

**AN APPRAISAL OF AUTHORITATIVE CUSTOMS IN ISLAMIC LAW AND
THEIR LEGAL APPLICATIONS**

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1. Introduction:

In the Name of Allah, the Beneficent, the Merciful. One of the very important sources of law in Islam is custom (al-urf). More often than not, the jurists make reference to it in the justification or ratiocination of certain injunctions of the Sharī'ah. These discussions could be found in both works of fiqh (law) and *uṣūl* al-fiqh (jurisprudence). Accommodation of customs and habituations of individuals and groups as regulatory basis of certain injunctions demonstrates that the *Sharī'ah* is a living law. Customs are generally recognised as lawful in Islam. However, customs do evolve over time and becoming authoritative makes it the basis of certain injunctions of Islam. This work seeks to discuss this category of customs, their legal basis and conditions for authoritativeness as well as classical and contemporary applications.

Technically, *al-'Ādah* has been described as a conduct that has been repeatedly done, established amidst the people and accepted by them.¹ To explain it further, *'ādah* is where one has the desire and inclination towards certain conduct and as a result does it regularly until he habituates it and even becomes difficult for him to leave it.² Where a particular behaviour is continuously repeated and adopted by group of individuals who accepted it and do it, then it turns into *'urf*. This is the reason why Al-Zarqa defined it as "the *'ādah* of the majority of people on speech or conduct".³

This brings us to the term related to *'ādah* often mention together or used synonymously which is *al-'urf*. *Al-Urf* is defined as any usage, expression or otherwise, known to a particular group of people who are comfortable with it and has not been despised by those with good conscience.⁴ It is also defined as what is firm among people, seen as good and accepted by the conscience and they have continued with it; and although it is not brought by the *Sharī'ah*, it has approved it.⁵

From the above definitions, we can see that both *'Urf and Ādah* are synonymous in referring to people's practice. However, in *'Urf* emphasis is on the knowledge of it among the people as well as its regulation of conducts while on *Ādah*, the emphasis is on its repetitiveness; and both have to be approved by the good conscience.⁶ This is the reason why the definition by Ibn Amīr Al-Hājj of *'Ādah* that it is a matter that occurs repeatedly without being planned⁷ better reflects the legal

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¹ Al-Sadlān, S.G., *Al-Qawā'id Al-Fiqhiyyah Al-Kubrā, wa mā tafarra'a anhā*, (Riyadh, Dar Bilansiyyah 1417H) p. 333.

² Shalabi, M.M., *Al-Madkhal fi al-Ta'rīf bi al-Fiqh al-Islāmī*, (Egypt, Dar al-Ta'līf, 1962), p. 217.

³ Al-Zarqa, A. M., *Al-Madkhal Al-Fiqhi Al-Āmm*, vol. 2, (Damascus, Dār Al-Qalam 1998/1418), p. 838.

⁴ Id, p. 335.

⁵ Iwad, S. S., *Athar al-Urf fi al-Tashri' al-Islami*, (Dār al-Kitāb al-Arabī, n.d.), p. 52.

⁶ For more on *'Urf and 'Ādah*, see Al-Sadlān, Op. Cit., pp. 326-389

⁷ Alhājj, I. A., *Al-Taqrīr wa Al-Tahbīr*, vol. 1, (2nd ed, Dār al-Kutub al-Ilmiyyah 1403H), p. 282.

applications of *'adah* in works of jurisprudence.⁸ In other words, it is that which continuously happens without being organised or decided in the mind. Such repetitiveness can either be from an individual or a group as the case may be; and whether its root is nature as in the case of heat and coldness of whether being the cause for hastening the age of puberty or slowing it down or it is out of desire and lust as in misappropriating public funds without just cause.⁹

There are a range of legal issues that are referred to as customs in Islamic law. It is what people are accustomed to in their day to day lives based on their needs such as eating, drinking, costumes, dispositions, transactions and contracts.

Customs are generally recognised as lawful in Islam as embodied in the maxim *Al-Aşlu fı Al-'Adāt al-Ibāhah* (The Norm of *Sharī'ah* regarding Customs is Lawfulness).¹⁰

These customs do evolve from simple lawfulness in the eyes of the *Sharī'ah* to the strength of authoritativeness where certain legal issues are referred to it for regulation. "*Custom is Authoritative*" is the fifth Universal Maxim of Islamic Law and it implies that a custom, general or specific, is regarded as authoritative with legal force provided it does not contradict an absolute text (*naşş*).

Customs, whether good or evil, have great importance in the life of man. When it is formed and accustomed to it will be hard to let go. The human soul as Ibn Khaldun has put it, when it got used to something it becomes part of its formation and nature.¹¹ This is why it is known as the second nature. We know that the *Sharī'ah* does not intend to create hardship to the people by obliging that which is difficult.¹² This is the reason why customs that are accepted by the good conscience are considered as lawful.

The court is accordingly authorised to base its judgment on custom in matters which are not regulated by the text, provided it is current, predominant among people, and is not in conflict with the principles of *Sharī'ah*. A custom which runs contrary to *Sharī'ah* and reason is therefore precluded.¹³

2. Causes of the Rise of Customs

Although it may be difficult for us to comprehensively outline the causes of the rise of custom, the following are some of the causes that lead to the rise of customs: necessities, behaviours inherited from ancestors, imitation of the rich and powerful, need and legislative powers of the state and injunctions of the *Sharī'ah*, etc.¹⁴ In the following paragraphs, we will attempt to look at some of these causes along with their examples:

⁸ Cf Al-Bāhusain, Y.A., *Qā'idatu Al-'Adatu Muhakkamah*, (Riyadh, Maktabat Al-Rushd 1433AH/2012), p. 26-27.

⁹ Al-Bāhusain, Op. Cit., p. 27.

¹⁰ Al-Najdī, A.M.Q., *Majmū' Fatāwā Shaikh al-Islām Ibn Taimiyyah*, vol. 4, (Al-Ri'āsah al-'āmmah li Shu'ūn al-Haramain n.d.), p. 196, vol. p. 16-17; Al-Sa'dī, A.N., *Risālah fı al-Qawā'id al-Fiqhiyyah*, (Al-Ahsā, Maktabat Ibn al-Jauzī 1410H/1989), p. 24; Al-Bāhusain, Y.A. *Qā'idatu Al-Yaqīnu Lā Yazūlu bish-Shakk*, (Riyadh, Maktabat Al-Rushd, 2000), p. 109; Al-Ḍuwaiḥī, A.A.M., *Qā'idat al-Aşlu fı Al-Aşhyā'i al-Ibāhah*, (Riyadh, Islamic University of Muhammad bin Su'ūd 1428H), p. 139.

¹¹ Ibn Khaldūn, A. M., *Al-Muqaddimah*, (Egypt, Al-Bahiyyah, n.d.), p. 219.

¹² Al-Bāhusain, Y.A., *Qā'idatu Al-Mashaqqatu Tajlib al-Taisīr*, (Riyadh, Maktabat al-Rushd 1424H/2003), p. 355.

¹³ Kamali, M. H., *Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law*, (UK, The Association of Muslim Lawyers, 2010), p. 3. Retrieved on 28/11/2010 from <www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf>.

¹⁴ Al-Bāhusain, *'Adah*, Op. Cit., p. 85-92.

i. **Necessities:** These refer to those things which one has no choice but to follow. These are dependant on the nature of human beings such as the age of puberty, longest and shortest periods of menstruation and post-natal bleeding, longest period of pregnancy. It also includes, impairment suffered by individuals such as certain organs not functioning properly causing one to continuously release urine, faeces, *istihāda* (menstruation-like bleeding with no specified duration). All these and other features an individual may possess without their choice have been recognised by the Islamic law and applied certain injunctions that are specific for these people.¹⁵

ii. **Need (*al-Hājah*):** Need often push man to search for things that make his life easier and enjoyable; and as well seek to protect rights and interest through means that is conducive to his time. This is one of the main causes for the emergence of customs. These needs and actions subsequently influence business transactions and will over time become an accepted norm of behaviour between people of the trade from among whom it emerged.¹⁶ These include conducts such as documenting transactions between buyer and seller and determination of any liability that may rise therefrom, mode of payment, use of cheques, responsibility for transporting purchased goods, contracting by conduct (instead of explicit offer and acceptance), etc.¹⁷

Need as a cause for easing things is a recognised doctrine in Islamic law as a form of necessity, and more often than not, the basis of certain injunctions. The maxim "Need, whether of a public or private nature, is treated as necessity" (*al-Hājah tunazzalu manzilat al-Darūrat 'āmmatan kānat au khāṣṣah*) is a testimony to that effect.¹⁸ Public need means the entire people is in need of it and private is where the need is for a peculiar town, group or profession; and not necessarily individuals except in very rare situations.¹⁹ An example of this maxim is permissibility to enter a lavatory in return of a specific amount even though neither the amount of time nor the water that will be used is known. This is comparable to an Islamic injunction in which it is allowed to hire a breast-feeding mother to feed a child, because neither of the parties knows the exact quantity of milk.²⁰ According to Ibn Taimiyyah, the basis of this is that transactions that people need which are not prohibited unless the Book and the Sunnah have indicated its prohibition.

3. Legislative Power of the State: One of the most important causes of the rise of custom is the legislative power of the state or rulers. Obedience of such directives will over the time create customs linked to them. Legitimate state directives or laws under which certain customs emerge are also recognised by the *Sharī'ah*.²¹ Historically, many customs such as the innovation of *maulid* celebration, first initiated

¹⁵ Al-Bāhusain, *al-'Adah*, Op. Cit., p. 85.

¹⁶ Al-Mish'al, A. A., *Athar al-'Urf wa al-'adah fī Dirāsāt al-Nawāzil al-Fiqhiyyah ma'a tatbiqāt Fiqhiyyah Mu'āsirah*, Part of Conference Proceedings on Foundational Methods in the Study of Contemporary Legal Issues (KSA, Ministry of Higher Education 1431AH=2010), p. 168.

¹⁷ Al-Bāhusain, *'Adah*, Op. Cit., p. 86.

¹⁸ Majalla Art. 32, Al-Zuhaili, M. M., *Al-Qawa'id al-Fiqhiyya wa tatbiqatuha fil Madhahib al-Arba'a*, vol. 1, (Damascus, Dar El-Fikr 1427H/2006), p. 288, Al-Suyūti, A. A., *Al-Ashbāh wa Al-Nazā'ir*, (Beirut, Dar Al-Kutub Al-Ilmiyyah 1403), p. 88; Ibn Nujaim, Z. I., *Al-Ashbāh wa Al-Nazā'ir*, (Dār Al-Fikr 1983), p. 91; Al-Borno, M. S. A. M., *Al-Wajīz fī idāh al-Qawā'id al-Fiqhiyyah al-Kulliyah*, (Riyādh, Maktabat al-Ma'ārif 1410H), p. 242.

¹⁹ Al-Zuhaili, M., Op. Cit., p. 289

²⁰ Jumu'a, I. A., *Al-Qawā'id al-Fiqhiyya al-Muyassara*, (Al-Waqfeyya 1427H), p. 49. Retrieved from: <<http://www.waqfeya.com/book.php?bid/5348>> on 12/05/2013.

²¹ It should not escape our mind that the function of Rulers is to safeguard the religion of Islam and therefore no legislation is valid unless it does not explicitly contradict the provisions of Sharī'ah. See Generally: Al-Mazrū', A. M., *Ilzāmu waliyy al-Amr wa Atharuhu fī al-Umūr Al-Khilāfiyyah*, (Riyādh, Al-Bayān 1434H), p. 20-21.

by the Shi'ī ruler of Egypt Mu'izz li Dīnillah in the year 362H and the Shi'ah celebration of *yaum al-ghadīr* every 28th of Dhul Hijjah also innovated by Mu'izz al-Daulah Abu Al-Hasan after which it became a tradition among Shi'ites were linked to the legislative powers of the State.²² Laws (or directives) of the state such as establishment of registries for births and deaths, marriages, lands, create certain customs that make the process a norm in the society.²³

In the Islamic theory of customs, these legislations become customary over the years and become established and the *Shari'ah* shall recognised them as part of its laws just as it is a state law which it also recognised so long as it does not contradict its provisions or objectives.

4. Imitating others. This cause is one of the significant features in the rise of customs. It takes different forms and features. It mostly takes the form of imitating community leaders and its prominent figures to satisfy ones ego especially in ceremonies and social occasions. Besides, the masses are often of the belief that it is obligatory upon them to follow the footsteps of their leaders.²⁴ This also includes the inclination of dominated people's imitation of their dominators and this is most prominent where colonised people imitate the customs and behaviours of their colonisers.²⁵ These imitations can be of good and bad natures. Where it does not contradict with the teachings of Islam then they are recognised as lawful. However, if it clashes with the provisions of the *Shari'ah* they law shall not recognise them as valid as we can see later.

5. Following the footsteps of ancestors: Behaviours and habituations of one's ancestors which are considered as norms by upcoming generations cannot be easily dismantled especially among the elderly. These include customs of taking revenge or limiting marriage to be only between close relatives as well as many other superstitions and innovations in religion. Allah Ta'āla has said:

*"Just in the same way, whenever We sent a Warner before thee to any people, the wealthy ones among them said: "We found our fathers following a certain religion, and we will certainly follow in their footsteps.""*²⁶

Similar customs include visiting graveyards of saints and sacrificing to them as well as loud acts of supplications after prayers in mosques without specific legal authorities.²⁷

Of course, there is both good and bad customs of some nature and often times, it gets mixed up with injunctions of the *Shari'ah* to the extent that ignorance may cause inability to distinguish between the two.

3. Basis of Customs in Islam:

Apart from the above statement attributed to Ibn Mas'ud, other evidence in which the recognition of customs is confirmed by the *Shari'ah* can be seen in the Qur'an where Allah, the Most High has said:

*"Hold to forgiveness; command the urf; but turn away from the ignorant."*²⁸

²² Al-Bāhusain, *'Ādah*, Op. Cit., 87.

²³ Al-Mish'al, Op. Cit., 170.

²⁴ Ibn Khaldun, Op. Cit., p. 31.

²⁵ Al-Bāhusain, *al-'Ādah*, Op. Cit., p. 89.

²⁶ Qur'an 43:23

²⁷ Al-Bāhusain, *ibid*.

Some jurists used this verse as proof of authoritativeness of custom.²⁹ While talking about disagreement between spouses regarding domestic stuffs and provisions, Al-Qarafi stated that:

“the party whose statement is supported by the custom will command credibility. This is based on the saying of Allah, Glory be to Him, “Hold to forgiveness; command the urf”. Judgement will thus be in favour of the party on whose side the custom stands until the contrary is proved.”³⁰

Nevertheless, some jurists have argued that the term 'urf' in the verse does not necessarily refer to the technical term of custom as has been accustomed by subsequent jurists. Some have interpreted the term to mean all directives of Allah, the Most High that are known through the revelation (*wahy*).³¹ Some have also interpreted it to mean being good; or a directive that is very particular concerning the word of believe, *lā ilāha illā Allah* (there is no god but Allah) as has been narrated from 'Aṭā'.³²

Another legal authority cited as the basis of the custom in Islam is the Saying of Allah Ta'ālā:

"But he (to whom the child is born to) shall bear the cost of their food and clothing on equitable terms (bil ma'ruf)." ³³

Recognising this verse as another basis of custom is also be interpreting the term *bil ma'ruf* to mean as accustomed or based on that which people are aware of as opined by Ibn al-Arabi and al-Jaṣṣāṣ.³⁴

From the Prophetic ahādīth too, jurists have inferred the validity and authority of customs from several ahādīth, among which we will mention the following:

A Hadith attributed to Abdullah Ibn Mas'ūd described as suspended (*mauqūf*)³⁵ Hadith:

"what the Muslims deem to be good is good in the sight of Allah". ³⁶

Though the hadīth is *mauqūf*, it has the status of *marfū'*;³⁷ because companions of the Prophet, peace and blessing of Allah be upon him will not utter important assertion of this magnitude by reliance on their opinions.³⁸

All these authorities are however speculative as there is no agreement between jurists on the exact meaning of the term *al-'urf* or *ma'rūf* in it's implication of

²⁸ Qur'an 7:199

²⁹ Al-Sadlān, Op. Cit., p. 338.

³⁰ Al-Qarāfi, S. A. I., *Al-Furūq*, vol. 3, (Beirut, Resalah Publishers 2003), p. 194.

³¹ Al-Alūsī, S.S.M., *Rūḥ al-Ma'ānī fī Tafsīr al-Qur'ān wa al-Sab' al-Mathānī*, vol. 9, (Mu'assasat al-Nur 1386H), p. 147.

³² Al-Qurṭubī, M.A.A., *al-Jāmi' li Ahkām al-Qur'ān*, vol. 7, (Dar al-Kutub al-Masriyyah 1991), p. 346;

³³ Qur'an 2:233.

³⁴ Ibn Al-Arabī, A.M.A., *Ahkām Al-Qur'ān*, vol. 2, (Beirut, Dār Al-Fikr n.d.), p. 105, 106; Al-Bāhusain, Op. Cit., p. 122.

³⁵ Hadith is said to be *mauqūf* (suspended) is a narration from a Companion only, i.e. he did not explicitly attribute it to the Prophet, peace and blessing of Allah be upon him. (Al-Ghaurī, S. A., *Al-Madkhal ilā Dirāsāt Ilm al-Hadīth*, (Damascus, Dār Ibn Kathīr 1430H/2009), p. 715.

³⁶ Al-Shaibānī, A. H., *Al-Musnad*, vol. 1, (Al-Maktab Al-Islāmī: n.d.), p. 379. According to Al-Haithamī, its narrators are trusted men. (Al-Haithamī, vol. 1, *Mujma' al-Zawā'id*, (Al-Qudsī: n.d.), p. 177-178.

³⁷ Al-Sadlān, Op. Cit., p. 333.

³⁸ Id, p. 337; Al-Zarqa, A. M. *Sharh al-Qawa'id al-Fiqhiyya*, (Damascus, Dar al-Qalam 1409H/1989), p. 219,

customs. This was the reason why al-Marāghī has opined that because good customs are difficult to let go, the basis of the maxim or custom can be inferred from all the legal authorities that imply lack of difficulty or hardship in the injunctions of the religion. For instance, where Allah, the Most High says:

*“Allah intends every facility for you; He does not want to put to difficulties.”*³⁹

In another verse, Allah says:

*“... and (Allah) has imposed no difficulties on you in religion.”*⁴⁰

The effect or relevance of these two verses remain dominant on all the injunctions of the *Sharī'ah*. As a result, customs that are intended to facilitate our day to day life and do not contradict either specific or general provisions of the *Sharī'ah* shall be valid and can evolve to become authoritative in the long run.⁴¹

According to jurists, this verse is absolute in dismissing all forms of difficulty in the obligations of the religion. It applies in all circumstances and not only in the context of the cause of its revelation.⁴²

Therefore, clear evidence for the recognition of customs is the general principle of easiness in Islam. Islam does not intend to cause hardship to a Muslim. As we have seen earlier, certain customs become norm of the people and cannot be easily forgotten.

It is also clear that Islam has approved some customs that are entrenched among Arabs. Customs that protect the interests of the people have been reformed to remove elements that contradict the general principle of justice Islam preaches. Such can be seen through the Islam's approval of some transactions of Arabs such as sales of *salam*, mortgages, partnerships, *mudāraba* and leases. It disapproves some customs that consists eating other's properties in vanities such as usury and transactions that lead to conflict, sales of ambiguous and nonexistent (*bay' al-gharar*) like selling of a foetus of an animal, milk in udder or fish in river etc.⁴³

4. Conditions of Authoritative Customs

i. The Custom must be Operative (*muttarid*) and Prevalent (*aghlabiyya*).

According to Al-Suyūti, only continuous customs are enforced by the law but not when they are uncertain.⁴⁴ Ibn Nujaim stated that only customs that are operative and prevalent will be considered.⁴⁵ The usage must therefore be in all circumstances. For instance, if the custom is such that a dowry is divided into two parts: one part delivered immediately and the other part delayed to a later time, it should be prevalent in all marriage occasions.⁴⁶ It also means that the custom should be generally accepted and known to the people of the locality.⁴⁷ Its dominance means it should be widely practiced in regulating all related conducts.⁴⁸

³⁹ Qur'an Chapter 2 verse 185 Quranic translation we used Ali. Y. A. *Holy Quran Text and Commentary*, 3rd ed. (U.S.A.; Amana Co. 1938 and Lebanon: Darl Elfikr Beirut, 1989).

⁴⁰ Qur'an 22:78

⁴¹ Cf Al-Marāghī, *Al-Ijtihād fī al-Islām*, p. 51.

⁴² Al-Bāhusain, Op. Cit., p. 208.

⁴³ Al-Nadawi, A. A., *Mausū'atu al-Qawā'id wa al-Dawābit Al-Fiqhiyya al-Hākimah li al-Mu'āmalāt al-Māliyyah fī al-Fiqh al-Islami*, vol. 1, (Publisher Unindicated 1419H/1999), p. 170.

⁴⁴ Al-Suyuti, Op. Cit., p. 89.

⁴⁵ Ibn Nujaim, Op. Cit., p. 93

⁴⁶ Al-Sadlān, Op. Cit., p. 353.

⁴⁷ Al-Sadlān, Op. Cit., p. 353.

⁴⁸ Al-Zarqa, A. M., *Al-Madkhal Al-Fiqh Al-Āmm*, vol. 2, (Damascus, Dār Al-Qalam, 1418H/1998), p. 874; The Mejelle, Art. 504.

ii. The custom that is intended to regulate a particular conduct must exist prior to the conduct. The custom must be available and used to control such conducts before the current conduct, either action or expression, that is intended to govern.⁴⁹ According to Ibn Nujaim, a new custom will, as a result, not be regarded authoritative.⁵⁰ That is why jurists say, if we obliged upon a person a custom that does not exist during the particular behaviour, we are obliging upon him that which is not obligatory.⁵¹ Jurists are also clear that applicable customs must be those that are practised in place and time in which such conduct is intended to regulate occurs.⁵²

iii. A custom should not contradict a definite textual provision or an absolute principle. Such custom that contradict a clear provision of Islam will not be supported by the law. According to Al-Sadlan, it must conform to the provisions of *Shari'ah* as its clash with the law renders it void. Customs such as drinking alcohol, gambling, women accompanying funeral procession, lightening candles on graves, uncovering parts of the body which Islam obliged to be covered were all customs of the *jahiliyya* period and were banned by Islam when it came will not receive legal backing.⁵³

iv. Custom should not be contradicted by explicit statement. This condition is in line with the maxim which states that “*no attention shall be paid to inferences (implication) in the face of an explicit statement.*”⁵⁴ Authority of Customs will not be implied if there is an explicit statement setting a common practice aside. This is because what the people are used to is an inference (implication), and implication is only considered in the absence of explicit statement. Thus whenever there is an explicit statement that contradicts an implication, it lost its role of representing intention and custom, which will be set aside in favour of the explicit statement.⁵⁵ In other words, custom will loose its authority of regulation if the term of agreement has expressly set it aside. It is only operative where the parties are silent concerning it or have expressly referred to it. In short, for a customary usage to gain legal authority it should not contradict explicit statements of contracting parties for instance. For example if a person is hired to work from noon to afternoon, he will not be obliged to work from morning to noon with a pretext that it is the norm in the locality.⁵⁶

5. Applications of Authoritative Customs

a. Classical Applications:

Customs have been recognised as a fertile area for the development of Islamic law both by legists and jurists. In both classical and contemporary works, several applications of authoritative customs can be easily traced. The following are some of these applications of authoritative customs from the classical works of *fiqh*:

- i. The lowest and longest periods of menstruation, post-natal bleeding and purity are based on what women have been accustomed to.⁵⁷
- ii. Little gap between offer and acceptance do not harm formation of a contract but a wider gap does; and this depends on the custom of people.⁵⁸

⁴⁹ Al-Sadlān, Op. Cit., p. 356.

⁵⁰ Ibn Nujaim, Op. Cit., p. 101.

⁵¹ Al-Sadlān, Op. Cit., p. 356-7

⁵² Iwad, Op. Cit., p. 225.

⁵³ Al-Sadlān, Op. Cit., p. 359.

⁵⁴ The Mejelle, Article 13.

⁵⁵ Suwār, W., *Al-Ta'bir an al-Irādah*, (3rd ed, Cairo, Maṭābi' Dār al-Kitāb al-'Arabī, n.d.), p. 208.

⁵⁶ Al-Sadlān, Op. Cit., p. 361.

⁵⁷ Al-Lhuaji, p. 45, Al-Zuhaili, p.303

iii. The hand of a thief will not be cut-off unless he took it from a secured place (*hirz*), determination of which is dependent on custom. Where the custom has recognized an article as secured in certain circumstance, then the *Shari'ah* will recognised it as secured and the punishment of theft is applicable.

iv. It is not permissible for a Judge to receive a gift unless it is from one who is accustomed to giving him gifts.⁵⁹ Else, where he receives a gift from a person that has never given him a gift prior to his appointment, it shall be interpreted as bribery.⁶⁰

v. Where acceptor and offeror of gift differed on whether it is a consideration; with the giver claiming it to be a consideration and the recipient denying. Resort should be made to a custom for resolution.⁶¹

vi. The gift of a lender is permissible if approved by custom. Else, it is only permissible after the settlement of the debt⁶². This is for the fear that it may be a *riba* (usury or interest).

vii. The contract of *istiṣnā'* (production and supply) is considered legal by the majority jurists because people have been accustomed to such transaction. The permissibility is based on *istihsān* (juristic preference) according to Hanafis.⁶³

viii. According to some jurists, the legal injunction regarding suitor's gifts to his fiancée, consumables or otherwise, who has changed his mind for whatever reason, will be subject to custom of the area. If the suitor is responsible for the withdrawal, the gift will not be returned. But if the responsibility is from the side of the fiancée, he will have the right of the return of the gift. On what to return, if the gift is not a consumable, the actual gift is to be returned; if on the other hand it is a consumable, the value should be returned. All this is dependent on the custom of the people⁶⁴.

ix. Permissibility to declare a movable property as *waqf* if such property is customarily declared as such⁶⁵.

10. Abu Hanifa states that it is permissible to appoint a non-Muslim judge to administer justice between people of his religion. He based this opinion on the fact that it is allowed for them to testify about each other as well as the permissibility for them to act as their own guardians in their marriages. So it is permissible for them to have a judge between themselves in accordance to their customs. Shafi'is too have expressed similar opinion⁶⁶. But the majority scholars are of the opinion that it is not permissible to appoint a non-Muslim judge to judge even for non-Muslims⁶⁷.

b. Contemporary Applications:

Contemporary Muslims scholars have also made their contributions in the theoretical field of customs as well as its applications. Several particulars or emerging issues have been based on the authority of customs. The following are some of their examples:

⁵⁸ Id., p. 46.

⁵⁹ Al-Zuhaili, p. 303.

⁶⁰ Al-Mausū'a, vol. 33, p. 306.

⁶¹ Al-Rūqi, p. 318.

⁶² Al-Zuhaili, p. 305.

⁶³ Al-Sadlān, p. 378.

⁶⁴ As-Sadlān, p. 383.

⁶⁵ As-Sadlān, p. 386.

⁶⁶ Al-Harīrī, Ibrahim Muhammad, *Al-Qawā'id wad-Dawabit al-Fiqhiyya li Nizāmīl Qada'i fil-Islām*, (Dār 'Ammār, 1420=1999) p. 158. See also: Ibn Hammām's *Fat'h al-Qadīr* vol. 5, p. 499.

⁶⁷ Zaidān, Abdulkarim, *Nizām al-Qadā'i fi al-Sharī'ah al-Islamiyyah*, (Mu'assasat Al-Risālah: 1409H=1989), p. 27

i. Properties defined by custom: It is based on custom that people have today come to value things that were not valuable before; or things that were not recognised as property in earlier ages. The value for such things became obvious due to scientific discovery that found certain uses that people sought and pay huge amount of money to acquire. This covers several areas including medical, agriculture and industry.⁶⁸ Examples of some custom-based properties include recognition of certain laboratory mice and insects as well as certain poisons as valuable for their use in scientific and medical research.⁶⁹ It is based on custom that Hanafis have also recognised things that were perceived as impure like animal excrements as valuable properties because people are accustomed to using it as fertilizers in their farms.⁷⁰ Jurists have also noted that a thing acquires the status of being a valuable property when all or parts of the people exploit it as thus. The reason is that a custom that establishes that a thing has the status of valuable property is one of those customs that is being referred to in establishing certain general legal rulings.⁷¹

ii. Intellectual properties are also construed as properties based on customs. In the same manner, general custom (*al-'Urf al-'Āmm*) has recognised the right of an author in his work and innovation; and as a result confirmed him the right to be compensated and rewarded. If it were invalid to deal in such right, taking compensation or reward for them would have been a prohibited acquisition.⁷²

iii. Conducting contract through modern communication devices phone calls, text messages, emails and instant messaging services; and accepting as valid and enforceable obligations. This is because people have become accustomed to such dealings and have recognised such transactions as enforceable among them. These means can be validly use as proof of the existence of such transactions.⁷³

iv. Possession of subject matter of contract is one of conditions required in conclusion of contracts. In modern era, such possession can take several forms such as transfer of certificate of ownership, issuance of certificate of share. Thus, even if there is no physical possession of such property, possession of such instruments shall be seen as possession of the properties as has been confirmed by contemporary customs.⁷⁴

6. Conclusion

i. Summary

The work started by defining custom and describing its juristic usage. While *al-'urf* is described as publicly acknowledged habits recognised as custom, *al-'ādah* is habituations of an individual either by choice or nature. Such behaviours and habituations often serve as basis of injunctions of the *Sharī'ah*. Customs are born out necessity, need, legislative power of the state, imitating others as well as following the foot steps of ancestors. The jurists have relied on several verses of the Qur'an as well as Prophetic tradition for the recognition of custom as both authoritative and a source of law in the *Sharī'ah*. The conditions for authoritative customs require that they must be operative and prevalent, they must pre-exist the conduct it intends to regulate, they

⁶⁸ Al-Nadawī, A.A., *Jamharat Al-Qawā'id Al-Fiqhiyyah*, vol. 1, (Al-Rājihī Investment Bank 1421H), p. 263-264.

⁶⁹ Qūtah, 'A. A. M. W., *Al-'Urf: Hujjiyatuhu wa Atharuhu fī Fiqh al-Mu'āmalāt inda al-Hanābilah*, vol. 1, (Mecca, Al-Maktabah Al-Makkiyyah 1418H), p. 351-353.

⁷⁰ Al-Bāhusain, Op. Cit., p. 141.

⁷¹ Al-Mish'al, Op. Cit., p. 199.

⁷² Al-Nāhī, S., *Haq Al-Ta'lif fī Al-Qawānīn al-Waḍ'iyah wa fī Naẓar Al-Shar' Al-Islāmī*, (1981) *Hady al-Islām*, vol. 25, No. 7 & 8, pp. 39 @ 42.

⁷³ Al-Duwaiḥī, A., Al-Nawāzil al-Uṣūliyyah, (1435H) in *Al-Buhūth al-Fiqhiyyah al-Mu'āshirah*, 48, 86.

⁷⁴ Id, p. 43.

should not contradict explicit text and they should not be negated by explicit statements of parties to an obligation. The work concluded by citing several classical as well as contemporary examples of authoritative customs.

ii. Finding

The following findings can be observed from the work:

1. Customs that are publicly recognised or habituations of individuals can serve as a basis of injunction which can be inferred therefrom.

2. The necessities and needs of the people to protect their interests and its pursuits gives birth to customs in Islam.

3. For a custom to be valid and authoritative, it should be in agreement with the textual and implied provisions of the Sharī'ah.

4. In judicial decisions, it is very important for a judge to take cognizance of the customs of the people so that appropriate injunctions of the *Sharī'ah* can be adequately applied.

4. Things that the Sharī'ah has not defined but it refers to customs for their definition such as properties, professions, articles of trade are all inferred from customs.

iii. Recommendations

1. *Mujtahids*, academic researchers and *Sharī'ah* court judges should take cognizance of customs when making their decisions.

2. Muslim should note that not every conduct described as custom is lawful or authoritative. Rather, such custom must be subject to the general and specific provisions of the Sharī'ah.