Islam as mentioned earlier, therefore there are no shares allocated for them.

Islam has abolished the practice of giving inheritance to adopted children as practised in the *jāhiliyyah* period. In addition, Islam has also abolished the practice of limiting the right of inheritance only to those who are able to go to the battle field in order to defend the tribes. Islam also stipulated that women and children have the right to inherit.

ʿAṣabah or the agnate who is the male relative of the deceased had the privilege to inherit in *jāhiliyyah*. If a person died without having a son or father to inherit, his property would be inherited by his brothers or his agnate. The sisters would not get any share. However, in Islamic law there are shares allocated for the sisters and brothers of the deceased, although there is still some favour shown towards the agnate.

Kalālah which means those who inherit from the deceased who dies leaving neither an ascendant nor a descendants were known in *jāhiliyyah* and had their allocation in inheritance. Islam also gives the *kalālah* their shares of inheritance as mentioned in the *Qurʾān*:

¹²⁹ *Anṣār* are those who were living in Medina at the time the Muslims migrated there.

"They asked you for a legal verdict. Say: God direct (thus) about *al-Kalālah*. If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does God makes clear to you (His law) lest you go astray. And God is the All-Knower of everything"¹³⁰

Although Islamic law through the *Qur'ān* has accepted some of the *jāhiliyyah* practices with regard to inheritance, it has severely limited others and enshrined the law of inheritance in the legislation of the *Qur'ān* in chapter 4 verses 11,12 and 176.

2.5 Comparison Between the Islamic Law and *Jāhiliyyah* Commercial Practices

In the *jāhiliyyah*, the Arabs used to have transactions and contracts with each other as a basic necessity in their daily life. They also used to own property and dispose their property according to their existing practice. The property of the Arabs in that period was limited and simple because of the simplicity of their life. For those who lived in the desert normally their property consisted mainly of

¹³⁰ *Qur'ān*, 4/176

camels, cattle, tents, clothes and a few utensils. But for those who lived in towns there were properly built houses and shops which had value and also, in the town, land had its value. For both the town people and the desert bedouins, slaves were a common and valuable form of property.

As for the right to hold property, the *jāhiliyyah* customary practice recognised the right of every free man to own property. This does not seem to apply to the slaves, because they were the property of their masters. As for women, it seems that in some cases they too had the right to hold the property that they might receive from their husbands as a dowry or by gift from their parents and relatives. However, it is claimed that some of the tribes debarred women from inheriting. Sometimes a woman became rich by trade and commerce e.g. Khadījah the wife of the Prophet, who was well known as a wealthy woman among the *jāhiliyyah* community. As for an infant or a lunatic there does not seem to have been any legal institution which could protect them from the dishonesty of their guardian if the latter chose to act in such a way.

Islam allowed all human beings to own property. As for a child, his guardian is responsible to take care of his property until he is able to manage the property himself. A slave can own property with the permission of his master.

In the *jāhiliyyah*, there were various types of commercial contract practised by the people and some of these contracts have been approved by Islam whereas some others have been forbidden. Among the contracts which were practised at that time is the contract of sale. There were several types of sale contract among which were:

1. Sale of goods for goods as an exchange of goods or barter (*muqāyaḍah*).
2. Sale of goods for money, a form of sale commonly being used (*bayʿ*).
3. Sale of money for money or money-changing (*ṣarf*).
4. Sale in which the price was paid in advance, the article to be delivered at a future date, this sale being called (*salam*).
5. Sale with an option to revoke (*khiyār*).
6. An absolute or irrevocable sale (*al-bayʿ al-tāmm*).
7. Sale of goods, the price to be paid in future (*al-bayʿ bi al-thaman al-ʾājil*).
8. A transaction in which the vendor sells the article for the cost price and certain stated profits (*murābahah*).
9. Sale at the cost price, i.e. without any profit (*al-tawliyah*).
10. Sale at less than cost price (*wadīʿah*).
11. Sale by bargaining (*musāwamah*).
12. Sale by throwing a stone which means that several clothes or other goods being exposed for sale, the buyer throws a stone and whichever piece it falls upon becomes the property of the buyer, neither party having the option of revoking the sale (*bayʿ bi ʾilqāʾ al-ḥajar*).

13. A form of sale in which the bargain was concluded by the buyer touching the goods which at once become his property whether the vendor agreed to the price or not (*mulāmasah*).
14. A form of sale in which the shopkeeper would throw an article towards the intending buyer, this having the effect of completing the sale (*munābadhah*).
15. The sale of dates on a tree before they have been harvested (*muzābanah*).
16. The sale of wheat in the ears or of a foetus in the womb (*muḥāqalah*).
17. A form of sale in which the vendor of the article says to the buyer, 'I sell you for the debt which I owe you on condition that when I repay the debt you will give back the article to me.' The buyer, however, could not make use of the article without the vendor's permission (*mu'āmilah*) or (*bay' al-wafā'*).
18. A form of sale called 'two bargains in one' in which the condition was that the buyer should sell the article back to the vendor within a stated period. (*bay'atayn fi bay'*).
19. A form of sale in which the purchaser would pay a portion of the price to the vendor stipulating that, if he approved of the article, he would pay the balance, otherwise he would return it and the amount paid by him would be forfeited (*'urbūn*).

20. A sale in which the goods were not in possession of the vendor at the time of the contract, but he is to secure it afterwards in order to fulfil the contract (*bay' al-ma'dūm*).¹³¹

Among these contracts, Islam has approved all the contracts that do not have the element of oppressing or cheating other parties. Islam has approved the sale of goods for goods and sale of goods for money¹³² and also the sale of goods with the price to be paid in the future, in which all these contracts must be concluded with the free will of the parties involved. Islam has put some conditions for most of the above mentioned contracts in order to be valid. Among these contracts are the sale of money for money (*ṣarf*) contract¹³³, the *salam* contract¹³⁴, sale with an option to revoke contract¹³⁵, *murābahah*, *al-tawliyah*, *waqī'ah*¹³⁶ and *bay' al-wafā'* contracts¹³⁷. As for *bay' bi-'ilqā' al-ḥajar*, *mulāmasah*, *munābadhah* and

¹³¹ See Abdur Raḥīm, *Muhammadan Jurisprudence*, pp.13-14

¹³² See al-Zarqā', *Al-Madkhal*, 1/298

¹³³ The conditions are: handing over the exchange amount before concluding the contract, the value must be same in both currencies, there must be no right of withdrawal (*khiyār*) and no postponement of the contract. See Zuḥaylī, *Al-Fiqh al-Islāmī*, 4/636 for details.

¹³⁴ The conditions for *salam* are: the type, description and amount of the article must be specified. Beside that when and where the article will be handed over also must be specified in the contract. Both parties also should know the capital amount of the deal. See Zuḥaylī, *Al-Fiqh al-Islāmī*, 4/599-600

¹³⁵ See al-Zarqā', *Al-Madkhal*, vol.1, pg.459-60 for details

¹³⁶ For detail of these three type of contract see op. cit. vol.4, pg. 704-712

¹³⁷ For details see Zarqā', *Al-Madkhal*, vol.1, pg.545-47

muzābanah contracts, they are invalid in Islamic law, because these types of contracts have the tendency of denying the freedom of choice to the buyers and they deprive the buyer of approving the contract. In a *Ḥadith* which was quoted by al-Jaṣṣāṣ the Prophet has forbidden these types of sale¹³⁸. As for *muḥāqalah* the scholars have differentiated between the sale of wheat (and similar items) in the ear and the sale of the foetus in the womb. They approved the former and disapproved the latter¹³⁹. Finally, for the *ʿurbūn* contract, there are differences in the opinions of the scholars. The majority of scholars said that it was not permitted but Aḥmad b. Ḥanbal held the view that it is a permissible contract¹⁴⁰.

In addition to those mentioned above there were some other contracts practised in the *jāhiliyyah* period. They also practised partnership contracts (*ʿaqd al-sharikah*). This is mentioned in the books of *sīrah* which described that the Prophet, before being appointed as the Messenger of God, had been doing business with his partner whose name was Sāʿib b. Abī Sāʿib. When the Prophet met Sāʿib on the day when Makkah was conquered by the Muslims He said to him: "Welcome to my brother and partner who did not oppose and dispute".¹⁴¹ This type of contract has been approved by Islam. However, the scholars laid down

¹³⁸ Jaṣṣāṣ, *Aḥkām al-Qurʾān*, vol.1, pg.528

¹³⁹ Al-Zarqāʿī, *Al-Madkhal*, vol.2, pg.998

¹⁴⁰ Zuḥaylī, *Al-Fiqh al-Islāmī*, vol. 4, pg.448/9

¹⁴¹ Zaydan, *al-Madkhal*, pg.34, citing *Imtāʿ al-Ismaʿ li-al-Maqrīzī*, pg.8-9

some guidelines for it. The contract of *al-mudārabah* was also known among the *jāhiliyyah* people. This contract means that a person who has money will give it to another person to trade and both of them will share the profit according to the agreement between them. The *Quraysh* sent caravans to Syria and Yemen and on these trips, those who had money would give it to the traders to do business in order to share in the profit¹⁴². This kind of contract has been approved by Islam.

Al-qard was another type of contract practised during that period. This contract means that a person would borrow something including the borrowing of money from another person and upon giving or paying it back the borrower would have to pay usury (*ribā'*) on the goods or money that he borrowed. Islam recognised the contract of *qard* as mentioned in a *Ḥadith* of the Prophet in which he said, "If a Muslim loans to another Muslim, the reward for it is twice that of *ṣadaqah*".¹⁴³ However, Islam has forbidden the practice of usury as mentioned in the *Qur'ānic* verse which says, "But God hath permitted trade and forbidden usury".¹⁴⁴ This means that Islam preserved the original idea of *qard* with the banning of interest (*ribā'*).

¹⁴² Zaydan, *Al-Madkhal*, pg.34

¹⁴³ Al-Shawkānī, *Nayl al-Awṭār*, vol.5, pg.347.

¹⁴⁴ Qur'ān, 2/275

The *jāhiliyyah* people also practised the contract of pawn (*rahn*) which means holding something that has a value as security for a loan. But the mortgagor has the right to own the mortgaged thing if the mortgagee does not pay his debt in the agreed period. They made this one of the conditions in the contract and it was also a common practice among them.¹⁴⁵ In Islamic law, *rahn* is allowed but certain modifications have been made in which there are certain conditions that were set up by the scholars to validate this contract. These conditions are:

1. Both parties to the contract must have the legal power to possess and dispose of the property. Therefore, the mortgage of an insane or demented person will be invalid.
2. The terms of the mortgage must be expressly declared.
3. The debt and the mortgaged property must not be prohibited commodities whose transactions are illegal under Shari'ah, e.g. wine, pigs etc.¹⁴⁶

In addition, the mortgagor has no right to own the mortgaged article if the mortgagee does not pay his debt in the agreed period. In this case, the judge has the power to sell the mortgaged article and pay the mortgagor according to majority of scholars. However, Abū Ḥanifah held the view that the judge must not sell the mortgaged article without the consent of the mortgagee, instead, he should hold the article until the mortgagee is willing to sell it.¹⁴⁷

¹⁴⁵ Al-Shawkānī, *Nayl al-Awtār*, vol.5, pg.355, Zaydān, *Al-Madkhal*, pg.35

¹⁴⁶ Doi, *Shari'ah*, pg.387

¹⁴⁷ Zuḥaylī, Wahbah, *Al-Fiqh al-Islāmī*, vol.5, pp.275-6

Bayʿ al-madīn is another type of sale practised in the *jāhiliyyah*. This sale means that a creditor has the right to sell the debt that he owes if a debtor is unable to repay the debt in its proper time, whereas in Islamic law, this type of contract is not allowed because the debt is connected to the debtor and not to other people (third parties). Therefore, the creditor has the right to request the debt but he has no authority to sell the debt.¹⁴⁸

The above mentioned transactions and contracts are among the various types of transactions that were practised in the *jāhiliyyah* period. As is obvious, some of these practices have similarities to Islamic law, where some of them are wholly accepted by the law of Islam and some others have been accepted with certain modification. However, in the *jāhiliyyah* period there do not seem to have been institutions to regulate these practices. Perhaps there was some kind of appeal to the leadership of the tribe to resolve disputes. In Islam, institutions were developed to regulate these matters.

* * *

This chapter has demonstrated some examples of the *jāhiliyyah* practices which have been considered by Islamic law. In all of the four parts that were discussed, we notice that Islam has not totally abandoned the practices of the

¹⁴⁸ Zaydān, *Al-Madkhal*, p.36

jāhiliyyah period, but it has taken into consideration many of their practices which do not contradict the teachings of Islam. The above discussion also indicates that one of the major functions of Islamic law is to reevaluate or ratify the existing *jāhiliyyah* practices. This is done by changing them completely or partly in certain cases and by preserving them in others in order to suit the Islamic legal principles that were revealed by the *Qur'ān* and the *Sunnah* of the Prophet. In addition, this chapter also demonstrates the development of the *jāhiliyyah* practices until the advent of Islamic laws. We can conclude by saying that customary practice has played a major role in the formation of Islamic law. However, Islamic law takes its legal origins from the *Qur'ān* and *Sunnah*, not the customary practices of the *jāhiliyyah*.

CHAPTER THREE

The Development of The Theory of 'Urf From The Prophetic Period to The Present

3.1 Introduction

Islam was revealed to the Prophet over a period twenty three years of his life, of which thirteen were in Makkah and ten in al-Madīnah. After this period in which the revelation was completed, Islamic law has gone through several phases of development up until recent times. The scholars of Islamic law have categorised the development of Islamic law traditionally into six major stages named as follows: *foundation, establishment, building, flowering, consolidation and stagnation and decline*. These stages occur in the following historical periods:

- a) Foundation :the era of the Prophet (609-632CE)
- b) Establishment :the era of the *Khulafā' al-Rāshidūn*, from the death of the Prophet to the middle of the seventh century (632-661CE)
- c) Building :from the founding of the Umayyad dynasty (661CE) until its decline in the middle of the 8th century CE
- d) Flowering :from the rise of the 'Abbasid dynasty in the middle of the 8th century CE to the beginning of its decline around the middle of the 10th century CE

- e) Consolidation : from the decline of the 'Abbasid dynasty at about 960CE to the invasion of Baghdad by the Mongols in the middle of the 13th century CE
- f) Stagnation : from the sacking of Baghdad in and decline 1258CE to the present time¹

These stages illustrate the development of Islamic law from the time of the Prophet until the present time, with stage four being regarded as the climax of the development after which the decline can be observed.

3.2 The Prophetic Period (609-632 CE)

In this period Islamic law went through two phases of development, the first of which was when the Prophet was in Makkah and the later period was when the Prophet was in al-Madīnah. During the Makkan period, which starts with the beginning of the Prophethood and ends with the Prophet's migration to al-Madīnah, most of the revelation focused on building the ideological foundation of Islam. Therefore, the basic topics of the Makkan revelation all reflect the principle of building faith in God. Among the basic topics in this period are: the unity and

¹ Some scholars have divided this development into seven stages in which the last stage was further divided into two. The stagnation and decline stage is from the sacking of Baghdād to the codification of the Islamic law in which the *Majallat al-Aḥkām al-'Adliyyah* was written by the Ottoman Government and the final stage is from that time until the present time. See al-Zarqā', *Al-Madkhal al-Fiqhī al-'Āmm*, vol.1, p.147

existence of God, life after death, stories of previous peoples, challenges to the pagan Makkans to imitate the style of the *Qur'ān* and formal prayers.² There are not many aspects of Islamic law discussed in this period. Therefore, there are no obvious traces of the usage of *'urf* in this period except that the Muslims continued to use the same custom of the Arabs before there were any rulings imposed on them by God.

After the Prophet migrated to al-Madīnah and the spread of Islam, the revelation became more concerned with the organisation of the Muslim community. During this period many rulings of Islamic law were revealed by God as the need for such law increased. It was then that the last three pillars of Islam, which are fasting in the month of *Ramaḍān*, paying the *zakāh* and performing pilgrimage were revealed. Indeed the prohibition of intoxicants, pork, gambling and the punishments for adultery, murder and theft as well as many other laws were also revealed during this time.

The sources of Islamic law during this period were either the *Qur'ān* or the *Sunnah* of the Prophet. The *Qur'ān* was sometimes revealed in terms of general principles which may be applied to various aspects of Islamic law. In this respect, the *Sunnah* has the role of explaining the intent of the *Qur'ān*, either by statements of the Prophet or his actions. For example, the *Qur'ān* commanded the Muslims

² Shalabī, *Al-Madkhal fī-al-Ta'rīf bi-al-Fiqh al-Islāmī*, p.51-5

to perform regular prayers without describing how they should be performed, so the Prophet prayed among his followers and told them, "Pray as you have seen me praying."³ On certain occasions, the Prophet may deduce rulings (*ijtihād*) based on the general principles of the *Qur'ān*. However, the *ijtihādāt* of the Prophet may be confirmed by the revelation if correct or corrected by God if incorrect. An example of the *ijtihād* of the Prophet which was corrected by the *Qur'ān* is that of the *zihār* divorce. It was related that Khawlah bint Tha'labah said, "My husband, Aws b. al-Şamit, pronounced the words: 'You are to me like my mother's back.' So I came to the Messenger of God to complain against my husband. However, the Messenger of God disagreed with me and said, 'Fear God, He is your cousin.' I continued complaining until the verse was revealed:

"God has indeed heard the statement of the women who disputed with you concerning her husband and carried her complaint to God, and God hears your discussion. Surely God hears and sees all things. If any men among you declare their wives like their mothers, (*i.e. zihār*), they cannot be their mothers. None can be their mothers except those who gave birth to them. They use bad words and falsehood..."⁴⁵

³ Al-Bukhari, *Şahīh*, vol.1, p.345, no.604

⁴ *Qur'ān*, 58/1-3

⁵ This *Hadīth* was related by Abu Dāwūd in *Sunan Abu Dāwūd* vol.2, p.266, no.2214

In the above example, the Prophet accepted *zihār* as a valid form of divorce and had told Khawlah to accept it. However, God declared it invalid.

At this stage of the *fiqh* development, the Companions of the Prophet were also permitted to make their *ijtihād*. Indeed, this was encouraged by the Prophet to prepare his Companions to carry on the application of the *Sharī'ah* after he left them. This can be noticed on several occasions in which the Prophet has allowed his Companions to give judgements on certain matters. It was reported that 'Alī b. Ābī Ṭālib said, "God's Messenger sent me to Yemen as a judge, so I asked, 'Oh Messenger of God! You are sending me and I am young, and I have no knowledge of giving judgements?' He replied, 'God will guide your heart and keep your tongue firmly (attached to the truth). When two litigants sit before you, do not decide until you have heard what the other has to say in the same way you heard the first, for it is more suitable for the correct judgement to become clear to you.'"⁶ Yet in another *Ḥadith* Abū Sa'īd al-Khudrī was reported to have said, "The Qurayzah tribe surrendered on the condition that it would be Sa'd b. Mu'ādh who would pass judgement on them. So, the Messenger of God sent for him. When Sa'd approached the mosque riding on a donkey, God's Messenger said to the Anṣār (Muslims of al-Madīnah), 'Stand up to receive your chief.' And he said to Sa'd, 'These people have surrendered on the basis of accepting your decision.' Sa'd said, 'Execute their warriors and take their women and children as captives.' On

⁶ Ibid, vol.3, p.301, no.3582

hearing that the Prophet said, 'You have judged according to God's judgement.'⁷ The above citation indicates that both the Prophet and his Companions practised *ijtihād* during this stage in the development of Islamic law. However, it should be noted that the *ijtihādāt* of the Prophet are not considered as an independent source of law, because their validity depended on divine revelation for confirmation. Indeed, the *ijtihādāt* of the Prophet were basically a means of giving his Companions lessons in the methods of *ijtihād* and the Companions' *ijtihādāt* at this stage were basically for practice.

The usage and consideration of *'urf* at this stage of the development of Islamic law can be observed through the recognition and modification of certain pre-Islamic Arabs customs by the *Qur'ān* and the *Sunnah*. Among matters which were recognised and modified were certain aspects of criminal and evidence law such as the incorporation and modification of the blood-revenge (*al-tha'r*) practice into the institution of *qiṣāṣ* in Islamic law, the practice of *diyah* and also the concept of *qasāmah*. The other matters that were involved were family law and many rulings relating to the commercial law (*mu'āmalāt*) which was discussed earlier.⁸ The *ijtihād* of the Prophet also gave a substantial consideration to the customary practice of the people at that time. Among the examples is the judgement that was given by the Prophet in the case of Khawlah with regard to

⁷ Muslim, *Ṣaḥīḥ Muslim*, vol.3, p.966, no.4368

⁸ Please refer to chapter two of this work

zihār as mentioned earlier.⁹ Even though the judgement of the Prophet was corrected by God, initially the Prophet has given his judgement based on the custom of the Arabs at his time. This indicates that the custom can be referred to as an original source of law if it does not contradict the text and the principles of Islam. Among the other examples of the judgements of the Prophet which were based on *ʿurf* is the permission of the contract of *salam*¹⁰ which was widely practised in al-Madīnah. This type of contract is the contract to sell something which does not yet exist, but, according to a *Ḥadith*, the Prophet allowed it to be practised.¹¹ The Prophet gave an exceptional ruling on this type of contract because it was a general practice of the people and was required in the society. These are among the examples of the usage of *ʿurf* in this early stage and indeed there are many other occasions in which *ʿurf* has been given consideration. In fact the customs which were prevalent during the lifetime of the Prophet and were not directly overruled by him are regarded as having received his tacit approval and become part of what is known as *Sunnah taqrīriyyah*.

⁹ See page 4

¹⁰ *Salam* is an advance sale in which the price is determined but delivery postponed

¹¹ Ismāʿīl, Mohamad, *Subul al-Salām Sharḥ Bulūgh al-Marām*, v.3, p.97

3.3 The Era of Khulafā' al-Rāshidūn and The Major Companions (632-661 CE)

The era of the *Khulafā' al-Rāshidūn* and the major companions begins from the Caliphate of Abū Bakr. During this stage the Islamic empire extended to Syria, Jordan, Egypt, Iraq and Persia. Thus, most of the populations of these regions embraced Islam and the Muslims were brought into contact with new systems, customs, cultures and patterns of behaviour which were totally different from the place where Islam had started. The consequence of this was the rise of many problems which had not occurred at the time of the Prophet. To resolve these problems, the Caliphate relied on decision by consensus (*ijmā'*). Normally when faced with a new problem the Caliph would follow the following steps to solve them:

1. They would try to find a specific ruling on the problem in the *Qur'ān*.
2. If they could not find the answer there, they would try to find the solution in the *Sunnah* of the Prophet, the sayings and actions of the Prophet.
3. If they still did not find the answer, they would ask the people whether they had heard any rulings of the Prophet on such problems.
4. If they still did not find the answer, they would then call a meeting of the major Companions and try to get unanimous agreement on a solution to the problem.

5. If, however, no agreement could be determined, then the scholars would make their own *ijtihād*.¹²

In this period, as can be observed, the sources of Islamic law increased to include *ijmā'* as another source of the law. Indeed, the Companions also utilised *qiyās* (analogical reasoning) in making decisions as Caliph 'Umar is reported to have ordered one of his governors to use *qiyās* as mentioned in his letter which was sent to Abū Mūsā al-Ash'arī in Kūfah in which he said, "You must know the similarities and likenesses (*al-ashbāh wa al-amthāl*) and compare (analogy) between different matters."¹³

As far as the usage of *'urf* is concerned, the *Khulafā' al-Rāshidūn* and the Companions preserved many pre-Islamic social customs and traditions and have also adopted and established some useful foreign customs. Indeed, they preserved the pre-Islamic customs that were practised during the time of the Prophet. For example, the measurement of grain continued to be regarded as *kaylī* (measured by capacity) and gold and silver were considered *waznī* (measured by weight). Many of the pre-Islamic commercial transaction which did not violate Islamic principles were also preserved, such as the contract of *salam* already mentioned.

¹² See Ibn Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'in*, vol.1, p.62-3

¹³ Ibid, vol.1, p.63

Among other examples of the usage of *'urf* is the customary practice of setting up a limited partnership (*muḍārabah*). This kind of contract was practised by 'Umar and 'Uthmān and other Companions¹⁴ and was later developed by the *fuqahā'* as a legally defined institution with the necessary terms and conditions for its different branches. Mālik b. Anas (d.179AH/795CE) has also mentioned some of 'Umar's judgements based on *'urf*. One example is the payment of *diyyah* (blood money) which was based on the prevailing custom. Those who used gold had to pay a *diyyah* of approximately one thousand dinars while those who used silver had to pay approximately twelve thousand dirhams. According to Mālik, the Syrian and Egyptians used gold in their commercial transactions, while the Iraqis used silver.¹⁵ These usages might have influenced 'Umar's decision. However, for those who still dealt in a cashless economy, payment had to be taken from their real wealth, which was camels. At the time of the Prophet and Abū Bakr, blood money was paid only in the form of camels¹⁶ as that was the existing custom. But 'Umar amended the blood-money payment system because of the new conditions that occurred at his time with the consideration for the traditional method to be continued for those who needed it.

¹⁴ See Al-Shafi'i, *Al-Umm*, vol.7, p.114

¹⁵ Mālik, *Muwattā'*, p.647

¹⁶ *Ibid*, p.647

Among the examples of the acceptance of a foreign custom by the Companions is the implementation of the *dīwān*¹⁷ (public registries) system by ‘Umar. Al-Māwardī, the prominent Shāfi‘ī scholar (d.450AH), states that once ‘Umar received a large amount of *ṣadaqah* (charity gift) from Baḥrain. He consulted the Companions on how it should be managed. One of the Companions suggested that the *dīwān* system be established and ‘Umar agreed with that suggestion. In another narration, it was reported that a Companion, Hurmuzān from Persia, was familiar with the Persian *dīwān* system and explained it to ‘Umar. Yet in another report, Khālid b. al-Walīd, who was also at the meeting related what he had seen in Syria, where apparently the Byzantine rulers had their own *dīwān* system. ‘Umar accepted these suggestions and established the *dīwān* system in al-Madīnah.¹⁸

The above account on the usage of ‘urf in the era of the Companions indicates the gradual development of the theory of ‘urf. The Companions followed the way of the Prophet in which they preserved the customs which were not in contradiction with the teachings of Islam. The *Qur’ān* and *Sunnah* methodology

¹⁷ From this word is derived the word *dawwana*. ‘Umar instituted the first *dīwān* in Islam to organise the pay, register the fighting forces and set the treasury in order. The register covered the people of al-Madīnah, the forces that participated in the conquest and those who emigrated to join garrisons in the provinces, together with their families. A committee of three genealogists carried out the registration by tribes and pay depended on past services to Islam and relationship to the Prophet. Registration by tribes continued till the end of the Umayyad period. The first *dīwān* was *dīwān al-jund*. See *Encyclopedia of Islam* (new edition), vol.2, p.323

¹⁸ See Al-Māwardī, *Al-Aḥkām al-Ṣultānīyah*, p.249

which provides general principles rather than giving a specific rulings on a matter gave a wider choice to the Companions to incorporate the *'urf* of the people in their rulings which changed according to the change of time and place.

3.4 The Era of the Formation of *Madhāhib* (Schools of Law)

This era occurs in the third and fourth stages of the development of *fiqh*. It is in this period that the two different approaches towards Islamic law began. It saw the disputes between *ahl al-ḥadīth* and *ahl al-ra'y*.¹⁹ It was during this era that *fiqh* took shape as an independent Islamic science and the famous Islamic schools of law were established namely: the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools. It was in this era that the different sources of Islamic law were identified and some legal differences developed between the major schools of law separating them from each other.

Beside *Qur'ān*, *Sunnah*, *ijmā'* and *qiyās*, the other sources such as *istiḥsān*, *istiṣlāh*, *'urf*, *'amal ahl al-Madīnah*, *istiṣhāb*, and *sadd al-dharā'i'* were developed by the above schools. The Ḥanafī school is renowned for the principle of *istiḥsān*

¹⁹ *Ahl al-ḥadīth's* stand is to avoid making legal rulings on an issue if clearly defined texts from *Ḥadīth* or *Qur'ān* related to the issue were not available. The laws whose reasons (*'illah*) were identified by God or His Prophet were used in analogical deductions (*qiyās*) whereas those left undefined were not. *Ahl-al-ra'y*, on the other hand, felt that where revealed texts were not available or subject to interpretation, they could use reason to establish a legal rulings. It should be noted that these two trends were merely extensions of trends which first appeared among the Companions.

in which there is scope for exercising and appreciating *'urf*.²⁰ Abū Ḥanīfah himself has considered many customs of the people in his rulings particularly in matters pertaining to the commercial law (*mu'āmalāt*). He is reported to have said that *'urf* determines and interprets the actual meanings of the legal terms commonly used in the society. However, custom has no legal effect if it is contradicted by a *naṣṣ* (*Qur'ān* or *Sunnah*).²¹ In the later period the scholars of the Ḥanafī school have developed the principle of *'urf* and relied upon it in the treatment of many cases. Muḥammad al-Shaybānī (d.189AH/805CE), the prominent Ḥanafī scholar, considers custom to be a source that should be considered in making decisions. Some of his statements are often quoted by other scholars. For instance: "*'urf* is decisive"; "evidence derived from custom is like that inferred from *naṣṣ*"; "what is known by *'urf* is like the condition laid down by *naṣṣ*"; "a general statement may be specified by the evidence of custom"; "custom is valid to particularise a general rule."²² Ibn 'Ābidīn (d.1252AH/1836CE), another famous scholar from the Ḥanafī school, was among the first jurists to deal specifically and exclusively with this subject in his treatise *Nashr al-'urf fī Binā' al-Aḥkām 'alā al-'Urf*²³. In this treatise he deals with most of the issues of *fiqh* based on *'urf* and *'ādah*. Ibn Nujaym

²⁰ See the discussion on *'Urf* and *Istiḥsān* in chapter six

²¹ Al-Sarakhsī, *Al-Mabsūṭ*, vol.9, p.17

²² Ḥamidullah, *Muslim Conduct of State*, p.35, citing al-Shaybānī, *Sharh al-Siyar al-Kabīr*, vol.1, p. 194, vol.2, p.296, vol.4, pp. 16,23-5

²³ Ibn 'Ābidīn, *Majmu'ah al-Rasā'il Ibn 'Ābidīn*, pp.112-45

(d.970AH/1563CE), another Ḥanafī scholar also has discussed *ʿurf* at length in his renowned book *al-Ashbāh wa al-Nazāʾir*.²⁴

Mālik b. Anas, the founder of the Mālikī school, also has relied extensively on *ʿurf* in his judgements. In fact he has made the *ʿamal* (practice) of the people of al-Madīnah as a legal source that he relied upon in his judgements. This is reflected in his work *al-Muwatṭāʾ* in which he has relied upon *ʿamal ahl al-Madīnah* on many occasions.²⁵ Indeed, the concept of *ʿamal* was developed by the Mālikī jurists to the extent that *ʿamal* was applied in a broad sense to include the *ʿurf* of all nations and areas.²⁶ According to Coulson, the concept of *ʿamal* developed from the centre of Qayrawān and was consistently applied by the *qāḍīs*.²⁷ Beside the usage of *ʿamal*, *ʿurf* also was developed in the Mālikī school by including it among the various bases of the Mālikī doctrine of public interest (*maṣāliḥ al-mursalah*). This doctrine was discussed by al-Shāṭibī (d.790AH/1388CE) at length in his famous work *al-Muwafāqāt*. Al-Shāṭibī also has addressed the importance of considering *ʿurf* in making judgements. Indeed, the customs which helps to achieve the community's common welfare are included

²⁴ Ibn Nujaym, *Al-Ashbāh wa al-Nazāʾir*, pp.101-14

²⁵ See the discussion on the relationship between *ʿurf* and *ʿamal* in chapter six

²⁶ Ibrahim, Ahmad, *Sources and Development of Muslim Law* in Singapore *Malayan Law Journal*, 1965, p.33

²⁷ Coulson, *Muslim Custom and Case Law*, in *The World of Islām*, vol.6, (1959) no.1-2, p.22

in *maṣāliḥ*, and they play an important role in fulfilling the purposes of the *Shari'ah*.²⁸

The third prominent founder of the Islamic school of law, al-Shāfi'ī was also reported to have utilised the *'urf* of people and his followers also have developed this theory. Even though al-Shāfi'ī does not discuss *'urf* as a legal source or as an authentic legal argument, in his renowned works *al-Risālah* and *al-Umm*, there is evidence that he accepted *'urf* as a valid argument. For instance, in discussing the subject of *ijtihād* in his treatise, *al-Risālah*, al-Shāfi'ī admits that a decision should be made according to the particular circumstances of a given place and time which are different from others.²⁹ Ibn al-Qayyim (d.751AH/1750CE) has reported the statement of al-Shāfi'ī on the condition of a person who is qualified to give a *fatwā* (legal opinion) in which he said,

"It is not permitted for a person to give a *fatwā* in matters of God's religion unless he is knowledgeable in the Book of God, the abrogated and abrogation..... and knowledgeable in the different (customs) of the people (*ikhtilāf ahl al-amṣār*)...."³⁰

The above statements indicate the importance and significance of *'urf* in making decisions according to al-Shāfi'ī. In the later period the scholars of the Shāfi'ī

²⁸ Al-Shaṭībī, *Al-Muwāfaqāt*, vol.2, pp.200-208

²⁹ Shāfi'ī, *Risālah*, pp.297-8

³⁰ Ibn Qayyim, *I'lām al-Muwaqqi'in*, vol.1, p.46

school have also developed the theory of *ʿurf*, for instance al-Juwaynī (d.478AH/1085CE) has pointed out the significance of customs and traditions by saying that *ijmāʿ* is proved by uninterrupted *ʿurf*.³¹ Al-Suyūṭī (d.911AH) another Shāfiʿī disciple, was the first Shāfiʿī jurist to acknowledge the importance of *ʿurf* in the social life. He has discussed the subject of *ʿurf* at length in his work *al-Ashbāh wa al-Naẓāʾir*. According to al-Suyūṭī, the *fiqh* maxims that he discussed were considered by Qāḍī Ḥusayn b. Muḥammad as the foundation of the Shāfiʿī school of law.³² One of the maxims that was discussed is the maxim: "custom is arbitrator" (*al-ʿādah muḥakkamah*). Under the heading of this maxim, he discussed *ʿurf* and *ʿādah* and emphasised that there are many legal issues that can be solved by referring to this source.

This theory was also developed by the scholars of the Ḥanbalī school. Even though there are no clear and definite opinions from Aḥmad b. Ḥanbal on *ʿurf*, the scholars of this school have used *ʿurf* in their judgements. For instance Ibn Qudāmah (d.682AH/1284CE), the prominent Ḥanbalī jurist, described both his opinion and that of Aḥmad b. Ḥanbal in his book *Al-Mughnī*. He mentions that Ibn Ḥanbal accepts weak reports if he found that they correspond with local

³¹ Juwaynī, *Ghiyāth al-Umam*, p.39

³² Suyūṭī, *Al-Ashbāh wa Al-Naẓāʾir*, p.7

custom.³³ Indeed, Ibn Qudāmah himself recognises *ʿurf* and utilises it in many of his legal opinions.³⁴

Ibn Taymiyyah (d.728AH/1327CE) and Ibn al-Qayyim al-Jawziyyah (751AH/1350CE) also accepted *ʿurf* in theory and practice. Ibn Taymiyyah has discussed *ʿurf* in his book *al-Fatāwā*³⁵ and has demonstrated on several occasions cases in which *ʿurf* should be used. An example of taking custom into consideration occurs when he discusses the subject of travelling. The definition of travelling according to him should be determined according to the prevailing *ʿurf* as there is no limitation specified by the *Sharīʿah*. Ibn al-Qayyim also gave several examples on the usage of *ʿurf* in his writings. For instance, to determine whether commercial goods are defective or not should be referred to *ʿurf* of the people. If the *ʿurf* says it is defective then the purchaser has the right to replace it. However, if the defect is very minor and it is not considered as a defect in *ʿurf*, then the retailer has the right to refuse the replacement. Indeed, Ibn al-Qayyim states that those who issue rulings by only reporting what is stated in the books without considering the *ʿurf* and *ʿādah* of the place and the particular circumstances of people are misguided and misleading others.³⁶

³³ Ibn Qudāmah, *Al-Mughnī*, vol.6, p.485

³⁴ *Ibid*, vol.3, pp.561-2, vol.6, p.485, vol.7, p.18

³⁵ Ibn Taymiyyah, *Majmūʿ Fatāwa Sheikh al-Islām Ibn Taymiyyah*, vol.19, pp.243-47

³⁶ Ibn al-Qayyim, *Al-Ṭurūq al-Ḥukmiyyah fi al-Siyāsah al-Sharʿiyyah*, vol.3, p.89

The above account of the development and utilisation of *ʿurf* by the prominent founders and followers of the four respective schools of law again demonstrates the evolution of the theory of *ʿurf*. Indeed, it is in this era that many legal maxims about *ʿurf* were written by the scholars that indicate the importance of appreciating *ʿurf*. There is no doubt that this theory is a very important one that can be utilised as a supportive source in Islamic law. Even though it is not an independent source of law, *ʿurf* has played a significant role in the development of Islamic law. The development of this theory has continued from this era which is the era of the formation of the *madhāhib* till recent times.

3.5 The Era of *Majallat al-Ahkām al-ʿAdliyyah* to the Present time

Majallat al-Ahkām al-ʿAdliyyah is a codification of laws made in the time of the Ottoman Government which was completed in the year 1876CE and was declared as the law of the Empire. This codification which was based on the Ḥanafī school of law was gathered from various Ḥanafī works of *fiqh*. This law consists of one thousand eight hundred and fifty one articles which was divided into three main parts. The first part contains the discussion of the definition and classification of Islamic law. The second part discusses the legal maxims in

Islamic law and the final part contains the rulings related to Islamic commercial law (*mu'āmalāt*).

As far as the theory of *'urf* is concerned, the Majallah has mentioned several legal maxims that are directly related to the theory of *'urf*, which should be taken into account in making decisions on matters pertaining to Islamic law. The maxims that were mentioned are as follows:

1. Custom is an arbitrator (article 36)
2. Public usage is conclusive evidence and action must be taken in accordance therewith (article 37)
3. The matter which it is customary to regard as impossible is considered to be impossible in fact (article 38)
4. It is an accepted fact that the terms of law vary with the changes of time (article 39)
5. In the presence of custom no regard is paid to the literal meaning of a thing (article 40)
6. Effect is only given to custom where it is of regular occurrence or when it is universally prevalent (article 41)
7. Effect is given to what is of common and constant occurrence; but not to what happens infrequently (article 42)
8. A matter recognised by custom is regarded as though it were a contractual obligation (article 43)

9. A matter recognised by merchants is regarded as being a contractual obligation between them (article 44)

10. A matter established by custom is like a matter established by law (article 45)³⁷

This reference to the theory of *'urf* in the Majallah indicates that it is being utilised by the scholars at that time in order to make legal judgements. This also demonstrates the importance of *'urf* as it covers many aspects of law particularly the commercial law.

The development of this theory can also be observed in the period after the Majallah was written (1876CE) until the present time. Most of the *uṣūl al-fiqh* literature that was written by the modern scholars has included a section on *'urf* in their discussions as a supporting source of Islamic law. Most of these scholars have discussed *'urf* by including the opinions of the past scholars on this theory. For instance Zarqā' has allocated a special chapter that discusses this theory under the heading of *al-Nazariyyah al-'Urfiyyah* (The Theory of Customary Practice).³⁸

³⁷ See chapter five for further discussion on these maxims

³⁸ Al-Zarqā', *Al-Madkhal*, vol.2, pp.832-940

Also Khallāf,³⁹ Badrān,⁴⁰ Zaydān,⁴¹ Abū Zahrah⁴² and other prominent contemporary scholars have exhaustively discussed this principle in their writings.

* * *

The above discussion on the development of *urf* from the Prophetic period to the present indicates that this theory has evolved gradually from the time of the Prophet until recent times. There is no doubt that this principle will be continually developed by the scholars as it is an important instrument that should be considered in making many judgements. It is certain that this theory is one of the most important supporting sources in Islamic law and has to be taken into account in making judgements and introducing new legal solutions to novel problems.

³⁹ Khallāf, Abd al-Wahhāb, *Ilm Uṣūl al-Fiqh*, pp.89-91

⁴⁰ Badrān, Abū al-Aynayn, *Uṣūl al-Fiqh al-Islāmī*, pp.224-233

⁴¹ Zaydān, Abdul Karīm, *Al-Wajīz fi Uṣūl al-Fiqh*, pp.252-258

⁴² Abū Zahrah, Muḥammad, *Uṣūl al-Fiqh*, pp.254-258

CHAPTER FOUR

Inconsistency Between 'Urf and The Text¹ of Revelation and Other Sources of Islamic Law

4.1 Introduction

This discussion on the conflict between 'urf and the text of revelation and other sources of Islamic law will examine the position and authority of 'urf in the situation where there is conflict between 'urf and the mentioned sources. In the earlier discussions of the conditions of valid 'urf, it was mentioned that one of the conditions of valid 'urf is that it must not be in conflict with the text.² In this respect, the 'urf can either be in agreement with the text and other sources or it might be in conflict with them.

If 'urf is in agreement with the text of revelation, there is no doubt that it will be accepted and can be practised as part of the Islamic legal system. For instance, the 'urf of making a feast on the marriage day which has been endorsed

¹ Wherever the word 'text' is mentioned in this chapter, what is meant is the revelation text, i.e. *Qur'ān* and *Ḥadith*, unless another explanation is given

² See Chapter One, pg. 58-9

by the *Ḥadith* of the Prophet in which He says to (Abd al-Rahman b. (Awf: "Make a feast, even with one sheep."³

In addition, (*urf* might, also, be in conflict with the rulings of the jurists which were based on the other sources of Islamic Law such as *qiyas*, *istihsān* and *maṣlahah al-mursalah* .

4.2 Conflict Between (*Urf* and The Text (*Nass*)

The following discussion on the conflict between (*urf* and the revelation text can be divided into two parts: namely: the conflict between (*urf* and the particular text (*nass khāṣṣ*) and the conflict between (*urf* and the general text (*nass (āmm)*).

4.2.1 Conflict between (*urf* and the particular text (*nass khāṣṣ*)

Before any detail discussion on this subject can take place, it might be appropriate to define the meaning of particular text (*nass khāṣṣ*) as a technical term in *uṣūl al-Fiqh*. The meaning of *khāṣṣ* according to Fathī al-Duraynī, a prominent modern jurist, is, "The expression that is placed as a proof which carries specifically one meaning" (*al-lafz al-maūḍū' li-al-dalālah (ala ma'nā wāhid (ala sabīl al-infirād)*). He further explains when discussing the subject of the authority

³ Bukharī, *Ṣaḥīḥ al-Bukharī*, vol. 7 p.7

of *khāṣṣ* that the meaning of the particular (*khāṣṣ*) *Sharī'ah* text or other legal texts is clear and holds only one meaning. It is clear by itself and does not need any interpretation.⁴ For example the following *Hadith* which says: "The Messenger of God forbade the selling by *munābadhah*, i.e to sell one's garment by casting it to the buyer not allowing him to examine or see it. Similarly, he forbade the selling by *mulāmasah*, i.e. to buy a garment by merely touching it not looking at it".⁵ This *Hadith* indicates the clear meaning that a person is not allowed to practice the selling by *munābadhah* and *mulāmasah*.

In the light of the above discussion on the meaning of *naṣṣ khāṣṣ*, it is the consensus of the scholars that, if *'urf* is in conflict with the particular text, it is invalidated⁶ because the injunction of the particular text is clear and must be observed. The text undoubtedly is also stronger than *'urf*, so it must prevail over *'urf*. In this respect, if *'urf* is allowed to prevail, it will result in the abandonment of the text. Therefore, *'urf* whether it occurs before or after Islam, must not prevail over the particular text as texts are the main source of *Sharī'ah* and *'urf* is only a supportive source. One of the examples of the *'urf* that occurs in the pre-Islamic era which contradicts a particular text is the practice of usury which has been

⁴ Durāinī, Fathī, *Al-Manāhij al-Uṣūliyyah fi Ijtihād bi al-Rā'i fi Al-Tashrī' al-Islāmī*, pp.658-60

⁵ Al-Bukārī, *Ṣaḥīḥ al-Bukhārī*, vol.3, p.200

⁶ See Sharkasī, *Al-Mabsuṭ*, vol.12, p.196

forbidden with the text which rules, "...but God hath permitted trade and forbidden usury...".⁷

However, there is one case in which *'urf* can be considered even if it contradicts a particular text. This is in the case where the particular text was based on the *'urf* of the people when it was issued. In this instance, the text itself is considered a custom text (*naṣṣ 'urfī*), because it was based on the custom when it was issued. Therefore, the injunction of this text must be implemented according to the *'urf*. If the *'urf* changed, the rulings also must be changed accordingly. This exception can be noticed in the following example relating to the variety of items which can be exchanged which could result in being categorised as usury. The *Ḥadith* of the Prophet mentioned six items which must be exchanged with the same weight and amount. If it is exchanged with different weights or amounts the difference is considered as usury. The items mentioned are, gold, silver, barley, dates, salt and wheat. The measurement that is considered in this *Ḥadith* is obviously the measurement that is used at the time of the Prophet whether it is dry measure (volume measure) (*kaylī*) or weight (*waznī*). The scale of gold and silver at the time of the Prophet were based on *waznī* and the measurement for other items mentioned above were *kaylī*. Therefore, if the exchange for the same items is not made equally, the difference is considered as usury. This measurement might change from time to time, such as the measurement that is being used at the

⁷ *Qur'ān*, 2/275.

present. Almost all the mentioned items are measured according to their weights at present. With this change the present measurements should be followed although if this measurement is used, it might result in different amounts from the original measure mentioned in the text.

The other example that can be quoted here is regarding the text that rules about treating the silence of virgin to her guardian on the question of her marriage as consent. In a *Hadith* the Prophet said that the silence of a women indicates her consent. However, scholars agree that this ruling was based on the *'urf* at the time it was uttered by the Prophet as at that time virgins were too shy to express their consent by words. But if this situation changed at a time in which customarily it is normal for a woman to express her consent by words, and her silence does not indicate her consent, this custom must be taken into account in asking her permission for marriage, although, originally, according to the text her silence is sufficient to indicate her permission.

The above mentioned exception is the only situation in which the *'urf* can be considered if it contradicts the particular text. In any other circumstance the text will constantly prevail over *'urf*.

4.2.2 Conflict between *'urf* and the general text (*nass 'āmm*).

Conflict between *'urf* and the general text (*nass 'āmm*) can be divided into two categories, namely: the *'urf* that occurs at the time the text was revealed or uttered and the *'urf* that occurs later, after the completion of the revelation or after the Prophetic period. This discussion shall start with the *'urf* that occurs at the time the text was revealed or uttered.

i) The discussion on this point can be further divided into two sections which is the contradiction of the general text with the verbal *'urf* (*qawli*) and the contradiction with the practical *'urf* (*'amali*). If contradiction occurs between the meaning of verbal *'urf* and the linguistic meaning of the general text, it is the consensus of the scholars that the customary meaning (*'urf*) will prevail and must be considered.⁸ The position of the meaning of the verbal *'urf* here is similar to the position of the general text. This means that the role of *'urf* here is to determine and specify the meaning of the word according to its common meaning. This also means that the custom also plays the role of specifying (*takhṣīṣ*) the general meaning of the text. The customary meaning of a word is very important here, as it determines the meaning which is meant by the people in their usages and transactions. If there is any dispute over the meaning of the word, it must be referred to its customary meaning and not to the linguistic meaning. For instance, the meaning of the word

⁸ Jidī, Omar, *Al-'Urf wa al-'Amal fi al-Madhab al-Mālikī*, p.172

dīnār must be interpreted as the currency of the country where a transaction is concluded even though there are several countries which use the same term for their currencies. This is because the customary meaning in this case refers to the currency of the country where the transaction is concluded unless there is another condition agreed. Similarly, the term *al-ṣiyām*, *al-bayʿ*, *al-ijārah* and other terms used in the *Qurʾān* should be referred to its customary denotations and not the linguistic ones.

The scholars disagree on the situation where there are conflicts between the general practical (*urf*) and the general text. The question in dispute is whether the general practical (*urf*) can specify the general text or not. The Ḥanafī school held the opinion that the general practical (*urf*) can specify the general text, however, most of the remaining schools disagree with this opinion.⁹ The Ḥanafis support their opinion arguing that all the scholars agreed that the practical (*urf*) can qualify the absolute text (*yuqayyid al-muṭlaq*).¹⁰ Therefore, this can also apply in the case

⁹ Abū Sanah, Aḥmad Fahmī, *Al-ʿUrf wa al-ʿĀdah fi Raʿi al-Fuqaha*, p.120

¹⁰ *Muṭlaq* is a word which is neither qualified nor limited in its application. This means the expression that indicates the various meanings within its genus (*al-laḥẓ al-dāll ʿala madlul shaʿiʿi fi jinsihī*) see al-ʿĀmidī, *Al-Aḥkām*, vol.3, p.2. As an example, when we say a book, a bird or a man it is a general word which can apply to any book, bird or man. When *muṭlaq* is qualified by another word or words it becomes a *muqayyad*, such as qualifying a book as a blue book or a man as a tall man. One of the example for *muṭlaq* can be noticed in the verse concerning the expiation of those who wish to go back to their wives after *zihār*, which says: "But those who divorce their wives by *zihār*, than wish to go back on the words they uttered (it is ordained that such a one) should free a slave (*raqabah*) before they touch each other.....". (58/3) The word *raqabah* in the verse is *muṭlaq* (absolute), it is not limited or restricted to any kind of slaves whether Muslim or non-Muslim. Yet in another verse the expiation of an erroneous killing consists of "freeing a Muslim slave" which is mentioned in *surat al-Nisāʾ*(4) verse 92 which says, "... If one (so) kills a believer, it is ordained that he should free (continued...)

of general text with *'urf*, i.e. the general practical *'urf* can specify the general text (*takhṣīṣ al-āmm*). The *jumhūr* disagree with the Ḥanafis and in response say that it is incorrect to draw an analogy between *muṭlaq* and *muqayyad* and *takhṣīṣ al-āmm* as both are two different principles. This is because the indication of *muṭlaq* on *muqayyad* is the indication of the partial on the whole (*dalālah al-juz'ī 'alā al-kullī*) and this kind of indication is weak, whereas the indication of *āmm* on *khāṣṣ* is the indication of the whole on the partial (*dalālah al-kullī 'alā al-juz'ī*) which is a stronger indication. So, according to the *jumhūr*, these two principles are totally different from each other. Therefore, there can be no comparison between them.

An example of the general practical *'urf* that specifies the general text could be noticed in the text relating to feeding the child. It is mentioned in the *Qur'ān* in *Surah 2* verse 233 that the mothers shall give suck to their infants for two whole lunar years. This text is general to all women but according to the customary practice of the Arabs at the time the verse was revealed, those noble women in the society did not give suck to their children, instead they would pay other women to do so.¹¹ This was practised at the time of the Prophet and he endorsed it. This

¹⁰(...continued)

a believing slave (*fa taḥrīru raqabatin mu'minatin*)...". This second verse qualifies that the slave to be released as a Muslim whereas the first verse is conveyed in absolute terms.

¹¹ Qurtubī, *Al-Jāmi'*, vol.3, p.161

indicates that the general customary practice of the Arabs has qualified this verse so that it excludes noble women from giving suck to their infants.

On the other hand, if the practical *'urf* is the *'urf* of a certain group of people such as the practice of some businessmen and not the whole, it has no authority to specify the general text.¹² This is because if this kind of practice is allowed to specify the text, then the text will be specified simply by any practice of the people which might lead to the text being specified for the interest of certain groups of people. This also might cause certain people to having the privilege of specifying some texts but not others which would create confusion and inconsistency in the law.

ii) As for the *'urf* that occurs later, after the completion of the revelation or after the Prophetic period, it has no authority to specify the general text. However, there are also exceptional situations in which this *'urf* can be considered, which will be discussed later. This opinion is held by the majority of the scholars (*jumhūr*).¹³

The reason for this is that this *'urf* occurs after the meaning of the injunction is clear and determined at the time of revelation. This means, that the meaning of the text has been valid from the time it was revealed or uttered by the Prophet. If the *'urf* which occurs later is authorised to specify the text, this will means that *'urf*

¹² Al-Zarqā', *Al-Madkhal al-Fiqhī al-'Āmm*, vol.2, p.898

¹³ Ibid, p.900

will abrogate part of the text and this is against the principle of the *Shari'ah* which indicates that abrogation cannot take place after the revelation is completed. In addition, it will also cause many rulings to be changed without proper grounds. There is no difference between the verbal *'urf* and the practical *'urf* in this situation. Neither are authorised to specify the general text. For instance, after the revelation, if the *'urf* has changed in determining the meaning of certain words, it will have no effect on the original meaning of the revelation which was determined by the customary meaning at the time it was revealed. The reason for this is that the *'urf* that stands at the time of revelation has already determined the meaning of the words and it cannot be changed by the *'urf* that occurs later. For example, the oath (*yamīn*) that is not accountable in verse 89 surah 5 which means, "God will not call you to account for what is futile in your oath, but He will call you to account for your deliberate oaths...". The *yamīn* that is uncountable in this verse is the oath with the name of God and not the oath of divorce or freeing a slave because this meaning was not known in the pre-Islamic period.¹⁴ This indicates that if someone swears to divorce his wife or free his slave, the oath is accountable and is not included in the exemption of the above verse.

Based on the above reasoning, all the other texts of *fiqh*, agreements or contracts such as the contract of sale, or bequests and other related matters should, also, be interpreted according to the *'urf* at the time the text, contract or job was

¹⁴ Abu Sanah, *Al-'Urf wa al-(Ādah fi-Rā'i al-Fuqahā'*, p.125

concluded and not the *ʿurf* that may occur later. For example the *fiqh* text that states, "If a person sends his son to a teacher (*ustādh*), and there is dispute in determining who should pay whom, the *ustādh* asking from the guardian of the child for payment and the guardian asking from the *ustādh*, in this case who should pay to whom? The decision should be based on *ʿurf*. If the *ʿurf* indicates that the *ustādh* has to pay or otherwise this must be followed".¹⁵ In this context, one of the meanings of the word *ustādh* refers to master (craftsman) who teaches skills (*rabb al-ṣināʿah*) and who sometimes has to pay other to teach the skills to his apprentices.¹⁶ At the present the word *ustādh* gives the meaning of the teacher who teaches knowledge, so it is incorrect to understand the above text using the present customary meaning of the word *ustādh*. This is because the master (craftsman) who teaches skills will normally teach the students to do something which indirectly benefits the teacher as well as the student. So, in certain places, the teacher might pay the student for the work that he has done. To use this meaning in the present time would be out of context as the teacher who teaches other knowledge will not get material benefit from what he teaches.

Ibn Nujaym said that the valid *ʿurf* is the *ʿurf* that occurs in conjunction with the text and not the *ʿurf* that occurs later. He further explained that this was the reason why it was said that the *ʿurf* which came later is insignificant (*la ʿibrah bi-*

¹⁵ Zarqāʾ, *al-Madkhal*, vol.2, pp.902-3

¹⁶ See Al-Jawāliqī, *Kitāb al-Muʿarrab*, p.73

al-ʿurf al-tāriʿ).¹⁷ This indicates that all the *ʿurf* which comes later, whether it is the practical or verbal *ʿurf*, is negligible even though it may be the general *ʿurf*.

However, there is a situation in which the *ʿurf* that comes later can be considered, e.g. if the reason (*ʿillah*) behind the text was based on *ʿurf* and this *ʿillah* is unsuitable to the later situation. The *ʿillah* behind the revelation of the text is either mentioned in the text or deduced by the scholars through their *ijtihād*. In this situation, the later *ʿurf* should be considered although it may be in conflict with the text, as not to consider it might lead to the reason behind the text being denied. This is because the *Shariʿāh* texts should be considered along with their causes of revelation.¹⁸ The example in borrowing and lending something from others, as it is mentioned, is that it is permissible to borrow pieces of bread from neighbours, because this practice was common and sometime necessary. When returning the borrowed pieces it is not necessary that the weight of the returned pieces of bread is similar to the borrowed ones, instead, the number of pieces of bread borrowed should be returned regardless of the weight although bread is included as one of the items of *ribā* as mentioned in the saying of the Prophet. The general text which is the saying of the Prophet emphasised that the exchange of the items of *ribā* must be made with the same weight, any difference being considered as usury. This view was based on the *ʿurf* of the people as the neighbours normally would

¹⁷ Ibn Nujaim, *Al-Ashbāh wa Al-Nazāʿir*, p.110

¹⁸ Al- Zaraqāʿ, *Al-Madkhal*, vol.2, p.904

not regard the difference in weight in lending bread to others but, instead, considered the pieces. Therefore, this practice is not considered as usury which is prohibited in Islam. This is because the *'illah* behind the prohibition of usury which is oppressing the other party involved in the transaction does not exist in this context. Therefore, this practice is allowable according to *'urf* and necessity. Furthermore, there are no specific texts that forbid this practice of borrowing and lending bread among neighbours.

Another example of accepting *'urf* which occurs later because of the difference in *'illah* can be noticed in the following situation. According to the Ḥanafī school, a commutative contract such as the contract of sale, must not consist of any condition that contains any benefit which is out of the nature of contracts, such as the condition that the retailer has to send the goods to the purchaser at his own expense or the condition that permits the retailer to utilise the goods for a certain period or other similar conditions. This opinion was based on a *Ḥadith* which states that the Prophet has forbidden the sale with conditions.¹⁹ However, there are two types of conditions which were excluded and considered as valid in the contract which are:

1. The conditions permitted by another text such as the condition of *khiyār*²⁰

¹⁹ Ibid, vol.2, p.906

²⁰ *Khiyār* is stipulated right of cancellation in a contract within certain period which is agreed by the parties involved.

2. The condition which is known and practised by people

This indicates that, according to the Ḥanafī school, the condition which is part of the *‘urf* of the people is excluded from the general text mentioned in the above *Ḥadith*. Therefore, it must be considered and respected even though it is a current *‘urf*.²¹ The condition commonly practised by the people is excluded from the text based on the effective cause (*‘illah*) of the ruling given by the Prophet. The *‘illah* in the above ruling was to avoid dispute among the parties involved. Therefore, if it is the practice of the people to set certain conditions in their contracts and it is well known, there is no reason for disputes on the condition which are common practice. So, the *‘illah* does not exist in this case. Therefore, it is valid as the ruling exists based on the existence of the *‘illah*, and when the *‘illah* is absent the ruling should also be changed to suit the change of *‘illah*. This type of condition which is common among the people and can be considered is not limited to the general *‘urf*, but furthermore the specific *‘urf* also should be regarded here.²²

The above discussion on the conflict between *‘urf* and the text can be summarised as follows. If a conflict occurs between *‘urf* and the particular text, then the particular text will prevail as it is stronger than *‘urf*. However, the only situation where *‘urf* can prevail over a particular text is when the particular text is based on the *‘urf* of the people when it was issued. If the conflict is between *‘urf*

²¹ Al-Zarqā, *Al-Madkhal al-Fiqhi al-‘Āmm*, vol.2, p.906

²² *Ibid*, vol.2, p.907-8

and the general text, the *'urf* either occurred at the time the text was revealed or uttered or it might occur later. In the first situation, if the contradiction is between the verbal *'urf* and general text, the verbal *'urf* will prevail, but if the contradiction is between the practical *'urf* and the general text, the Ḥanafis held the opinion that it can specify the general text but most of the other scholars disagree with this opinion. As for the *'urf* that occurs later after the completion of the revelation, most of the scholars agreed that it has no authority to specify the general text except in the situation where the cause (*'illah*) of the text was based on *'urf* and this *'illah* is incompatible with the later situation.

4.3 Conflict Between Qiyās, Istihsān, Maslahah and 'Urf

'Urf has the power to overrule *qiyās* on certain occasions²³. This is because the abandonment of *'urf* in such situations will create problems for the people and this is contrary to the aims of the *Shari'ah* which is to prevent hardship for people. However, in the situation where there is conflict between *'urf* and *qiyās*, *'urf* will prevail over *qiyās* as the consideration of *'urf* is more likely to benefit the people and in their interest than considering *qiyās*. This opinion is held by most of the scholars.²⁴ One example of the conflict between *'urf* and *qiyās* is in the paying of debt. The principle of *qiyās* indicates that the payment of debt should not be made

²³ See page 209-213

²⁴ See Ibn 'Abidīn, *Majmū' al-Rasā'il*, pp.114, Al-Zarqā', *Madkhal*, vol.2, p.913

to other than the debtor and it is invalid if it is paid to others without the authorisation of the debtor. However, this principle of *qiyās* is ignored by the scholar in the instance of a father receiving the dowry of his virgin daughter and this is considered valid even without the consent of the daughter as it is the custom that the father will receive the dowry on behalf of his daughter unless she insists that the dowry should be paid to her and not to anyone else.²⁵ Similarly, the rulings which were deduced from *qiyās* that was based on *ʿurf*, should be changed according to the change of *ʿurf*. In this respect, al-Qarāfī mentioned in his book *Al-Aḥkām* that to give a ruling on an instance that was based on *ʿurf* after it had changed is against the consensus (*ijmāʿ*) and he considered this kind of a ruling as ignorance in religious matters (*jahālat fi-al-dīn*). He further elaborated that to change the rulings according to the changes of *ʿurf* does not mean to reject the *ijtihād* of the previous scholars but it is to implement the principles of *Sharīʿah* which was agreed on and emphasised by the scholars.²⁶ One of the examples of this kind of conflict is in the case of a stolen cloth. According to Abū Ḥanīfah, if a person stole a cloth and dyed it black, that would decrease the value of the cloth. Therefore, the thief should compensate the owner either by replacing it with another cloth similar to the one stolen or returning the stolen dyed cloth and paying the amount of depreciation of the value of the cloth. This ruling was based on the general principle of *qiyās* on stolen things. However, when the *ʿurf* and attitude

²⁵ Al-Zarqāʿ, *Al-Madkhal*, vol.2, p.915

²⁶ Al-Qarāfī, *Al-Aḥkām*, p.68

of people changed towards the black colour during the 'Abbāsīd period as the 'Abbāsīds made this colour the government symbol, Abū Yūsuf and Muḥammad al-Shaybānī, the two disciples of Abū Ḥanīfah, said that dyeing a stolen cloth black increased the value of that cloth and did not decrease it. Therefore, the thief should compensate the owner by replacing it with another cloth similar to the one stolen or return the stolen dyed cloth and the owner has to pay the difference of the increased value of the cloth.²⁷ The different rulings given in this example are the result of the changes of time and 'urf and not because of the difference of ideas as such. The above method can also be applied to any other similar situations at present as the attitude of people towards a matter might change from time to time. Therefore, the rulings also must be changed to suit the changing situations and practices of people.

The position of 'urf with regard to other sources is very strong as Ibn Humām has mentioned that 'urf is in the position of *ijmā'* in the situation where there is no revealed text.²⁸ This indicates that 'urf appears stronger than *qiyās*. The abandonment of *qiyās* when it is in conflict with other sources is considered by the Mālikis and Ḥanafis scholars as *istiḥsān* and one of the sources that is considered when it is in conflict with *qiyās* is 'urf.²⁹

²⁷ Ibn 'Ābidīn, *Radd al-Muḥtār 'ala al-Durr al-Mukhtār*, 5/125

²⁸ Ibn Humām, *Fath al-Qadīr*, vol.6, p.157

²⁹ Al-Zarqā', *Madkhal*, vol.2, p.914

One important point that should be observed is that *'urf* which prevails over *qiyās* in the situation where there is conflict between the two, should be the general *'urf* and not the specific *'urf* as the specific *'urf* is only practised by certain groups of people. Thus, it cannot be relied upon as a general rule that affects others.³⁰

As for the conflict between *istihsān* and *maṣlahah* with *'urf*, it is obvious that *'urf* will prevail as it is stronger than these two sources. If *qiyās* which is the fourth major source in Islamic law can be abandoned when it is in conflict with *'urf*, then *'urf* should prevail when it is in conflict with other minor sources. In fact, the appreciation of *'urf* is also part of *maṣlahah*, and therefore there should not be any conflict between these two sources. It is a matter of choosing which is the greater *maṣlahah* if there is a conflict between these two. Obviously, to consider *'urf* as greater *maṣlahah* is accurate as it is the common practice of the people.

4.4 Conflict Between 'Urf and The Views of Scholars (Mujtahidīn)

A *Mujtahid* is a scholar who deduce the rulings of *fiqh* from the sources which are recognised by the *Sharī'ah*. There are certain criteria that must be fulfilled by the *mujtahid* which are:

³⁰ Ibn 'Ābidīn, *Majmu' al-Rasā'il*, p.116

- a) Profound knowledge of the texts whether *Qur'ān* or the *Sunnah* of the Prophet
- b) Knowledge of all aspects of the Arabic language
- c) Knowledge of the abrogating and abrogated (*al-nāsikh wa al-mansūkh*)
- d) Knowledge of the Principles of Islamic law (*uṣūl al-fiqh*) and other related sciences.³¹

One of the important sciences which the *mujtahid* should also have is the knowledge of the common practice and the social conditions of people. This latter knowledge is very important because rulings issued without considering the customs and conditions of the people will not fulfil the needs of society. Therefore, it may not benefit the society and this is against the principles of the *Shari'ah*. The ignorance of the customs and conditions of people by the *mujtahid* will make it difficult for him to relate his rulings with the situation and needs of the people. It is obvious that some rulings deduced by the *mujtahid* at one time, which were based on the situation and custom at that time, have to be changed at a later period because of the changes of customs and situations of the society. This is also the reason why the *mujtahid* must have knowledge of the customs and situation of the people. In this respect al-Sarakhsī mentioned in his book *Al-Mabsūṭ* that the minimum expectation of the *mujtahid* is that he should possess the knowledge of *Qur'ān* with its different meanings and the knowledge of *Sunnah*

³¹ For detail see Badrān, *Uṣūl al-Fiqh al-Islāmī*, pp.477-81

including its transmission, texts and different meanings, good ability in *qiyās* and knowledge in the customs of the people.³²

There is no doubt that every *mujtahid* will give rulings based on the *‘urf* at his time. Therefore, it is obvious, in the situation where there is conflict between the current *‘urf* and the view of the scholars, that the *‘urf* should prevail. This happens in matters where there already existed an opinion of scholars based on *‘urf* at the time it was issued. Indeed, differences in opinions on certain matters between the different schools of law also sometimes exist because of the difference of *‘urf* between the places where the rulings were issued. The occurrence of such conflict can be observed in the *fiqh* literature that gives different opinions of the scholars on certain matters based on *‘urf*. Among the examples of the above conflict is the opinion on crop sharing (*al-muzāra‘ah*)³³. According to Abū Ḥanīfah this practice is not allowed. However, Abū Yūsuf and Muḥammad al-Shaybānī allowed this practice as it was a necessary transaction and was commonly practised by the people. So, in this regard, the latter opinion seems to be more suitable with the present time as it is the practice of the people to allow others to plant their land and share the profit between them. Similarly, Abū Ḥanīfah, Abū Yūsuf and Muḥammad al-Shaybānī held the opinion that a person who teaches others to read

³² Al-Sarakhsī, *Al-Mabsūṭ*, vol.16, p.62

³³ *Al-muzāra‘ah* means the landlord assigns someone to plant his land and the profit will be shared between them

the *Qur'ān* or other religious knowledge is not allowed to take any payments as it is the responsibility of those who know this knowledge to teach the others. However, the later scholars allowed the teacher to be paid because of the changes of situations in which not many people are willing to teach without payment and it is a necessity to learn the *Qur'ān* and other religious knowledge. The above example indicates the necessity to issue new rulings on matters which have their rulings from the previous scholars because of the changes of *'urf*. Therefore, we could conclude by saying that if the opinion of a scholar contradicts the *'urf* the rulings should be revised to suit the situation and current *'urf*. The contradiction that should be changed is restricted to the opinion that was based on the *'urf* at the time the ruling was issued and not the opinion which was based on a clear text.

4.5 Contradiction Between 'Urf and Language

A word sometimes gives different meaning according to its usage. A certain word or phrase is understood, linguistically, with a certain meaning but customarily it may have its own meaning which is different from the linguistic meaning. In the context of *'urf*, we could observe that sometimes the customary meaning of a phrase is different or contrary to the linguistic meaning. This kind of contradiction between the customary and linguistic meanings is more likely to occur in the wordings used in vows or bequests. Therefore, it is important to know which meaning prevails as this will affect the consequence of the vow or bequest that

takes place. The scholars of Islamic law have different views on this matter. Al-Suyūṭī mentioned several views in discussing this matter including the view of al-Shāfiʿī and al-Ghazālī quoted from the saying of al-Rāfiʿī in which he said,

"The imam and al-Ghazālī's view in this matter is to consider (*urf*. However, in vows if the linguistic meaning is more widely used than the customary meaning, it should prevail over the customary meaning" ³⁴

The above quotation indicates the opinion of the Shāfiʿī school which is in favour of considering the customary meaning when it is in conflict with the linguistic meaning of a word. However, in certain instances where the linguistic meaning is more widely used and intended, it should prevail over the customary meaning. This is the general view in the Shāfiʿī school, but there are other opinions in the same school that the linguistic meaning should prevail over the customary meaning as was held by Qāḍī Ḥusayn.³⁵

The Ḥanafīs also held the opinion that the customary meaning should prevail over the linguistic meaning particularly in a vow. Indeed, most of the Mālikīs also held a similar opinion as mentioned by al-Qarāfi.³⁶ The instance that was given

³⁴ Suyūṭī, *Al-Ashbāh wa al-Nazāʿir*, p.94

³⁵ Ibid, p. 93. Qāḍī Ḥusayn is Abū ʿAlī-Ḥusayn bin Muḥammad bin Aḥmad al-Marwarūdhī who is widely known as Qāḍī Ḥusayn. He is a well known Shāfiʿī scholar who died in 462AH. See Khalikān, *Wafayāt al-Aʿyān*, vol.2, p.134-5

³⁶ See Al-Qarāfi, *Al-Furūq*, vol.1, p.175, *Sharh Tanqīḥ al-Fuṣūl*, p.112

by al-Qarāfī in supporting this ruling is the meaning of the saying of the Prophet which says, "God will not accept prayers (*ṣalāh*) without cleanliness (*tuhūr*)". He says the word *ṣalah* in this *Ḥadīth*, if interpreted according to its linguistic meaning which is *du'ā'* is certainly incorrect, instead it should be understood with its customary meaning which is the ritual prayer.³⁷

Another example on this subject is the instance of a person swearing not to eat wheat. The meaning that can be understood is that the person swears not to eat bread because normally people did not eat wheat. Similarly, if a person swears that he will not eat eggs, he will be breaking his oath by eating chicken or duck eggs but, if he eats fish eggs he is not breaking his oath as the customary meaning that is understood from the word egg is "chicken egg" and not "fish egg", although, linguistically, "fish egg" also uses the same term. Similarly, in a bequest, if a person says that he will make a bequest (*waṣiyyah*) of part of his property to an *ʿālim* (scholar) and the customary meaning of this particular word, when it is uttered, refers to those who are expert in religious matters, part of his inheritance must be given to those who are expert in religious matters even though the word *ʿālim*, linguistically, can also apply to those who are expert in all other fields of knowledge. In this case, the customary meaning should prevail as it is the meaning that is commonly used and understood by the people. Similarly, if a person says that his wife is his sister, he is not considered as conducting *zihār* customarily

³⁷ Al-Qarāfī, *Tanqīh al-Fuṣūl*, p.114

because it is common that a Muslim will call another Muslim his brother or sister in Islam. However, if it is clear that his intention in calling her by such a word is meant to consider her as his own sister, then clearly it is considered as *zihār*.

From the various opinions of the scholars, it can be concluded that the opinion of the *jumhūr* is that the customary meaning should prevail over the linguistic meaning of a word if there is contradiction between the two. This is in accordance with the legal maxim that reads, "In the presence of custom, no regard is paid to the literal meaning of a thing" (Majallah 40). In fact, the most important question here is which meaning is more widely used or understood by the people when a word is uttered. If the customary meaning is more widely used, then it should prevail. However, if the linguistic meaning is widely used, then it should prevail over the customary meaning. If both usages give the same meaning, then there is no question about it. However, if there is no customary meaning, then the linguistic meaning must be used as mentioned in the maxim that reads, "It is a fundamental principle that words shall be construed literally" (Majallah 12).

* * *

The above discussion on the subject of contradiction between *urf* and the texts and other sources of Islamic law indicates the importance of considering *urf* in deducing the rules of *fiqh*. It is clear that in certain situations *urf* has the

capability to specify the general text if there is a contradiction between these two sources. Furthermore *ʿurf* also will prevail if it contradicts other sources such as *qiyās*, *istihsān* and *maṣlaḥah*. The discussion also highlights the importance of examining the *ʿillah* of a ruling as the departure of the *ʿillah* will effect the ruling that was deduced. This is the reason why the ruling that was deduced based on *ʿurf* must be changed because the *ʿillah* of such a ruling will depart with the passage of time and change of circumstances. This discussion also indicates the authority of *ʿurf* when it is in contradiction with the opinions of jurists as it is very important for jurists to discover the current *ʿurf* before issuing any ruling. Finally, most of the scholars also agreed that *ʿurf* should prevail when it is in contradiction with the linguistic meaning of a word as it is obvious that the customary meaning is more widely used by people than the linguistic meaning of a word.

CHAPTER FIVE

The Legal Maxims (*Qawā'id Fiqhiyyah*) Relevant To

The Theory of 'Urf

5.1 Introduction

Qawā'id fiqhiyyah as defined by al-Zarqā' the prominent modern jurist, are general *fiqh* principles which are presented in a simple format consisting of the general rules of *Shari'ah* in a particular field related to it¹. These principles have general rules which can be applied in various cases. Most of these principles are very general as mentioned by al-Qarāfī in his famous work *al-Furūq* in which he says, "Most of Fiqh principles are general (*aghlabiyyah*)"² These legal maxims have a great role in the formation of Islamic law because they are used as principles to deduce many rules of *fiqh*. Many cases which occur can be referred to these maxims for solutions and in many instances they can be the measurement for the validity of certain deeds. For example the legal maxim that says, "Injury may not be met by injury" (Majallah 19); this legal maxim gives the general meaning that if a deed will cause injury to others then it cannot be implemented. It also indicates that if an injury has been done then it must get the proper

¹ Al-Zarqā', *Al-Madkhal*, vol.2, pg.948

² Al-Qarāfī, *Tahzīb al-Furūq*, vol.1, pg.36

treatment because it is against the rules. Al-Qarāfī in his introduction of his book *al-Furūq* also mentioned the importance of these maxims in Islamic law when he said,

"Islamic law can be generally divided into two parts, namely, the fundamental matters (*uṣūl*) and the branches (*furūʿ*). The fundamental matters are further divided into two sections, the first is what was called *uṣūl al-fiqh* and the latter is the general principles of *fiqh* which are very important and from which many rules of *fiqh* can be deduced.³

Al-Zarqāʾ in his introduction when discussing this topic, mentions that although these legal maxims are general principles, they have significant roles in *fiqh*. These maxims have solved most of the minor rules (*aḥkām*) of *fiqh* and without them these minor rules will have no standing ground which will make it hard to solve them.⁴

These legal maxims were not written all at once by a particular scholar, but they were developed by the jurists at the time of the resurgence of *fiqh*. Most of the authors of these maxims are not known except for those originally deduced from the sayings of the Prophet; for instance the maxim that says, "Injury may not be met by injury" . Another maxim known to be derived from the sayings of the

³ Ibid. vol.1, pp.2-3

⁴ Al-Zarqāʾ, *Al-Madkhal*, vol.2, pg.949

famous scholars which was then formulated to be a legal maxim is the saying of Abū Yūsuf (d.181H)⁵ in his well known book "*al-Kharāj*", " A ruler is not permitted to take anything that belongs to a person except through a proper way which has already been established (*laysa li-al-imām an-yukhrija shay'an min yadi aḥad illā bi-ḥaqqin thābiṭ ma'rūf*)".⁶ But most of the maxims were developed by the jurists themselves when solving the problems of *fiqh*. Among the earliest jurists who developed these maxims were the jurists of the Ḥanafī school.

As for the literature on this subject, there is a rich literature written by the scholars. This literature was written beginning from the third century of the *hijrah* up to the present time. Among the earlier literature in this subject are the maxims written by Abū Ṭāhīr al-Dabbās which consist of seventeen maxims gathered from the Ḥanafī school. However, the earliest compilation in the form of a note of these maxims was written by Abī al-Ḥasan al-Karkhī (d.334AH/945CE) which was annotated later on by Najm al-din Abū Ḥafṣ (Umar al-Nasafī (d.710AH/1310CE)).⁷ In the fifth century of *hijrah*, Abū Zayd (Abd Allah b. (Umar Al-Dabbūsi wrote his book *Ta'asīs al-Nazar* in which he elaborated some of the important maxims. After

⁵ Abū Yūsuf Ya'qūb b. Ibrāhīm is one of the famous Ḥanafī jurists.

⁶ Abū Yūsuf, Ya'qūb b. Ibrāhīm, *Kitāb al-Kharāj*, p.37

⁷ Both of these scholars, Al-Karkhī and Al-Nasafī, lived in the third century of the *hijrah* and both are well-known scholars of the Ḥanafī school.

this period various other books were written on this subject.⁸ Most of these legal maxims were later incorporated into the well-known *Majallat al-Aḥkām al-ʿAdliyyah* the Ottoman civil code. Among the contemporary books written on this subject is *Sharḥ al-Qawāʿid al-Fiqhiyyah* by Aḥmad al-Zarqāʾ.

Al-Ṣuyūṭī mentioned that some of the Shafiʿī scholars' opinions say that all the rules of *fiqh* are built on four maxims, namely, certainty is not dispelled by doubt, hardship causes the giving of facility⁹, injury is to be removed and custom is an arbitrator.

5.2 The Effect of ʿUrf on Legal Maxims

The theory of ʿurf has played a major role in the formation of the legal maxims. Each and every type of ʿurf, whether it is the verbal (ʿurf qawālī) or the practice (ʿurf ʿamalī) has its role in the formation of certain legal maxims. This is the reason why in their discussion on *qawāʿid fiqhiyyah*, the scholars have included the maxims related to the theory of ʿurf as one of the important maxims. As an example the legal maxim which is normally discussed is, "Custom is an

⁸ Among the other books written on this subject are: *Al-Jumūʿ wa-al-Furūq* by ʿAbd al-Wahhāb Al-Baghdādī, *Qawāʿid al-Aḥkām fi Maṣāliḥ al-Anām* by Izzuddīn ʿAbd al-ʿAzīz b. ʿAbd al-Salām (d.660AH), *Al-Qawāʿid* by Ibn Rajab al-Ḥanbalī, *Kitāb Al-Furūq* by Shihāb al-dīn al-Qarāfī (d.684AH/1285CE), *Al-Ashbāh wa al-Nazāʾir* by al-Suyūṭī (d.911AH), *Al-Ashbāh wa al-Nazāʾir* by Ibn Nujaym (d.970AH/1563CE) and others.

⁹ This means that difficulty is the cause of facility and in time of hardship consideration must be shown.

arbitrator (Majallah 36)¹⁰. In addition, the scholars also discussed other maxims relevant to *‘urf* which were considered as the branches of this main maxim in their discussion of this subject. This indicates the importance and the role of *‘urf* in the formation of legal maxims. In fact, the consideration of *‘urf* in these legal maxims has made it easier for the jurists to resolve many problems which arise as the result of the change of circumstances and place. The *‘urf* related maxims can also be utilised to resolve the problems related to public interest (*maṣlahah*) and necessity (*ḍarūrah*) of people. These problems might be either related to the *uṣūl* (primary) matters or the (*furū’*) (secondary).

5.3 The Maxim Which is Regarded As Governing All Other Maxims on ‘Urf

The maxim which reads *al-‘ādah muḥakkamah* is considered by al-Suyūṭī, Ibn Nujaym and al-Zarqā’ as the main maxim and all the other maxims related to *‘urf* are regarded as branches of this main maxim. *‘Ādah* in this maxim means the practices of the people whether in their doings or in their sayings, regardless of whether it is the general practices of the people or the practices of certain groups of people. These practices must be considered as arbitrator and can specify a general matter (*takhṣīṣ al-‘āmm*) or restrict an unrestricted matter (*tuqayyid al-*

¹⁰ Indeed, according to al-Zarqā’ this maxim is the primary maxim related to the theory of *‘urf* and all other maxims are the branches of this main maxim. This is the reason why he placed other maxims as the branches of this maxim when discussing them. See al-Zarqā’, *Al-Madkhal al-Fiqhī*, vol.2, pp.999-1001.

mutlaq). For instance, a contract does not specify whether the delivery of the goods is the responsibility of the purchaser or the retailer. In this case the prevailing custom should be depended upon to specify and clarify this matter which is not mentioned in the contract. In addition, *urf* can also be depended upon to interpret a general statement which was not clarified. The word *ādah* in this context also includes the normal practices of people in their daily transactions. Therefore, if there arise any dispute among them in a particular transaction, the normal practice in that particular transaction should be the arbitrator to resolve the dispute. However, in the situation where the *ādah* contradicts a stipulated agreement between the parties involved, it is nullified. In this case the statement should prevail and not the practice as such. This is because the statement or condition which is agreed on in a contract has greater authority over the customary practice of the people.

Adah is also nullified if it contradicts the text of the *Qur'ān* or the *Sunnah* of the Prophet according to most of the scholars. However, Abū Yūsuf¹¹ held the opinion that in the situation where the *urf* is in conflict with the text and the rulings of the text was based on *urf* or *ādah*, it can be changed according to the prevailing *urf* or *ādah* provided that there is need for such a change. For instance, the measurement for certain types of goods at the time of the Prophet might be different from what is being used in other times. Therefore, the *Ḥadith* which

¹¹ Abu Yusuf is one of the well known scholars of Ḥanafī's school

indicates about this matter, could be disregarded because it was based on the practice that was prevalent at that time. If such a ruling is needed at present, the current practice should be used on this particular matter even though it does not coincide with the saying of the Prophet.¹²

There are several other maxims that can be considered as the branches of this main maxim. These branches indicate the different types of *'urf* and the conditions of a valid *'urf*.

5.4 The Maxims Indicative of the Different Types of 'Urf.

1) There are three maxims that indicate the verbal *'urf* (*'urf qawlī*) which are:

a. *Al-Haqīqah tutrak bi-dalālat al-'ādah* which means in the presence of custom no regard is paid to the literal meaning of a thing. (Majallah 40)
This maxim indicates the verbal *'urf* which means that if a word is used commonly by people with a certain meaning which is different from its literal meaning, then the technical meaning which is commonly used by the people should prevail and not the literal meaning. For instance, the usage of the word *'ulamā'*; customarily this word means persons who are knowledgeable in religious matters but literally this word means

¹² For detail see Bāz, Sālim Rustum, *Sharḥ Majallah*, pg.34

knowledgeable persons in any field. Therefore, this word should be understood according to its customary meaning in the normal usage. However, if both the literal and the metaphorical (*majāz*) meanings are commonly used by people, the literal meaning will prevail according to Abū Ḥanīfah. But according to Abū Yūsūf and Zūfar the metaphorical meaning will prevail.¹³ As an example, if a person swore not to eat a kind of wheat and he ate bread which was made of that kind of wheat, he would not be considered violating his oath; because he is considered eating bread literally. However, if he ate the wheat itself, he would be considered violating his oath. But according to Abū Yūsūf and Zūfar he would be breaking his oath by eating bread which is made of the type of wheat; because metaphorically he is eating wheat even though the name has been changed to bread.

b. *Al-Kitāb ka-al-khiṭāb* which means, correspondence takes the place of an exchange of conversation (Majallah 69). This maxim is also connected with the above maxim which is in a verbal form whereas this maxim indicates the meaning that is given in the form of writing. Therefore, if a matter is expressed in the form of writing, the customary meaning should also be considered regardless of the literal meaning.

¹³ Al-Khayyāt, *Naẓariyyat al-Urf*, pp. 98-99, citing *Sharḥ al-Tawdīḥ li-Matn al-Tanqīḥ* li-Ṣadr al-Ṣhariḥ (Abd Allah b. Mas'ūd al-Bukharī, p.9501)

c. *Ishārat al-akhras al-ma'hūdah ka-al-bayān bi-al-lisān* which means, the recognisable signs of the dumb person, take the place of statements by word of mouth (Majallah 70). The meaning of a sign given by a dumb person must also be understood according to what is common among them. If the sign gives more than one meaning, the meaning that is common must be taken into consideration.

The maxims mentioned above indicate the importance of considering *'urf* in understanding the sayings of a person in certain situation in order to deduce a precise rule of *fiqh*. Ibn 'Ābidin, in commenting on this matter, said that the oath, vow, bequest, endowment and contract between two parties must be based on their language and convention (*'urf*), even though it may contradict the Arabic language or the *'urf* enshrined in the practice of *Sharī'ah* (*'urf shara'*).¹⁴ In fact, the approval of a contract should also be based on the normal practice which indicates the consent of people. For instance, in the contract of sale, if the normal practice is that the retailer will hand the item of sale to the buyer and the latter will pay the price without saying anything, this will be the normal practice indicative of the consent of the parties involved and the transaction is accordingly, considered valid.

2) As for the maxims which indicate the practice *'urf* (*'urf 'amali*), they are as follows:

¹⁴ Ibn 'Ābidin, *Majmū'ah Rasā'il*, pp. 136-145

a. *Al-Ma'rūf 'urfan ka-al-mashrūt shartan* which means, a matter recognized by custom is regarded as though it were a contractual obligation. (Majallah 43)

b. *Al-Ma'rūf bayn al-tujjār ka-al-mashrūt baynahum* which means, a matter recognised by merchants is regarded as being a contractual obligations between them. (Majallah 44)

c. *Al-Ta'yīn bi al-'urf ka-al-ta'yīn bi al-naṣṣ* which means, a matter established by custom is like a matter established by law. (Majallah 45)

These three maxims give almost the same meaning. However, they demonstrate different applications in different situations. The meaning of these maxims is that every practice that is common among the people and does not contradict Islamic teachings, is considered as a contractual obligation or a binding law. In other words, the practice of people is considered binding and should be taken into account in cases of disputes. These maxims, also, demonstrate the power of 'urf within the general sources of *Sharī'ah* in which, it can specify the general matter, and, also, qualify the unrestricted matters. It can, also, be considered as a condition in transactions if there are no other conditions agreed on by the parties involved. For example in the contract of sale, if the practice of a given place orders the retailer to send the goods to the buyer, then he will be

obliged to do so even though this may not be mentioned in the contract. So, it is obvious that the prevailing *'urf* when the transaction is concluded must be taken into account if there is any dispute between the parties involved. Similarly, if a person rented a house, and the responsibility to settle the bills of electricity and water was not mentioned, in this case, the *'urf* of that place will determine whether it is the tenant or the landlord who must pay the bills. If the *'urf* of that place rules that the tenant normally pays such bills, he is obliged to do so.

The second maxim, mentioned above, has specified the matters recognised by merchants as having the power of contractual obligations. In fact, this can be applied not only to the merchants but also to the other groups of people such as the professionals, i.e. engineers, doctors, etc. For instance, if there are certain formats that are established between them, such formats will be considered as mutual agreements and cannot be changed until other decisions are made. We can, then assume that a matter recognised by a group of people is regarded as being a contractual obligation between them.

3) As for the maxim that indicates the general *'urf* (*'urf 'āmm*) and the specific *'urf* (*'urf khāṣṣ*) it can be incorporated in the maxims mentioned above. This means that the practice which is recognised by merchants or professionals is considered as a specific *'urf* and the other practice which is known among the other people is considered as the general *'urf*.

5.5 The Maxims Indicative of the Condition of a Valid 'Urf

To enable a practice to be considered as a source in making rules, it must fulfil certain conditions. Some of these conditions are referred to in certain legal maxims, although, there are some other conditions which are not mentioned in these maxims. The conditions mentioned are as follows:

1. *Innamā tu'tabar al-'ādah idha i'ttaradat aw ghalabat* which means, effect is only given to custom where it is of regular occurrence or when universally prevalent. (Majallah 41) This maxim means not all customs and practices of people can be considered in deducing the rules of *fiqh*, nor would such practices be considered as the basis of judicial decisions in *Shari'ah* courts.

b. *Al-'Ibrah li-al-ghālib al-sha'ī' lā li-al-nādir* which means, effect is given to what is commonly known (widespread); not to what happens infrequently. (Majallah 42) One point that should be observed in this respect is that the distinctive mark which shows the practice is widely spread is when it can be considered as the special 'urf of a certain group of people. For example, in determining the age of maturity (*bulūgh*), the jurists decided that the maturity age for those who live in cold countries is eighteen years and for warm countries is fifteen years old. This rule was

based on the fact that is widely known by the people of these countries, although there are some people who may arrive at the age of maturity¹⁵ before or after the mentioned ages but these are rare instances which cannot be considered¹⁶ in deducing the rules of *fiqh* or as the basis of judicial decisions in *Shari'ah* courts.¹⁷

Among the other maxims that are considered as a branch of the main maxims and at the same time are indicative of the importance of considering *'urf* in making judgements, are the following maxims:

1. *Isti'māl al-nās ḥujjah yajib al-'amal bi-ha* which means, the usage of people is a valid evidence according to which it is necessary to act. (Majallah 37) This maxim indicates that if a certain group of people are familiar with a certain practice, such a practice will be considered as the rule which it is necessary to follow. This is applicable if there are no other contradictory practices and this practice does not contravene the *Shari'ah*. For example, it is a common practice between people that if someone gave some food to another using a plate, this plate should be returned unless it

¹⁵ The age of maturity for a man begins from his first ejaculation or when he arrives at the age of maturity as mentioned above. As for a women her maturity is from the first menstruation or when she arrives at the age of maturity as mentioned.

¹⁶ Khayyāṭ, *Nazariyyāt al-'Urf*, p.100

¹⁷ For detail explanation on these conditions see pp.53-55

is a paper or plastic plate which has no real value. Such a practice is considered as a rule which must be followed unless it is universally changed later on.

2. *Al-mumtani'* (*'ādatan ka al-mumtani'* *haqīqatan* which means, a thing impossible by custom is as though it were in truth impossible. (Majallah 38) This maxim indicates that if a thing is customarily impossible or illogical, it is also impossible to happen in the material world. For example, if someone claimed that another person, who is five years younger than him is his son, this allegation could not be accepted because it is impossible that the latter can be his son with such difference of age between them. Similarly, if a person claims the ownership of a large estate but he is well known as a poor, person and he is not known to have received any property or other wealth from the others, his claim would be invalid because of his situation which makes it impossible for him to possess such property.

5.6 The Maxim Which Indicates the Need For a Change of Law With the Change of 'Urf

The maxim which reads *la yunkar taghayyur al-aḥkām bi-taghayyur al-azmān* which means, it cannot be denied that with a change of time the requirement

of the law changes is among the most important maxims which indicates the need to change the law according to the change of circumstances. It is obvious that the condition of the universe, mankind, their privileges, and their assumptions will not remain in similar form and method; instead they will differ with the changes of time and circumstances. Such changes encompass persons, time and places.

Changes in life are a sociological phenomenon that cannot be denied because it is a necessity of the life of human being. This is why it is also necessary and rational to change the law and rules according to such changes. Despite this, there are some rules and values which should be preserved with the change of time and place; because they are universally accepted rules and values, e.g. the rules that say a criminal should be punished. This is also the reason why, in Islamic law, there have been many changes that occur with the change of circumstances and place. These changes are introduced in order to achieve the maximum justice and to make it simple for the people to practice them in their daily life, because one of the aims of the Islamic system is to prevent hardship and complications in life. So, if there are certain judgements issued at certain times according to the circumstances of those times, they may not be suitable for the people of another time; as this will be a burden for them to comply with it. This is the reason why a new rule is necessary for them which is compatible with the existing situation which will make it easy for them to practice.

One of the reasons why there are different opinions among the earlier and the later scholars of Islamic law in certain matters, is due to the changes of circumstances. Al-Zarqā¹⁸ highlighted this point when he talked about the present scholarship in which he said,

"If they (the earlier scholars) still lived and observed the present circumstances, they would issue the same judgement as the present scholars have done and they would change most of the judgements they issued in their time. This is due to the difference of circumstances and not to judgements as such"¹⁸

In addition, Ibn Abī Zayd al-Qayrawānī (d.386H) when asked about his opinion that allows the use of a dog to guard a house though this opinion is different from the opinion of Mālik who bans the ownership of dogs, al-Qayrawānī said:

"If Mālik were still alive at this time he would allow the use of tigers (to guard the house)".¹⁹

Realising the importance of the difference of circumstances which prompts the change of law, the jurists established this maxim which indicates that it cannot be denied, it is essential, that with the change of time the need for changing the

¹⁸ Al-Zarqā, *Al-Madkhal*, vol.2, p.924

¹⁹ Al-Jidī, *Al-Urf wa al-Amal* p.145 citing Al-Mahdi, *Hāshiyat al-Mahdi al-Wazzānī*, vol.2, p.350

law is necessary. As it is obvious, some of the *fiqh* rules have their own causes (*'illa*) and there is a common cause for all the *fiqh* rules which is to prevent hardship and provide benefit for mankind. If this cause is denied in certain rules, it must be changed for the benefit of people. There is a principle established in Islamic law which says, "The rules of *Shari'ah* will change according to the changes of its causes". In fact, one of the conditions that must be fulfilled by the *mujtahid* is that he must have a good knowledge about the *'urf* and changes which occurs in society.

5.6.1 The Type of Rules That Will Change According to the Change of Time and Circumstance

The jurists of Islamic law are agreed that the rules which will change according to the changes of time are the rules of *ijtihād* (*al-aḥkām al-ijtihādiyyah*) which are derived from analogical reasoning (*qiyās*), public interest (*maṣlahah*) or juristic preference *istiḥsān* etc. As for the fundamental rules which are established by the *Qur'ān* or *Sunnah*, such as the rules of the obligation to avoid the bad things or that a transaction can only be concluded if the parties involved are satisfied or other similar rulings, they are all immutable. These rules will not be changed with the change of time.

The procedure followed to implement these rules, however, might change from time to time. For instance to fulfil the obligation of giving every citizen his right in cases of disputes is an example of the fundamental rights, but the method used to achieve them is through the courts. The procedure followed in the court to solve this problem might differ from time to time. The judgement might be delivered by a single judge at one time but in another time a jury system might be introduced to solve the same problem. So, in this example we can notice the different procedures followed to implement the fundamental rules with the change of time. In Islamic law, different procedures can be followed as long as they do not contradict the general principles of Islamic teachings. All such procedures can be used in order to achieve the objective of *Shari'ah*, i.e. to obtain benefits and prevent hardship from people (*jalb al-maṣāliḥ wa dar' al-mafāsid*).

5.6.2 Examples of The Rules that Change According to The Change of Time and Circumstance

There are two factors affecting the change of time; namely, corruption or immorality and development. Corruption or immorality is connected with the behaviour of people in which they may become immoral and it is necessary to change the law in such a situation. The development of various aspects of life, e.g. as in administration, etc, can also become a reason for changing the rules. Illustrations for the above situation can be observed in the following explanation:

1. Among the rules that were changed by the later scholars due to corruption and misbehaviour of people are the following:

a) The earlier scholars held the opinion which says that the deed which is part of the obligation must be done without taking any payment because it is an obligation for those who are competent, for instance performing the ritual obligations such as being the leader in the congregation (*imām*), teaching *Qur'ān* or other related religious knowledge. However, the later scholars realised that not many people were willing to perform these obligations, due to the lack of consciousness among the people towards such responsibilities. Therefore, they issued a new rule saying that it is allowed for those who carry out such public responsibilities to accept payments. This is because these responsibilities are vital to the Muslims community.²⁰

b) The qualification of the evidence of a witness in a court is that he or she must be known to have integrity (*adālah*). This means that the person is trustworthy, and he or she regularly performs the ritual obligations as a Muslim. This is mentioned in the *Qur'ān* which rules that, "...and take for witness two persons from among you, endued with justice, and establish the evidence..."²¹ However, the later scholars realised that it is very hard to

²⁰ Ibn 'Ābidīn, *Majmū'ah Rasā'il*, pg.123/4

²¹ *Qur'ān*, 65/2

find a witness who fulfils all the requirements of a witness as mentioned in the *Qur'ān*. So, they ruled that a person can be a witness if he fulfils part of the requirements, i.e. the best person available who fulfils the required qualifications. This meant that they reduced the standard qualifications of a witness from the maximum to the best available level of integrity and probity.²²

c) In the past, the common practice in Malaysia with regard to marriage is that a male is allowed to marry without going through any courses which are related to married life. This is because most of the people at that time realised their responsibilities towards their families after getting married as the result of them being religiously and morally educated since childhood. However, these days the behaviour of people has changed with the result that many young people do not know their responsibilities; and this may affect their marriage leading to divorce and other problems. Accordingly, the authorities have made it compulsory for every youth who intends to get married to go through certain courses that will enhance their knowledge of Islam and family life.

2. The change of rules because of new developments in life can be observed in the following examples:

²² Ibn 'Ābidīn, *Majmū'ah Rasā'il*, pg.124

a) At one time, in the contract that involves real property, it was mandatory to register such a property according to its specifications. If the contract was made without direct knowledge of the property, the specifications of the property involved must always be mentioned in the contract in order to differentiate the property involved from other properties as a condition to validate the contract. However, according to the new system it is only essential to mention the registration number of the transaction without mentioning other specifications because the number specifies the property involved in the transaction.²³

b) A similar rule applies to the hand-over of the property which is sold or rented. In the past it must be delivered to the other party actually with the handing over of the keys or by any other proper way. However, with the change of circumstances and with the new system the property is considered delivered to the other party with the change of name in the registration documents. With this measure the property is considered delivered and any liability which may accrue thereafter must be regarded as the responsibility of the buyer.²⁴

²³ Al-Zarqā', *Al-Madkhal*, vol.2, pg.934

²⁴ *Ibid*, vol.2, p.934

c) Islamic law imposes on the divorced wife a waiting of a certain period of time (*iddah*) before she can remarry. This waiting period is required to make sure that the woman is not pregnant and that there is no mixture in the lineage (*nasab*). In the past when only one judge decided the divorce and there were no other people who could challenge his judgement, the waiting period for the divorced woman would start immediately after the judgement was issued. However, at present, with the change in the judicial system which allows the parties involved to challenge the judgement issued in another court, the waiting period should not start until the final judgement has been upheld. This is because if the waiting period started immediately after the first judgement, it might end before the final judgement was issued. If this happened, the women would have the right to remarry before the case was concluded and this would create difficulties. Therefore, the later scholars issued the rules that the waiting period will only commence when the case is over.²⁵

The examples mentioned above indicate the change of opinion in certain matters with the change of time. These differences in rules are not due to a difference in opinion or the bases of making the rules but rather to the change of circumstances which has influenced the change of rules.

²⁵ Ibid, vol.2, p.935-6

5.6.3 Sunnah Proofs Indicative of Changing the Law Due to the Change of Circumstances

There are certain Prophetic traditions and rules agreed by the Companions of the Prophet which indicate the possibility of changing the law according to the change of time. The relevant traditions in this matter are:

1. Related from (Ā)ishah, the Prophet said, "Had not (*law lā*) your kinsmen been very close to idolatry, I would have built the *Ka'bah* on the foundations made by Ibrāhīm".²⁶

2. (Abd Allah b. (Umar said, the Prophet said, "Had I not been (*law lā*) worried that some matters would trouble my followers, I would have ordered them to delay their (*Ishā*) prayer until two thirds of the night had passed".²⁷

The jurists agreed that the word *law lā* in the above *Ḥadith* indicates that the building of the *Ka'bah* on the foundations made by Ibrāhīm and the delaying of (*Ishā*) prayer until two thirds of the night had passed are recommended deeds but

²⁶ Al-Nasā'ī, *Sunan al-Nasā'ī*, vol.5, p.169. This means on the same foundation that was build by Ibrahim.

²⁷ Bukhārī, *Ṣaḥīḥ*, vol.1, p.319

the Prophet did not wish to make them obligatory. The reason for not making the building of the *Ka'bah* on the foundations made by Ibrāhīm obligatory is because at that time the Quraysh were still very near to paganism and they still preserve some of their *jāhiliyyah* practices. Therefore, if the building of the *Ka'bah* was changed they might go against it and such a change might lead to more harm than any benefit. The reason for not making the delaying of (*Ishā'*) prayer until two thirds of the night compulsory is that it might be a burden for those who were not used of doing so. Hence, we could notice that this *Ḥadith* indicates that the rules change according to the change of time.

The instances reported from the Companions that indicate the probability to change the rules with the change of time are clear in the following narration:

1. (Ā)ishah said, "If the Messenger of God had seen what new things the women have introduced (in their way of life), he would have definitely prevented them from going to the mosque as the women of Banī Isrā'īl were prevented".²⁸ The reason for (Ā)ishah to give this comment is that the behaviour of women at the time of the Prophet was different from her time; because in the time of the Prophet most women observed proper Islamic dress and followed good manners which was not so at the time (Ā)ishah made this comment. This indicates that (Ā)ishah was

²⁸ Muslim, *Ṣaḥīḥ*, vol.1, pg.241

confident that the Prophet would have changed the rule if such immoral practices had happened in his time.

2. Regarding the call for the *jum'ah* prayers, in the time of the Prophet, Abu Bakr and 'Umar there was only one call before the ceremony started. When 'Uthmān assumed power he ordered the second call which was not done by his predecessors. The reason for ordering the second call was because in the time of 'Uthmān, the population of al-Madīnah had increased and many people were busier with their work. So, the first call was meant as a reminder for them to get ready for the prayer. The change introduced here was because the situation in 'Uthman's time was different from that of the previous times. Therefore, he changed the rules for the benefit of the people.

We can notice that some of the rules which were mentioned in the *Qur'ān* and *Sunnah* were changed by the Companions due to the change of circumstances. This can be proved by the following cases:

1. It was mentioned in the *Qur'ān* that the punishment for the theft is to cut off the hand.²⁹ In 'Umar's period, he suspended this rule for a certain period of time because al-Madīnah suffered from a drought which caused a food shortage and

²⁹ The meaning of the verse is, "As to the thief, male or female, cut off his or her hands, a punishment by way of example, from Allah...". *Qur'ān*, 5/38

starvation. In this particular situation, 'Umar suspended the rules because if thefts happened they were normally related to starvation. Therefore, Umar did not implement the rules because of the hard circumstances.³⁰

2. Zayd b. Khālid related that the Prophet was asked about a lost camel. The Prophet said, "You have nothing to do with it, leave it alone because it has its feet which it can use to find drink and food until its owner finds it". It is clearly understood from this *Ḥadith* that the Prophet did not permit anyone to take a lost camel. This rule was persistent throughout the Prophet's, Abū Bakr's and 'Umar's periods. But when 'Uthmān assumed power, he ordered that a camel which had lost its way should be caught and sold. The money was then kept and given to the owner of the camel when he was identified. At the time of 'Alī b. Abī Ṭālib, a place was built in which such camels were kept until their owners were identified.³¹ In this case, 'Uthmān and 'Alī changed the rule which was implemented in the time of the Prophet because the nature and behaviour of people changed (which might cause the lost camels to be stolen if they were not kept in a safe place). Both 'Uthmān and 'Alī realised the cause and effect of the rules implemented by the Prophet. So, when the cause changed with the change of time, they had to change the rules for the benefit of the people.

³⁰ Zaydān, *Al-Madkhal*, pg.123-4

³¹ Zaydān, *Al-Madkhal*, p.124-5

3. At the time of the Prophet and Abū Bakr the divorcing of wives three times with a single pronouncement was considered as one divorce and not three. However, 'Umar ruled that such a method of effecting divorce was equivalent to three declarations of divorce and not one. This was because 'Umar realised that the people had begun to play with the word 'divorce'. So, he had to change the rule in order to bring more respect to the law of divorce.³²

These cases indicate that the Companions also suspended or changed some of the rules which were implemented at the time of the Prophet. One point which should be borne in mind is that even though the original rules from the *Qur'ān* or *Sunnah* were suspended or changed, they were still the valid rules and they were not abrogated by the rules implemented by the Companions. So, if the earlier situation existed again, the original rules should be implemented. The Companions suspended or changed some of the rules because they realised what were the ethos and causes behind such rules. Accordingly, when such causes disappeared, the rules too should be changed for the benefit of the people.

5.7 Secondary Maxims Relevant to the Theory of 'Urf

There are some maxims indirectly related to the theory of 'urf. Although some of these maxims are considered as main maxims in certain fields, they are

³² Ibid, p.125

still considered as secondary maxims when related to *'urf* because there is a substantial role played by *'urf* itself in utilizing such maxims. These maxims are as follows:

1. "*Al-Umūr bi-maqāṣidihā*" which means: matters are determined by their objectives"; (Majallah 2). This means that the effect of any particular transaction must conform with the object of such a transaction. The source of this maxim is a Prophetic tradition which rules, "Verily, the deeds are according to the intentions,...."³³. The message of this *Ḥadīth* can be understood clearly in the context of ritual obligations. But in the matters that involve civil transactions, the intention of the heart cannot be known to others. So, the intention has to be expressed either by sayings or deeds and this largely depends on the way the matter is expressed. For example, in the contract of sale, to know whether both parties are pleased or not with the transaction largely depends on the way this contract is expressed. If the way it is expressed demonstrates the agreement then it is considered to be concluded. Such an expression can be inferred depending on the practice of the people (*'urf*). This is the reason why the jurists said that the wording is not important in a transaction but the most important matter is the expression which shows in practice the agreement of both parties. There is a maxim that indicates this matter which says, "In contracts, effect is given

³³ Al-Nawawī, *Matn al-Arbaʿīn al-Nawawīyyah*, pp.12-3

to intention and meaning and not to word and phrases". (Majallah 3) The effect of *'urf* on this maxim is in expressions relating to transactions which involve more than one party.

2. "*La 'ibrah li-al-dalālāt fi-muqābalat al-taṣrīh*", which means: no attention should be paid to inferences in the face of obvious facts". (Majallah 13) In the previous discussion on the condition of valid *'urf*, we mentioned that the *'urf* must not contravene the clear stipulations or agreements. If there is no agreement which is against the *'urf*, the *'urf* will prevail. In this respect, when there are statements of the parties involved in the transaction which contravene the customary practice, the customary practice is to be set aside. If any disputes occur after the transaction is concluded, they must be referred to the statements agreed on and not to the customary practices as such.

3. "*La yunsab 'ilā sākit qawl wa-la-kin al-sukūt fi ma'rad al-hājah bayān*", which means: no statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is an absolute necessity for talking. (Majallah 67) This means that it may not be said that a person who keeps silent has made such and such a statement, but if he keeps silence where he ought to have made a statement, such silence is regarded as an admission. The silence of a person where he ought to have made a

statement is considered permission or endorsement from the person in practice (*idhn al-ʿurfī*). For example the silence of a virgin when asked her permission in marriage is considered consent because normally women are shy to express their will in this matter. So, in this maxim the silence of a person where it is needed for him to give a statement is considered as permission from him in *ʿurf*.

4. "*Al-Mashaqqah tajlub al-taysīr*" which means: difficulty begets facility. (Majallah 17) This maxim indicates that difficulty is the cause of facility and in time of hardship consideration must be shown. This maxim also manifests all the facilities given in Islamic law.³⁴ In fact, there are many verses of the *Qurʾān* and sayings of the Prophet which indicate facilities in Islam. Among such is the verse that says, "God intends every facility for you; He does not want to put you to difficulties".³⁵ The meaning of difficulties in this maxim refers to the extraordinary difficulties which cannot be endured by people. Realising such difficulties can be achieved by referring to the *ʿurf*. If the *ʿurf* indicates that it is an extraordinary difficulty, it can be the cause of facility, for example, the permission for a sick person to pray in a sitting or sleeping position if he or she is not able to stand. In this respect, we should bear in mind that the consideration for

³⁴ See Al-Suyūṭī, *Al-Ashbāh*, p.77

³⁵ *Qurʾān*, 2/185. See Ibid, p.76-77 for details of other verses and *Ḥadith* regarding this matter.

difficulty is valid only in the matter which does not directly contradict a clear text. If it directly contradicts a clear text, the text will prevail and not the difficulty except in the case of necessity (*ḍarūrah*) which permits the prohibited things as mentioned in the maxim which rules "*Al-ḍarūrah tubīḥ al-maḥẓūrāt*", (necessity renders prohibited things permissible). (Majallah 21)

5. "*Al-ḍarar yuzāl*", which means: injury is to be removed. (Majallah 20)
This maxim is closely related to the above maxim³⁶ in which the role of *ʿurf* here is to determine the matter which can be considered as injury (*ḍarar*). What is considered injury in the eye of *ʿurf* is the injury that must be removed. The consideration of *ʿurf* in the previous and the present maxim is because it is the need (*ḥājah*) of the people which must be taken into consideration. This is why there is another maxim that says that the need (*ḥājah*), whether of the public or an individual, is reduced to the degree of the necessity (*ḍarūrah*). The (*ḥājah*) usually is the normal practice of the people which can also be considered as their *ʿurf*. For example, the contract of *salam* which seems to be prohibited according to the condition of contract of sale which indicates that the goods must be delivered at the time the transaction is concluded, because in the *salam* transaction, the goods are handed over at a later period. However, this type of contract is a need of

³⁶ The maxims that says, difficulty begets facility.

the people and at the same time it is also the *'urf* of the people. Because it is a need, it is allowed although it is against the condition of the contract of sale.

* * *

All the maxims mentioned above relate to the theory of *'urf*. From the above discussion we can see how this theory has influenced many aspects of Islamic law in which the maxim ruling that, "the custom is arbitrator" is considered one of the most important maxims in Islamic law. We can also notice the importance of changing the law according to the change of time and circumstances. It cannot be denied that the conditions and necessities of people change from time to time, which makes the changing of law a necessary measure. The above discussion has also pointed out the importance of considering the *'urf* of the people in order to gain benefits and prevent hardship from them (*jalb al-maṣāliḥ wa dar' al-mafāsid*).

CHAPTER SIX

'Urf and the Other Sources of Islamic Law

6.1 Introduction

The theory of 'urf as mentioned earlier is one of the important supporting sources of Islamic law. Sometimes we find that a particular problem is solved on the basis of more than one source of Islamic law. There are four sources in the Islamic jurisprudence that are agreed on by the scholars to be the main sources of Islamic law and all the jurists agreed that these four sources must be referred to according to their priority. These sources are the *Qur'ān*, the *Sunnah*, the *ijmā'* (consensus) and the *qiyās* (analogy). These theories have the basis from the *Qur'ān* and *Sunnah* in which many instances and the rules mentioned in these two sources were based on 'urf. As for *ijmā'*, there are several decisions made by the jurists that were based on 'urf. In addition, there were some secondary sources about which there is some dispute among the scholars as to whether they should be utilised as a source of Islamic law. Among these sources are *istihsān*, *istiṣhāb*, *al-maṣaliḥ al-mursalah*, the *fatwā* of the Companion, *sadd al-dharā'i'* and *'amal ahl al-Madīnah*.

The following discussion shall examine the relationship between the theory of *'urf* and *ijmā'*, *istihsān*, *istiṣhāb*, *maṣlahah al-mursalah*, *sadd al-dharā'i'* and *'amal ahl al-Madīnah*. These sources are chosen because *'urf* has played a substantial role in them and there is a strong consideration of *'urf* in them.

6.2 *'Urf and Ijmā'*

Ijmā' is defined as the unanimous agreement of the *mujtahidūn* of the Muslim community of any period following the demise of the Prophet on any matter.¹ From the above definition, we can conclude that the basic subject of *ijmā'* is the consensus while for *'urf* the basic subject is the practice of the people. The common ground that both sources share is that in deducing a rule they depend on a large number of people. The other similarity between these two sources is that all the rules that are deduced from these sources are meant for the benefit of people and to prevent difficulties for them. However, there are several differences between these two sources that can be summarised as follows:

1. In order to be valid, is not necessary for *'urf* to be the practice of all people, but the practice of a large group of people is sufficient. For *ijmā'* the consensus of a group or part of the scholars is not adequate, and instead the rules must be agreed upon by all scholars.

¹ Al-Āmidī, *Al-Aḥkām*, vol.1, p.167.

2. It is a condition of *ijmā'* that it must be the consensus of scholars (*mujtahidīn*), but for *'urf* the practice considered is a general practice whether it is of the scholars or the common people.

3. The rules reached through *ijmā'* cannot be changed²; however, the rules based on *'urf* can be changed with the change of time and circumstances.

4. Valid *'urf* must represent a common and a recurrent phenomenon but this does not happen to *ijmā'* which is valid with the consensus of scholars even though it does not reflect a common and a recurrent phenomenon.

Another point that is important in the relation between these two sources is that often we can observe that several rules of *fiqh* based on *ijmā'* are originally part of the practice of the people (*'urf*). These rules are either the consensus of opinion of the jurists that is agreed by them verbally or through the stipulation agreement which is reached by virtue of the fact that they did not reject the practice of the people. Indeed, the participation of the jurists in the practice of the common people also indicates their consensus on the practice (*al-ijmā' al-'amalī*). This is mentioned by al-Qarāfī in his book *Tanqīh al-Fuṣūl* when he discusses *ijmā'* as follows, "It (*ijmā'*) is the consensus of the *mujtahidīn*, and the consensus

² According to some scholars, if the consensus rule is based on *'urf*, then it can be changed according to the change of *'urf*. This point will be further discussed later on.

of the *mujtahidīn* is their consensus in their sayings or doings or in what they believe."³ This means that the *ijmā' al-'amali* can be considered as part of *ijmā'* and it is a strong proof that can be relied upon in making decisions. In this respect, most of the Ḥanafī scholars said that the silent *ijmā'* is a proof; however, al-Shafi'ī did not consider it as a proof unless the silent *ijmā'* was a continuous practice.

One of the example which can be quoted in this respect is the evidence of the legality of *qirād*. Malik has elaborated this in his *Muwatta'* as follows:

"Malik related to me from Zayd b. Aslam that his father said, "Abd Allah and 'Ubayd Allah, the sons of 'Umar b. al-Khaṭṭāb, left with the army for Iraq. On the way home, they passed by Abū Mūsā al-Ash'arī, the Governor of Basrah. He greeted them and made them welcome and told them that if there was anything he could do to help them, he would do it. Then he said, "There is some of the property of God that I want to send to the *Amīr al-Mū'minīn*, so I will lend it to you and you can buy wares from Iraq and sell them in al-Madīnah. Then give the principal to the *Amīr al-Mū'minīn*, and you keep the profit." They said that they would like to do that, and so he gave them the money and wrote to 'Umar b. al-Khaṭṭāb to take the money from them. When they came to sell they made a profit. When they paid the principal to 'Umar he asked, "Did he lend everyone in the army the like

³ Al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, p.322

of what he lent you?" They said, "No." 'Umar b. al-Khaṭṭab said, "He made you the loan because you are the son of the *Amīr al-Mū'minīn*, so pay the principal and the profit." 'Abd Allah was silent. 'Ubayd Allah said, "You do not need to do this, *Amīr al-Mū'minīn*. Had the principal decreased or been destroyed, we would have guaranteed it." 'Umar said, "Pay it." 'Abd Allah was silent and 'Ubayd Allah repeated what he said. A man who was sitting with 'Umar said, "*Amīr al-Mū'minīn*, better that you make it a *qirāḍ* loan." 'Umar said, "I have made it a *qirāḍ*." 'Umar then took the principal and half the profit, and 'Abd Allah and 'Ubayd Allah, the sons of 'Umar b. al-Khaṭṭab, took half the profit."⁴

This is the incident that indicates the validity of *qirāḍ*. *Qirāḍ* is a kind of contract that is agreed on by two parties in which one party will invest the capital and the other party will do the job. The profit that is made out of the job will be shared by both parties. This term is the term that is common among the Ḥijāz people. The Iraqis called this type of contract *muḍārabah*.

The jurists agreed that there is no evidence from the *Qur'ān* or *Ḥadith* which indicates the validity of this contract. But this contract became valid because it was practised by the Companions of the Prophet, and this is considered as their consensus of opinion that this type of contract is valid even though it was

⁴ Mālik, *Al-Muwattā'*, p.529

not practised during the time of the Prophet. This point was mentioned by al-Shawkānī (d.1250AH/1832CE) who said, "This saying indicates that the Companions were practising this type of contract without any objection, and this can be considered as their consensus (*ijmā'*) on the validity of this contract. There is no evidence for it from the Prophet except for what was related by Ibn Mājah from Ṣuhayb who says, "The Prophet said, "Three matters have blessings: forward buying, giving loans and mixing wheat with barley for (using) at home but not for selling."⁵

In fact, there are many other instances where the *ijmā'* is derived from the practical (*urf*) because many of these type of practices are necessary and beneficial. Therefore, they are being practised by the ordinary people and the scholars which made them recognised these practices as practical (*urf*).

In the Mālikī school, the practice of the people of al-Madīnah is considered as a consensus and a proof that can be relied on. This is the reason why there are many expressions such as, the matter according to us is such and such (*wa al-amr 'indana kadhā*) or the matter agreed upon by us is such and such (*al-amr al-mujtama' 'indana kadhā*). These practices of the people of al-Madīnah are the practice that was acquired from their predecessors which are claimed to have their origin in the time of the Prophet through the sayings or doings or the consensus of

⁵ Shawkānī, *Nayl al-Awṭār*, vol.5, p.394

the Companions, for instance in the measurements which is used and the single *iqāmah*⁶ which was derived from the deeds of the people of al-Madīnah.

6.2.1 Can *Ijmā'* be Changed With The Change of 'Urf

Some of the scholars held the opinion that when there is *ijmā'* in a particular problem it can be changed with another *ijmā'* on condition that the *mujtahidūn* of the first *ijmā'* had disappeared, i.e. died. If the *ijmā'* was held in the first century of Islam, most of the scholars held the opinion that it cannot be revoked by another *ijmā'*. In fact, most of the scholars are in favour of the second opinion, even though the *ijmā'* was held after the first century of Islam.⁷ The above ruling applies in the situation where *ijmā'* was concluded generally by taking into consideration the various aspects of Islamic teachings. However, if the *ijmā'* was based on 'urf can it be changed according to the change of time and circumstances? The response for this question can be summarised as follows:

1. If the *ijmā'* agreed upon are on the rulings in which their cause ('illah) and benefit (*maṣlahah*) will not change with the change of time and circumstances, it will not change according to the change of 'urf, for example the *ijmā'* on matters relating to ritual matters (*ibādah*).

⁶ *Iqāmah* is the repetition of the *adhān* by those about to perform the prayers immediately. The single *iqāmah* means all the wordings are pronounced once; this is the opinion of the majority of scholars except the Ḥanafī's who insisted that the wording be repeated twice in the *iqāmah*.

⁷ Abū Zahrah, *Uṣūl*, pp.197-8

2. If the *ijmā'* was on a ruling which was based on *'urf*, we should expect the rule to be changed with the change of circumstances. This is because the cause (*'illah*) no longer exists, and therefore these kind of rulings are unsuitable to be implemented or in certain cases are impossible to be implemented in a different situation. In certain situation, if these kind of rulings are implemented, they might cause difficulties to people and this is against the primary objective of every ruling in Islamic law which is to prevent hardship for people. An example of this type of change could be noticed in one occurrence which happened in the time of 'Umar with regards to the party responsible for the payment of blood money (*diyah*). In the pre-Islamic and the Prophet's times the normal practice on this matter was that the clan (*'ashīrah*) is the party responsible for the paying of blood money. The reason for this is that they are the closest people to the culprit and furthermore, the established practice was such that the clan is responsible for the welfare of its members⁸. However, it is claimed by some jurists that when 'Umar established the *dīwān*,⁹ that institution took the responsibility away from the clan because of its role as a body which helps their members who are in difficulty. This view was claimed to be the

⁸ There is a Prophetic tradition which indicates the responsibility of the clan to pay *diyah*. It was reported by al-Bukhari and al-Muslim related from Abū Hurayrah he said, "Two women confronted each other and one of them threw a stone at the other which resulted in the demise of the latter. The Prophet ruled that the *diyah* was to be paid by the clan (*'āqilah*)".

⁹ See Al-Mawardī, *Al-Aḥkām al-Ṣultāniyyah*, p.249.
For detail on the meaning of *dīwān*, see footnote no.17 in chapter three

ijmā' at that time and was later held by the Ḥanafī's.¹⁰ This limited *ijmā'* was based on the argument that the cause (*'illah*) for the rules no longer existed for the clan but instead became the responsibility of the *dīwān* as such.

By referring to the above example, one could say that the limited *ijmā'* which may have been held at the time of 'Umar cannot be implemented at present because the *dīwān* system is no longer being used now. If the said *ijmā'* that may be held at the time of 'Umar cannot be overruled by another *ijmā'*, this will lead to chaos because no alternative rule could be implemented on the same problem at the present time. Therefore, the conclusion is that, if the *ijmā'* was based on *'urf* at the time it was concluded, it can be changed with the change of *'urf*. Based on this fact, we can also suggest that at the present time the body that is responsible for assisting a person if any difficulties happen could also be responsible for assisting him in paying blood money, for example family association or other similar bodies.

¹⁰ In this respect, there are different opinions among the scholars on the implementation of this rule. Although there were a new setup at the time of 'Umar, is the responsibility to pay the blood money lay on the *dīwān* or still to be paid by the clan. The majority (Mālikī, Shāfi'ī and Ḥanbalī) held the opinions that the clan still bears the responsibility to pay the blood money. Their basis for this is the above *Ḥadīth* (see footnote no. 8). However, the Ḥanafīs held that the responsibility is the *dīwān's*, because the *dīwān* has taken over the responsibility of the clan in helping its members, therefore the clan no longer held responsibility for this matter. With respect to this, Al-Sarakhsī mentioned in his *Mabsūt*, "There is no doubt that the consideration in this matter is assistance (*al-nuṣrah*) and this applies to the culprit in the case of murder, therefore it is the responsibility of the *dīwān* members to provide assistant to their *dīwān* fellows". See Al-Sarakhsī, *Al-Mabsūt*, vol.27, pp. 124-25, see also, Zuḥaylī, *Al-Fiqh al-Islāmī*, vol.6, pp.322-3

The above discussion demonstrates the relation between the theory of *‘urf* and *ijmā’*. We can recognise that these two different sources have a common background since both of them depend on a large number of people in deducing rules. In this respect, the role of the practice *ijmā’* (*ijmā’ al-‘amālī*) is also very important as a kind of *ijmā’* that should be relied upon. We can observe the importance of considering the *‘urf* of people when deciding on appropriate rulings to be implemented. Finally, it is necessary to change the rules concluded by *ijmā’* which was based on *‘urf*, so that suitable rules can be given at the appropriate time and this will definitely be in agreement with the objective of Islamic law which wishes to provide benefit and prevent hardship from people.

6.3 *‘Urf and Qiyās*

There are many rules that were not mentioned in the *Qur’ān* or *Sunnah* deduced by the scholars using this theory. If we examine the role that is played by *‘urf* which relates to *qiyās*, we could notice that in certain situation *‘urf* has the power to overrule *qiyās*. This is applied in the situation where the usage of *‘urf* is more important and necessary because of *maṣlahah*. For example, in the following transactions, *qiyās* is being abandoned because, if it is used, it will cause difficulties. The instances are:

1. Hire contract; this type of contract is invalid originally according to Islamic law, because it is a contract on a matter that does not exist, meaning the contract here is the contract to utilise something, but when the contract is concluded, the other party has not yet utilised the object of contract. According to the principles established in Islamic law, it is not permissible for anyone to buy or sell a non-existing object. Therefore, if this type of contract is analogised with the contract of sale, it will be considered invalid. However, it has been validated by Islam because it is a necessary contract that has been practised by the people and the prohibition of this contract would create difficulties and problems for people. This point is mentioned by Ibn 'Ābidīn who says, "The contract of hire was legalised even though it was contrary to analogical reasoning. The reason for this is that this contract is a contract on a non-existent object and the contract on a non-existent object is invalid according to the *Hadith* of the Prophet in which he says to al-Ḥākim b. Ḥazm, "Do not sell what you don't possess....".¹¹

The contract of hire is only allowable on the object that is not forbidden in Islam. If the object of hire is a prohibited item, it cannot be hired although it is a common practice (*urf*), e.g. the hiring of musical instruments for the purpose of dancing or annoyance. In addition, *urf* has the authority to define the details of a hire contract, i.e what is considered

¹¹ Ibn 'Ābidīn, *Majmū'ah al-Rasā'il*, p.125.

included or not included. This role of *'urf* also contradicts *qiyās* in which originally all the details must be defined in the contract so that there will be no dispute in the future. However, in this context, *'urf* has the power to define the details of the contract. Similarly, it is permissible to hire public toilets and bathrooms without specifying the amount of water to be used or the period of usage. This permission was based on the practice (*'urf*) of people, because the prohibition of such a practice would lead to difficulties. However, according to *qiyās*, the amount of water and period of usage must be determined otherwise the contract will be invalid.

2. The contract of *salam*. This type of contract is the contract of forward buying which means the handover of the goods is postponed but the price of the goods is paid at the time the contract is concluded. This type of contract is valid according to the *Qur'ān*, *Ḥadīth* and also *ijmā'*. The proof from the *Qur'ān* is the verse that rules, "O ye who believe! When ye deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing..."¹² Ibn Qudāmah said that this verse was considered a general evidence in transactions which include the contract of

¹² *Qur'ān* 2/282. 'Abdullah Yusuf 'Ali in commenting on this verse says, "The first part of the verse deals with transactions involving future payment or future consideration, and the second part with transactions in which payment and delivery are made on the spot. Examples of the former are if goods are bought now and payment is promised at a fixed time and place in the future or if cash is paid now and delivery is contracted for a fixed time and place in the future." *The Holy Qur'ān, Text, Translation and Commentary*, p.117

salam.¹³ As for the proof from the *Ḥadīth*, it was related that Ibn ‘Abbās said, "When the Prophet arrived at al-Madīnah the people used to practise forward buying with dates in which they forwarded it for one, two and three years. The Prophet said, "Whoever wishes to deal in forward buying must fix the weight and time".¹⁴ Ibn Qudāmah mentioned that it was the consensus of the jurists that this type of contract is a valid contract.¹⁵ Even though the contract of *salam* is permissible in Islam, it clearly contradicts *qiyās* in this particular case. This is because it is the selling of a non-existent object and one of the condition of the contract of sale is that the goods must exist and be available at the time the contract is concluded. In this contract, the goods do not exist. Therefore, it is invalid according to *qiyās* because the selling of a non-existent object is invalid according to the *Ḥadīth* that says, "Do not sell what you don't possess". It is in this respect that the permission to deal with this type of contract contradicts *qiyās*. However, it has been legalised because such a contract was practised by the people of al-Madīnah and the Prophet noticed that this practice was a necessity for them. In this example we could notice that *‘urf* can overrule *qiyās* in certain situations and circumstances.

¹³ Ibn Qudāmah, *Al-Mughnī*, vol.4, p.312

¹⁴ Ismā‘īl, Muhammad, *Subul al-Salam Sharḥ Bulūgh al-Marām*, v.3, p.97

¹⁵ Ibn Qudāmah, *Al-Mughnī*, v.4, p.275

3. The contract of *istiṣnāʿ*. *Istiṣnāʿ* means the order for the manufacturing of goods at an agreed price. This contract too involves non-existent objects, therefore it is invalid according to *qiyās*. This contract, similar to the previous ones, is originally invalid but it has been legalised because of the practice of the people and its necessity. In this respect al-Kāsānī (d.587H) said,

"*Istiṣnāʿ* is the contract that is permitted through *ijmāʿ* which is contrary to *qiyās* because it is a contract that is widely practised by people. The *ijmāʿ* can overrule *qiyās* and no one has opposed that this matter is *ijmāʿ*. It is a necessity for people because someone might need to make shoes or socks with certain specifications. If this kind of contract is forbidden, this will cause difficulties to people."¹⁶

The other point about the contract of *istiṣnāʿ* is that its object should be an object which is usually being ordered by the people. This means that *ʿurf* determines the type of objects that can be ordered.¹⁷ At the present time, we can notice that this type of contract is a necessity, particularly in the commercial and industrial fields. If it is forbidden, this will make life

¹⁶ Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, vol.5, pp.2-3

¹⁷ See *Ibid*, vol.5, p.3

more difficult. Finally, we could say that this example too is a clear indication of the role played by *urf* to overrule *qiyās* in certain situation.

6.4 *Urf* and *Istihsān*

Istihsān, literally, means to approve or to deem something preferable. It is a derivation of *ḥasuna* which means to be good or beautiful. In its juristic sense, *istihsān* is a method of exercising personal opinion in order to avoid rigidity and unfairness which might result from the literal enforcement of the existing law. 'Juristic preference' is a suitable description of *istihsān* as it involves setting aside an established analogical reasoning in favour of an alternative ruling which serves the ideas of justice and public interest in a better way.¹⁸ Not all the schools of Islamic law agree on utilising this principle. The Ḥanafīs, Mālikīs and Ḥanbalīs validate *istihsān* as a subsidiary source of law whereas the Shafīīs, Zāhirīs and Shī'ites reject it and refuse to give it any credibility in their formulation of the legal theory of *Usūl al-Fiqh*. In this respect, al-Āmidī (d.615AH/1218CE), when discussing this topic, mentions that the disputes which occur concerning the validity of *istihsān* are about the departure from the rules of the text to other rules based on the practice of the people. He further elaborated that if the practice is the practice of the authoritative jurists such as the expert or influential leading jurists (*ahl al-ḥall wa-al-'aqd*), it is acceptable and such a measure can be referred to as

¹⁸ Kamali, *Principles*, p.311

ijmā'. However, if it is the practice of common people, it cannot be accepted as a proof to depart from the original rule.¹⁹

The jurists are not in agreement on a precise definition for *istihsān*. If we examine the different definitions of *istihsān*, we will notice that the Ḥanafīs adopted the definition of Abu Ḥasan al-Karkhī (d.334AH/945CE) who says, "*Istihsān* is a legal principle which authorises departure from an established precedent in favour of a different ruling for a reason stronger than the one which is obtained in that precedent".²⁰ While citing this definition, al-Sarakshī (d.483AH/1090CE) adds that the precedent which is set aside by *istihsān*, normally, consists of an established analogical reasoning which may be abandoned in favour of a superior proof, i.e. the *Qur'ān*, the *Sunnah*, necessity (*ḍarūrah*) or a stronger *qiyās*²¹. On the other hand, the Mālikīs place greater emphasis on *istiṣlāh* (consideration of public interest) and are not seriously concerned with *istihsān*, although they have in principle validated *istihsān*. Somewhat similar to *istiṣlāh*, the Mālikīs view *istihsān* as a broad doctrine which is less stringently confined to the *Qur'ān* and *Sunnah* than the Ḥanafīs have viewed it. Hence, according to Ibn al-ʿArabī, "*Istihsān* is to abandon exceptionally what is required by the law because applying the existing law would lead to a departure from some of its own

¹⁹ Al-ʿĀmidī, *Al-Aḥkām fi Uṣūl al-Aḥkām*, vol.4, pp.213-4

²⁰ Ibid, vol.4, p.212.

²¹ Al-Sarakshī, *Al-Mabsūt*, vol.10, p.145

objectives." Ibn al-ʿArabī also emphasises that the essence of *istiḥsān* is to act on "the stronger of two indications (*al-ʿamal bi-ʿaqwā al-dalīlayn*)". He further divided *istiḥsān* into several categories. Whereas the majority of scholars held on to *qiyās* when it was attacked on the grounds of rigidity, Mālik and Abū Ḥanīfah departed from *qiyās*, or specified the general in *qiyās* on the ground of *maslaḥah* and other indications.²² The Ḥanbalīs definition of *istiḥsān* also relates *istiḥsān* closely to the *Qurʾān* and *Sunnah*. According to al-Qāḍī ʿAbū Yaʿlā (d.480H) the definition of *istiḥsān* is the abandonment of one legal norm (*ḥukm*) for another - (or one of the most appropriate of two cases of *qiyās-awlā al-qiyāsayn*) on the basis of the *Qurʾān*, *Sunnah* or consensus.²³ These definitions indicate the different interpretations of *istiḥsān*. Despite these different interpretations of *istiḥsān*, the essence of *istiḥsān* is to formulate a decision which sets aside an established analogical reasoning for a reason that justifies such a departure and seeks to uphold a higher value in the *Sharīʿah*.²⁴ We can say that the departure to an alternative ruling in *istiḥsān* may be from a clear analogical reasoning (*qiyās jalī*) to a hidden analogical reasoning (*qiyās al-khafī*) or to a ruling which is given in the *Qurʾān*, *Sunnah*, consensus, custom or public interest.

²² Al-Shaṭībī, *Al-Muwāfaqāt*, vol.4, p.115-6

²³ Ibn Taymiyyah, *Masʿalah al-Istiḥsān*, p.457. This manuscript is edited by George Makdisi under the title *Ibn Taimīya's Autograph Manuscript on Istihsan: Materials For The Study Of Islamic Legal Thought*.

²⁴ Abu Zahrah, *Uṣūl*, 245

The scholars have divided *istihsān* into several types according to its bases.

The Ḥanafī scholars divided *istihsān* into two main categories:

The first is the departure from the clear analogical reasoning (*qiyās jalī*) to the hidden analogy (*qiyās khafī*) because the latter is stronger and more effective in repelling hardship and also it is arrived at through deeper reflection and analysis. This type of *istihsān* is also called *istihsān qiyāsī*. An example for this type of *istihsān* can be noticed in the Ḥanafī law of *waqf* (charitable endowments) in which the *waqf* of cultivated land includes the transfer of all the ancillary rights of water (*ḥaqq al-shurb*), right of passage (*ḥaqq al-murūr*) and the right of flow (*ḥaqq al-masīl*); even if these are not explicitly mentioned in the instrument of *waqf*. The above ruling is made based on *al-qiyās al-khafī* which can be described as follows: it is a general rule of the Islamic law of contract, including the contract of sale, that the object of the contract must be clearly identified in detail. What is not specified in the contract is not included therein. In this instance, if we draw a direct analogy (*qiyās jalī*) between sale and *waqf* as both involving the transfer of ownership, we must conclude that the attached rights can only be included in the *waqf* if they are explicitly identified. It is, however, argued that such an analogy would lead to inequitable results as the *waqf* of cultivated lands without their ancillary rights, would frustrate the basic purpose of the *waqf*, which is to facilitate the use of the property

for charitable purposes. To avoid such a hardship, a recourse to an alternative analogy, that is to *qiyās khafī* is therefore necessary. The hidden analogy in this case is to draw a parallel, not with the contract of sale, but with the contract of lease (*ijārah*). For both of these contracts involve a transfer of usufruct (*intifāʿ*). Since usufruct is the essential purpose of *ijārah*, this contract is valid, on the authority of a *Ḥadith*, even without a clear reference to the usufruct. This analogy with *ijārah* will completely validate the *waqf* even if it does not specify the attached rights to the property in detail.²⁵

The second variety of *istiḥsān* consists of making an exception to a general rule of the existing law. This type of *istiḥsān* is also called *istiḥsān istithnāʿī*. This type of *istiḥsān* is further divided into five categories namely, *istiḥsān al-naṣṣ*, *istiḥsān al-ijmāʿ*, *istiḥsān al-ḍarūrah*, *istiḥsān al-ʿurf* and *istiḥsān al-maṣlahah*.

These are the types of *istiḥsān* which were outlined by the Ḥanafīs. The Mālikīs have their own types of *istiḥsān* in which they are similar to three types of *istiḥsān istithnāʿī* of the Ḥanafīs which are *istiḥsān al-ijmāʿ*, *al-ʿurf* and *al-maṣlahah*. They added *istiḥsān* of abandoning the simple and insignificant matter to avoid hardship in order to achieve facility (*al-istiḥsān bi-tark al-yasīr al-tāfīh*

²⁵ See Al-Ḥasan, Khalīfah Bābakar, *Al-Adillah al-Mukhtalaf fi-hā ʿinda al-Uṣūliyyin*, p.12

raf'an li-al-mashaqqah wa 'ithāran li-al-tawsi'ah), and *istihsān* to consider the disputes (*istihsān bi-murā'āt al-khilāf*). Indeed, of these two type of *istihsān*, the latter is considered to be the strongest, for, it derives support from other recognised sources especially when it is the *Qur'ān* or the *Sunnah*. The scholars of all schools are generally in agreement to accept this type of *istihsān*.

The above discussion indicates that *'urf* is one of the legal sources of *istihsān*, and is one of the types of *istihsān* outlined by the Ḥanafī and Mālikī schools. The type of *istihsān* which is based on *'urf* also varies according to the type of *'urf*. They include the following classifications: *istihsān* which is based on the *Sharī'ah* practice (*istihsān bi-al-'urf al-sharī*), *istihsān* which is based on the practical *'urf* (*istihsān bi al-'urf al-'amalī*) and finally *istihsān* which is based on the verbal *'urf* (*istihsān bi al-'urf al-qawli*). We shall illustrate each of these kinds as follows:

1. *Istihsān* based on the *Sharī'ah* practice (*istihsān bi-al-'urf al-Sharī*) is as when a person swears that he will not pray. According to *qiyās* he will break his oath if he starts praying by making *takbīr* (the statement of *Allah Akbar* at the beginning of *salāh*). Similarly, in the case of fasting, if a person swears that he will not fast but starts fasting, he is considered to have broken his oath. However, according to *istihsān* in the former case the person has not broken his oath, instead he is only considered to have broken

his oath if he has performed one or two *rak'ah*. This is based on the fact that, according to the *Shar'*, prayers consist of a group of acts and not only a single act. But in case of fasting the situation is different in which there is only one act, that is, to abstain from eating and drinking at a certain period of time.²⁶

2. *Istihsān* which is based on the practical (*urf (istihsān bi-al-'urf al-'amalī)*) can be noticed in the *waqf* of moveable goods. Since *waqf* involves the endowment of property on a permanent basis, and moveable goods are subject to destruction and loss, they are, therefore, not to be assigned in a *waqf*. This general rule has, however, been set aside by the Ḥanafī jurists, who validate the *waqf* of movables such as books, tools and weapons on the ground of its acceptance by popular custom²⁷. Similarly, strict analogical reasoning would require that the object of sale is accurately defined and quantified. However, popular custom has departed from this rule in the case of entry to public baths where the users are charged a fixed price without any agreement on the amount of water used or the duration of their stay.

3. *Istihsān* which is based on the verbal (*urf (istihsān bi-al-'urf al-qawlī)*) can be observed in the following example. If a person swears that he will

²⁶ Badran, *Uṣūl*, pp.202-3

²⁷ *Ibid*, p.202

not enter a certain premises with a certain person, he is not considered to have broken his oath by entering the mosque with that person because although, linguistically, a mosque is a premise, in the verbal practice the word mosque is used to describe the place of prayers and not other buildings as such. So he is not considered as having broken his oath according to *istihsān*.

* * *

The above discussion tackles the role of *ʿurf* as a basis of *istihsān* in which we can conclude that the scholars recognise the importance of *ʿurf* with regard to *istihsān* in which *ʿurf* is considered here as a means to achieve the aim of *Shariʿah* which is to prevent hardship and provide facilities.

6.5 *ʿUrf and Maslahah*

Maṣlahah, literally, means benefit or interest. When it is narrowed to *maṣlahah mursalah*, it denotes unrestricted public interest in the sense of not having been regulated by the Law-giver and when no textual authority can be found on its validity or otherwise.²⁸ Al-Ghazālī (d.505AH/1111CE) defined *maṣlahah* as the consideration which secures a benefit or prevents harm but is, in

²⁸ Badrān, *Uṣūl*, p.209

the meantime, harmonious with the aim and objective of the *Shari'ah*. These objectives consist of protecting the five essential values, namely religion, life, intellect, lineage and property. According to the author, any measure which secures these values falls within the scope of *maṣlahah* and anything which transgresses them is *mafsadah* (evil) and preventing the latter is also *maṣlahah*.²⁹ From this definition we can notice that the aim of *maṣlahah* is to secure a benefit and prevent hardship which is also the basic aim of the theory of *'urf*. Therefore we can say that in this context *maṣlahah* is a general principle of which the theory of *'urf* is a part.

The scholars have divided *maṣlahah* into three categories:

1. *Maṣlahah* which the Lawgiver has expressly upheld and has enacted a law for its realisation. This is called *al-maṣlahah al-mu'tabarah*, or accredited *maṣlahah*. This type of *maṣlahah* cannot be rejected even though it is against the *'urf* of the people. For instance Islam has ordered its follower to protect their intellect and therefore Islam has forbidden the consumption of liquor to its followers. So if the consumption of liquor is accepted and common among the people, this practice is still forbidden because it is against the *maṣlahah* that was ruled by the Lawgiver. Similarly, any other item of consumption which can harm the intellect is

²⁹ Al-Ghazalī, *Al-Mustasfā*, vol.1, pp.139-40

forbidden even though it is a common practice of the people to consume it. The validity of *maṣlahah* in this case is definite and no longer open to debate. The scholars are in agreement that promoting and protecting this and other similar values constitutes a proper ground for legislation. The fact that the Lawgiver has upheld them is tantamount to His permission and approval of all measures, including legislation, that aim at their realisation.³⁰

2. The second type of *maṣlahah* is the invalidated *maṣlahah*, or *maṣlahah mulghā* which the Lawgiver has nullified either explicitly or by indication that could be found in the *Sharī'ah*. The scholars are in agreement that legislation which based on such interest is invalid and no judicial ruling may be issued in its favour. Similarly the practice of people that is included in this category is invalid and cannot be considered. As an example the practice of usury in transaction, even though is common among the people, is invalid because the *maṣlahah* in this case is clearly nullified (*mulghā*).

3. The third variety of *maṣlahah* is the *maṣaliḥ* that have been validated after the divine revelation came to an end, namely the *maṣlahah mursalah*. For this type of *maṣlahah* there is no text that validates it nor any text that invalidates it. This means that the practice of people (*'urf*) can be included

³⁰ Badrān, *Uṣūl*, p.209-10

under this type of *maṣlaḥah* if it gives benefit to people and prevents harm from them because that is also part of *maṣlaḥah*. In addition, the other various principles of Islamic Law such as *istiḥsān*, *sadd al-dharā'ī'* and *istiṣhāb* can also be included under the category of *maṣlaḥah mursalah* as all of them hold the same objective, that is to provide benefit to mankind and prevent hardship from them which are also the main aim of *maṣlaḥah* and *Shari'ah*.

From the above-mentioned types of *maṣlaḥah* we can notice that there are similarities between the classifications of *maṣlaḥah* and *'urf*. The similarities can be noticed in the valid and invalid custom in which the valid custom (*'urf ṣaḥīḥ*) can be considered as part of *maṣlaḥah mu'tabarah*. This is the case if there is an indication in the text that validates this type of custom. An example is the continuation of prohibition of marriage with mother, children, aunts and uncles which was practised in the pre-Islamic period by some Arabs. This prohibition has been endorsed by the *Qur'ān*³¹ because there is benefit from it, which is to secure lineage. But if there is no indication that validates the custom and it is not against the text, then this kind of practice can be included in *maṣlaḥah mursalah*, for example the practice of a sale which is concluded merely by the exchange of goods without any utterance of offer and acceptance (*bay' al-ta'āṭī*). The invalid custom (*'urf fāsid*) can be considered as part of *maṣlaḥah mulghā* as both share the

³¹ See *Qur'ān*, 33/4

common feature of being nullified by the Lawgiver, either explicitly or by indication, for instance the practice of some pre-Islamic Arabs of disinheriting the female relatives which has been rejected by the *Qur'ān*³².

The jurists have also set certain conditions that must be met by the prescribed *maṣlahah mursalah* in order for it to be valid. These conditions are designed to ensure that *maṣlahah* does not become an instrument of arbitrary desire or individual bias in legislation:

1. The *maṣlahah* must be genuine (*ḥaqīqiyyah*), as opposed to imaginary *maṣlahah* (*maṣlahah wahmiyyah*), which is not a proper ground for legislation. There must be a sensible probability that the benefits of legislating a rule in the pursuance of *maṣlahah* outweighs the harms that might accrue from it. An example of a plausible *maṣlahah*, according to Khallāf is to abolish the husband's right of *ṭalāq* by vesting it entirely in a court of law.³³

2. The *maṣlahah* must be general (*kulliyyah*) which means it prevents harm or secures benefit to the people as a whole and not to a particular person or group of persons. This indicates that legislating a rule on ground of *istiṣlāḥ* must contemplate a benefit to the largest possible number of people. This

³² See *Qur'ān*, 4/11

³³ Khallāf, *Ilm*, p.86

is because the whole concept of *maṣlahah* is meant to secure the welfare of the people at large.

3. Finally, the *maṣlahah* must not be in conflict with a principle or value which is upheld by the *naṣṣ* or *ijmā'*.

The above-mentioned conditions are to a certain extent similar to the conditions that were set up by the scholars for *'urf* to be valid. The first condition is partially similar to the condition of *'urf* which says that *'urf* in order to be valid must be an existent practice, in other words it must be a practical *'urf*. An existing practice (*'urf*) is normally genuine therefore we should expect that it will be a beneficial practice. As for the second condition of *maṣlahah*, it is similar to the condition of *'urf* which indicates that *'urf* must represent common and recurrent phenomena which means the *'urf* must be practised by the people commonly and frequently in their daily life. The practice of a few individuals or a limited number of people will not be authoritative. This is because the advantage of legalising the existing *'urf* is meant for the benefit of the whole community and not for a few individuals. Finally, the third condition is also similar to the condition of *'urf* in which both *maṣlahah* and *'urf* must not violate the clear text or a principle that was established by the text. The above facts about *maṣlahah* and *'urf* indicate the close relation between these two principles in which each and every consideration of *'urf* are meant to provide benefit and prevent hardship from mankind which is also

regarded as part of *maṣlahah*. Therefore, all *ʿurf* which consist of the above-mentioned conditions of *maṣlahah* must be taken into consideration in any decision or judgement.

In addition, if we examine the rules which are based on the principle of *ʿurf*, we will find that all of them are in the scope of *maṣlahah* and were based on the general principles of *Shariʿah*. Among the examples quoted by the scholars with regard to this subject is the ruling which makes the workman liable to the damage which was caused by his negligence (*taḍmīn al-ṣunnāʿ*). This kind of transaction is a necessity to the people as many of them will give their belongings to a workman for repair or alteration. In the early period of Islam, the workman was not liable for the damage to others' goods which were in their possession. But when ʿAlī b. Abī Ṭālib became the ruler he realised that many of the workmen were careless when they were working on the goods owned by others. Therefore, he made the workmen liable for the damage to goods of others if the damage was caused by their negligence. This practice is contrary to the earlier practice, and ʿAlī applied this rule because he realised the *maṣlahah* of doing so, that is to secure the property of people.³⁴ This ruling was imposed because of the change of *ʿurf* among the workmen and it was accepted by the Companion and the scholars who realised the *maṣlahah* behind it.

³⁴ Shatībī, *Al-ʿItisām*, p.356-7

In addition, *‘urf* can also be the determining factor as to whether the matter or deed is appreciated as *maṣlahah*. If certain matters or deeds are categorised as *maṣlahah*, they can be practised as long as they do not contravene a clear text, for example, the practise regarding the payment of dower in marriage which require a certain amount to be paid at the time of the contract and the rest at a later date. The *maṣlahah* for this kind of practice is to release the burden from the husband of paying the full amount at one time which might result in the delaying of marriage if the full amount was required at the same time.

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This discussion can be concluded by saying that it is important to take into consideration all the *maṣāliḥ* that will benefit people. Similarly, the *‘urf* of people also must be appreciated in making any judgment, because the very appreciation of *‘urf* is a legal *maṣlahah*. In addition, all the rulings based on *‘urf* with the consideration of *maṣlahah* that intends to provide facility have their basis in the *Qur’ān* which rules, "...He has imposed no difficulties on you in religion..."³⁵ and in another verse, "...God intends every facility for you; He does not want to put you to difficulties..."³⁶ Indeed, the principles of *Shari‘ah* also indicate the above points in the maxim, "*al-mashaqqah tajlub al-taysir*" which means: difficulty

³⁵ *Qur’ān*, 22/78

³⁶ *Qur’ān*, 2/185

begets facility (Majallah 17) and "*al-amr idhā dāq ittasa'*" which means: latitude should be afforded in the case of difficulty. (Majallah 18)

6.6 'Urf and Sadd al-Dharā'i'

Sadd literally means blocking and the word *dharā'i'* (which is the plural of *dharī'ah* and is synonymous with *wasīlah*) signifies the means of obtaining a certain end. *Sadd al-dharā'i'* thus indicates blocking the means to an expected end which is likely to materialise if such a means is not obstructed. The means that is to be blocked in this context is the means to evil and not the means to something good.³⁷ Al-Qarāfī defined *sadd al-dharā'i'* as closing down the means of evil in order to prevent it.³⁸ In this respect, it is appropriate to know the different between *sadd al-dharā'i'* and *muqaddimah* (preliminary) because the two can at time coincide and overlap. Briefly, *muqaddimah* consists of something which is necessary for obtaining the results that it contemplates in the sense that the latter cannot materialise without the former. For instance, ablution (*wuḍū'*) is a *muqaddimah* to *ṣalāh* and the latter cannot be performed without the former. But *dharā'i'* to something do not stand in the same relationship to its end. Although the means is normally expected to lead to the end it contemplates, yet the latter may also be obtained through some other means. The end, in other word, is not

³⁷ Kamalī, *Principles*, p.392

³⁸ Al-Qarāfī, *Al-Furūq*, vol.2, p.32

exclusively dependent on the means. For instance, travelling in order to commit a theft is *muqaddimah* to the theft that it contemplates but is not a means to it, and this kind of travelling is considered illegal (*ḥarām*). Travelling which might consist of walking in a certain direction is basically neutral and cannot, objectively, be said to constitute a means to theft. Similarly, committing adultery which might lead to the intermix of lineage can be *muqaddimah* and means because committing adultery which leads to the intermix of lineage is a means and the intermix of lineage cannot be materialised without committing adultery and this is appreciated as preliminary (*muqaddimah*).³⁹

The scholars divided *dharā'ī'* into four categories, namely:

1. Means which definitely leads to evil such as digging a deep pit on a public path which is not lit at night. Anyone who passes the path is most likely to fall in the pit. Based on the near-certainty of the expected result of injuring others, the means which leads to that result is equally forbidden. The scholars of all schools are, in principle, unanimous over the prohibition of this type of *dharī'ah* and a consensus is said to have been reached on this point.⁴⁰ The above example is the example of the unlawful act of transgression in which the perpetrator is held to be responsible for any loss

³⁹ Badrān, *Uṣūl*, pp.245-6

⁴⁰ Badrān, *Uṣūl*, p.243, Abū Zahrah, *Uṣūl*, p.271

or damage that might occur. However, sometimes the *dhari'ah* may consist of an act which is basically lawful, in which case the scholars have disagreed over the question of responsibility. An example is when someone digs a water well in his own house but so close to the wall of his neighbour that the wall collapses as a result. The act here is held to be basically lawful as it consists of the exercise of the right of ownership, which is said to be irreconcilable with the idea of liability for damages. According to one view, however, the perpetrator is liable for damages in this case. This ruling is based on the principle that says, *daf' al-maḍārr muqaddam 'alā jalb al-manāfi'* which means: preventing an evil takes priority over securing a benefit.⁴¹

2. The second type of *dhara'i'* is that which is most likely to lead to evil and is rarely, if ever, expected to lead to a benefit. For example, the selling of weapons at the time of war or selling grapes to a wine maker. Al-Shāṭibī mentioned that this type of transaction is forbidden, but according to Badrān and Abū Zahrah (d.1977CE) it is only the Mālikī and Ḥanbalī scholars who considered these transactions as forbidden (*ḥarām*).⁴²

⁴¹ Ibid, p.243, ibid, p.271

⁴² Ibid, pp. 243-4, ibid, p.272

3. The third type of *dharā'i'* is that which frequently leads to evil but there is no certainty, nor even a prevailing probability that this will always be the case. For example the sale which is used as a means to procuring usury (*ribā'*), e.g. the types of sales, normally known as *buyu' al-'ājāl* (deferred sales), in which either the delivery of the object of sale or the payment of price, is deferred to a latter date. This would all tend to fall under this category of means. The scholars differed in this matter. The Mālikis and Ḥanbalis held the opinion that the means which is likely to lead to usury is *ḥarām* and must be hindered. But Abū Ḥanīfah and Shāfi'ī ruled that unless it definitely leads to evil, the basic legality of the sale must be held to prevail.⁴³

4. The last type of *dharā'i'* is that which is rarely expected to lead to evil and is most likely to lead to a benefit. For example, the digging of a water well in a place which is not likely to cause injury or harm to anyone or growing certain varieties of fruits, such as grapes in one's own property. In all these cases, there is possibility that a *mafsadah* might be caused such as the grapes might be fermented into wine but in this case a mere possibility of this kind is overlooked in view of the stronger likelihood of the benefit that it would otherwise achieve. The scholars are generally in agreement on the appreciation of this type of *dharī'ah*.

⁴³ For detail on this matter see *ibid*, pp. 244-5 and *ibid*, pp. 272-3

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After examining the above facts about *sadd al-dharā'i'*, we can say that all the *'urf* that leads to evil must be prevented because these *'urf* are invalid, and can be classified as *'urf fāsid*. One of the examples that can be given in this context is the practice of people with regards to the social intercourse between men and women especially among the younger generation. The practice of not putting a limit on this relationship will lead to a bigger evil, i.e. illicit sexual behaviour that may lead to immorality in society. Therefore, there should be a limit on the relationship between the two sexes in order to preserve the social value. The other point about this subject is that all the means including the *'urf* of the people that leads to evil must be prevented as it is an obligation for the Muslims to do so. The *Sharī'ah* makes certain things forbidden and all the means that lead to the forbidden things must be prevented as mentioned by Al-Qarāfī who said,

"Whenever the objective (*maqṣad*) is prohibited, the means that leads to it is also prohibited as the means follows the objective."⁴⁴

⁴⁴ Al-Qarāfī, *Al-Furūq*, vol.2, p.33

6.7 Urf and Istishāb

Istishāb literally means escorting or companionship. Technically, *istishāb* indicates that facts, or rules of law and reason, whose existence or non-existence had been proven in the past are presumed to remain so for lack of evidence to establish any change⁴⁵. *Istishāb* is validated by the Shāfi'īs, Ḥanbalis, the Zāhiris and the Shi'ah Imāmiyyah schools but the Ḥanafis and Mālikis consider it as a very weak proof.⁴⁶

The scholars divided *istishāb* into four categories based on the nature of the conditions that are presumed to be continued. The four varieties of *istishāb* are as follows:

1. *Istishāb ḥukm al-ibāḥah al-aṣliyyah* or *istishāb* which presumes the continuity of the general rules and principles of the law. This means if there are no rulings in the *Sharī'ah* on a matter, it will be categorised within the principle of *ibāḥah* which is the general norm of Islamic law concerning a matter that is regarded beneficial and free of evil consequences. Hence, when the law is silent on a matter and is not opposing reason it will be presumed to be permissible. Many of the

⁴⁵ Badran, *Uṣūl*, p.217

⁴⁶ Al-Ḥasan, *Al-Adillah*, p.65

rulings based on the theory of *ʿurf* are part of this kind of *istiṣhāb*. The *ʿurf* that has been practised for a long time, is beneficial to people and does not contradict the text and general principles of Islam, can be used as a basis for judicial rulings based on the theory of *istiṣhāb*. These practices can be legalised within the framework of the principles of *ibāḥah* as described above.

2. *Istiṣhāb al-ʿadam al-aṣlī* or the presumption of original absence which means that a fact or rule of law which has not existed in the past is presumed to be non-existent until the contrary is proved. For example, if A claims that B owes him some money, the presumption of absence here will be in B's favour unless A has the proof of his claim.⁴⁷

3. *Istiṣhāb al-wujūd al-aṣlī* or the presumption of original presence. This type of *istiṣhāb* takes for granted the presence or existence of that which is indicated by the law or reason. For instance when X is known to be indebted to Y, X is presumed such until it is proved that he has settled the debt or was acquitted of it. Provided that Y's loan to X is proven in the first place as a fact, it is sufficient to give rise to the presumption of its

⁴⁷ Badran, *Uṣūl*, p.219

continuity and Y needs not prove the continuity of the loan in question every day of the month.⁴⁸

4. *Istiṣhāb al-wasf* or continuity of attributes such as the presumption that a missing person is still alive. The person will be presumed alive until there is credible evidence which proves otherwise.

The above kinds of *istiṣhāb* indicate the different types of presumption which can be drawn. As far as the theory of *'urf* is concerned, it can be categorised in the first type of *istiṣhāb* mentioned above. And all the established *'urf* can be incorporated into *istiṣhāb*; because one of the conditions of the validity of *'urf* is that it must be in existence at the time a transaction is concluded. An example is the practice regarding the costs of formal registration in the sale of real property. The normal practice for this is that the purchaser is to pay the costs and this can be practised as long as no contrary evidence is found or there is no agreement which obliges the retailer to bear the cost. So, if there occurs any dispute on this matter, the early presumption should be made based on the practise at the time the contract is concluded. This demonstrates the relation between these two theories and how both can be incorporated in certain matters.

⁴⁸ Kamālī, *Principles*, p.381

6.8 'Urf and 'Amal Ahl al-Madīnah

'Amal of al-Madīnah was of fundamental importance to the legal reasoning of Mālik b. Anas. He extensively relied upon the 'amal insofar as it constituted for him an absolute non-textual source of Islamic law by which he would interpret or elaborate the textual sources of law. The *Muwatta'* is a perfect example of the source book of the precepts of al-Madīnah 'amal. It is a general fact that al-Madīnah 'amal constitutes Mālik's most authoritative legal argument, although some did mention that Mālik's legal reasoning had two basic elements: 'amal and *ra'y*.⁴⁹ 'Amal ahl al-Madīnah as meant by Mālik is the practice of the people of al-Madīnah at his time and the previous times. These practices are those which were common and known among the people of al-Madīnah which they had inherited from their ancestors going back to the period of the Prophet. However, some of the scholars such as al-Shafī'ī⁵⁰, al-Sarakhsī⁵¹ and al-Ghazālī⁵² have a different interpretation of the concept of 'amal as they understand 'amal as the consensus of the people of al-Madīnah. The first meaning that was mentioned

⁴⁹ See Schacht, *Origins*, pp.312-314, 58-59, 63

⁵⁰ See Al-Shafī'ī, *Al-Umm*, 7/212

⁵¹ Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 1/314

⁵² Al-Ghazālī, *Al-Mustasfā*, vol.1, p.187

above seems the closest to the meaning of *'amal* which is meant by Mālik⁵³ in his writings, particularly in his *Muwattā'*. Although Mālik has been using different terminology when describing *'amal*, it gives the same meaning, namely, the practice of al-Madīnah's people. Some of the terms commonly used by Mālik are as follows:

1. *Al-Amr al-mujtama'* (*'alayhi 'indanā* which means the matter that is agreed among us.⁵⁴
2. *Al-Amr 'indanā* which means the matter according to us.⁵⁵
3. *Hadhā al-'amr alladhī adraktu 'alayhi al-nās wa ahl al-ilm bi-baladina* which means this is the matter that I have meet (known) from the common people and the scholars among them in our town.⁵⁶
4. *Al-ladhī lam yazal 'alayhi ahl al-'ilm bi baladina* which means (the matter) that is still being practised by the knowledgeable people in our town.⁵⁷
5. *Al-Sunnah 'indana* which means the practice according to us.⁵⁸

⁵³ Qādī 'Iyāḍ has elaborated the meaning of *'amal* which was meant by Mālik in his book *Tartīb al-Madārik wa Taqrīb al-Masālik*. He has also rejected the understanding of certain scholars of Mālik's view of *'amal* such as the view of Al-Ghazālī and Al-Ṣayrāfī. See 'Iyāḍ, *Tartīb al-Madārik*, vol.1, pp.67-8

⁵⁴ See Malīk, *Al-Muwattā'*, p.478

⁵⁵ Ibid, p.511

⁵⁶ Ibid, p.234

⁵⁷ Ibid, p.506

⁵⁸ Ibid, p.556

6. *Al-Amr alladhī lā ikhtilāfa fī-hi 'indanā* which means the matter which is not disputed among us.⁵⁹

7. *Al-'amr al-makrūh alladhī la ikhtilāfa fi-hi 'indanā* which means the reprehensible matter which involves no dispute among us.⁶⁰

These are some of the regular terminologies that occur in the *Muwatta'* of Mālik, some of these terms do not indicate the consensus of al-Madīnah's people; but a few did have the possibilities to be understood as the consensus of al-Madīnah's people. These varieties in the usage of terminologies are the style and method of writings and what Mālik means by these terminologies is the practice of the people of al-Madīnah and not their consensus. This is the point which is emphasised by Ibn Khaldūn when he explains this matter by saying that Mālik did not mean to say "the consensus of the people of al-Madīnah" when he used the terms "The matter is agreed by the people of his town" but instead what he wish to express was the imitation of a generation of their ancestors which went back to the Prophet.⁶¹

⁵⁹ Ibid, p.504

⁶⁰ Ibid, p.519

⁶¹ Ibn Khaldūn, *Muqaddimah*, p.445

In the letter written by Mālik to al-Laith b. Sa'd (d.175AH)⁶² he described the reason why he relied upon the *'amal* of the people of al-Madīnah. The reason given by Mālik was that all people are dependent upon the people of al-Madīnah because of the unique relationship that they had with the Prophet. Al-Madīnah also was the place of his *hijrah* and also the place where part of the *Qur'ān* was revealed that set down the law, disclosing what was permissible and what was forbidden. The people of al-Madīnah were present during the revelation; the Prophet gave them orders and they obeyed him; the Prophet would establish the *Sunnah* and they would observe it and this continued until the death of the Prophet. At the end of the letter Mālik states that whenever a matter (of Islamic law) is predominant (*zāhir*) in al-Madīnah and is followed in *'amal*, he did not believe that anyone has the prerogative to go against it on the basis of the limited part of this same legacy which they possessed, this legacy which none may take for himself or lay claim to. He further added, that if the inhabitants of the various regions (of the Islamic empire) (*ahl al-amṣār*) should begin to say, "But this is the *'amal* of our city" or "This is what those who preceded us had always been doing", they would not in doing that be following the surest and most reliable course, nor would they be doing what was permissible for them⁶³.

⁶² Abū al-Ḥārith Al-Laith Ibn Sa'd al-Fahmī (94-175/713-791) was an Egyptian contemporary of Mālik and respected *muḥaddith*, *faqīh* and historian. Like Mālik he was a student of al-Zuhrī and others.

⁶³ The latter of Mālik was transmitted in *Tartīb al-Madārik by al-Qādī 'Iyād*. See, 'Iyād, *Tartīb al-Madārik*, vol.1, pp.64-5

In other instances, it was also related that Mālik said that many Companions of the Prophet were in al-Madīnah and most of them had died there but only a few of them lived in other parts of the world. So, he asked which one is better to be followed, the people of the place that the Prophet and most of his Companions died in or the people in whose place only a few of the Companions had died. The above arguments of Mālik indicate the importance of *ʿamal* to the Mālikīs and the reason why Mālik held to the *ʿamal* of the people of al-Madīnah and on certain occasions preferred *ʿamal* over the *āḥād Ḥadīth*.⁶⁴

6.8.1 Sources of *ʿamal*

As for the sources of *ʿamal* it is also mentioned in Mālik's letter to al-Layth that there are two sources of al-Madīnan *ʿamal* which are:

1. The *Sunnah* of the Prophet and
2. The *ijtihād* of those who came into authority after the Prophet, such as prominent Companions and successors (*tābiʿīn*).

⁶⁴ Mālik has said in one instance that some of the scholars among the *tābiʿīn* (the generation that come after the Companions) would give a ruling based on the *ʿamal* even though they knew about certain *āḥād ḥadīth* on the matter. In this respect, Ibn Qāsim and Ibn Wahhab said that in their opinion, the *ʿamal* has more authority than *āḥād ḥadīth* to Mālik. See ʿIyād, *Tarīḥ al-Madārīk*, vol.1, p.66

According to Mālik, the perfection of the people of al-Madīnah and their *ʿamal* are the results of their obedience to the Prophet and their careful adherence to the *Sunnah* which He had laid down for them. Similarly, Mālik believes that the al-Madīnan Caliphs and their successors (the *tābiʿīn*) are those who follow the Prophet's *Sunnah* closely and he also regards the inhabitants of al-Madīnah as the closest people to the Prophet who follow the *Sunnah* of the Prophet.

The second source which is the *ijtihād* of those who assumed authority after the Prophet, according to Mālik, is acceptable because of the vast knowledge they had of the Prophet's teachings, their access to other Companions of whom they could inquire about matters of which they had no knowledge, and their recent experience of having been with the Prophet and learned Islam at first hand. Thus, he believes, they were capable of discerning those opinions in *ijtihād* which were strongest and most worthy of being followed, i.e., of being incorporated into *ʿamal*.⁶⁵

6.8.2 Classification of *ʿAmal*

Basically the Mālikī scholars divided *ʿamal* into two categories as it refers to the above source of *ʿamal*.

⁶⁵ Ibid, vol.1, pp.64-5

1. The first type of *ʿamal* is the *ʿamal* which is derived from the *Sunnah*. This type of *ʿamal* originated from the era of the Prophet which is also called "*ʿamal naqlī*", an *ʿamal* which is transmitted, as it were, as a principle of law from the Prophet to the later generation. There are four sources of *ʿamal naqlī* which can be identified as composing part of the *Sunnah* of the Prophet. These components are either:

a) Express statement (*aqwāl*), injunctions or commands of the Prophet such as the wording of the call to prayer and the *iqāmah*, which is the repetition of the *adhān* by those about to perform the congregational prayers, and the *ʿamal* of using certain established Madīnan weights and measures, such as the Madīnan *ṣāʿ* and *mudd* for the collection of *zakāh*.

b) The example of actions or conducts (*afʿāl*) which the Prophet set such as the *ʿamal* of omitting the recitation of *basmalah*⁶⁶ during congregational prayers, the number of *rakʿah* at each prayers, the *sajdah* (prostration) and others.

c) Tacit approval (*iqrār*) which the Prophet gave to the actions which took place around Him such as the precepts of the Madīnan *ʿamal* that no *zakāh*

⁶⁶ *Basmalah*: The *Qurʾānic* wording in the beginning of a *sūrah* which means: In the name of God the Most Gracious Most Merciful

is due on fruit, provender, and green vegetables⁶⁷ even though these things existed at that time, or

d) The Prophet left out (*tark*) some matters or rules that existed and were common at that time such as the *zakāh* on fruit, provender and green vegetable as the above example. Some scholars claimed that '*amal naqlī*' is an authoritative legal argument (*ḥujjah*) and is preferred over *khbar al-wāḥid* and *qiyās*⁶⁸. Qadī 'Abd al-Wahhāb⁶⁹ has said that there is no dispute on this kind of '*amal*' among the Mālikis and it is also agreed on by most of the Shafī'ī scholars.⁷⁰

2. The second variety of '*amal*' is the '*amal*' derived from *ijtihād*. The *ijtihād* here refers to the *ijtihād* of the Madīnan *fuqahā'* in the post-Prophetic period. Qāḍī 'Iyāḍ approved only those types of '*amal*' in this categories that were supported by the Madīnan local consensus.⁷¹

Furthermore, he does not differentiate between types of '*amal*' that resulted

⁶⁷ See Mālik, *Mūwaṭṭā'*, p.231

⁶⁸ See 'Iyāḍ, *Tarṭīb al-Madārik*, vol.1, p.68

⁶⁹ Qadī 'Abd al-Wahhāb is Abū Muhammad 'Abd al-Wahhab b. 'Alī bin Naṣr Al-Baghdādī. He was a jurist and linguist born in 363H and died in 421H.

⁷⁰ See *Ibid*, vol.1, p.69

⁷¹ *Ibid*, vol.1, p.71

from earlier or later instances of *ijtihād*. On the other hand, Ibn Taymīyyah and al-Ibn Qayyim differentiate between the Madīnan *ʿamal* which resulted from *ijtihād* in the days of the Madīnan Caliphate and *ijtihād* which resulted in *ʿamal* after that time. The *ʿamal* that resulted from *ijtihād* during the first three Caliphs until the death of ʿUthmān is referred as "*ʿamal qadīm*" and the later *ʿamal* which resulted after the above period is referred as "*ʿamal mutaʿakhhir*".⁷² According to the information cited by Ibn Taymīyyah, ʿAbd al-Wahhāb regarded none of the instances of Madīnan *ʿamal* which resulted from *ijtihād* to be authoritative. He further elaborated that some Mālikis regarded *ʿamal qadīm* to be a valid legal argument when supported by local consensus. They considered this as a legitimate type of *ijmāʿ*, although distinctive from the *ijmāʿ* of the *ummah* and not as authoritative.⁷³ On the other hand, according to Ibn Taymīyyah, ʿAbd al-Wahhāb held that *ʿamal mutaʿakhhir* was not regarded as authoritative by meticulous Mālikī scholars (*al-muḥaqqiqīn*). This indicates that there were some Mālikī scholars who regarded it as authoritative but whom ʿAbd al-Wahhāb did not regard as meticulous.⁷⁴ Ibn Taymīyyah and Ibn al-Qayyim hold Madīnan *ʿamal qadīm* in high regard and they hold that this type of *ʿamal* is of the category of *Sunnah*; both have drawn a clear distinction between *ʿamal*

⁷² Ibn Taymīyyah, *Ṣiḥḥat Uṣūl*, pp.26-28; Aāl Taimīyyah, *Musawwadah*, pp.331-332.

⁷³ Aāl-Taymīyyah, *Al-Musawwadah*, pp.331-332

⁷⁴ *Ibid*, p.27

qadīm and *ʿamal mutaʿakhhir*, but neither of them regards *ʿamal mutaʿakhhir* as authoritative.⁷⁵

6.8.3 The differences between *ʿamal* and local custom (*ʿurf*)

This discussion will start by examining the differences between *ʿamal* and *ʿurf* from Mālik's point of view. According to Abū Zahrah, besides relying upon the *ʿamal* extensively, Mālik also gives higher priority to *ʿurf* than the others *imāms* of the other major *Sunnī* schools. The reason for this is because the concern for *maṣlahah* takes such a high priority in Mālik's view. This is also supported by al-Shāṭibī who suggests that there is generally a close relationship between sound local custom and the *maṣāliḥ* of the people of that locality. Al-Shāṭibī also held that this priority which Mālik gives to local customs is supported by the example of the Prophet, who recognised many of the pre-Islamic customs of the Arabs. The reason for this, according to him, was to abolish only those customs which were harmful and to keep and perfect those which were beneficial.⁷⁶ In addition, it should also be noted that, as far as Madīnan *ʿamal* is concerned, it was originally in the city of al-Madīnah that the Prophet established this task of determining which of the pre-Islamic Arabs customs should be kept and which of them should be abolished.

⁷⁵ Ibn Taymiyyah, *Ṣiḥḥat al-Uṣūl*, pp.161-169

⁷⁶ Al-Shāṭibī, *Al-Muwāfaqāt*, 2/214

Hence, those pre-Islamic customs that remained part of the *‘amal* of the people of al-Madīnah in the Islamic era such as the customary method of buying and selling, the precepts of *qasāmah* and other such customs would have been regarded as legitimate types of *‘amal* by virtue of the Prophet's acceptance of them. Thus, such types of *‘amal* can be regarded as part of Madīnan *‘amal naqlī*, since although they did not originate from the Prophet, they would be considered as coming under his *Sunnah* by virtue of his having given them explicit or tacit approval (*iqrār*). Umar al-Jidī in his work *al-‘Urf wa-al-‘Amal fi-al-Madhab al-Mālikī* mentions that the meaning of *‘amal* to the Mālikis is the practice that is common and is practised by the people (*wa ma i’tāduhu qaumuhu wa ta’ārafūhu wa sārū ‘alayh*).⁷⁷ Based on the above facts, we could say that the customs of the Arabs which had come to be incorporated into the *‘amal* of al-Madīnah would have greater authority than the sound local custom. We could also conclude that there are no difference to the Mālikis between the principle of *‘amal* and the local custom (*‘urf*) of the Madīnan people. This means the customary practices of the people of al-Madīnah which were practised in the pre-Islamic era, the time of the Prophet and the first three Caliphate⁷⁸ are considered as *‘amal* to the Mālikis. Therefore, these two terminologies and principles have the same meaning and usages in this context.

⁷⁷ Al-Jidī, *Al-‘Urf wa al-‘Amal fi-al-Madhab al-Mālikī*, p.325

⁷⁸ This if the classification of Ibn Taymīyyah and Ibn Qayyim is considered, see above p. 244-45

However, there is an opinion which differentiates between the concept of *ʿamal* and Madīnan local custom. The differences mentioned are as follows:

1. The *ʿamal* is given the priority over others in ritual (*ʿibadah*) matters whereas *ʿurf* has no role in determining matters pertaining to rituals.⁷⁹
2. The *ʿamal* in order to be valid must fulfil certain conditions but this does not apply to *ʿurf*.⁸⁰
3. *ʿUrf* is the practice of the common people regardless of whether they are knowledgeable or not, on the other hand, *ʿamal* is the practice of the knowledgeable people which must be followed.

The above-mentioned opinion on the differences between *ʿamal* and *ʿurf* are not a strong opinion and these arguments could be rebutted as follows:

1. The first point concerning the application of *ʿamal* in ritual matters is not a strong point as this matter is a matter on which the scholars differ. Most of the scholars held the opinion that *ʿamal* can only be considered in matters pertaining to commercial (*muʿāmalah*) and not to ritual (*ʿibadah*) matters as such. In fact, the same difference of opinion occurs regarding the usage of *ʿurf*.
2. The second point mentioned above does apply to *ʿurf* and not only to *ʿamal* as it is obvious that *ʿurf* in order to be valid must also fulfil certain conditions as mentioned earlier.

⁷⁹ Jidī, *Al-ʿUrf wa al-ʿAmal*, p.395 citing *Tuhfah al-Akyās*, 2/25

⁸⁰ Ibid, p.395, citing *Rafʿ al-ʿItāb wa al-Malām*, p.20

3. As for the third point, this is the only precise difference between *'amal* and *'urf*. As mentioned earlier *'amal* is the practice of the people of al-Madīnah and there is no doubt that these people are those who lived with the Prophet and learned Islam at first hand, so, that they are the most knowledgeable people in matters pertaining to Islamic teaching.

We can conclude by saying that the only difference between *'amal* and *'urf* is that *'amal* is the practice of the Madīnan community in the early days of Islam. These practices either received the tacit approval of the Prophet or they were practices which were not against Islamic law. Indeed, in certain matters, such as, the matters pertaining to transaction and other such practices which have legal impact, the practice of the Madīnan people should be considered as part of the Islamic legal system. The reason for this is that if there had been any alteration to the practice of the Madīnan people, the Prophet should have informed them about it, and obviously it was the duty of the Prophet to abolish those practices which were detrimental and to keep and perfect those which were beneficial.

* * *

The discussion on the relationship between the theory of *'urf* and other important sources in Islamic law demonstrates the close relation of this theory to the other theories. As mentioned earlier, this theory is one of the most significant

theories in Islamic law and is the object of consideration in most of other sources of Islamic law. This is because this theory is a theory that is related to the practice and deeds of the people which must be taken into consideration in making any decision of law. The practice of people changes according to the change of place and time. Therefore, any decision which might affect the Muslims must be based on their needs that change from time to time and from one place to another.

The importance of *'urf* with regard to *ijmā'* could be observed in the role of the practical *ijmā'* (*ijmā' (amālī)*) which has a very close connection with the theory of *'urf*. Indeed, it is very important to take into account the *'urf* of the people in making *ijmā'*, as the abandonment of *'urf* will cause difficulties to the people. The other significant point in the relationship between *'urf* and *ijmā'* is that we can observe the importance of changing the rules which are concluded by *ijmā'* based on *'urf*, so that a suitable rule can be given at a suitable time and this will obviously be important to prevent hardship for people. As for the role of *'urf* with connection to *qiyās*, it could be observed through the authority of *'urf* to overrule *qiyās* on certain occasions, because the abandonment of *'urf* in this respect might create problems for the people and this is contrary to the aim of the *Sharī'ah* which is to prevent hardship for mankind. As for *istihsān*, *'urf* is considered as one of the bases that can be relied upon to deduce rules from the theory of *istihsān*. *'Urf* also has a major role with regard to *maṣlahah* because as mentioned earlier the consideration of *'urf* in making any judgment is itself *maṣlahah*. In addition,

the theory of *istiṣḥab* and *sadd al-dharā'ī*' also has a close relationship with the theory of *'urf* and finally the *'amal* of the people of al-Madīnah has a very close similarity to the theory of *'urf* as mentioned.

CONCLUSION

The main purpose of this study was to explain the necessity of considering *‘urf* and its indispensability in Islamic law. The importance of considering *‘urf* is due particularly to the fact that the texts have laid down only broad and general principles for legislation, so that the solution for the incidents or cases whose rules have not been provided by the texts should be referred to other sources of Islamic law such as *‘urf*.

The application of *‘urf* can be traced back as early as from the time of the Prophet. This could be observed through the recognition of certain pre-Islamic practices by the Prophet. This indicates that Islam has not totally abandoned the practices of the *jāhiliyyah*, instead, it has taken into consideration many of their practices which do not contradict the teachings of Islam. The Companions have also taken into consideration many existing customary practices in their legal decisions. In addition, the jurists of Islamic law have also taken *‘urf* into consideration in making legal rulings. Therefore it is essential to acknowledge that one of the major functions of Islamic law is to reevaluate or ratify the existing practices. This is done by changing it completely or partly in certain cases and by preserving it in others in order to suit the Islamic legal principles that were revealed by the *Qur’ān* and the *Sunnah* of the Prophet. However, Islamic law takes

its legal origins from the *Qur'ān* and *Sunnah*, not the customary practices of the *jāhiliyyah* or other practices.

In fact, *'urf* has infiltrated into the *Shari'ah* by two important ways which are:

1. The recognition of certain practices of the pre-Islamic Arabs by the *Qur'ān* or *Sunnah*.
2. The consideration of certain customs by the jurists in their respective schools of law.

Apart from that, the main reason for considering *'urf* is because of its ability to provide solutions to satisfy the interest of the community in many cases.

As far as the authority of *'urf* is concerned, it emerges that, there are no strong textual evidences from the *Qur'ān* or *Sunnah* which indicate *'urf* as an independent source of Islamic law, despite the significant role played by *'urf* in the development of the *Shari'ah*. The grounds for recognising *'urf* as a proof, have been partly due to the circumstantial character of *'urf* that it is changeable with the change of circumstances, time and place. This means that the rules of *fiqh* that have been formulated according to the prevailing custom at one time can be changed if the prevailing custom is no longer being practised. This is the reason why we can find the different *fatāwā* given by the scholars on particular issues due to the changes of customs on which an earlier *fatwā* was founded. The utilisation of *'urf*

by the *Qur'ān* and *Sunnah* also indicate that it is not being used as a main source to deduce the rules of *fiqh* or to solve a problem that arises, but it is only depended upon to make clear or interpret the matter which is not clear. This signifies its role as a supportive source and not as a main independent source of legislation.

In order to regulate the utilisation of *'urf* the scholars have set several conditions for *'urf* to be valid. These conditions are essential to be observed, so that there is a constant restriction on the utilisation of *'urf*. It is also necessary in order to avoid undesirable manipulation in the application of this theory.

It is extremely important to examine the *'illah* of a ruling, as the departure of the *'illah* will effect the ruling that was deduced. This is the reason why the ruling that was deduced based on *'urf* must be changed because the *'illah* of such a ruling will depart with the passage of time and change of circumstances. The ruling whose *'illah* has departed is outdated and implementing such a ruling will deny facility to people. This is against the aim of *Shari'ah*.

The legal maxims formulated by the scholars from the early period of the resurgence of *fiqh* have acknowledged the role of *'urf* in Islamic law. These maxims should be utilised constantly as a guidance in making legal rulings. As is obvious, most of these maxims are general principles which could be applied in

many instances, therefore they should be utilised in accordance with the needs of contemporary society.

There is a close relationship between the theory of *'urf* and other important sources in Islamic law which are *ijmā'*, *qiyās*, *istihsān*, *sadd al-dharā'i'*, *maṣlahah* and *'amal ahl al-Madīnah*. The importance of *'urf* with regard to *ijmā'* could be observed in the role of the practical *ijmā'* (*ijmā' (amalī)*) which have a very close connection with the theory of *'urf*. Indeed, it is very important to take into account the *'urf* of the people in making *ijmā'*, as the abandonment of *'urf* will cause difficulties to the people. In addition, we could observe the importance of changing the rules concluded by *ijmā'* based on *'urf*. This is essential so that a suitable rule can be given at a suitable time and this will obviously be important to prevent hardship for people. The role of *'urf* with connection to *qiyās* could be observed through the authority of *'urf* to overrule *qiyās* on certain occasions because the abandonment of *'urf* in this respect might create problems for the people and this is contrary to the aim of the *Shari'ah* which is to prevent hardship for mankind. *'Urf* is considered as one of the bases that can be relied upon to deduce rules from the theory of *istihsān*. *'Urf* also has a major role with regard to *maṣlahah* because the consideration of *'urf* in making any judgment is itself *maṣlahah*.

The important role of *'urf* in the above context is obvious because it is a theory that is related to the practice and deeds of the people which must be taken into consideration in making any decision of law. The practice of people changes according to the change of place and time. Therefore, any decision which might affect the Muslims, must be based on their needs that change from time to time and from one place to another.

One point that should be observed in this context is that the application of *'urf* in Islamic law is limited to the matters related to *mu'amalah* and not the rituals (*'ibādah*) as matters of rituals are strictly guided by the text of the *Qur'ān* or *Sunnah*.

Finally, *'urf* has been an important tool throughout the development of Islamic law and will continued to be so in the future. It is the responsibility of the scholars of Islamic law to revise and reevaluate the previous *ijtihādāt* particularly those which were based on *'urf*. The previous *ulamā'* have given their rulings based on the existing *'urf* and these rulings might not suitable to be implemented at present. Therefore, these rulings should be revised and a set of new rulings should be found based on the present *'urf* which can accommodate the needs of society in this twentieth century.

APPENDIX

Adat ('Urf) and Islām in Malaysia

Introduction

Customary law or *undang-undang adat* is an important source of law in Malaysia. Before the emergence of the European power in the region of South East Asia, the Malay peninsular at that time was being occupied by three groups of different origins. They were the Negrito, Senoi and Melayu Asli (original Malays). At that time the law practised was the common law for each group, and, normally, the leader of the group was the most powerful person who dealt with any problem and he normally passes judgements on any problem that occurs. After that, rule passed into the hands of the Malacca Sultanate. At the end of the Malacca Sultanate era, there were two source of written laws that had been influenced by Islamic law and the native Malay customary law. The two sources were the Hukum Kanun Melaka and the Undang-undang Laut Melaka.

In the year 1511 the Portugese colonised Malacca and it was ruled by a Captain and military law was imposed. The Captain was assisted by a chief judge who was called the Ovidor and also seven Magistrates who were responsible for the civil and criminal matters. They had the power to issue sentences on those

who committed any offence or violated the law. When the Dutch took over power, the same system continued as under the Portugese.

After that, the British implemented their law in Malaya when they colonised Malaya. In addition, in every state they established Islamic Religion Councils (*Majlis Agama Islam*) to look into matters pertaining to Islamic Marital law and matters regarding the customary practices of Malays (*Adat Istiadat Melayu*). In fact, before the advent of the British to Malaya, the law that was practised were the Malay customary laws which originated from two well known main customary practices among the Malays, i.e. 'Adat Temenggung' and 'Adat Perpatih'. At the present, the civil law of Malaysia is partially deduced from the English common law and the *Majlis Agama Islam* still exists in every state in Malaysia to deal with matters pertaining to family law and matters regarding the customary practices of Malays (*Adat Istiadat Melayu*).¹

Customary Law in Malaysia

The customary law in Malaysia has a long history which can be traced from the fifth century CE. From the fifth to the fifteenth centuries, under the impact of Indianisation and the early reception of Malay influence from neighbouring

¹ For detail information on the above introduction, refer to Ahmad Ibrahim and Ahilemah Joned, *Sistem Undang-Undang Di- Malaysia*, pp.7-26

Sumatra, elements of both Hindu law and custom and Sumatran customary law infiltrated into the country at different times. The Hindu influence appears to have entered the country either directly from India or through the Hinduised states of Indonesia, especially after the rise in Java in the fourteen century of the Majapahit empire which stretched its political dominion over both Malaya and Singapore. Some of those who migrated from Sumatra to the Malay peninsular brought with them their customary practices. Some of them brought the Hinduised customs and legal notions while others brought to their settlements in Malaya (especially in the State of Negeri Sembilan) the local customary laws of the Minangkabau, and these two sources are currently considered to be the origin of Malay customary law.² These customary practices brought to the Malay peninsular were considered as the "early Malay customary law". They consisted of a whole body of customs and traditions which were developed in the Malay community and with the passage of time acquired the character of law. Being essentially unwritten law in the early stages, these customary practices survived in traditional sayings and narratives; but were, in the later stage embodied in a series of compilations, some of which possessed the semblance of "codes" and were called *undang-undang* in Malay. Some of these practices were modified later on when Islam entered the Malay peninsular but the influence of Hindu practices is still obvious in some of the practices of the Malays until the present, these particularly in the practices which

² See Mackeen, Abdul Majeed, *Contemporary Islamic Legal Organisation in Malaya*, p.10, and Ibrahim, Ahmad, Joned, Ahilemah, *Sistem Undang-undang di Malaysia*, p.28-30.

were not adopted as law.

The early Malay customary law, which took root in the country, functioned in two types of social groupings in the Malay society. The first type of social grouping which was matrilineal with its kinship structure was called the '*perpateh*' tradition and it predominated in the region now composing of Negeri Sembilan and parts of present day Malacca mainly in Naning. The latter which was based on the territorial units and was described as the '*temenggong*' tradition is said to have prevailed in other areas of Malaya. Therefore, the entire body of Malay customary law falls into one or the other of two categories commonly referred to as *adat perpateh* and *adat temenggong*. The *perpateh* system, often regarded as the pure Malay law based on exogamy and on a matrilineal structure, is considered to be an extension of the tribal laws which governed Minangkabau society, and were brought over to Malaya, supposedly intact, by its early emigrants. By contrast, the *temenggong* system, laid on patriliney and endogamy and is regarded as the natural consequence of exposure to and eventual supersedure by the autocratic and patriarchal institutions of the Hinduised states of southern Sumatra, especially Palembang through which its transmitters are believed to have travelled to Malaya. The Minangkabau penetration into Malaya appears to have begun before the advent of Islam and has continued well into the centuries after the expansion of Islam in the land.³

³ See Mackeen, Abdul Majeed Mohamed, *Contemporary Islamic Legal Organisation in Malaya*, pp.10-12

Two Forces in Malay Society

Adat perpateh is more detailed⁴ and rigid when compared with *adat temenggung*. This is because the *adat temenggung* from its very nature, is more susceptible to change with the introduction of other tenets and doctrines. Generally, it can be said that the *adat* were derived from one stock or source. The difference in them were more a matter of detail rather than of kind. These differences can be traced by examining the *terombo* or the song of the origin of the *adat*. In fact, most of the customary rulings are normally expressed in the *terombo* and sometimes it is hard to understand the true meaning that was meant in the *terombo*.

The origin of *adat temenggung* and *adat perpateh* can supposed be traced by Temenggong and Perpateh who were maternal brothers of different sires. Both of them later on became the founder of two famous institutions of Malay custom, Temenggong developed an aristocratic patrilineal way of life and Perpatih follow a democratic matrilineal social system of government. In addition to the mentioned differences, they also differed radically in their conception of common justice. These differences were presumably influenced by the two separate domains for their administration which were the coastal area below Bandar Rokan for

⁴ This regards to its tribal organisation, its matrilineal way of life, its female proprietorship of customary land, its exogamous marriage system, etc.

Temenggong and for Perpateh the hinterland above it. This fact was illustrated in the *terombo* which can be translated as follows:

Then follows Dato' Seri Maharaja di-Raja
Bringing the two distinct Penghulus (Chiefs)
That is Dato' Temenggong and Dato' Perpateh
Nan Sabatang (only son),
Down river (seaward) to Bandar Rokan,
Where the fishing crafts are tied up in neat rows,
Where the poles (oars) are laid criss-crossed,
Where the dippers (buckets) are found scattered,
Here is the dividing line (of the influence) of Dato' Temenggong and Dato'
Perpateh Nan Sebatang,
Seaward towards Kampar Kiri and landward
towards Kampar Kanan

Seaward to Kampar Kiri

Where the waters (sea) roll and swell, where
the waves chop and spray,
Where the sands form the white shore, where
the bank juts its head
Where the cape runs into promontories, where
the foreign traders enter and leave
Where the Merchants buy and sell,
That is the province of Dato' Temenggong,
Bendahara Kaya.

Then landwards to Kampar Kanan:

Where the water is one gantang for each pool,
where the night-bird (sedengkang)
jarred at night,
Where the tiger sits in judgement, where the
wild boar pays the fine,
Where the sand collects in heaps, where the
rock spread in patches,
Where the creeper plant sheds its leaves, where
the meranti (good timber tree)
rubs its branches,
Where the squirrels run up and down, where

the monkeys jump in glee,
 Where the short-tailed monkey swings his leg,
 where the apes howl,
 Where the eagle returns to its eyrie, where the
 hornbills fly past
 Where the snake sleeps in coils, where the civet
 folds in sleep,
 Where the toads croak at night, where the wah-wah
 cries with melancholy note,
 Where the water-spirit shrieks with weird variation,
 This is the country of Dato' Perpatch Nan Sebatang.⁵

⁵ The Malay version of the above *terombo* is as follows:

Maka turutlah Dato' Seri Maharaja di-Raja
 Membawa Penghulu yang dua silai,
 Ia itu Dato' Temenggong dan Dato' Perpatch Nan Sebatang
 Turun kalaut ke Bandar Rokan,
 Tempat perahu yang bersusun-susun
 Tempat galah yang bersilang seli,
 Tempat gayong yang berlengkang lenkong,
 Di-situ lah pembahagian Dato' Temenggong
 dengan Dato' Perpatch nan sebatang,
 Menghilir ka-Kampar Kiri dan menghulu ka
 Kampar kanan

Menghilir ka-Kampar Kiri:

Tempat ayer yang bergelombang, tempat ombak
 yang memecah,
 Tempat pasir yang memuteh, tempat tebing
 yang menjulor,
 Tempat tanjong yang menanjong, tempat
 dagang keluar masuk,
 Tempat saudagar berjual beli,
 Itu lah pembahagian Dato' Temenggong,
 Bendahara Kaya.

Kemudian menghulu ka-Kampar Kanan

Tempat ayer sa-gantang sa-lubok, tempat
 sedengkang berbunyi malam,
 Tempat harimau berhukum, tempat babi bertimbang,
 Tempat pasir timbun menimbun, tempat batu
 hampar menghampar,
 Tempat akar berchampak daun, tempat meranti
 bersanggit dahan,
 Tempat tupai berturun naik, tempat kera
 berlompat lompatan,

He who kills must give restitution;
To the son you give sustenance,
The nephew you hand to ransom,
You bargain in a sale, you repent of a sin,
You pay for a service done,
Compensation for blood,
Compensation for life
An offence is nullified by judgement and fine,
A debt is satisfied by accord and satisfaction;
A knot is released by untying action,
If you stray at the further end of your path,
Return to your starting point,
This is the law of Perpatih Nan Sebatang.

The above wording expresses the justice system of the Temenggong and Perpatih with regards to justice lies in the matter of slain. The Temenggong's concept is retaliation but the Perpatih adopted the restitution concept.

The advent of Islam in the region of South East Asia has affected the system and the practices of people in that area. Furthermore, the advent of Islam also has effected the two forces in the Malay society which were the *adat temenggong* and *adat perpatih*. The following discussion shall examine the effect of Islam on these two systems and to what extent these systems are in harmony with the Islamic system⁶.

⁶ This study only examines certain practice of *adat temenggong* to see its connection to Islamic teaching therefore we should anticipate other aspects of this practice not included in this study as the subject of *adat temenggong* is a broad subject which can be examine in detail at another time.

Adat Temenggung

Adat Temenggung is a practice that was not codified as a binding law because it was based on the ancient practice and the common daily practice of the people. Although the rulings in *adat temenggung* were not codified, we can still find some information on this practice in the collections of Malay laws of Malacca, Pahang, Kedah, Perak and Johore because these collections have been largely influenced by *adat temenggung*⁷. Among the laws from the above collection is the *Undang-undang Sembilan Puluh Sembilan Perak* (Ninety-Nine Laws of Perak), *Undang-undang Kedah* (The Laws of Kedah) and others.

Adat temenggung as mentioned earlier was based on a patrilinear system and this is in common with many other social systems. Being patrilinear it has soon identified itself with the new teaching of Islam and absorbed the Islamic system specifically in the hereditary succession and the predominance of the male over the female in the inheritance of the property. The absorption of Islam in *adat temenggung* was very deep to the extent that some people described both as a synonymous system. For instance, in the matter of inheritance, the property which was not distributed according to the *perpateh* system of matrilineal ownership is assumed to be inheritable through the *temenggung* system which is considered as

⁷ See Ibrahim, Ahmad and Joned, Ahilemah, *Sistem Undang-Undang di Malaysia*, p.34

the Islamic way of distributing inheritance.⁸ It is quite obvious that the distribution of inheritance according to *adat temenggung* was largely influenced by the Islamic system of inheritance. However, there were certain non-Islamic practices in the distribution of inheritance which were preserved under this system. For instance, in *adat temenggung* if a man died and left the joint acquired property⁹, the wife will have a special share allocated for her from this property, unless there is a fixed share given to her while the husband is still alive. The other example is that, if a man dies with no children and he only leaves a small value of property, all the property will be given to his wife.¹⁰

In the political scene also there were substantial effects of Islam on the customary *temenggung* states which became Sultanate States by degree. The *temenggung* states adopted Arabic names such as *Dār al-Amān* or 'State of Peace' for Kedah, *Dār al-Ihsān* or 'State of Beneficence' for Selangor and other such names for the other states. The official correspondence between states although written in the Malay language is interspread with stock Arabic expressions. The more Arabic words used in such correspondence, the more they were appreciated and valued. Normally letters between a Sultan and another will begin with suitable Arabic greetings such as *Ya Shams al-Qamar*, 'O the Sun of the Moon'. The letters

⁸ Ibid, pp.18-19

⁹ Joint acquired property is the property that is obtain jointly by both the husband and his wife.

¹⁰ Ibrahim, Norhalim Hj., *Adat Perpatih Perbezaan Dan Persamaannya Dengan Adat Temenggung*, pp.138-9

from the public were began with *Ya Qaḍī al-ḥājat*, 'O judge who fulfils the wishes (of the one who seeks the favour)'. Further more the Sultans adopted titles and prefixes such as *Ri'āyat al-Dīn*, 'Defender of the Faith', *Al-Mu'taṣim Billah*, 'One who seeks refuge with God' and other such titles. In addition, the Sultans not only became the head of the Malay custom but also of the religion of Islam.¹¹ This privilege of the Sultan remains inviolate till this day. These are some of the influences of Islam on the *temenggung* system which has strong influence on the Malay society.

The practices of *adat temenggung* are to some extent synonymous with the Islamic system but there are some of its aspects which contradict the Islamic system. In order to examine the subject of how far this practice is synonymous with the Islamic system, we will observe some aspects of this practice and compare them with the Islamic system. Some quotations from *The Ninety Nine Laws of Perak* will be examined randomly because this law is considered one of the old Malay collections which was generally based on *adat temenggung* as mentioned earlier.

The punishments for criminal offences in *adat temenggung* are in some instances similar to the Islamic system. For instance the punishment relating to murder is that the slayer must answer with his life; but in the case of true believers,

¹¹ op.cit. pg.19

if the murderer appears before the court, the death penalty will not be inflicted and instead a fine of five *tahil*¹² of gold must be paid and a funeral feast provided, and either a buffalo, white goat or a white camel, as the price of his liberty.¹³ The genuine punishment for murder according to this practice is equivalent to *qiṣāṣ* in Islamic law. But in Islamic law the punishment is equally applied to all believers regardless of the piety of the believer. The fine imposed on the true believer also has its equivalent in Islamic law which is the payment of *diyāh* (blood-money). So, in this matter, this practice is not totally against the Islamic system but it must be modified to suit the Islamic system.

Another example in the criminal area is the punishment for theft. For the first offence the offender has to pay back what he had stolen. The second offence would involve loss of a finger and a third expulsion from the *mukim* (district).¹⁴ According to the Islamic system, if a person commit this offence and fulfils all the criteria which makes him liable to the punishment, the offender's right hand should be amputated from the wrist for the first theft. If there is a second offence than according to the four *Sunnī* schools the thief's left foot should be amputated.¹⁵ So, in this matter it is obvious that *adat temenggung* rulings in this particular case

¹² One *tahil* is equivalent to thirty seven point five gram

¹³ J.Rigby, *The Ninety Nine Laws of Perak*, an article in *Readings in Malay Adat Laws*, p.58

¹⁴ *Ibid*, p.58

¹⁵ See El-Awa, Mohamed S, *Punishment in Islamic Law*, p.4

contradict the Islamic system.

The rulings of *adat temenggung* on a woman that commit adultery are to some extent in agreement with the Islamic system. In the case of a married woman who misconducts herself with another man, the penalties are either divorce, death or expulsion from the country, or the woman may be forced to marry her paramour.¹⁶ The Islamic rulings on a married individual who commits adultery regardless whether the offender is a man or woman is that the person must be stoned to death.

The rulings of *adat temenggung* in the matter pertaining to family matters are, also, to some degree, similar to the Islamic system. The payment of dowry is a requirement in this system but the amount of dowry is fixed, which for an ordinary person is a *tahil* and a *paha*¹⁷ at the most. The payment in the case of *rajas* (ruler) is ten *paha* of gold and in the case of the *Hashimites* (the descendent of the Prophet) five *tahil* of gold. In Islamic law there is no fixed amount of dowry; however the government can determine the amount to be used as a guide for the people in fixing their dowry. Another instance with regard to family law in *adat temenggung* is in the case where a woman wishes to be divorced by her husband. In this case, if she complains to the court on three occasions, she can

¹⁶ op.cit, p.75

¹⁷ *Tahil* and *paha* are measurement used for certain amounts of gold

have a divorce but she must redeem herself by returning an amount equivalent to her dowry, and she must pay to the court a *paha* of gold as a court fee. Similarly, if the husband wants a divorce he must pay within three months two *paha* of gold (for her maintenance) and pay the whole of the dowry in cash (if not already paid).¹⁸ The above practice of redemption for divorce by a women is to a certain extent similar to the concept of *khul'* in Islamic law which permits a woman to ask for divorce if sufficient grounds exists for the divorce. However, if the husband wants to divorce his wife, he has the right to do so because divorce is the right of the man in Islam. The husband is also responsible for paying the maintenance of his divorced wife and the children when this occurs.

As for the rulings regarding prohibited marriage in *adat temenggung*, it is stated that persons who may not be married on the ground of consanguinity are: the mother and son, father and daughter and brother and sister. Widowers or widows are also are not allowed to marry a stepchild by reason of affinity. The true believers are also prohibited from marrying an infidel. The mentioned prohibited marriages are similar to the Islamic prohibition in marriage. However, there are some other prohibitions in Islamic law which do not occur in *adat temenggung* as mentioned in the *Qur'ān*.¹⁹ These are some practices of *adat temenggung* in the matters relating to family that can be analysed under this

¹⁸ Ibid, pp.59-60

¹⁹ *Qur'ān*, 4/23

heading even though there are many other aspects of family law that might conform with the Islamic system.

As for the system of inheritance in *adat temenggung* there are general rulings that apply to the disposal of the property which are mentioned in the *Ninety Nine Laws of Perak* as follows:

"House and garden, crockery, kitchen utensils and bedding, are taken by the female children. Implements of iron or weapons, padi lands or mines go to the sons. The debts and assets of the estate are divided as follows: a son takes double a daughter's share. The remaining property is equally divided, for all children are on an equality, all have the same origin. And it must be mentioned that if there are unmarried children their shares are increased by ten percent."²⁰

The ruling applicable to a young person who dies unmarried leaving considerable amount of properties, while his parents, brothers and sisters are still alive is that the father and mother shall not inherit, instead the properties will go to the brothers and sisters and they are responsible for all the liabilities. The parents are allowed to take the clothing of the deceased. If the deceased left no parents or kinsfolk, the property will revert to the *kadzi*²¹ or to the ruler of the state.²² The above general

²⁰ Ibid, p.66

²¹ *Kadzi* or the original arabic word *qāḍī* is a salaried religious official appointed by the ruler

ruling on the disposal of inherited property was partially similar to the Islamic system in which the male children of the deceased will get two shares while the female gets one. But the practice of giving ten percent more to the unmarried is different from the Islamic system which does not distinguish between the married and unmarried. Furthermore, in the Islamic system of inheritance, the debt of the deceased must be settled before the properties are distributed. In the second instance according to the Islamic system, beside the brothers and sisters, the parents of the deceased also have their share.²³

The above analysis covers some of the instances of *adat temenggung* implemented in certain parts of Malaysia until the advent of the British power.²⁴ The practices that are not related to the legal procedures which are under the jurisdiction of the civil courts or Islamic Religious Council are still preserved, particularly in matters relating to ritual procedures of marriage. As for the criminal matters they are under the jurisdiction of civil court, and the matters relating to inheritance are dealt with by the Islamic Religious Council. From the above account, we could observe that certain aspects of *adat temenggung* are similar to the Islamic system, but there also exist some differences between these two systems. To apply the theory of *'urf* in this case, we shall say that the original

²² Ibid, p.67

²³ For detail see, Doi, Abdur Rahman I, *Sharī'ah: The Islamic Law*, pp.277-8

²⁴ See Ibrahim, Ahmad and Joned, Ahilemah, *Sistem Undang-Undang di Malaysia*, p.20

practices of *adat temenggung* which are in accordance with the Islamic system must be preserved and allowed to be practised but the differences that occur have to be modified to suit the Islamic system.

Adat Perpateh

Adat perpateh is practised widely in the state of Negeri Sembilan and part of the Naning District of Malacca until the present time. The basic unit of society under this system was the clan (*suku*) which consists of smaller subunits in extended family groups (*perut*). These grouping of clans formed territorial units, the district which became a constituent part of the State. In the matrilineal structure of *adat perpateh*, law is considered as the group's responsibility and its real source is the will of the clan whose members are bound by the unwritten laws which are contained in the *terombo* or the song of the origin of the *adat*. This song of *adat* appears to cover many aspects of the law, namely, the election of chiefs, marriage, divorce, the status of the husband in the wife's clan and succession to property.

The discussion shall start by examining certain aspects in the practice relating to marriage in *adat perpateh* as this practice is still observed by some people in certain parts of Negeri Sembilan. The customary rituals and acts in matters relating to marriage in *adat perpateh* are meant to make a marriage lasting

and stable, and also to guarantee a prosperous union. This is because, marriage involves not just personal but family and tribal ties as well. Thus, polygamy and divorce are equally hard and disgracing. Among the customs of marriage is the practice that is followed in the engagement; this practice is described by Haji Mohamad Din in his *Two Forces in Malay Society* as follows:

"First, there is a *menghulur chinchin* or 'sending the ring' ceremony. This is done by depositing a ring with the parents of the prospective bride. This signifies an overture for the bride's hand on the part of an interested groom. A feast is held, to which the bride's relatives are invited, the ring is shown and at the same time opinion and approval are sought. If the relatives do not approve the marriage, the ring is returned to the suitor. If the proposal is accepted, another ceremony is held, to which the relatives of both parties are invited to be present. Here the *chinchin tanya* or 'seeker ring' is circulated to be viewed and examined by the relatives present, symbolising the discussion of the merits and demerits of the bridegroom. If the union is approved then another ring is placed beside the first. The appearance of a double ring signifies that the match is agreed upon, and the pact is sealed under the customary understanding expressed as:

One ring to sound the parents,

Two rings unanimous agreement,

Approval entails the customary covenants,
Repudiation by the man he forfeits the token,
Breached by the bride she repays two-fold,
Blemish of either the pact is annulled,
Insanity and lunacy are outside the pact".²⁵

The practice of giving rings in engagement, no doubt, does not contradict the Islamic system that encourages a man to identify and get known by the woman whom he would like to take as his life partner. In fact, the gift to the prospective bride indicates the intention to take her as ones wife. This custom is clearly acceptable in Islam.

As for the marriage ceremony, the *lembaga* (head of the district) and the headman of both the two tribes of the bride and groom are invited, their presence being regarded as tacit approval of the union. Any deviation from the set ritual of marriage is regarded as a divergence from the custom and indeed may even cause disgrace.²⁶ In Islam, marriage is understood as being only a legal contract which does not encourage such meticulous rituals to validate a marriage.

Adat perpateh does not encourage marriage between cousins and also inter-

²⁵ Ali, Haji Mohamad Din, *Two Forces in Malay Society*, p.25

²⁶ Ibid, p.25

tribal marriage. A member of a tribe (*suku*) is not recommended to marry someone from his or her own tribe but, instead it is preferred to marry members of other tribes. In a customary marriage it is also forbidden to take another wife within the same tribe.²⁷ Islam does not prevent the marriage between cousins. Inter-tribal marriage is also accepted in Islam if it does not fall into the category of the individual who is forbidden to be married as mentioned in the *Qur'ān*.²⁸

As for polygamy, customarily it is an offence to take another wife when one is already married. This clearly encourages monogamy and reduces polygamy. One of the reasons for this rule is, presumably, the matrilinear nature of *adat perpatih* which is more likely to secure the interest of women. Islam, on the other hand, allows polygamy with up to four wives if the husband is able to deal justly with them as commanded by the *Qur'ān*.²⁹ In the *perpatih* system, if someone neglects the customary principle by engaging himself in a prohibited marriage (according to custom), this individual will be punished in which case he will be expelled from his tribal village and he will not be accepted in other tribes. In addition, committing some offences will lead to execution and all the culprit's

²⁷ Ibrahim, Norhalim, *Adat Perpatih Perbezaan dan Persamaannya Dengan Adat Temenggung*, p.107

²⁸ The *Qur'anic* individuals forbidden to be married are mentioned in the verse which says: "Prohibited to you (for marriage) are your mothers, daughters, sisters, father's sister, mother's sisters; brother's daughter, sister's daughter; foster-mothers (who gave you suck), foster- sisters; your wife's mothers; your step-daughter under your guardianship, born of your wives to whom you have gone in, no prohibition if you have not gone in, (those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past..." *Qur'ān*, 4/23

²⁹ *Qur'ān*, 4/3 which means, "...marry women of your choice, two, three or four; but if ye fear that ye shall not be able to deal justly (with them) than only one..."

property will be seized by the ruler.³⁰

In divorce, like marriage *adat perpateh* has its own laws and rituals. This can be noticed from the following quotation:

"Since marriage entails the co-relationship of a host of relatives, if not of the tribes themselves, divorce presents considerable social embarrassment if not an open quarrel. Custom ordains that before a divorce takes place there should be due deliberation on the reasons for the intended dissolution. There must be cogent and sufficient reason for so doing; failure of love alone does not always suffice. Custom demands that a husband who contemplates divorce from his wife must go through an arbitration called *bersuarang* or 'settlement'. A small feast is held by the husband, to which he invites both the relatives of his wife as well as his own. The husband will then air his grievances, so that they may be considered by the parties present. In the majority of cases the quarrel can be mended. The presence of elders has often been beneficial in patching up what may prove to have been a hasty decision or an irrelevant quarrel. But, should good counsel not prevail, and if the husband still insists on divorce, separation is allowed after a settlement of the conjugal property."³¹

³⁰ Ibid, p.108

³¹ Ali, Haji Mohamad. Din, *Two forces in Malay society*, p.26

This statement is supported by a *terombo* which says:

Destiny maketh a marriage,

Destiny endeth the marriage,

Joints earnings are shared,

Wife's property remains,

The union is dissolved,

Settlement permits a gift.³²

In Islam, divorce is the right of the husband; however, in some cases the wife has the right to ask for separation if there are convincing reasons for doing so. The above procedure of *bersuarang* or settlement is similar to the principle of *hakam* or arbitrator in Islamic law. Islam also ordains that an arbitrator be appointed to sort out the differences and bring reconciliation between husband and wife as soon as differences between spouses take place. This is mentioned in the *Qur'ān* which rules that:

"If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace God will cause their reconciliation..."³³

After divorce takes place, there will be another issue that must be solved, which is the distribution of property. In *adat perpateh* marriage property falls into

³² Ibid, p.26

³³ *Qur'ān*, 4/35

three categories of which each category has its own method of disposal. These categories and the way of disposal can be summarised as follows:

1. *Harta charian*, this is the jointly acquired properties which have been acquired during wedlock such as a rubber estate, a herd of husbandry, joint savings etc. This property is to be distributed to both parties in the case of divorce.
2. *Harta dapatan*, this is the property owned by the wife when she gets married. This property is solely owned by her and it will be hers forever. The husband has no share in it in case of divorce.
3. *Harta pembawaan*, this is the property owned by the husband when he gets married. In the case of divorce, the husband will have it as it is his property.³⁴

The Islamic point of view does not differ from the customary practice on this matter. The husband and wife have their right to the property that they owned and the jointly acquired property should be distributed fairly between them in case of divorce.

Besides practices related to marriage, there are also practices in *adat perpatih* related to the punishment for criminal offences. This practice is no longer exercised at present, and instead everyone is bound by the State's criminal code. In *adat perpatih* there are eight categories of criminal offences which are:

³⁴ Ibrahim, Norhalim, *Adat Perpatih Perbezaan dan Persamaannya Dengan Adat Temenggung*, pp.111-2

1. *Tikam Bunuh*, the word *tikam* means wounding others with sharp weapons without causing death and the word *bunuh* means causing death by stabbing with sharp weapons.
2. *Upas Racun*, the word *upas* means deceitfully making someone take poison without causing death. The word *racun* gives the meaning causing death with poison.
3. *Samun Sakar*, *samun* means seizing others' properties for personal interest. The word *sakar* means causing death while seizing others properties.
4. *Siar Bakar*, *siar* means intentionally burning others' property without causing total damage. *Bakar* means causing others property to be burnt which causes total damage either intentionally or not or by negligence.
5. *Maling Curi*, the word *maling* means burglary at night. *Curi* means burglary in the day time.
- 6 *Umbuak Umbai*, *umbuak* means accepting bribe for self interest and *umbai* means threatening others to do something for one's benefit.
7. *Sumbang Salah*, the word *sumbang* means intentionally doing wrong in public. *Salah* means using force or threat to compel others to do wrong.
8. *Dahaga Dahagi*, *dahaga* means intentionally opposing the customary officer while carrying his duty. *Dahagi* means the act of the customary officer who makes a false accusation against those under his control.³⁵

³⁵ Selat, Nordin, *Sistem Sosial Adat Perpatih*, pp.132-3

These are the categories of crime in *adat perpateh*. In fact, there are no fixed sentences for all these categories of crimes for those who are convicted. Generally, the judge has full powers to issue any judgment for the crime committed as long as it is within the general categories of punishments and his jurisdiction. However, certain of these crimes are punishable by specific measures.

With regard to the qualified person to judge the case, there are two factors which will determine the right person for this duty. First, the type of crime which is committed, and second, whether the accused belongs to the same tribe as the victim. If it is a minor crime and the victim belongs to the same tribe, this case will be judged by the sub-tribe leader (*ketua perut*). The limit of punishment that can be issued by the sub-tribe leader is the penalty for a crime that requires the slaughter of a goat for a feast which is required to be given as an atonement for the crime committed. But the more serious cases which involve individuals from different tribes will be handled by the tribal leader (*lembaga*) whose jurisdiction will be to punish for crimes which require the convicted person to slaughter a cow or buffalo for a feast which is required to be given as an atonement for the crime committed. The major crimes which involve different tribes will be judged by the *adat* chief in the district (*Undang*).³⁶

The general concept of punishment in *adat perpateh* is to achieve solutions

³⁶ Ibid, p.136

by replacement or compensation and not for the sake of retaliation or punishment as such. This is because, when a person commits a crime that is considered harmful to the whole society, it is also regarded as harmful to the whole society when such a person is punished. This is the reason why only the person who commits a serious crime will be sentenced to death or be expelled for the benefit of the whole society. Other crimes are settled by replacing the lost thing or compensation and a feast to amend the damaged relationship between the parties involved. For instance, if a person wounded another, then the tribe of the convicted person would have to pay compensation to the victim's tribe, and if a person killed another from a different tribe, the killer or one of his tribesman will have to join the victim's tribe as a replacement. But in some instances the death sentence will be applied to the person who killed another and this sentence can only be issued by the *undang* or the ruler (*Yang Dipertuan Besar*). If the victim is from the same tribe, the slayer has to slaughter a buffalo and cook a certain amount of rice for the feast.

Generally there are three categories of punishments in *adat perpatih* which are:

1. *Gali Urat* which is the grievous penalty which involves exile from the village forever. This is the punishment for murderers. The alternative to this sentence is to compensate the victim's tribe by joining them as a replacement of the victim.

2. *Buang Batang* which is lighter than the first one which entails the slaughter of a buffalo or sheep and making a feast to feed the whole village. In the presence of the whole village, the convicted person has to apologise for his wrong doing. If he refuses to do so, he will face expulsion from the village.

3. *Getis Pucuk*, this is the lightest punishment in which the convicted must repent and ask forgiveness from the victim.

In addition, in the *adat perpateh* system, if a tribal leader commits a crime he will not be punished publicly, instead he will be asked to retire giving some seemingly acceptable reason, and must ask for forgiveness privately. However, if the leader commits an offence that humiliates the members of his tribe, he can be punished openly and must ask for forgiveness publicly.³⁷

From the above account of the criminal system in *adat perpateh*, we could observe some similarities in the category of criminal offences between this system and Islamic law. There are the crimes of: murder, theft, damaging others' properties, bribery and wrongdoing which are all considered as offences in Islam. There are no obvious similarities in the punishments between these two systems, because Islam has its particular way and rulings in dealing with crime. However, the three categories of punishments in *adat perpateh* can be incorporated in the

³⁷ Ibid, pp.138-40

classification of the discretionary punishments (*al-ta'zīr*) in Islamic law. As for the punishment of someone who has a position in the society, in Islam there are no differences between the punishment of this group of people and the others.

The major conflict between Islam and *adat perpatih* system is in the field of land inheritance. The reason for this conflict is related to the tribal organisation and its exogamous system of marriage. It is very important that land should be entailed to the women of the tribe who form the permanent members of the customary society. Generally, there are four types of properties in *adat perpatih* which are:

1. *Harta pusaka* or ancestral property.
2. *Harta charian* or the joint acquired property.
3. *Harta dapatan* or the property owned by the wife when she gets married.
4. *Harta pembawa* or the property owned by the husband when he got married.

In the *perpatih* system, the ancestral property belongs to the tribe; it vests in the female members but they hold it as trustees for their tribe rather than as owners.³⁸

R.J. Wilkinson referred to the general principles of *adat perpatih* which emphasises that the origins of a tribe are from the women and a man is considered as the member of his mother's tribe before his marriage but after marriage he is considered as part of his wife's tribe. Similarly, land can only be owned by the

³⁸ Taylor, E.N., *The Customary Law of Rembau*, in *Reading in Malay Adat Laws*, ed. Hooker, M.B., p. 126

women.³⁹ The above general principle indicates that the land can only be inherited by women and not men. In fact, according to Mohamad Din Ali, the male members of the tribe are by custom excluded altogether from the customary inheritance.⁴⁰ Even though the male heirs are excluded from the inheritance, they are compensated through the system of the tribal exogamous marriage in which when a man marries into another tribe, his wife will already have her share of the customary holdings. He thus can benefit from the property that his wife owned. As for the unmarried males, they have the right of life occupancy over the property of their mother. In this sense the female proprietary rights are not absolute, instead it is a system of trusteeship of land in favour of the female with some advantages to the male members of the tribe. This is the reason why it is the duty of a mother or, failing the mother, of a sister to make sure that the customary debts of a son or a brother such as the subsistence, nuptial fee and other debts are settled and honoured.⁴¹ E.N. Taylor also described the principle of the distribution of ancestral properties in *adat perpateh* in the following quotation:

"The basic principle is equal distribution to direct descendants *per stirpes*, but it must always be remembered that the property belongs to the family, not to the individual, and it may be entirely wrong to

³⁹ Othman Ishak, *Hubungan Antara Undang-Undang Islam Dengan Undang-Undang Adat*, p.76 citing: Wilkinson, R.J., *Law Part 1, An Introductory Sketch*, in *Papers on Malay Subject*, p.10

⁴⁰ See Ali, Haji Mohamad Din, *Two Forces in Malay Society*, p.28

⁴¹ *Ibid*, p.28

say 'this woman has two daughters- therefore they have half each and all others are barred'. That rule applies only to the proper share of the *proposita* and if she was registered as the holder of all the land derived from her mother,⁴² and left one sister, the sister would be entitled to half and the two daughters only to one quarter each. The rule therefore can only be stated in general terms, *viz.* that all the ancestral property of the family is to be divided equally *per stirpes*, and transmission must always be ordered with due regard to any partial distribution which may already have been made..... . The share of a deceased potential heiress intact to her descendants and there is no limit to the right of inheritance in the direct line; if all intervening generations are extinguished an infant may be entitled to succeed to her great-great grandmother or great-great-grand aunt"⁴³

The above quotation indicates that the ancestral property should be distributed equally to the female heirs and they are the only rightful heirs to the ancestral property in *adat perpateh*.

The above ruling is applicable to ancestral property. As for the other three types of property they are relevant in the instance of the death of the husband or wife. *Harta charian* or joint acquired properties will be given to the wife in the

⁴² This means all her share of lands that she acquired when her mother died

⁴³ Taylor, E.N., *The Customary Law of Rembau*, pp.130-1

case of the death of her husband. But in the case where the wife dies before the husband, this property will be kept to be given to her children. In the case where the couple have no children, the properties will be distributed to the tribe and the heirs of both parties. *Harta dapatan* or the properties owned by the wife when she got married will be given to the tribe of the deceased. Finally, the *harta pembawaan* or the properties owned by the husband when he got married will be given to the husband's tribe to be distributed.⁴⁴

This practice of inheritance in *adat perpateh* is still being practised in several areas in Negeri Sembilan. The following cases of the distribution of inheritance property in the District of Rembau indicates that the customary properties are allocated to the female heirs only:

1. Case registration no: PTR:378/149/1991 which was concluded on 14/11/91. In this case Rohani bt. Ahmad died and left four lots of land. The deceased have three sons and one daughter which is Musa, Sahat, Ismail and Murni. Murni is dead and left behind her five daughters and seven sons. In this case all the inherited land was distributed to the five daughters of Murni and no share is allocated for the male heirs of the deceased.

⁴⁴ Ibrahim, Norhalim, *Adat Perpatih Perbezaan dan Persamaannya Dengan Adat Temenggung*, pp.111-2, see also Taylor, E.N., *The Customary Law of Rembau*, pp.123-4

2. Case registration no: PTR: 378/184/1991 which was concluded on 16/1/92. In this case Mariam bt. Tahir died and left four lots of land. The deceased has no daughter but she has a son. She also has two sisters Iyah and Bakiah, both of them are dead. Iyah left two daughters Zainab and Lebar. Bakiah left a daughter Ramlah. In this case the, the only son of the deceased did not receive anything, instead, all the property was distributed among Zainab, Lebar and Ramlah who were the nieces of the deceased.

3. Case registration no: 378/150/92 which was concluded on 24/8/1992. In this case, Iyah bt. Mohamad Nor is dead and she left nine plots of land. She has one son Abu and two daughters Bakiah and Ramlah. Ramlah is dead and had three sons who are Mohamad Anuar, Mohamad Yazid and Abdul Ghani. The distribution concluded in this case was that all the properties went to Bakiah the daughter of the deceased and her three grandsons (sons of Ramlah) were entitled to "life occupancy"⁴⁵ on half of the inherited land.⁴⁶

These cases illustrate the rights of women in this system to inherit and it is clear that there are no shares for the male heirs, even though the male is the direct

⁴⁵ Life occupancy means that the person have the right to utilise and make benefit of the land even though he does not own it.

⁴⁶ These cases was registered at the Land Office of The District of Rembau, Negeri Sembilan, Malaysia.

son of the deceased. However, in the third example mentioned above, we could notice that the male heirs are given the right as the life occupant of the land but they have no right to own it.

No doubt, this customary distribution of inheritance is in favour of the female heirs. The system gave the women rights of ownership, so that they were less dependent on their male counterparts. It also deprives the male heirs as they are not given any shares in the inherited lands of their ancestors.

Islam, on the other hand, has its own method in the allocation of the estate of the deceased. The *Qur'ān* rules that the share of a male is twice that of a female.⁴⁷ In addition, Islam also gives other male heirs shares in inheritance. Excluding the husband, there are eight categories of agnates who are entitled to inherit in the following order:

1. Son
2. Son of son how low so ever
3. Father of the deceased
4. Grandfather of the deceased how high so ever
5. Brother of the deceased
6. Son of the brother of the deceased
7. Uncle, i.e. brother of the father of the deceased

⁴⁷ *Qur'ān*, 4/11

8. Son of uncle, i.e. son of the brother of the father of the deceased⁴⁸

Adat perpateh recognises the practice of adoption. The fully adopted child has all the rights and responsibilities of a natural child. In fact, there are two degrees of adoption in *adat perpateh* which are determined according to the ceremony performed. These two categories are:

1. Complete adoption which means that the relationship constituted between the parties is in all respects equal to that between a natural mother and child. This type of adoption is also called *kedim Adat dan Pusaka*.
2. Limited adoption which means an explicit relationship is established, but the right to inherit is restricted. This type of adoption is also called *kedim Adat*.⁴⁹

The female child with complete adoption has the privileges similar to the normal female child as mentioned by Taylor:

"On completion of the ceremony necessary for a full adoption the adoptee assumes all the rights and liabilities of a natural child, both direct and collateral, and becomes entitled to inherit all property, of whatever kind, to which a natural child would succeed and, in the

⁴⁸ Adapted from, Doi, Abdur Rahman I, *Sharīh: The Islamic Law*, p.277

⁴⁹ Selat, Nordin, *Sistem Sosial Adat Perpateh*, p.131, see also, Taylor, E.N. *The Customary Law of Rembau*, p.136

case of acquired property, irrespective of whether it was acquired before or after the date of adoption. A fully adopted daughter becomes the sister and *waris*⁵⁰ of her adoptive mother's sons; she must cherish them whenever they are unmarried and is heiress to their *harta pembawa*. If an adopted daughter already has children they become the grand-children and heiresses of the adoptive parent, even if the adoptee dies first.⁵¹

In the rulings of *adat perpatih*, only women are allowed to adopt a child; her husband may be the prime mover but on dissolution of the marriage the adopted child remains with the wife or her heirs. Men are only allowed to adopt women as their sisters; even though this practice is rare, it is certainly established.

The Islamic view in adoption is quite obvious, as it does not apply the legal consequences of birth to adoption. Therefore, there are no shares allocated to an adoptee. In fact, this practice of allocation of inheritance for the adopted child was the practice of the pre-Islamic Arabs. When Islam came, this practice was abolished, thus all the legal consequences relating to adoption were also abolished.⁵²

⁵⁰ *Waris* means heirs

⁵¹ *Ibid*, Taylor, E.N., P.135

⁵² See *Qur'ān*, 33/5, 37 and 40 these verses indicates the abolition of the practice of adoption.

The abovementioned practices in *adat perpateh* are part of the whole system and we can notice that some aspects of *adat perpateh* clearly contradicts Islamic law but there are others which are acceptable in Islam. As far as the system of inheritance is concerned, the practice of *adat perpateh* can only be incorporated into Islām if the male heirs, after receiving their appropriate entitlement, voluntarily to relinquish them in favour of the customary distribution of the properties. However, the practical problem with this system as implemented at the present, is that the male heirs are not given the choice, instead they are forced to accept the practice. The solution to this problem is to amend the law in order to give the freedom of choice to the male heirs whether to have their shares or to give it to their female heirs.

Adat Kampung (The Village Custom)

Adat kampung is the common customary practices of the villagers in Malaysia which covers several aspects of life. These practices are normally the practices inherited from the previous generations, unlike the two *adat* discussed above which were originally a practice introduced by someone for a group of people. This is the reason why these practices vary from one State to another. In fact, these practices are still being maintained and observed by the village folk in Malaysia at present.

Before any detailed discussion of this subject can take place, it is appropriate to discuss the position of these *adat* among the Malays. If one examines the role played by *adat* in the life of Malays, it is obvious that *adat* has taken a significant influence in the life of Malays. Its basis can be found in the various religions which the Malays followed throughout their history. For instance, the *adat's* of many Malays were originally from Hindu custom especially in marriage ceremony, *kenduri* (religious feast) and in custom related to the *raja-raja* (Kings). This attitude of the Malays towards the *adat* is expressed by their saying *biar mati anak jangan mati adat* which means let our children die rather than our *adat*. In addition, there is another expression which indicates the strength of their *adat* to Malays which is *hidup dikandung adat mati dikandung tanah* which means life is bounded by *adat*, as death is bounded by earth. One of the obvious matter among the Malays who do not have profound knowledge of Islam is that they cannot distinguish between *adat* and Islam. This ignorance goes to the extent that some people cling on to some of the *adat* practices and consider them as an integral part of the Islamic teaching, for instance, the *adat* of the rural Malays of asking for the blessing and protection of the guardian spirit of the jungles and rivers before venturing into them. This *adat* began by saying the name of God and His Prophet, then the name of an ancestor will be called upon to excuse the person's rudeness for daring to enter their compound and to protect him from the other spirits of the jungle.⁵³ Some of the *adat* ceremonies were attended by

⁵³ Mohamad, Mahathir, *Inter Action, Inte Gration*, in *Intisari*, vol.1, no.3, p.38

Muslim religious personalities which in another way endorsed the *adat* which in certain ways clearly contradicts Islamic teaching. For instance, until a short time ago, the pagan sacrificial offerings to the spirit of the sea by East Coast fisherman were accepted as being within the bounds of Islam with the attendance of some Muslim religious men.⁵⁴ The following discussion will demonstrate some of the aspects of *adat* among the Malays which originated in Hindu custom and how some of the unIslamic *adat* were considered as part of Islamic teaching.

There are many aspects of Malay life which are still bounded by *adat* and this discussion will focus on the *adat* in marriage, birth and death. In the Malay marriage ceremony, the most outstanding feature is the *bersanding*⁵⁵ or sitting in state of the bride and groom which is called *Raja sehari* or King for a day. This ceremony which is Hindu in origin has a greater significance to the ordinary Malays than the Islamic prescribed *'aqd* which determines the beginning of the relationship in marriage. Indeed, so important is the *bersanding* ceremony that in a form of marriage known as *nikah gantong* which literally means 'hanging marriage' the couple, though they have actually completed the *'aqd* Islamically, are not allowed to live together until the *bersanding* ceremony is held months or sometime years later. This indeed reduces the *'aqd* to the status of an engagement.

⁵⁴ Ibid, p.39

⁵⁵ *Bersanding* is a ceremony in which the bride and groom will seat on a stage which is specially decorated facing the invited guest. Normally the couple will dress in traditional Malay suit and they will be accompanied by someone to act as care taker.

Besides that the recitation of *Qur'ān* and *du'ā'* in this ceremony adds the Islamic flavour to it. This *adat* of *bersanding* is strictly followed although it has no Islamic basis. However, nor does it basically contradict Islam as the requirements of the *'aqd* for Islamic marriage are fulfilled.

The *berhinai* or henna ceremony is another example of the Hindu custom observed in the Malay marriage ceremony. This ceremony is held before the *'aqd* and *bersanding* and the most important part of the ceremony is the anointing of the bride's forehead, a symbol which indicates purification. This is followed by a mark of respect by the bride to the anointer by touching her forehead with the tips of her fingers held together.⁵⁶

Islam encourages its followers to celebrate marriage, but this celebration must be done within the boundary permitted by Islam. There must not be any practice which is against Islam such as the consumption of alcohol, dancing between men and women and other forbidden acts. The ceremony should be done according to the normal practice of the local people and there is no certain format of celebration outlined by Islam. The Prophet encouraged Muslims to celebrate marriage. This is stated in a *Ḥadith* related by Ibn Ḥanbal and al-Tirmidhī in which he said, "Announce the marriage in the mosque and celebrate it with the sound of the tambourine". This *Ḥadith* indicates that Muslims are recommended

⁵⁶ Ibid, p.40

to announce their marriages and have a celebration on that day. In another *Ḥadith* related by al-Bukhārī and Ibn Ḥanbal it was reported that (ʿĀ)īshah attended the marriage of al-Furayʿah bint Asʿad in the house of the bridegroom who was Nabīṭ b. Jābir al-Anṣārī, then the Prophet said to (ʿĀ)īshah, "O, (ʿĀ)īshah what entertainment do you have? Verily, the Anṣār people like entertainment". This *Ḥadith* also indicates that the Prophet did allow entertainment in the marriage celebration. Islam also encourages the marriage parties to give a banquet (*walīmah*). This was mentioned in a *Ḥadith* related by al-Bukhārī which mentioned that the Prophet made a banquet for one of his daughters with two *mudd*⁵⁷ of barley." From the above evidence, it is clear that Islam encourages its followers to announce and celebrate their marriages, but all this must be done within the legal framework set by Islam.

Other than marriage, there are also certain customary practices on the birth of a child. In fact, these *adat* lay down certain rules from the time of pregnancy till the birth and some period after the birth. At about the seventh month of pregnancy, the ceremony called *melenggang perut* is imposed. This ceremony was described by Dr Siti Asmah as follows:

"At seven months' pregnancy, those who are expecting for the first time, will have to undergo the ceremony of *melenggang perut* which

⁵⁷ *Mudd* is a measure used at the time of the Prophet.

is equivalent to pelvic rocking exercises. The expectant mother is made to lie on seven sheets (or *sarongs*) whereupon two women standing on each side of her, pick up their respective ends of the sheet to roll the mother gently from side to side. This is repeated until the seven sheets have been taken away one by one, after which the mother is given a bath of lime water and flowers. This is followed both by prayers for a safe delivery, and a feast. The attending *bidan*⁵⁸ is given two and a half yards of material, candles and a few dollars for presiding at the ceremony."⁵⁹

In addition, there is another act in this ceremony which is the rolling of coconut on the mother's tummy. The coconut will be left rolling from the mother's tummy to the ground and it is predicted that if the coconut stops rolling in the normal position which is the top facing up, the foetus will be a boy but if the coconut stops side up down, the foetus will be a girl.⁶⁰ This practice is illogical as it is impossible that the position of the coconut can determine the sex of the foetus. When the time of delivery comes, it is the duty of the *bidan* to supervise this delivery. There are beliefs among the old folk that there is a kind of devil that likes to come on the delivery day to sip the blood of the mother. Therefore, it is a custom to hang a kind of plant called *mengkuang* which is full of thorn

⁵⁸ *Bidan* means midwife

⁵⁹ Mohamad. Ali, Dr. Siti Hasmah, *Effect On a Basic Attitude Health in Intisari*, vol 1, No 4, p.29

⁶⁰ Al-Hadi, Syed Alwi, *Adat Resam dan Adat Istiadat Melayu*, p.14

underneath the house to prevent the devil from coming near the delivery place. In addition, it is a custom also to cross the newborn baby's forehead with oil, mixed with charcoal to prevent the devil from disturbing the baby.⁶¹ This practice is likely to be originally Hindu and it has nothing to do with the Islamic teaching.

After a child is born, it is required by *adat* that the head be shaved on the seventh day, if the umbilical cord has fallen, or on the ninth day if it has not. A ceremony also is held on this occasion in which the child will also be named. The child will be passed from one guest to another, each in turn clipping off a few locks of the child's hair with scissors and the clipping will be placed into a bowl of coconut milk. After cutting part of the hair, the guests will sprinkle *beras kunyit* (uncooked rice stained yellow with turmeric) around the child, so as to protect the child from evil spirits. The number of guests doing this must be odd. Finally, the whole head will be shaved and the child will be given a name.⁶² The practice of shaving and naming the child on the seventh day is encouraged by Islam. The Prophet ordered the hair of a child to be shaved as mentioned in a *Hadith* regarding the birth of Ḥasan the grandson of the Prophet, he said, " Shave his hair and make a gift as the weight of his hair".⁶³ Indeed, this practice is part of the *aqīqah*⁶⁴

⁶¹ Ibid, p.15

⁶² See *ibid*, pp.15-16, and Mohamad, Mahathir, *Inter Action Inte Gration*, p.41

⁶³ Al-Tirmidhī, *Sunan al-Tirmidhī*, vol.3, p.37

⁶⁴ *Aqīqah* literally means hair of a new born. Technically it is the sacrifice of atonement frequently held on the seventh day after the infant's birth

which is strongly recommended by Islam. However, the practice of sprinkling the *beras kunyit* is more likely to be a Hindu practice which was adopted by the Malays and it is not acceptable Islamically. This is because Islam orders the newly born baby be marked with a *du'ā'* which is, "I ask protection from You, for him and his descendents from the cursed satan."⁶⁵

After delivering, it is a custom for the mother to go through the *pantang* (puerperium) period. This period is forty four days in which the mother stays in her room attending to her infant and she is given certain kinds of food to eat. During this period, she is not allowed to go out of the house nor is she allowed to do intense work, even though she may be fit to do so. When the period of forty four days is completed, the mother will be bathed with lime water and a small feast takes place among the family members. This *adat* is still being observed widely by the Malays at the present even though the way it is being observed might be different from the past or from one place to another. These are some of the *adat* known among the Malays with regard to the birth of a child and we could notice that there is a direct influence of Hindu custom relating to birth.

When death occurs, there are also certain practices being followed. The custom relating to death, as with birth, are also influenced by Hindu practices. Basically in death, Malays follow all the injunction of Islam except in some

⁶⁵ See Zuhaylī, Waḥbah, *Al-Fiqh al-Islāmī wa Adillatuh*, vol.3, p.640

instances in which some deeds are done which are not accepted by Islam. One of these practices is to place a mirror on the remains in order to frighten the *jinn* and Satan who are said to be afraid of their own images. There are no indications whatsoever relating to this matter in Islam. The prayers are said in the mosque and sometime in the house of the deceased. This is regarded in Islam as the responsibility of the living towards the deceased but unfortunately, in many areas *adat* dictates that those who pray should be given small payments by the relatives of the deceased.⁶⁶ In some places those who offered the prayers will be given food before they leave. Giving money or food to those who offer the prayers not ordered in Islam as it is the responsibility that must be borne by the living as mentioned earlier. This practice will add to the burden to the family of the dead who have already been bereaved. Therefore, such a practice should be avoided. After the deceased is buried, the relatives will hold a religious ceremony on the third, seventh, fourteenth, fortieth and hundredth day on which the person died. In some places, this will be done each year on the date the person died. This is another practice which has no backing from the text and was not ordered by Islam. Therefore this kind of practice which is considered as a ritual is not required, for it was not ordered by God and His Messenger. Again, on this ceremony the family of the deceased have to be burdened by spending on such occasions which were not recommended by Islam. Instead of making such a feast, it is better for the living, especially the children of the deceased, to offer *du'ā'* for the deceased as this

⁶⁶ See *ibid*, p.50

was recommended by the Prophet in his saying, "When a man dies his acts come to an end, but three, recurring charity (*ṣadaqah jāriyah*), or knowledge (by which people) benefit or a pious son who prays for him (for the deceased)."⁶⁷

The mentioned *adat* are only part of the *Adat Kampung* that is practiced in Malaysia as there are many other *adat* which are observed on other occasions not discussed here. As a matter of fact, all nations have their own practices with regard to many aspects in life. Islam does not require that all these practices be abolished. Instead, these practices can still be exercised if they do not contradict the Islamic teaching. The practices that contradict Islam should be abolished or altered to suit the injunctions of the *Qur'ān* and *Sunnah*. However, we could also find that some of these *adat* can be modified to suit the Islamic teaching. As this matter can only be clarified by the Muslim scholars, it is the duty of these scholars to educate the people to distinguish between the *adat* which are acceptable Islamically and can be incorporated as part of Islamic law and those *adat* which clearly contradict the Islamic teaching. It is essential also for those who issue rulings to take into account the *adat* which do not contradict Islam. As far as the theory of *'urf* is concerned, these *adat* can be practised as long as they fulfil the conditions drawn for the acceptance of valid *'urf* as mentioned earlier.⁶⁸

⁶⁷ Muslim, *Ṣaḥīḥ*, vol.3, p.867

⁶⁸ See Chapter one for the condition of valid *'urf*

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