Custom in Islamic Law and Legal Theory

The Development of the Concepts of ‘Urf and ‘Adah in the
Custom in Islamic Law and Legal Theory
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Titles:

Custom in Islamic Law and Legal Theory: The Development of the Concepts of ‘Urf and ‘Ādab in the Islamic Legal Tradition

Ayman Shabana
Custom in Islamic Law and Legal Theory

The Development of the Concepts of 'urf and Ādah in the Islamic Legal Tradition

Ayman Shabana
To Mona, Yusuf, and Maryam
with love and gratitude
Contents

Series Editor’s Preface xi
Acknowledgments xiii
Note on Transliteration and Translation of Arabic Words xv

Introduction
  Custom in the Islamic Legal Tradition: Past and Present 1
  Custom and Religion 2
  Custom and the Problem of Definition 4
  The Purpose of the Study 5
  The Thesis 10
  The Scope of the Study 11
  The Method 12

Part 1 Custom and the Major Debates in the Field of Islamic Studies

1 Custom and Islamic Law in Modern Scholarship 17
   The Beginnings and the Emergence of a Dominant Paradigm 18
   Ethnographic Studies 19
   Literary Textual Studies 23
   Qāḍī Justice and Max Weber’s Influence 28
   Reactions to the Dominant Paradigm 30
   Revisions and Paradigm Shifts 31
   Studies Devoted to ‘Urf 32
   Normative Juristic Approach 38
   Concluding Remarks 42

Part 2 Beginning and Early History

2 Normative Foundations of the Concept of Custom in the Islamic Legal Tradition 45
   The Definition of ‘Urf 49
Contents

Textual Foundations of ‘Urf in the Qur’an 50
‘Urf in the Sunnah of the Prophet 52

3 From ‘Ādah to ‘Urf: Theological Foundations of the Concept of Custom as reflected in the Debate over Causality 59
The Mu‘tazilī and the Ashʿarī Schools on Causality 60
Al-Ghazālī and Ibn Rushd between Occasionalism and Determinism 64
Al-Juwaynī and the Link between the Theological ‘Ādah and the Juristic ‘Ādah? 68

4 Custom between the Theoretical School and the Applied School 71
The Beginnings and the Origins 71
The Works of Jurisprudence (Uṣūl): The Early Structure of the Sources 73
The Theoretical Approach (Tariqat al-Mutakallimin) 76
Conventional Signification (al-dalālah al-‘urfiyah) 77
Particularization of the General (Takhfīs al-‘Āmm) 78
‘Urf and the Verification of Reports (Tawātur and Ijmā‘) 79
‘Urf, Ijtihād, Istīfa‘ 84
Al-Juwaynī’s Theory of ‘Urf and the Discourse on Political Contingencies 85
The Applied Approach (Tariqat al-Fuqahā‘) 87
The Debate on Juristic Preference (Istīhsān) 89

Part 3 Development and Expansion

5 The Expansion of Legal Theory 95
Custom in Mainstream Legal Theory and Emerging Legal Genres 95
Custom within the Four Sources: ‘Urf and Qiyās 96
Beyond the Four Sources: ‘Urf and Istidlāl 100
The Scope of the Sources: ‘Urf and Takhfīs 105
Conclusion 110

6 Custom and Legal Maxims: al-Qawā‘id al-Fiqhiyyah 111
The Development of the Genre 111
‘Urf and the Criteria for the Evaluation of Benefits 114
Types of Indicators 115
Scattered Implications of ‘Urf in Substantive Law 116
Customary Permission and Customary Condition 117
Jurisprudential Maxims and Substantive Maxims 119
Contents

Legal Maxims and the Deep Structure 121
The Five Cardinal Maxims 123

7 Custom and the Objectives of Sharī‘ah:
	Maqāṣid al-Sharī‘ah 125
	Maqāṣid in Legal Theory 126
	Custom in al-Shāṭibī’s Theory of Objectives 128
	The Objectives of Sharī‘ah 130

The Ultimate Objective: Achieving People’s Benefits 130
The Subsidiary Objectives 135
Classification of Customs 138
Custom as a Category 139
Custom as a Measure 141

8 Custom, Legal Application, and the Construction of Reality 147
Custom and Ijtihād 149
Custom and Legal Application between Fatwā and Ḥukm 149
Custom and Judges’ Verdicts 153
Custom, Jurisconsults’ Opinions, and Legal Change 160

Conclusion 167

Notes 173

Bibliography 227

Index 241
This book is the first volume of a new series of original studies on Islamic law and theology that clearly raise the bar for rigorous scholarship in the field of Islamic Studies. The volumes of this series are chosen not only for their disciplined methodology, exhaustive research, or academic authoritativeness, but for their significant insight into the world of Islam as it was, is, and is likely to become. The volumes are selected for their relevance to furthering the understanding of the lived and the living Islam, the realities that have shaped the ways Muslims perceive, represent, and practice their religion. Ayman Shabana initiates the series with his eye-opening study on the role of practice and custom in the development and theory of Islamic law. This is the first systematic study to investigate the extent to which Muslim jurists integrated, rationalized, and normatively legitimated the reliance on both what was thought to be universal or local social norms and practices in the context of a legal system guided by Divine text and will. To date, contemporary scholars, whether Western or non-Western and Muslim or non-Muslim, have assumed that the role of social practice and custom in the normative constructions and theories of Islamic jurisprudence has been very limited. Shabana's original and ground-breaking scholarship not only mandates the re-examination of these inherited perceptions, but, even more, it invites researchers to revisit long-held assumptions about the nature and function of so-called religious legal systems, especially in contrast to the broad and often ambiguous category of secular legal systems. Furthermore, among the profoundly salient issues Shabana's study raises is the dynamic balance between determinism, contingency, and functionalism in a legal system founded on the assumption of a supreme and eternal legislator, and thus, transcendent and universal laws that are perpetually valid, unwaveringly necessary, and always good. These dogmatic assumptions, however, are dynamically and creatively negotiated within the context of other compelling and at times competing assumptions, such as that the laws of God are found not just in texts but also in the nature of creation; the laws of human autonomy, agency, and inheritance of the earth; or the imperative of ending human suffering or avoiding hardship.
Like all solid scholarship, Shabana’s work on these critical issues raises as many questions as it answers. But this book will become an indispensable starting point for any person who hopes to understand the nature of Islamic law, and it is bound to become the necessary foundation for any future work on the place of custom, and indeed the role of revelation and determinism, in Islamic jurisprudence. No serious student of Islamic law or theology can afford not to read this original and timely book.
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Note on Transliteration and Translation of Arabic Words

Transliteration of Arabic words follows the *ALA-LC Romanization Tables: Transliteration Schemes for Non-Roman Scripts* with the exception of rule 11(b1): the case of (א or א) representing the combination of long vowel plus consonant where it is written as īyah but here it is written as iyyah (e.g. fiqhiyyah). The Arabic words ḥadīth, muftī, mujtahid, shari‘ah, and sunnah are treated as common English words and therefore are not italicized. As a general rule, the capitalized Sunnah refers exclusively to the sunnah of the Prophet. Translation of Qur’ānic verses either comes from or is a modified version of Abdullah Yusuf Ali’s *The Meaning of the Holy Qur‘ān*. Unless otherwise indicated, translation of all other passages, including Prophetic reports, is my own.
Introduction

Custom in the Islamic Legal Tradition: Past and Present

A quick survey of most modern works of Islamic legal theory reveals the importance of the legal concept of custom. Following the legal reforms that were undertaken in the majority of modern Muslim nation-states, the status of custom as a source of law has been consolidated. Most of these reforms have listed custom as one of the main sources of law, even in some cases before shari‘ah itself. The majority of these legal reforms were inspired by modern Western legal codes and they echoed the theoretical paradigms that shaped these Western legal codes.¹ When we turn to the primary or classical sources of Islamic law, however, we find that custom had traditionally played a more supportive role in the construction of shari‘ah-based rulings. Eventually, Muslim jurists recognized custom as one of the sources of Islamic law, though as a secondary source rather than a primary one. This gradual shift in the status of custom is seen mainly as a function of the pressure that was exerted on Muslim jurists to recognize the important role of actual practice in shaping legal theory. According to this view, Muslim jurists initially incorporated custom under other generic concepts such as the tradition (Sunnah) of the Prophet, consensus of the jurists (ijmā‘), or even juristic preference (istihsān). They, however, had to recognize custom as an independent source of law when such *ad hoc* recognition proved increasingly insufficient.

The shift in the status of custom in the modern period raises the question of whether it was precipitated externally by the modern legal reforms that were imposed on the tradition from without, or internally by other factors from within. Undoubtedly, modern legal reforms have drastically expedited this shift and even pushed it beyond the limits that the legal tradition would allow. Still, however, it would be inaccurate to attribute the causes of this shift solely to the Western-inspired legal reforms.² In the following chapters, I argue that the concept of custom underwent an internal, gradual, and incremental process of evolution which, in turn, was
a part of a larger process that shaped the entire legal tradition. Moreover, I argue that although on the surface this tradition seemed static, fixed, and immutable, at a deeper level it was subject to constant change and reconstruction depending on the numerous variables that the jurists confronted. Otherwise, how can one explain the extended history of shari‘ah and its various patterns of localization? Despite the apparent rigid structure consisting of the four cardinal sources (Qur‘an, Sunnah of the Prophet, consensus of the jurists, and juristic analogy), the actual construction of the law also relies on a number of secondary sources, built-in mechanisms, and various other nuances that permeate the different stages of the legal process. It is through these multiple sources that the law secures a degree of flexibility that allows it to maintain its currency.

Unmeasured flexibility, however, has the potential of undermining the distinctive identity of a legal system, to the extent that the resultant law becomes completely unpredictable. In the case of Islamic law, it was legal theory that preserved the distinctive identity of the Islamic legal system. Regardless of the particular conclusions that a jurist might reach, these conclusions would be acceptable as long as the jurist remained bound by the main prescriptions of the legal method. These conclusions, however, are not considered final or unquestionable. They remain subject to revision and critique by fellow jurists within a system of peer review that preserves the identity of the tradition. Over time, Islamic law developed within an interpretive legal culture that was governed and bound by its own regulations. Those regulations determined important factors such as criteria for membership, guidelines for lawmaking, and hierarchy within the tradition.

Due to the cumulative and dynamic character of this tradition, it is difficult to study particular concepts in isolation. Because concepts do not exist in a vacuum, they can only be understood in particular contexts. Analyzing the concept of custom in the Islamic legal tradition, therefore, entails the study of other related concepts within the tradition, and ultimately, the study of individual concepts sheds light on the development of the entire tradition.

Custom and Religion

The relationship between custom and religion is as old as religion itself. One of the primary goals of religion, in the Abrahamic prophetic tradition, is to combat the erroneous practices and customs that conflict with its core principles and teachings. In its constant struggle against later accretions,
religion is constantly in need of renewal and reform to regenerate itself and to preserve its pure essence. The famous historian of religion, Friedrich Max Müller, notes:

If there is one thing which a comparative study of religions places in the clearest light, it is the inevitable decay to which every religion is exposed. It may seem almost like a truism that no religion can continue to be what it was during the lifetime of its founder and its first apostles. Yet it is but seldom borne in mind that without constant reformation, i.e., without a constant return to its fountain-head, every religion, even the most perfect, nay the most perfect on account of its very perfection, more even than others, suffers from its contact with the world, as the purest air suffers from the mere fact of its being breathed.3

This dialectical relationship between custom and religion is particularly relevant in the case of Islam. Islam does not consist only of an orthodoxy that defines a certain belief system but—and even to a larger extent—as an orthopraxy that defines normative practice. Custom, by definition, relates more to actions and practices than to thoughts, ideas, or beliefs. If this holds true for the formative period of Islamic history, it also holds true for the subsequent periods, because the encounter between Islam and custom in the different regional contexts never stopped. In a sense, the history of the Islamic legal tradition can be seen as a documentation of the encounter between shari‘ah and the different regional customs. Through renewal and reform, the jurists strove to accommodate agreeable customs and combat disagreeable ones.

The primary focus of this study is the legal concept of custom and the extent to which it influenced the process of lawmaking—or, more particularly, the thinking about lawmaking—as reflected in legal theory. It is important, nonetheless, to keep in mind the distinction between the religious and legal senses of custom. These two senses may appear to be inseparable, but, in fact, their interconnectedness may account for the confusion that the term often evokes. From the religious perspective, custom is perceived as a negative construct that corrupts the original and pure essence of religion. From the legal perspective (as a legal tool), on the other hand, custom is perceived positively as a means that enables the legal system to adapt and adjust to different contexts. By incorporating custom within the larger framework of legal theory, the jurists turned custom from a rival of shari‘ah into a legal instrument that allows the legal tradition to adjust itself to different social and cultural settings. The jurists strove to balance these two considerations. On the one hand, they aimed to purify the law and rid it of the accretions that gradually crept into it over time, and on the
other, they sought to incorporate those customary elements that did not clash with the fundamental principles of the law. In other words, the jurists aimed to adjust the law to ensure its applicability, but not at the expense of its normativity.

Custom and the Problem of Definition

In dealing with a loaded and historically rich concept such as custom, it is important to start by separating its different meanings. Custom as a social norm is probably the most obvious meaning of the term. All societies, past and present, develop common normative systems as well as criteria that govern their interpretations and applications in terms of acceptability and unacceptability. Common values and practices derive either positive or negative connotations from the normative system of the society. This notion of normative system comes close to the concept of *urf in the Islamic legal tradition. The juristic discussions on the concept of *urf can be seen as an effort to determine the criteria that characterize a “good” custom within the Islamic legal system. This collective meaning of custom may be contrasted with its individual counterpart. Custom as an individual norm refers to the habits that an individual acquires or develops. Custom in this sense corresponds with the Arabic term *âdah, which is often translated as “habit.” As the subsequent discussion explains, the relationship between *âdah and *urf cannot always be reduced to the difference between the collective custom and the individual habit.

We can distinguish at least three main domains within which custom was used in the Islamic intellectual tradition: the philosophical domain, the theological domain, and the legal domain. In both the theological and philosophical discussions, custom was used as a universal norm that includes the fixed or semifixed laws governing the entire universe and the human experience of it. In this context, we can distinguish two different meanings of custom. The first refers to a natural or cosmic norm that regulates the relationships between the different components of the physical world. According to the divine plan, the universe is designed to follow regular and recurrent laws that, in turn, account for the order people observe in the different natural phenomena. The second refers to a universal moral code that governs human relationships, in spite of the numerous variations suggesting otherwise. The Qur’ân repeatedly invokes the concept of *summat Allah (God’s way), which neither changes nor alters. It includes, for example, provisions that emphasize justice, mercy, and moderation, and guard against injustice, cruelty, and excess. Muslim jurists argue that
shari‘ah embodies this universal moral code and seeks to infuse it into the legal rulings on the different substantive issues.

Muslim theologians sought to address the philosophical questions from the Islamic point of view. They employed the concept of custom in their investigation of various questions of metaphysical and natural philosophy. For example, the concept of custom is associated with the concept of nature; accordingly, nature does not function on its own and in accordance with its own independent laws. It is, rather, created by God, and our experience of it is based on the custom that he instituted and that he can break at will. Similarly, custom is used in theological debates on important issues such as divine existence, the need for prophethood, and the scope of religious responsibility (taklif), among many others. I explore this point further in chapter 3.

Within the legal domain, we can distinguish at least three ways in which custom was used. The first is custom in substantive law, used to signify concrete examples of regional and temporal variations. This includes what the jurists used to refer to as linguistic convention (‘urf qawli) or practical custom (‘urf ‘amalî). The second is also in substantive law, used in comparison with the other two categories of devotional deeds and transactions. The category of custom in this sense, ‘ādāt, consists of the regular human actions that are not, in themselves, associated with legal prescriptions. Custom here refers to a wide array of activities that the individual undertakes by virtue of being human, such as eating, drinking, or sleeping. In principle, custom in this sense falls under the category of mubah (allowed), unless strong evidence proves otherwise. The third, and most important sense, is custom as an abstract tool in legal theory. It is in this sense that the concept was used to educe the numerous examples of customary practices in substantive law. In this study, the term custom is used primarily to refer to this last sense.

The Purpose of the Study

The treatment of custom in legal theory is particularly important for its direct connection with the critical issue of social change. Jurists used this generic concept to account for different regional practices from the perspective of shari‘ah and its sources. Custom (referred to as ‘urf or ‘ādah) in this sense is a neutral concept; it is not intrinsically antithetical to shari‘ah. It does not, by itself, carry either a positive or negative connotation. This also means that, in principle, shari‘ah neither condones nor condemns custom. In order for such determination to be made, the custom in question
needs to be analyzed and scrutinized in the light of the general principles of shari‘ah. Eventually, the jurists developed systems of evaluation that defined the conditions and criteria for such determination. Arguably, customs could be studied as an evaluative measure of the legal system’s tolerance for change and flexibility to adapt to different contexts over time.

The study of custom is also important for its rich interpretive potential. Custom offers an illustrative example of a crucial dynamic that connects legal theory (usūl al-fiqh) and substantive law (furū‘ al-fiqh) in the Islamic legal tradition. I refer to it as the “abstraction factor.” As the discussion below illustrates, this factor was not limited to the concept of custom but was also critical for the development of other important concepts in legal theory, such as ījmā‘ and īstiḥāṣān. The abstraction factor governs the development of a certain concept out of countless concrete examples of real-life incidents, questions, or events. When the jurists repeatedly encounter a particular theme either in their own investigations or in similar precedents, they abstract the common features in those questions into principles that can be easily extrapolated without the need to refer to particular examples. The payment of a dowry, for example, is one of the conditions of a valid contract of marriage. Different procedures developed in different places to fulfill that condition. It may be paid at the conclusion of the contract in full or may be paid in two or more installments, depending on the customary practice in a particular region. Similarly, it may be paid in cash, gold, or other valuable items. While the condition (payment of dowry) itself does not change, its application may vary depending on the common custom in particular contexts. These varying practices were incorporated under the abstract legal tool of custom or ī‘urf.

The concept of custom also serves as an indicator of the different roles that Muslim jurists assumed. As explained in subsequent chapters, Muslim jurists saw their primary task to be adapting their social contexts to the guidelines of shari‘ah. At the most elemental level, shari‘ah stands for God’s way, which Muslims believe provides guidance on different aspects of human behavior. The history of the concept of custom offers numerous concrete examples of how the jurists strove to accomplish this goal, both when shari‘ah supplied clear instructions and, even more importantly, when it did not. Tracing the history of the concept of custom can thus reveal the jurists’ understanding of both shari‘ah and shari‘ah-based rulings.

Researchers have grappled with the exact definitions of the two terms of shari‘ah and Islamic law and whether they are synonyms. For the purpose of the present context, shari‘ah is used to refer to the divine instructions of legal import that are embodied in divine or divinely inspired texts. Islamic law, on the other hand, is used to refer to the human articulations of these
instructions, as expressed by Muslim jurists. Islamic law, therefore, corresponds more to *fiqh* than to *sharī'ah*; it aims to approximate *sharī'ah*, but it is never its literal expression. While Muslims believe that *sharī'ah* is divine, the law remains human because it is the product of a legal theory that is human in every sense of the word. Nonetheless, in view of its connection with *sharī'ah*, Islamic law is believed to be anchored in divine guidance. As such, it not only aims to regulate human affairs but also to adjust them in accordance with the divine expectations. Divine revelation, as a carrier of religious truth, is perceived as an ultimate source of guidance. Humans, therefore, are expected to submit to its authority even if they fail to understand or rationalize its commands fully. Custom, on the other hand, lacks such unquestionable authority. It is rather an expression of social and cultural norms whose normative value remains always in need of additional validation by either legal or religious sanction. Therefore, the dialectic relationship between custom and *sharī'ah*, as manifested in different discussions and debates, remained fundamentally marked by one particular tension. This tension had to do with custom’s precise role in guiding, constructing, and reconstructing the *sharī'ah*-based laws.

But if Islamic law, through its emblematic connection with *sharī'ah*, claims a divine origin, the question of the role and the extent of human agency becomes pertinent. After all, human agency is indispensable for the interpretation, construction, and application of divine commands. Similarly, if Islamic law claims continuity over time, several questions arise about the feasibility of maintaining such continuity on the basis of fixed texts. Religious norms imply fixity, permanence, and immutability. Human law, on the other hand, implies change, flexibility, and temporality. The historical development of the concept of custom is a significant starting point for clarifying several dynamics within the Islamic legal tradition, such as the relationship between the divine and the human, the fixed and the changing, and the goals and means.

This study seeks to trace the evolution and development of the concept of custom in the Islamic legal tradition with a special focus on legal theory (*usūl al-fiqh*). The conventional narrative, both by Muslims and Orientalists, indicates that by the fifth century AH (eleventh century CE), the Islamic intellectual tradition in general and the legal tradition in particular had entered into a long phase of *taqlīd* (blind imitation). Building on the findings of recent scholarship, I demonstrate that, although it is true that the main configurations of the Islamic legal tradition in terms of intellectual currents and major schools of thought were developed prior to the fifth century AH, the creative engagement with this tradition did not simply die out after this period. Close examination of the treatment of the concept of custom in the works of major legal theorists, such as al-Shāfi‘ī,
al-Shirāzī, al-Juwaynī, al-Ghazālī, Ibn ʿAbd al-Salam, al-Qarāfī, and al-Shāṭībī, should reveal that it was used as an important medium through which they negotiated the divide between legal theory and practice as they continued to reconstruct the legal tradition for their own respective contexts. Through their works and careers, these legal theorists, among others, represented major turning points in the history of the legal tradition. They were able to achieve major breakthroughs only after studying, absorbing, and synthesizing the contributions of their predecessors, particularly how these predecessors were able to adjust the law to their own social contexts. The incorporation of the concept of custom within the shariʿah paradigm reveals that the jurists did not treat shariʿah as a theoretical enterprise that was meaningful only for the elitist culture of sophisticated scholars. It was rather the cornerstone of the only system of justice that Muslims knew up until at least the eighteenth century. The history of the ideas and theories related to custom should illustrate the interrelationship between theory and practice in the Islamic legal tradition as reflected in the different legal genres.

In studying past ideas, one has to guard against the influence of the present. One has to insure that in studying these ideas, he or she is not projecting modern understanding and sensibilities on the past; one should seek to understand such ideas in their own context and avoid anachronistic constructions. But since history is always written in the present, it seems impossible to escape the influence of the present completely. Nonetheless, one has to be aware of this dilemma and consider the motives that drive one’s work. In this vein, one may wonder why we should study the development of the concept of custom in the Islamic legal tradition. In a way, this question applies to the study of historical phenomena in general. Without a deep grasp of history, it would be difficult to understand or explain the present. This is particularly important in the case of literary traditions, where authority is constructed around important texts and the communities of interpretation that produced these texts. Within each tradition there are a number of key ideas on which most of the debates are constructed. The present study seeks to illustrate that custom was one of the concepts that formed the deep structure of the Islamic legal tradition.

But the study of the concept of custom is not only important for understanding the history of the Islamic legal tradition; it is equally important for understanding its reconstruction in the present. For example, the issue of custom offers useful insights about the development of the Islamic legal tradition by illustrating the different phases any legal system undergoes. Once a strong and coherent theoretical framework has been established,
the later phases consist mainly of constant adjustment of this theoretical framework to the changing social and historical contexts. The history of the concept of *urf, therefore, can reveal the different complexities, nuances, and subtleties involved in such adjustments. Similarly, this history points out the significant role of the interpretive communities of the jurists in maintaining and preserving the Muslim juristic idiom and facilitating communication within a single integrated framework. One might refer to this dynamic as a flexible duality; that is, reliance on the fundamental principles at the core of the tradition that gives it its unique identity and openness towards other inductive or deductive methods that address the microlevel changing details.

Studying the issue of custom can also serve as a significant starting point for understanding the impact of Western cultural modernity on the later phases of the Islamic intellectual tradition in general and the legal-jurisprudential tradition in particular. This is mainly exemplified in the modern movements of legal reform and codification that emphasized the role of custom in the process of lawmaking. Through these reform projects, custom not only ceased to function under the auspices of shari‘ah, but it became its competitor. The roots of this paradigm shift go as far back as the roots of Western modernity, where a new understanding of religion began to dominate Western thought and those who came under its influence. According to this new understanding, custom not only impacted religion, but it was the root of religion itself. This explains the approach the early Orientalists took in their works on the Islamic legal tradition. Once again, we see that the concept of custom is inextricably linked with the notion of religion: the attitude toward one would definitely impact the attitude toward the other.5

Consequently we may distinguish two main attitudes or “views of the world” towards both religion and custom. On the one hand, we have the materialist, atheist view, which ascribes the controlling powers of this world to the internal and independent natural laws of causality. It does not take any theistic or transcendental considerations into account. According to this view, God is non-existent, dead, or simply disinterested in the micro or even macrolevel details of this world. Here, custom is identified with the concept of nature, in the sense of nature’s consistent and recurrent patterns.

On the other hand, we have the theistic view of the world that presumes the existence of an all-knowing and omnipotent creator. According to this view, custom is conditioned by the limitations set by this creator. Of course, these two views represent the extremes of the continuum of faith, with many others in between. Keeping in mind that Islam not only
consists of an internal belief system, but also includes regulations that bear on the external sphere, it is easy to understand why Muslim jurists always spoke of custom as a secondary rather than a primary source of law. It also helps explain the tension that Muslim jurists were constantly grappling with between the divine will—as manifested in the founding texts—and the changing sociohistorical contexts. Conscientious jurists have been driven by the motivation to balance fidelity to the ideals of their faith with pressure to accommodate change. The history of the concept of custom in the Islamic legal tradition captures this challenging undertaking like no other.

The Thesis

The sources of Islamic law consist of two primary sources (the Qurʾān and the Sunnah of the Prophet), two procedural sources (juristic consensus and analogical reasoning), and a number of inductive sources including juristic preference, interest, and custom, among others. These sources are tied together in an ordered and hierarchical relationship. Within this hierarchical order, custom can be a source of law as long as it does not conflict with a higher source. The place of custom in Islamic legal theory, however, is not limited to the question of the sources. Custom permeates the various stages of the legal process. For example, the role of custom is crucial to the interpretation of the textual sources, the determination of their significance, and their scope of application.

In Islamic legal theory, the relationship between reason and revelation is not rigidly linear. It is rather dynamic and two-dimensional with reality (actual practice) as a necessary intermediary element. In inspiring reason, revelation is grounded in reality; in examining revelation, reason is informed by reality. In the former, reality is anchored in the ever significant experience of the Prophet and in the latter, it derives from the particular context of the reader.

The study of the diachronic development of custom as an abstract tool in legal theory reveals that it originated in the two primary sources of the Qurʾān and the Sunnah of the Prophet. Up until the fifth century AH (eleventh century CE), two parallel sources influenced the development of the concept. The first was the many cases in substantive law derived from the normative example set by the Prophet himself as well as the succeeding generations of legal authorities. These normative practices served as models that the following juristic communities of interpretation continued to invoke and reinforce. This is particularly evident in the different