

**The Importance of Considering Custom (‘URF/‘ĀDAT)  
In Issuing Fatwa (IFTĀ’)**

**In Ibn ‘Ābidin’s *Sharḥ ‘Uqūd Rasm al-Mufti\****

**Keperentingan Menimbang Adat (‘URF/‘ĀDAT)  
Dalam Mengeluarkan Fatwa (IFTĀ’)**

**Dalam Ibn ‘Ābidin’s *Sharḥ ‘Uqūd Rasm al-Mufti***

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**Abstract**

It is necessary for a Muftī to know the custom (‘urf/‘ādat) of his people and place. Non awareness of custom will result in mufti’s fatwa not being at par with the problems and demands of the developing societies. This paper emphasizes the important role custom plays in *sharī‘ah*, essentiality of its knowledge for the jurists/muftis, and its significance in issuing fatwa (*al-iftā’*), while referring to the translation of Ibn ‘Ābidin’s *Sharḥ ‘Uqūd Rasm al-Muftī (Commentary on Muftī’s Manual)*. The paper finds that there is no way out for a mufti to issue a *fatwa*, while ignoring the custom of his time. *Fatwa* is a tool for the evolution of *sharī‘ah* in dealing with the evolving worldly affairs, and guarantees the most suitable solution in changing circumstances, provided that the custom of the people are taken into consideration.

**Keywords:** Custom (‘urf), Habit (‘adat), Fatwa, Muftī, Iftā, Specification (*takhiṣṣ*), Legal Text (*al-naṣṣ*).

**Abstrak**

Ia adalah satu keperluan untuk Mufti mengenalpasti adat (‘urf/‘ādat) orang dan tempatnya. Ketidaksedaran adat akan menyebabkan fatwa yang dikeluarkan mufti tidak setaraf dengan masalah dan keinginan negara yang membangun. Kajian ini menekankan

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kepentingan peranan adat dalam *sharī'ah*, keperluan ilmunya bagi mufti untuk mengeluarkan fatwa (*al-iftā'*) sambil merujuk kepada terjemahan Ibn 'Ābidin's *Sharḥ 'Uqūd Rasm al-Mufti*. Kajian ini mendapati bahawa tidak ada cara lain bagi seorang mufti untuk mengeluarkan fatwa tanpa memahami adat pada masanya. *Fatwa* adalah satu alat untuk syariah dalam menangani urusan duniawi yang berkembang, dan menjamin penyelesaian yang paling sesuai dalam mengubah keadaan, dengan syarat adat rakyat dipertimbangkan.

**Kata Kunci:** Adat ('urf), Adat ('adat), *Fatwa*, *Mufti*, *Iftā'*, Spesifikasi (takhiṣīṣ), Teks Perundangan (al-naṣṣ).

### Introduction

As communication breakdown between individuals and organizations lead to conflict and misunderstanding, similarly a mufti's non-awareness of norms and customs of his time and place lead to mismatch between fatwa and recent arising matters of the people. This paper is highlighting the reasons why scholars ('ulamā'), *sharī'ah* advisors, and *sharī'ah* committees should consider the custom of their contemporary time when they are drafting fatwa or legal resolutions. The paper discloses the crucial role custom beholds in issuing-fatwa (*iftā'*). For a substantial discussion, the paper includes the five essentials of custom Ibn 'Ābidin illustrated in one of his treatise *Sharḥ 'uqūd rasm al-mufti*. This is an extensive work of the 18<sup>th</sup> AD/13<sup>th</sup> AH century Ottoman mufti of Damascus on principles of issuing fatwa. The work includes detailed guidelines and principles required in drafting fatwa. One of these requirements Ibn Abidin deliberates is recognizing the custom of people and place. He expressed this in the following two chaplets:

*Wa al-'urf fi al-Shar' lahu I'tibār*

*Lidhā 'alaihi al-hukm qad yudār*

(And custom in *sharī'ah* law possesses consideration)

(Because of which on it legal norms sometimes turn)<sup>1</sup>

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\* This is a revised version of a chapter from the author's doctoral dissertation. The dissertation is a complete translation and analysis of *Sharḥ 'uqūd rasm al-mufti*.

<sup>1</sup> Mohammad Amīn Ibn 'Ābidin al-Shāmi, *Sharḥ 'uqūd rasm al-mufti* (Islamabad: Maktabah Bayt al-Qalam), 80.

### Definition and Reconciliation between the Terms “*Urf* (Custom)” and “*Adah* (Habit)”

There are two definitions of the terms *custom* and *adah* in *Sharh ‘uqud rasm al-mufti*. First definition is quoted from Ibn Nujaym’s *al-Ashbāh wa al-Nazā’ir*:

Custom are those recurring matters which become deeply-rooted into the life of the people, compatible to the rationale of the sound natured people.<sup>2</sup>

The second definition is quoted from a commentary of *al-Ashbāh wa al-Nazā’ir* Ibn Abidin refers concisely as “Commentary of *al-Biri*”. This is a work of Ibrahim Ibn al-Husayn al-Biri (d. 1099AH) entitled ‘*Umadat dhawi al-Basai’r*.... Al-Biri defines both terms as:

“The custom (*al-‘urf*) and habit (*al-‘ādah*) are matters which become deeply-rooted in the hearts of the people rationally, and sound natured people receive it with acceptance.”<sup>3</sup>

The two definitions presented here do not differentiate between the term *custom* and *habit*. Both have to be rational, recurring, deeply rooted into the life of people and received with acceptance by sound natured people. However Amir Badsha in his commentary of *al-Taḥrīr* known as *Taysir al-Tahrir* stated that: “The term *habit* is the recurring matter with no rational connections.”<sup>4</sup> This draws a distinction between the two terms in terms of having a rational connection. *Custom* is always parallel to rational while *adah* does not require any evidence and rationality to collate into lives of people. In order to reconcile this apparent inconsistency be-

<sup>2</sup> Ibn Nujaym, *Al-Ashbāh wa al-Nazā’ir fī al-Fiqh al-Ḥanafī* (Karachi: Qadimi Kutub Khana, n.d.), 79.

<sup>3</sup> Ibrahim Ibn al-Husayn Ibn al-Biri, ‘*Umadat dhawi al-Basai’r li Hill Muhimmat al-Ashbah wa al-Naza’ir*.

<sup>4</sup> Muhammad Amin Amir Badsha, *Taysir al-Tahrir* (Beirut: Dar al-Fikr, n.d.), vol. 1, 317.

tween the definitions of *custom* and *adah*, we have to divide the recurring matters in peoples’ life into two stages, the early and the later. In the early stage people create a rational connection in a practice they want to apply for the rest of their life. They have to arbitrate with the rational acceptance in order to perfect that practice. After recurring of this practice for a while in their life attention is not given to the rational connection like before. The practice start to resemble body reflexes which does not wait for the brain to send a signal. So the early stage of the recurring matters is denoted as *custom* and the later stage as *habit*.

To surmise the definitions and synthesis it, we would say that custom denotes “a practice characteristic of a society or social group” derived from the Latin *suescere* meaning to be accustomed or to be used to. The Greeks use the term *ethnos* rooting from *ethos* meaning “a group of people accustomed to live together, a nation.”<sup>5</sup> In Islamic Law, “custom (‘urf) and habit (‘adat) are that which become constant in the people compatible to their rational and received with acceptance by the people considered to be of good nature.”<sup>6</sup> In every period of time, people tend to use various methods to regulate their social and financial behavior or conduct towards each other. At certain point, they mutually agree on a specific method and start to consider it as correct and appropriate, rectifying every matter on its basis. Such customs and habits are considered as sources (*uṣūl*) in Islamic jurisprudence, as the Prophet—peace be upon Him—said, “What Muslims behold as good is good before Allah”. In other words customs are only those, which are “sound and reasonable”

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<sup>5</sup> Robert H. Winthrop, *Dictionary of concepts in cultural anthropology*, (New York: Greenwood Press, 1991), 70.

<sup>6</sup> *Al-‘Urf wa al-‘ādah mā Istaqarra fi al-nufūs min jaht al-‘uqūl wa talaqat hu al-tibā‘ al-salīmah bi al-qabūl*. Mohammad Amīn Ibn ‘Ābidin al-Shāmi, *Majmū’ah rasāil Ibn ‘Ābidin*, (Beirut: Dār Ahyā al-Turāth al-Arabi), 112, vol. 2.

and practices that are devoid of benefit or “which partake in prejudice and corruption” will not be included in the definition of *‘urf*.<sup>7</sup>

### Recognition of *Custom* and Its Arguments

Ibn Abidin presented a textual (Qur’an and Sunnah) based argument for the recognition of *custom* in Islamic jurisprudence and a practical argument i.e. wide spread usage (*isti‘mal*) of *custom* by the jurists in their juristic works. He referred to al-A’raf (7: 199): **“Hold to forgiveness; command what is right (*al-‘urf*); but turn away from the ignorant.”** This is not a very strong argument for *custom* because the word *al-‘urf* in the verse connotes various meanings such as “professions of the faith, that which people consider good, that which is familiar and known, and *‘urf* in the sense of custom.”<sup>8</sup> Ibn Abidin disclosed this argument with the words “some scholars argued (*qala ba‘du al-nas*)”. This shows that he himself was not very confident with this argument. Despite this he presented the verse as an argument because there seemed to be a correlation between the Qur’anic concept of *‘urf* (right or good) and the legal concept of *custom*. Both are compatible to the rationale and acceptable by the sound natured people. The literal and the technical connotations are in harmony.

As for the Sunnah, Ibn Abidin referred to Ibn Nujaym’s argumentation based on a report:

“The sixth maxim: The *habit* is a judged matter (*muḥakkamah*). Its foundation is the prophet’s announcement: **“What Muslims deem to be good is good in the sight of Allah.”**<sup>9</sup>

<sup>7</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2<sup>nd</sup> edn. (Kuala Lumpur: Ilmiah Publishers, 1999), 283; Imam Muhammad Abu Zahra, *Usūl al-Fiqh* (al-Qāhirah: Dār al-Fikr al-Arabi, 1928), 216.

<sup>8</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 292.

<sup>9</sup> Ibn Nujaym, *Al-Ashbāh wa al-Nazā’ir fī al-Fiqh al-Ḥanafī* (Karachi: Qadimi Kutub Khana, n.d.), 93—94.

Ibn Abidin refuted this argument on the basis of the transmission of this report. He stated that it appears to be a statement of the companion Ibn Mas'ud and not connecting to the Prophet peace be upon him.<sup>10</sup> Ibn Abidin's style of presenting and disapproving the textual argument shows that the verse and the report are not suitable to be used as direct argument for the recognition of *custom*. Hence these are indirect arguments. The direct argument for the recognition of the *custom* is the practice of the jurist-consuls. They referred to *custom* in so many arising matters that it secured the position to be a source of Islamic jurisprudence (*usul*). In relation to this Ibn Nujaym wrote:

You should know that *habit* and *custom* are considerable; many *issues* refer to it to the extent that the jurists made it a principle. They say: the real [meaning of the words] will be abandoned because of the meaning indicated by the peoples' usage (*al-isti'māl*) and their *habit*.<sup>11</sup> The *habit* is only considerable if it was uninterrupted and dominant. Basing on this the jurists in the *issue* of sale (*al-bay'*) say: "if a person sold in exchange of dirhams or dinars in a place where the currency, monetary system and marketability is something else, his sale will be turned over to the dominant currency of the place. *Al-Hidāyah* said: "this is because the currency is dominantly known by the people, so *sale* in simple currency will be turned over to the latter." In *Sharḥ al-Bīrī* it is quoted from *al-Mabsūt* that: "something established by custom is like established by the *text*."<sup>12</sup>

This is very much evident today. People in the market and shopping malls in Kuala Lumpur or any other place in the world buy and sell

<sup>10</sup> Ahmad Ibn Muhammad al-Hamawi, *Gumz 'Uyun al-Basai'r Sharḥ al-Ashbah*, vol. 1, 295.

<sup>11</sup> Ibn Nujaym, *Al-Ashbāh wa al-Nazā'ir*, 93—94.

<sup>12</sup> *Ibid.*, 95. To further support the practice of the jurist-consul, Ibn Abidin presented specimens of legal issues that were based on custom. A list of these issues from *Sharḥ 'uqūd rasm al-mufti* is provided in the appendix for reader's reference.

using the dominant currency of the place. If the contract is concluded without mentioning the specific currency, the contract is considered to be in local currency because of the dominant practice of the people. Similarly when deals are made with overseas companies, the dominant currency USD or EURO is considered to be the currency of the transaction.

Custom always had an influence in the history of legal systems of different societies, as Mahmassāni says “for custom, which preceded written law and actually fulfilled its functions before codification, still supports, interprets, adjusts, and revitalizes written law. It will still act as a link between the past and the present and between the present and the future.”<sup>13</sup> Paul Vinegradoff distinguishes custom as the fountainhead of legal observance as he writes, “it is not conflict that initiates rules of legal observance, but the practices of everyday directed by the give-and-take consideration of reasonable intercourse and social cooperation.”<sup>14</sup>

#### **Essentiality of Knowing Custom for *Muftis***

There are four reasons why a jurist/*mufti* should know customs of all time. Firstly custom is needed by the jurists and muftis to understand the sources (*nuṣūṣ*) of the *sharī'ah* by contemplating the custom of Arabs which existed in the time of revelation (*nuzūl al-wahyi*), for without that knowledge, it is impossible for them to escape from the cloud of doubt and complication<sup>15</sup>. An ancient dictum braces this notion, which says *consuetude est optima legume interpres* (custom is the best interpreter of law). To interpret and illustrate Islamic law prevalent custom of the time of revelation is most relevant as Ibn Nujaym (d. 970 A.H.) says “the rel-

<sup>13</sup> S. Mahmassani, *Falsafat al-Tashrī' fi al-Islam tr. Farhat J. Ziadeh* (Kuala Lumpur: The Open Press, 2000), 131.

<sup>14</sup> Imtiyaz Hussain, *Muslim Law and Customs* (Kashmir: Srinagar Law Journal Publications), 135.

<sup>15</sup> ‘Ādil Ibn ‘Abd al-Qādir Qūtah, *al-‘Urf; hujjiatuhu, wa athruhu fi fiqh al-mu’āmalat al-māliyah ‘ind al-Hanābilah* (Makkah al-Mukarramah: Al-Maktabah al-Makkiyah, 1997), 59, vol. 1.

evant custom to interpret the language of law is that which is contemporary to the period of revelation and not the later one"<sup>16</sup>.

Secondly: custom is needed by the jurists and the muftis while they are dealing with the manifest rulings and books related to fiqh, because every jurist deduces (*yastambitu*) only for their contemporary time according to their customs, habits, and needs. Not knowing the relation of a decision with its time will lead to obscurity in preference of more than one opinion.<sup>17</sup>

Thirdly, custom is needed by the jurists and muftis to know their contemporary events, because unless they understand their contemporary event, they cannot implement any legal norm on it.<sup>18</sup> This can be well understood when Imam Abu Yusuf (d.182/798) declared lawfulness of selling things by weighing which was previously declared for selling things by measurement (*bi al-kayl*). He made this decision because he could clearly observe the custom of selling things by measurement, was replaced by weighing.<sup>19</sup>

Fourthly, custom is needed by scholars/muftis to know the people of their time, because unless they know their people, their habits, ways of dealing, lifestyle, social behavior, transactions, dialects etc, the scholars/muftis cannot facilitate the people according to the time, place, and need<sup>20</sup>.

<sup>16</sup> *Al-'urf al-ladhī taḥmilu 'alaihi al-alfāz innamā huwa muqārīn al-sābiq dūna al-muta'akkhir*. See Riaz al-Hasan Gilani, *The reconstruction of legal thought in Islam*, (Delhi: Markazi Maktaba Islami, 1994), 186.

<sup>17</sup> 'Ādil Ibn 'Abd al-Qādir Qūtah, *al-'Urf*, 60, vol. 1.

<sup>18</sup> *Ibid.*, 69, vol. 1; Abu Zahra, *Usūl al-Fiqh*, 218-219.

<sup>19</sup> Riaz al-Hasan Gilani, *The reconstruction of legal thought in Islam*, 188; S.A.A. Rizvi, "Social ethics of Muslim shurafā in India: customary law in the fatawa of Shah 'Abd al-'Aziz Dihlawi," *Islamic and Comparative Law Quarterly*, vol. 3, no. 1 (1983): 5; Abu Zahra, *Usūl al-Fiqh*, 217.

<sup>20</sup> 'Ādil Ibn 'Abd al-Qādir Qūtah, *al-'Urf*, vol. 1, 71.



These four crucial roles played by *'urf*, projects that a scholar/*mufti* without the knowledge of *'urf* will not be able to understand the needs of the people and would be unable to build a bridge between the society and themselves. Perhaps this is one of the dilemmas of the contemporary time. Scholars and people are just like walking on single train tracks hoping to connect at one point, but after accomplishing vast distances, they still find themselves unconnected. *'Urf* is a source which can lighten the burden and looking at it through the eyes of Ibn 'Ābidin will cast more light. In his time, the Ottoman Empire went through major changes leaving scholars facing waves of new inventions and lifestyles just similar to our time trying scholars with dictates of modernization and globalization phenomenon<sup>21</sup>. In that particular period Ibn 'Ābidin used *'urf* to accommodate many of the needs of his time which can again be a great help in similar situations and circumstances.

Ibn 'Ābidin wrote a treaty on *'urf* with the topic "*Nashar al-'urf fi binā' ba'd al-ahkām 'ala al-'urf*" dated 1827, which is referred to frequently by the contemporary scholars<sup>22</sup>. Around his time *'urf* was elevated from the "periphery of legal theory" towards virtually becoming an independent source and principle in Islamic jurisprudence, especially in the legal thought of Hanafi School<sup>23</sup>. This elevation can be well pictured

<sup>21</sup> Khalil Mardam Bik, *A'yān al-qarn al-thālith 'ashar fi al-fikr wa al-siyāsah wa al-ijtimā'*, 'Adnan Mardam Bik, (Beirut: Muassisah al-Risalah, 1977), 6.

<sup>22</sup> Mohammad Amīn Ibn 'Ābidin al-Shāmi, *Majmū'ah rasā'il Ibn 'Ābidin*, (Beirut: Dār Ahyā al-Turāth al-Arabi), vol. 2, 112. Ibn 'Ābidin embodied the discussion of *'urf* in two of his thirty one (31) treaties and they are as follow:

1. *Sharḥ 'Uqūd Rasm al-Mufti*: This is his commentary of his own work *'Uqūd Rasm al-Mufti* in which he weaved seventy four chaplets relating to methodology of *iftā'*. Sixty ninth poem of this work is on *'urf*. The work is published by Maktabah Bayt al-Qalam, Blue Area, Islamabad.<sup>22</sup> The work is also known as *Sharḥ Manzūmah*.
2. *Nashr al-'urf fi binā' ba'd al-ahkām 'ala al-'urf*: Ibn 'Ābidin wrote this treaty specifically on *'urf* after the former work. As he cited at the end of the discussion of *'urf* in the latter work, that to elaborate the topic in hand extensively he wrote another treaty naming it *Nashr al-'urf*...

<sup>23</sup> *The Encyclopedia of Islam*, Edition 2000, "*'urf*".

when seen at *al-Ashbāh wa al-nazā'ir* of Ibn Nujaym Zain al-Dīn Ibn Ib-rāhim (d. 970 A.H.) in which he included a chapter on custom. One of his passages says “the reflection of *al-'ādah* and *al-'urf* is so constant on legal issues (*masā'il*) that the scholars made it a principal source (*aṣal*)”<sup>24</sup>. Now when coming back to Ibn 'Ābidin, it shows that his treatise is basically moving the work of Ibn Nujaym to upper level by giving it extensive elaboration both theoretically and practically. Usage of *'urf* as an important source in Ibn 'Ābidin's time can also be pored over when we open his *Sharḥ 'Uqūd Rasm al-Mufti*, where he wrote, “and it is important for the mufti to know the *'urf* and the situation of the people of their time, and graduated from the discipleship of a distinguished experienced teacher in its study.”<sup>25</sup>

It is significant to see a thirteenth century Hanafi jurist giving such importance to *'urf* in Islamic jurisprudence, which was not adequately explored by the earlier Hanafīs. Although, *'urf* came into picture in the time of Abu Yusuf (d.182/798), for some reason it could not strengthen its root, until the post-classical period when scholars started to confer special status on *'urf* and composed special chapters on it in legal literature.<sup>26</sup> In this vein Ibn 'Ābidin's treaties played the role of reviving and rejuvenation,<sup>27</sup> especially the passages where he discussed the essentiality of considering custom in giving fatwa (*iftā'*).

### Essentiality of Considering Custom in IFTĀ'

Ibn 'Ābidin was endowed with the position of *amīn al-fatwa/nā'ib al-mufti* by Mufti Shaykh Hussayn al-Murādi son of Mufti Ali Efendi al-

<sup>24</sup> Zain al-Din Ibn Ibrahim Ibn Nujaym, *Al-Ashbāh al-Nazā'ir* (Beirut: Dār al-Fikr al-Mu'asir, 1985), 101.

<sup>25</sup> Mohammad Amīn Ibn 'Ābidin al-Shāmi, *Sharḥ 'uqūd rasm al-mufti* (Islamabad: Maktabah Bayt al-Qalam), 84.

<sup>26</sup> Gideon Libson, “On the development of Custom as a source of Law in Islamic Law,” *Islamic Law and Society*, vol. 4, no. 2, (1997): 154.

<sup>27</sup> Wael B. Hallaq, *Authority, Continuity, and Change in Islamic law* (Cambridge: Cambridge University Press, 2001), 216.

Muradi (d.1183 A.H./1769 A.D.)<sup>28</sup>. Inquiries of issues (*al-as'ilah*) were addressed to him from different provinces (*al-bilād al-mukhtalifah*), and the locals and foreigners both harvested the usufructs of his answers. He was the authority to take refuge to on the occasions of conflict of opinions in *fatāwa* and thus achieved fame in his lifetime and after<sup>29</sup>.

Ibn 'Ābidin held this position from 1784 to 1836 (his death), which adventured under several different governors (*wālīs*). Taking this into account the impact of every new wālī was on every aspect of life which resulted change of custom as well—for custom is the method, majority of a society prefer and mutually agree upon to manage and solve their everyday life and this method will be subjected to change its shape according to the moulds of time created by their political, geographical, economical, and other situations—Legal issues based on custom required renovation on every evolution of new custom. Failure to do so was to indulge people in difficulty, a fact that Ibn 'Ābidin was well aware of. The best way to alleviate the difficulty was to entrust the responsibility of updating the custom-related issues in good hands—the qualified muftis. For insurance of this responsibility to be executed well, he jotted down five essentials in his *Sharḥ 'uqūd rasm al-mufti*, drawing attention to the importance of *'urf* and illuminating its method of usage to muftis. The essentials are as follows:

1. Importance of following recent custom
2. Importance of knowing the accepted custom
3. Observation of public interest (*al-maṣlahah*) in *al-iftā*
4. Importance of knowing the people, time and their situations (*al-aḥwāl*)
5. Observation of custom in *al-iftā* until it doesn't oppose the Islamic law (*al-shar'*)

<sup>28</sup> Ibid., 410, vol.1; Dick Douwes, *The Ottomans in Syria: a history of justice and oppressions* (London: I.B. Tauris Publishers, 2000), 109. For detail of Murādi Family in Damascus see The Encyclopedia of Islam, New Edition 1993, "al-Murādi".

<sup>29</sup> Muhammad Mutī' al-Hāfiz & Nazar Abāzah, *'Ulamā' al-Dimashq*, vol. 1, 415.

We structure each essential as a sub-heading followed by the discussion Ibn 'Ābidin made with other further necessary elaborations.

### Importance of Following Contemporary Custom

To explain this Ibn 'Ābidin posed a hypothetical question, a reasonable intellectual might appose and wrote, "If you comment", that custom changes from time to time, so if a new custom appears, which didn't appear in the previous time, is it permitted for the mufti to deflect the previous manifested legal issue (*al-manṣūṣ*) and follow the recent custom?

In answer to this question Ibn 'Ābidin wrote, "I will say, yes", because the later jurists who deflected the provided legal issues did not deflect except because of the appearing of the new custom after the time of the senior *mujtahid*. It is important for the mufti to follow his recent custom in interpreting the custom-related-words (*al-alfāz al-'urfīyah*) and also in the legal rulings which the *mujtahid* based them on the custom of his time. A mufti's switching from his custom to another is in fact following the *mujtahid* (*iqtidā' bi him*)<sup>30</sup>.

Ibn 'Ābidin came up with the mentioned question and answer to clear a misconception a mufti might be discouraged with—in opining (*fatwa*) in-contra to the opinion of his senior *mujtahids*—He cleared this misconception that giving a new *fatwa* in custom-related issues is actually in accordance with the methodology (*uṣūl*) of the senior *mujtahid*. The senior *mujtahid* came up with a legal opinion his contemporary custom required him to do so and assumed that his subsequent muftis will follow in his footsteps. It will be totally inappropriate for a mufti to follow blindly his senior *mujtahid* in custom-related issues while neglecting his people's present custom. In another way to say this is, a mufti not updating the custom-related issues is in fact opposing his senior *mujtahids'* methodology.

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<sup>30</sup> *Sharḥ 'uqūd rasm al-mufti*, 83; *Āp fatawa kaise dein*, 112.

### Importance of Knowing the Accepted Custom

Then Ibn ‘Ābidin stipulates that the above statement is only applicable if the mufti is considered amongst those jurists who own correct opinion and judgement (*ra’yu wa nazr*), and capable of recognizing the maxims of *shar‘* to an extent that he can differentiate between the type of customs on which legal ruling (*al-aḥkām*) can be based and vice versa.

Reason behind these stipulations is because previously the early scholars conditioned the mufti to be a *mujtahid*, which is absent in the present time. Thus, the least requirement for the mufti in present time is at least to be able to recognize the legal issues with its qualifications (*quyūd*) and conditions (*shurūṭ*)—which are mostly not mentioned in the *fiqh* literature because of the presumption and reliance on the understanding of the *fiqh* scholars.

Similarly it is also important for the *non-mujtahid* mufti to know the custom of his time and the situation of his people well. He should go for training under an experienced teacher in its mastery.<sup>31</sup> It is said at the end of *Muniyat al-Mufti*<sup>32</sup>, “even though a person has memorized all the books of our scholars, but when it comes to *fatwa*, he has to become a novice in order to avoid mistakes. There are many legal issues, which have to be answered according to the customs of the people—which are not apposing *sharī‘ah*”. *Al-Quniyah*<sup>33</sup> states that, “it is not permitted for the mufti and the qāḍi to opine according to the manifest ruling, while at the same time abandon the custom”. *Khazānat al-Riwāyāt*<sup>34</sup> further

<sup>31</sup> Ibid., 84.

<sup>32</sup> This is the work of Yūsuf Ibn Abi Sa‘īd Aḥmad al-Sijistāni. See *Kashf al-Zunūn ‘an Asāmi al-Kutub wa al-Funūn*, 1887, vol. 2.

<sup>33</sup> This is *Quniyah al-‘Ārif li Ḥukm al-Iqtidā bi al-Mukhālif* written by Muhammad Ibn Akram Ibn Abd al-Rahman. See *Kashf al-Zunūn*, vol. 4, 241.

<sup>34</sup> *Khazānat al-Riwāyāt fi al-Furū‘* written by Qaḍi Jakkan al-Hanafī al-Hindi from Kun Gujrat. See *Kashf al-Zunūn*, vol. 1, 702.

strengthens that a mufti will not give *fatwa* against the custom of the people of his time".<sup>35</sup>

Ibn 'Ābidin quoted these quotations to instill awareness in muftis that they will be able to answer his people's contemporary challenges and needs, only if they are aware of their people's custom. Another critical point he highlighted under the thesis of this heading is that presently because of decaying intellectual capabilities, muftis are not *mujtahids* (we may call them the *non-mujtahid* muftis). This implies that the *non-mujtahid* mufti will be in *taqlīd* of his senior *mujtahids*, giving fatwas according to their methodology.

And it is obvious that amongst the legal manifests of the senior *mujtahids* are the legal issues based on the custom of their time. Since customs are instable, the legal issue will change as custom will change. For such custom-related issues the senior *mujtahid* assumed an unwritten *uṣūl* that every succeeding mufti will keep such issues up to date according to their changing time, place and situations. To avoid inconsistency with the senior *mujtahid's* unwritten *uṣūl*, the *non-mujtahid* mufti should be at least capable enough to know the recognized custom and custom-related issues and only way to master this is to go through training under an experienced teacher.

#### **Observation of Public Interest (*al-Maṣlaḥah*) in *al-Iftā'***

Similar to the mentioned quotations are the words of *al-Ashbāh* reporting *al-Fatāwa al-Bazāziyah* that, "a mufti will give *fatwa* according to the public interest he thinks is appropriate".<sup>36</sup> To strengthen the importance of public interest in *fatwa*, Ibn 'Ābidin referred to an issue in his work *Radd al-Muḥtār (Ḥāshiyah)* that if the guardian of the murdered accuses a person not from their residential area, and two witnesses witnessed against the later person, their witness will not be accepted according to Imam Abu Hanifah and according to Abu Yusuf and Muhammad Ibn al-Hasan al-Shaybāni will be accepted.

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid. *Al-Fatāwa al-Bazāziyah* is the work of Muhammad Ibn Muhammad well known as Ibn al-Bazzār al-Kurdi al-Hanfi (d. 867 H.).

Ibn ‘Ābidin after elaborating the issue, quotes al-Sayyid al-Hamawi that the latter quoted al-Maqdisi saying, “I halt myself from issuing *fatwa* according to Imam Abu Hanifah and prohibited its publication as well, just because it may regulate general harm (*al-ḍarar al-‘āmm*)—any disobedient person who will be familiar with the Imam’s opinion will be courageous in killing someone in a place, where there is no non-resident with the confidence that the residents’ witness will not be accepted against him—for this reason I say: in particular appropriate *fatwa* is according to the two companions (*ṣāhibayn*) Abu Yusuf and Muhammad al-Shaybāni, and the legal ruling will change because of the changing time”.<sup>37</sup>

Ibn ‘Ābidin’s rephrasing of the mentioned quote under the discussion of custom in his *‘Uqūd Rasm al-Mufti* cites the relation between *maṣlaḥah* and *‘urf* in the Islamic jurisprudence of Hanafi School i.e. *maṣlaḥah* will always be subsequent (*tābi‘*) to custom. It will be assorted within the changing custom or in custom of place to place. Hence, it is important for the mufti to give *fatwa* in issues similar to the one mentioned above favoring more towards the *maṣlaḥah* of his people and he cannot understand their *maṣlaḥah*, unless he is familiar with their custom and life style.

### **Importance of Knowing the People, Time and their Situations (*a-Aḥwāl*)**

It is in *Fath al-Qadīr*, under the chapter of Fasting, “If a person fasting ate the meat stuck in his teeth, his fast will not be void and if the meat was much, his fast will be void, on the contrary Zufar<sup>38</sup> said it will be void in both circumstances”.<sup>39</sup>

<sup>37</sup> Ibn ‘Ābidin, *Radd al-Muḥtār ‘ala Durr al-Mukhtār*, (Beirut: Dār al-Kutub al-‘Ilmiyah, 1994), 319, vol. 10.

<sup>38</sup> Zufar Ibn al-Hudhayl al-‘Anbarī (d. 158/775).

<sup>39</sup> Ibn Hummām, *Fath al-Qadīr*; Burhān al-Dīn Ali Ibn Abi Bakar al-Mirgināni, *al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, (al-Qāhirah: Dār al-Salām, 2000), 311, vol. 1.

In commentary of this text the author of *Fath al-Qadīr* comments that in fact it is important for the mufti to make a sort of *ijtihād* and recognize the situation of his people case by case (*al-waqā'i*). It is well known that expiation (*al-kaffārah*) requires the sin or crime to be complete (*kamal al-jināyah*), so it is better to see the type of person in such cases. If the person is amongst those who feel aversion on himself because of such act—eating decayed meat stucked between the teeth—*fatwa* will be on opinion of Abu Yusuf, and if he is amongst those who don't feel anything because of such act, then *fatwa* will be on Zufar's opinion<sup>40</sup>.

Ibn Hummām used the notion “*ḍarb al-ijtihād*” in referring to a mufti's *ijtihād* which implicates that the mufti is not *mujtahid muṭlaq*. His *ijtihād* will be in the *uṣūl-realm* of his senior *mujtahid*. Hence the term, translated as “a sort of *ijtihād*” in this work is in the meaning of thorough research (*taḥqīq*). Khair al-Dīn Ramali in *Fatāwa Khairiyah* in footnotes of one of his *fatwas* wrote, it is compulsory for a mufti to make a thorough research before dispensing his *fatwa* blindly... hence giving *fatwa* is a important work, and a person not careful in it can only be an ignorant one (*jāhil*)<sup>41</sup>. Mufti Sa'īd Ahmad Pālan Puri translated “*ḍarb al-ijtihād*” as a level of *ijtihād*, meaning that if a mufti hasn't reached the hierarchy of *mujtahid muṭlaq*, at least he should have some spirit of *ijtihād* in his effort.

Both translations lead towards one implication and that is thorough research and enquiry of people's capacity and situations. The mufti should have a thorough knowledge of the people involved in the case he has to give *fatwa*. This can be well understood if seen at a case occurred in the *dārul-iftā* (office of *fatawa* works) of Jamia Ashrafi, Lahore<sup>42</sup>: an

<sup>40</sup> Ibid.

<sup>41</sup> Sa'īd Ahmad, *Aap Fatawa kaise Dein*, 24.

<sup>42</sup> Jamia Ashrafi is an Islamic University in Lahore founded in the days of Pakistan-India separation. It offers courses in Quran, Sunnah, Fiqh and other disciplines. Beside this it has a *daru-iftā* headed by then Mufti Hamidullah Jan. The Jamia caters the answers for the *istiftā* coming from all around Pakistan and overseas.



*istiftā* (question-letter) came from the state of Peshawar asking the amount of zakah due on their annually harvested crops. The *dārul-iftā* posted the answer to the *mustaftī* (person asking the mufti) simply saying one twentieth (*niṣf ʿushr*) of his harvested crops. Two days after sending the *fatwa*, the mufti realized that they have given the *fatwa* according to Punjab state—farmers use irrigation to water their farms which is considered as *maʿūnah* (relief) which reduces the agricultural zakah to one twentieth—while the farmers in Peshawar, water their farms using rain water, which disqualifies them from the *maʿūnah* leaving them with the original amount due (one tenth). The sent *fatwa* was called back and a new according to the area of the *mustafti* was sent.

Such miscalculations occur when the situation, capacity and the area of the people are not well researched and enquired before dispensing a *fatwa* for their arising issues. Ibn ʿĀbidin well aware of such slip-ups recommended the muftis to do their home-work well prior to dispensing their *fatwas*.

#### **Observation of Custom in *al-Iftā* Provided it does not Oppose the *Sharīʿah***

It is important for the mufti and the qāḍi to know their people and their custom. The jurists said, “He who doesn’t know the people of his time, is ignorant”<sup>43</sup>. Strengthening this is the statement of scholars who said that issues related to *qaḍā*, *fatwa* should be given according to Abu Yusuf because he had experience of many cases, and knew the situation of people. Similar to this statement are the words of al-Kurdari in *Baḥr al-Rāʿiq* regarding Muhammad al-Shaybāni that the latter used to go to the dyers asking about their latest trades and dealings amongst themselves.<sup>44</sup>

Ibn ʿĀbidin chose these quotations to support his heading that muftis should follow the example of Abu Yusuf and Muhammad in knowing

<sup>43</sup> “*Man jahila bi ahl zamānihi fa huwa jāhil*”

<sup>44</sup> Ibn ʿĀbidin, *Sharḥ ʿuqūd rasm al-mufti*, 86; Saʿīd Ahmad, *Āp fatawa kaise dein*, 119; *Baḥr al-Rāʿiq*, vol. 6, 445.

thoroughly their people's custom before making any decisions in Islamic Law. The only moment when the mufti should not give attention to his people's customs is when their custom is in opposition of *sharī'ah* (eg. *Al-ribā*).

Then Ibn 'Ābidin quoted: the scholars in the legal issue—if a land owner grows something which is considered low quality (*adnā*) while the land has the capacity of growing high quality crops (*a'lā*), he is subjected to pay tax of high quality (*khirāj al-a'lā*)—say that this ruling will be beared in mind, but not issued as a *fatwa*, so that a tyrant leader doesn't become insolent in confiscating the wealth of the people.<sup>45</sup>

This theory is objected in *al-'Ināyah Sharḥ al-Hidāyah* that how come it is legal to conceal a legal ruling? Even if the high tax is charged, it will be right in its place, because at the end of the day payment of tax is compulsory (*wājib*). The objection later is answered that if this *fatwa* is issued, the tyrant leader will apply it in all types of land (e.g. this land used to grow saffron, so tax of saffron should be paid) and this will be inequity and aggression.<sup>46</sup>

*Fath al-Qadīr* further strengthens this answer that this ruling will not be issued as *fatwa* because in it is possibility of a tyrant leader's dominion on the wealth of Muslims. He will claim that land of so and so is capable of growing saffron or something similar to it. Once this inequity and injustice will start, correcting it will be headstrong.<sup>47</sup>

Ibn 'Ābidin after unveiling these quotations concludes that if muftis and qādis kept on holding fast to the manifest legal rulings (*zāhir al-manqūl*), leaving the custom and explicit contexts aside, ignoring the situation of people, it will only result in loss of many rights and injustice to the people.<sup>48</sup>

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid.; *al-'Ināyah sharḥ al-hidāyah*, 285, vol. 5.

<sup>47</sup> Ibn 'Ābidin, *Sharḥ 'uqūd rasm al-mufti*, 87; Sa'īd Ahmad, *Āp fatawa kaise dein*, 119; Ibn Hummām, *Fath al-Qadīr*, 285, vol. 5.

<sup>48</sup> Ibn 'Ābidin, *Sharḥ 'uqūd rasm al-mufti*, 87; Sa'īd Ahmad, *Āp fatawa kaise dein*, 120.

### Conclusion

Ibn ‘Ābidin explained the importance of custom for a mufti to consider in his *fatwa*, with the condition that the mufti knows which custom is accepted in *sharī‘ah* and which is not. He unveiled that a mufti familiar with his people’s custom will easily be able to fence his *fatwa* with ‘public interest’ and continued that to avoid people from miss-using a mufti’s *fatwa*, the latter should know their situation accurately. Lastly he drew a barrier that the mufti in usage of custom can go up to the point until the custom is not opposing the *sharī‘ah*. Looking at Ibn ‘Ābidin’s explanation of the relation between custom and *fatwa*, it shows that utilizing custom as a source of Islamic jurisprudence is relevant for mufti in every age. There is no way out for a mufti to issue a *fatwa*, while not facing custom of his time. *Fatwa* is a tool for the evolution of *sharī‘ah* in dealing with evolving worldly affairs, and guarantees the most suitable solution in changing circumstances.

In *Sharḥ ‘uqūd rasm al-muftī*<sup>49</sup>, Ibn ‘Ābidin explains the essential theory of custom with the muftis. Here again Ibn ‘Ābidin’s explanation shows precaution; custom is a source of Islamic jurisprudence, but to avoid misuse or to extend its benefit in larger context, a jurist must be in the rank of the mufti. This is logical because custom-related issues are of a communal nature—an individual’s habit or a few people’s custom is not enough to qualify as a legal issue. The ruling should be sought from a jurist who is in the position to assess the situation of a society as a whole, and the position of the mufti is most appropriate to meet this requirement. Compared to local scholar (e.g. *imām* of a local mosque) of a small village, mufti is in a better position to judge a certain issue as custom-related. The local scholar is the first to notice a custom because of his daily interaction with the people; however, to know whether a custom is applicable to be scrutinized under the theory of ‘*urf*, the local scholar is not in a favorable position to make this decision. The issue of Balkh is a good example where the local scholars looking at the *ta‘āmul* of their

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<sup>49</sup> Ibid.

people in weaving, considered it as valid custom to specify *naṣṣ*. Later, when the other scholars, outside Balkh, saw that this was *ta'āmūl* of one place only, they did not permit the *ta'āmūl* of weavers. They could clearly see that the *ta'āmūl* of weavers didn't reach the level of *ta'āmūl* of *istiṣnā'*, which was common everywhere.<sup>50</sup>

Thus, an individual jurist prior to utilizing 'urf should consult the mufti of the area to assure the status of the custom, and whether the issue he wants to deal with is custom-related or not? In case they find it custom-related, then to avoid mistakes in usage of custom, they should thoroughly evaluate the custom to ensure that it remains within the perimeter of the *sharī'ah*.

Another important message this work delivers to the present muftis and jurists is that they should always be careful when giving *fatwa* from manifest rulings. They should be aware of the context of a legal ruling recorded in the manifest ruling and the sources of its deduction. If that legal ruling happens to be custom-related, then before applying it in today's context, a thorough research of the prevailing condition of the people and their environment must be conducted. Giving remedy of one sickness to another is not always beneficial. In the same vein, issuing *fatwa* in a present custom-related issue from a manifest ruling, which was also custom-related, might not benefit the people at large, because customs are always changing because of necessity, corruption, and the like. Issuing a custom-related-manifest ruling as *fatwa* without taking into account the conditions of the present world will only throw the people in hardship (*mushaqqah*) and harm (*al-ḍarar*), which is against the policy of the *sharī'ah*.<sup>51</sup>

<sup>50</sup> The issue of Balk is discussed in detail in chapter 3 of the dissertation. Please refer: Mohammed Farid Ali, "Custom ('Urf) as a Source of Islamic Jurisprudence in the Works of Ibn Abidin al-Shami (d. 1252/1836)" (Masters Dissertation, International Institute of Islamic Thought and Civilization, IIUM, 2006), 32.

<sup>51</sup> Wahbat al-Zuhayli, *Uṣūl al-Fiqh al-Islāmi*, (Beirut: Dār al-Fikr al-Mu'āsir, 2004), vol. 2, 866; al-Quran, al-Baqarah (2): 185; See chapter four and page 46: Mohammed Farid Ali, "Custom ('Urf) as a Source of Islamic Jurisprudence in the Works of Ibn Abidin al-Shami (d. 1252/1836)".

There are two observations in light of this work we would like to highlight. First, our contemporary developments are never ending under the influence of globalization and modernization. Custom of people and place is affected by new developments. Some might say it the other way round, that changing custom is the development. Both the custom and development have the relation of *lāzim malzūm*, meaning to say that one cannot be changed until another is changed or both travels together in the flow of time. And this makes it obvious that every new development will change the life-style of people and this is understandable, because if the people will not change their life style with the development, they won't be able to reap benefit from the new development. It is just like asking a 17<sup>th</sup> century engineer to use hi-tech equipment. Having said this, development does not pertain to infrastructure and material world only. Development also pertains to modern education, political, economic, and social systems. Adding onto these, the modern technology all together has imparted a different type of addiction to consumers. All these are creating and demanding for new customs and habits. The *sharī'ah* scholars cannot close their eyes to these undeniable customs and habits.

Another important observation is that even though Ibn 'Ābidin wrote his works on custom in the context of traditional institution of *iftā'* and *qadā'*, never the less his discussions are equally relevant to the contemporary equivalent institutions. Some of the equivalents are state mufti's office, state religious office, *sharī'ah* advisors, *sharī'ah* committees, etc.

With these observations we conclude that considering the custom of the people in giving *sharī'ah* resolutions is still important and essential as it was previously. The contemporary *sharī'ah* institutions we stated earlier have to play an important role when dealing with arising *sharī'ah*-matters. They cannot ignore the customs and habits especially those which serve peoples' need (*darūrah*) and benefit (*maṣlahah*). Grave hardship (*mushaqqah*) and harm (*darar*) will befall people, if their customs are ignored.