

‘Urf -o- Ādah (Custom and Usage) as a Source of Islamic law

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Abstract

Customs, traditions and usages of people are considered as sources of law in almost all jurisprudences of the world. In Islamic law ‘Urf (custom) and ‘ādah (tradition) are considered important sources of law. Numerous injunctions of the Islamic Fiqh are based on customs and usages of the people. From the period of the Prophet of Islam to the development of law schools custom (‘urf) was considered as a source for law making activities. In this article ‘urf as a source of Islamic Fiqh has been studied.

Introduction

‘Urf (custom) and ādah (usage) are very ancient and important sources of Islamic law. As the pre-Islamic Arabs had no written documents or script, their social systems were regulated by custom and tradition. According to the available historical accounts, the *khulafa’ al rashidun* retained many pre-Islamic social customs and traditions and also adopted and established some useful nonindigenous customs. Such borrowing was quite acceptable in their eyes, for the Prophet himself had acknowledged the validity of some pre-Islamic customs that were compatible with the letter and spirit of the revelation. In Arabic there are two terms for legal custom ‘urf and ādah. ‘Urf and ādah are two technical terms of Islamic jurisprudence. Literally and technically, these terms differ but in usage in society they overlap each other. The scope of ‘urf is greater than that of ādah. The literal meaning of ‘urf, according to Ibn al-Fāris, is:

“‘Arafā (عرف) takes its origin from ‘ain, rā and fā. It is employed in two senses: (1) arrival of two things – one followed by the other attached and (2) peace and tranquility.”ⁱ

According to Imām Rāghib al-Isfahānī:

“‘Urf refers to knowing something because of its effect, and it is more general in scope than knowledge.”ⁱ
Ibn ‘Ābidīn states:

“‘Urf or ‘ādah is a state which is firmly established in hearts and appeals one logically. Besides, pious natures embrace them.”ⁱⁱ

‘Urf and ‘ādah rise to the level of authenticity in society, because these guiding principles are based on equity, sympathy and easiness. In the English jurisprudence custom is a primary source of law. Islamic jurisprudence also gave recognition to them. ‘Urf comprises customs which people practise voluntarily – and their unbroken practice dates back years and even centuries. For instance, a knock on a door is deemed a token of seeking permission, which is binding for entering a place. If somebody’s home catches fire, to protect their goods or safeguard their lives, no permission is sought. Normal practice in society dictates that seeking permission is not needed here, because this is what sympathy and public interest demand. Included in this usage is the matter of guests who are allowed to utilize all the household articles which one generally utilizes; and the guests are not supposed to ask for permission. If seeking permission was stipulated as a condition in everyday issues, people would needlessly suffer, and the business of life would descend to chaos. The Islamic law, therefore, recognizes the great need of the masses and regards it as a source of law, as was the routine in olden days.

‘Urf in pre-Islamic era

Before the advent of Islam, old customs, usages, habits and practices were the foundations of Arab society and civilization. Contained in these usages and practices were the remains of the religion of the Prophet Ibrahīm.

Also, some effects from Christianity and Judaism found way into them. Another element was the customs of their geographical environment and contacts with the foreign nations.

From pre-Islamic time, some customs and habits that were practiced as obligatory laws are quoted below:

1. They showed respect to treaties and transactions.
2. They regarded the holy months as worthy of respect, so none was allowed to fight during the sacred period.
3. They respected the venerable places. If anyone was after the blood of another person, and the prey would seek refuge in the House of Allāh, his refuge was not violated.
4. On the way back from Makkah, they used to hang leaves around their necks or those of their camels and reached their homes safe and sound. And they suffered no maltreatment.
5. Their religious symbols and identities were temples. There they worshipped, prostrated themselves, performed circumambulation, vowed and prayed for health, wealth and offspring.
6. The Jews and the Christians fasted in their own ways; even the Quraysh fasted on the day of Ashura. Some kept fasts of observing silence for certain days.
7. Circumcision was also popular among them. Arab literature supplies us instance which tell us that they washed the dead; Arab poetry contains references of burning them.²

Islamic *sharī'a* and the use of '*urf*'

Most certainly, Islam is the continuation of divine guidance and direction. It is the most advanced form of collective conscience of human society. It sanctified the most exalted customs and usages of human beings. Islam partially took some customs and adapted or adopted some others. Besides, Islam continued many genuine instructions of revealed religions. Allāh the Exalted created the universe and he enforced His law in it; each and every item in the universe is bound to act accordingly. However, man has been granted free will, and the potential to do good or bad has been given him. For the sake of showing the straight path, Prophets and Messengers were raised with the one and the same objective. The teachings were identical, and so were their goals. The Books revealed to them were the works of same Author (that is, Allāh Almighty). All the difference lies in styles of communication which were adopted for various audiences but the purpose remained the same. The Books do not contradict other books, rather they confirm one another. In short, all these are the various editions of the same *al-Kitab*. Hence harmony and similarity in human principles, rules and regulations, customs and habits and divine laws is a logical consequence. In like manner, the teachings of all the Prophets were also in harmony with each other. They, all of them, gave the concept of Allāh's Oneness, worship, all-embracing sovereignty and His Lordship (Who created all the worlds.) They enjoined to carry out only those injunctions which were comprehensively good for man.ⁱⁱⁱ

Early Prophets' enlightenment used to serve as a supplement of the last Prophet's enlightenment. With the most welcome arrival of the Last Messenger, all the previous *sharī'as* perfected.

Islam and other revealed religions share many values. Some of them are mentioned in the following lines:

1. To fight against Allāh's enemies;
2. Not to vow in the name of other than Allāh;
3. Not to kill an animal in the name of other than Allāh;
4. To sacrifice one's life in Allāh's cause;
5. To believe in the evil of homosexuality.

Apart from the preceding instances, there are many injunctions where Islam and the religion of the Prophet Ibrāhīm agree.^{iv} Out of the vast body of customs and usages of the bygone religious communities, Islam embraced only those instances which were the authentic rites and which were also in harmony with Islam's collective wisdom and rules and regulations. Had Islam unquestioningly followed the usages and practices of the Arabs, circumambulation of the House of Allāh naked would not have forbidden, idols would not have been removed from the *Kaba*, and sacrifices would have been okayed in accordance with the fashion of the Arabs. Then those in debt would continue to be slaves, girls would be buried alive and women would go without any share in inheritance. Keeping in view the great role played by '*urf*', 'Allāma Ibn Qayyim enumerated over one hundred instances of usage and custom in society. Some examples are quoted below:

1. Whenever a currency is mentioned without any qualification, the commonly used currency of the area is intended;

2. To whip a hired animal on account of its slow work;
3. To return a borrowed item to a child, a servant or the spouse of the owner, instead of handing it to the lender;
4. To hire the services of a lawyer, if one is unable to do a required job oneself;
5. When anyone gets a home on rent, one can invite and entertain guests and friends there, even though these issues are not part of the contract;
6. If someone gets garments on rent, he is allowed by *sharī'a* to wash them, if they are normally washed in that situation in society;
7. To appoint someone as one's lawyer to conclude a business deal through him;
8. Passing through a field, one can perform *tayammum* with its soil, and can offer prayer without seeking the land owner's permission.
9. If someone learns of the expected arrival of a flood, and believes his neighbour's household items are in danger, with the master of the house not available – he can raze a wall to ground (provided the house is locked) and excavate the things. The one who razes the wall will not be considered a criminal, because his deed is a sign of sympathy and welfare.
10. A situation emerges where a neighbour's belongings are taken forcibly and everything is gone. Then, if a resident of the locality took a step and got back some luggage, he will not be considered responsible for the loss of the items gone.^v

Customs and usages have always been sources of Islamic law. Rather in ancient times, just customs and usages served as law.

Commonly, the following verse of the Holy Qur'ān is cited which establishes that '*urf*' is a source of law:

خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ.

“Keep to forgiveness and enjoin '*urf*' and turn away from the ignorant.”^{vi}

The statement of 'Abdullāh bin Mas'ūd also serves the same purpose:

مَا رَأَى الْمُسْلِمُونَ حَسَنًا، فَهُوَ عِنْدَ اللَّهِ حَسَنٌ.

“Whatever Muslims regard as good, it is good in the sight of Allāh.”^{vii}

Of the vast body of texts which directly or indirectly establish '*urf*' as a source of law, two evidences have been cited here.

Imām Shatibi shed light on '*urf*' and '*ādah*' and discussed their status in Islamic law. The arguments advanced by him clarify the issue and its status as a source of law. His arguments are summarized below:

1. There are texts, quotes of the Companions, evidences and arguments which prove mutual relation between causes and effects. They, in *sharī'a*, are indications of the proof of '*urf*' and '*ādah*'.
2. As all the laws and injunctions of *sharī'a* are identical, they point to the fact that the lawgiver did not turn away from the customs and usages of the people.
3. It is an undeniable and agreed upon fact that *sharī'a* laws are based on the beneficial purposes of people. It requires that '*urf*' and '*ādah*' should be relied on.
4. If the customs and usages of people had not been regarded in Islamic law, it would have caused unbearable problems. If people were forced to behave against their habits and practices, it would have pushed them to great disturbance, as jurists have explained:
“There is a great harm in disengaging people from their habits.”^{viii}

The use of *Ma'rūf* in the Qur'ānic verses

As early was discussed that '*Urf*' is a custom which is very well accepted by the collective conscience of the people and it is a trusted tradition. In Arabic such habit or custom which is widely accepted and respected is known as *Ma'rūf*. **Ma'ruf** is an Islamic term meaning that which is commonly:

- known
- understood
- recognized
- acknowledged
- accepted

Ma' rūf, in various forms, has been referred at more than forty places in the Holy Quran. Some relevant verses are quoted below:

فَمَنْ عَفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبِعْ بِالْمَعْرُوفِ.

“And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness.”³

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا الْوَصِيَّةَ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ.

“It is prescribed for you, when death approaches one of you, if he leaves wealth, that he bequeaths to parents and near relatives in kindness.”^x

وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ.

“And women shall have rights similar to the rights against them.”^x

الطَّلَاقُ مَرَّتَانٍ فَاِمْسَاكُ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ.

“Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness.”^{xi}

فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاضَوْا بَيْنَهُم بِالْمَعْرُوفِ.

“Place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness.”^{xii}

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ.

“The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child.”^{xiii}

All the above verses contain the word *al-ma' rūf*, or its variant forms, which represent well accepted and well practiced norms of the society. Abū Sinah Ahmad Fahmi explains the reason why *'urf* is authentic and it can have a say in many an issue:

“Allāh orders His Prophet to observe *'urf*: it is known among people verbally or practically; their hearts are satisfied with it and intellects accept it. So, the imperative verb requires action in accordance with *'urf*. Otherwise the imperative verb is useless.”^{xiv}

Imām al-Qurtubī writes in his exegesis of the Holy Qur'ān:

“*Urf*, *ma' rūf* and *arifa* – all these words stand for every good habit with which intellect is contended and soul is satisfied.”^{xv}

A small number of commentators dispute with those who are of the view that *'urf* and *ma' rūf* refer to such commandments that Allāh instructed His Prophet or those which they learned through inspiration. The opinions of the commentators of the Holy Qur'ān, on *'urf* in Sura Araf verse 199, can be divided into groups:

1. *'Urf* and *sharī'a* are synonyms, because there is no argument against it. This opinion is held by Imām Qarafī, Ala al-Dīn Tarablusi and Rashid Rada.
2. *'Urf* stands for the habits and usages of people which do not dispute any legal text. Most scholars incline to this view.

Both of these viewpoints appear to be valid, so neither can be ignored. We can also say that these views are the two sides of the same picture.

Imām al-Tabarī comments in his *tafsir* that *ma' rūf* is a familiar thing which is not disapproved by the Muslims and adopting it is praiseworthy.^{xvi}

Mentioning the idea of Imām al-Rāzī on this issue will further clarify the concept of *ma' rūf*.

“*Urf* is such a matter that is familiar, acting accordingly is imperative and its existence is better than its non-existence.”^{xvii}

The preceding opinions of jurists and commentators of the Holy Qur'ān show that *'urf* and *ma' rūf* are matters which are taken as reliable by legal injunctions. That is why Dr Mustafa Zarqa writes:

“There might be hardly any chapter of jurisprudence, including crimes and punishments, where commands have nothing to do with *'urf*.”^{xviii}

This opinion of Dr Mustafa al-Zarqa states the significance of *'urf* and *'ādah* in monetary issues, contracts, transactions and marriages. However in theology, acts of worship, ethics and – in some other matters – the role of custom and usage is limited.

After the Qur'ānic verses, the most authentic report is given below:

“Allāh examined the hearts of the servants, so He chose the heart of Muhammad (Allāh bless him and give him peace). Allāh therefore raised him for Messengership. Then He examined the hearts of the servants, so He chose the hearts of his Companions for him.

He therefore made them the helpers of his religion and the viziers of His Prophet. So whatever the Muslims regard as good, it is good in the sight of Allāh, and whatever the Muslims regard as bad is bad in the sight of Allāh.”^{xix}

A large number of jurists have advanced the preceding report from *Hadīth* literature to substantiate *ijma*, *istihsan* and *'urf*. Discussing the authenticity of *'urf*, Ibn Hammam quoted this narration and then commented:

“*Urf* has risen to the rank of authenticity, and that is his (the Prophet's) saying: ‘Whatever the Muslims regard as good, it is good in the sight of Allāh.’”^{xx}

The quote under discussion is apt for deciding that *'urf* is authentic. Also, the quote appeals one's intellect: what is a common practice among believers, their intellects sing its praise and their hearts warm to it – surely, that thing will be pleasing to Allāh and reliable in *sharī'a* as well. But some – only a few – scholars went to differ. They have questioned its chain of transmission. As for as its text is concerned, they argue that in the quote the word *al-Muslimuna* has the letters *alif*, *lam*(ل) which connote generality. So the text – in their opinion – refers to the consensus of the Muslims, not the usage of people which consists of their words and deeds. In short, in their eyes, the quote refers to the authenticity of consensus, not the authenticity of *'urf*.

Ibn Hazm writes in this regard:

“This saying is a pointer to the consensus of the Muslims only because the saying does not run thus: ‘What is good according to some Muslims is good with Allāh as well.’”^{xxi}

Despite the criticism and disagreement of Imam Āmadi and Ibn Hazm and a few other scholars, the overwhelming majority of jurists agree that the preceding verses of Holy Qur'ān (especially 7:199) and the this saying substantiate *'urf* as an evidence of Islamic law, as witnessed by the explanations of the commentators of the Holy Qur'ān and jurists.

The proof of *'urf* from the Confirmative Sunna

Confirmative Sunnah (*Sunna taqririyya*) has been defined as follows:

“It refers to a speech/deed which was uttered in the presence of the Holy Prophet, or performed during his time, or was brought into his knowledge, but he did not deny. Or he observed silence and did not prohibit what was done before him, during his time, or was brought into his knowledge. His silence in the face of such a speech or deed is a sign of their permissibility.”^{xxii}

Sunna taqririyya and usages and customs are very closely linked, because *a'rāf* (customs) in the era of the Prophet – which he did not forbid – belong to *Sunna taqririyya*. A study of the biography of the Prophet tells us that, after he left Makka and settled in Madina, he prohibited many vitiated practices and habits, while he kept silence about those which were invitated. For instance, various forms of industry and business deals he maintained. Another case where the usage and practice of the Prophet's time rose to the level of *Sunna taqririyya*:

“It is related from 'Urwa that the Prophet (Allāh bless him and give him peace) gave him a dinar with which to buy a sheep, and with it he bought two sheep. Then he sold one of them for a dinar and brought the dinar and the sheep, and the Prophet prayed for him to have blessing in his business dealings. So even if he were to buy dust, he would have a profit in it.”^{xxiii} All these instances help us to understand that many habits and usages and practices are part and parcel of *sharī'a*, because their proof comes from *Sunna taqririyya*.

Proof of *'urf* based on practical consensus

A large number of usages and customs came into existence through practical consensus. When the people of an era are familiar with an act, and practise it regularly, and no knowledgeable person has denied it, despite awareness of it, but rather they have acted upon it – it is called practical consensus.

In the beginning, it is *'urf*, but later on it assumes the characteristic of practical consensus. The books of jurisprudence abound with examples of habits and usages of this sort. There are issues which do not seem lawful in the light of analogy; *istihsan bi-l-urf* demands that they be permissible. On this point, Imām al-K'asani has cited some examples and then he comments:

“Analogy requires that such matters should not be permissible ... but *istihsan* demands that they be permissible, because people act according to it. (This saying also supports it:) Whatever the Muslims regard as good, it is good in the sight of Allāh.”^{xxiv}

An example of this type is a business in which one person invests money, and the other person works, and the profit is divided according to an agreed upon formula. Al-Shawkani writes on this subject:

“All these acts and sayings attributed to the Companions of the Holy Prophet are evidences that the Companions used to practise *mudaraba* (an ancient form of financing practised by the Arabs since long before the advent of Islam) and would not deny it. And their unanimous agreement on *mudaraba* is a proof of its permissibility.”^{xxv}

In the fiqh of Imām Mālik, the usage of the people of Madina is like practical consensus. And it is a well-known principle of his school of law. And many rules formulated by him were formed in this fashion. Imām Mālik takes the usages and customs of the residents of Madina as authority and entirely relies on them. If anyone acts against them, the people of Madina, the Imām does not like him.

Levels of *'urf* in Islamic Law

In Māliki fiqh there are four levels of the usage of the people of Madina:

First level

Some practice which existed during the lifetime of the Holy Prophet. Examples are the scales for measuring and weighing things. This usage is agreed upon and is authentic.

Second level

The routine of the people of Madina until the martyrdom of the third caliph 'Uthman. Imām Mālik holds it authentic.

Third level

In some issues, two evidences dispute. For instance, two traditions or analogies differ, and the residents of Madina happen to act in accordance with one evidence. Whether or not such usage is authentic, it is a disputed issue. It is authentic in the opinion of Imām Mālik, Imām al-Shafī'ī and some followers of Imām Ahmad b. Hanbal, while it is not the opinion of Imām Abū Hanifa and some followers of Imām Ahmad.

Fourth level

The later generations of Madina and their practices. It is not authentic, according to Imām Abū Hanifa, Imām al-Shafī'ī and Imām Ahmad. But the followers of Imām Mālik contradict on them; they regard it reliable. But this is the view of conformists.

Authenticity of *'urf* based on beneficial purpose

One reason of treating *'urf* and *'ādah* as sources of law is a basic principle of Islamic jurisprudence: beneficial purpose and remove harms. Islamic law ensures that the interests and benefits of people be protected and hardships be warded off. When people get into a certain habit, it is not easy to break it.

Jurists from various schools of thoughts gave recognition to the rule of *maslahat-e- mursala*. In *sharī'a* injunctions many issues are resolved on its basis. That is why *maslahat-e-mursala*, in the eyes of jurists, is a reliable source of law; many times it decides whether or not a habit or a practice is acceptable. If public benefits and interests are not observed, one's individual and communal life will be reduced to misery. To put in the words of jurists:

“Denying the habits of people is a cause of great inconvenience.”^{xxvi}

Ibn 'Abidīn substantiates the view that turning back on the usages and customs of people is a source of unease:

“Disagreeing with the habits of the masses gives birth to manifest harm.”^{xxvii}

Imām al-Shatibi also offers some explanation of the issue:

“When we have learnt that the lawgiver kept beneficial purposes in view, it shows that (*sharī‘a* law) also essentially attaches significance to habits.”^{xxviii}

All the former and the present-day scholars and jurists have admitted the importance and role played by beneficial purposes, and elucidated that *‘urf* and *‘ādah* cannot be overlooked. One of the modern scholars, Abū Zuhra of Egyptian’s view reads as follows:

“Doubtless, to give recognition to such a usage as is not vitiated is one kind of beneficial purposes. It is not right for a jurist to close his mind to a usage, rather driving principles from it is obligation.”^{xxix}

To put it in a nutshell, where there is no source available for resolving problems, the source of law will be deemed what the people practise.

Conclusion

Islamic *sharī‘a* is destined to continue for ever, so it follows that its rules and principles should be applicable, usable and practicable for every age. The usage of people is a reality which has been in the past and will continue to exist in the future. A great deal of financial, social and marital injunctions of Islamic law is founded on the customs, and just on the customs and usages.

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