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The Juristic Distinction between Valid and Invalid Custom (ʿUrf) Parameters and Criteria

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Abstract
Custom (ʿurf) is a subsidiary source of Islamic jurisprudence. It plays an important role in regulating human transactions in accordance with the objectives of Islamic law. This study explains the juristic distinction between valid and invalid custom. It first examines the lexical and technical meanings of ʿurf. It then discusses the factors that lead customs to emerge and persist. The study classifies custom as valid when it accords with Islamic law and as invalid when it conflicts with its texts or objectives. It also considers the authority of custom in light of the Qur'an, the Prophetic Sunnah, and practical consensus. The study identifies the conditions and parameters that govern the legal recognition of custom. It then presents the position of the International Islamic Fiqh Academy on moral rights as a contemporary application of custom. The analysis confirms that such rights must remain subject to the established principles of Islamic law.

Keywords: valid custom; invalid custom; Islamic jurisprudence; parameters and criteria; International Islamic Fiqh Academy; moral rights.

1. Introduction
Custom is one of the principal juristic rules used to regulate people's affairs and transactions. It has a significant influence on individual and collective conduct. This influence must remain consistent with the objectives of Islamic law. Muslim legal theorists therefore examined the meaning of custom and the conditions governing its recognition. They distinguished valid custom, which accords with the purposes of Islamic law, from invalid custom, which may not be applied because it conflicts with those purposes.

This study examines the lexical and technical meanings of custom. It also explains the causes of its emergence, its classifications, and its legal authority. The discussion draws on the Qur'an, the Sunnah, and practical consensus. It then identifies the parameters and criteria that determine whether a custom may serve as a basis for legal reasoning. The study also considers a contemporary application. This application is the International Islamic Fiqh Academy's recognition of moral rights, to which modern custom has assigned an appreciable financial value.

1.1 Research Objectives
The study has four objectives:

1. To establish the lexical and technical foundations of the concept of custom.
2. To distinguish the types of custom and clarify the difference between valid and invalid custom.
3. To identify the parameters and criteria used by jurists to accept or reject a custom.
4. To present the legal evidence supporting custom as a source of Islamic legal rulings.

1.2 Significance of the Study

The significance of the study lies in the following matters:

- It demonstrates the flexibility of Islamic law and its capacity to accommodate evolving customs.
- It provides a scholarly basis for distinguishing valid custom from invalid custom while protecting the objectives of Islamic law.
- It offers researchers an important juristic tool for understanding contemporary transactional rulings.
- It helps direct juristic reasoning towards new issues through a disciplined, purposive approach.

1.3 Research Problem

The central research question is as follows: How may valid custom be distinguished from invalid custom under the relevant juristic parameters and criteria, and to what extent is custom authoritative in Islamic law?

This question gives rise to three subsidiary questions:

1. What juristic parameter governs the acceptance and recognition of custom?
2. Which criteria render a custom invalid and legally disregarded?
3. How have jurists addressed newly emerging customs across different historical periods?

2. The Meaning of Custom

2.1 The Lexical Meaning of ʿUrf

Ibn Fāris states that the Arabic root ʿ-r-f has two principal meanings. The first denotes succession and continuity. The second denotes calmness and reassurance.

The first meaning appears in the expression ʿurf al-faras, the mane of a horse. It is so named because its hairs follow one another in succession. The Arabs also said that sandgrouse arrived ʿurfan ʿurfan, meaning that they came successively, one after another.

The second meaning denotes knowledge and recognition. Thus, the statement that one person ʿarafa another means that the former recognised and knew the latter. The term maʿrūf also derives from this sense. It refers to something with which people feel at ease and familiar.[1]

2.2 Custom in Arabic Lexicography and Islamic Legal Theory

According to Lisān al-ʿArab, the terms ʿurf and maʿrūf may denote generosity and benevolence. They describe the good that a person performs or extends to another. The Qur'an states: "Keep their company in this world with kindness."[2] In this verse, maʿrūf means companionship founded on kindness and benevolence.

The terms ʿurf, ʿārifah, and maʿrūf are also presented as the opposite of wrongdoing. They refer to good conduct that the human disposition accepts and finds reassuring. Al-Zajjāj similarly states that maʿrūf encompasses every act regarded as commendable.

Ibn Manẓūr writes: "The ʿurf of the land is its elevated part, and its plural is aʿrāf. The leading and upper parts of winds and clouds are likewise called aʿrāf, while the singular is ʿurf."

Al-Fayrūzābādī explains in al-Qāmūs al-Muḥīṭ that maʿrūf is that which a thing indicates and makes known. The expression "he asked him for news so that he might know it" uses the same root. Likewise, taʿārafa al-qawm means that the members of a group came to know one another.[3]

Legal theorists, both classical and modern, offered several technical definitions of custom. These definitions differ in formulation but remain close in substance. Al-Nasafī defines custom as "that which becomes settled in the mind through reason and is accepted by sound human dispositions."[4]

Other leading definitions include the following:

1. Al-Jurjānī defines custom as "that upon which minds have settled, as attested by reason, and which sound human dispositions have accepted."[5]
2. Ibn ʿĀbidīn explains that ʿādah derives from repetition. Through frequent and continuous repetition, a practice becomes familiar and settled in people's minds. They accept it without requiring separate proof or contextual

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[1] Ibn Fāris, Muʿjam Maqāyīs al-Lughah, vol. 4, p. 281.

[2] Qur'an 31:15 (Luqmān).

[3] See Ibn Manẓūr, Lisān al-ʿArab, vol. 9, pp. 239-242.

[4] Al-Fayrūzābādī, Al-Qāmūs al-Muḥīṭ, vol. 3, pp. 179-180; Ḥāfiẓ al-Dīn al-Nasafī, Taṣfiyat al-Ḥāfiẓ al-Dīn al-Nasafī, manuscript held at Dār al-Kutub; ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī.

[5] See al-Jurjānī, Al-Taʿrīfāt, p. 193.

evidence. It then acquires the status of a customary reality. In his view, habit and custom are closely connected in application, although they differ conceptually.[6]

3. A modern definition describes custom as "a matter with which people feel at ease and familiar, and which a community regularly observes because reason approves it and persons of sound judgement do not reject it."[7]
4. Another definition states: "Custom is what people recognise and consistently follow in speech, action, or omission. It is also called habit."
5. Custom has also been defined as "that which people regularly observe in their transactions and through which the affairs of their lives remain orderly."[8]

2.2.1 Discussion of the Technical Definitions

The preceding definitions reveal several points of disagreement among scholars.

First, some definitions are not fully inclusive because they exclude invalid custom.

Second, most definitions use phrases such as "that with which people feel at ease," "that which becomes settled in the mind," "that which people recognise," or "that which people regularly observe." These expressions suggest universality. In practice, however, a custom may be established by the conduct of the majority. Unanimous observance is not required.

Third, some scholars equate habit with custom. The two concepts are related in application, but they are not identical.

Fourth, some definitions confine custom to transactions. The stronger view is that its scope is wider. Custom may also affect certain means connected with worship, ordinary practices, and criminal matters.

2.2.2 The Preferred Definition

In The Effect of Custom on Islamic Legislation, al-Sayyid Ṣāliḥ ʿAwaḍ adopts a comprehensive definition. He states:

> Custom is that which becomes settled in people's minds, which reason regards as good, which sound human dispositions accept, and which people continue to observe, provided that Islamic law neither rejects it nor withholds its approval.

Each element of this definition serves a distinct purpose:

- **"That which"** gives the definition a general scope and includes every form of custom.
- **"Becomes settled in people's minds"** excludes incidental practices that occur only once or a few times.
- **"Reason regards as good"** excludes customs rejected by sound reason.
- **"Sound human dispositions accept"** excludes conduct rejected by an upright disposition. It also excludes practices accepted only by distorted inclinations or personal desires.
- **"People continue to observe"** excludes a practice that does not endure and is later altered or abandoned.
- **"Islamic law does not reject it"** excludes every custom that conflicts with Islamic legal texts and rulings. Interest-based banking transactions are an example because they constitute an invalid practice driven by worldly interests.
- **"Islamic law approves it"** excludes pre-Islamic customs that Islamic law did not endorse. It also excludes later practices that conflict with Islamic legal texts.[9]

3. The Emergence and Classification of Custom

3.1 Causes of the Emergence of Custom

An examination of social phenomena shows that customs and habits arise from several principal causes.[10]

3.1.1 Social Necessity

A community may be compelled to adopt a particular practice because of its living conditions. The practice initially meets an essential social need. Repetition then turns it into an established habit and, eventually, a custom that few people disregard.[11]

3.1.2 Pressing Need

Some customs emerge in response to an urgent need. Ignoring that need would cause hardship or distress. Custom then becomes a means of removing hardship.[12] Human needs continually change as societies and historical periods develop. Most

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[6] Ibn ʿĀbidīn, Majmūʿat Rasāʾil Ibn ʿĀbidīn, vol. 2, p. 114.

[7] Ibn ʿĀbidīn, Nashr al-ʿUrf fī Bināʾ Baʿḍ al-Aḥkām ʿalā al-ʿUrf; Aḥmad Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 8.

[8] Al-Maydānī, Ḍawābiṭ al-Maʿrifah, p. 45; ʿAbd al-Wahhāb Khallāf, Uṣūl al-Fiqh, p. 89; Uṣūl al-Fiqh, p. 273.

[9] Al-Sayyid Ṣāliḥ ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 52.

[10] Uṣūl al-Fiqh li-Ibn Taymiyyah, vol. 2, p. 512.

[11] Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 13.

[12] Al-Zarqā, Al-Madkhal al-Fiqhī al-ʿĀmm, vol. 2, p. 841.

prevailing customs therefore respond to social needs. States take custom into account in their regulatory systems, while individuals do so in everyday dealings.[13]

3.1.3 Professional and Social Considerations

People recognise differences among professions and occupations in their daily dealings. Each profession or field may therefore develop its own customs. These customs become the governing reference for transactions within that field and are rarely disputed.[14]

3.1.4 Authority or Personal Preference

A custom may arise from an order issued by a ruler or from a particular preference. Some customs established under Fāṭimid rule in Egypt, including certain celebrations of saints' birthdays, illustrate this process.[15]

3.1.5 Inherited Custom

A community may inherit a practice from its ancestors without having any genuine need for it. Some pre-Islamic beliefs passed from parents to children in this manner.[16] The Qur'an describes this attitude: "We found our forefathers following a way, and we are guided by their footsteps."[17]

3.1.6 Pure Imitation

Imitation may itself give rise to custom. It assumes several forms:

- A nation may imitate its leaders, rulers, and other influential persons.
- A defeated nation may imitate a power that colonised its land and thought. It imports that power's customs and traditions and applies them unchanged because it assumes that they deserve to be followed.

These causes vary according to time and place. A practice familiar in one country may be unknown in another. This applies to both verbal and practical customs. Such differences often arise from natural conditions, including climate and patterns of living.[18]

3.2 Classification into Valid and Invalid Custom

3.2.1 Valid Custom

Valid custom is a practice recognised by people that conflicts with neither an Islamic legal text nor a consensus. It must not cause the loss of a legitimate interest or produce harm.

Islamic law may expressly recognise such a custom. One example concerns the maintenance and clothing owed to a mother, taking account of the husband's means. The Qur'an states:

> Mothers shall breastfeed their children for two complete years, for whoever wishes to complete the period of nursing. The father of the child shall provide for them and clothe them according to what is customary.[19]

Here, maʿrūf refers to the prevailing custom. It imposes no hardship on a person of limited means and permits no neglect by a wealthy person.[20]

Valid custom also includes pre-Islamic practices later approved by Islamic law. One example is diyah, or financial compensation for unlawful killing. The practice was known before Islam and was later recognised by Islamic law.[21] Another example is salam. Under this contract, a seller undertakes to deliver specified goods at a later date, while the buyer pays the price in advance. This contract was known before Islam and was subsequently approved.[22]

A valid custom may also lack direct textual recognition. It remains acceptable when it causes neither harm nor corruption. The division of a marriage gift into prompt and deferred portions is one example. Some societies follow this practice, and no legal text prohibits it.

3.2.2 Invalid Custom

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[13] Muḥammad Jamāl ʿAlī, Al-ʿUrf wa-Atharuhu fī al-Aḥkām, pp. 27-28.

[14] See Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 15.

[15] Ibid., pp. 15-16.

[16] Al-Mubārakī, Al-ʿUrf wa-Atharuhu fī al-Sharīʿah wa-al-Qānūn, pp. 55-56.

[17] Qur'an 43:22 (al-Zukhruf).

[18] Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 16; al-Mubārakī, Al-ʿUrf wa-Atharuhu fī al-Sharīʿah wa-al-Qānūn, p. 56.

[19] Qur'an 2:233 (al-Baqarah).

[20] ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 142.

[21] Ṭalabat al-Ṭalabah, p. 313. The page number in the Arabic manuscript appears as "3 31" and has been normalised here as 313.

[22] Al-Jurjānī, Al-Taʿrīfāt, p. 160.

Invalid custom is a practice followed by people that conflicts with Islamic legal texts. It may also make the prohibited lawful or nullify an obligation.[23] It has likewise been defined as any recognised practice that contradicts a legal text, causes harm, or defeats a legitimate interest.

Examples include:

- prohibited conduct at religious festivals and funerals;
- interest-based financial transactions;
- gambling contracts;[24]
- insurance contracts founded on uncertainty and excessive risk. Such customs are invalid because the legal evidence establishes their impermissibility.[25]

4. The Legal Authority of Custom

The majority of scholars agree that custom has legal authority and may serve as the basis of many rulings. They rely on evidence from the Qur'an, the Prophetic Sunnah, and practical consensus.

4.1 Evidence from the Qur'an

4.1.1 The Command to Enjoin What Is Customarily Right

God states: "Accept what is easy, enjoin what is customarily right, and turn away from the ignorant."[26] Al-Qarāfī invokes this verse when discussing a dispute between spouses over household property. He writes: "We may rely on God's statement, 'Accept what is easy and enjoin what is customarily right.' Therefore, judgement is given in accordance with whatever customary practice attests, unless evidence establishes the contrary."[27]

The verse directs the Prophet to act in accordance with recognised custom. This instruction indicates that custom has legal significance. Had it possessed no value, it would not have been commanded.

4.1.2 Maintenance and Clothing According to Custom

God also states: "The father of the child shall provide for them and clothe them according to what is customary."[28] Maintenance and clothing are therefore assessed in accordance with prevailing custom. Their amount varies with the parties' poverty or wealth.[29]

The legal text makes custom the standard for assessing maintenance and clothing. This confirms that custom is a recognised reference when rights and duties must be quantified.[30]

Al-Ṭabarī's interpretation of this verse supports the same conclusion.[31] The term maʿrūf denotes what a man owes his wife and child in light of his circumstances. A prosperous person bears a different obligation from a person of limited means. Prevailing social custom provides the standard. The equivalence mentioned by al-Ṭabarī can be determined only by reference to established practice. That practice identifies acceptable levels of maintenance and clothing.

The verse therefore establishes the legal relevance of custom. It links maintenance to social practice rather than fixing a precise textual amount. A similar principle appears in the verse concerning expiation: "from the average of what you feed your families."[32] This verse fixes no specific quantity or type of food. It refers instead to what people regard as an average meal. The standard lies between expensive and inexpensive food and between the food of the wealthy and that of the poor. Common food also varies between countries and among social groups within the same country. The legally required standard is therefore what the relevant community regards as average. This demonstrates that custom forms part of the basis of certain Islamic legal rulings.

Ibn al-ʿArabī states in Aḥkām al-Qurʾān that this is a legal-theoretical proof through which God has connected lawful and unlawful matters. He writes: "This is not a quantity fixed by law. God has instead referred it to customary practice."[33]

4.2 Evidence from the Prophetic Sunnah

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[23] Khallāf, ʿIlm Uṣūl al-Fiqh, p. 90.

[24] Zaydān, Al-Wajīz fī Uṣūl al-Fiqh, p. 216.

[25] Al-Jurjānī, Al-Taʿrīfāt, p. 208, definition of gharar.

[26] Qur'an 7:199 (al-Aʿrāf).

[27] Al-Qarāfī, Al-Furūq, vol. 3, p. 149.

[28] Qur'an 2:233 (al-Baqarah).

[29] See al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ, vol. 4, p. 23.

[30] Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 23.

[31] Qur'an 2:233 (al-Baqarah).

[32] Qur'an 5:89 (al-Māʾidah).

[33] Ibn al-ʿArabī, Aḥkām al-Qurʾān, vol. 1, p. 513.

4.2.1 The Report Attributed to ʿAbd Allāh ibn Masʿūd

Scholars cite the report attributed to ʿAbd Allāh ibn Masʿūd: "Whatever Muslims regard as good is good in the sight of God, and whatever they regard as reprehensible is reprehensible in the sight of God."[34] Jurists and legal theorists use this report to support the authority of custom, consensus, and juristic preference. Al-Suyūṭī writes in al-Ashbāh wa-al-Naẓāʾir: "The sixth maxim is that custom is authoritative. Its basis is the Prophet's statement: 'Whatever Muslims regard as good is good in the sight of God.'"

The inference is that a practice accepted by Muslims, their reason, and their sound dispositions is legally acceptable. God would not allow them to agree upon falsehood. A custom that people observe and that violates no legal text is therefore recognised by Islamic law. For this reason, classical and modern works on custom regularly cite this report.

Objections to the Report's Attribution

Some scholars challenge the report's attribution to the Prophet. Al-ʿAlāʾī states:

> Despite extensive research, repeated examination, and inquiry, I have not found it attributed to the Prophet in any collection of hadith, even through a weak chain. It is instead a statement of ʿAbd Allāh ibn Masʿūd that ends with him.[35]

Al-Zaylaʿī likewise identifies three chains for the report, all of which end with Ibn Masʿūd.

Response to the Objection

Even if the report is established only as a statement of Ibn Masʿūd, it may be treated as having the force of a Prophetic report because its subject leaves little room for personal opinion. At minimum, it is the view of a Companion. The majority of scholars regard the view of a Companion as authoritative, especially when it became widespread and no opposing view is known.

Whether attributed to the Prophet or confined to Ibn Masʿūd, the report remains among the strongest authorities used to establish the maxim that custom is authoritative. It also supports the recognised place of custom in Islamic law.[36]

Objection to the Report's Meaning

Other scholars argue that the report does not establish the authority of custom. In their view, the word "Muslims" refers to qualified jurists rather than the public. The phrase "whatever they regard" denotes considered judgement and juristic reasoning. Ibn al-Qayyim explains that, among the Companions, an opinion was "what the heart concludes after reflection, consideration, and a search for the correct position where the indications conflict."[37]

The word "Muslims" is also expressed in general terms. On this reading, it encompasses all qualified jurists among those competent to deliberate and decide. The report would then concern consensus,[38] not custom. Its use as proof of the authority of custom would therefore be misplaced.[39]

Response to the Objection Concerning Meaning

The report appears to support the authority of consensus. That does not prevent it from also supporting custom, particularly practical consensus.[40] A custom may be accepted by qualified jurists or followed by the Muslim community in its transactions. If that practice is regarded as good, it is good in the sight of God.[41] If it is regarded as reprehensible, it is reprehensible in His sight. The report may therefore support the legal recognition of custom, although its meaning is not conclusive. The existence of this interpretive possibility does not negate the authority of custom.[42]

4.2.2 The Hadith of Hind bint ʿUtbah

ʿĀʾishah reports that Hind bint ʿUtbah said: "Messenger of God, Abū Sufyān is a miser. He does not give me enough for myself and my child unless I take from his property without his knowledge." The Prophet replied: "Take what is sufficient for you and your child according to what is customary."[43]

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[34] Aḥmad ibn Ḥanbal, Al-Musnad, vol. 1, p. 379.

[35] See al-Zaylaʿī, Naṣb al-Rāyah, vol. 4, p. 133.

[36] See al-Mubārakī, Al-ʿUrf wa-Atharuhu fī al-Sharīʿah wa-al-Qānūn, p. 115; al-Zarqā, Sharḥ al-Qawāʿid al-Fiqhiyyah, p. 165.

[37] Al-Ṭayyib al-Khuḍarī al-Sayyid, Buḥūth fī al-Ijtihād fīmā lā Naṣṣ fīh, p. 219.

[38] See ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 181.

[39] See Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, pp. 25-26.

[40] Al-Sayyid, Buḥūth fī al-Ijtihād fīmā lā Naṣṣ fīh, p. 219.

[41] See ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 181.

[42] See Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, pp. 25-26.

[43] ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 182.

The Prophet made maʿrūf, or recognised custom, the standard for assessing maintenance. This standard determines sufficiency in food, clothing, and similar needs. Islamic law therefore leaves many detailed assessments to prevailing custom. It also accommodates differences among persons, places, circumstances, and periods.[44]
Al-Nawawī states in his commentary on this hadith: "Its benefits include reliance on custom in matters for which Islamic law has fixed no specific measure."

4.3 Practical Consensus

Practical consensus further supports the authority of custom. A continuous practice inherited by the Muslim community across generations may have no known opponent. It then amounts to collective approval and acquires the status of recognised legal-theoretical evidence.[45]

5. Conditions for the Recognition of Custom and the Academy's Position on Moral Rights

5.1 Conditions for the Recognition of Custom

5.1.1 No Conflict with an Islamic Legal Text or a Definitive Principle

A fundamental condition is that custom must not conflict with an explicit text of the Qur'an or the Prophetic Sunnah. It must also remain consistent with definitive principles derived from those sources. The Lawgiver best knows the interests of human beings. A matter established by revelation is a binding truth that custom may not suspend.[46]
A custom that contradicts revelation is disregarded. It may make lawful what God has prohibited, prohibit what He has permitted, or nullify an established rule. Such a custom is a wrong that must be opposed. Examples include interest-based dealings, immodest exposure, prohibited conduct at weddings and funerals, gambling contracts, the denial of women's inheritance rights, bribery, and the wearing of gold or silk by men. These are invalid customs and have no legal weight.[47]

Customs That Do Not Conflict with Islamic Law

A custom that does not conflict with Islamic law falls into one of two situations.
First, a custom may be entirely free of conflict and may accord with the objectives of Islamic law. Many commercial customs, political arrangements, judicial procedures, and social systems belong to this category. Such practices meet human needs and accord with the principles of sound administration and reform.
Second, a custom may appear to conflict with a legal text. The apparent conflict may be reconciled through methods accepted by legal scholars. The text itself may also rest on a customary rationale. In either case, custom remains relevant to the analysis and may influence the resulting ruling.[48]
Abū Sunnah's View on Conflict between Custom and Legal Evidence
Aḥmad Abū Sunnah argues that a custom may be recognised in the presence of an apparent conflict with legal evidence only when two conditions are met:

1. It must be a general custom or a particular custom recognised by the Prophetic Sunnah. A particular custom unsupported by the Sunnah is normally disregarded, except under the view attributed to the Balkhī jurists and those who followed them.
2. The custom must be traceable to a recognised source of Islamic legal evidence or possess another accepted basis in Islamic law.[49]

The issue then concerns an apparent conflict between two forms of legal evidence. Jurists resolve it through established interpretive methods. A general text may be particularised, and an absolute text may be qualified. An analogy may be set aside in favour of juristic preference. Custom does not nullify or defeat a text. Rather, the two sources are reconciled as far as possible. The text is applied to a specified situation, while custom governs situations outside that scope. Custom may sometimes displace analogy because it is more persuasive and more responsive to the purposes of the law. It reflects people's interests in their transactions.[50]

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[44] See al-Nawawī, Sharḥ Ṣaḥīḥ Muslim, vol. 12, p. 9.

[45] ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 182.

[46] Al-Turkī, Uṣūl Madhhab al-Imām Aḥmad: Dirāsah Uṣūliyyah Muqāranah, pp. 603-604.

[47] See Muḥammad ibn ʿAbd al-Ghaffār al-Ashqar, Al-Aʿrāf al-Bashariyyah fī Mīzān al-Sharīʿah al-Islāmiyyah [Human Customs in the Balance of Islamic Law], p. 55.

[48] See Muḥammad ibn ʿAbd al-ʿAzīz Qūtī, Al-ʿUrf wa-Atharuhu fī Fiqh al-Muʿāmalāt al-Māliyyah ʿinda al-Ḥanābilah [Custom and Its Effect on Ḥanbalī Jurisprudence of Financial Transactions], vol. 1, p. 244.

[49] Ibid.

[50] Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 83.

Abū Sunnah supports this analysis with the hadith of Ḥakīm ibn Ḥizām. The Prophet said: "Do not sell what you do not possess." Jurists did not apply the general wording to istiṣnāʿ, or manufacture contracts, because custom had established those contracts.[51]

The Prophet also prohibited pebble sales and sales involving excessive uncertainty. The prohibition is general and invalidates a sale when the subject matter is materially unknown. Jurists nevertheless exempted the purchase of a drink from a water carrier. The quantity was unknown, but customary practice accepted the transaction. Custom therefore operated as the basis for particularising the general rule.[52] Strictly speaking, custom itself does not particularise or qualify legal texts. The operative authority is consensus founded on custom.

5.1.2 Consistency or Predominance

For a custom to be recognised, it must be consistent or predominant.

- **Consistency** means that the custom is followed continuously in all relevant instances without exception.
- **Predominance** means that the custom prevails in most relevant instances, even if a small number of exceptions exist.

Al-Suyūṭī writes: "A habit is recognised only when it is consistent. If it is unstable, it is not recognised; and if the relevant indications conflict, the matter is disputed."[53] Imām al-Ḥaramayn al-Juwaynī similarly states: "A matter in which habit is clearly consistent is authoritative, and what it implies is equivalent to what is expressly stated. If the indications conflict, however, the matter is disputed."[54]

Occasional departures do not deprive a custom of its authority while it remains predominant.[55] Al-Shāṭibī states: "When habits are legally recognised, occasional breaches do not affect their recognition so long as they remain habits overall."[56] This accords with the juristic maxim: "Legal consideration attaches to what predominates; a rare occurrence has no ruling."

Only a predominant or consistent custom may therefore be recognised. A custom becomes settled among people only through predominance or consistency. These qualities operate as contextual evidence of a person's intention in speech and conduct.

Suppose goods are sold for unspecified dirhams in a locality where several currencies circulate at different values. The price is construed as referring to the predominant currency. Predominance here supplies the contextual evidence that identifies the parties' intended meaning. It also demonstrates why custom is needed to interpret transactions.

A shared or equivocal custom is different. This term refers to a situation in which observing and disregarding a practice are equally common. Such a custom cannot determine the intended meaning because it creates uncertainty. For example, a sale for unspecified dirhams is invalid when all circulating currencies are equally prevalent. The price remains unknown because no contextual evidence identifies the intended currency.[57]

The same problem arises when a father and daughter disagree about property sent to her at marriage. The property may have been a gift or merely a loan for use. An equivocal custom cannot resolve the dispute because it provides no stable standard.

5.1.3 Generality

Another proposed condition is that a custom should be general. It should be observed throughout a country rather than confined to a group, profession, or locality. Generality must be distinguished from consistency.

A custom may be general but not consistently observed in every instance. Conversely, a custom may be consistently observed within a particular group or environment. A legally recognised custom must therefore possess sufficient prevalence and acceptance. It must also be clearly predominant or consistent.[58]

Consistency and generality are not identical. Jurists therefore disagree on whether both must be present. A custom may be general without governing every case, or consistent while remaining limited to a particular environment or group.[59]

5.1.4 Existence at the Time of the Transaction

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[51] Reported by Ibn Mājah, Sunan, Book of Commercial Transactions, chapter on the prohibition of selling what one does not possess and profiting from what one does not guarantee, vol. 2, p. 737, no. 2187; and Abū Dāwūd, Sunan, Book of Hiring, chapter on a person selling what he does not possess, vol. 3, p. 281, no. 3503. Al-Albānī authenticated it in Ṣaḥīḥ Sunan Ibn Mājah, vol. 2, p. 13, no. 1780.

[52] Reported by Muslim, Ṣaḥīḥ, Book of Sales, chapter on the invalidity of pebble sales, vol. 4, p. 10, no. 156, with al-Nawawī's commentary.

[53] Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 83.

[54] Muṣṭafā al-Bughā, Āthār al-Adillah al-Mukhtalaf fīhā fī al-Fiqh al-Islāmī, p. 280.

[55] Al-Suyūṭī, Al-Ashbāh wa-al-Naẓāʾir fī Qawāʿid wa-Furūʿ Fiqh al-Shāfiʿiyyah, p. 185.

[56] Al-Nadwī, Al-Qawāʿid al-Fiqhiyyah [Islamic Legal Maxims], pp. 130, 227.

[57] Abū Sunnah, Al-ʿUrf wa-al-ʿĀdah fī Raʾy al-Fuqahāʾ, p. 74.

[58] Ibid., p. 74, with minor adaptation.

[59] ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 196.

A custom must exist when the relevant transaction is concluded. It must precede the contract or act and continue to exist when that act occurs. A custom affects only later conduct and does not govern acts that preceded it. This rule applies to verbal customs concerning expressions and practical customs concerning conduct.

Al-Suyūṭī writes: "The custom by reference to which words are construed is the preceding custom that accompanies them, not a later custom."[60]

Ibn Nujaym likewise states: "No consideration is given to an emergent custom." He explains that custom is considered in transactions but does not retroactively qualify a general declaration. A later custom cannot particularise or restrict a transaction that occurred before the custom emerged.[61]

Al-Shāṭibī observes that habits vary with periods, places, and circumstances. A new custom should therefore not govern the conduct of persons from an earlier period. An external indication may, however, prove that the new custom corresponds to the earlier practice. If so, it may assist in evaluating past conduct.[62]

The scholars' statements establish that a custom must be in force when the relevant act occurs. It cannot govern past conduct unless clear evidence shows that it existed at the time. Nor can it govern future conduct before it has actually become established. Time is therefore central to the recognition of custom, whether the custom concerns ordinary practice or a legally relevant habit.[63]

5.1.5 No Contrary Express Statement

A custom must not be contradicted by an express statement or conduct. Custom normally governs because the parties' silence about a recognised practice amounts to implicit acceptance. An express term or clear agreement to the contrary takes priority. Express meaning is stronger than the implication supplied by custom.[64]

Al-ʿIzz ibn ʿAbd al-Salām confirms this principle. He writes: "Whenever a matter is established by custom, an express contrary agreement is valid if it accords with the purpose of the contract and can be performed." A hirer may therefore stipulate that a worker must work throughout the day without an interval for food or drink, provided that the condition can be performed and accords with the contract's purpose. A condition requiring a month of specified service is likewise binding, even if it differs from ordinary custom.[65]

Custom functions as an implied contractual term under the maxim: "What is established by custom is equivalent to an express stipulation." The parties' silence shows reliance on settled custom. That implication ceases when an express provision states otherwise, since "an implication has no weight against an express statement." Custom is therefore authoritative only when it conflicts with neither a definitive legal text nor an express contractual term.[66]

5.1.6 Binding Force

Once the preceding conditions are met, a custom becomes binding and legally recognised. It must not contradict a legal text. It must be consistent or predominant, general or otherwise legally relevant, earlier than the transaction, and unopposed by an express term.

Binding force means that people regard compliance with the custom as obligatory. The custom then assumes a status similar to an express condition. Jurists articulate this principle through several maxims:

- What is established by custom is equivalent to an express stipulation.
- What is recognised among merchants is equivalent to a stipulation between them.
- Custom is authoritative.[67]

A custom becomes binding when it establishes a right in an obligatory manner. It must also be settled in people's minds and accepted by reason and sound human dispositions. Such acceptance shows that the community regards the custom as binding. This feature distinguishes a legally recognised custom from an incidental or temporary habit.[68]

5.2 The International Islamic Fiqh Academy's Position on Moral Rights

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[60] Al-Suyūṭī, Al-Ashbāh wa-al-Naẓāʾir, p. 193.

[61] Ibn Nujaym, Al-Ashbāh wa-al-Naẓāʾir, p. 101.

[62] ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 196.

[63] Al-Shāṭibī, Al-Muwāfaqāt fī Uṣūl al-Sharīʿah, vol. 1, part 2, p. 583.

[64] Muḥammad Jamāl ʿAlī, Al-ʿUrf wa-Atharuhu fī al-Aḥkām, p. 55 ff.

[65] Al-Shāṭibī, Al-Muwāfaqāt fī Uṣūl al-Sharīʿah, vol. 1, part 2, p. 583.

[66] Al-ʿIzz ibn ʿAbd al-Salām, Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām, vol. 2, p. 325; al-Shāṭibī, Al-Muwāfaqāt fī Uṣūl al-Sharīʿah, vol. 1, part 2, p. 583.

[67] Al-Zarqā, Al-Madkhal al-Fiqhī al-ʿĀmm, vol. 2, p. 879; al-Suyūṭī, Al-Ashbāh wa-al-Naẓāʾir, p. 182; al-Khayyāṭ, Naẓariyyat al-ʿUrf [The Theory of Custom], pp. 94-102.

[68] ʿAwaḍ, Athar al-ʿUrf fī al-Tashrīʿ al-Islāmī, p. 151; al-Nadwī, Al-Qawāʿid al-Fiqhiyyah, p. 256.

At its fifth session in Kuwait City, held from 10 to 15 December 1988, the Council of the International Islamic Fiqh Academy considered papers and expert discussions on moral rights. It then adopted a resolution on the subject.[69]
The resolution recognises business names, corporate names, trademarks, literary production, inventions, and discoveries as rights belonging to their holders. Contemporary custom has assigned these rights a tradable financial value. Islamic law therefore recognises them, and their violation is impermissible.[70]
The Academy also permits the use and transfer of business names, corporate names, and trademarks for consideration. The transaction must be free from fraud, swindling, forgery, and prohibited uncertainty. Copyrights and patent rights are likewise protected by Islamic law. Their holders may exploit and transfer them, and no person may infringe them.[71]

5.2.1 Custom and the Scope of Istiṣnāʿ

An important condition of an istiṣnāʿ contract is that it concern goods customarily manufactured and traded during the relevant period. If people begin to transact in newly developed goods, those goods may enter the scope of istiṣnāʿ.
Some contemporary jurists therefore argue that istiṣnāʿ is not confined to items mentioned by classical jurists. It may include:

- garments, although the manufacture of garments was not formerly treated in this manner;
- footwear, vessels, furniture, and military equipment;
- aircraft, automobiles, ships, lighting equipment, analytical laboratories, cameras, and writing machines;
- modern products such as satellites and spacecraft, provided that their specifications can be defined sufficiently to prevent dispute.[72]

Jurists explain that rulings founded on custom change when the custom changes. Rules concerning maintenance and protected custody provide examples. A transaction rejected under an earlier custom may therefore become permissible under a later one.[73]
Abū Sunnah writes: "Whatever custom recognises may validly be manufactured under istiṣnāʿ. Our Ḥanafī jurists' express statement that garments may not be manufactured under istiṣnāʿ rested on the custom of their period. The practice is now widespread and is valid, provided that the custom is general."[74]

6. Parameters and Criteria for Valid and Invalid Custom

6.1 Parameters of Valid Custom

Jurists identify several conditions that a custom must satisfy before Islamic law will recognise it.

6.1.1 No Conflict with a Definitive Legal Text

A custom that conflicts with a Qur'anic text or an authentic Prophetic report is disregarded. Legal texts take priority over custom. Ibn ʿĀbidīn states: "Custom is not recognised when it conflicts with Islamic law."[75]

6.1.2 Consistency or Predominance

A custom must recur regularly in people's dealings or prevail in most of them. A rare or exceptional practice is not recognised. Al-Suyūṭī states: "The custom that receives legal consideration is the predominant, not the rare."[76]

6.1.3 Existence at the Time of the Transaction

An extinct custom, or one that people no longer observe, cannot govern a transaction. The existence of custom depends on its continuing social stability.

6.1.4 No Conflict with a Weightier Legal Interest

A custom is disregarded if it causes harm or defeats a weightier public interest. Islamic law seeks to secure benefits and prevent harm.

6.1.5 Stability and Public Recognition

An individual practice or a practice confined to a narrow group is generally disregarded unless it becomes widespread and predominant in the relevant community.

6.2 Criteria for Identifying Invalid Custom

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[69] Buḥūth fī Qaḍāyā Fiqhiyyah Muʿāṣirah [Studies in Contemporary Juristic Issues], pp. 119-120.

[70] Al-Būṭī, Qaḍāyā Fiqhiyyah Muʿāṣirah [Contemporary Juristic Issues], pp. 97-108.

[71] Al-Muʿāmalāt al-Māliyyah al-Muʿāṣirah fī Ḍawʾ al-Fiqh wa-al-Sharīʿah [Contemporary Financial Transactions in Light of Jurisprudence and Islamic Law], p. 132.

[72] See al-Junaydil, Manāhij al-Bāḥithīn fī al-Iqtiṣād al-Islāmī [Research Methods in Islamic Economics], vol. 1, p. 213.

[73] See Journal of the International Islamic Fiqh Academy, issue 5, vol. 3, p. 2267.

[74] Al-Najjār, Taʾṣīl al-Iqtiṣād al-Islāmī [Foundations of Islamic Economics], p. 171.

[75] Ibn ʿĀbidīn, Ḥāshiyah, vol. 1, p. 123.

[76] Al-Suyūṭī, Al-Ashbāh wa-al-Naẓāʾir, p. 98.

Invalid custom is a practice that people regularly follow but that conflicts with the purposes of Islamic law or impairs protected rights. Jurists identify it through the following criteria.

6.2.1 Conflict with Islamic Legal Texts

A practice that conflicts with the Qur'an or the Sunnah is invalid. The pre-Islamic customs abolished by Islamic law are examples.

6.2.2 Harm or Corruption

A custom is invalid when it wrongfully consumes people's property or harms an individual or the community. This conclusion rests on the maxim: "No harm shall be inflicted or reciprocated."

6.2.3 Excessive Uncertainty, Interest, or Fraud

A commercial custom founded on interest, fraud, material ignorance, or excessive uncertainty has no legal force and must be rejected.[77]

6.2.4 Impairment of Rights or Suspension of Duties

A custom may deny women their inheritance rights or impose marriage gifts so excessive that marriage becomes difficult. Such practices remain invalid even if they are socially widespread.

7. Conclusion

Custom is an important juristic instrument in the formulation of Islamic legal rulings. Its authority, however, depends on compliance with the principles and objectives of Islamic law. Valid custom accords with the legal texts and secures a recognised interest. Invalid custom conflicts with Islamic law or leads to harm.

The Qur'an, the Sunnah, and practical consensus support the legal authority of custom. Yet a custom must be stable, predominant, and relevant to the period in which the transaction occurs. It must not contradict a definitive legal text or an express contractual term.

The study also demonstrates the capacity of Islamic jurisprudence to respond to new developments. The International Islamic Fiqh Academy's resolution on moral rights is a clear example. Contemporary custom assigned those rights a financial value, and Islamic jurisprudence recognised them as protected proprietary interests. Custom therefore remains a dynamic legal instrument. It can advance justice and respond to social change while remaining within the framework of Islamic law.

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[77] Al-Qarāfī, Al-Furūq, vol. 1, p. 177.

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