

Judicial Supervision of Custom

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Abstract

Custom and usage, as an important part of legal and Islamic jurisprudential sources, play a key role in regulating social relations and interpreting statutes. However, their legal status varies across legal systems, and this divergence affects judicial processes. In Iraq and Egypt, custom is recognized as a principal source following legislation, and courts refer to it in the absence of a statutory text. By contrast, in Iran, under the influence of Imami jurisprudence, custom is considered merely an instrument for explaining legal concepts and identifying factual instances. The aim of this study is to conduct a comparative analysis of the legal position of custom and the manner of judicial supervision over it in the three mentioned countries. The findings indicate that the precedence of custom over Sharia in Iraq and Egypt has led to legal conflicts, while Iran's approach has prevented such inconsistencies.

Keywords: judicial supervision, Islamic Sharia, Iraqi Civil Code, Egyptian Civil Code, Iranian law

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1. Introduction

In the complex and intertwined conditions of contemporary life, customs and usages play a pivotal role in formulating rules and judgments that effectively organize and regulate society; this is because the majority of people in different countries, regardless of time, environment, culture, and social class, share in these customary practices (Hasanī, 2021; Sabā'ī, 2023). These customs exert broad influence across all aspects of modern life and have been shaped by various developments. Within this framework, customs and usages serve as a crucial means for clarifying the legal ruling (ḥukm shar'ī) or the subject matter of a ruling (Abū Sanna, 1947; Subḥānī, 2006).

This role of custom in alignment with juristic reasoning (ijtihād) and the derivation of Islamic legal rulings establishes a foundation for societal reform and stability; applying custom in its proper context results in judgments that structure social life in harmony with its multifaceted realities (Bāḥusayn, 2012; Ḥanafī, 2020). The importance of custom in the formation of rulings is such that no jurist or judge can neglect it (Khalaf, 2005; Ṣāliḥ).

Islamic scholars, past and present, have paid special attention to custom, recognizing its significant function in deducing rulings and filling legislative gaps (Abdī, 2019; Subḥānī, 2006). As time and place change, people's customs and usages also

evolve; therefore, custom plays a prominent role in deriving rulings on issues where no explicit legal text exists (Ḥarāzī, 1983; Kāshif al-Ghiṭā). This perspective has been accepted by many jurists and legal theorists (Shalabi; Waraḳī).

Custom has sometimes been expressed as *sīrat al-‘uqalā’* (conduct of rational people), *ṭarīqat al-‘uqalā’* (method of rational people), or *binā’ al-‘urf* (construction of custom). Some scholars argue that custom determines legal concepts but not their specific applications (Ibn Manzūr, 1911; Jurjānī, 1938). Despite differences of opinion, custom is recognized as a complementary source of lawmaking and has had a considerable impact on Islamic jurisprudence (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974).

Jurists have relied on custom in many jurisprudential issues, developing principles, rules, and legal maxims based on it, which then serve as foundations for Islamic rulings, statutory texts, and *fatāwā* (Abū Sanna, 1947; Ḥalfī). In many Islamic schools and positive legal systems, custom has been accepted either as a supplementary or interpretative source (Ḥasanī, 2021; Sabā’ī, 2023).

This dynamic provides wide scope for the influence of social variables, enabling diverse legal reasoning adapted to temporal and spatial factors (Jurjānī; Shalabi). Through this means, jurists and legislators regulate legal aspects of life to align social realities with the Shari‘ah or, in the absence of explicit legislation, resolve disputes in accordance with prevailing customs (Abū Sanna, 1947; Bāḥusayn, 2012). This feature is a distinctive merit of Islamic law, which explicitly defines what is fixed and immutable while leaving variable matters general so as to preserve universality and timelessness (Sabā’ī, 2023; Subḥānī, 2006).

For this reason, many *fatāwā* and rulings have evolved over time under the influence of changing social customs, yet always within the boundaries permitted by Shari‘ah (Khalaf, 2005; Ṣāliḥ). The significance of custom as a legislative necessity for harmonizing with civilizational changes and adapting to the lives of legal subjects over centuries is clearly evident (Ḥanafī, 2020; Tanāghū, 1974).

Some schools of thought regard custom as a legislative source that may be consulted in the absence of statutory text and have offered various justifications for its authority (Abū Sanna, 1947; Sabā’ī, 2023), while others reject this approach and present counter-arguments (Ḥasanī, 2021; Subḥānī, 2006). Thus, jurists disagree over whether custom is a principal or merely supplementary source and over its ranking among other sources of law (Kāshif al-Ghiṭā; Sanhūrī & Abū Stait, 1950).

To examine the role of custom in the civil codes of Iraq, Egypt, and Iran, it is first necessary to assess its position within Islamic law and then analyze these legal systems, identifying their similarities, differences, ambiguities, and deficiencies (Ḥarāzī; Tanāghū, 1974).

For instance, Egypt’s Civil Code No. 131 of 1948, Article 1, paragraph 2, stipulates:

“If there is no applicable statutory text, the judge shall rule according to custom; if no custom exists, then according to the principles of Islamic Shari‘ah; and if neither is available, then according to the principles of natural law and rules of equity.” (Kīrah; Sanhūrī & Abū Stait, 1950)

The preparatory works of the Egyptian Civil Code (vol. 1, p. 187) note that this article aligns with Article 1(2) of the Swiss Civil Code. Thus, custom is positioned immediately after statute, obligating judges to consult it directly when no statutory provision exists (Bakrī & Zuhayr; Faraj).

However, the Egyptian legislator deliberately avoided authorizing judges to create legal rules in such cases, unlike the Swiss approach; the phrasing of Article 1(2) in Swiss law empowers judges to “create legal rules,” while the judge’s task in Egypt is limited to applying law — otherwise, the principle of separation of powers would be undermined (Khalaf, 2005; Tanāghū, 1974).

The preparatory works (p. 184) also clarify that Shari‘ah was the primary source of inspiration in drafting current Egyptian laws. Some who lack sufficient knowledge of Shari‘ah may wrongly consider it regressive and incompatible with the advancement of modern legal systems, but the truth is the opposite: the accepted principles of Islamic law are fully compatible with modern societal development (Sanhūrī & Abū Stait, 1950; Subḥānī, 2006).

Nonetheless, the Egyptian legislator did not justify the precedence of custom over Sharī'ah in Article 1(2). This appears to stem from imitating Western laws to conform with modernity while overlooking the viability of Sharī'ah in all times and places (Ḥasanī, 2021; Sabā'ī, 2023).

Similarly, the Iraqi Civil Code No. 40 of 1951, Article 1(2), closely modeled after the Egyptian provision, states:

“If there is no applicable statutory text, the court shall rule according to custom; if no custom exists, then according to the principles of Islamic Sharī'ah most consistent with the provisions of this Code, without being bound by a particular school; and if none, then according to rules of equity.” (Abū Sanna, 1947; Kāshif al-Ghiṭā)

Here too, custom is prioritized over Sharī'ah and recognized as a legal source in the absence of statutory text, contrary to the position in many Islamic schools, which only consider custom after Sharī'ah's silence (Ḥanafī, 2020; Ḥasanī, 2021).

It is noteworthy that much of Egyptian and Iraqi legislation is drawn from Islamic jurisprudence; this evident contradiction requires careful analysis to clarify why custom is prioritized over Sharī'ah (Jurjānī; Sanhūrī & Abū Stait, 1950).

Iraq's civil law was historically based on Islamic jurisprudence, particularly the *Majallah al-Aḥkām al-'Adliyyah* (Hanafi tradition). Yet, foreign provisions were incorporated without clear justification, merging with local norms and creating conflicting legal sources (Khalaf, 2005; M. Manṣūr). Moreover, the preamble to Iraq's Civil Code defines sources of law as “legislation, then Islamic jurisprudence without commitment to a specific school, and then equity,” but does not explicitly list custom — contradicting its mention in Article 1(2) (Abū Sanna, 1947; Sabā'ī, 2023).

This prioritization of custom also conflicts with Article 2 of the 2005 Iraqi Constitution, which declares:

“Islam is the official religion of the State and a fundamental source of legislation; no law may be enacted that contradicts the established rulings of Islam.” (Abdī, 2019; Subḥānī, 2006)

Thus, Article 1 of the Iraqi Civil Code, which obligates judges to resort to custom when no statutory text exists, creates a clear contradiction with the Constitution and Islamic legal doctrine (Bāḥusayn, 2012; Khalaf, 2005).

By contrast, the Iranian legislator, unlike Egypt and Iraq, does not consider custom an independent source of law and instead obliges judges to rely directly on Islamic law. In Iran, custom is used only within a limited scope — to interpret legal concepts and clarify factual instances where the Sharī'ah is silent (Ja'farī; Subḥānī, 2006). This approach stems from the Ja'farī (Twelver Shi'i) school.

Article 167 of the Constitution of the Islamic Republic of Iran (1979) provides:

“The judge must strive to adjudicate all cases on the basis of codified laws; if no such law exists, he must issue a ruling based on authoritative Islamic sources and valid *fatāwā*. The judge is not permitted to refrain from rendering a judgment due to silence or deficiency in the law.”

Accordingly, the Iranian legal system does not recognize custom as an independent legislative source; rather, it uses custom only as an interpretive and evidentiary tool, affirming that Sharī'ah is complete and sufficient.

These differences in approach are significant and yield critical implications for the field of law. Studying the role of custom in civil law guides judges in determining whether custom should be treated as an autonomous legal source equivalent to statute or merely as an auxiliary factor in legal reasoning.

Accordingly, it is necessary to analyze the relevant statutory texts, identify similarities and differences, clarify the hierarchical rank of custom among legal sources, and compare the codes to detect deficiencies and ambiguities, offering possible legal reforms.

It is also essential to assess whether custom enters the field of Islamic legal sources recognized by various schools, such as consensus (*ijmā'*), *maṣlaḥa mursala* (public interest), and *dhara'i'* (legal means), and to determine the proper stance when custom conflicts with statutory text.

Ultimately, it must be clarified to what extent custom can fill legislative gaps, the degree of its potential conflict with Sharī'ah, and how to resolve contradictions arising from statutory provisions. Finally, guidance must be provided on addressing newly emerging customs that legislators might use to generate legal rules, while delineating evidence, reasoning, and limitations for applying custom within the framework of material legal sources — such as defining concepts and determining subject matters — without granting custom a legislative role.

2. General Concepts

2.1. Definition of Custom ('Urf) in Lexicography and in Legal Terminology

2.1.1. Custom in Language

In Arabic, 'urf has two principal meanings.

First, with damma on the 'ayn and sukūn on the rā', it denotes the continuous, connected following or pursuing of a thing. This word has multiple usages, including "'urf al-arḍ," meaning the highest part of the land, and "'urf al-faras," meaning a part of the horse. (Fīrūzābādī; Ibn Manzūr, 1911)

The second meaning of 'urf points to calm and repose; that is, to something the soul recognizes and in which it finds assurance. (Jurjānī, 1938; Zubaydī)

'Urf, ārifah, and ma'rūf stand in contrast to nakirah; that is, anything the soul recognizes and to which it feels at ease. (Ibn Manzūr; Shīrīnī)

'Urf is related to the root of "i'tirāf" in the sense of acknowledgment. (Jurjānī)

In the Noble Qur'ān it is stated:

"But if they strive to make you associate with Me that of which you have no knowledge, do not obey them; yet keep their company in this world with appropriate kindness (ma'rūfan)."

and also:

"Show forgiveness, enjoin what is right (al-'urf), and turn away from the ignorant" (al-A'rāf, 7:199);

and:

"And live with them [your wives] in a manner that is right (ma'rūf)" (al-Nisā', 4:19), meaning conduct that is commendable and approved by people and not subject to censure. (Rāghib Isfahānī; Tabarsī)

Ma'rūf also signifies generosity when coupled with prudence in spending, as well as good counsel and benevolent companionship with family and others; these are counted among the noble traits of human beings. (Rāghib Isfahānī; Ṣāliḥ)

2.1.2. Custom in Legal Terminology

In technical usage, numerous definitions of 'urf have been offered from different vantage points. Some define it absolutely and without restriction; others condition it upon conformity with the Islamic Sharī'ah. Jurists in positive law have likewise proposed various definitions. To encompass most of the well-known definitions, they may be grouped into three approaches as follows: (Sanhūrī & Abū Stait, 1950; Subḥānī, 2006)

First Approach:

Custom is that which becomes established in people's minds and is approved by sound natures in the judgment of reason; namely, that which people habitually follow in their dealings so that their affairs are ordered by it and sound temperaments accept it. It is a matter that has become fixed in souls and, by repeated practice, is acceptable to those of sound disposition. 'Urf comprises all that people have grown accustomed to, with applications connected to deriving legal rulings, defining concepts, interpretive presumptions, subject-matters, and probative indications. In brief: the particle "mā" in these definitions signals generality and includes both speech and conduct; the phrase "mā istaqarra fī al-nufūs" indicates that what occurs rarely or sporadically and is not accepted by people is not custom—like a practice that happens once or a few times without settling into the soul. The phrase "min jihati al-'uqūl" excludes what arises from caprice and lusts, such as reprehensible acts like drinking wine and sundry forms of debauchery. (Abdī, 2019; Khalaf, 2005)

An objection is raised here: are usurious contracts and the cremation of the dead consistent with this definition, which requires acceptance by sound natures? The response is that sound natures are not invariably sources of good nor immune from ugliness; only revealed religions and divine laws are safeguarded from error. Another critique of these definitions is that customs contrary to the Sharī'ah can exist. (Ḥasanī, 2021; Ṣāliḥ)

Second Approach:

In this view, an additional condition is appended to prior definitions: the custom must not conflict with the Islamic Sharī'ah. 'Urf is that which people habitually do, refrain from, or say—termed “public habit” or “practice”—and which the Lawgiver has not rejected. Whatever people have become accustomed to and which the Sharī'ah has not repudiated—and which rational members of society deem good and the Lawgiver has approved—counts as 'urf. 'Urf is anything people customarily observe, whether a prevalent act or a common utterance among them. Custom serves as a reference point in domains where the Lawgiver has remained silent; if it conflicts with a textual proof, it is devoid of probative force. (Sabā'ī, 2023; Subḥānī, 2006)

Third Approach:

Scholars and legal theorists differ in defining 'Urf because they have introduced varying conditions and constraints. 'Urf is a habit whereby people persist in a certain pattern of behavior and regard it as binding, such that violating it entails material sanction. 'Urf is a set of rules formed by people's habituation to a particular conduct, transmitted from generation to generation, and, like law, accompanied by punishment. 'Urf thus denotes a rule or convention that has, through repeated adherence, acquired obligatory force. (Kīrah; Tanāghū, 1974)

Custom is also the avenue by which behavioral rules penetrate into practice as an unwritten norm arising from the community's habituation to a specific conduct to regulate an aspect of social life, creating a felt necessity to observe it. 'Urf is a popular and primary source that interacts directly with society and serves as its natural instrument for regulating the details of transactions and the standards that written law—by reason of complexity or difficulty—cannot fully address. 'Urf operates as an unwritten law generated by repeated social behavior and by the community's sense that failure to observe it warrants compulsory sanction. (Faraj; M. Ḥ. Manṣūr)

From this survey of definitions, the following may be concluded:

First, the lexical and technical definitions of 'Urf converge in meaning: both stress continuity and stability, and they require that custom be settled and manifest in people's lives. (Ibn Fāris; Jurjānī)

Second, the word 'urf appears twice in the Qur'ān, while al-ma'rūf occurs thirty-two times; 'urf signifies ma'rūf, that is, commendable speech or conduct, and also beneficence and continuity; al-ma'rūf means what is proper and righteous, encompassing acts, omissions, and beliefs. (Rāghib Isfahānī; Ṭabarsī)

Third, to align the juristic definition of 'Urf with the legal one, it is necessary to add the condition that the custom be accepted by sound natures and that it not contravene legal rules—or, alternatively, that it be affirmed by law. Legal scholars may sometimes validate a custom that conflicts with the Sharī'ah—such as usurious transactions in certain countries that recognize and enforce them—whereas in Islamic jurisprudence such a custom is not accepted and lacks probative authority. (Ḥanafī, 2020; Sanḥūrī & Abū Stait, 1950)

2.2. “Habit” (Ādah) in Language and in Terminology, and Its Difference from Custom

2.2.1. Definition of Habit in Language and in Terminology

1. **Habit in language:** Ādah denotes a practice to which one returns time and again. Its triliteral root (‘-w-d) indicates repeated return to something. Its plurals include ‘ād, ‘ādāt, and ‘īd. Terms such as ‘ād, ‘āwadah, mu‘āwah, ‘awādan, i‘tāda, and isti‘ādah all signify repetition and frequent recurrence. A habit is a repetitive matter that typically occurs without a rational nexus and includes both speech and conduct; in other words, it is the repeated performance of an act or behavior. (Ibn Fāris; Ibn Manẓūr)
2. **Habit in terminology:** Ādah is that which becomes fixed in souls through repetition and is accepted by sound natures, or, put differently, a repeated matter lacking a rational connection. It is also said to be what people, by the judgment of reason and with inclination and willingness, perform repeatedly and to which they return. This definition includes both deed and utterance; whatever is performed repeatedly without a rational relation is called a habit—whether it issues from an individual or a group, and whether its origin is natural, arises from desires and passions, or is incidental. Two salient features mark the definition of habit: first, repetition; second, the absence of a rational nexus. The absence of a rational nexus is necessary, for if there is a rational causal relation between cause and effect, the phenomenon is

no longer a habit but causation—for example, the turning of a key each time resulting in the opening of a lock. (Abdī, 2019; Jurjānī, 1938)

Psychological studies indicate that, by its nature, habit is broader than custom. A habit forms when a person is inclined to perform an act and repeats it until it becomes ingrained, its performance easy, and its abandonment difficult. This repeated act is called a habit. The act may be performed by an individual or a group; if confined to a person or a small group, it is called a habit, but if it becomes prevalent among the public or the majority, it becomes ‘Urf (custom). (Ḥarāzī; Waraḳī)

2.2.2. Definition of habit in law:

‘Abd al-Razzāq al-Sanhūrī defines habit as “that which people are wont to follow in their transactions and which is used to interpret the parties’ intent, but which is not, in itself, binding.” Likewise, Muḥammad Ḥusayn Maṣṣūr states: “Habit is a behavior to which people adhere over a long period without reliance on a belief in its obligatory force.” Many such habits are local, varying by region or particular occupation. (M. Maṣṣūr; Sanhūrī & Abū Stait, 1950)

It should be noted that some habits have no connection with law and create no legal obligation, such as habits pertaining to occasions, gift-giving, attire in various ceremonies, and the like. Many such practices do not rise to the level of legal rules or acquire binding force. However, some habits operative in dealings and agreements between persons—known as “contractual usages”—have been recognized by law. (Bakrī & Zuhayr; Kīrah)

3. The Distinction Between Custom and Habit

On the basis of the distinction drawn between ‘Urf (custom) and ‘Ādah (habit), significant consequences follow, which differ between scholars and jurists of the Sharī‘ah, on the one hand, and legal scholars, on the other. We will first examine the distinction as understood by scholars and jurists of the Sharī‘ah and then present the perspective of legal scholars. (Subḥānī, 2006; Tanāghū, 1974)

3.1. The Distinction Between Custom (‘Urf) and Habit (‘Ādah) among Religious Scholars and Jurists

By consulting the definitions advanced by jurists of Islamic law, it becomes clear that custom is conditioned upon being settled and accepted by sound human dispositions; that is, it must be something prevalent and accepted among people and either endorsed by the Lawgiver or, at minimum, not opposed by the Lawgiver. Some jurists also regard custom as something that has been repeated time and again. On this basis, scholars are divided into three groups. (Ḥasanī, 2021; Subḥānī, 2006)

1. Some draw no distinction between custom and habit and treat the two as synonymous; in other words, ‘urf and ‘ādah are two terms with one meaning, or they coincide in extension even if their intensions differ. This view appears in the definition stating: “al-‘ādah wa-l-‘urf mā istaḳarra fī al-nufūs wa-taḳabbalathu al-ṭibā‘ al-salīmah.” Accordingly, this group holds that custom and habit are equivalent and coextensive, and both encompass speech and conduct. (Ibn Maṣṣūr; Jurjānī, 1938)
2. The second group distinguishes between custom and habit; they typically treat ‘urf as expressed in the realm of speech and ‘ādah in the realm of action and behavior. Put differently, custom is primarily verbal, whereas habit is behavioral. The term al-‘ādah (‘-w-d) signifies the continuation and repetition of a matter that may be confined to an individual and need not extend to a wider population, whereas ‘urf commonly denotes repetition that is manifest at the collective level. (Ibn Fāris; Shīrīnī)
3. The third group conceives the relationship between custom and habit as one of genus and species: ‘ādah is the broader category and ‘urf the narrower; therefore, every custom is a habit, but not every habit is a custom. A habit is a repeated matter—whether its origin is reason or nature, and whether it is a deed or an utterance issued by an individual or a group. This is akin to saying “every human is an animal, but not every animal is a human.” Some habits are also customs, but habit is broader and custom more limited. (Abdī, 2019; Tanāghū, 1974)

It may be concluded that, in the usage of jurists, ‘urf and ‘adah are often treated as synonymous without a major difference; what truly matters are the Sharī‘ah conditions governing their application, which ultimately draw the two toward a common meaning. Nevertheless, we endorse distinguishing between custom and habit, because this differentiation carries significant legal and Sharī‘ah consequences. (Sanhūrī & Abū Stait, 1950; Subḥānī, 2006)

3.2. *The Difference Between Custom and Habit in the View of Legal Scholars*

Some legal scholars treat custom and habit as having one meaning, whereas others distinguish between them. From the earlier definitions, it appears that ‘urf is binding and continuous, while ‘adah lacks such obligatory force. This difference allows a judge to rule on the basis of custom without resorting to the parties’ views, whereas habit does not operate in the same way and remains subject to the parties’ interpretation and to the claimant’s invocation of it. (Faraj; Kīrah)

The Iraqi legislator likewise considers that, in the Civil Code, custom and habit do not differ, since ‘urf is viewed as a set of binding rules derived from people’s usual conduct accompanied by a belief in its legal obligatoriness. (Khalaf, 2005; Sanhūrī & Abū Stait, 1950)

Other differences between custom and habit identified by legal scholars include the following. (Tanāghū, 1974)

1. A court applies custom based on its own knowledge and without the parties’ request, whereas, with respect to habit, the interested party must request its application and prove it. The presumption is that a judge knows the custom, because custom has the force of law and knowledge of the law is among the judge’s duties; thus, proving custom is the judge’s responsibility, not the parties’. No such presumption exists for habit, and proof of it lies with the parties. (Bakrī & Zuhayr; Kīrah)
2. Rules of custom are binding, and ignorance of them is no excuse, whereas a habit applies only when there is an implicit or explicit agreement of the parties; absent such agreement, it creates no liability. (Abū Sanna, 1947; Sanhūrī & Abū Stait, 1950)
3. An individual is not required to prove custom, but must furnish evidence to establish a habit. (Faraj; Khalaf, 2005)
4. Custom has the force of law, and violating it is reviewable by higher courts, whereas habit is merely a fact, the assessment of which lies within the competence of the trial judge. (Kīrah; Tanāghū, 1974)
5. Some legal scholars maintain that commercial custom can, at times, override statutory rules, whereas habit is not accorded such status. (Sabā’ī, 2023; Sanhūrī & Abū Stait, 1950)

From what has been stated, both ‘urf and ‘adah are terms drawn from the Qur’ān and Sunnah for which no strict, original boundary was fixed between them. In many instances, the two terms have been used interchangeably. Nevertheless, care must be taken in their application, especially when ‘adah is understood as voluntary and conscious continuity; otherwise, habit would mean mere repetition or natural inclination and cannot be equated with custom. (Rāghib Isfahānī; Subḥānī, 2006)

4. **Judicial Supervision of Custom**

In this regard, two distinct approaches exist.

The first approach recognizes custom as an independent source among the sources of legislation. This view is reflected in the laws of Iraq and Egypt. For example, Article 1, paragraph 2 of the Iraqi Civil Code provides: “If there is no applicable statutory text, the court shall rule according to custom; if no custom exists, judgment shall be rendered according to the principles of Islamic Sharī‘ah that are most compatible with the provisions of this Code, without adherence to a particular school; and if that is not available, then according to the rules of equity.” (Abū Sanna, 1947; Sanhūrī & Abū Stait, 1950)

Likewise, the Egyptian legislator states in Article 1(2) of the Civil Code: “If there is no applicable statutory text, the judge shall rule according to custom; and if no custom exists, the ruling shall be made according to the principles of Islamic Sharī‘ah...” (Kīrah; Sanhūrī & Abū Stait, 1950)

By contrast, the second approach does not treat custom as an independent source of legislation. This view appears in Iranian law. Pursuant to Article 167 of the Constitution of the Islamic Republic of Iran: “For issuing a judgment in any dispute, the

judge must first consult the codified laws, and if there is no text, the ruling must be issued on the basis of authoritative Islamic sources or trusted fatwas.” (Sabā’ī, 2023; Subḥānī, 2006)

On this basis, the methods of challenge and appeal against judicial decisions will be examined within each approach; first, judicial supervision of judgments will be addressed, and then appeals against rulings based on custom will be analyzed. (Ḥasanī, 2021; Tanāghū, 1974)

4.1. *Supervision of Judicial Decisions*

Judicial oversight rests on two pillars: first, the institution charged with exercising supervision; and second, the domains and issues in which judicial rulings are reviewed and controlled. (Faraj; Kīrah)

4.1.1. *The Supervisory Authority over Judicial Decisions*

In every country, the highest court—such as the Court of Cassation in Iraq—has the mandate to articulate legal principles consistent with legislative texts or complementary to them. Under the Iraqi Judicial Organization Law, the Court of Cassation is the nation’s highest judicial authority, exercising oversight over all courts and composed of a president, five vice-presidents, and at least thirty judges. The seat of this court is in Baghdad. (Khalaf, 2005; Sanḥūrī & Abū Stait, 1950)

In Egypt, this authority is the Court of Cassation (Maḥkamat al-Naqḍ), and in Iran, the Supreme Court is the highest judicial authority charged with supervising the correct application of laws and unifying judicial practice (Article 161 of the Constitution of Iran). Under Article 61 of the Constitution, the Supreme Court is constituted in accordance with regulations drafted by the High Council of the Judiciary and is responsible for ensuring the correct application of the law in the courts and establishing uniform judicial precedent. (Subḥānī, 2006; Tanāghū, 1974)

The Chief Justice of the Supreme Court, pursuant to Article 162 of the Constitution, is appointed for a five-year term from among qualified judges, upon the proposal of the Head of the Judiciary and after consultation with the justices of the Supreme Court. The Chief Justice and the Prosecutor-General must possess, in addition to justice and juristic expertise (ijtihād), comprehensive knowledge of judicial affairs. (Ḥasanī, 2021; Sabā’ī, 2023)

The principal objective of the appellate court (the court of cassation) is to ensure uniformity of approach in similar cases and to resolve interpretive disagreements in the application of statutes. This authority quashes judgments of trial courts where the law has not been correctly applied and, by clarifying the proper meaning of legal concepts, prevents contradictory constructions of the law; hence it is called the “court of law.” (Kīrah; Sanḥūrī & Abū Stait, 1950)

Nevertheless, the functions of courts of cassation do not preclude statutory interpretation in instances of ambiguity or silence; however, where a legal text is clear and explicit, the court is not permitted—through erroneous interpretation or misapplication—to occasion an error in the application of the law. Every legal text is capable of application only under particular, specified conditions, and in such cases the court must apply the existing text without deviation; personal ijtihād is not permissible. (Faraj; Tanāghū, 1974)

As a rule, courts of cassation or review supervise only the legal aspects of cases: the existence, interpretation, and application of the law; they are not empowered to intervene in matters of fact (the evidentiary record). (Kīrah; Sanḥūrī & Abū Stait, 1950)

Accordingly, in Iraq the supervisory authority is the Court of Cassation; in Egypt, the Court of Cassation; and in Iran, the Supreme Court. Despite differences in nomenclature, these bodies share the same function of high-level oversight over the judiciary. (Subḥānī, 2006; Tanāghū, 1974)

4.1.2. *Aspects in Which Judicial Rulings Are Subject to Oversight*

The judge is obliged to apply the law correctly to the concrete case before him; therefore, he must first search for the appropriate statutory text and comprehend it with care and full insight. Such comprehension requires the exercise of the judge’s

intellectual abilities and rational analysis, together with an exact understanding of the facts and their surrounding circumstances; correct apprehension of reality facilitates the selection of the proper legal text. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

When reality is correctly understood, the application of the law will likewise be correct. After this stage, the judge enters the process of “legal subsumption (tatbīq),” that is, matching the established elements of fact with the selected legal rule to resolve the dispute. (Faraj; Kīrah)

Legal subsumption is a technical process in which the judge—after mental evaluation and intellectual effort—extracts the legal characteristics arising from the facts and then aligns them with the law. This requires a complete and precise description of the juridical event, including its material and legal elements and its surrounding conditions. A judgment rendered without adequately setting out the elements of subsumption is incomplete and susceptible to quashing. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

Accordingly, the judge must, by carefully reviewing all details of the facts and the evidentiary materials submitted, identify the legal relationship between the facts and the statutory text. Hence, the judgment must indicate the elements constituting the alleged conduct or act and the specific legal provision relied upon, so that higher courts can review the correctness of the legal subsumption. (Bakrī & Zuhayr; Kīrah)

The judge’s task is not limited to aligning law and fact; he must also penetrate to the depth of the law and bring to light the interests and rights it protects, for the primary purpose of law is the safeguarding of individuals’ rights and freedoms. Therefore, the judge is obliged to take three essential steps: (1) determine the applicable legal rule (major premise); (2) determine the disputed factual event and conduct the legal subsumption (minor premise); and (3) infer the degree of conformity between the legal rule and the established facts. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

On the basis of this process, the judge operates in two domains:

- In the domain of law: he selects the applicable rule, infers its fit to the facts, and issues judgment accordingly.
- In the domain of fact: he proves the elements of the claim and their realization. (Faraj; Kīrah)

At times, in examining the elements of the facts, the judge encounters ambiguity or difficulty in the statutory text and is compelled to interpret the law; that is, he must grasp the meanings and terms of the text prior to application and clarify its implications. Under the principle that a judgment may not rely on the judge’s personal knowledge, he must always apply the law correctly and impartially, avoiding any biased interpretation or distortion of the law’s true meaning. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

4.1.3. Oversight by the Court of Cassation of Legal Subsumption

The Supreme Court—also known as the “court of law”—is charged with supervising legal subsumption. Nevertheless, among legal scholars and in judicial practice, views differ regarding the scope and limits of such oversight, some of which are set forth below. (Kīrah; Subḥānī, 2006)

First: The View of Legal Doctrine

Legal doctrine regards subsumption as a juridical process by which an appropriate legal characterization is imposed upon a particular fact pursuant to a statutory text. Accordingly, an error in subsumption is an error in the application of law and falls within judicial oversight. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

However, another view—sometimes associated with the “Paris thesis”—narrows the scope of oversight over legal subsumption. It distinguishes between determinate and indeterminate legal concepts: if the subsumptive error pertains to an indeterminate legal concept, it is treated as a factual error and thus falls outside the Court of Cassation’s purview; but if the legislature has precisely defined the meaning of the term, an error of subsumption is a legal error subject to review. This theory has also been criticized by some writers. (Faraj; Kīrah)

Second: The Judicial View

The Egyptian Court of Cassation has set specific criteria for overseeing legal subsumption. It distinguishes between an error of interpretation (a factual error attached to the trial judge’s assessment) and an error of application (a legal error subject to oversight). (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

In one of its rulings it stated: “The Court of Cassation is entitled to supervise the legal characterizations and the legal subsumption of what the judgment has established, to determine whether that subsumption accords with the law. It is also entitled to examine whether the trial judge has disregarded extant textual provisions in the materials submitted that affect the case’s outcome.” (Egyptian Court of Cassation, Appeal No. 98, dated 02/03/1933). (Kīrah; Sanhūrī & Abū Stait, 1950)

4.2. *Challenging Judgments Rendered on the Basis of Custom*

The trial judge (judge of fact) is not subject to the Court of Cassation’s oversight in all matters relating to procedural steps and formalities, nor with respect to contractual usages—including establishing their existence, interpreting them, and applying them. In the past, French doctrine treated contractual usages and custom as equivalent in this regard and considered that the trial judge was not subject to cassation review on these matters. More recent approaches, however, tend toward accepting cassation oversight at least over the application of custom. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

Two principal views on oversight of the application of custom:

1. The first view treats custom as one of the sources of legislation and thus regards its rulings, like statutory texts, as subject to review by appellate courts. (Sabā’ī, 2023; Sanhūrī & Abū Stait, 1950)
2. The second view does not consider custom an independent source; it places custom within the domain of “facts” and therefore outside the review of appellate courts. (Faraj; Kīrah)

Section One: Challenging Judgments that Treat Custom as a Source of Legislation

This section examines the laws of Egypt and Iraq, jurisdictions that recognize custom as an independent legal source, ranking it after codified legislation.

4.2.1. *Challenges to judgments based on custom in the Egyptian legal system*

As noted earlier, the Egyptian legislator regards custom as one of the principal sources of law, explicitly stated in Article 1(2) of the Egyptian Civil Code: “Where no applicable legal rule exists, the judge shall rule according to custom; if no custom exists, he shall rule according to the principles of Islamic Sharī’ah; and if these are lacking, then according to the principles of natural law and rules of equity.” (Kīrah; Sanhūrī & Abū Stait, 1950)

Because custom in Egyptian law has the force of law, the Court of Cassation is competent to supervise the trial judge regarding the existence of custom, its interpretation, and the manner of its application. If the judge errs in any of these respects, the Court of Cassation will quash the ruling and remit the case to another judge for retrial. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

Nevertheless, in numerous decisions the Egyptian Court of Cassation has stated: “Establishing the existence of custom is a factual matter and is not within the competence of the Court of Cassation; so long as the court of first instance relied upon the evidence before it, the judgment is sound and unassailable.” And in another ruling: “Determining the existence of custom lies within the competence of the trial court and is not subject to cassation review.” (Faraj; Kīrah)

This jurisprudence treats custom as a “factual” matter, and it does not even permit the trial court to rule on the basis of its own personal knowledge in this regard. In effect, by overlooking the legal character of custom, it has treated custom as a question of fact—an approach that conflicts with basic principles of law, though it stems from practical considerations: ascertaining custom is difficult for the judge, and cassation oversight of it poses numerous complexities. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

However, this view sacrifices certain foundational legal principles, including the principle that custom and foreign law are law. It is to be hoped that academic circles and legal doctrine will encourage the Court of Cassation to correct this course and return to the fundamental principles of law. In sum, the Egyptian Court of Cassation treats custom as a factual matter and does not consider the determination of its existence or interpretation to be within its oversight, except where the trial court has violated rules of proof or engaged in contradictory logical inference. (Kīrah; Tanāghū, 1974)

This stance stands in clear tension with the legal status of custom as a source of law and reflects the influence of Western legal systems on the Egyptian Civil Code. Had the legislator placed the principles of Islamic law before custom, such a

contradiction would not have arisen. Moreover, Article 248 of the Code of Civil and Commercial Procedure provides that the parties may appeal judgments of the courts of appeal to the Court of Cassation when the challenged judgment is based on contravention of the law or error in its interpretation or application, or when a defect in the judgment or proceedings has occurred that affected the outcome. (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

4.2.2. Challenges to Judgments in the Iraqi Legal System

The Iraqi legislator provides in Article 1, paragraph 2 of the Civil Code:

“Where no applicable legal rule exists, the court shall adjudicate on the basis of custom; and if no custom exists, it shall adjudicate according to Islamic Sharī‘ah that is most consistent with the provisions of this Code—without adherence to a specific school....” (Kīrah; Sanhūrī & Abū Stait, 1950)

This approach follows the path earlier chosen by the Egyptian legislator—namely, recognizing custom as one of the principal sources of legislation, ranking immediately after codified statutes. Accordingly, in the legislator’s view, custom constitutes an independent source, and the court is obliged to ascertain its existence; in this framework, custom has the force of law, and it is the court—not the litigants—that bears responsibility for determining the content of the law. (Sabā’ī, 2023; Sanhūrī & Abū Stait, 1950)

However, the 1951 Iraqi Civil Code, in its preliminary part, identifies the primary sources of law as follows:

1. Legislation;
2. Islamic jurisprudence without commitment to a particular school;
3. Rules of equity;
4. and, as interpretive sources, jurisprudence (fiqh) and judicial precedents in Iraq and countries with similar laws. (Khalaf, 2005; M. H. Manṣūr)

Despite this, Article 1(2) of the same Code presents custom—after codified statutes and before Islamic Sharī‘ah—as a principal source, thereby creating a clear contradiction within the text of the law. (Kīrah; Sanhūrī & Abū Stait, 1950)

The reason for advancing custom in this hierarchy is not clear, although the Egyptian legislator attributed a similar move to the influence of the Swiss Civil Code. That approach was not especially successful, because it granted the judge discretion beyond his function and enabled the “creation” of legal rules, whereas a judge’s task is merely to “apply” the law. (Sanhūrī & Abū Stait, 1950)

Most provisions of the Iraqi Civil Code are rooted in Islamic jurisprudence, particularly the Ḥanafī fiqh that underpins the *Majallat al-Aḥkām al-‘Adliyyah*. Yet all Islamic schools agree that custom is authoritative only when no Sharī‘ah ruling exists—that is, in the zone of legislative “silence.” Even in Imāmī (Twelver Shī‘ī) jurisprudence, custom is not accepted as an independent source of legislation; rather, it is used to elucidate concepts and identify subject-matters, because this school emphasizes the completeness of the Sharī‘ah and its lack of need for supplementation by custom. (Alī, 2003; Ibn ‘Ābidīn; Subḥānī, 2006)

Thus, a clear contradiction has arisen between the preliminary part of the Iraqi Civil Code and Article 1(2), on the one hand, and between the Civil Code and Islamic Sharī‘ah, on the other. This tension can lead to rulings that conflict with the principles of Islamic law—even though Islamic Sharī‘ah formed the basis of the Iraqi Civil Code and many of its provisions were drawn from the *Majallat al-Aḥkām al-‘Adliyyah* (Explanatory Memorandum to the Iraqi Civil Code, para. 8). (Abū Sanna, 1947; Sanhūrī & Abū Stait, 1950)

Ultimately, it must be emphasized that Article 1(2) of the Iraqi Civil Code conflicts with the country’s Constitution, because Article 2 of the Constitution states:

“Islam is the official religion of the State and a fundamental source of legislation; no law may be enacted that contradicts the established rulings of Islam.” (Abdī, 2019; Subḥānī, 2006)

Therefore, giving precedence to custom over the established principles and rulings of Islamic law amounts to an explicit violation of the Constitution. The provision must be amended so that Islamic Sharī‘ah takes precedence over custom. Custom should remain solely an evidentiary and clarificatory tool within the framework of the law of proof—the sphere in which its

real and proper role is defined. In that setting, the judge may employ lawful means, including custom, to prove the instances and subject-matters related to the dispute, without elevating custom to an independent source of legislation that supplants Shari‘ah. (Ḥasanī, 2021; Sabā‘ī, 2023)

4.2.3. *Challenges to Judgments in a System that Does Not Recognize Custom as an Independent Source (Iranian Law)*

The Iranian legislator does not recognize custom as an independent source of law and obliges the judge, in issuing judgments, first and foremost to resort to codified statutes. The judge must issue a reasoned decision based on valid judicial standards and derive the ruling in each case from the enacted laws. In the absence of an express rule, he must consult authoritative Islamic sources and trusted *fatāwā* and is not permitted to refuse adjudication on the pretext of silence, deficiency, ambiguity, or conflict in the laws. The judge may also refrain from applying governmental regulations and by-laws that are contrary to statutes and Islamic rulings or that exceed the executive’s competence (Constitution of Iran, Arts. 167–170). (Sabā‘ī, 2023; Subḥānī, 2006)

On these principles, when no statutory text exists, the judge is required to resort to authoritative Islamic sources. The Constitution designates Islam and the Ja‘farī Twelver school as the official religion and school of the country, and this school does not recognize custom as an independent source of legislation—save in specific instances permitted by Islamic law. The prevailing view among Shi‘ī jurists and legal theorists rejects the referential authority of custom for discovering Shari‘ah rulings; they do not accept an independent legislative role for custom and recognize only its instrumental function. (Ḥasanī, 2021; Subḥānī, 2006)

Nonetheless, in some cases custom is employed to clarify concepts; for example, where doubt arises about the inclusion of a particular notion in subjects such as sale or lease, ordinary linguistic usage (*ṣidq ‘urfī*) can disclose the Shari‘ah subject. Likewise, in ambiguities such as defining *ghabn* (lesion) or “defect” in the object of sale, customary understanding is determinative. Custom also plays a role in identifying instances: for concepts like *waṭan* (domicile), *ṣa‘d* (earthen surface), *maḥāzah* (wilderness), *ma‘dīn* (mine), *ḥirz* (secure place in theft), and *arḍ al-mawāt* (dead land), when doubt arises about the instance, recourse is had to custom. In addition, every society has local and specialized customs incorporated—by agreement—into contracts and unilateral acts; such usages serve as practical indicators to resolve many potential ambiguities in parties’ words and conduct. (Abū Sanna, 1947; Subḥānī, 2006)

In this vein, Article 394 of the Iranian Code of Civil Procedure provides that proceedings in the Supreme Court take place without the presence of the parties unless the investigative panel deems their presence necessary. Article 401 of the same Code specifies the scope of the Supreme Court’s competence: (1) where the judgment is void or the investigation is deficient, the case is remitted to the issuing court; (2) if the judgment is rendered by a court lacking jurisdiction, the Supreme Court refers the case to the competent court; and (3) where there is a procedural irregularity, a miscalculation of damages, or an error in naming the parties, the Supreme Court must identify all defects contained in the judgment. (Kīrah; Tanāghū, 1974)

A prominent scholar of criminal procedure has emphasized that review in the Supreme Court does not constitute a third stage of adjudication and that the Court must not delve into the merits. Drawing upon Article 161 of the Constitution, he stated: “Should the Supreme Court enter into the merits of cases, it would surely deviate from its historical and traditional mission. Unfortunately, in some cases, powers have been conferred upon the Supreme Court that transform it into a court of appeal—contrary to the foundational purpose of its establishment.” He added: “It appears that the framers of the Constitution envisioned the Supreme Court in its traditional role, and the current practice of granting it a substantive review function was never the original intent.” (Sanhūrī & Abū Stait, 1950; Tanāghū, 1974)

Accordingly, in the Iranian legal system, although custom plays an instrumental role in clarifying concepts and determining instances, it occupies no independent place in the legislative process—creating a fundamental difference when compared with legal systems that are custom-based. (Sabā‘ī, 2023; Subḥānī, 2006)

5. Conclusion

The comparative study of the role and legal weight of custom in the Iraqi, Egyptian, and Iranian legal systems shows how deeply each jurisdiction’s constitutional, jurisprudential, and historical foundations shape the place of custom in adjudication.

Custom, by its very nature, emerges from society and expresses the repeated, accepted behaviors of people; but whether this social norm can transform into a binding legal norm depends on the underlying theory of law adopted by each system.

In Iraq and Egypt, the codes explicitly elevate custom to a principal legal source immediately after written statutes. This approach aligns with a civil law tradition strongly influenced by European codifications but adapted to Arab-Islamic contexts. By granting custom such a status, these systems aim to fill legislative gaps pragmatically and to ensure that judges can decide cases even when statutes are silent. Yet, this pragmatic accommodation of custom has created tensions. In Iraq, the Civil Code simultaneously declares Islamic jurisprudence a core source while placing custom ahead of Sharī'ah in Article 1(2). Such internal inconsistency risks conflicting rulings and legal instability, especially in matters where Sharī'ah provides substantive principles but custom diverges. Similarly, Egypt's choice to model its law after Swiss and French traditions, while constitutionally maintaining Islam as a state religion, leaves unresolved the theoretical and normative relationship between Sharī'ah and custom.

Iran, on the other hand, adopts a sharply different stance. Rooted in Imāmī Shī'ī jurisprudence and its emphasis on the sufficiency and completeness of Sharī'ah, the Iranian legal system does not recognize custom as an autonomous source of law. Instead, custom is limited to a supporting and interpretive role: clarifying concepts, determining subject-matters, and providing practical context for ambiguous terms in contracts and statutes. The Constitution enshrines this approach by directing judges, in the absence of clear legislation, to return to Islamic sources and reliable *fatāwā*, not to customary norms. This creates stronger doctrinal coherence between the written constitution and the practice of judicial decision-making. It also protects the system from the conceptual conflicts seen in Iraq and Egypt, but at the cost of reducing judicial flexibility in dealing with rapid social change and novel transactions that lack direct textual support.

A core insight emerging from this analysis is the tension between legal certainty and social responsiveness. Systems like Iraq and Egypt, by granting custom legislative rank, gain adaptability and can better align law with lived social practices. However, this openness comes with risks: erosion of higher legal principles, constitutional contradictions, and unpredictable judicial reasoning when custom evolves or clashes with established Sharī'ah standards. Iran's approach avoids these tensions by giving primacy to codified law and Sharī'ah, yet its formalism can slow legal adaptation to modern commercial and social realities.

Another important observation concerns judicial oversight. Where custom is treated as law, higher courts logically should supervise its identification and application to maintain consistency. Yet, as seen in Egypt, the Court of Cassation has often considered the ascertainment of custom a question of fact outside its review, undermining the notion of custom as law and generating conceptual confusion. Iraq faces similar challenges: judges must establish custom, but there is insufficient doctrinal clarity about how higher courts should intervene when its definition or content is disputed. By contrast, Iran's Supreme Court retains a strictly legal oversight role, since custom never rises to the level of law and remains evidentiary; this reduces interpretive conflict but also limits the development of judicial guidance on customary practices.

Practically, these differences affect litigants and legal practitioners. In Iraq and Egypt, lawyers must gather evidence of custom and anticipate its potential elevation to binding rule; in Iran, they rely primarily on statutes and Sharī'ah-based reasoning, turning to custom only to interpret contracts or clarify uncertain terms. For judges, the Iraqi and Egyptian models demand balancing social realities with formal legal hierarchies, often without clear constitutional anchor; the Iranian model demands strong doctrinal knowledge but offers less room for discretionary adaptation.

This comparative perspective also sheds light on legislative policy choices. For countries aiming to modernize while preserving Islamic legal identity, the Egyptian and Iraqi experience illustrates the dangers of transplanting Western civil law frameworks without fully integrating them into the existing Islamic legal structure. Placing custom ahead of Sharī'ah may appear pragmatic but can destabilize the system's internal coherence and weaken the binding force of constitutional declarations about religion and law. Conversely, Iran's approach demonstrates the benefits of internal consistency and clear normative hierarchy, but may require complementary reforms—such as modern *ijtihād* and flexible statutory drafting—to keep pace with evolving social needs without sacrificing legal certainty.

Ultimately, the study underscores that neither extreme—rigid exclusion of custom nor unrestricted elevation of it—is fully satisfactory on its own. A balanced model would recognize custom's social value and evidentiary power while maintaining constitutional and Sharī'ah primacy. Such a model would allow judges to use custom to interpret, fill procedural and definitional gaps, and support equity, but would avoid granting it legislative rank that could contradict higher normative sources. This

would also enable clearer judicial oversight, since higher courts could review whether custom has been applied in a way consistent with constitutional and statutory principles.

For future lawmaking, clarity and internal harmony are critical. Legislators should define the place of custom precisely: whether as a supplementary interpretive source, a factual indicator of social practice, or a conditional legal source subordinated to higher law. Explicit statutory guidance would help avoid contradictions like those found in the Iraqi Civil Code and refine judicial methods of proving and applying custom. Moreover, constitutional courts or supreme courts should articulate consistent standards for reviewing lower courts' reliance on custom, ensuring that legal predictability is not undermined by the fluidity of social norms.

The deeper lesson is that legal systems operate not only on formal rules but also on lived realities. Custom reflects those realities and can enrich the law by keeping it socially relevant. Yet, to serve justice, custom must be framed within a coherent legal hierarchy that protects foundational principles and ensures stability. The comparative experience of Iraq, Egypt, and Iran shows how difficult but necessary this balancing act is. It invites further scholarly and legislative effort to refine the relationship between society's evolving norms and the enduring structures of law, ensuring both fidelity to fundamental legal commitments and responsiveness to the dynamics of modern life.

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