The rule of law could be derived

The orthodox Muslim opinion reacted strongly against this decision by asserting that he can be governed by no other law but by Muslim law. This resulted in the passing of the Shariat Act, 1937. The jurists of all the schools of Muslim law have maintained that there are only four formal sources of law, the Koran, the Sunna, the Ijma and the Kyas, and custom is not a formal source of Muslim law.

But no Muslim jurists (barring those of the Shia school) have ignored the role of custom in the evolution, formation and development of law. The Prophet himself did not abrogate all the customs of the pre-Islamic Arabia; on the contrary, he retained in their original form many Arabian customs which did not conflict with the basic tenets of Islam. A tradition runs thus: " Virtues of the pre-Islamic period are to be retained in Islam".

The Prophet went further, and based many rules of Muslim law on the then existing customs. This trend was continued by the Caliphs. In the present submission what appears to have happened is this: most of the Muslim jurists accepted custom as supplementary to the sacred law (i. e.

, the Koranic law and the Sunna), though they did not admit that a custom derogatory to the sacred law could prevail over it. Thus, if the text was silent or indifferent on a particular point, custom could be the basis of rule of law. Similarly, when a general rule or law existed, a particular rule of law could be derived from custom. Ibn Abedin said: " Many decisions are based on usage so much so to say that it has been taken as an established source of law". According to Abu Hanifa, istihsan could be based on custom. The doctrine of masalhul mursal (public interest) of the Malikis was also based on custom.

Malik held the view that in the absence of an explicit text, custom of the people of Madina could be the basis of the Ijma. Although Shafi did not attach much importance to custom, the latter exponents of his school did not ignore it altogether. Ghezali's famous maxim on custom runs thus: " What is customary is as if stipulated". Similar is the position of the Hanbalis. Imam Tufi, a latter exponent of his school, maintained that custom was one of the nineteen sources of law. Abdul Rahim aptly observed: " Customs, generally as a source of law, are spoken of as having the force of the Ijma and their validity is based on the same texts as the validity of the latter.

It is laid down in the Hedaya that custom holds the same rank as the Ijma in the absence of an express text, and in another place in the same book custom is spoken of as being the arbiter of analogy". The scholars of the Sunni school agree that a custom in derogation to a rule derived by Kiyas prevails. Custom is equated with the Ijma, and sometimes it may even override it. Thus, it is submitted that in Muslim law, a custom in derogation to the Koran and the Sunna cannot prevail though if it is supplementary to these, it may provide basis for law. Custom in derogation of the Kiyas is allowed to prevail. In sum, custom does not have a status inferior to that of Ijma. In the initial and formative stages of Islam, it was not possible to formulate comprehensive code of law and, therefore, the Prophet and the Companions left many matters to be determined by custom. For instance, remuneration of foster mother and compensation for civil wrong was specifically left by the Koran to be regulated by the general usage.

Similarly, succession to the officer of mutawalli, in case the settlor has not laid down a scheme of succession, is governed by usage. Some of the Muslim

countries, where Muslim law has been codified and reformed, expressly provide for the application of custom. Thus, in the Ottoman Code, it has expressly been laid down that: (i) custom is authoritative and can be invoked as a ground for a legal precept; (ii) public usage is conclusive and action must be taken in accordance therewith; and (iii) a matter sanctioned by custom is as if stipulated in a contract. It appears that for the acceptance of custom, the Muslim jurists laid down four conditions: (a) custom must be of regular occurrence, Le., it must be continuous and certain, (b) it should be universal (it seems that community custom has no place in Muslim law, though local custom has), (c) it should be reasonable, and (d) it should not be in contravention of any express text of the Koran or the Sunna. It seems that custom in Muslim law need not be ancient or immemorial. Abdul Rahim says, “ Even a custom, which has sprung up within living memory, will be enforced if it be found to be generally prevalent among the Mohammedans of the country in which the question of its validity has arisen”. In an Indian case, the Privy Council specially emphasized that custom or usage should be “ ancient and invariable”, though it need not be immemorial in the English law sense.

In modern India, the rule laid down by the Privy Council that custom, if otherwise valid, overrides the rule of Shariat is still a valid proposition, though after the Shariat Act, 1937, custom has become an insignificant aspect of Muslim law. It prevails only in certain areas of law and in certain places. Thus, in many parts of the country, a daughter is not entitled to a share in agricultural land on the death of the father. Similarly, among the Sayyad Muslims of Jhang District of Punjab, an unmarried sister, in the

absence of collateral succession succeeds to the property of her brother till her marriage, and thus takes only a limited estate, having no right of alienation.

Fyzee rightly says, “ These and similar notions based on self-interest are too deep rooted to be destroyed by the magic wand of God-Prophet-Koran”.