Considering Custom in the Making of Siyar (Islamic International Law)

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Custom is a source of Islamic law in general and Siyar (Islamic international law) in particular. Islamic jurists have set out the elements and conditions of customs for general jurisprudential purpose. However, no one has, to the authors' knowledge, formulated them from Siyar perspective. This paper is an attempt to fill this gap by tracing two important elements of an international custom, namely frequent and dominant general practice of States, and acceptance of that practice as law. These two will constitute a valid custom provided they fulfill certain conditions, most importantly that the custom must not conflict with Shari'ah or the spirit of Shari'ah.

Keywords
Custom, Islamic Jurisprudence, Siyar, International Custom, Opinio Juris

1. Introduction

Today custom ('*urf*)[1] is recognized as a source of Islamic law, especially by the Hanafi

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1 The Arabic terms, '*urf* and '*adah*, are interchangeably used for custom. Some authors have made a distinction between them. For example, Imam Abu Hamid Muhammad al-Ghazali (450-505 A.H/1058-1111 C.E) meant by '*urf* and '*adah* 'practices of Muslims' and 'God's custom in running the world' respectively. WAEL B. HALLAQ, LAW AND LEGAL THEORY III 343 (1999) cited in G. Libson, *On the development of custom as a source of law in Islamic law*, 4 ISLAMIC LAW & SOCIETY 133 at n. 4 (1997). Muhammad Hashim Kamali has defined the former as "recurring practices that are acceptable to people of sound nature" and the latter as "(personal) habits of individuals." *See* M. H. KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 369 (2003). As custom, in general, refers to common social practices this article uses the term in the sense of '*urf* in line with the connotations given by these two authors.

School of law.[2] It is defined as "recurring practices that are acceptable to people of sound nature."[3] It took a long time for a custom to receive the recognition.[4] First, a custom entered into the corpus of Islamic law as *Sunnah* (sayings, doings and approvals of the Prophet Muhammad). For example, the following rules have their roots in pre-Islamic customs: *diyah* (blood money payable by the relatives of a killer to the successors of the killed); *salam* transactions (advance payment for future goods); *rahn* (mortgage);

[2] There are four main (Sunni) Schools of Islamic jurisprudence- Hanafi School, Maliki School, Shafi-i School and Hanbali School- named after their founders. Imam Abu Hanifa (actual name was Nu'man bin Thabit), born in 80 A.H. and based in Iraq (Kufa), was the founder of the Hanafi School. Imam Malik bin Anas, born in 95 A.H. and based in Madina, was the founder of the Maliki School. Imam Muhammad bin Idris Al-Shafi-i, born in 150 A.H. in Gaza and finally based in Egypt, was the founder of the Shafi-i School. Imam Ahmad bin Hanbal, born in 164 A.H. and based in Iraq, was the founder of Hanbali School. These schools are a result of their differences with regard to the methodologies of lawmaking from the *Shari'ah* (core Islamic law) sources such as the Qur'an, *Sunnah* (saying, doings and approvals of Prophet Muhammad), *Ijma'* (consensus of Islamic jurists) and *Qiyas* (analogical deduction). Some of their leading features may be briefly stated as follows. Hanafi School takes the Qur'an as the principal source of *Shari'ah*. It does not accept normally any *ahad Hadith* (a *Sunnah* reported by one/two persons) because the authenticity of such *Hadith*, given the number of narrator, is not above question. If such a *Hadith* conflicts with the Qur'an, Hanafi School sticks to the Qur'an. For example, according to one *ahad Hadith*, no marriage (of women) is valid without the guardian's consent (Narrated by al-Tirmidhi, 1101; Abu Dawood, 2085; Ibn Maajah, 1881). Hanafi School does not take this *Hadith*. It relies on the Qur'an, which allows business transactions by women as well as by men, *e.g.*, "Oh you (men and women) who believe! When you deal with each other in transactions..." (Qur'an, 2:282). It argues that in Islam marriage is a civil contract. If a business contract, which is a civil contract, can be accomplished by both men and women, why should women not be able to consent to their own marriages? Besides, there are instances of marriages without guardian during the Prophet's time and his Companions' time. Accordingly, Hanafi School allows marriage without the guardian's consent. On the other hand, Shafi-i School takes *Sunnah* as the explanation of the Qur'an. So, it accepts *ahad Hadith* even if it apparently contradicts with the Qur'an. As such, according to this school, marriage without the guardian's consent is not allowed. In Islamic lawmaking the Maliki School gives a special value to the practices of the people of Madinah in accepting *Ahadith* (plural of *Hadith*) because the Madinah people saw the Prophet and, therefore, were better knowledgeable of the Prophet's *Sunnah*. As such, if any *Hadith* was not supported by the Madinah practices, Imam Malik did not accept that. Contradistinguished with this, Imam Ahmad bin Hanbal accepted all *Ahadith*, weak or strong. Because Imam Abu Hanifa was extremely cautious about the authenticity of *Hadith*, he did not accept weak *Hadith* (*Sunnah* narrated by people of weak memory and low level of piety). He used and his school do use *Qiyas* extensively to make new laws (*fiqh*) out of the fundamental sources (the Qur'an and the *Sunnah*). On the contrary, other schools, especially Shafi-i and Hanbali Schools, make restrictive use of *Qiyas*. In interpreting the legal texts (the Qur'an and *Sunnah*) these three schools take a conservative approach, whereas Hanafis adopt a liberal approach. An ample example is the relevance of customs in the lawmaking process. Hanafi School takes custom as a formal source subject to the fulfillment of certain conditions, most importantly that a custom must not conflict with *Shari'ah* or the spirit of *Shari'ah*. Maliki School, as said above, attaches special importance to Madinah practices and customs. Other two Schools initially did not accept custom as a source of Islamic law. Of course, both Imam Al-Shafi-i and Imam Ahmad bin Hanbal acceded to the importance of people's practices at the later parts of their lives. However, over time custom has occupied a position, in a varying degree though, in all Schools of Islamic jurisprudence. In particular, the Hanafi School has crowned it with a very distinguished status. *See* Libson, *infra* note 4.

[3] Kamali, *supra* note 1, at 369.

[4] For an excellent account of the development of custom as a source of Islamic law, *see* Libson, *supra note* 1, at 131. *See* also RATNO LUKITO, ISLAMIC LAW AND ADAT ENCOUNTER: THE EXPERIENCE OF INDONESIA, M.A. thesis presented to McGill University 5-37 (1997), *available at* http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp03/MQ37218.pdf (last visited on Mar. 10, 2010).