



Custom as a Legal Principle of Legislation for Shi'i Law

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Abstract: This paper will argue that the principle of a *lacuna* in Shi'i law can empower jurists to go beyond the traditional parameters of the shari'a. The principle allows for an expansion of Islamic law since jurists can legislate laws that have not been explicitly prohibited by textual sources. I will demonstrate that, in the past, Shi'i jurists often appealed to local customary practices in legislating laws that were absent in revelatory sources. This juridical practice is premised on the view that all reasonable beings accept and behave according to common norms and values. I will argue also that, based on the principle of the custom of reasonable people, jurists can deploy American social norms and customs as a source of new legislation. Such considerations can lead to a radically different formulation of diasporic jurisprudence.

Résumé : Cet article soutient que le principe de lacune (*lacuna*) dans le droit shi'ite peut donner aux juristes la possibilité de dépasser les paramètres traditionnels de la shari'a. Ce principe autorise les juristes à aller au-delà de la loi islamique dans la mesure où ils seraient confrontés à un problème légal qui n'aurait pas été textuellement interdit par les sources écrites. Je vais démontrer que les juristes du passé ont souvent fait appel aux coutumes locales afin de légiférer en l'absence de lois dans les sources scripturaires. Cette pratique juridique se fonde sur l'idée selon laquelle tous les êtres raisonnables acceptent et partagent les normes et valeurs sociales. J'ajouterai également que, en se basant sur le principe de la coutume des gens raisonnables, les juristes peuvent s'appuyer sur les valeurs et normes américaines pour développer de nouvelles lois. Ces considérations peuvent ainsi ouvrir sur des formulations radicalement différentes de la jurisprudence diasporique.

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Islamic law, the shari'a, occupies a central role in Muslim devotional and daily practices. Based on the revelatory sources (Qur'an and Sunna, i.e. the traditions of the Prophet) and other hermeneutical devices, the shari'a was formulated by Muslim jurists in the eighth and ninth centuries CE. Guided by a corpus of precepts and laws and their own independent reasoning, the jurists, especially in the 'Abbasid period (750–1258), constructed a legal edifice by elaborating a system of shari'a laws. They developed and interpreted Islamic law by invoking, in addition to the textual sources, various hermeneutical principles for the derivation and application of a juridical ruling such as public interest (*maslaha*) and juristic preference (*istihsan*), legal analogy (*qiyas*), 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 Muslim community (Hallaq, 1999).

One of the major factors that impinged on the formulation of the shari'a in the classical era was custom (*'urf*). In this paper, I argue that, to devise new rulings or revise older ones, Muslims can go beyond medieval *fatwas*, or religious opinion on a point of law, and that custom (*'urf*) can be deployed to revise aspects of Shi'i jurisprudence in modern times. More specifically, I will examine how custom and other principles associated with it can empower Muslim communities to respond to the challenges they encounter as a minority community in America.

The Shari'a Revisited

Many medieval juristic opinions, like the laws on slavery, guardianship of women, child marriages, and blood price (*diyya*), are contested in the modern context as changing socio-political circumstances have forced Muslim jurists to rethink and revise classical religious opinions on many points of law. Shi'i jurists like Mustafa Ashrafi Shahrudi and Mohammed Mojtahed Shabistari (b. 1937) have argued that there is a need to enunciate a jurisprudence that addresses contemporary concerns as the traditional legal treatises do not address issues that are relevant today. Topics such as human rights, the environment, political jurisprudence, and socio-political challenges are largely absent in these treatises. Instead, more attention is paid to topics like the amount of water that is required to purify an object (*kurr*), details of the distance traveled before one can offer shortened (*qasr*) prayers, and the amount of blood that invalidates prayers (Shahrudi, 1995: 1/119; Shabistari, 2001).

In the past, Muslims revised their laws when situations or circumstances dictated it. Many examples illustrate how jurists have revised the laws due to novel circumstances. The famous Shi'i jurist Muhammad b. Ja'far Tusi (d. 1067), for example, altered his rulings based on changes of seasons. He stated that it is prohibited to sell water in winter

since it has no value; however, it is permitted to sell it in the summer because of its scarcity in that season (Fadhli, 2007: 267–269). Similarly, Ja'far al-Subhani (b. 1929), a contemporary Iranian Shi'i jurist, argues that in the past, jurists prohibited the selling of blood; now that it has various medicinal values, it is permissible to sell it (Subhani, 2009: 1:335–336, 2007: 23–24).

Scholars have argued that it is essential that Muslims continue to review and revise the law in keeping with the dictates of their changing circumstances. A contemporary Iranian jurist who is famous for his reformist views, Mojtabah Shabistari states that a new *ijtihad* (the reasoning of the mujtahid, or legal expert) is required, one that goes beyond jurisprudence (*fiqh*) and Islamic legal theory (*usul al-fiqh*) and embraces subjects such as society, history, economics, politics, and psychology. To derive these laws, he claims that Muslim thinkers need to construct a comprehensive theory of human nature and social change (Shabistari, 2001: 249).

Similarly, Mohsin Sa'idzadeh (b. 1958), another 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 juristic hermeneutics which have favored men. For Sa'idzadeh, such laws are amenable to change based on the needs and interests of the times (Zaman, 2002: 186, Takim, 2010 b: 162).

The Role of Custom ('urf) in Islamic Law

An important component in revising Islamic jurisprudence is the role of custom ('urf) in explicating and molding religious rulings. The word 'urf refers to the social norms and local customs of a particular community or group. It can also be seen as the collective wisdom, knowledge or experience of a community. Although the term can be deployed to connote different types of social conventions and practices, the one that will concern us in this paper is the custom ('urf) that is accepted by all rational beings, that is, the common custom ('urf al-'amma).¹ I will also discuss the role of local custom ('urf) in Islamic law.

To be sure, Islamic law did not start with a clean slate. There were many pre-Islamic social norms and customs, which Islam incorporated in its legal framework. It would not be an exaggeration to say that the genesis of the Islamic legal edifice can be traced to the social norms and customs of pre-Islamic Arab society. 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 live-stock, there were specific customs for that economy (Damad, 2005: 8). 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 for contracts of purchase, rental and sale, discharge of debts, inheritance, compromise between debtor and creditor, limited partnership, etc. can also be traced to the prevalent custom ('urf) (Shabistari, 2001: 252).

Islam also adopted many pre-Islamic family customs and laws. These include the injunctions on slavery, dowry (*mahr*), the guardianship (*wilaya*) of daughters, child

custody, temporary marriage (*mut'a*), etc. Among other examples, the contemporary Iranian scholar Ayatullah Bujnardi (b. 1942) cites the blood money, a custom which was endorsed by Islam (Bujnardi, 2002: 128–133).² Shi'i jurists acknowledge that most of the Islamic social and commercial laws are endorsed. Based on this understanding, a transaction sanctioned by custom is religiously valid if it does not violate the ethical and moral precepts of the Qur'an and the Sunna.³

The Qur'an 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 (Q 2:158) or engaging in commerce during the pilgrimage season (Q 2:198) were retained. The significance of respecting and sustaining local custom (*'urf*) is further demonstrated in a statement that 'Ali b. Abi Talib (d. 661) reportedly made to Malik b. al-Ashtar, his governor in Egypt. He told him to be careful of (preserving) the local tradition (*sunna*) (Shabistari, 2001: 254).

It should be noted that the custom (*'urf*) that formed the backbone of the social and economic laws in Islam was not restricted to the practices of Muslims. Rather, pre-Islamic custom 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. As long as they did not contravene the moral–ethical framework of the Qur'an, customary norms and laws were endorsed by Islam. In the process, local custom (*'urf*) was Islamized.⁴ For the nascent Muslim community, pre-Islamic did not mean un-Islamic. It would thus not be an exaggeration to state that the Islamic legal tradition is an amalgamation of textual sources and juristic interpretation using various hermeneutical devices, including local custom (*'urf*).

The Interfacing of Custom and Law

I have argued that Islamic law is, in part, an extension of pre-existing social values and customs. The above discussion on custom highlights the role of the actual practice in shaping the law and demonstrates that custom is connected more to the actions and practices of local communities than to abstract laws. Stated differently, custom provides the framework within which the law is constructed and interpreted. It is because of the significance of custom (*'urf*) that one of the pre-requisites of becoming a legal expert (*mujtahid*) is the need to be aware of the local custom (Mohammed, 2013: 109). Knowledge of customary practices is important for a legal expert (*mujtahid*) so that a judgement can be rendered that is appropriate for a given circumstance.⁵

The Qur'an also recognizes the importance of custom. The frequent usage of the term "what is known" or "what is recognized" (*al-ma'ruf*, derived from the same roots as *'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*) (Hawting, 2004). The frequent usage of the term "what is known" (*al-ma'ruf*),

especially when discussing women (Q 2:228), shows the Qur'anic concern that human conduct be premised on its ethical and moral precepts.

Although Shi'i jurists do not consider custom ('*urf*') as an independent source for deriving legal precepts, they agree that it plays an important role in identifying the object of legal rulings. Since it was originally within the domain of the theory of jurisprudence (*usul al-fiqh*) that custom ('*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.⁶ For example, an important principle posited 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, he or she should consult custom ('*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 custom ('*urf*') does not construe a practice to be harmful, then the ruling will not apply to it, and the act would not be considered prohibited (Sachedina, 2009: 70–71). For example, Ayatullah Fadlallah states that, in areas where the daylight lasts eighteen hours or longer, one should fast for eighteen hours, but one is permitted to break the fast “if he is afraid of harm” (Darwish, 2009: 227). In such instances, the shari'a often endorses what custom ('*urf*') has determined as applicable.

Another example of the role of custom ('*urf*') in determining the law is the question of whether a husband has the right to demand anal sex and whether the wife is bound to comply with his demands. The critical issue here is whether giving pleasure (*tamkin*) covers the entire body or not. Ayatullah Muhsin Hakim (d. 1970) maintains that custom ('*urf*') determines that the denial of anal sex does not constitute disobedience (*nushuz*).⁷ In fact, he continues, there is no proof to state that pleasure applies to every part of the body. Similarly, there is no proof to indicate that a man can enjoy any part of the body he likes. The minimum amount that she is required to provide (*qadr mutayaqqan*) is that which is known and accepted by custom ('*urf*'), which, in this case, does not include anal sex (Mahrizi, 2008: 272).⁸

Similarly, in a marital relationship, a husband is obligated to provide what is customarily suitable for his wife. If his wife comes from an affluent background, he is required to maintain her, based on what is befitting her social status, if he is able to do so (Shahid al-Thani, 1989: 5/471). Custom ('*urf*') also determines how much time a husband must spend with his wife. In a polygamous relationship, while spending a night with one wife, the husband may not leave the home for an errand or go to another wife's home unless it is absolutely necessary. If he does so out of necessity, he is obligated to make up for the missed period in which he left the home, unless the time is so short that it would customarily not be considered a time away from home (Tabrizi, 2016: 109). It is thus custom ('*urf*') that will determine what time is considered to be excessive.

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 he or she changes his or her 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 guardianship falls on the

biological father, not on the one who gave birth even if she changes her gender. It is custom (*'urf*) that determines that, in this instance, the trans-father is actually the one who gave birth, the mother (al-Qummi, 1994: 115). Interestingly, Ayatullah Khumayni (d. 1989) rules that if the father was to change his gender and become a woman, he would lose the guardianship because it is contingent on the father retaining his original biological status (al-Qummi, 1994: 115). In both cases, it would seem biology trumps gender choice but not in the same way in both cases.

Custom as an Evaluative Measure for the Law

Custom may also shape many rulings that are either ambiguous or difficult for a jurist to determine. For Muslims, the question of listening to music has always been a contentious one. 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.⁹ The statement is very ambivalent and leaves much room for interpretation. When asked how a person can determine whether a particular kind of music is suitable for entertainment or amusement, most jurists have ruled that custom (*'urf*) will determine whether a particular form of music is permissible (*halal*) or forbidden (*haram*).

When questioned as to how to differentiate between music that is permissible or forbidden, Ayatullah 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 permissible (*halal*) or not and it is not possible to ascertain its permissibility, then that music can be presumed to be permissible (*halal*). Al-Khu'i further adds that music is forbidden (*haram*) for those who are aroused by it but not for those who are not (al-Husayni, 1999: 444). Ayatullah Gulpaygani (d. 1993) is more strict. He rules that if social norms or custom (*'urf*) determine that a particular sound is musical, then it is forbidden (*haram*) to hear it regardless of its effects (al-Husayni, 1999: 444). Similarly, many jurists have argued that it is prohibited to sing or hear songs. It is local custom (*'urf*) that determines if a particular tune or theme can be considered a song or not. The example of custom (*'urf*) as applied to music by Shi'i scholars is premised on the assumption that all cultures use the categories of permissible (*halal*) and forbidden (*haram*) and have determined which genres of music are intended as entertainment and which ones not.

The question of how custom (*'urf*) can be utilized in a non-Muslim society is more complex. It remains unclear how the principle of custom can be applied in Western societies that do not think in these categories. For example, al-Khu'i cites division in local custom (*'urf*) as to whether a type of music is permissible or not, but there are no customs in Western societies making this determination. All music is permissible.

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, Ayatullah 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 goes is the common perception of the people, in the sense that they would call him 'dead'" (cited in al-Hakim, 1999: 191).¹⁰

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 dowry (*mahr*) was given to a bride before the marriage was consummated. If she claimed that she did not receive the dowry, she would have to provide evidence to demonstrate that the dowry 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 dowry was given to the bride 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 dowry (al-'Amili, 1980: 1/151–152). In this case, the law of providing evidence was revised to reflect the new prevalent custom ('*urf*'). The foregoing discussion on the role of custom in shaping Islamic law indicates that the shari'a was often constructed and even, at times, revised around local custom ('*urf*') rather than the other way around.

Custom ('*urf*') and the Conduct of Reasonable People (*sira 'uqala'*)

When invoking local custom ('*urf*') in legislating laws, Shi'ite jurists appeal to a notion that has received little attention in Western scholarship on Islamic law, the concept of the conduct of reasonable people (*sira 'uqala'*). In Shi'i legal theory (*usul al-fiqh*), the conduct of reasonable people is characterized as a non-textual revelatory proof (*al-dalil al-shar'i ghayr al-lafzi*). The principle is founded upon the conduct of reasonable people (*sira 'uqala'*). The term refers to what is customarily perceived as rational and is agreed upon by those endowed with reason. This Shi'ite juristic hermeneutical device is premised on the view that all reasonable beings accept and behave according to common norms and values.

The principle replaces the need for a written revelatory text and becomes binding for the community. Although no reported text is essential for recognizing the conduct of reasonable people (*sira 'uqala'*), their conduct is sufficient proof for a jurist to rule that the lawgiver approved of 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 (al-Sadr, 1978: 2/182; Takim, 2006).

An important consideration in this context is the presumption of a congruity between the conduct of reasonable people (*sira 'uqala'*) and what God ordains. It is assumed that the lawgiver would endorse what reason determines as good or evil. It has to be remembered that Shi'i jurists assert that reason is in congruity 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 epitome of rational people (*ra'is al-'uqala'*). Logically, it would be impossible for God to command what is contrary to reason or to demand the opposite of what reason dictates.

Shi'is quote a legal maxim (which is also in the form of traditions from the Imams) that whatever reason rules, the law will rule likewise (*kullama hakama bihi al-'aql hakama bihi shar'*). For them, this is further proof of the role of the principle of the conduct of reasonable people (*sira 'uqala'*) in legislating laws that are not covered by the

shari'a. In this context, the famous Shi'i jurist Murtada al-Ansari (d. 1864) states: "The truth is that there is a real correlation between rational rule and rule of shari'a, and our predecessors have strongly supported it. What is meant from the *mulāzama* (correlation) is that the Divine rule would be proven by rational rule, and the rational rule is a proof for the Divine rule" (Boozari, 2011: 31).

It should be noted that, for the Shi'is, the primacy of reason is premised on the view that reason is firmly entrenched in the human conscience and is the sole criterion for moral cognition. This postulation is premised on the view that reasonable beings have a common understanding of ethical terms regardless of their religious or cultural affiliations. As such, Shi'i legal theory acknowledges the capacity of reason to independently assess moral values and to be a necessary component for rulings attributed to a just and moral God.

For any custom (*'urf*) to have a valid basis in legal decision making, it has to be based on the views of reasonable people. The term "custom of reasonable people" (*sira 'uqala'*) refers to what is normally perceived as reasonable by people of sound mind. Thus, transactions like share-cropping and limited partnership are not only based on custom but are also contingent on their being acceptable by people of sound mind and intellect. It is to be noted that in Shi'i legal theory, custom and reason are deeply interwoven. The assertion that social norms or custom (*'urf*) connected to the demeanor of reasonable people refers to all people endowed with reason, whether they are Muslims or not. The reasonable persons (*'uqala'*) referred to behave in a certain way because they are reasonable beings (*'uqala'*), not because they belong to a distinct nation or espouse a particular religion. Thus, the concept of custom (*'urf*) transcends the customs of the Muslim community in the sense that it upholds the practices and norms of reasonable non-Muslim societies as normative. This concept resonates strongly with the pre-Islamic social norms and customs (*'urf*) that Islam inherited and endorsed in its legal framework.

An example of how the principle of the conduct of reasonable people (*sira 'uqala'*) is deployed in juristic discourse is that of rational beings' acceptance of a singular tradition (*khobar al-wahid*) if the person transmitting it is considered to be reliable.¹¹ Similarly, reasonable people act on the apparent meaning of a word. So far, jurists have used this principle to establish certain legal principles like accepting the apparent meaning of a text (*hujjiyya zawahir*) or the principle of continuance (*istishab*). There has been no consideration of how this principle can be used to legislate on laws in the American context. As I will demonstrate, local custom that reflects and is validated by the custom of reasonable people (*sira 'uqala'*) is an important hermeneutical device to derive new laws that are conducive to the American milieu especially as it expands the scope of jurists to legislate new laws.

One of the proponents of the use of the custom of reasonable people in Islamic law is Ayatullah al-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 be granted a divorce under Islamic law, the lawgiver has to institute a method 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 dowry (*mahr*) that he gave her. This opinion can be established based on the views of reasonable

beings, especially as Islam has granted dignity and inalienable rights to all human beings (al-Sane'i, n.d.: 50–51).

Furthermore, al-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. Al-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" (Q 41:47) to substantiate his argument. Furthermore, reasonable people (*'uqala'*) rule that what is against this correlation – that both parties have equal rights to divorce – is unjust and would be tantamount to oppressing the woman (al-Sane'i, n.d.: 51). Basing his argument on the Qur'anic principle of God's justice and the reasoning of all reasonable beings, al-Sane'i rules that the correlation is valid and applicable. Hence, he concludes, a woman has an equal right to divorce.

Another example of how an important legal ruling is predicated on the conduct of reasonable people (*sira 'uqala'*) is cited by Ayatullah Khumayni. In his discourse on imitation (*taqlid*) of a jurist, Khumayni argues that the sole proof of this institution is the practice of reasonable people (*sira 'uqala'*), that is, the ignorant (*jahil*) person referring to the scholar (*'alim*). Just as a sick person seeks the advice of a doctor, he states that a person who is ignorant of the law must seek the opinion of an expert in law (Tabrizi, 1962: 3:167).

Legislating on Laws and the Principle of a *lacuna* (*mintaqah al-faragh*)

Shi'is believe (like the Mu'tazilites)¹² in the inherent ability of the human intellect to decipher basic moral and ethical precepts independently of revelation. This postulation is premised on the view that reasonable beings have a common understanding of ethical terms regardless of their religious or cultural affiliations. For Shi'is, because law and ethics are intertwined, 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 case is not treated 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 a *lacuna* (*mintaqah al-faragh*) where, as will be noted, there is no injunction 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 the conduct of reasonable people (*sira 'uqala'*) and custom (*'urf*) (Mavani, 2013: 228–229).

Shi'i legal theory has posited the principle of a *lacuna* (*mintaqah al-faragh*), which empowers a jurist to either revise earlier rulings or infer new laws. The domain of a *lacuna*, as it has been called, allows for the expansion of Islamic law since it enables jurists to legislate on matters 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.

Viewed from this perspective, Muslims are empowered to assert their presence and legislate on laws 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 al-Subhani states that in the derivation of religious injunctions, it is the local custom (*'urf*) rather than erstwhile rulings that should be referred to (al-Subhani, 2007: 189). By using the custom of reasonable people in the advent of a *lacuna* (*mintaqā 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.

There are many cases that can fall into the domain of a *lacuna* (*mintaqā faragh*). The shari'a has nothing to say about military strategy, trade unions, patent and copyright laws, use of pesticides, health care, government economic and fiscal policy, etc. Similarly, it is silent on the type of governance that a community should adopt. Hence, democracy, nomocracy, theocracy, autocracy are acceptable forms of government as long as the Qur'anic goals of justice and equality are fulfilled. It is in the realm of a *lacuna* that such issues can be addressed. In the past, Shi'i jurists were challenged to render judgements on working for a tyrannical or hostile 'Abbasid regime. Since there was no explicit legislation on this, they pronounced their rulings based on what served the interests of the community. In the diaspora, where Muslims are not confronted with tyrannical governments, the principle of a *lacuna* enables jurists to rule on the permissibility of working for the local judiciary and rendering judgements by their laws. Similarly, rules on engaging in civic responsibilities, pledging allegiance to and abiding by the laws of the diasporic countries and engagement with non-Muslims can be established based on the needs of the Muslim communities in the diaspora. Jurists like al-Sane'i have argued that rulings in the sphere of a *lacuna* can be issued based on Qur'anic principles like justice and equality even if such laws were not enacted in the past (al-Sane'i, 2011: 14).

However, as Ali-Reza Bhojani has observed, for various factors, reason has played a very limited role in judicial decision making. This is because Shi'i jurists claim that, in itself, reason cannot discern the purposes of legal prescriptions because the divine will and commandments are not objectively accessible by deploying reason. Despite its rationalistic outlook, there is little or no distinction between the normative thinking of modern Shi'i thought and the thinking of other Muslim schools of law. Thus, in reality, reason (*'aql*) is as irrelevant in the inference of shari'a laws in Shi'ism as it is in the other schools of law. Bhojani (2015: 1–2) complains that reason is not utilized enough in Shi'i jurisprudence despite the jurists' claim to the contrary.

Custom (*'urf*) in Contemporary America

Generally speaking, contemporary Shi'i juristic manuals cite rulings that were deciphered by jurists in the eighth and ninth centuries rather than utilize their divinely-endowed intellectual faculty to deal with modern contingencies. 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 a patriarchal tribal culture. Eighth-century cultural norms that posited that women were inherently deficient and in need of perpetual male protection are deemed to be

immutable and imposed on twenty-first-century America where, ironically, women are frequently more educated than men and of independent means. Jurists who insist on adhering to edicts issued in eighth-century Arabia are oblivious to the fact that they are pronouncing rulings on contemporary women and minorities based on social norms and custom (*'urf*) of a bygone age.

It is important to comprehend the social customs and historical considerations that led to the derivation of particular juristic edicts rather than accepting them as divinely ordained. It is also essential to understand that divine endorsement of a pre-Islamic custom does not translate to divine revelation. To be sure, there is nothing sacred or Islamic about a custom that permits child marriage, slavery, or stipulates 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 precepts.

Muslims are not mandated to follow the pre-Islamic customs that the Prophet Muhammad encountered. There is no statement from the Prophet or verse in the Qur'an that binds Muslims to eternally 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 public interest (*maslaha*), juristic preference (*istih-san*), legal analogy (*qiyas*), opinion (*ra'y*) etc. to deduce new laws whenever they found the pre-Islamic norms unpalatable. It is because of this that, wherever Muslims resided, the law was contingent upon the school of law a person followed.¹³ Legal pluralism and heterogeneity in juristic practices in the early period of Islamic history indicate that there is much scope for diversity and revision of the law.

The claim that Islam is a universal religion necessitates that its law expand to cover novel circumstances wherever Muslims reside. Just as previous legal rulings were partially predicated on local customs, Western custom (*'urf*) can serve as a valid basis for legal prescription. Crucially, there is nothing in the textual sources to indicate that custom (*'urf*) has to be imported from Islamic lands. It can be predicated on wherever Muslims reside. Hence, contemporary customs, which are based on the practices of reasonable people, can be utilized in legislating on laws in the American context, because, as I have argued, law and custom are intertwined.

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 customs, social norms, etiquettes, and conventions that are accepted by people of sound reason and are not antithetical to Islamic values can serve as an important tool for empowerment and integration in the socio-political milieu. This interpretive activity includes extending the existing law to new situations and changed circumstances that were not explicitly addressed in the scripture. As Sherman Jackson has reminded us, the sound custom (*'urf*) in America would be what people of sound mind, using commonly accepted values, acknowledge as proper and that is not antithetical to the interests of Sunni Muslims (Jackson, 2005: 162).

The principle of *lacunae* (*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 preventing the extension of this principle to include cases where prevalent customs

require new rulings or the revision of older ones. Legislating on new rules in this realm is interwoven with the Qur'anic concept of the well-known standard of behavior (*al-ma'ruf*) (Q 2:228), which refers to the collective practices of the community. It also reflects the most socially-acceptable practices at the time.

In this context, it should be noted that Islamic law was formulated not by inscribing scripture or tradition into the religio-legal institutions but by endorsing and re-inscribing pre-existent practices and customs that were neither dictated nor inscribed by the revelatory texts. Hence, it is correct to state that Islamic law was not always shaped by hermeneutics of Islamic texts. As a matter of fact, the historical experience of Muslims shows that, besides acts of worship, for a practice to become "Islamic," it did not have to originate from or be inspired by the revelatory texts. It merely had to show that it was not in violation of the scripture (Jackson, 2011: 178). Hence, it is correct to maintain that anything alien or foreign is not necessarily antithetical to Sunni Islam, and similarly to Shi'i Islam. A good example of this is the institution of the caliphate, which was established by the early Muslim community, even though it does not have any scriptural validation.

Islamic Laws in America

In the past, Muslim jurists relaxed some of the laws for those Muslims living in places where they were in the minority. Most of these adjustments were based on the principles of necessity or in order to alleviate 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 (Jackson, 2011: 175–176). Hanafi jurists even allowed diasporic Muslims to engage in gambling (Khalidi, 2004: 45). Al-Juwayni (d. 1085) permitted Muslims to deal in prohibited financial matters when compelled to do so, whereas the Maliki jurist al-Wahrani (d. 1504) said Muslims can consume alcohol and pork, and deal in usury if compelled (El Fadl 1994: 180).

More recently, Rashid Rida (d. 1935) argued that permitting Muslims to live in the diaspora and yet to 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. Therefore, he allowed Muslims to borrow and lend money with interest (El Fadl 1998: 66). This would empower them economically.

Unlike Sunni Islam, authority in Shi'ism is strictly defined and hierarchical. The "source of imitation" or of "emulation" (the *marji* ' ; pl. *maraji* ') refers to the most learned juridical authority in the Shi'i community, whose rulings on Islamic law are followed by those who acknowledge him as their source of reference. For most devout Shi'is, the religious opinions of the sources of emulation (*maraji* ') are final and beyond critique. Religious matters that are not covered in the juridical literature composed by the sources of emulation are referred to their offices. Because of this factor, the Shi'i religious outlook in the diaspora is shaped by the opinions of those religious authorities that are often formulated in the religious circles in Iraq and Iran.¹⁴

Among Shi'i jurists, the articulation of juristic laws to address the specific needs of diasporic Muslims in accordance with their newly adopted customs has yet to be discussed extensively. Consequently, erstwhile edicts have been either imposed on the diaspora or relaxed when abiding by these laws has created difficulties (*haraj*) for the faithful. Stated differently, Shi'i diasporic jurisprudence (*fiqh*) is underdeveloped in this area. It is restricted to the collection of fatwas, or religious legal opinions, produced in the seminaries by jurists who do not fully comprehend the challenges experienced by their followers residing in the diasporic milieu. Jurists invoke principles like necessity (*darura*), and the absence of harm (*la haraj*) in validating certain practices in the diaspora. So, for example, Ayatullah Fadlallah (d. 2010) states that when implementing a ruling that would result in moral corruption (*mafsada*), such an edict may be suspended. He cites the example of some mourning rituals which, he opines, must be suspended if they would result in the denigration of Islam (Darwish, 2009: 105; Takim, 2018: 76).

In response to various questions posed by Shi'is living in the West, the sources of emulation (*maraji'*) have composed a distinct genre of juridical texts called "new matters" or "current events" (*mustahdathat*) (Seestani, 1996). A study of this literature indicates an underlying commitment to casuistry – that is, the examination of specific cases rather than the exposition or elaboration of detailed rules or principles. Rather than presenting a fully-fledged or well-articulated legal system, most of the *responsa* (fatwa) are on an ad hoc and piece-meal basis. In many instances, laws are as applicable in the diaspora as they are in Muslim-majority countries.

For example, when he is asked if a Muslim builder or contractor can build a place of worship for non-Muslims in the West, Ayatullah Seestani says it is not permissible to do so because this is tantamount to promoting false religions (al-Hakim, 1999: 150). Similarly, he does not allow Muslims to serve in the Western judiciary. When asked if it is permissible for a holder of a law degree to serve as a judge in non-Muslim countries where he or she would be required to judge according to non-Islamic laws, he states that he does not deem it permissible to administer judgement for those who are not qualified and for those who judge on the basis of non-Islamic laws (al-Hakim, 1999: 155). To date, Shi'i jurists have not interfaced local Western custom (*'urf*) and Islamic laws. Instead, their responses are based on the interpretation of revelatory sources and the extra-revelatory principles cited in Islamic legal theory.¹⁵

Knowledge of a society's customary practices and norms is indispensable for a jurist to render a judgement that is germane to a particular diasporic situation. There is little direction in the *responsa* (fatwa) from the sources of emulation (*maraji'*) or any other genre of literature on specifically social or political diasporic issues. The challenges of acculturation, assimilation and integration, or of Muslim youth who experience peer pressure or marry outside the community, the question of building a network of economic enterprises within the community, or how to empower the diasporic Shi'i community politically, socially, and economically have not been addressed. Similarly, the rulings from the sources of emulation (*maraji'*) have yet to discuss issues like countering marginalization, Islamophobia, social exclusion, and how to effectively counteract the vitriolic attacks by Wahhabis and Salafis. Many Black Shi'is complain that there is very

little in jurisprudence (*fiqh*) treatises that address their specific socio-economic needs in America (Takim, 2010).

Based on the principle of the custom of reasonable people and other principles outlined above, American social practices and customs can serve as a source of new legislation provided it does not violate the Qur'anic moral-ethical framework. Such a reading will mean that custom (*'urf*) will often shape rather than merely explicate or specify aspects of Islamic rulings and will necessitate a revision of many laws. Juristic rulings on child custody, women's testimony, inheritance, guardianship of women, women's ability to be granted a unilateral divorce, female judges, discriminatory laws against non-Muslim minorities, and aspects of the Islamic penal code like stoning, were based on patriarchal and tribal customary laws at the advent of Islam. Similarly, rules on conducting marriages in the vernacular can be revised based on the principles of the custom of reasonable people.¹⁶

Based on the principles outlined above, juristic opinions on topics such as patent and copyright laws, giving and receiving interest to lending institutions, swearing allegiance to a non-Muslim government, working for government secret service agencies, civic duties, serving in a non-Muslim army especially when it fights a Muslim country, sale of shares and bonds, painting human beings in three dimensions, or relying on DNA results, need to be formulated or revised.

Invoking concepts like custom (*'urf*) and the conduct of reasonable people (*sira 'uqala'*) will also lead to newer considerations on laws such as inter-gender handshaking, mixed-gendered social gatherings, celebrating local holidays, female nurses caring for and treating male patients, listening to various genres of music, the inherent purity of non-Muslims, allowing non-Muslims to enter mosques, organ donation, and the prohibition against playing chess, etc. Other traditionally sensitive laws like those on working in restaurants or airlines which serve alcohol and forbidden (*haram*) meat will also be revisited (Seestani, 1997: 35).

A salient point to be remembered is that the legislation of Islamic laws in America should not be seen as repugnant or violating rational and moral norms as conceived by reasonable people in the American diaspora. The contemporary custom of reasonable people (*sira 'uqala'*) dictates that any form of discrimination is subject to ridicule and seen as an affront to human dignity. As such, even though the old jurisprudence (*fiqh*) manuals are replete with rulings on slavery and child marriages, they should be nullified. The custom of reasonable people also determines that laws which deny basic human rights to others (slavery) or that discriminate between men and women, Muslims and non-Muslims on issues such as saving life, giving blood money, organ and blood donation, and female testimony must be revised.¹⁷ Such edicts contravene the basic universal and moral principles of Islam.

Usage of local custom (*'urf*) can substantially revise the traditional jurisprudence (*fiqh*). 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 handshaking as it can lead to an improper interaction. They have allowed the shaking of hands only if it is necessary or if a covering (*sitr*) is placed between the parties (Fadlallah, 1998: 217–218; Darwish, 2009: 240). Some jurists have admitted that the prohibition against shaking hands is

no longer relevant. The Iranian jurist Mohsin Sa'idzadeh, for example, believes that men and women can shake hands (Mir-Hosseini, 1999: 267). This suggests that the prohibition is not unanimously accepted even within clerical circles, a point which further corroborates my argument that it was prohibited as it was considered to be conducive to lustful interaction. The proscription of inter-gender handshaking indicates that many modern day jurists issue rulings based on medieval customs or 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.

Similarly, statues and paintings were used, at one time, 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 purposes. Based on this consideration, Ayatullah Ja'far al-Subhani argues that the ruling proscribing the display of statues and works of art at home needs to be revised (al-Subhani, 2007: 442).

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 re-examination 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 much discussion on slavery and on whether the blood money (*diyya*) of women and non-Muslims is less than that of Muslim men. Rules of inheritance and testimony are skewed against women. Such laws reflect the patrilineal character and male dominance of eighth- and 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 (Takim, 2004).

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 connects the universal principles of Islam with their contemporary issues. The challenge for jurists is to construct theological and legal discourses based on the socio-political and cultural realities confronting them. They can invoke American custom that has 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. This form of custom (*'urf*) differs from local customs and practices, since the probative value of the latter is not accepted by Shi'i jurists. On the various forms of custom (*'urf*), see al-Mansuri (1992).
2. There are many traditions on custom (*'urf*) cited from the Imams, see al-Mansuri (1992: 128–133).
3. Khalil al-Mansuri argues that custom (*'urf*) has probative value in the legal tradition, see al-Mansuri (1992: 191–200).
4. See examples of *'urf* that were endorsed by the Prophet, in Shabana (2010: 54–57).
5. A *mujtahid* is one who exercises *ijtihad*, i.e. independent reasoning. The term *ijtihad* is seen as a jurist's exertion of his mental faculties to arrive at an absolute proof based on the interpretation and application of the authoritative sources of Islamic law: the Qur'an, Sunna, and consensus (*ijma'*).
6. For other references to custom (*'urf*) in juridical treatises, see al-Mansuri (1992: 88–89). For examples of where the application of a legal ruling depends on custom, see Bujnardi (2002: 1/93–99).
7. Muhsin al-Hakim was a famous jurist of the last century. He became the sole source of emulation (*marja'*) in 1961, after the death of Grand Ayatollah Sayyid Husayn Burujerdi.
8. Since reason cannot determine independently what constitutes the minimum amount of pleasure that she is required to provide, this ruling can be construed as an example of an edict that is based on local custom (*'urf*).
9. The majority of the Shi'is consider Ayatullah Seestani to be the most learned scholar (*a'lam*) and source of emulation (*marji'*) of our times.
10. Seestani's argument seems to be mute. The question is how to define death. He says that it is whatever people say it is. But, that only brings us back to the question of how to define death. In other words, if there was an agreement – which now relies on the medical definition of death – on the definition of death, the question would not arise. His argument also seems to be suggesting that untrained common folk have more authority for determining the definition of death than trained medical professionals, since it is the former to whom he appeals for clarity.
11. Some Usulis – those who favor the use of *ijtihad* (i.e. the reasoning of the mujtahid, or legal expert) – and most Akhbaris – who reject the use of reason in deriving rulings – scholars rejected the singular tradition as a valid source from which legal rulings can be issued, unless it was attached to an indicator [a marker]. This was because a singular tradition, in itself, provides only conjecture, not certitude as to the actual ruling on the case.
12. Mu'tazilites were rationalist theologians, prominent between the eighth and the eleventh centuries.
13. For examples of changes in legal opinions due to new circumstances in the early period of Islam, see al-Alwani (2003: 40).
14. The followers base their religious practices in accordance with their judicial opinions. For further discussion on this, see Takim (2009).

15. These include the four general procedural principles: exemption (*bara'a*), precaution (*ihtiyat*), choice (*takhyir*), and continuity (*istishab*).
16. On the revision of laws regarding the recitation of marital vows in the vernacular, see Milani (2001: 105–106).
17. Ayatullah 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 (1997: 49). Ayatullah Seestani also states that it is permissible to remove bodily organs from non-Muslims, but not from Muslims. See Seestani (1997: 102).

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