

## **Urf- As a Foundation and Root of Islamic Law: A Juristic Set-up.**

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# Urf- As a Foundation and Root of Islamic Law: A Juristic Set-up.

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## Abstract:

This article opines on how Islam, being a social –doctrine and a promoter of social welfare and betterment took care of social-sensitivities and social needs far earlier than the formal establishment of an Islamic society. Such an embedded concept of social welfare, later on proved to be a base for its legal philosophy and legislation where local customs were endorsed as a source of Islamic law. Islam did consider how social and local customs fluctuate and develop a society and how such customs turn to be a buffer against a conceptual-aggression within any society.

*Key Words: Urf, Legal Philosophy, Society, Doctrine, Local customs, Islamic Law*

## Introduction:

Islam coins the terminology of ‘Urf’ for such customs. The word ‘Urf is derived from the root of making the tri-letter word meaning to know, to endorse or to admit. The Muslim jurists have taken ‘Urf’ for such practice found in vogue and followed by the multitude of society and never reported to be discontinued since its introduction.<sup>1</sup> The Prophet (may peace be upon him) himself endorsed the Arab customs wherever they were compatible and in consonance with the spirit of Islam. His immediate successors followed the same rule. In the preliminary stages of Islamic law certain civil and penal suits were dealt as per Arab custom; these include sale and purchase, trade, transactions, means of measurement and weight, hiring and renting, fixation of value according to gold and silver, the blood money and murder.<sup>2</sup>

The Muslim Jurists engaged in completion of Islamic law classified ‘Urf into two categories i.e. ‘Urf-e-Sahih (valid custom) ‘Urf-e-Fasid (invalid custom). An ‘Urf, they say will be termed as the

valid one when it will have the capacity to be called a source of Islamic law which neither contradicts neither the al-Nass (Quranic verses or Prophetic sayings) nor the sound reason. It also doesn't bear disorder and dilapidation for society and its weal. In other words, it will be termed as Fasid (valid) if it lacks the required gravity to be a source of Islamic law in its own scope.<sup>3</sup>

The increasing human population, besides the expansion of Islam across the peninsula to Africa and Asia and to the Eastern-Europe and other regions, (once ruled by Romans and Persians) motivated the Muslim jurists to exercise the maxim of 'Urf', essentially to cope with mushrooming issues in the Islamic law.<sup>4</sup> Comprehensive formulas and maxims regarding the 'Urf were introduced and initiated like:

- 1- What is establishment by 'Urf will be taken as revealed by al-Nass. OR
- 2- The 'Adah (tradition) will be an arbiter until and unless discarded by an open indication (from Quran or Sunnah). OR
- 3- An 'Urf' if it was contradicted by a Nass will be questioned for its credence. OR
- 4- In a transaction what is preceded by an 'Urf' will be considered as Pre-conditionals by parties. OR
- 5- Credit will be given to the well circulated 'Urf' but not to the rare-one. OR
- 6- A verdict based upon 'Urf' will face a change when the latter is changed.<sup>5</sup>

The above maxims led to a legally defined institution with necessary sub-terms and conditions and hence Islamic law was evaluated accordingly.

The latest maxim followed the traditional practice of Umar-I who made necessary changes in the payment of blood money 'Urf' was found changed. It is notable that during the days of Prophet and his immediate successor Abu-Bakr, blood money was paid in the form of camels, as was the Arab custom in vogue. But Umar-I after realizing that in urban areas monetary economy has been introduced, he made necessary amendment and categorized the origin of blood money as follow:

- 1- One hundred camels for those wealth was still camel-ahl-al-lbil (camel possessor).
- 2- Ten thousand dirham for those who dealt in silver-ahl-al-Waraq (silver possessors).
- 3- One thousand Dinars for those who dealt in gold-ahl-al-Dhahab (gold possessors).
- 4- Two thousand sheep upon ahl al-Sha' (possessors of sheep-flock).
- 5- Two hundred cows upon Ahl-al-Baqar (possessors of cow-flock).
- 6- Two hundred dresses upon those dealing in cloth-ahl-al-Hullah (stuff possessors).

The above 'Urf'-based judgment of Umar-I denotes that he amended the old way of payment of blood money, only to face the new condition accommodating both the urban and rural population.<sup>6</sup> Umar I after the establishment of Diwan (Public treasury) then gave up what had been said in (d), (c) and (f) by ruling that the blood money will be paid in the form of Dinar or silver or camel.<sup>7</sup>

Another example of 'Urf' given preference is that of a new definition of 'Aqil-al-Diyyat. Simply 'Aqila' means paternal relatives. According to Arab custom if a murder took place by Khata (mistake) then the paternal relatives of the murderer were to share the total blood money with the latter. The Prophet (peace be upon him), Abu Bakr and Umar-I maintained the custom for some time. Later on after the registration of citizens was established such blood money was then deducted from the people sharing in Diwan in which the murderer had been registered but not from his paternal relatives.<sup>8</sup>

It was not difficult for Fuqaha while going through the process of legislation in the first half of 2<sup>nd</sup> Hijra (century) to determine the changed 'Urf' as a cause for the change in the 'Urf-based rules and existence of 'Urf' as a cause of continuity of such rules.<sup>9</sup>

To explain the authenticity of 'Urf' in view of social interest, it is a preliminary juristic principle that the sale and purchase of a non-existent item is termed as Batil (ineffectual one).<sup>10</sup> However, the order for manufacturing was 'Istithna' or exempted from the above principle because the 'Urf' demanded it.<sup>11</sup> It was supported by two further juristic maxims that (a) Istithna' (exemption) of Juz (part) from an Asal (original) for the sake of social welfare is lawful,<sup>12</sup>(b) an 'Amr (matter) if found constricted then its breadth will be pursued and if it is found unexpectedly expanded it will be leveled provided the social welfare requires such practice.<sup>13</sup>

Following the above two maxims the Fuqaha allowed the Waqf (endowment) of book under 'Urf so that poor students may receive knowledge<sup>14</sup> despite the Waqf of movable properties had been termed invalid by them. <sup>15</sup> and similarly the Wasiyah (will) of Mahjur (a person interdicted by law to conduct any disposal in his property due to immaturity or due lunacy) was termed exempted from the original maxim and such Wasiyah was allowed for the sake of public-benefits. <sup>16</sup> The Hanafite termed such process as Istihsan bil'Urf (diversion to a better way on grounds of 'Urf). They say that such formula i.e. Istihsan bil 'Urf can be followed on a confined scale where the 'Urf' requires such process. <sup>17</sup>

The jurists are extremely cautious in penetrating matters as above with circumspensive angles lest such touching may not contradict Quran or Sunnah-based injunctions which are pre-explained and which are transcendent to Ijtihadic-jurisdiction. To avoid such complexity, The Fuqaha have confined the utilization of "Urf' by the following conditions.

First the 'Urf' should not be Mukhalif-le-Nnass i.e. contradicting the Nass (the text of Quran and Hadith). We have already dealt it in the category of 'Urf-e-Sahih. It is said: If a Nass falls against an 'Urf' the latter will be ineffective. <sup>18</sup> OR

Usages will be endorsed if not repugnant to what is elucidated in Quran or Sunnah.<sup>19</sup> OR

- Pre-Islamic divine doctrines are valid as a Shara' until a Nass springs up against it. <sup>20</sup> OR
- Initially all matters will be left in to-to until decisive proof comes there. <sup>21</sup> OR

- There is no place for Ijtihad in the presence of Nass. 22
- Any ijtihad found in any controversy to a Nass based verdict will be termed ineffective. 23
- A matter found in a practice for long time will be left as it was. 24
- Hindrances would be omitted. 25
- The needs validate what is Pre-Prohibited. 26
- What has been termed lawful due to need and necessity will be confined to its own limits. 27
- Zarurah (need) will deal like Hajah (needs). 28

The above maxims prove directly or indirectly the validity of an 'Urf' in some cases and invalidity of an 'Urf' in others. The absolute validity of an 'Urf' is in such case where it does not cause violation of open injunction in any circumstances. For instance, the Prophet allowed fructification or pollination per custom of Madanites though earlier on he had forbidden it, by saying that the [people know their day to day matter better than him. 29 Another example is that of the delayed dower and the dower payable with immediate effect. At first Islam had defined the legalized the latter one only. No concept of the first one was found in the early days. However, the aforesaid was given legal status due to its existence in the 'Urf' of Iraq. 30 Similarity the transfer of guardianship of a child to paternal relative was made according to the prevailing Arab-custom.31

It is a well-known principle that the sale and purchase of an extinct-item is invalid which bears no legal effects. However, after being stationed at Madina the Prophet (peace be upon him) noted that Bai' al-Salam (delayed return of an item for the one received on spot) and Bai' al-Arayah (contract of barter in dates) was in vogue in Madina. Logically it was banned because the second item did not exist on the spot. The Prophet (peace be upon him) gave concession to 'Urf' and exempted the above two transactions from the original principle quoted above. 32 Similarity the transaction of hawalah (bill of exchange) was termed valid under the Arab custom 33 and similarity the validity of waqf of moveable property as earlier discussed.

- The Istithna (exemption) of an item for the public interest was followed by a famous maxim:
- The need validates the pre-prohibited. 34
- However, the above maxim was supplemented by another maxim:
- What was validated for the sake of need and necessity will be confined within its lot. 35

- The first maxim exempted the consumption of all prohibited according to needs-and hence is Mutlaq (absolute) in its scope while the latter-one requires check and balance and discourages quitting and misuse of the concession in the subject matter. 36

The word 'Urf Makhaliq al Nass' denotes an 'Urf contradicting to the entire Nass or to a part of a Nass. In the first case the jurists unanimously say that if an Urf was found contradicting the entire Nass the first will be held frozen. However, if it was found contradicting a part of it then the Hanafites-contrary to the rest of jurists –consider 'Urf' as a means of Istithna from a Nass in some cases and as a means of Istithna from a Nass in some cases and as means of Takhsis (specification) of a Nass in others in connection with public needs and necessities. 37

Secondly; if the 'Urf in question in found in practice of the masses for a long time and is not reported to have discontinued at any time after being introduced, then the following maxim holds.

- An'adah (synonymous to 'Urf) will be given place, which is widely circulated and not discontinued. 38
- The above maxim holds in case of dispute between parties regarding the fixation of rate. Here the price and currency will be preferred which is found circulated on a large scale. The case has been dealt in Fiqqhi reference accordingly. 39
- Thirdly, the 'Urf' should be Qadeem (predated) vs. the matter under consideration that should be postdated and not vice-versa. The maxim says that:
  - The Qadeem (pre-existed) will be considered in to-to. 40 OR
  - Rehabilitation of an existed matter is per status quo. 41 OR
  - No place for such an 'Urf' erected after the in-question matter exists. 42 OR
  - The oft-happening and well-circulated matter but not the rare-happening matter deserves such a place. 43 OR
  - Highlighting the above maxims, a transaction like endowment or will or lease and others if once determined and held according to the pre-existed 'Urf' then a change will not be accommodated despite the new-sprung 'Urf' requires such change. 43(a)

Hanafites as compared to other contemporary schools prefer 'Urf' even in the existence of Qiyas (analogy) Abu Hanifa admits 'Urf' based conditions in a transaction though it may fall against Qiyas. 44 His immediate pupil Muhammad b. Hasan al-Shaibani, (who is a founder of international law) has credited 'Urf' on a wide scale. His famous books Al-Siyar al Kabir and al-Saghir formulate international law on the basis of 'Urf'. He remembers Umar-I who introduced 'Ushur (a customary tax according to the 'Urf' exercised abroad). 45 Ibn 'Abiddin another

Hanafites jurist has elaborated all those 'Urf'-based verdicts in his famous book named 'Nashr Al'arf fi Bina Ba'd al-Ahkam' aka 'Urf and similarly Ibn-Nujaim's book Al-Ishbah wal Nazir is a comprehensive collection of juristic maxims that advocate 'Urf'.

Maliki Fuqah term the Taamul Ahlal Madiana (practice of Madanites) as a source of Islamic law. They even prefer it to a Khabr-e-Wahid (Hadith narrated by less than four persons). 47

Ibn Farhun Maliki advocates 'Urf' to be a source of Islamic law and stress that when and wherever the Nass is lacking 'Urf should be maintained. 48 If a Mujtahid, during his stay abroad notes several customs he will defer his Ijtihad unless he is well aware of all the customs and conventions of the country. 49

In his two famous books i.e. Kitab al Risalah and Al- 'Umm, Imam Shafi' did not consider 'Urf as source of Islamic law. However, he speaks of the authenticity of 'Urf' and terms it as an arbiter regarding the ultimate definition of Hirz (place prepared for the protection of property) in a theft case where such definition is found equivocal. 50

Ali bin Habib al-Mawardi (d.450 A.H) a Shafite jurist and the author of a famous book Al-Ahkam al-Sultaniyyah considers 'Urf' as an inevitable unit for a sound legal system. 51 Similar opinions about the crucial impact of 'Urf on social life have been deliberated by the eminent scholar relating to Shafi school, like Muhammad b. Shahab al-Ramli (d.1004. A.H) al- Juwani (d. 478 A.H) Khatib al-Bughdadi, Jalaluddin al-Sayuti (d. 911.A.H) in their work relevant to our subject. The latter has quoted prominent jurists who based their legal ruling upon 'Urf'. They included Qazi Hussain (d. 462. A.K) Tajuddin al-Subki (d. 711 A.H), Abuzayed al-Baghavi (d. 516 A.H) and Abdul Rahim al-Isnavi (d. 772). 52

Ahmad bin Hanbal (d. 241 A.H) gave less attention to the accommodation of 'Urf' as a source of law and referred some new cases to the contemporary 'Urf'. For instance, once he was asked to fix the meaning of Hukra (hoarding-the storing of food). He said that such definition should be left to the society whether it used it for food or not. 53

However later Hanbalities like Muffaq al-din Qadamah (d.620. A.H), Imam ibn Taimiyyah (d. 652 A.H), Muhammad b. Abu Bakr ibn Qayyim (d-751 A.H) recognized 'Urf' as a source of law and followed it in various Fiqhi or legal formations.

The behavior of ibn al-Qayyim seems more encouraging than both his predecessors when he exercises 'Urf' as Wajib (obligatory). 55

## **Conclusion:**

To wind up the discussion the conclusion of furuqi, our predecessor on the subject is hereby reproduced that Shari'ah is the major norm, which regulates the conduct and governs all aspects of Muslims individuals and their societies. Its basic sources are the Quran and Sunnah, while 'Urf, 'Adah, and all other methods of Ijtihad are secondary (i.e. non-independent, derivative) sources. Rulings based on these secondary sources are allowed provided they are in accordance with Islamic principles and norms.

The Khulafa ay-Rashideen made use of local customs and practices where it was possible to do so. The Fuqaha, continued to follow this practice and provided legal and rational grounds for its acceptance. It is also in accord with a Prophet's Hadith, wisdom is the lost property of the faithful who deserves it most wherever it may be found, 56 a saying that encouraged Muslim scholars to accept useful knowledge and the other good things of life which were in line with Shari'ah.

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