

Abstracts

Muslim jurists classified sources of Islamic law into two, that is agreed and disputed sources of Islamic law. *Al-urf* (custom) falls within the disputed sources of Islamic law. The aim of this paper is to discuss *Al-urf* as a source of Islamic law. Therefore, the scope of this paper is limited to discussing *Al-urf* as a source of Islamic law as such it is needless to say that the scope of this paper does not give room for comprehensive discussion on the generality of the sources of Islamic Law.

Keywords: *Al Urf*, Custom, Source, Islamic Law,

1. Introduction

Al-urf (Custom) is a recurrent practice which is acceptable to the people of sound nature.¹ This definition excludes recurrent practices among some people in which there is no benefit or which partakes prejudice or corruption. Sharia approved in principle the use of custom in determination of *Halal* and *Haram*.² One of the important features of *Al-urf* is that it changes with the change of time, place and circumstance. This instability of *Al-urf* is what makes some scholars hesitate to accept *Al-urf* as a source of Islamic law on its own because a ruling in an Islamic law may not be constant but changes based on time and place. But, however, the scholars in general have adopted it in one form or the other and base their ruling on it.

2. Classification of *Al-urf*

Jurists classified *Al-urf* in to the following classifications, namely, *Al-Urf Al Qauli* or *Al-Lafazy* (Verbal) and *Al-Urf Al Amali* or *Fi'ili* (Actual). *Al-Urf Alqauli* or *Al-Urf Al Lafazy* (Verbal) is an agreement of people on the meaning of a word as a result of customary usage which becomes dominant meaning in that particular context, while the literal meaning is reduced to the status of exception.³ Example of this type of *Al-urf* could be seen in the custom of *Fuqahau* they used the word *Durham* or *Darahim* to mean money.⁴ *Al-Urf Al Qauli* or *Al-Urf Al Amali* (Actual) is the recurrent practice of people which becomes common to them in their day to day activities.⁵ Example of this type of *Al-urf* could be seen in buying and selling of commodity by way of giving money and taking the commodity without uttering any word.⁶ The two classifications of *Al-urf* mentioned above are further classified into two, namely, *Al-Urf Al-Am* and *Al-Urf Al-Khas*. *Al-Urf Al-Am* consists in practices of all people everywhere (such *Urf* is almost non-existent).⁷ *Al-Urf Al-Khas* are recurrent practices of people of a particular country, State, Community, society or members of a particular trade or profession. This type of class of *urf* is the *urf* which Muslim jurists and *mujtahiduun* are mostly concerned with.⁸ Another classification of *al auarf* is *Al Urf Al Ashih* and *Al Auaarf Al Fasid*. *Al Urf Al Sahih* is a custom which does not contradict or violate the Islamic principles or teaching.⁹ *Al Urf Al Fasid* is a custom which contradicts the Islamic principles or it goes against the teaching of Islam.¹⁰ Some Muslim Jurists further classified *Alyrf* into the following: Positive *Urf* (example of this custom is culture of generosity or Hospitality), *Neytral Urf* (example of this custom is Preference of a particular diet of a particular community, and Negative *Urf* (This is a custom or tradition which goes against the teaching of Islam).¹¹

3. Conditions for the Application of *Al Urf*

For *al urf* to be applied the following conditions must be satisfied

- 1) The custom must constitute a common and recurrent phenomenon
- 2) The custom must be in existence at the time specific case or issue had or has been decided
- 3) The custom must not contradict clear stipulation of an agreement
- 4) The custom must not violate the principles of Islamic law¹²

Distinction between *Al Adah* and *Al Urf*

Al urf and *Al adah* are used interchangeably in the field of Islamic Jurisprudence, however some jurists distinguished the two concepts by saying that *Al adah* is a general while *Al urf* is specific. Every *Urf* is *Al adah*, but it is not every *Al adah* that constitutes *Al Urf*.¹³

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¹ Absulhana S. *Usul al Fiqh* p. 28

² *ibid*

³ *Usulul fiqh al islamy* p. 201

⁴ *ibid*

⁵ *Ibid* p 202

⁶ *ibid*

⁷ *Usul Alfikh Islamic Jurisprudence*, p 29

⁸ *Ibi*

⁹⁹ *ibid*

¹⁰ *ibid*

¹¹ *ibid*

¹² *Sources of Islamic Law*

¹³ *Al adillah almukhtaliffiha* p116

Distinction between *Al Urf* and *Alijma*

Al urf is the consensus of majority of people on what they consider as common phenomenon among them, this includes the general public and specific literates and illiterates, *mujtahiduun* and others¹⁴ But *Ijma* can only be done with consensus of all the *mujtahiduun* to the exclusion of all other members of the public.¹⁵ A ruling which is made based on *Alijma* is like a ruling which is made based on a specific Nass it could not be changed or altered and it is also applicable to those that will come in the future¹⁶. But a ruling which is based on *Al urf* changes with the change of time and environment and it does not constitute a binding ruling on the future generation,¹⁷

4. Legal Basis

The legal basis of *Alurf* could be traced from the sources of Sharia and the general intendment of sharia and its legal principles.¹⁸

- 1) Alsunna Al taqririyyah (Tacit approval of the Prophet S.A.W)
- 2) Alijma (Consensus of al Mujtahiduun)
- 3) Rafu al Kharaj (Removal of hardship)
- 4) Al masalih (Consideration of public interests)

Al Sunna Al Taqririyyah

Sunnah Taqririyya is the tacit approval of the prophet (S A W) this arises in a situation whereby the statement is made in the presence of the Prophet (S. A. W), or a statement id made during his life time and same comes to His notice and did not object to it, or an act is made in His presence. or is done during his life time and knows the existence of such act but did not object to it.¹⁹

5. Application of *Al Urf* by the Four Sunni School of Islamic Law

The ruling which is made based on *al urf* changes with change of *al adah* time and place. It is possible to have two different ruling on the on the same issue among the jurists of the same school due to the change of time or change of *al urf*. For example, the early Hanafi jurists had agreed among themselves that it was not lawfull for a *quranic* teacher to be collecti fees as remuneration for teaching the holy Quran, because it is an act of worship like any other act of worship as such it is not lawful to be paid for it²⁰. The above position was held when the teachers of *al quran* were paid salary from the *Bait al mal* (Public Treasury) but when the *Mutaakhirun* of the Hanafi Jurists observed that the situation has changed it ruled that earlier *urf* was changed and it is now lawful for a teacher of *quran* to be collecting fees as remuneration of his teaching. They went further to say that even the Imam and Muazzin are entitled to be paid for their act. All the four Sunni school that is Hanafi School, Maliki School, Shafii School and Hambali school have accepted and applied *al urf* in their schools. Below are the examples of such applications.

Hanafi school applied *al urf* and ruled that whoever purchases a house, the building of that house is included. They held that house customarily includes the building.²¹ The Maliki school applied *al urf* to determine whether the stolen property was kept in a proper custody at the time of the theft. On this point Ibn Rushd al Maliki said proper custody for the purpose of establishment of the offence of theft is determined by custom.²² Shafii school used and applied custom to determine whether the trust is kept in a proper custody to determine the liability or otherwise. This school held that the trustee shall be exonerated from liability if he keeps the trust in a custody which customarily such trust are kept.²³ Hambali School entitled the employee to be paid remuneration of his even without stipulation to that effect at the time of employment. On this point, the Hambali school held that the employee shall be paid the remuneration of his work and shall be assessed determined using *al urf* as if there was a stipulation as to payment of remuneration

6. Conclusion

In conclusion, although it is only the Maliki School of law that clearly recognized and considered *Al utf* (custom) as a source of Islamic law, but from the above discussion it is clear that all the four Sunni school of law have considered and applied custom in their rulings therefore making it one of the sources of Islamic law in their Schools.

¹⁴ Ibid p116

¹⁵ ibid

¹⁶ Ibid 123

¹⁷ ibid

¹⁸ ibid

¹⁹ ibid

²⁰ Usulul Fiqhil Islamy, p 209

²¹ ibid

²² Ibid p 205

²³ ibid