

Usul al-Fiqh

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11. Urf and Istishab

Urf (Custom): *Urf* (custom) is defined in Usul as "recurring practices which are acceptable to people of sound nature. Urf and its derivative 'Maruf' both occur in the Quran, mostly in the sense of "good" (as opposed to "bad or evil") adherence to Allah's injunctions (3:110; 7:199). However, Urf has been used in the sense of custom also in some places in the Quran (Ref. 2:233 with regard to maintenance of children). The Shariah, therefore, has in principle approved custom in determination of rules regarding 'halal' and 'haram'. Fuqaha also adopted Urf in the determination of the Ahkam of Shariah. The rules of Fiqh which are based on juristic opinion (*ray*) or Ijtihad have often been formulated in the light of prevailing custom. It is, therefore, permissible to depart from them if the custom on which they were founded changes in the course of time.

A rule propounded by some Fuqaha (Suyuti and Sarakhsi) is that "what is proven by Urf is alike that proven by Shariah". This was adopted by Turkish Khilafat in Al-Majallah. However, this rule is applicable in the case of Urf of the Muslim nations and when the Urf is not in conflict with the rules, essence and spirit of Shariah. Urf of non-Muslim societies must be very carefully examined.

Customs which were prevalent in Arabia in the lifetime of the Prophet (SM) and which were not over-ruled by the Prophet (SM) are treated to have received his tacit approval and considered as a part of *Sunnah taqirriyyah*. An example of this is payment of *Diat* (compensation for murder) to the family of murdered by "Aqilah" (male kinsmen of the murderer - female relations have no obligatory liability in this regard, they can, however pay, if they want), where payment of Diat has been agreed upon. For details on the rules of Qiyas and Diat, refer to some Islamic law books.

The followings are the conditions of Urf:

- a. It must be common and recurrent.
- b. Urf must be in practice at the time of transaction, i.e., past Urf is no basis.
- c. Custom or Urf must not violate the *nass* or clear stipulation of the Quran and the Sunnah.
- d. Custom must not contravene the terms of a valid agreement (valid according to Shariah).

There is difference between Urf and Ijma. Urf is essentially a local or national practice, whereas Ijma is an agreement of Ulama across places and countries. There are other differences which are not substantial in character (See Kamali). Urf has been sub-divided into *Qawli* (verbal) and *Fili* (actual). Verbal Urf consists of agreement of people on the meaning of words. As a result, the customary meaning becomes dominant meaning and

literal meaning is reduced to the status of an exception. Actual Urf consists of commonly recurrent practices which are accepted by the people.

Urf Qawli and Urf Fi'li are both sub-divided into two further types:

- a. *Al-Urf al-amm* or practice of all people everywhere (such Urf is almost non-existent).
- b. *Al-Urf al-Kbass* is the practice of a particular country or locality or some places. This is the Urf with which Usul is mostly concerned.

Urf has also been classified as *Urf al-Sahib* (valid Urf - valid according to the Quran and the Sunnah) and *Urf al-Fasid* (disapproved Urf, not valid according to the Quran and the Sunnah).

Dr. Jamal Badawi has divided Urf into 3 (three) types - positive, neutral and negative. An example of *positive Urf* is generosity or hospitality. A *neutral Urf* is preference for particular diet of a particular place. A *negative Urf* is a tradition which goes against Islamic law and teaching. Dr. Jamal mentions th if a local custom is negative, then it must be rejected. (Ref.: Dr. Jamal Badawi, 'Islamic Teaching Course', Lecture No. G-23).

Urf as a source of Islamic law is quite sensitive. In this area, we should depend on the views of the majority of senior scholars. Urf has been justified on the basis of Quranic Ayats 22:78 and 7:199, but these verses are not Qati in this respect. Some traditions have also been quoted in support (see Kamali) but these are also not clear evidence in support. Urf is not an independent proof on its right. However, it can play useful part in interpreting and implementing Islamic law. It is also noted that the rise of codified statutory legislation in modern states has, to some extent, reduced the need for Urf.

As we have noted earlier, rules based on Urf are liable to be changed. Some examples can be seen in the text book. In future also, rules based on Urf or Ijtihad will continue to change, where needed.

In conclusion, I will say that Urf is no longer an important proof or source of Islamic law. However, it may help sometimes in understanding, interpretating, and implementing Islamic law. A very cautious approach should be taken in this regard.

Istishab: *Istishab* literary means courtship or companionship. In Usul-al-Fiqh, Istishab means presumption of existence or non-existence of facts. It can be used in the absence of other proofs (*dalil*).

It has been validated by a large member of scholars, though not all. In its positive sense, Istishab presumes continuation of a fact (marriage or a transfer of ownership) till the contrary is proved. However, the continuation of a fact would not be proved, if the contract is of temporary nature (for instance, *Ijara* or lease). Istishab also presumes continuation of negative.

Because of its basis in probability, Istishab is not a strong ground for deduction of the rules of Shariah. Hence when it comes in conflict with another proof (dalil), the latter takes priority. Istishab is of four types:

- a. Presumption of original absence (*Istishab al-adam al-asli*) which means that a fact or rule which had not existed in the past is presumed to be non-existent.
- b. Presumption of original presence (*Istishab al-wujud al-asli*). This means that the presence of that which is indicated by law or reason is taken for granted. For instance, a husband is liable to pay "Mohr" by virtue of existence of a valid marriage.
- c. *Istishab al-bukm* which presumes the continuity of general rules and principles of law. For instance when there is a ruling in the law (whether prohibitory or permissive), it will be presumed to continue.
- d. *Istishab al-wasf* (continuity of attribute) means to presume continuity of an attribute until the contrary is established (for instance, clean water will be continued, to be treated as clean water). Please see other examples in the text book.

The Ulama of Usul are in general agreement on the first three types of Istishab. There is more disagreement on the fourth.

Some important legal maxims have been founded on Istishab, such as:

- a. Certainty can not be disproved by doubt (*Al-Yaqin la Yazul bil Shak*).
- b. Presumption of original freedom from liability (*bara'ab al-dbimmah al-asliyyah*).

Hasan Turabi, the famous jurist, has highlighted the significance of Istishab in his book "Tajdid Usul al-Fiqh al-Islami". He thinks that it has the potential of incorporating within its scope the concept of natural Justice and the approved customs and mores of society.