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CHAPTER 9

CUSTOM IN THE İSLAMIC LEGAL TRADITION

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I. DEFINITION AND SCOPE

THE two Arabic terms associated with the concept of custom are *'urf* (pl. *a'raf*) and *'ada* (pl. *'adat*). The word *'urf* shares the root of several derivatives that signify, among other things, what is "known," "famous," or "commendable." The two words *'urf* and *ma'ruf* are used as synonyms and both are mentioned in the Qur'an and Hadith to denote commendable and praiseworthy deeds.¹ The same relationship also exists between the opposites of these two terms, *nukr* and *munkar*, which denote what is unknown or condemnable.² The two terms *ma'ruf* and *munkar* are conjoined in the moral exhortation to command good and to forbid evil (*al-amr bi-al-ma'ruf wa-al-nahy 'an al-munkar*), which is considered one of the fundamental principles in the Islamic moral-legal tradition.³ The word *'urf* refers to well-established conventions and practices in a given society or among a group of people. This would include common linguistic and moral practices such as idiomatic expressions, types of transactions, or definition of proper conduct. The word *'urf* was used by the early jurists in this general sense before the development of new classifications to distinguish different customs in terms of types (e.g. linguistic

¹ Ibn Manzur, *Lisan al-'Arab*, 10:112.

² Ibid.; Isfahani, *al-Mufradat fi Gharib al-Qur'an*, 334-335.

³ Michael Cook, *Commanding Right and Forbidding Wrong*, 9.

s. 231-248

8 The Opinions of (Individual) Prophet's Companions (*madhhab al-ṣaḥābī*)

Under certain circumstances the opinions of individual prophet's companions are recognised as possessing normative character.²⁰⁹ There is a high degree of agreement on the fact that the prophets' companions' practice is binding in matters concerning the afterlife; the same is true of consensus decisions on secular legal matters. There is furthermore agreement that opposing statements by prophet's companions neutralize one another, as it were – one cannot be used as a source of law against another.²¹⁰

There is continuing controversy on the normative character in the case of statements by a companion which have not been confirmed as a consensus decision but which were not contradicted at the time by other rules, either. Supporters of the binding effect (Hanafites, Malikites, some Hanbalites) base themselves on sura 7:199, on a prophetic tradition²¹¹ and on the *ṣaḥāba's* proximity to the event of the revelation. Opponents (Shafīites and other sections of the Hanbalites) point out the fallibility of the prophet's companions and historical examples to the contrary.²¹²

Legal differences emerge, depending on the recognition or rejection of this source of law, for instance with regard to the position under inheritance law of a woman who was divorced irrevocably, and thus with legally binding effect (*muṭallaqa bā'in*), by a dying man who then dies during the statutory period of waiting before she may remarry (*'idda*). Advocates of a legal obligation refer to a statement by the caliph and prophet's companion 'Uthmān, who supported the claim to inherit. Opponents base their argument on the general discontinuation of the claim to inherit once the divorce has been made final.²¹³

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- 209 Cf. e.g. Kamali, Principles, 235 ff. With prudent differentiation: al-Shāfi'i, Al-risāla, 295 f., with the comment that there were hardly any cases where the statements of individual prophet's companions remained without contradiction.
- 210 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 203 ff.; Salqīnī, Al-muyassar, 171.
- 211 'My companions are like the stars; you will be rightly guided whichever one you follow' (*aṣḥābī ka-l-nujūm bi-ayyihim iqtadaytum ihtadaytum*); cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 269.
- 212 Cf. Salqīnī, Al-muyassar, 172.
- 213 Cf. al-Zuhaylī, Al-fiqh, vol. 7, 452 f. with further references.

9 Customary Law (*'urf*) and Custom (*'āda*)

From the point of view of works of sharia theory, customary law (*'urf*) is accepted as long as it does not contradict the mandatory rules of the sharia. This is often expressed in such a way that all customary law may be recognised if it does not prohibit what is permitted and permit what is forbidden.²¹⁴ Its validity as a source of law is supported by sura 7:199 and a prophetic tradition.²¹⁵ Some scholars also adduce *istiṣlāḥ*.²¹⁶ Contemporary scholars of the Indian Islamic Fiqh Academy even give common custom (*'urf-e 'aam*) precedence over *qiyās* and allow *qiyās* to be abandoned following a widespread special custom.²¹⁷

A practical instance of recognised customary law is the specification of gifts the groom (*khāṭib*) gives the bride (*makhṭūba*)²¹⁸ on the occasion of their betrothal as presents (*hiba*) rather than as part of the obligatory dower (*mahr*). Another instance is taking possession of purchased goods after being told their purchase price. This is seen as the consensus necessary in order to conclude a contract (offer and acceptance; cf. 4.4.d below).²¹⁹ Further instances are the tacit agreement to pay in the respective national currency, goods being free from faults even without prior agreement, or the tacit agreement to pay the customary fee (*ujrat al-mithl*) for commercial services.²²⁰

Customary law could be strengthened by means of putting the relevant mechanisms of finding the law into written form; the Moroccan '*amal* literature of the fifteenth to seventeenth centuries is often adduced as an instance.²²¹ Thus the term '*amal* also occurs as a synonym for (local) customary law, especially with the connotation of actually applied law.²²² The fact that Islam

- 214 *La yuhrim al-ḥalāl wa la yuḥill al-ḥarām*; cf. Salqīnī, Al-muyassar, 165; Kamali, Principles, 283 ff.; on its extensive social acceptance as something 'Islamic' see Rosen, The Justice, 85 ff.
- 215 *Ma ra'ahu l-muslimūna ḥasanan fa-huwa 'inda Allāhi ḥasan*; in al-Ghazālī, Al-mustaṣfā, vol. 1, 267 f. with criticism.
- 216 Salqīnī, Uṣūl al-fiqh, 152.
- 217 Islamic Fiqh Academy (India), Juristic Decisions (2009), 33 para. 4-15.
- 218 The linguistic forms – 'groom' as the active participle of the verb, 'bride' as the passive one – indicate the ideas of who plays which part in preparing the way for a marriage.
- 219 Cf. al-Zuhaylī, Al-fiqh, vol. 4, 99 f. and also Art. 175 of the Ottoman Mecelle.
- 220 Cf. Ibn Qayyim al-Jawziyya, I'lām, vol. 3, 3.
- 221 Concerning the controversy over the interpretation of the texts in question cf. Rosen, The Justice, 25 f., 34 ff. with further references.
- 222 Cf. al-Yaḥṣūbī, Tartīb al-madārik, vol. 1, 19 ff., 22 ff. and already the discussion in Mālik ibn Anas and Ṣaḥnūn's works (references in Ch. Müller, Sitte, 34 n. 57).