Conditions of a Valid Custom in Islamic and Common Laws

Hafiz Abdul Ghani
Assistant Professor of Religious Studies
Forman Christian College (A Chartered University)
Lahore, Pakistan

Abstract

This research paper highlights different kinds of customs and conditions for the validity of a legal custom in Islamic Sharī'a and common law. Both Islamic and the Western Jurisprudences have accepted custom and usages as an important sources of law. There is hardly any aspect of Islamic and English Jurisprudences where customary laws do not make their presence felt. From the individual to the international level, the use of customs in legal injunctions is a proven and undeniable fact. In social interaction, customs and usages encompass all these matters of every day life: inheritance, marriage, divorce, dowry, guardianship, adulthood, family ties, will, property, bestowal, division, religious rituals and adoption of a child. It is true that 'urf and 'ādat cannot attain the status of law unless they are supported by some political authority. But this is also a fact – and an undeniable fact – that, in the beginning, customs and usages as well as moral values acquired the status of laws.

Key Words: Custom, Usage, *'Urf , Ādat, sharī'a, Law, jurisprudence*

Introduction

Custom and usage are two technical terms of English jurisprudence which are known in Islamic jurisprudence as *'Urf* (عرف)and *Ādah* (عادہ). Literally and technically, these terms differ but in usage in society they overlap each other. In Islamic Law the definition of custom is stated as follows:

"*'Urf* or *'ādah* is (a state) which is firmly established in hearts and appeals one logically. Besides, pious natures embrace them. "[1]

Another definition is offered by 'Abd al-Wahhāb al-Khallāf:

"*'Urf* is a matter well known by the majority of the people whether it is words, some practice or some abandonment. But is does not negate any of the Book of Allāh or the Sunna of the Prophet."[2]
In common law the literal definition of custom is stated as below:

"A practice that by its common adoption and long unvarying habit has come to have the force of law."[3]

This definition points out the fact that custom is a matter accepted by the common people. Also, it has been put into practice since long. In statutory law, another phrase, to explain this concept, is "custom and usage" which is defined in these words:

"General rules and practices that have become generally adopted through unvarying habit and common use."[4]

An other definition is gives as:

"Custom in its origin is a rule of conduct, which the governed observe spontaneously and not in pursuance of a law set by a political superior."[5]

According to Halsbury:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm."[6]

According to Salmond custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.[7]

Kinds of Legal Custom

1. Kinds of custom in Islamic Law

Experts in Islamic law have divided *'urf* and *'ādat* from various angles. These divisions tell one their scope and their force as social law alongside Islamic law and the civil code. Following are the main divisions of *'urf* and *'ādat*:

(A) Division of *'urf* based on soundness and defect

Urf and *'ādat* – whether they correspond or contradict the aims and injunctions, sacred texts (ie Qur'ān and Sunna) and proofs of Islamic law – have been divided into two classes. So sometimes *'urf* and *'ādat* are valid and sometimes invalid.

Sound Custom *('urf)*

Sound *'urf* is a practice which does not go against any holy text on definitive implication of the text. Nor does it reject any good thing which *sharī'a* promotes and encourages. Also, it opens no door which leads one to the road which must be shunned according to the dictates of Islam. An expert in Islamic law, Zaydān writes about it:

"'Urf is a matter which is well known among the masses, and it does not negate any holy text (ie Qur'ān and Sunna), nor does it waste or spoil any good cherished by Islamic Law."[8]

All jurists pay heed to this kind of *'urf.* To support this *'urf,* there is always some definitive implication of the holy text. Maintenance allowance for a baby's mother is the obligatory duty of the husband. And it will be determined in accordance with his financial position because this is *ma'rūf* (usage). The Qur'ān guides us on this issue:

وَعلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ.

"But he shall bear the cost of their food and clothing on equitable terms."[9]

In this verse *ma'rūf* refers to what the father of the child can afford. At another place the Scripture enlightens us on the issue:

لِيُنفِقْ ذُو سَعَةٍ مِّن سَعَتِهِ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنفِقْ مِمَّا آتَاهُ اللَّهُ لَا يُكَلِّفُ اللَّهُ نَفْساً إِلَّا مَا آتَاهَا.

"Let him who has abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allāh has given him. Allāh asks nothing of any soul save that which He has given it."[10]

Commenting on this verse, Shaykh Ibn al-'Arabī writes:

"The Islamic law has not determined the quantity of maintenance allowance. The quantity – according to the usage (of the area) – will be decided according to the financial position of the spender (the husband)."[11]

Ibn al-'Arabī believes that Islamic law contains many injunctions which were formulated by keeping in view the customs, practices and habits of people.[12]

Invalid Custom *('urf)*

Invalid *'urf* in Islamic Law is a custom which nullifies a text of the divine law or challenges the lawfulness or unlawfulness of a thing. Such usage will not be reliable. 'Abd al-Karīm Zaydān defines what invalid *'urf* is:

"It is a practice – a well known practice – among people, but it opposes the divine law, or legitimizes something prohibited, or rejects an obligatory act, or brings about some harm, or makes an end of some beneficial purpose."[13]

Some examples of invalid custom are quoted below:

1. Money matters which involve usury;
2. Illegal activities carried out after the birth of a baby;
3. The dower money gifted to the girl by the husband is taken by the guardian;
4. Free mixing of males and females in society.

(B) Division of custom *('urf)* based on Usage:

The second division of *'urf* is based on its usage in society. Its two kinds are: *'urf* based on speech and *'urf* based on practice.

Custom based on speech (عرف قولی)

This *'urf* includes words, phrases and terms which are used in society in some special sense, although it does not comply with what dictionaries contain. *'urf* based on speech is defined as follows:

" *'Urf* based on speech introduces a certain sense of a word among people, so they – when they hear it – interpret it in just one sense. And they do not go for any other (i.e. literal) meaning."[14]

To put in the words of Mustafa al-Zarqa:

"Words and phrases which are commonly used among people, and their meanings are grasped by people by turning to context and effort by reason."[15]

These definitions establish that *'urf qawli* helps us to use and interpret a certain word or phrases the way people understand them; literal sense is not intended here. Besides, people do not differ as how certain words should be explained. An example from Urdu is the word *sharbat*. The word literally means "a drink", but now it is used for a special drink – sweet cold drink which one usually takes in hot season.

Jurists in Islamic law like Ibn 'Abidīn, hold that the sense of *'urf* qawli is definitive, specific and well known among masses. But the followers of Imām al-Shafi'ī do not share this view.[16]

Another instance of *'urf qawli* is the Arabic word *walad(ولد)*. Literally, the word means a boy or a girl. But practically people use this word for a boy only. Also, for *samak* (fish), in Arabic, the word *lahm* (meat) is not employed by people in society – although lexicon and the Holy Qur'ān have used the word *lahm* (meat) for fish:

وَهُوَ الَّذِي سَخَّرَ الْبَحْرَ لِتَأْكُلُواْ مِنْهُ لَحْماً طَرِيّاً وَتَسْتَخْرِجُواْ مِنْهُ حِلْيَةً تَلْبَسُونَهَا.

"And He it is Who has constrained the sea to be of service that you eat fresh meat from thence, and bring forth from thence ornaments which you wear."[17]

Another example is the word *dābba(دابہ)*. According to Arabic lexicon, this word refers to every animal that crawls on the earth. When we turn to usage, it is specific to animals, as Imām Amidi has written:

"The word *dābba* is specific to animals as goes custom and usage (in society), though Arabic lexicon suggests that the word is common to all the animals that crawl on earth)."[18]

An important condition for *'urf qawli* is that the sense of a word should be self-evident; no context or intellectual exercise should be employed. The same concept was given by Ahmad Fahmi.[19]

An example is the situation where a man, armed with a stick, rushes forward and issues threats to someone sying: "Today I'll not let you get away. Today I'll make an end of your life." The context bears evidence that murder is not intended, rather severe beating is meant. In like manner, it is said that such-and-such an alma mater is preaching the light of knowledge. The intended sense is not that the building of the seat of learning is responsible; it is the education that is transmitted.

In order to determine their meanings, these examples demand one to have recourse to context and intellectual effort. So these cases are not the instances of *'urf qawli*.[20]

As for as the scope of *'urf qawli* is concerned, Islamic law offers us a rule. The speech of a speaker will be interpreted in accordance with the custom and usage of his language. Even if the understood meaning runs counter to what the lexicon holds. Besides, people do not go for the literal implication of the word(s) uttered by the speaker. In order to facilitate people, jurists in Islamic law direct them in their agreements.

"The literal meaning of a certain word is abandoned because of custom, usage and habit."[21]

Dictionaries may suggest various types of contracts for a certain word. But if people practically meant a particular contract, then that meaning will be valid, and all the other meanings will carry no weight.

In the light of this principle, legal scholars have given many examples. Some of them are as follows:

If anybody takes an oath that he will not set foot in the place of such-and-such a man, its usual meaning is not entering the house. Should he enter it without setting foot (for example, he rides on an animal, a bicycle or in a wheelchair) his oath will go null and void.[22]

If anywhere a certain term is used for divorcing one's spouse, and people commonly use it for the same purpose (even if literally the term does not convey the sense of divorce) – marriage will cease to exist. As an example, during the era of Ibn 'Abidīn, men would divorce their better halves by uttering the words: "Divorce is on me." If one examines the sentence for divorce, marriage does not cease to exist. But the practice of the time allowed. So it occurred.[23]

These examples show us that the usage of society does have a say in determining the sense of words, phrases and sentences. The divine law also deals accordingly. Even if the words and their meanings are not harmonious, even if the words go against the rules of grammar, if the usage embraces it, it is valid.

Custom based on practice (عرف عملی)

Urf 'amali is a practice which people in a certain area adopt. Mustafa al-Zaraqa defines the term:
"*'Urf 'amali* is a situation where people get used to a certain way of life in their habitual and social matter."[24]

This definition contains a phrase *al-afal al-adiyya* which refers to one's habitual practices – for example – eating, drinking, wearing clothes and ploughing. Another phrase *al-muamalat al-madaniyya* points to mutual human rights and contracts.

Some examples are given below for better comprehension of the issue under discussion:

1. To buy or sell something without uttering any words which one normally uses for sale or purchase. This situation is valid. Ibn Qudama legitimized this form of purchase and sale and presented some instances.[25]
2. To facilitate people bath rooms are available everywhere. Against a fixed amount, they take a bath there. But before entering it, they do not determine as how long they will stay there, or how much quantity of water they will consume.
3. Some people get their shoes made. Generally, no amount with shoe makers is fixed beforehand; it is already fixed.
4. To pay monthly rent of houses and shops the specific custom of the are is followed.
5. After purchasing wood, coal, wheat, etc, people follow the normal custom of the area. According to the dictate of the custom, these goods may or may not be not conveyed to the home of the buyer by the shopkeeper.

6. On certain occasions, places and under some circumstances – people usually cook some specific meat, wear specific clothes and make use of specific instruments.[26]
   In-depth study of the Islamic law services as a witness that if *'urf* amali does not refute or challenge any revealed law, it will carry the weight of absolute jurisdiction and complete authority where habitual practices and social issues are concerned. Most injunctions are dealt with accordingly. In this connection some instances are produced below:
   1. If anybody sends his servant to buy vegetable or meat, and if the servant buys both of them or something else, the buyer himself will be liable. The master will not be obliged to accept the stuff, because the servant buys what does not comply with the usage of the area.[27]
2. Someone may swear on oath that he will not eat meat for a weak, and the people of the locality eat no other meal than goat's. If he eats chicken, mutton or beef, his oath will stay sound. So he will not have to make any sort of atonement.[28]
3. A husband is responsible for providing the needs of his spouse. But he will supply the things keeping in view his own financial status and the social standing of the wife and his family.[29]

   All these cases are evidences that words, phrases, sentences and terms are interpreted as the usage of the area goes. The force and significance of habit and usage is given in the words of legal scholars:

   "Decision lies with habit and usage."[30]
4. To rent a house or a shop, one tackles financial issue according to the custom of the area. Therefore, after renting such places, one moves one's luggage there. No extra contract or permission is sought for this purpose; these issues are understood.
5. When something is left with another person as trust, and it suffers damage, the level of loss will be determined as local people do.[31]

Scope of *'urf* amali in social matters

There are some social matters where local usage and practice will direct us in establishing rights or rejecting them. Usage will go void when it contradicts revealed laws. Legal scholars in some matters have declared the soundness of *'urf* in the details of some procedures, transactions and contracts.

Some instances are given in the following lines:

1. When somebody stays as a guest at his friend's home, it is permissible for him to eat or drink there, even without asking for permission. What sort of things he can use, or how much quantity he can consume – these issues will be settled in the light of the practice of the community.[32]
2. Legal scholars hold that just buying and selling in business is enough. Uttering words which one normally does on the occasion is not essential. Nowadays in supermarkets and at big general stores, people themselves choose and pick items with prices written on them, take them to the counter, pay the price and the purchase is complete.[33]
3. In purchase and sale and renting, etc, some issues are implied and understood, even if they do not come under discussion. Responsibility lies with the person, in accordance with the custom and usage of local people. In some areas, people rent out their houses or shops, and make a demand that for the written agreement the tenant will make payment.
4. A sold item goes to a buyer, and so do related things, even if they are not mentioned. If a house is purchased, its purchase will include kitchen, toilet, courtyard and upper storey as well, though these parts of building are not separately mentioned. Pertaining to this issue, the jurists in Islamic law have gone into details and laid down some principles. In all these matters, their guiding principle has been the usage of the area.[34]
   Experts in Islamic law hold that when a house is sold to somebody, the following items are not included in the sale:

Drinking water;
Passage for entering and leaving the place;
And place where water passes.[35]

But at this point ʻAllāma Ibn ʻAbidīn holds divergent views. In his legal verdict, he stressed that the fashion in the sale and purchase in his area varies. When a house is sold, the normal practice includes all the above mentioned things as well.[36]

5. In business transaction or any other sale and purchase, both parties fix the rate and deal proceeds accordingly. For the payment, the currency of the area is understood and no details are discussed. Just the currency which is normally used is intended. If, in a place various currencies are employed, then it must be settled as which currency is to be paid; otherwise the business deal will go void.[37]
6. If wages for labour, or rent for houses are not mentioned, the usual practice will resolve the issue.[38]
7. If a father gave dowry, and later on disagreement arose in that father stated that he just lent dowry, but the daughter claimed that it was a marriage gift and was her possession – then, according to the custom, the daughter's say will be respected.[39]
8. In all sorts of writings, receipts and cheques – people deal with each other according to the local usage. Writing is reliable, but if somebody writes something in the air with his finger, the contract will not take effect. The present-day custom demands us not to rely on any bones, tree leaves and skins of animals, as was the usage in the past. Besides, just signatures are sufficient; no formal verbal acknowledgement is of necessity.

Division of custom in terms of generality and specialty

With regard to practising *ʻurf*, it is divided into two kinds: general *ʻurf* and special *ʻurf*. Now each division is elucidated in accordance with the expert opinions of grand scholars.

General *ʻurf*

General *ʻurf* is the usage which is agreed upon by people everywhere. Ibn ʻAbidīn says that a usage which is abided by people of all the countries; both ancient and modern people observe it.[40]

Another leading jurist Mustafa al-Zarqa is of the opinion that this type of *ʻurf* is abided by all the people of all the countries and cities.[41]

In the light of these arguments and definitions, general *ʻurf* is the usage where the people of one or all the countries agree. Some striking instances include taking a bath in a public bath room, leaving fruit on trees and paying dowry immediately or delaying it. Ibn ʻAbidīn is of the view that general *ʻurf* is a practice which has been in existence since the time of the associates of the Blessed Messenger. Such a usage is very valuable in the estimation of experts in *fiqh*. They derive rules from such a usage and hold:

"Where no *nass* (inspired law) is available (for direction and guidance), general *ʻurf* has the force of *ijmāʻ* (consensus)."[42]

Special *ʻurf*

Special *ʻurf* is a usage which is common in a certain place among a specific group like traders and farmers. When it clashes with an inspired law, it will be rejected. It carries weight against an analogy whose cause comes from revealed law or something similar. For instance, in Iraq *dābba* is used for a horse, although the word means every animal.

What is the status of this type of *ʻurf*? Usul al-Fiqh guides us here:

"The injunction of special *ʻurf* is established for the people among whom it is popular. They may belong to any area, city or group."[43]

As this sort of *'urf* is not common to many people, Ahmad Fahmi comments:

"Specific *'urf* is not observed by all the subjects of a land."[44]

In short, special *'urf* or usage carries much diversity. It exists in so many various forms, because interests and beneficial purposes undergo change with the passage of time. With them come different means of realizing those interests. [45]

2. Kinds of 'urf in Common law

In common law custom is divided into two major classes: legal custom and conventional custom.

(A) Legal custom

Salmond explains what legal custom is: "Custom which is operative per se as a binding rule of law, independently of any agreement on the part of those subject to it."[46] To put legal custom in the words of Dr V. D. Mahajan: "The legal custom is one whose legal authority is absolute. It possesses the force of law proprio vigore."[47] The force which goes with legal custom can be well appreciated in these words: "The parties affected may agree to a legal custom or not but they are bound by the same."[48] Legal custom is further divided into two kinds: general and local custom.

(i) General Custom

It is common and abided by in the whole country, or it may be restricted to some territory, as Mahajar writes: "A general custom is that which prevails throughout the country and constitutes one of the sources of the land."[49] There was a time when in England common law was considered as general custom and a saying went among people: "The common law of the realm is the common custom of the realm."[50] This idea continued to exist until the end of the eighteenth century. But that the Common Law of the realm and general law were synonyms was not correct.

(ii) **Local Custom**

It is a custom confined to just one area. Besides, it must be in practice since long time and so old as human memory cannot grasp when it commenced.

V. D. Mahajan defines it in the following words: "Local custom is that which prevails in some defined locality only such as borough or country and constitutes a source of law for the place only."[51]

(B) Conventional Custom

In statutory law the second major category is conventional custom. Law supposes that whenever two people make a contract of any sort, the contract or deal takes force according to the custom and usage of the local people. So, if there is a particular custom concerning a business activity, the contract will observe it as well; the custom will be considered part and parcel of the contract. Usually, rules and regulations which govern business are based on conventional custom and usage about which Salmond writes:

"A conventional custom is as established practice which is legally binding, not because of any legal authority independently possessed by it, but because it has been expressly or implicitly incorporated in a contract between the parties concerned."[52]

1. Conditions of acceptability of custom in Islamic Law

Customs, habits, conventions and usage in Islamic law and other legal systems are assigned great significance. But no source of law in the world dictates that every custom and habit must take the form of law. Doubtless, it is a secondary beneficial source of law. That is why Islamic source employs the term *'urf* instead of *riwāj*.

'Urf suggests some aspect of beauty, harmony with sound reason and observance of beneficial purposes. For the validity and acceptance of *'urf*, some rules and regulations, restrictions and conditions have been laid down.

(A) Custom should be all-embracing or dominant

For the reliability of *'urf* in Islamic law, it must be all-embracing or dominant, that is, all the matters or most of them should proceed accordingly. The type of *'urf* acceptable in the eyes of legal scholars and jurists in Islamic law is:

"Only such a habit is respected as is all-embracing or dominant."[53]

This rule points to the fact that *'urf* and *'ādat* are such comprehensive formulae that no matter escapes them, nor are they opposed. It means all or most issues are tackled according to it. The condition of practical dominance are essential for common and special *'urf*.

In *'urf* and *'ādat*, when the all-embracing character or dominance is missing, they cannot be relied on. Only when it is common and dominant, it will be credible. For instance, somebody sells an article without naming its price. Now, if its price is well known among the masses, it will be understood. If no known price exists in the market, the act of sale will be vitiated.

On this issue, Ibn Nujaym has cited some examples:

Somebody sells an item against *dirham*s or *dinar*s, but the matter is disputed in the area; the case will be settled in the light of the dominant usage, that is, more widely used currency.[54]

The food (and residence these days) of the servant or slave will be the responsibility of the matter, as dominant usage has it.[55] Against vacations in school whether teachers will be paid salary or not – the issue will be taken in the light of the local practice.[56] This condition of the acceptability of *'urf* is valid in Hanbalī and Shafi'ī schools of law as well.

For the soundness of *'urf* whether it should be common, and general, jurists in Islamic law hold divergent views. Some Hanafī and Shafi'ī scholars are of the opinion that *'urf* should be general, not special. Ibn 'Abidīn throws light on the issue.

"The summary of the arguments of the vast majority of the jurists says that special *'urf* is not reliable."[57]

On the contrary some scholars argue that *'urf* should be trustworthy from both angles: general and special. Imām Jalāl al-Dīn al-Suyuti wrote on this issue. Ibn Nujaym – who also said much the same – writes: "According to the point of view held by the majority, general *'urf* is not reliable, but many grand scholars (giving it a tacit approval) issued decrees according to it."[58] The Mālikī school of law considers the *'urf* of the people of Madina reliable, although it is a special *'urf.* Hanafī jurists also took injunctions based on special *'urf,* as Ibn Nujaym writes:

"Hanafī jurists, in order to seek solution to certain issues, relived on the *'urf* of the Egyptians."[59]

The usage of Egypt is special and restricted to that area; nevertheless, *Hanafī* jurists sought guidance and direction from it. Shafi'ī jurists, in connection with acceptance of *'urf* as general or special, hold views similar to those of *ahnaf* as expressed in the above passage.

Here a question arises: why did some people who knew the science of *fiqh* preferred general *'urf* for its acceptance? The answer is this that some jurists are of the opinion that *'urf* generalizes special (things) and restricts absolute (matters). When the same lawyers take the issue of the soundness of *'urf*, they stipulate the condition that it must be well known in all the Islamic lands. If an *'urf* is special – it will be nullified.

The bottom line of the preceding discussion is this that the first and foremost condition of the acceptance of *'urf* is that it must be all-embracing and dominant in society. For the authenticity of *'urf*, just being well-known is not sufficient; living by it by the masses is also binding. One of the famous principles of Islamic Law is:

"Only when a habit is all-embracing or dominant, it is reliable."[60]

The significance of *'urf* for people is so great as a mufti cannot and should not overlook it. He issues decrees in its light. The following quotation by Imām al-Qarafi enlightens us on the issue under discussion:

"If we go to another city whose residents have different habits from us, we shall issue decrees in accordance with their habits; we shall not observe the habits of the people of over region. In similar fashion, if somebody comes to us, and his habits do not agree with those of ours, we shall also issue decrees keeping his habits in view."[61]

This guiding principle guides us that habits, usages and customs of every region will have a say in resolving their issues. Still imperative is the fact that *'urf* be all-embracing and governing in society.

(B) Custom must be established at the time of legislation or deals

In legislation, settlement of matters, and interpretation of words and phrases, *'urf* is trusted; but here a condition is stipulated that when these activities take place, *'urf* must be in use. Moreover, in use, it must be reliable, authentic and trustworthy for the matter which is to be decided in the light of *'urf*. No such *'urf* is reliable as comes into being after legislation, settlement of matters and interpretation of texts. Imām al-Shatabī throws light on the subject:

"In order to understand *sharī'a* texts and injunctions, turning away from the usage and habits of Arabs is not allowed, even though they were illiterate, because the Qur'ān was revealed in their language. When they do not have any practiced usage, then – to comprehend *sharī'a* – reliance should not be placed in unfamiliar things. It is sound in words, meanings and styles."[62] The same principle will be applied in grasping the implication of other *sharī'a* texts, that is, the meaning of a text will be determined in the light of the following; the literal meaning of words and their implication in everyday language when the text was produced. Then it will be deemed that the lawgiver also intended the same.

In short, to comprehend a text, the ancient usage, customs and habits will be taken into account; no later form of *'urf* will be considered to interpret the ancient texts. The example is cited from the Qur'ān; in the entitlement of Zakāt (the Alms-due), one category is *fī sabil Allāh* (in the way of Allāh). When the verse was sent down, the above mentioned phrase had specific implications among its listeners, ie Companions: Jihad (Holy War), beneficial purposes and all ways of doing good. Likewise, another phrase *ibn al-sabīl* occurs in the Holy Book. Arabs would, in society, use the phrase for a wayfarer.

Now some words and phrases in texts are not understood the way they were understood fourteen hundred years ago in Arabia. Nowadays *ibn al-sabīl* is a boy whose parents are known. To interpret the texts, the modern usage will not be taken into account, rather the texts will continue to be used in the sense they were understood when they came into existence. Imām al-Qarafi has briefly described this issue:

"The connotation of usage is preferable to the connotation of language, because usage abrogates lexicon, and because abrogating factor takes the lead over the abrogated one. For instance, in purchase and sale matters, what is meant by money is the currency which exists at the time of contract. The later custom will not be considered valuable. In like manner, in (interpreting the) *sharī'a* texts, the same habits will be taken into account which existed when the text came into existence."[63]

Imām Jalāl al-Dīn al-Suyuti also expressed his view on the usage which is reliable and which is not: "The usage whose words one taken into consideration is the old usage, not the new one."[64] Decidedly, *'urf* is valid neither for bygone people nor for the future generations; it is binding on those who live by it. The views held by Mustafa al-Zaraqa are also enlightening:

"In order to arrive at the implication of *sharī'a* texts, it is imperative that their connotation must be understood according to the literal meanings and usage of the (relevant) time. It is the same that is intended by the lawgiver.

Because of the new usage of later times, the words (of the divine texts) will not change their meanings. Otherwise legal texts will have no meanings assigned to them."[65]

In settling disputes and deciding issues, when people stipulate no condition, their tacit approval lends support to the usage already practiced. If people about to conclude a contract stipulate a condition which goes against the usage of the area, or some explanation against it exists, the *'urf,* whether verbal or practical, will not be reliable. An agreed upon principle of jurisprudence says:

"Against explanation, no connotation or indication is trustworthy."[66]

Izz al-Dīn b. 'Abd al-Salam throws light on the same issue "In matters which areestablished through *'urf,* if both parties explain something which goes against *'urf,* but it does not conflict the spirit of the contract, and its fulfilment is also possible – such a condition is sound and reliable."[67] Why *'urf* is not reliable against a condition, the reason advanced is this: "In comparisons with the connotation of the word, *'urf* is weak, because a principle says: 'Against explanation, no connotation or indication is reliable."[68]

A couple of illustrations will help better understand the issue. If a business deal is concluded and payment is made in cash, but both the parties agree on installments, this contract will be sound, and the usage will not be taken into account. In similar manner, if a custom in a region dictates that the expenses of registry are on the buyer, but both the parties agree that they will be on the seller, the contract will take effect, and the common practice will not affect it.[69]

(C) Custom must not disagree with *sharī'a* texts

An other condition for the validity of legal customs is that they are reliable only when they do not disagree with *sharī'a* texts. If they are put into practice, they must not suspend the injunction of the absolute texts. In legislation, *sharī'a* texts weigh far heavier than habits, customs and usages, because usages might be based on falsehood. Islamic injunctions and divine texts have been granted to people in order that they might live by them, and venerate them in the real sense of the word, so to adopt customs and habits which dispute *sharī'a* is strictly proscribed. In this connection Ibn 'Abidīn gives us a principle of jurisprudence:

"Apparent narration – which is based on the clear text of the Book, Sunna and consensus – its opposite *'urf* will not be reliable, because such an *'urf* that disputes a *sharī'a* text is nullified."

According to this principle of jurists, any *'urf* which negates some *sharī'a* text will doubtless be rejected. If somewhere a usage is founded on usury – it will not serve as evidence that usury is legitimate. Likewise, in other transactions and contracts, *'urf* will not be used, if it is in contradiction to divine laws.

When a common usage does not contradict *sharī'a* texts, but is in contradiction with some cases which fall under the command of *nusūs*, it will be acceptable. Under the circumstances, the command will be specified and analogy, etc, will be abandoned.

According to Mustafa' al-Zarqa', (if every usage is abided by,) the vitiated usages and habits of people will smash divine laws to pieces and its foundations will be razed to the ground. Then only the signs of *sharī'a* will be left.[70]

In the following pages, the analysis of jurists is presented in situations where common usage and *sharī'a* (texts and injunctions) contradict each other:

1. Custom in total contradiction with *sharī'a* texts

This situation takes two forms:

(i) When a usage comprehensively negatives a *sharī'a* evidence or commandments, (and acting accordingly will suspend a divine text,) doubtless such a usage is vitiated and nullified, as Ibn 'Abidīn writes:

"When usage contradicts a *sharī'a* evidence, and contradicts it in such a comprehensive manner as practicing it will cause one to abandon the *sharī'a* text, there is no doubt that will be rejected. Common usages (of this type) among the masses include consuming usury, drinking wine and wearing silk and gold."[71]

So, any usage which disagrees with a *sharī'a* text will be rejected, no matter whether the usage is common or special, and whether it came into existence before or after the divine text was proclaimed. The Holy Qur'ān also lends support to this principle:

"Falsehood cannot reach it from before it or behind it – it is a revelation from the One Who is All-Wise, Praiseworthy."[72] At another place Allāh says in the Scripture what the legal status of a Qur'ānic text is in his estimation: "He (the Holy Prophet) does not speak from whim. It is nothing but revelation revealed."[73]

These enlightening arguments led Islamic jurists to derive a principle:

"A practice against a divine text is not reliable."[74]

The following writing of al-Hasan al-Shādhalī can be seen as the elucidation of the preceding rule:

"If a usage goes against the *sharī'a* evidences, and the established rules and principles which are derived from it (because they do not undergo any alteration with the ever-changing environment, habits and time), no inclination is allowed towards such a usage. Rather such a vitiated usage will be necessarily ended."[75]
(ii) If a *sharī'a* text, when issued, was based on usage and later usage changes, in such a situation whether or not the injunction of the text will alter. On this issue, jurists hold divergent views. According to what the majority of jurists and Imām Abū Hanifa maintain, the change of the usage will not be relied on. But Imām Abū Yūsuf said that the usage would be reliable.[76]

2. Custom in partial contradiction with *sharī'a* texts

When *'urf* partly defies divine texts or absolute injunctions, it takes the following forms:

(i) When a common usage does not contradict a *sharī'a* text in all respects, but it disagrees with the text on some points, and both can be harmonized – such a usage will hold ground.
(ii) When a *sharī'a* text and general or special usage contradict, and both of them cannot be harmonized – then *sharī'a* text will be trustworthy and *'urf* will be neglected.

On this issue, Ibn 'Abidīn also writes:
"When there is a contradiction with a *sharī'a* text, common usage and special usage will not be relied on."[77]
When – on an issue – no *sharī'a* text exists, then *'urf* will be treated as a divine text. The whole discussion can be summed up in the following quote attributed to a companion. "Whatever Muslims regard as good, fine and praiseworthy is good in the eyes of Allāh as well."[78]
'Urf will always be rejected, when it negates or disagrees with a *nass* because "A *sharī'a* text is more effective and powerful, and the more powerful cannot be given up for the less powerful."[79]

2. Conditions of acceptability of custom in common law

The following chief conditions have been laid down for the acceptability of custom in written law:

(A) Not to be contrary to justice, equality and public policy

Sir W. H. Rattigan writes explaining the conditions for the acceptability of written law:

"Where a custom... is contrary to justice, equity and good conscience that they are at liberty to reject it as the rule of decision."[80]

So it is essential that Usage and practice accord with the welfare and betterment of the masses. No such customs can hold ground as negate the interest of the common man and woman.
"The authority of usage is not absolute, but conditional on a certain measure of conformity with justice and public utility."[81]

(B) Not to be contrary to enacted law

Custom and usage are valid, so long as they do not challenge any statutory law:
"A custom must not be contrary to an Act of Parliament."[82]

Here the views of P. J. Fitzgerald are quoted:
"The true rule is, or should be, that a custom, in order to be deprived of legal efficacy must be so obviously and seriously repugnant to right and reason, that to enforce it as law would be more mischief than that which would result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity."[83]

(C) Immemorial antiquity

It also matters how old the usage is. The members of society who live by such a custom must not know as when it was created. Although some lawmakers have maintained that a sound usage should be seven hundred years old, yet it is not essential. The reality is this:
"Time so remote that no living man can remember it or give evidence concerning it. Custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory."[84]

(C) Observance as of right

To rise to the level of law, a rite must travel to a widely practiced usage and custom. But a more necessary condition stipulated it is putting it into practice voluntarily. Neither the courts of a land, nor the government enforce people into abiding by it. Nearly all the people of society agree to it. Salmond maintains the same point of view:
"It must have been observed as of right... The custom must have been followed openly, without the necessity for recourse to force, and without the permission of those adversely affected by the custom being regarded as necessary."[85]

Conclusion

Custom is a source of law both in Islamic law and common law but they do not accept a custom as a law or source of law until it is valid. In Islamic law a custom is acceptable when it is not contrary to Quran and Sunna and it has been accepted by the collective conscience of people of the socity. In common law a custom is taken as legal custom when it is ancient, well practiced, observed as a right, and not contrary to any enacted law.

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