

Ilorin Journal of Religious Studies, (IJOURELS)

Vol.3 No.2, 2013, Pp.133-148

‘URF/ ‘ADAH (CUSTOM) : AN ANCILLARY MECHANISM IN SHARI‘AH

Taiwo Moshood SALISU

Department of Religions and Peace Studies

Islamic Studies Unit,

Lagos State University,

Ojo, Lagos State, Nigeria.

+2348023850153

salisutm1965@yahoo.com

Abstract

According to the legal maxim in Islamic legislative system, custom (‘Urf/ ‘Adah) is said to be authoritative (al-‘adah Muhakkamah). Thus, right from the inception of Islam, it has been playing a decisive role in the dispensation of Shari‘ah. Indeed, medieval and modern works in Islamic jurisprudence (‘Usul al-Fiqh) are replete of many judgments (Qada’) and rulings (ahkam) that were based on the custom of the people. The present study aims to x-ray the extent to which ‘Urf/ ‘Adah has been an indispensable mechanism in Islamic Ordinance. This is premised on the fact that Islam sanctioned some customs that are considered non-inimical to its tenets. The study has found that ‘urf / ‘Adah regulates the precise implication of terms that are commonly used in a given locality or society. It is argued through the paper that a quite number of Qur’anic verses (ayat) are assimilated with the aid of customary interpretation of a given locality. The descriptive study established that ‘Urf/ ‘Adah is not only a manifestation of the flexibility of Shari‘ah but that its incessant relevance would always come to play via internal dynamism as well as regular synthesis between its norms and the changing social realities. The research unmasked the fact that an Islamic Juri-Consult (Mufti) would continue to be acknowledged when he acquaints himself with the prevailing customs in his environment. The paper highlighted some conditions which makes ‘Urf / ‘Adah acceptable in Islamic Ordinances and concluded by observing that even though Urf/ ‘Adah occupies a crucial place in Shari‘ah yet, the degree of acceptability varies among the Sunni Schools of Thought.

Key words: ‘Urf/ ‘Adah, Sources of Shari‘ah, ‘Usul al-Fiqh, ahkam.

Introduction

It is incontrovertible that custom and customary practices are significant for the purpose of defining peoples' identity, thus, they are as old as mankind. Of course, not all the ancient customs and usages of the pre-Islamic days were abrogated, for there still remained a large corpus of such traditions that were considered worthwhile and/or beneficial by the Prophet.¹ Indeed, the flexibility and resilient nature of Islam establishes *'urf /'adah* as a source of deriving rules (*ahkam*) for litigations in Islam. Thus, its (Islam) accommodation of the non-repugnant customs of the pre-Islamic days and its modification and frowning at some repugnant conventions is not in doubt. However, *'urf /'adah* cannot have an independent legal force except to complement the *Qur'an* and *Sunnah* especially where there is no express verdict on a particular issue.

To our mind, therefore, the overall interest of Islam is ensuring guaranteed welfare, equity and fair-play for its adherents and, perhaps, this accounts for why the Prophet (SAW) was said to have given some judgments (*Qada'*) based on custom or law of the land (Madina) with the proviso that such norms agree with Islam. Therefore, the thrust of this research is to assess the machinery of *'urf/'adah* with a view to discerning its indispensable place in the dispensation of *Shari'ah* in Islam. The paper is discussed under five sections precluding the introduction and conclusion.

Definition of *al-'urf*

Al-'urf which is known as *minhag* in Hebrew conveys 'right' 'kindness' 'beneficence' as the *Qur'an* amply used it "command what is right" (*Qur'an* 7:199)

Al-'Urf, a noun derived from the perfect tense "*arafa*" literally, means "to know" i.e. that which is known and also acceptable to a community. It is defined as a well known norm with a set of people by which they are accustomed in form of act, speech or a bequeathed trend from the past generations to the succeeding ones.² To Zaydan, *al-'urf* is whatever is unanimously agreed upon by a society which is not only consistently stuck to, but also tenaciously adhered to in their daily life ranging from speech to action.³ It is something that has been practised by the community or a group of people to the extent of it being accepted as binding upon them. It could manifest in words or deeds.⁴ *Imam* Ghazali defines it as "what is accepted by people and is compatible to their way of

thinking and is normally adopted by those considered to be of good character”⁵

Al-^cUrf, judging from the above, therefore, could be termed as societal values, ethos, conventions and ideals. It could also be translated as the traditions of the people of sound minds and for it to serve legal purposes, it must not only be logical but also represent the refined aspect of customs, at least according to some medieval scholars such as al-Tabari (d.923C.E.), Ibn Qutaybah (d.889C.E.), Ibn ^cAbidin (d.836C.E.) and Abu Yusuf al-Bistami (d.798C.E)⁶

Forms of *Urf*

Al-^cUrf in *Shari^cah* is of two kinds; namely verbal custom (*al-^curf al-qawli*) and practical custom (*al-^curf al-^camali*). *Al-^curf al-qawli* refers to the change in the original meaning of words or terms as a result of long usage or expressions which varies in meaning. For instance, the original word for ‘Broom’ in Yoruba dialect is ‘*Òwò*’, which has changed to ‘*Igbale*’ nowadays. So also is ‘Beans Pudding’ i.e ‘*Òlẹ*’ which has changed to ‘*Moinmoin*’ in the contemporary days. The old usage has virtually lost its original meaning to the extent that if it is used today, it is difficult to comprehend what is meant or intended without making reference to the circumstances in which it is being used. However, the new word usage ‘*Igbale*’ and ‘*Moinmoin*’ respectively, are easily understood without any reference to the circumstances in which they are used. Verbal custom includes terms used by people in a given locality, region or even country which convey the same meaning but in different words or terms. *Imam* Abu Hanifah posits that *^curf* determines and interprets the actual meanings of terms commonly used in a society, region or nation.⁷

A comparison of common terms in usage between South-Western Nigerian Muslims and South African Muslims will illustrate the point here: ‘*irun*’ and ‘*namaz*’ (*Salat*), ‘*awẹ*’ and ‘*roza*’ (*Siyam*), ‘*sari*’ and ‘*sehri*’ (*Suhur*), ‘*eesu*’ and ‘*sipara*’ (*Juz^c*), ‘*nafilah*’ and ‘*sunnah*’ (Supererogatory prayer), *walimah*⁸ and *khatam* (feast for the completion of learning the *Qur’an*). Susanne, in a paper succinctly writes:

Custom includes those whose expression varies in meaning, and so the expression may change its meaning in relation to the same people, like the difference of terminology according to the usage of artisans in their crafts which differs from the usage of the majority, or in respect of the predominant usage in some ideas so that that expression which previously had a certain meaning which might have been understood as meaning something else⁹

Al-urf al-amali is that which exists in practice and is peculiar to a group of people, region or locality, the opposite of which might be the case in another society. For instance, the practice of paying house rent at the beginning of the month in Nigeria and end of the month in South Africa. Another example is where men are the dominant sales persons in the markets in Northern Nigeria but women are in the case of Southern Nigeria.

Abu Zahrah and Khallaf classified *urf* into good custom (*urf sahih*) and bad custom (*urf fasid*)¹⁰ The former is described as that which does not only negate any textual and/or jurisprudential facts either in its principle or application, but also has a firm legislation that has not been altered by environmental and cultural traits¹¹. In other words, good custom is the type that renders neither lawful to be unlawful nor unlawful to be lawful e.g. presentation of gifts (*Hadiya*) to one's fiancée before the wedding day. Abu Zahrah further classified good custom into two: viz: *urf Amm* and *urf Khass* i.e. general and specific custom.

General custom is the one that is conventionally accepted in all places like entering the bathroom while specific custom is the one that thrives in a particular city, province or region or exists among a group of people like transaction conventions, trading tradition, farming system and marital system among others. Ibn 'Abidin in *Nashr al-urf fi bina'i'ba'd al-ahkam ala al-urf* (Disseminating the Essence in the Formulation of Legal Rules Based on Custom) argues that a general custom which contradicts a text (*nass*) cannot be followed. However, where it contradicts only certain aspects of a text, then it acts as a limiting factor on the text. He contends further that specific custom cannot be followed even though some jurists would permit it.¹² He gives as an example, a general custom business transactions remarking that "a matter recognized as customary among the merchants is regarded as *urf* if agreed upon" e.g. the acceptable transaction peculiar to the merchants of Egypt, Lebanon, and its environs in those days known as *as-Sabtiya*.¹³ Mahmassani comments further on this practice: "If a merchant sold a commodity to a purchaser without agreement as to the time or manner of payment and if it was customary for merchants to obtain the price by weekly installments, then the contract of sale should be interpreted to this particular custom"¹⁴

The latter (i.e. *urf fasid*) is the kind that is not in conformity with the text of the *Qur'an* and/or ultimately negates any textual stand. Thus, it is not only unacceptable but also rejected in the legal realm. Hasiballah¹⁵ enunciated that *urf fasid* is the type that renders the unlawful lawful and

vice versa, e.g. paying *Sadaq* (dower) to the bride's parents, barring girls from inheritance, compelling a widow to marry into the late husband's family, taking usury, consuming alcohol, setting aside religious norms in ceremonies etc.

It suffices to say here that there is no substantial difference between *adat* and *urf*, for both are synonyms as regards intent and import, albeit, different in their application i.e. while *adat* is restricted to a person or locality *urf* is wider in scope, being the norm of the society.

Relationship between *urf* and *Ma'rif* in the *Qur'an*

The word *urf* in the speech of the Arabs is an infinitive noun of *ma'rif*, which according to 'Abbas al-Nadwi, a lexicographer is "something universally accepted, generally recognized, conventionally good, fair, right, wrong, courteous, equity etc."¹⁶ The word appears once in the *Qur'an* (7:199) while *ma'rif* appears thirty-nine times.

A general survey of the *Qur'an* would reveal that *urf* and *ma'rif* deal with social obligations of the *Ummah*. Perhaps, this explains why the word *ma'rif* is used so frequently. Citing few examples of the Qur'anic usage of the word as well as their exegetical interpretations is considered not out of place. Al-Tabari interprets the word (*ma'rif*) to mean faith in Allah and His Messenger as well as compliance to His dictates. He says 'Ye enjoin *ma'rif* and forbid *munkar*'(Q3:110) means that "You enjoin belief in Allah and in His Messenger and enforcing His laws and that you forbid polytheism, disbelief in His Messenger, and practicing that which He forbade" But he does not deviate from the conventional meaning of *ma'rif* i.e. "the good", "the familiar" "the customary", arguing, "The origin of *ma'rif* is: if a thing is known (*ma'rif*), its commission is good and is found pleasing among the people who believe in Allah. Thus, obedience to Allah by implication was called *ma'rif* because it is an act known to the people who have faith in Allah and cannot disapprove its commission."¹⁷ The Qur'anic verse containing the word *urf* "Hold to forgiveness; command what is right..." according to some of the Qur'anic exegetes (*Mufasssirun*) could also convey fear of Allah and observance of His commands cum prohibitions. Ibn Qutaybah (276/889), for instance, interpretes *urf* in the Qur'anic expression as fear of Allah, doing good to people, guarding the tongue against lying, and avoiding looking at forbidden things. He anchors his explanation on the fact that these actions are called *urf* and *ma'rif* because every spirit knows them and every heart is pleased with them.¹⁸ To al-Qurtubi, *urf* in the *Qur'an* usage means

“refraining from sin, acknowledging the kin and preparing for the Hereafter”¹⁹

^cUrf and Ma^cruf refer specifically to compliance to Allah’s dictates and not to human understanding of good. Kamali argues:

The reason for the position taken by the *Mufassirun* becomes apparent if one bears in mind Islam’s perspective on good and evil (*husn wa qubh*) which are, in principle, determined by divine revelation. Hence, when God ordered the promotion of ma^cruf, He could not have meant the good which reason or custom decrees to be such, but what He enjoins. This would also explain why ^curf in the sense of custom is not given prominence in the legal theory of the *'Usul al-fiqh*, although it carries some authority.”²⁰

It is important to note that like the *Sunnah*, custom provides an in-depth meaning cum contextual usages in the *Qur'an*. This is confirmed by the ^cUlama’ of both medieval and contemporary times. In fact, Shihab al-Din al-Qarafi (d.684/1285), a Maliki jurist, unequivocally submits that ^curf is not only distinctly upheld in the *Qur'an* as a proof of *Shari'ah* but forms an integral part of the *Qur'an*.²¹ Al-Tabari, too, is not far away from this stand as he declares “All deeds enjoined or recommended by Allah are of the ^curf.”²² Besim Hakim in his article “The Role of ^cUrf in Shaping the Traditional Islamic City” argued that the *Fuqaha'* saw in ^curf a seed of a tree of knowledge which was later developed by them as one of the pillars for interpreting and developing the law.²³ This is corroborated by Kamali who states: “The ^cUlama’ have generally accepted ^curf as a valid criterion for the purpose of interpreting the *Qur'an*”²⁴ Several examples in the *Qur'an* lend credence to this assertion. For instance, “...but Allah has permitted trade and forbidden usury...” (Q2:275) is the blanket Qur’anic expression regarding both *Bay'a* and *Riba*. Ibn Qudama, a Hanbali jurist argues in his *al-Mughni* that this general statement of the *Qur'an* can only be interpreted by what people comprehend as trade or sale, for Allah did not state the *modus operandi* for trade or sale.²⁵ A similar expression is “the age of full strength” or “age of puberty” used in the *Qur'an* in reference to an orphan’s property: “Come not nigh to the orphan’s property except to improve it, *until he attains the age of full strength...*” (Emphasis is mine, *Qur'an* 17:34). The point here is that determination of ‘the age’ varies from one place to another and on varied factors such as conventions, biology, geography, environment, family descent, etc. Ajetunmobi concurs: “The major areas in which ^cUrf can play

a significant role in this circumstance include determination of age of puberty and period of menstruation which are both subject to either geographical/ biological circumstances or individual peculiar experiences”²⁶ Yusuf ‘Ali provides us with the definition of maturity in India and England thus:

Ashuddun means the age when the orphan reaches his full maturity of strength and understanding say between the ages of 18 and 30. The age of legal majority may be 18 (as for certain purposes in India) or 21 (as in England) and (*18 in Nigerian constitution*) For certain purposes in Muslim law, it may be less than 18. In the orphan’s interest a much stricter standard is required in his case²⁷ (emphasis is mine)

In giving official recognition to the parents and the next of kin in the testamentary dispositions of property, who hitherto were not recognized prior to the advent of Islam, the *Qur’an* directs:

It is prescribed when death approaches any of you, if he leaves any goods that he makes a bequest to parents and the next of kin according to *reasonable usage; this is a due from the God-fearing* (Q2:180)

The general phrase is also used in relation to a widow who after four months and ten days, can “dispose of herself in a *just and reasonable manner*” (Q2:234) The *Qur’an* enjoins the maintenance of widows and divorced women while they are fulfilling their terms (*‘iddah al-Wafat* and *‘iddah al-Talaq*):

Those of you who die and leave widows should bequeath for their widows a year maintenance and residence. But if they leave (the residence), there is no blame on you for what they do with themselves provided it is *reasonable* and God is Exalted in Power For the divorced women, maintenance (should be provided) on a *reasonable* (scale)...(Q2:240-241)

It is a notable fact that dower (*Sadaq*) is determined by what is conventionally agreed upon to be equitable and reasonable. Islam does not put any burden on any one, hence, it allows the *Sadaq* to be determined by the convention of a given society. The *Qur’an* directs: “...But bestow on them (a suitable gift), the wealthy according to his means and the poor according to his means, a gift of a *reasonable* amount is due from those who wish to do the right thing”. (Q2:236; 4:25) While the *Qur’an* warns against misappropriation of orphans’ properties, it accepts that if one is

poor, one can enjoy a portion of it based on what is *just* and *reasonable*. (Q4:6). With regard to maintenance of the family (*nafaqah*), the Qur'an advises: "Let the man of means spend according to his means..." (65:7; 4:34) This, to our mind, is another instance which justifies the usage of *'urf*, for the determination of the 'means' referred to can only be based on what is conventionally reasonable.

Abdullah b.Fodio, a Sokoto Jihadist and Maliki jurist in his *Diya' al-Ummah* attests to the inestimable influence of local usage and custom on the comprehension of the Qur'anic text. He writes:

Thus, in determining whether it is the duty of the husband or the wife to provide for household goods, the usage and custom of the society in question should decide the issue, which will then be recognized by the *Shari'ah*.²⁸

El-Awa echoes the same view: "Accordingly, the Koranic command that every Muslim should support his family has not precisely specified what portion of a man's income is to go to his dependants; this is to be decided according to *'urf*."²⁹ A statement of the Prophet directed to the wife of Abu Sufyan, quoted by al-Qurtubi is also instructive: "Take from the property of Abu Sufyan *what is adequate for you and your child in a normal manner*"³⁰ (emphasis mine) This demonstrates that custom can be made the basis of a legal decision, for 'what is adequate for you and your child in a normal manner' can only be interpreted using the conventions and norms of the land.

From the foregoing, it is evident that *'urf* and *ma'ruf* in the Qur'anic usage are more or less the same thing both literally and technically, as it is difficult for one to differentiate between the two and this accounts for its indispensability in the understanding of the Qur'anic directives.

'Urf: An Ancillary Mechanism in Shari'ah

Although, *'adah* / *'urf* is not officially recognized as a source of law, it has achieved the force of law in some measures under the banner of the four recognized sources (i.e *Qur'an*, *Sunnah*, *Ijma'* and *Qiyas*), for it is undeniable according to Okunola³¹ that the subject matter of Islamic jurisprudence is derived from pre-Islamic Arab institutions. Be that as it may, the role of *'urf* in changing some rules based on custom as well as in restricting the limits of others based on texts spurred scholars like al-Qarafi (d.684/1285) to list it as a source of *Shari'ah*. al-Tawfi (d.1316) also identifies nineteen sources of *Shari'ah* and placed *'urf* in the tenth

position.³² In fact, its role in the Islamic legislative system cannot be under-estimated, for from the formative, classical, medieval and modern periods of Islam, it has continued to contribute tremendously to the growth of *Shari'ah* Ordinance, thereby unveiling its mutable nature. *Fiqh* works are replete with examples showing how *urf* has served as a source of Islamic Ordinance. Its decisive role, according to Faruqi is apparent in chapters dealing with sales, representation and agency, marriage, divorce, oath-taking and share-cropping contracts.³³ Mahmassani corroborates the indispensable role of custom in the Islamic legal framework:

Custom has always played an important part in the history of legal systems among various peoples. This role, although relatively minor in the present day by comparison with the past, is nevertheless crucial and cannot be ignored by present legislation. For custom... still supports interpretes, adjusts and revitalizes written law. It is a link between the past, present and the future³⁴

Ebrahim Moosa argues that the timeless relevance of *Shari'ah* is largely due to the internal dynamism as well as regular synthesis between its norms and the changing social realities. In his words, "Like all legal systems, Islamic law also had a pragmatic dimension. This is evident from the legal maxims that advocate that rules based on customs and community practices change with a change in time and place"³⁵ These maxims are cited in al-Khallaf's work (d.1956), "*al-ma'rifat 'urfan ka'l-mashrut shar' an*"; "*wa thabitu bi'l-'urfi ka thabit bi'l-Nass*" i.e. "What is known through custom has a legal force; and what is established on custom is likened to what is established by the text"³⁶ Ajetunmobi shares the views of Mahmassani and Moosa, as it is clear from his remarks:

The inclusion of *Urf* among the sources of Islamic Law has contributed immensely to its flexibility. Through *Urf*, doctors of the law have been gaining the opportunity of re-interpreting the two primary sources in the light of peoples' civilization at different ages and in different localities...By way of measurement, the scope of *Urf* as an auxiliary source of Islamic Law may seem narrow and limited, yet it is an important role which cuts across a very wide area of human endeavour³⁷

The formative period of Islam, therefore, showed that the Prophet did not ignore the existing norms but tried to synchronize the societal norms and customs in line with the divine instruction. al-Sarakhsi (d.490/1097), an eleventh century scholar and jurist, recognized *urf* on the same hierarchy

as the *Qur'an*, *Sunnah* and *Qiyas*, albeit, as noted by Gideon Libson, this postulation remained a marginal one, for it did not contemporaneously gain any popularity in Islamic discourse.³⁸

It has been mentioned earlier that those pre-Islamic customs that were not condemned or repealed by the *Qur'an* have the force of *Shari'ah*. The same principle is applicable to custom of any given society which is not at variance with the *Nass*, for jurists generally agreed "What has not been declared unlawful is permissible". Thus, the onus was on the *Fuqaha'* to differentiate between acceptable customs and those to be discarded due to their incompatibility with *Nass*. Besim Hakim reasons: "The ultimate purpose for the *Fuqaha'* was to develop the necessary framework to help in formulating rational decisions and judgments when faced with questionable habits and customs"³⁹

It should be noted, however, that *'adah* or *'urf* would not be acceptable as a source of *Shari'ah* if it contravenes any spirit or letter of the *Qur'an* and *Sunnah*. The general rule is that only a prevailing *'adah* or *'urf* can have the force of law. In other words, the custom of one age or generation is not enforceable in another generation. The *Fuqaha'* unanimously agreed that custom over-rides *Qiyas*, and remains legally operative even if it is opposed to a rule of law based on *Qiyas*, provided that it does not conflict with a clear text (*Nass*).

Ibn Farhun recommends that if a *Mufti* finds himself in a town or nation where their customs differ from what he is familiar with, he should not give any *fatwa* until he familiarizes himself with the norms and usages of the place.⁴⁰ In other words, *Muftis* and *Qadis* must acquaint themselves with the people's customs and traditions so as to be able to comprehend the cases before them correctly and accurately and avoid the risk of inappropriate legal rulings. For instance, Imam al-Shafi'i was forced to change the position he upheld in Iraq when he got to Egypt due to the prevailing customs he met there.⁴¹ *'Adil Qutah*⁴², a prominent and prolific Saudi scholar, in his work entitled: *al-'Urf: Hujjiyatuhu wa Atharuhu fi Fiqh al-Mu'amalat al-Maliyah 'inda al-Hanabilah* (Custom: Its Probative Value and Implications in the Islamic Law of Monetary Transactions According to the Hanbalite School) recommends that if a jurist was to avoid mistakes and give rulings (*Ahkam*) based on sound interpretations, he must know the following:

- the meaning the relevant text (s) had among the Arabs at the time of revelation, along with the custom that informed this meaning;

- the customs prevailing at the time the classical jurists handed down the rulings contained in the authoritative manuals;
- the prevailing norms and institutions of the society in which the contemporary jurist intends to apply his ruling; and
- the habits, customs, proclivities, and the like of the people whose situation the contemporary jurist intends to address.

Conditions (*Shurut*) Governing The Acceptability Of *Urf*/*Adah* in *Shari'ah*

It has been established above that not all customs are tenable in *Shari'ah*, hence the need to stipulate conditions for any given custom to be considered as a basis for a legal opinion. The following conditions govern the acceptability of *urf* according to a source.

- It should be commonly practiced by the community, or a community, the former being a phenomenon common to all sections of Muslim society, and the latter common to a particular group or in a particular area i.e. it should be general and universal.
- To be considered *urf*, a practice should not only have been in existence prior to the occurrence of a particular case, incident, contract, or commercial transaction but must be in vogue at the time of the contingency to which it relates.
- *Urf* should not contradict an explicit provision of the *Qur'an* or *Sunnah*.
- In cases of disputes, *urf* is to be considered only where there is no explicit stipulation between the parties concerned. If an explicit stipulation exists, that stipulation should be adopted and *urf* discounted.
- If an *urf* is at variance to a *Nass* in a way that acting on the *urf* may not imply giving up of the *Nass* altogether but only particularizes the *Nass*, then it is permissible to particularize the *Nass* in its application for the purpose of acting on the *urf*. If, however, acting on such *urf* implies giving up the *Nass* altogether, then such *urf* becomes invalid and hence cannot be a legal instrument.
- If a general custom (*urf amm*) is in conflict with a rule based on *Qiyas*, *urf* will take precedence over the *Qiyas*.
- When the prevailing *adah/urf* custom changes, the rules must also change. But if otherwise, it remains decisive. The *Fiqh* Academy of the Organisation of Islamic Conference (*Majma' al-*

Fihi al-Islami) in recognition of this principle once gave a *fatwa* that among those things a sound *Mufti /Faqih* must note is the changing customs of the society.⁴³

Conclusion

From the foregoing, it could be deduced that *'urf/'adah* represents the gamut of customs that the legal system of the medieval and modern state structure accords recognition and is willing to deploy its machinery to support the enforcement of. Thus, it plays a vital role in the dispensation of *Shari'ah*, albeit, the schools of thought (*Madhahib*) differ on its status. However, whatever status that might have been accorded it, Libson, a Professor of Islamic Jurisprudence in the Hebrew University, argues in its favour thus: "A study of Muslim legal literature will show that Islamic law resolved the tension between theory and practice by what was in essence a *de facto* recognition of the role of custom".⁴⁴

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