



A Comparative Study Of Urf As A Source Of Islamic Law And Custom As A Source Of Western Law

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ABSTRACT

Generally knowing 'urf, it is the combination of the culture and the habits of the people, which grows in popularity and strength with continuous imitation. This later implants and transfers in the lives of the people. 'Urf is usually inherited generations after generation until the origin of other customs that dominate the previous one. In Islamic Law 'Urf is one of the most essential supporting sources that are visible in Islamic Law in a form of some legal rulings (ahkam). According to the variation in place, time, and circumstances, many of these ahkam changes. On the other hand, the custom is simply the usage and practice of different communities. This article is an attempt to answer, whether these customs are legally approved, can custom be law, even before it is recognized by precedent or authoritative legislation? What are the elements of custom by considering it as a source of law? Thus, this study explained and proposed 'urf and its application in Islamic law, particularly with the comparison of custom (as a source of Western Law). Furthermore, as a concept of Shari'ah, the classification of 'urf and custom were well analysed in this study. The validity of 'urf was clarified in-depth in this article while the legal maxims that shows the applicability of 'urf under Islamic law were also mentioned and it also ended with a reasonable conclusion.

Keywords: URF, Custom, Islamic Law, Western Law

INTRODUCTION

According to the mutual consent of the Muslim scholars, Islamic Law is initially originated from the Qur'an and Sunnah. However, some matters are explicitly or directly not indicated in Qur'an and Sunnah and therefore scholars have different opinions for approaching such issues. It is also not directly cited in Qur'an and Sunnah that 'urf can be considered as proof of Islamic Law. There isn't any explicit text for its validity but we have some inferences from our Prophet (PBUH) and his companions (sahaba) which show the acceptability and appropriateness of its usage.

For instance, some of his companions (sahaba) were practising a kind of birth control that was extremely famous in ancient times known as 'azl:

“We used to practice coitus interruptus (‘azl) during the lifetime of Allah’s Messenger (PBUH) while the Qur’an was being revealed.”¹

APPLICATION OF ‘URF IN ISLAMIC LAW

In Usul Fiqhi, the definition of ‘Urf is "recurring practices adopted by the people of sound nature". To apply ‘Urf as Islamic Law there are some conditions that must be recurrent and common. Urf must not abide by a valid agreement and its term and should be in practice at the time of any transaction. Most importantly it must not contradict the Quran and Sunnah.² In Arabic lexicology Urf or 'Adah indicates 'custom' and both terms are interchangeably used many times. Anyhow, they are different in technology and its literal senses. It is also observed that the technicality and scope of its usage are very much different and in a technical sense, the scope of the earlier is greater and broader than the latter one.³

DIFFERENCE BETWEEN URF AND CUSTOMS	
<p>‘Urf is an Arabic word that refers to a given society’s ‘Knowledge’ or custom.</p> <p>Urf is an important feature of ruling where there is not an explicit primary text of the Qur'an and Sunnah which specify the ruling.⁴</p>	<p>The term custom comes from the Arabic word al-awd which indicates repetition.</p> <p>The term custom is adopted from the Malay Archipelago community used widely and deeply in the early stages which covers the entire way of life up to the smallest habits like how to eat or sit.</p>

CLASSIFICATION OF ‘URF

Islamic scholars have classified the types of ‘urf and they have distributed them into many types. Some of the classifications are:

‘Urf el-Amali (The Practical Custom)	‘Urf el-Qawli (Verbal Custom)
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¹ Bukhari Book 67, Hadith 142

² Bello, Shafi'i, Application of 'Urf in Islamic Law (January 11, 2013). Available at SSRN: <https://ssrn.com/abstract=2199354> or <http://dx.doi.org/10.2139/ssrn.2199354>

³ Abdul Ghani, H., 'Urf-o-'Adah (Custom and Usage) as a Source of Islamic Law, American International Journal of Contemporary Research, Vol. 1, No. 2, (2011). p. 178.

⁴ 26, R., Abid, R., & Says:, I. (2019, December 10). The Role of 'Urf(Custom) in Islamic Law. Retrieved June 15, 2020, from <https://thethinkingmuslim.com/2013/12/26/custom-islamic-law/>

<p>For a person in his daily life, practical urf is comprised of commonly repeated practices and civil transactions.</p> <p>Practices that are repeated in day-to-day activities of life indicate a personal affair, which has no link with another person. Such as sleeping, eating, walking, and all other matters like that.</p> <p>The recurring practices in civil transactions indicate such practices which are intended to avoid reasons for legal disputes. It usually involves two contracting parties for instance contract of marriage, sale, rent, and some other similar contracts. Another example of practical urf is New Year's Day when people in certain places take vacations repeatedly every year on the same days. In this case, a specific group of persons will consider New Year's Eve as 'Urf.</p>	<p>There is always a literal meaning of a word but when there is a general agreement among people for the usage and meaning of words for a particular purpose then it is known as the verbal urf. Due to such agreement, the literal or original meaning of a word is reduced to an exception whereas the customary meaning becomes dominant.</p> <p>For instance, the literal meaning of the word salah is dua (request or supplication). Whereas the same word in Qur'an is used to describe the obligation of ritual prayers to the Muslims. Later, the literal meaning of Salah was reduced to unknown and the second usage ultimately became dominant.⁵</p>
<p>'Urf el-Am (The General Custom)</p>	<p>'Urf el-Khas (The Particular Custom)</p>
<p>'Urf el-Am is a specific habit that occurs widely throughout the district and the community. It is an act that has become a habit of most residents of all Islamic countries. The general custom is a type of custom which is being practised by many people irrespective of place and time.</p> <p>For instance, entering a mosque without taking off one's shoes is insulting its purity therefore it is commonly practised in Islamic countries to take off shoes before entering a mosque. ⁶</p>	<p>Urf el-Khas is a custom that occurs in certain districts and communities. It is a thing that is common or known by the population of a country or state, or a certain group of people only. 'Urf al-Khas in other words particular custom is a type of 'urf, which is widespread in a specific zone, or profession. People of a particular place usually practice such type of 'urf instead of 'urf being practised all way around.</p> <p>An example is that entering the homes of Muslims in Malaysia without taking off</p>

⁵ 1Al-Razi, Mahammad Bin AbiBakri, Mukhtarr al-Sihah, (Cairo: Dar al-Hadith, 1stEdn, 2000), at 368

⁶ Mizan, N. (2014, October 23). Urf(custom). Retrieved June '15, 2020, from - <https://www.slideshare.net/nelfiamiera/urf-custom>

	<p>their shoes is considered insulting to the host but any such concept is not being practised in other Islamic states such as Pakistan or Saudi Arabia.⁷</p>
'Urf el-Saahih (The Valid Custom)	'Urf el -Faasid (The Invalid Custom)
<p>Urf el-Sahih is a habit performed by the general public which does not conflict with Islamic propositions. The acts that have become the habit of the public which is not forbidden, and it halal and legalized.</p> <p>The custom which does not disregard the Shari'ah does not bring corruption and at the same time does not deny the interest of people is considered a valid custom.</p> <p>Any custom that does not harm human beings will be considered a valid urf.</p>	<p>Urf el-Fasid is something that has become a habit of the people which is not legalized, which is haram, and also forbidden in Islam. It is something that violates the shari'ah which brings harm to human beings and does not bring any good to them.</p> <p>In other words, it is a type of custom that occurs frequently in society that is contrary to Islamic law.</p> <p>Moreover, the invalid custom is practised by merely a few persons which are totally against the Islamic Shariah. Corruption, bribery and interest these days is very common among some people but it is against Islamic law (Shariah) and it is against the interest of the majority of people.</p> <p>For instance, paying interest (usury) on transactions is forbidden in Islam. Although this activity is being practised commonly among people but it is against the rules of Islam and contrary to Qur'an and Sunnah. Consequently, such invalid activities must be avoided and stopped practising.</p>

COMPARISON BETWEEN 'URF AND 'ADAH

⁷ Kamali Mohammad Hashim, Principle of Islamic Jurisprudence (2nd edn., 2000), at 290

Word 'Adah is originated from the Arabic word (al-Aodah) which means "to repeat" or "to return". It indicates the continuous practice or a habit, (daydan). 'Urf and 'Adah are synonymous with each other, and most of the 'ulama have used them in the same way.⁸

Although the majority of scholars equate al-Urf with al-Adah, some scholars distinguish it. The differences between al-Urf and al-Adah are:

1, Al-Adah is likely or sometimes born from individuals as well as groups of people. While al-Urf is likely to be born through the public only.⁹

2. Some scholars state that al-Adah is only focused on deeds. While al-Urf is usually focused on words only.

In short, al-Adah and al-Urf are done repeatedly so that they become ingrained in the soul, bring peace and are accepted by common sense. What is important, al-Adah and al-Urf can be accepted as a legal argument and what is beneficial and not contrary to Islamic law.¹⁰

CUSTOM AS A SOURCE OF WESTERN LAW

Customs must be observed for a long period without any distraction to be considered valid. Furthermore, if any such practice is being conducted for a long time but it is not in support or favour of general people and against moral values then it can't be considered valid. In simple words, the custom is followed worldwide by many people which are long-established practice. Customs are unwritten rules which do not contradict the interest of people. After some time custom becomes binding or take a shape of the obligatory character.

In ancient times the custom was considered an essential source of law, even practised by kings and their territories but with the beginning of modern evolution, it somewhat diminished. Customs consists of behaviours that are generally observed and practised as a rule of conduct.¹¹

Customs are traditions, habits and usages and nothing more than that which later became an important source of Law. Immoral customs were later demolished and valid customs became a part of law later. In ancient times the custom was taken as an essential source of law making.

CAN CUSTOM BE LAW?

⁸ 3 Ibn Manzur, Lisan al-'Arab, (Beirut: Dar Ihya' al-Turath al-'Arabi, 1999), vol. 3, at 316.

⁹ Salisu, T. M. (2013). 'Urf/'Adah (Custom): An Ancillary Mechanism in Shari 'ah. *Ilorin Journal of Religious Studies*, 3(2), 133-148.

¹⁰ Ibn 'Abidin Muhammad Amin Bin 'Umar "Nashr al-'Arf fi bina' Ba'di al-Ahkdm'ala al-'urf in *Majmu'ahrasa'il* Ibn 'Abidin, (Riyad: MaktabahAramayni, 1980), at 112

¹¹ Furnish, D. B. (1982). Custom as a Source of Law. *Am. J. Comp. L. Supp.*, 30, 31.

Custom is an essential source of common law. Different thinkers have different opinions.

Acceptance of Custom as Law (Opinion John Austin)

He was not in favour of considering custom as a law because according to Austin it did not develop in the interest of the sovereign. According to him, rules of law are being originated from the government, not from the customs.

Acceptance of Custom as Law (Opinion Savigny)

According to Savigny, the custom is the main source of common law. All sources of law must be originated with the will of the common people instead of the will of the sovereign.¹²

Ingredients of Custom (Fundamentals of a valid/legal Custom)

Jurist conducted a few tests for laying down essential elements of customs. A custom must have judicial recognition. A few fundamentals of a valid custom are explained below:

- **Antiquity** - The existence of a custom needed to be proved from time immemorial if it is needed to be recognised as law. Beyond human memory, for custom to be accepted legal, its existence for a long period is necessary.
- **Continuous in nature** - A custom should be in continuous practice to be considered valid. Its enjoyment must be beyond any interruption. Disrupted practices and long intervals raise doubts about the validity of a custom.
- **Reasonableness** - Custom must be reasonable it must be useful and convenient to society. If a custom is being challenged by any party, they need to satisfy the court about the unreasonableness of a custom. The court will later trace back the unreasonableness of a custom to the time of its origin. Norms of public utility and justice must be confirmed by custom. It should be based on reasons and rationality to be considered valid. A custom is invalid if it is likely to cause more mischief and inconvenience than convenience.
- **Peaceful Enjoyment** – If a custom is considered legal it must be peaceful for society. There must be freedom of joy in custom which must not be practised secretly. There must be an acknowledgement of the community for practising it.
- **Universal**- The custom must be General or universal and must be acceptable worldwide.
- **Certainty** - A valid custom must be definite and certain.
- **Consistency** - Customs must not clash with other established customs. A valid custom must be consistent and must not conflict with the statute law of the country.
- **Morality**- A valid custom must not be in opposition to the principles of morality and public policy. A custom that contradicts a public policy or is immoral is invalid. Court

¹² Bederman, D. J. (2010). *Custom as a Source of Law*. Cambridge University Press.

has declared such customs as invalid which are conducted for immoral purposes or which were against the policy of the public.

CLASSIFICATION OF CUSTOMS

Custom can broadly be divided into two subcategories:

- 1) **Customs having no sanction** - These are the customs that are not bound and they are non-obligatory. They are being followed because of the will and opinion of the public. Austin used the term legal morality for it. If a custom is not being followed there isn't any sanction for that. For instance, if a needy person in a time of natural disaster is not being sheltered or assisted by a resourceful person and later that needy person dies. In this case, another person won't be liable for his death under the law, only he will be considered guilty by society.¹³
- 2) **Customs having sanctions** - These are the customs that are binding and are enforced by the state. These customs are divided into further subcategories:
 - i) **Legal Customs** - These laws are applicable as a restrictive rule of law. They are approved by the court and have become a part of the country's law. They are implemented by the court. Legal custom are further classified into the following two subcategories:
 - a) **General legal Customs** - These are the customs that apply in the entire Territory of state.
 - b) **Local legal Customs** - These are the customs that apply to a certain place, district or town of a country.
 - ii) **Conventional Customs** - These are the customs that govern the parties to a contract. They are also called practices or usage. Conventional custom is an ongoing practice that is a legal binding because it has been particularly or impliedly incorporated in a contract between the concerned parties. Example local law and treaties.¹⁴

A Comparative Evaluation of the above analysis indicates several subjects that stand out as relative points of divergence and convergence between Islamic 'Urf (custom) and the international customary law. These subjects are discussed below:

Urf and custom are one of the most important aspects or characteristics in the culture of all nations. The community still adheres to the customs and traditions of the community, especially in matters related to community life. Customs that are not clear purpose and meaning will be abandoned by the community concerned. Islamic Law preserves' human

¹³ Kumar, R. LL. B.(Hons.)(Second Year) IIIrd Semester Paper-I Subject–Jurisprudence-I Unit–IV: Sources of Law Topic: Custom.

¹⁴ Terziev, V., Petkov, M., & Krastev, D. (2021). CORRECTION: THE " SOURCE OF LAW" CATEGORY. *IJASOS-International E-journal of Advances in Social Sciences*, 7(19), 355-363.

urf provided there is no damage and no loss of interest (maslahah) of life. Urf has a close relationship with the meaning of adat where most Islamic scholars do not distinguish between the two. Urf is an important source for issuing Islamic law even though some scholars do not recognize it as one of the sources of law. The scholars who recognize it see it as one of the most important resources especially in problems related to the relationship between fellow beings and in some other aspects.¹⁵

When new legislation is authorized in any modern state, it is mostly preferred to the custom. Hence, a custom must not be contrary to legislation or opposed by any party. For example, child marriage as a customary practice is considered illegal. Likewise, with time adoption laws were also altered by legislation in Asian countries.

Likewise, under Islamic Siyar (Islamic international law), an independent state is at freedom to accept or reject any western customary practice. Having said that, a custom is particularly accepted by the Muslim States as an Islamic Law (Shari'ah) and also it complies with other related basic requirements which turns into a legal binding and legal obligation in the Muslim States.

CONCLUSION

As an analytical manifestation of people's values, the custom is an essential part of nations concerning growth and history. Their legal and social systems are also influenced by their customs. Hence it is an essential source for law-making in several civilizations. Custom as an essential part of the law under both systems effectively replicates the decentralized nature of Western law and the potential dynamism in Islamic law. Custom plays a primary role in law-making in Western Law whereas it is considered a secondary source of Islamic law. Moreover custom as a law can easily be modified under both legal systems according to the need and validity. Nevertheless, these changes must be confirmed under Islamic Law by the fundamental of Grundnorm. On the other side, the Grundnorm of modern international law is secular and has the capability of change at any point in time. As Khadduri made a comparative analysis of 'Urf in Islamic Law with Custom in Western Law, he observed that the categories of law-making sources are the same for both categories are Muslim Law and the Statute of the International Court of Justice namely, customs, authority, agreements, and reason.¹⁶

¹⁵ Hamzah, D. A. A Comparative Analysis of Modern Customary International Law and Islamic Urf (custom).

¹⁶ Rahim, A., The Principles of Muhammadan Jurisprudence, Madras, (1911), p. 68.