The Role of Custom in Shaping Shi'i Islamic Law

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Islamic law, the *shari'a,* occupies a central role in Muslim devotional practices. Based on the revelatory sources (Qur'an and sunna) and other hermeneutical devices, the s*hari'a* was formulated by Muslim jurists in the eighth and ninth centuries. Guided by a corpus of precepts and laws and their own independent reasoning, the jurists, especially in the 'Abbasid period (750-1258 C.E.), constructed a legal edifice by elaborating a system of *shari'a* law binding on Muslims. They developed and interpreted Islamic law by invoking various hermeneutical principles such as *maslaha*, (the derivation and application of a juridical ruling that serves the public interest) and *istihsan* (juristic preference), analogy, reasoning, and other innovative interpretive devices. Through such stratagems, the jurists were able to go beyond the textual sources to extrapolate new rulings for issues that confronted the expanding Islamic empire.

One of the major factors that impinged on the formulation of the *shari'a* in the classical era was '*urf*, or customary law. In this paper, I intend to explore how '*urf* can be deployed to revise aspects of Shi'i jurisprudence that are deemed to be irrelevant in modern times. I also argue that '*urf* can be used to formulate new rulings. More specifically, this paper will examine how customary law and other hermeneutical devices associated with it can empower Muslim communities to respond to the challenges they have encountered as a minority community in America.

The *Shari'a* Revisited

Many juristic extrapolations have become irrelevant in the modern context as changing socio-political circumstances have forced Muslim jurists to rethink and revise some of the classical

articulations. Contemporary Muslim scholars have argued that there is a need to enunciate a jurisprudence that addresses contemporary concerns as current legal treatises do not address issues that are relevant today. Topics such as human rights, the ecology, political jurisprudence, and socio-political challenges are largely absent in these treatises. Instead, more attention is paid to topics like *kurr* (the amount of water that is required to purify an object), details of the distance traveled before one can offer *qasr* (shortened) prayers, and the amount of blood that invalidates prayers.[1]

In the past, Muslims revised their laws when situations (*mawdu*) or circumstances dictated. There are many examples of how jurists have revised the laws due to novel circumstances. The famous Shi'i jurist Shaykh Muhammad b. Ja'far Tusi (d. 1067), for example, changed his rulings based on seasonal variations. He stated that it is prohibited to sell water in winter since it had no value; however, it is permitted to sell it in the summer because of the scarcity of water in that season. Similarly, in the past, jurists prohibited the selling of blood; now that it has various medicinal value, it can be sold.[2]

Other Shi'i scholars have also argued that alterations in time and place require a re-examination of laws formulated in the classical period of Islam, the eighth – tenth centuries. For them, it is essential that Muslims continue to review and revise the law in keeping with the dictates of their changing circumstances. Ayatullah Shabistari (b. 1937), for example, states that a new *ijtihad* (reasoning) is required, one that goes beyond *fiqh* (jurisprudence) and *usul* (Islamic

[1] See Mustafa Ashrafi Shahrudi, "Hamsuy-e fiqh ba tahavvulat va Niyazhay-e Jami-e", in *Ijtihad va Zaman va Makan* 14 vols. (Qum: Mu'assi Chap va Nashr Uruj, 1995), 1/119.

[2] Ja'far al-Subhani, *Tadhkira al-A'yan*, (Qum: Mu'assasa al-Imam al-Sadiq, 2009), 1/335-6. See also Ja'far al-Subhani, *Masadir al-Fiqh al-Islami wa Manabiuhu* (Qum: Mu'assasa al-Imam al-Sadiq, 2007), 23-4;

legal theory) and embraces subjects such as society, history, economics, politics, and psychology.[3] To derive these laws, he argues that Muslim thinkers need to construct a comprehensive theory of human nature and social change. Shabistari goes on to argue that even the questions we pose today have to change according to the realities of the time.

> He states, "Today, an important part, or perhaps most, of the problems we must deal with are "novel matters" *(mustahdathat).* Whereas once the question to be answered was whether the pledge of allegiance *(bay'a)* of "those who loose and bind" was a legitimate basis of authority, the novel matters we need to take into account today are popular elections and revolutions.……. Instead of asking if it is permissible for the ruler to fix the value of currency, we should study how economic planning and free enterprise can be reconciled. Whereas once the jurist may have been called on to define the duties of the public inspector *(muhtasib),* the crucial question in our time is, 'Does the state have the right to maintain influence over every aspect of the life of its citizens?' In the past, jurists were concerned with defining the boundaries of the domain of Islam and the "domain of war" *(dar al-Islam, dar al-harb),* but today we must ask ourselves if it is permitted to violate the sovereignty of any people or nation….. We must search the Qur'an and *sunna* for solutions to contemporary problems such as these. This is what is meant by the universality of Islam, otherwise, Islam belongs to the Hijaz."[4]

Similarly, Mohsin Sa'idzadeh, (b. 1958) a contemporary jurist in Iran, argues that laws pertaining to women and the apparent lack of equality with men are not intrinsic to Islam; rather, they are products of Islamic hermeneutics which have favored men. For Sa'idzadeh, such laws

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[3] Ayatullah Muhammad Mujtahid Shabistari, "Religion, Reason and the New Theology," in *Shi'ite Heritage: Essays on Classical and Modern Traditions*, edited by Lynda Clarke (Binghamton: Global, 2001), 249.

[4] Ibid., 256.

are amenable to change based on the needs and interests of the times.[5]

The Role of Custom in Islamic Law

An important component in revising Islamic jurisprudence is the role of custom (‘*urf*) in explicating and moulding religious rulings. The word ‘*urf* refers to what is commonly known or the social norms and regulations of a community or group. It can also be seen as the collective wisdom, knowledge or experience of a community.[6] In the absence of a formal, normative or codified law, customary law forms the mode of behavior that regulates a community. Hence, custom sets the norm before the law is enacted.

To be sure, Islamic law did not start with a clean slate. There were many pre-Islamic customs and norms which Islam incorporated in its legal framework. In fact, it is not an exaggeration to say that the basis of the Islamic legal tradition can be traced to the customs and norms of pre-Islamic Arabs. Prior to the emergence of Islam the Meccans had simple customary laws of marriage, affiliation, personal property, war and truce. In Mecca, there were customs for trade, loans with interest, investment and slavery. In Medina, where the primary businesses were agriculture, gardening and livestock, there were specific customs for that economy.[7] Many precepts in Islamic law that pertain to transactions were based on these customs.

Islam also appropriated elements of pre-Islamic customary norms like the law of bartering unripe dates against their equal value in picked dried dates. The source of legal norms

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[5] Muhammad Qasim Zaman, *The ‘Ulama’ in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 186.

[6] There are different types of ‘*urf*. The one that will concern us is what is commonly accepted by all rational beings, i.e., ‘*urf al-‘amma*.

[7] S. Mostafa Mohaghegh Damad, *Protection of Individuals in Times of Armed Conflict Under International and Islamic Laws* (New York: Global, 2005), 8.

for contracts of purchase, rental and sale, discharge of debts, inheritance, compromise between debtor and creditor *(sulh),* limited partnership *(mudaraba*), etc. can also be traced to the prevalent custom.[8] Such legal injunctions may change based on socio-economic exigencies.

In the penal code, Islam adopted, among other laws, the custom of *qasama*. According to this law, fifty inhabitants of a tribe or city would take an oath that they did not cause the death of a body that is abandoned on their territory. By doing this, they free themselves from the liability of his death.[9] Islam also adopted many pre-Islamic family customs and laws. These include the injunctions on slavery, dowry (*mahr*), the guardianship of daughters (*wilaya al-bint*), child custody, *mut'a* (temporary) marriage and many others. In the case of a permanent marriage, pre-Islamic Arabs observed two types of marriages – *sadiqa* and *ba'l*.[10] Islam adopted aspects of both forms of marriages. Among other examples, the contemporary Iranian scholar Ayatullah Bujnurdi (b. 1942) cites the example of blood money (*diyya*), a custom which was endorsed by Islam.[11] Shi'i jurists acknowledge that most of the Islamic social and commercial laws are what they call *imza'i* (endorsed). Based on this understanding, a transaction sanctioned by custom is legally valid if it does not violate the ethical and moral framework of the Qur'an and *sunna*. [12]

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[8] Ayatullah Muhammad Mujtahid Shabistari, "Religion, Reason and the New Theology," 252.

[9] See details in Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1999) 6, 12-13.

[10] On the differences between the two types of marriages see Mahmoud Ayoub, *Islam: Faith and History* (London: Oneworld, 2012), 180.

[11] Ayatollah al-Sayyid Muhammad Musawi Bujnurdi, *Majmu'a Maqalat Fiqhi, Huquqi va Ijtima'i* (Tehran: Intisharat pejushkadeh Imam Khomeini va inqilab Islami, 2002), 1/102. There are many traditions on *'urf* cited from the Imams. See Khalil al-Mansuri, *Dirasa*, 128- 133.

[12] Khalid al-Mansuri argues that 'urf has probative value in the legal tradition. See Khalil al-Mansuri *Dirasa Mawdui'iyya Hawl Nazariyya al-'urf wa Dawruha fi 'Amaliyya al-Istinbat* (Maktab al-I'lam al-Islami: n.p., 1992), 191–200.

In the political realm, the convening of the tribal council and the selection of Abu Bakr as the first caliph to succeed the Prophet was the first manifestation of the re-emergence of the pre-Islamic polity. The insistence by Abu Bakr and many of his followers that the leadership be restricted to a person of Qurayshi descent was a further example of the reassertion of traditional notions of authority. All future Umayyad and ‘Abbasid caliphs were Qurayshis. This was a perpetuation of a pre-Islamic norm that only tribal affiliates to the tribal chief (that is, the Prophet) could succeed him, a notion that is absent in the Qur’an.

The Qurʾan mentions some of the traditions and customs of the pre-Islamic Arabs. It condemns the custom of female infanticide and “entering houses from the rear” (Q 2:189). Other customs like walking between the mounts of Safa and Marwa (2:158) or engaging in commerce during the pilgrimage season (2:198) were retained.

It should be noted that the ‘*urf* that formed the backbone of the social and economic laws in Islam was not restricted to the practices of Muslims. Rather, pre-Islamic ‘*urf* was not only endorsed but also Islamized by the nascent Islamic legal system. The incorporation of social norms in Islamic law evinces the need to take into account the dynamics of change that shape the interaction between a religion and the social milieu in which it operates.

Customs that were prevalent during the time of the Prophet and have not been proscribed are assumed to have his tacit approval. It is thus correct to state that as long as they did not contravene the moral framework of the Qur’an, customary norms were endorsed by Islam. In the process, local ‘*urf* was Islamicized.[13] The significance of respecting and sustaining local custom

[13] See examples of ‘*urf* that were endorsed by the Prophet in Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of `Urf and `Adah in the Islamic Legal Tradition* (New York: Palgrave, 2010), 54-57.

is further demonstrated in a statement that ‘Ali b. Abi Talib (d. 661) reportedly made to Malik b. Ashtar, his governor in Egypt. He told him to be careful of [preserving] local *sunna*.[14]

The role of customary law in shaping Islamic jurisprudence is acknowledged by Muhammad Amin ibn ‘Abidin (d. 1836), a famous Hanafi scholar. He states that much of what was established by Abu Hanifa (d. 767) was due to the ‘*urf* in his era but that they have changed with time. He cites the example of the custom of the permissibility of charging for teaching the Qur’an.[15] He further states that much of the corpus of the law in the past was based on custom and that the jurists would have ruled differently if they had lived at a different time.[16] Ibn ‘Abidin’s statement demonstrates not only the role of custom in moulding the law but also that variation in customs impacts how the law is altered and framed. His statement further demonstrates the flexibility available within the Islamic juristic tradition. It would thus not be an exaggeration to state that the Islamic legal tradition is an amalgamation of textual sources, juristic interpretation, various hermeneutical devices, and local custom.

The Interfacing of Custom and Law

I have argued that Islamic law is an extension of pre-existing social values and customs. The discourse on custom highlights the role of actual practice in shaping the law and that custom is connected more to the actions and practices of local communities than abstract laws. Custom

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[14] Shabistari, “Religion, Reason and the New Theology,” 254.

[15] Amjad M. Mohammed, *Muslims in Non-Muslim Lands* (Cambridge: Islamic Texts Society, 2013), 106-7.

[16] Muhammad Qasim Zaman, *The ‘Ulama’ in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 19.

also provides the legal tradition the flexibility required to adjust and adapt to different socio-cultural settings.

For the law to be functional, it has to be connected to the social norms and needs of the laity. Otherwise, it will become irrelevant in their lives. Stated differently, custom provides the framework within which the law is constructed and interpreted. It is because of the significance of custom that one of the pre-requisites to become a *mujtahid* is that he must be aware of local customs.[17] Knowledge of customary practices is important for a *mujtahid* so that he can render a judgement that is appropriate for that circumstance.

The Qur'an itself recognizes the importance of custom. The frequent usage of the term *al-ma'ruf* (derived from '*urf*) demonstrates its significance. The term occurs thirty-eight times in the Qur'an and connotes what is "known" or "recognized"; it is used in the sense of what is commonly seen as a good or honorable mode of behavior in contrast to what is reprehensible (*munkar*).[18] The frequent usage of the term *al-ma'ruf*, especially when discussing women (2:228), for example, shows the Qur'anic concern that human conduct be premised on its ethical and moral framework.

Since it was originally within the domain of the theory of jurisprudence that '*urf* was articulated, it is frequently deployed in the course of legal arguments. Juristic works are replete with references to the usage of custom demonstrating, in the process, how it has become a reference point around which Islamic law operates.[19] For example, an important principle posited

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[17] Muhammad *Ibn Abidin, Sharh 'Uqud Rasm al-Mufti* (Karachi: Qadimi Kutub Khana, n.d.), 39.

[18] Gerald Hawting, "Tradition and Custom," in *Encyclopedia of the Qur'an*, ed. Jane D. McAuliffe (Leiden: Brill, 2004).

[19] For other references of '*urf* in juridical treatises see Khalil al-Mansuri, *Dirasa*, 88–89. For examples of where the *shari'a* depends on '*urf* see Ayatollah al-Sayyid Muhammad Musawi Bujnurdi, *Majmu'a Maqalat, 1/*93-99.

in Islamic legal theory is that of harm and harassment. When a particular law causes harm to an individual or society then, based on this principle, it can be relaxed. Jurists have ruled that when a person is uncertain if a particular case should be construed as harmful or not, s/he should consult '*urf* as to what it would rule on the case. The definition of what constitutes harm and harassment is contingent on how custom defines its parameters. If, for example, custom does not construe a practice to be harmful, then the ruling will not apply to it. In this case, the act cannot be considered as prohibited.[20] Thus, the *shari'a* often endorses what custom has determined as applicable in that case.

Another example of the role of custom in determining the law is the question of whether a husband has the right to demand anal sex and whether the wife is legally bound to comply with his demands. The critical issue here is whether *tamkin* (giving pleasure) covers the entire body or not. Ayatullah Muhsin Hakim (d. 1970) maintains that '*urf* determines that the denial of anal sex does not constitute *nushuz* (disobedience). In fact, he continues, there is no proof to state that *tamkin* applies to every part of the body. Similarly, there is no proof to indicate that he can enjoy any parts he likes. The *qadr mutayaqqan* (the minimum amount that she is required to provide) is that which is known and accepted by '*urf* which, in this case, does not include anal sex.[21]

In recent times, custom has also played a role in cases of transgender surgery. It has been utilized to determine the guardianship of a parent if s/he changes her/his gender. If a mother changes her gender and becomes male, is he then entitled to exercise guardianship (*wilaya*) over the children? Jurists have ruled that the *wilaya* falls on the biological father, not on the one who

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[20] Abdulaziz Sachedina, *Islamic Biomedical Ethics: Theory and Application* (Oxford University Press, February 2009), 70-71.

[21] See also Mahdi Mahrizi, *Mas'ala al-Mar'a: Dirasat fi tajdid al-fikr al-dini fi* qadiyyati'i (Beirut: Binaya al-Sabah, 2008), 272.

gave birth even if she changes her gender. It is '*urf* that determines that, in this instance, the father is actually the mother.[22] Interestingly, Khumayni (d. 1989) rules that if the father was to change his gender and become a woman, he would lose the *wilaya* because *wilaya* is contingent on the father retaining his original biological status.[23]

Customary Law as an Evaluative Measure

Customary laws also shape many rulings that are either ambiguous or difficult for a jurist to determine. Jurists such as Ayatullah Seestani (b. 1930) have ruled that music that is appropriate for entertainment and amusement purposes is forbidden whereas other genres of music are permitted. The statement is very ambiguous and leaves much room for interpretation. When asked how can a person determine whether a particular kind of music is suitable for entertainment or amusement jurists have ruled that '*urf* will determine whether a particular form of music is *halal* or *haram*.

When questioned as to how distinguish between *halal* and *haram* music, Seestani's predecessor, Ayatullah al-Khu'i (d. 1992), states that if local custom is divided in determining whether a particular form of music is *halal* or not and it is not possible to ascertain its permissibility, then the music can be presumed to be *halal*. Al-Khu'i further adds that music is *haram* for those who are aroused by it but not for those who are not.[24] Since '*urf* differs based on place and time, music that would be considered appropriate in, for example America, would not

[22] Muhammad al-Mu'min al-Qummi, *Kalimat Sadida fi Masa'il Jadida* (Qum: Mu'assasa al-Nashr al-Islami, 1994), 115.

[23] Ibid.

[24] al-Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin* (Tehran: Markaz al-Taba'a wa'l Nashr Lil-Majma' al-'Alami li ahl al-Bayt, 1999), 444.

necessarily be allowed for Muslims living in England. Ayatullah Gulpaygani (d. 1993), on the other hand, rules that if '*urf* determines that a particular sound is musical, it is *haram* to hear it regardless of its effects.[25] Similarly, many jurists have argued that it is prohibited to sing or hear songs. It is custom that determines if a particular tune or theme should be considered a song or not.[26]

Where the religious precepts are general, custom specifies whether a case falls within a specified parameter. For example, when asked if a person who has been pronounced brain-dead by physicians should be considered dead, Seestani's response is to appeal to the common understanding of death. He states, "The criterion in applying the term dead in so far as the application of religious laws go is the common perception of the people, in the sense that they would call him "dead."[27]

Custom not only determines particular case rulings, it also defines the law in some cases. This is because a law is formed in a particular socio-cultural context. If that context changes, the law will cease to be applicable and has to be modified. Stated differently, variations in customary laws will impinge on the legal tradition. Ibn 'Abidin goes on to identify custom as one of the reasons for a change in ruling.[28] For example, Hanafi jurists in the Arab communities ruled that an offender's extended family was liable to pay *diyya* (blood money) for unintentional homicide.

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[25] Ibid., 443: For more details on music and singing see ibid., 443 ff.

[26] Ja'far al-Subhani, *Masadir* 192. Fayz Kashani does not accept that all forms of singing is haram. See Habib Allah Ahmadi, "Puya-i Fiqh-e Islami," in *Ijtihad va Zaman va Makan*, 1/67.

[27] 'Abdul Hadi al-Hakim, *A Code of Practice for Muslims in the West in Accordance with the Edicts of Ayatullah al-Udhma as-Sayyid Ali al-Husaini as-Seestani*, translated by Sayyid Muhammad Rizvi (London: Imam 'Ali Foundation, 1999), 191.

[28] Amjad M. Mohammed, *Muslims in Non-Muslim Lands*, 107.

This interpretation was culturally specific. Hanafi jurists in Balkh (Afghanistan) ruled that because the family structure in their country was different, they did not deem it appropriate to hold the extended family responsible for a single member's acts.[29]

Custom is more than just an evaluative measure in determining the law. It can actually mold and shape the law. During the times of the Shi'i imams, the *mahr* (dowry) was given to a bride before the marriage was consummated. If she claimed that she did not receive the *mahr*, she would have to provide evidence to demonstrate that the *mahr* had not been paid since her claim would contravene customary practice. However, during the time of Shams al-Din Muhammad b. Makki al-'Amili (d. 1384), also known as al-Shahid al-Awwal, the custom had changed so that the *mahr* was given to her after the marriage. In this instance, if she claimed that she had not received it, the burden of proof was upon the husband who had to provide evidence to show that he had given the *mahr*.[30] In this case, the law of providing evidence was revised to reflect the new prevalent custom.

In many instances, the law differed based on the custom of the place. According to Maliki jurists, based on the Arab tribal custom, a father can marry off his virgin daughter against her wishes even if she was forty years old, independent and wealthy.[31] Apparently, a virgin was not mature enough to make her own decisions. However, once she lost her virginity, she was

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[29] L. Ali Khan and Hisham M. Ramadan, *Contemporary Ijtihad: Limits and Controversy* (Edinburgh: Edinburgh Univ Press, 2011), 64.

[30] Muhammad b. Makki al-'Amili, *al-Qawa'id wa'l-Fawa'id* (Najaf: Jami'a Muntada al-Nashr, 1980), 1/151-2.

[31] Muhammad b. Ahmad Ibn Rushd al-Qurtubi, *Bidayat al-Mujtahid wa Nihaya al-Muqtasid* (Beirut: Dar al-Fikr, 2001), 2/7-8. See also Kecia Ali, "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law," in Omid Safi ed. *Progressive Muslims: On Justice, Gender, and Pluralism* (Oxford: Oneworld Publications, 2003), 169.

able to make major life-changing decisions independent of any male guardian. Based on this line of thinking, it is not too far-fetched to assume that guardianship was contingent on her virginity than on her intellectual capacity. According to Hanafi law, based on the cosmopolitan custom prevalent in Kufa, a woman could perform her marriage without the consent of her guardian.

The impact of '*urf in* shaping the law is more evident in finding an equal marital partner (*kafa'a*). Reflecting the diverse cultural milieu of Kufa, the Hanafis had an elaborate system regarding compatibility, maintaining that the occupation of the husband is essential in determining whether he is equal to his spouse. Hence, they recognize a detailed hierarchy of professions. Like the Hanafis, the Shafi'is and Hanbalis also require compatibility in religion, social status, profession and lineage. Reflecting the lack of class differential and social stratification in Medina the occupation of the husband was not deemed to be an important consideration for the Malikis. Although the concept of *kafa'a* was later adopted by the Malikis, they insist on compatibility of the couple in religious matters only.[32]

Custom and *Sira 'Uqala'iyya*

When invoking local '*urf* in legislating laws jurists appeal to a concept that has received very little attention in Western scholarship on Islamic law, the notion of *sira 'uqala'iyya*. In Shi'i *usul* literature, *sira* is characterized as a non-verbatim revelatory proof (*al-dalil al-shar'i ghayr al-lafzi*). The principle is founded upon the "custom of reasoned persons" *(sira al-'uqala'iyya).* The term refers to what is customarily perceived as rational and is agreed upon by those possessed with

[32] See Liyakat Takim, "Women, Gender and Islamic Law" in *Encyclopedia of Women and Islamic Cultures*, ed. Suad Joseph (Brill: Koninklijke, 2004).

reason. This juristic practice is premised on the view that all reasonable beings accept and behave according to common norms and values.

This principle replaces the need for written text and becomes binding for the community. Although no reported text is essential for the *sira*, the practice of reasonable people is sufficient proof for a jurist to rule that the lawgiver approbated the practice. This being the case, a particular principle can be established by arguing that the pattern of behavior was common to all rational beings, whether they lived in the times of the Prophet and Imams or not, and that no objection had been raised by the lawgiver.[33]

An important consideration in this context is the presumption of a congruity between *sira 'uqala'iyya* and what God ordains. It is assumed that the Lawgiver would endorse what reason discerns to be good or evil. Like their Mu'tazili counterparts, Shi'i jurists assert that reason is in harmony with God otherwise it would imply that God has created a device in human beings that is essentially in conflict with His purpose. In fact, Shi'i legal theory posits God to be the *ra'is al-'uqala'* (the epitome of reason). Therefore, it would be logically impossible for God to command what is contrary to rationality or to demand the opposite of what reason dictates.[34]

Shi'is quote a legal maxim (which is also in the form of traditions from the Imams) that *kullama hakama bihi al-'aql hakama bihi shar'* (whatever reason rules the Lawgiver will rule likewise). For them, this is further proof of the role of *sira uqala'iyya* in legislating laws that are not covered by the *shari'a*. In this context, the famous Shi'i jurist Murtada al-Ansari states: "The

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[33] Muhammad al-Baqir al-Sadr, *Durus fi 'Ilm al-Usul* (Beirut: Dar al-Kitab al-Lubnani, 1978), 2/182. See also Liyakat Takim, *The Heirs of the Prophet: Charisma and Religious Authority in Shi'ite Islam* (Albany: State University of New York, 2006), 132-4.

[34] Amirhassan Boozari, *Shi'i Jurisprudence and Constitution: Revolution in Iran* (New York: Palgrave Macmillan, 2011), 30.

truth is that there is a real correlation between rational rule and the rule of the *Shari'a*, and our predecessors have strongly supported it…What is meant from the *mulazama* (correlation) is that the divine rule would be proven by rational rule, and the rational rule is a proof for the divine rule."[35]

For any custom to have a valid basis in legal decision making, it must be based on the views of rational people. The term "custom of reasoned persons" refers to what is normally perceived as reasonable by people of sound mind. Thus, transactions like share-cropping and limited partnership are based not only on custom but are also contingent on them being acceptable by people of sound mind and intellect. It should be emphasized that in Shi'i legal theory, custom and reason are deeply interwoven. The '*urf* that is connected to the demeanor of rational people refers to all people of reason, whether they are Muslims or not. The '*uqala*' referred to here behave in a certain way because they are '*uqala*', not because they belong to a distinct nation or espouse a particular religion. Thus, the concept of '*urf* transcends the Islamic tradition in the sense that it upholds the practices and norms of reasonable non-Muslim societies as normative.

For example, all rational beings accept singular traditions (*khabar al-wahid*) if the person narrating it is considered to be reliable. Similarly, rational people act on the apparent meaning of a word. So far, jurists have used *sira* '*uqala*' to establish certain principles like accepting the apparent meaning of a text (*hujiyya zawahir*) or the principle of continuance (*istishab*). There has been no consideration of how this principle can be used to legislate laws in the American context. As I will demonstrate, local custom that reflects and is validated by *sira 'uqala'iyya* can

[35] Ibid, 31.

be used to derive new laws that are conducive to the American environment especially as it expands the scope of Islamic law.

One of the proponents of the use of the custom of reasonable people in Islamic law is Ayatullah Sane'i (b. 1937). In his discussion on the right of a woman to divorce her husband, he invokes the views of reasonable people and God's justice. He states that reasonable people would opine that since a wife cannot grant a divorce under Islamic law, the lawgiver has to legislate a way that will compel her husband to annul the relationship, even if he does not wish to do so. Just as the husband has the right to divorce her so she should have the right to divorce him by returning the *mahr* (dowry). This opinion can be established based on the views of rational beings, especially as Islam has granted the dignity and inalienable rights to all human beings.[36]

Furthermore, Sane'i argues, there is nothing in the *shari'a* that rejects this rational principle. This correlation (*mulazama* - that both parties have equal rights to divorce) is in accordance with Islamic principles and laws; it is also premised on another principle that undergirds Islamic law, that of justice. Sane'i quotes verses from the Qur'an that underline God's commitment to justice. For example, he quotes the verse "God will not be unjust to anyone" (41:47) to substantiate his argument. Furthermore, the '*uqala*' (reasonable people) rule that what is against this *mulazama* (that both parties have equal rights to divorce) is unjust and would be tantamount to oppressing the woman.[37] Basing his argument on the Qur'anic principle of God's justice and the reasoning of all rational beings, Sane'i rules that the *mulazama* is valid and applicable. Hence, a woman has equal right to divorce.

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[36] Ayatullah al-'Uzma al-Shaykh Yusuf al-Sane'i, *Wujub Talaq al-Khul' 'ala al-Rajul* (Qum: Mu'assa Fiqh al-Thaqalayn al-Thaqafiyya, n.d.), 50-1.

[37] Ibid., 51.

Legislating Laws in *Mintaqa al-Faragh*

Like the Mu'tazilis, Shi'is assert the autonomy of the human intellect and its inherent capacity to decipher basic moral and ethical values independently of revelation. This postulation is premised on the view that rational beings have a common understanding of ethical terms regardless of their religious or cultural affiliations. For the Shi'is, law and ethics are intertwined, so much so that God's laws must have a moral underpinning. Thus, a just God cannot decree something that would contravene His essence. This point is important because it empowers a jurist to derive laws based on rational and moral principles when a particular subject is not cited in the revelatory texts.

Based on this principle, the intellect can play an important role in deducing new legal judgements especially in the realm of *mintaqa al-faragh*, where, as will be noted, there is no judgement from the lawgiver. Since the revelatory sources have not provided any precepts in this domain, reason can help legislate new laws in conjunction with concepts such as *sira* and custom.[38]

In examining how injunctions can be revised in a new milieu, it should be noted that Islamic law does not cover every sphere of human activity. There are many areas where there is no legal injunction mentioned. Thus, for example, Muslims have accepted the concept of *siyasa al-shar'iyya*, where the state has the discretion to implement laws when the *shari'a* is silent on an issue. Ibn Qayyim al-Jawziyya (d. 1350) even stated that a law that is just is to be considered

[38] Hamid Mavani, *Religious Authority and Political Thought in Twelver Shi'ism: From 'Ali to Post-Khomeini* (New York: Routledge, 2013), 228-9.

as part of the *shari'a*.[39] The acknowledgement of the discretionary powers of the ruler occurred most notably in Ottoman Turkey.

Along the same lines, Shi'i legal theory has posited a lacunae which empowers a jurist to either revise earlier rulings or infer new laws. The domain of *mintaqa al-faragh*, as it has been called, allows for the expansion of Islamic law since jurists can legislate laws that have not been explicitly prohibited or mentioned in the textual sources. Since there is no definitive ruling prescribed by Islamic law in this domain, a jurist can introduce a law according to the needs of time and place. The importance of this concept is that it would redress any legal imbalance present in a particular socio-political context.

Viewed from this perspective, Muslims can assert their presence and carve out their own space wherever they reside. At the same time, they can pay allegiance to their legal tradition yet reform it. In legislating new laws within this domain, the contemporary Shi'i jurist Ja'far Subhani (b. 1929) states that in the derivation of religious injunctions, it is the local '*urf* rather than erstwhile rulings that should be referred to.[40]

By using the custom of reasonable people in the *mintaqa faragh*, jurists can venture beyond the narrow confines of inherited laws, the consensus of previous jurists, and the context-bound traditions and Qur'anic verses. Unfortunately, even for the Shi'is, reason has had a very limited role to play in Islamic legal theory. This has been admitted by scholars such as Muhammad Baqir al-Sadr (d. 1980) and 'Ali Rida Fayz who complain that most jurists pay little or no attention to '*aql*, which is considered to be the fourth source of law in Shi'ism.[41] There is a

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[39] Sherman Jackson, "Liberal/Progressive, Modern, and Modernized Islam: Muslim Americans and the American State," in Mehran Kamrava ed. *Innovation in Islam: Traditions and Contributions* (Berkley: Univ. of California Press, 2011), 176.

[40] Ja'far al-Subhani, *Masadir al-Fiqh al-Islami*, 189.

[41] See Muhammad Baqir al-Sadr, *Durus*, 2/203; see also 'Ali Rida Fayz,

need to distinguish between '*aql* as a potential source of the law and '*aql* as an actual tool that is used to infer the law. Scholars like 'Ali Rida Fayz have argued that although there is much juristic discourse about the role of reasoning, it is barely utilized as an independent source for deriving legal precepts.[42]

Islamic '*Urf* in Contemporary America

Islamic law was premised on historical realities as jurists understood and experienced it. Contemporary Muslim jurists have treated such laws to be both immutable and universal. Their manuals cite precepts that were extrapolated by jurists in the eighth and ninth centuries rather than utilizing the divinely-endowed intellectual faculty to deal with modern contingencies. Muslims are not bound to apply medieval juridical edicts (*fatawa*) in contemporary times; rather, they can be used as reference points for deriving newer ones.

It is essential to bear in mind that the law is contingent on the context and custom to which it is applied; hence, legal injunctions are interwoven to the vagaries of time and place. As customs and socio-political conditions change, the law must be amended accordingly. Jurists cannot appeal to laws which are based on seventh-century '*urf* and treat them as infinite and eternal. Equally, it would be presumptuous to assume that jurists living in the classical period of Islam can determine and enforce rulings to serve the needs of twenty-first century American Muslims. Just as faith cannot be imposed on anyone, the hermeneutics of a ninth-century scholar cannot dictate the lives of contemporary Muslims.

Vijeghihayi Ijtihad va Fiqh Puya (Tehran: Pijuhghah 'Ulum insani, 1997), 80-1.

[42] Ibid. 81.

The imposition of eighth-century Arabian customary laws in present times means that contemporary demands are ignored in favor of laws articulated during a period of male dominance in patriarchal tribal culture. Eighth-century cultural practices that posited women to be inherently deficient and in need of perpetual protection of a male guardian are deemed to be immutable and imposed on twenty-first century America where, ironically, women are frequently more educated than and independent of men. Muslims who insist on adhering to the edicts of eighth-century Arabia need to keep in mind that they are invoking Islamic texts to validate seventh and eighth-century '*urf* and that they are predicating their views and pronouncements on women and other minorities based on the culture of eighth-century Arabia.

It is essential, therefore, that Muslims comprehend the historical factors that led to the derivation of particular juristic edicts rather than positing them as divinely ordained. Furthermore, divine endorsement of a pre-Islamic custom does not translate to divine revelation. In fact, there is nothing sacred about a custom which stipulates that a woman can be married without her consent, or that a slave girl should not cover her hair in public, or that the blood price of a non-Muslim should be less than that of a Muslim. Due to the customs prevalent at the time, the Qur'an endorsed certain norms and practices. Had different customs prevailed at the time, the Qur'an would have probably endorsed them too as long as they did not violate its moral and ethical vision.

Muslims are not mandated to follow the pre-Islamic customs that the Prophet Muhammad encountered. I have found no statement from the Prophet or a verse cited in the Qur'an that requires Muslims to follow pre-Islamic laws that were endorsed in the seventh century. On the contrary, in the eighth and ninth centuries, Muslim jurists devised various methodological tools like *maslaha*, *istihsan* (juristic preference), *qiyas* (analogy), *ra'y* (opinion) etc. to decipher new

laws when they found the pre-Islamic norms unpalatable. It is because of this that, wherever Muslims resided, the law differed depending on which school of law a person followed.[43]

Legal pluralism and diversity in Muslim practices in the early period of Islamic history indicate that there is much scope of the revision of the law. Hence, contemporary customs which are based on the practices of reasonable people can be utilized in legislating laws in the American context. It is here that classical rules can be revised and newer ones formulated based on the customs of reasonable people especially where the *shari'a* is silent on an issue.

Interfacing Islamic and American Laws

It is important to bear in mind that reason is broader than revelation, especially when revelation is silent on a matter. Whereas revelation is cultural-specific and time-bound, reason is timeless. It is reason, based on the custom of the people of sound mind that can help devise laws in contemporary times. In composing or revising laws for the American context, jurists need to bear in mind that there is a dichotomy between the rationally derived universal values against the scripturally-based contextually defined laws.

The claim that Islam is a universal religion necessitates that its law expand to cover novel issues wherever Muslims reside. Just as previous juridical rulings were based on local customs, western '*urf* should be seen as a valid basis for legal prescription. The interpretation of law in the American context must take into consideration American norms, because, as I have argued, law and custom are intertwined. New interpretations of the law must be grounded in accepted social

[43] For examples of changes in legal pronouncements due to new circumstances in the early period of Islam see Taha Jabir al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections* (Washington: The International Institute of Islamic Thought, 2003), 40, fn 14.

norms. The sound *`urf* in America would be what reasonable people acknowledge as proper and is not antithetical to the interests of Muslims.[44] This interpretive activity includes extending the existing law to new situations and changed circumstances that were not explicitly addressed in the scripture.

Muslims must also realize that they cannot limit God and His laws to seventh-century Arabia, and that an eternal God speaks eternally. Whereas revelation is believed to be from God, the socio-political context of that revelation is culturally specific**.** There is a need to go beyond the literal understanding and historical exegesis of the Qur'an to an examination of and deciphering the moral élan of the Qur'an. To be sure, the inherited *fiqh* is not an always adequate reference for new *fatawa*. Neither is the consensus (*ijma*') of older generation a valid basis for inferring new rulings. Rather than essentializing and modifying certain aspects of Islamic law based on the legal order articulated in classical texts or on the basis of laws enacted in an Islamic country, American customary law must be recognized as a valid source of prescription especially where Islamic law allows recourse to local custom. Unless there is an explicit legal prohibition, American law can and should be used for self-empowerment and to gain access to the highest political and civic positions. By using local customary law, the principles of *shari'a* can be transformed into a functional system of law in America.

The principle of *mintaqa al-faragh* has so far been utilized for cases where there is no definitive ruling or textual source. There is nothing in Islamic legal theory from preventing the extension of this principle to include cases where prevalent customs require new rulings or the revision of old ones. It should also be borne in mind that the Qur'anic concept of *al-ma'ruf*

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[44] Sherman Jackson, *Islam and the Blackamerican: Looking Toward the Third Resurrection* (New York: Oxford University Press, 2005), 162

(2:228), the well-known standard of behavior, is malleable and can change with time. This means that jurists are not obliged to replicate laws that were premised on seventh-century '*urf*. To be fully engaged in the American political and social order, there is a need to articulate rules of Islamic law that interface with American customary law.

Islamic Laws in America

When living in minority, Muslim jurists in the past relaxed some of the stringent laws that were imposed on Muslims living in *dar al-Islam*. Most of these adjustments were based on the principles of necessity or alleviating hardships that diasporic Muslims experienced. Abu Hanifa (d. 765), for example, allowed the sale of alcohol, whereas the Maliki jurist Ibn Rushd (d. 1198) permitted Muslims to deal in interest in non-Muslim lands.[45] Hanafi jurists even allowed diasporic Muslims to engage in gambling.[46] Al-Juwayni (d. 1085) allowed dealing in prohibited financial matters when compelled to do so whereas the Maliki jurist al-Wahrani (d. 1504) said Muslims can consume alcohol, pork, and deal in usury if compelled.[47]

More recently, Rashid Rida (d. 1935) argued that permitting Muslims to live in the diaspora and yet deny them economic and political empowerment is a contradiction in terms. They need to engage in commerce and participate in political decision making which would affect not only diasporic Muslims but also Muslims living all over the world. He therefore

[45] Sherman Jackson, "Liberal/Progressive, 175.

[46] Omar Khalidi, "Living as a Muslim in a Pluralistic Society and State: Theory and Experience," in Zahid Bukhari et al. eds., *Muslims' Place in the American Public Square* (Walnut Creek: AltaMira Press, 2004), 45.

[47] Khaled Abou el Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," in *Islamic Law and Society*, 1, 2 (1994):180.

allowed Muslims to borrow and lend money with interest.[48] This would empower them economically.

Reasserting the role of universal moral values, the use of reason and utilizing local customs would necessitate changes in many rulings, especially, but not exclusively, for Muslims in America. Based on the principle of the custom of reasonable people jurists can deploy American customary law as a source of new legislation. Such a reading will mean that '*urf* will often shape rather than merely explicate or specify aspects of Islamic law. This novel reading of classical texts will necessitate a revision in many Islamic laws. The rulings on child custody, women's testimony, inheritance, guardianship of women, women's ability to give unilateral divorce, discriminatory laws against non-Muslim minorities and the Islamic penal code were based on patriarchal and tribal customary laws at the advent of Islam. For American Muslims, these can be revised based on contemporary local '*urf*.

Based on the principles outlined above, jurists also need to address topics such as patent and copyright laws, giving and receiving interest to lending institutions, Muslim political involvement, citizenship, serving in Western judiciaries, working for government secret service agencies, civic duties, serving in a non-Muslim army especially when it fights a Muslim country, supporting a political entity like the Republican party in the United States which endorses the Islamic prohibition on abortion and yet extends unconditional support for Israel.

Using concepts like '*urf* and *sira 'uqala'iyya* will also lead to newer considerations on laws such as inter-gender handshaking, mixed-gender social gatherings, female nurses caring for and treating male patients, music, the inherent purity of non-Muslims, organ donation, euthanasia

[48] Khaled Abou El Fadl, "Striking a Balance: Islamic Legal Discourse on Muslim Minorities," In Yvonne Haddad and John L. Esposito eds. *Muslims on the Americanization Path?* (Atlanta: Scholars Press, 1998), 66.

for brain-dead patients, etc. A salient point in the discussion of revising the law is that such revisions should not be seen as repugnant or violating rational and moral norms as conceived by reasonable people. Any form of discrimination in today's world is subject to ridicule and seen as an affront to human dignity. As such, rulings that discriminate fundamental human rights between men and women, Muslims and non-Muslims on issues such as saving lives, giving blood money; organ and blood donation, testimony need to be revised.[49]

For example, American custom does not consider inter-gender handshaking to have any sexual connotation. Rather, it is considered to be a respectful social greeting. Most Muslim jurists prohibit inter-gender hand-shaking as it can lead to an improper interaction. According to Ayatullah Seestani, if a woman is forced to shake hands with a male by her husband, she can leave him and yet be entitled to full maintenance.[50] Ayatullah Jawad Tabrizi (d. 2006) prohibits inter-gender handshaking based on the notion that the honor of Islam is preserved by desisting from it.[51] For Ayatullah al-Hakim, shaking hands with a person of the opposite gender is a practice of infidels that should be avoided as it threatens Islamic identity and could, presumably, lead to moral corruption.[52]

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[49] Seestani, for example, states that if a patient is not a Muslim, there is no objection to not giving him life-saving assistance. However, if the patient is a Muslim, all means have to be exhausted to rescue her/his life. Seestani also rules that if the patient is not a Muslim, life-supporting devices can be removed. However, if the patient is a Muslim, then it is not permissible to remove such a device even if the patient's relatives request that this be done. See Seestani, *Current Legal Issues According to the Edicts of Ayatullah al-Sayyid 'Ali al-Seestani* (London: Imam 'Ali Foundation, 1997), 49. Seestani also states that it is permissible to remove bodily organs from non-Muslims, but not from Muslims. See *Current Legal Issues*, 102.

[50] Linda Darwish, "Texts of Tensions, Spaces of Empowerment: Migrant Muslims and the Limits of Shi'ite Legal Discourse," (Ph.D Thesis, Concordia University, 2009), 238.

[51] al-Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin*, 187.

[52] Ayatullah al-Sayyid Muhammad Sa'id al-Hakim, *Murshid al*-Mughtaribin

Most jurists have allowed the shaking of hands only if it is necessary or if a covering (*sitr*) is placed between the parties.[53] Some jurists have admitted that the law on shaking hands is no longer relevant. Although he does not articulate it publicly, Mohsin Sa'idzadeh believes that men and women can shake hands. This suggests that the prohibition is not unanimously accepted even within the clerical circles,[54] a point which further corroborates my argument that it was prohibited as it was considered to be conducive to lustful interaction.

Juridical proscription of inter-gender handshaking demonstrates that many modern day jurists issue rulings based on medieval customs or based on the need to preserve Muslim identity and resist cultural invasion. In the American cultural milieu, inter-gender handshaking has no sexual connotations; in fact a refusal to shake hands could be construed as derisory and offensive, tarnishing the image of Islam. In a recent incident, two Syrian brothers in Switzerland refused to shake hands with their female teacher, claiming that it was against their religious beliefs. Swiss customary law construes shaking of teachers' hands as a sign of respect and is a longstanding tradition. Regional authorities intervened and stated that "the public interest concerning gender equality as well as integration of foreigners far outweighs that concerning the freedom of belief of students."[55] Based on the prevalent custom in the West, the law prohibiting inter-gender handshaking needs to be revised.

(Beirut: Mu'asssa al-Murshid li al-taba'a wa al-nashr wa'l tawzi',2002), 443.

[53] Fadlallah, Ayatullah al-'Uzma al-Sayyid Muhammad Husayn. *World of Our Youth*, Translated by Khaleel Mohammed (Montreal: Organization for the Advancement of Islamic Learning and Humanitarian Services, 1998), 217-8. Linda Darwish, "Texts of Tensions", 240.

[54] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Modern Iran* (Princeton: Princeton University Press, 1999), 267.

[55] *http://www.bbc.com/news/world-europe-36382596* (accessed May 25, 2016).

Similarly, statues and paintings were at one time viewed by local customs as objects of worship and veneration. However, in today's world, they are no longer utilized as objects of worship; rather they are displayed for aesthetic or artistic purposes. Based on this consideration, the contemporary Iranian scholar Ayatullah Ja'far Subhani argues that the ruling proscribing the displaying of statues and works of art at home should be revised.[56]

Conclusion

Contemporary Muslims are confronted with hegemonic values of the past and the emerging socio-political reality that often challenges the applicability of those values. The tension can be resolved only through the reexamination of the specific contexts of the rulings and the ways in which they were conditioned by the times. This exercise is contingent on recognizing that Muslims are not bound to erstwhile juridical or exegetical hermeneutics. Such considerations can lead to a radically different formulation of contemporary jurisprudence.

Unfortunately, even in today's legal manuals, there is discussion on slavery and that the *diyya* of women and that non-Muslims is less than that of men. Rules on inheritance, testimony are skewed against women. Such laws reflect the patrilineal character and male dominance of eighth-ninth century Arabian society when many of the rulings were devised. They also reflect the hegemonic laws devised by Muslims when they were the dominant empire that subjugated non-Muslims.[57]

Living in the West necessitates the revision of precepts that are not applicable or relevant in the new environment. Importantly, Muslims need contextually based legal guidance that

[56] Ja'far al-Subhani, *Masadir al-Fiqh al-Islami*, 442.

[57] See Liyakat Takim, "Women, Gender and Islamic Law."

connects the universal principles of Islam with their contemporary issues. Jurists need to construct the theological and legal discourse based on the socio-political and cultural realities confronting them. They can invoke American custom which have been approbated by the people of sound mind to extrapolate new religious rulings or revise older ones especially in fields where there is no explicit prohibition. In this way, local custom can shape the form of American Islam.

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[1] There are different types of *'urf*. The one that will concern us is what is commonly accepted by all rational beings, i.e., *'urf al-'amma*.

[1] S. Mostafa Mohaghegh Damad, *Protection of Individuals in Times of Armed Conflict Under International and Islamic Laws* (New York: Global, 2005), 8.

[1] Ayatullah Muhammad Mujtahid Shabistari, "Religion, Reason and the New Theology," 252.

[1] See details in Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1999) 6, 12-13.

[1] On the differences between the two types of marriages see Mahmoud Ayoub, *Islam: Faith and History* (London: Oneworld, 2012), 180.

[1] Ayatollah al-Sayyid Muhammad Musawi Bujnurdi, *Majmu'a Maqalat Fiqhi, Huquqi va Ijtima'i* (Tehran: Intisharat pejushkadeh Imam Khomeini va inqilab Islami, 2002), 1/102. There are many traditions on *'urf* cited from the Imams. See Khalil al-Mansuri, *Dirasa*, 128- 133.

[1] Khalid al-Mansuri argues that ‘urf has probative value in the legal tradition. See Khalil al-Mansuri *Dirasa Mawdui’iyya Hawl Nazariyya al-‘urf wa Dawruha fi ‘Amaliyya al-Istinbat* (Maktab al-I’lam al-Islami: n.p., 1992), 191-200.
[1] See examples of ‘*urf* that were endorsed by the Prophet in Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of `Urf and `Adah in the Islamic Legal Tradition* (New York: Palgrave, 2010), 54-57.

[1] Shabistari, “Religion, Reason and the New Theology,” 254.

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[1] Gerald Hawting, “Tradition and Custom,” in *Encyclopedia of the Qur’an*, ed. Jane D. McAuliffe (Leiden: Brill, 2004).

[1] For other references of ‘*urf* in juridical treatises see Khalil al-Mansuri, *Dirasa*, 88–89. For examples of where the *shari‘a* depends on ‘*urf* see Ayatollah al-Sayyid Muhammad Musawi Bujnurdi, *Majmu‘a Maqalat*, *1/*93-99.

[1] Abdulaziz Sachedina, *Islamic Biomedical Ethics: Theory and Application* (Oxford University Press, February 2009), 70-71.

[1] See also Mahdi Mahrizi, *Mas’ala al-Mar’a: Dirasat fi tajdid al-fikr al-dini fi* qadiyyati’i (Beirut: Binaya al-Sabah, 2008), 272.

[1] Muhammad al-Mu’min al-Qummi, *Kalimat Sadida fi Masa’il Jadida* (Qum: Mu’assasa al-Nashr al-Islami, 1994), 115.

[1] Ibid.

[1] al-Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin* (Tehran: Markaz al-Taba‘a wa’l Nashr Lil-Majma‘ al-‘Alami li ahl al-Bayt, 1999), 444.

[1] Ibid., 443: For more details on music and singing see ibid., 443 ff.

[1] Ja’far al-Subhani, *Masadir* 192. Fayz Kashani does not accept that all forms of singing is haram. See Habib Allah Ahmadi, “Puya–i Fiqh-e Islami,” in *Ijtihad va Zaman va Makan*, 1/67.

[1] ‘Abdul Hadi al-Hakim, *A Code of Practice for Muslims in the West in Accordance with the Edicts of Ayatullah al-Udhma as-Sayyid Ali al-Husaini as-Seestani*, translated by Sayyid Muhammad Rizvi (London: Imam ‘Ali Foundation, 1999), 191.

[1] Amjad M. Mohammed, *Muslims in Non-Muslim Lands*, 107.

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[1] See Liyakat Takim, "Women, Gender and Islamic Law" in *Encyclopedia of Women and Islamic Cultures*, ed. Suad Joseph (Brill: Koninklijke, 2004).

[1] Muhammad al-Baqir al-Sadr, *Durus fi 'Ilm al-Usul* (Beirut: Dar al-Kitab al-Lubnani, 1978), 2/182. See also Liyakat Takim, *The Heirs of the Prophet: Charisma and Religious Authority in Shi'ite Islam* (Albany: State University of New York, 2006), 132-4.

[1] Amirhassan Boozari, *Shi'i Jurisprudence and Constitution: Revolution in Iran* (New York: Palgrave Macmillan, 2011), 30.

[1] Ibid, 31.

[1] Ayatullah al-'Uzma al-Shaykh Yusuf al-Sane'i, *Wujub Talaq al-Khul' 'ala al-Rajul* (Qum: Mu'assa Fiqh al-Thaqalayn al-Thaqafiyya, n.d.), 50-1.

[1] Ibid., 51.

[1] Hamid Mavani, *Religious Authority and Political Thought in Twelver Shi'ism: From 'Ali to Post-Khomeini* (New York: Routledge, 2013), 228-9.

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[1] Ja'far al-Subhani, *Masadir al-Fiqh al-Islami*, 189.

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[1] Ibid. 81.

[1] For examples of changes in legal pronouncements due to new circumstances in the early period of Islam see Taha Jabir al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections* (Washington: The International Institute of Islamic Thought, 2003), 40, fn 14.

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