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The Effect of Language and Custom in Islamic Legal Theory

Mohd Daud Bakar

Abstrak

Uṣūl al-Fiqh atau metodologi hukum Islam bukan hanya prihatin terhadap hukum secara khusus, malah juga memberi perhatian terhadap persoalan-persoalan berkaitan bahasa, logik, metodologi, adat, epistemologi serta teologi. Setiap elemen di atas mempengaruhi ketetapan penafsiran hukum-hukum Syariah. Kredibiliti bahasa dalam penafsiran hukum tidak dapat dipertikaikan kerana sumber paling asasi Islam iaitu al-Qur'an dan Sunnah dianugerahkan kepada orang-orang Islam melalui bahasa, nahu serta morpologi Arab. Dari sudut lain, adat dan amalan awam berada dalam kedudukan yang sama pentingnya dengan bahasa dalam kaedah penafsiran hukum dan undang-undang. Artikel ini menghuraikan kedudukan dan kepentingan bahasa serta adat dalam penafsiran nas-nas Syarak.

This article aims to illustrate how both language and custom can affects the accuracy of legal interpretation in Islamic legal theory. The latter is generally meant as principles of *fiqh* i.e. principles of Islamic law. It is therefore a study dealing with legal theories, principles in the interpretation of legal texts, methods of reasoning and deduction of rules and other such matters.[1] By this definition, Islamic legal theory is completely different from positive law i.e. *fiqh*, since the former is not concerned with individual cases of law on their own but only with principles and proofs on which the rules of the individual cases are formulated. It is certainly, an

Islamic legal theory devised to identify and to interpret the sources in order to establish the law.[2]

In Islamic legal theory, a variety in discussions are deemed necessary to ensure that a jurist would be able to arrive at what is actually intended in the given texts or even in cases that are not textually provided. Out of these discussions I shall confine myself, however, as clearly suggested by the title of the article, to two different yet related issues or subject matters in Islamic legal theory, namely language and custom and also to the extent of which the two affect the accuracy of legal interpretation as far as human effort is concerned. More specifically, the article is particularly concerned with the problem of conflict between language, on one hand and custom on the other. This defined area of the study leads us naturally to explaining of the role of both language and custom in Islamic legal theory so that the conflict between the two can easily be understood and appreciated accordingly.

A jurist, from the Islamic perspective, is required, among other things, to obtain a high standard of knowledge of the language in which the Qur'an and the Sunnah were revealed and pronounced.[3] Hence, a legal interpreter is a knowledgeable person in classifying of Arabic words and their precise implications in addition to the methodological aspect of interpretation, called *uṣūl al-fiqh* i.e. Islamic legal theory.[4] We will see that, despite the existence of certain legal texts on a particular case for which a relevant and appropriate ruling is sought, disagreements can still arise as to the precise meaning of a word or perhaps a sentence in a legal text. Possession of a text does not mean that a disputation cannot arise.[5] This is so because, as stated by one scholar, the whole process of Muslim jurisprudence from the definition of the sources of law to the derivation of substantive rules, was a speculative effort of human intellect.[6] In other words, the law contained in the great jurists work of *sunnī* Islam is at most a human approximation, albeit a close one, to the ideal law of God.[7] Whatever the result may be, the classical Muslim jurist is obviously guided, not by intuition, but by *dalīl*, i.e. by textual evidence.[8] Every respective jurist will try to argue, for his part, that his interpretation is more reliable and accurate due to a more correct understanding of language. It is quite clear that each of the opposing groups would claim to be on the right side, which may however, turn out wrong and vice versa. Whether we agree or disagree with one of these two legal conclusions is another question, the point is that language is always used by the jurists to make their legal opinion prevail.

I will mention here a case disputed by classical jurists i.e. regarding the problem of the interpretation of a *ḥadīth* with regard to Ghaylān b. Salmā who, upon converting to Islam, asked the Prophet what to do with his ten wives, whereupon

the Prophet enjoined him to *"retain four of them and part with the others"*. The majority of the jurists interpreted the tradition to mean that Ghaylān was asked to retain four wives without having to remarry them.[9] Some of the jurists have interpreted this tradition differently by saying that this companion was asked by the Prophet to remarry four of his wives i.e. to conclude fresh contract of marriage on four of his wives.[10] Another scholar, supports the former interpretation arguing that this interpretation was supported not by one single *qarīnah* (literally represents a verbal or non-verbal element clarifying a part of speech extraneous to itself) but several. Among those is the element of 'language' that clarifies the intended meaning of the tradition. This *qarīnah*, he argues, is that the "Prophet began his injuction by uttering the word 'retain' which represents a positive command and not to part, even momentarily, with the four wives he decides to keep. Had the Prophet wanted him to divorce all of them first, and only marry four, he would have said so explicitly".[11]

The example cited above explains how language can contribute significantly towards the accuracy of legal interpretation. However, language can also bring a conflict to *fiqh*[12] to the extent that the removal of this conflict must be sought not only from language consideration but also from other elements operating in Islamic legal theory. For example, jurists disagreed amongst themselves regarding the legitimate use of *mafhūm mukhālafah* in legal interpretation. It is described as a purely linguistic argument. It stipulates that if an act is commanded, the conclusion is that any act to the contrary is prohibited. Conversely, it may be argued that the contrary of an act which is prohibited is recommended or obligatory.[13] The Prophetic statement that "*zakāt* is owed on goats which are put out to pasture" is taken by those who spoused this type of "evidence inference" to mean that goats which are maintained on fodder are not subject to *zakāt*.[14] The reverse conclusion however, is viewed by other jurists who do not regard this type of interpretation as valid.[15]

Custom is of no lesser significant than language in making legal interpretation or conclusion accurate. We need no explanation for this because texts were revealed to people who, at the same time, were adopting certain public and private usages i.e. custom. A number of texts, particularly of traditions, were based upon usages and customs prevalent at the time of revelation.[16] It is natural, when rules are based on customs, to consult those customs in the interpretation and understanding of the rules, such as in questions of blood-money.[17] In Islamic legal theory, custom although not recognised theoretically as a major source of Islamic law,[18] has been observed by the jurists as not just having played an important role in the growth of Islamic law but have always been co-existing with the law[19] since the custom is

binding and could be appealed to in settlement of disputes.[20] This statement is most evident from what is stated in Islamic legal maxims such as "custom is an arbitrator",[21] "public usage is conclusive and action must be taken in accordance therewith",[22] "that which is established by custom is equivalent to a stipulated condition",[23] "a matter recognised as customary amongst merchants is regarded as if agreed upon between them",[24] etc.

Having given this general explanation of custom, it is necessary to give the juristic perception of custom and the manner in which it is binding and authoritative. The term custom generally means that which a people or a section thereof have become accustomed to doing.[25] As far as Muslims are concerned, the custom has been defined as those recurring practices which are acceptable to people of sound nature (*'aql wa fiṭrah*).[26] One modern Muslim jurist has made this definition simpler by saying that custom incorporates both the public usages in both verbal and practice (*'ādat al-qawm fi qawl wa al-fi'l*).[27] What is of particular interest here is that custom, irrespective of the community in which it grows, occupies a significant place in the law making process and in some countries, custom is considered of prime importance in legal reference.[28]

In Islamic legal theory, however, laws are divine in terms of source of reference. Therefore, the most authoritative sources are mainly the Qur'an and Sunnah. Custom is merely one of other subsidiary sources in Islamic legal theory.[29] Nevertheless, custom is binding and authoritative particularly in cases where divine texts are absent or silent. In this case custom could be appealed to as an arbitrator in cases of dispute. Not only that, Ibn al-Qayyim (d.751A.H.), a great and notable jurist in the eight century of Hijrah, has stated that there is no objection in the change of the *ḥukm* as it accords with the change of time, place, circumstance, intention and custom.[30] Therefore, it is not surprising that the effect of custom on the change of *ḥukm* has been appreciated in the form of maxim that is "the terms of law vary with the change in the times".[31]

We have already given some maxims which explain this condition. Examples of binding custom occur frequently in the *Majallah*, i.e. the civil code of the late Ottoman Empire, as well as in books on jurisprudence. I will list some of the examples of legal maxims which I suppose, were "binding" at the time of their occurance only, unless the same custom continued to take place in recent days amongst Muslims. In the case hire contract (*ijārah*) concluded with a tailor, the latter is required by custom to provide the needle and the thread.[32] In other field of transaction, if a merchant sold a commodity to a purchaser without agreement as to

the time or manner of payment and if it was customary for merchants to obtain the price by weekly instalments, then the contract of sale should be interpreted according to this particular custom.[33]

Having contended that custom is authoritative and binding, the jurists have demanded certain conditions to be met before custom is taken as such. First and the foremost, it should be acceptable to people of sound nature i.e. reasonable and compatible with good sense and public sentiment. Simultaneously, it should not contradict any text and principle of the Sharī'ah. In other words, it cannot prohibit what is permissible and vice-versa. Accordingly, certain customs such as child adoption, transactions which involve usury and interest and the like are not accepted even though they are widely practised by contemporary Muslims. Then, custom must be of frequent and common recurrence. To this effect, article 41 of *Majallah* reads, "Effect is only given to custom where it is of regular occurance or when universally prevailing".[34] Further explanation was given by article 42 that is "Effect is given to what is of common occurrence, not to what happens infrequently".[35]

We have seen how both language and custom contribute to legal conclusion. However, sometimes we find that custom runs contrary to what is implied by the linguistic implication of a text. If this is so, surely one of them would be either superior or inferior or equal to the other. We can find an article in the *Majallah* which says, "It is a fundamental principle that words shall be construed literally".[36] However, this has been challenged by another maxim that is, "In the presence of custom, no regard is paid to the literal meaning of a thing".[37] Therefore, a closer examination of this conflict would be necessary before we can indicate our preference.

To undertake the above question, two cases in Islamic law will be brought forward. The first is concerned with *khiyār al-majlis*, i.e. option of cancellation of the sale in the contract meeting before separation. The Mālikīs are of the opinion that when a contract is completed by offer and acceptance (*ījāb wa qabūl*), both the buyer and seller are bound to all legal consequences arising from that contract. Neither has any right to repudiate that contract.[38] Imām Mālik b. Anas (d. 178A.H.), the founder of this school and resident of the city of Madīnah, justified his legal conclusion by simply saying "... there is no specified limit (*ḥadd ma'rūf*) nor any matter which is applied in this according to us."[39] This legal view is apparently contrary to the tradition of the Prophet which reads, "parties to a sale are free to change their minds so long as they have not left the meeting of the contract".[40] Mālik b. Anas has been charged by his opponent with a preference for the practice of the people of Madīnah over the language implication of the tradition. This is taken from the wording of the Prophet "the parties to sale are entitled to retract until

they separate (*mā lam yatafarraqā*)". Obviously, the wording of this tradition provides the right of cancellation or alteration of the contract provided that both parties remained available in the place where the contract was concluded.

The case clearly shows how the practice i.e. custom of the Medinese has been used to overwhelm the language implication of the tradition. Before that, the dispute also displays that there is a disagreement in giving that precise meaning of two words in the *ḥadīth* namely the meaning of separation (*tafarruq*) and two parties (*al-mutabāyi'ayn*). Mālik, in contrast to the vast majority of the jurists, viewed that what was meant by separation in this case is only separation by word.[41] Hence, as we have seen, he did not permit any party to a sale contract to change his mind after the acceptance, even if both parties were still at the place of contract. As regards, two parties, were meant by Mālik as two bargaining parties (*mutasāwimayn*) and not two parties of buyer and seller (*mutabāyi'ayn*).[42] According to my opinion, it is only to support his doctrine, that Mālik resorted to the practice of the Medinese for it reflects the continuous practice by the early Muslims in the city of Madīnah starting from the Prophet's time.

In any case, I am more inclined to accept the view expressed by some jurists that the meaning and the limitation of the word or precisely the phrase "until they separate" should be decided according to the custom prevalent at each respective city.[43] What is considered as separation in one city does not necessarily constitute the same in another city. Furthermore, this conclusion is parallel to one legal maxim which has already been cited, that of article 44 of *Majallah*, "A matter recognised as customary amongst merchants is regarded as if agreed upon between them".[44] In present days, we might find different practices in comtemporary Muslim communities towards the limitation of the meaning of separation in sale contract in which the determining point, if possible, is the existing custom in each respective community or even in each respective meeting of sale contract.

Another case to be discussed is related to the problem of theft with reference to the condition of the stolen property. Theft is one of the major crimes in Islamic law which generally means secretly taking away of another's property.[45] A thief shall be punishable by *ḥadd* (i.e. hand amputation) only when the thief fulfills certain conditions. Among other things, the stolen property should be kept in a guarded place (*ḥirz*).[46] *Ḥirz* means a place where property is kept in order that it may be away from the sight of others and safe from being taken away. Also, the guarded place or the place where the property is kept should not have been usurped from the person stealing the property. To determine the minimum meaning of *ḥirz*, the jurists disagreed in a proper place or custody in order to protect the property from being taken away illegally. In the classical books on Islamic law, some jurists have ex-

plained that, as far as a market is concerned, property is considered as guarded or kept in its custody when the owner of the property tied his property together[47] or the goods were put in their containers[48] even though this property is left outside the shop. Later jurists may require more than that to ensure that a property is actually kept in a guarded place to suit the current standard of security.

Whatever the degree of conflict between literal meaning of *ḥirz* and customary practice among the people may be, I am of the opinion that a proper and accurate meaning of *ḥirz* should be decided by or interpreted in accordance to the prevailing custom in each respective community.[49] Whatever is regarded by custom in one particular locality as fulfilling the required level of *ḥirz*, should be interpreted as such. Otherwise, we will leave this question unsolved since the language cannot offer a clear cut and binding understanding of the condition of *ḥirz*. Naturally, what is considered as *ḥirz* in one community does not necessarily constitute the same in another community. Each case should be taken into consideration the prevailing custom in each respective community.

By this elaboration, we can safely conclude that custom is not actually binding on its own but merely an element useful to add, reduce, explain, specify, define a particular statement. However, in doing so, custom is binding in the sense that its implication cannot be challenged by other elements, if any, which stand contrary to the existing accepted custom in Muslim community. In positive and substantive law, custom may play an equally varied and crucial role.[50] Consider for example the case in which a dispute arises as to whether a certain commodity was bartered for another commodity or sold for the commodity, then his word is admitted in a court of law, since the accepted mode of sale is payment, not barter. The customary practice here is itself evidence bearing upon the turthfulness of the seller (*fa al-qawl qawl al-bā'i' li quwwat qarīnat ṣidqih*).[51] Although both language and custom are two useful elements in clarifying what is actually intended by a particular text, the latter is more specific in the sense that custom is able to lend clarity to any unfixed language implication as previously shown. Should there be a conflict between the two, custom should take precedence over literal meaning[52] as long as this is in line with principles and broad objectives of Islamic law.

Notes

1. Muḥammad Khalid Mas'ud, *Islamic Legal Phylosophy*, International Islamic Publishers, New Delhi, India, n.d., p. 24.
2. *Ibid.*
3. Al-Shāfi'ī, *al-Risālah*, ed. Aḥmad Muḥammad Shākir, Egypt, 1940, paras: 143-178, pp. 44-53.
4. Al-Ghazālī, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Bulāq, Cairo, 1322A.H., reprint Baghdād, n.d., vol. 2, pp. 350-351.
5. Al-Duraynī, *al-Manāhij al-Uṣūliyyah fī al-Ijtihād bi al-Ra'y fī al-Tashrī' al-Islāmī*, Damascus, 1980, pp. 7-12.
6. Coulson, *Tensions and Conflicts in Islamic Jurisprudence*, Chicago, 1969, p. 23.
7. Bernard Seiss, "Interpretation in Islamic Law: The Theory of *Ijtihād*", In *American Journal of Comparative Law*, vol. 206, 1978, p.
8. *Ibid.*, p. 202.
9. Al-Ghazālī, *al-Mustaṣfā, op.cit.*, vol. 1, p. 390; idem, *al-Mankhūl min Ta'liqāt al-Uṣūl*, ed. Muḥammad Ḥasan Hītū, Damascus, 1980, p. 187.
10. *Ibid.*
11. Weal Hallaq, "Notes on the term *qarīna* in Islamic Legal Discourse", in *Journal of the American Oriental Society*, vol. 108, 1988, p. 478.
12. Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, Cairo, 1960, vol. 1, pp.3-6; al-Khin, *Athar al-Ikhtilāf fī Qawā'id al-Uṣūliyyah fī Ikhtilāf al-Fuqahā'*, Beirut, 1985, p. 70ff.
13. Al-Shīrāzī, *al-Luma' fi Uṣūl al-Fiqh*, Cairo, n.d., pp. 27-28; Ibn Rushd, *Bidāyah, op.cit.*, p. 4.
14. *Ibid.*
15. *Ibid.*
16. Subḥī Maḥmaṣṣānī, *Falsafat al-Tashrī' al-Islāmī* (The Philosophy of Jurisprudence in Islam), trans. By Fargat J. Ziadeh, Malaysia, 1987, p. 132.
17. *Ibid.*
18. Schacht, *An Introduction to Islamic Law*, Oxford University Press, 1964, p. 63.
19. *Ibid.*, p. 76.

20. 'Alī Ḥaydar, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkam*, Beirut, n.d., vol. 1, p. 40.
21. *Ibid.* See also the *Civil Law of Palestine and Jordan,* trans. By C.A. Hooper, Jerusalem, 1933, p. 20 (article 20) and *The Civil Code of the United Arab Emirates (The Law of Civil Transactions of the State of the United Arab Emirates)*, trans. By James Whelan & Marjorie S. Hall. London, 1987, p. 31 (article 50).
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. Maḥmaṣṣānī, *Falsafat*, *op.cit.*, p. 130.
26. Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, ed. Muḥammad Muṭī' al-Ḥāfiẓ, Damascus, 1986, p. 101.
27. Al-Zarqā', *al-Madkhal ilā al-Fiqh al-'Āmm*, Damascus, n.d., vol. 1, p. 131.
28. *Ibid.*, p. 132; Maḥmaṣṣānī, *Falsafat*, *op.cit.*, p. 131.
29. See Muṣṭafā Dīb al-Bughā, *Athar al-Adillah al-Mukhtalaf fīhā (Maṣādir al-Tashrī'iyyah al-Tābi'iyyah) fī al-Fiqh al-Islāmī*, Damascus, n.d., pp. 242-334.
30. Ibn Qayyim, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, Cairo, 1955, vol. 3, pp. 14-70.
31. 'Alī Ḥaydar, *Durar al-Ḥukkām*, *op.cit.*, vol. 1, p. 43.
32. *Ibid.*
33. *Ibid.*
34. *The Mejelle*, English translation, Law Publishing Company, Lahore, Pakistan, n.d., p. 8.
35. *Ibid.*
36. *Ibid.*, p. 10.
37. *Ibid.*, p. 8.
38. Al-Shawkānī, *Nayl al-Awṭār min Aḥādīth Sayyid al-Akhyār Sharḥ Muntaqā al-Akhbār*, Dār al-Jīl, Beirut, n.d., vol. 5, pp. 291-292.
39. Mālik, *al-Muwaṭṭa'*, ed. Muḥammad Fu'ād 'Abd al-Bāqī, Dār al-Ḥadīth, Cairo, 1993, p. 518.
40. Al-Shawkānī, *Nayl al-Awṭār*, *op.cit.*, vol. 5, pp. 290-293.
41. *Ibid.*

42. *Ibid.*
43. *Ibid.*, p. 293.
44. *The Mejelle*, *op.cit.*, p. 8.
45. Ibn Rushd, *Bidāyat, op.cit.*, vol. 2, p. 445.
46. 'Abdur Rahman I. Doi, *Sharī'ah: The Islamic Law*, London, 1984, pp. 256-257.
47. Al-Shāfi'ī, *al-Umm*, ed. M.Z. al-Najjār, Cairo, 1961, vol. 6, p. 135.
48. Mālik, *al-Muwaṭṭa'*, *op.cit.*, p. 637.
49. See Ibn Rushd, *Bidāyat, op.cit.*, vol. 2, p. 450.
50. Hallaq, Notes, *op.cit.*, p. 479.
51. *Ibid.*
52. Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir, op.cit.*, p. 101.