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The effect of Urf (common law) on family laws in Islamic Jurisprudence

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تأثير العرف علي أحكام العائلة في الفقه الإسلامي

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المُلخَص:

العُرفُ بمعنا ما هو مقبولٌ بحُكم العقل وَثابِتٌ في طبع الإنسان هو الذي أوجَدَ النظامَ الحَقوقي للمُجتمعات بِشكله الأول. وَ هو معروفٌ في أَكثَرِ الأنظِمَةِ الحَقوقية في العالمِ كأحدِ المَصادرِ الهامِ وَ الموثوقِ به، وَ يُؤيدُ جمهورُ فقهاءِ المذاهبِ الإسلامية دلالَةَ العُرفِ كحُجَّةٍ مُستقلَّةٍ أو غيرِ مُستقلَّةٍ بالإجماعِ وَ أخذوا في هذا الشَّانِ بالقرآنِ وَ السُنَّةِ وَ العقلِ وَ استندوا إليها.

وَ أحكامُ العائلةِ هي مِن أَفضلِ المجالاتِ لقيامِ العُرفِ بِدورهِ فيها لتحديثها وَ وضعها في طريقِ صحيحِ لِمعرفةِ مكوّناتها وَ أحكامها.

علي هذا، يقومُ هذا البَحثُ بِدراسةِ العُرفِ في مجالِ أحكامِ العائلةِ علي منهجِ توصيفيٍّ وَ تحليليٍّ ضمنِ دراسةِ ماهيةِ العُرفِ وَ شموله وَ شرعيته عندِ فقهاءِ المذاهبِ الإسلامية المختلفةِ وَ دراسةِ أدلَّةِ مَنْ يخالفُ حُجَّةَ العُرفِ الإسناديةِ.

الكلمات الرئيّسية : حقوق العائلة - العرف - الفقه الإسلامي

Abstract:

Common law as something accepted by the rule of wisdom found in the very self of humans formed the earliest type of the legal systems of societies. In most of the legal systems of the world, common law is known as one of the most important resources and is of high significance. Most of the Islamic jurisprudents agree on the authority of common law as an independent or dependent reason or proof. In this regard, the jurisprudents have referred to reasons of the Book (Holy Quran), the Tradition (Sunna), and wisdom. Family laws are included as the most potential fields for the common law to play a significant role in updating the rules and placing them in the right path of recognizing the required components. Thus, by applying a descriptive-analytical method, the present study attempts at studying the function of common law in laws related to the family through investigating the nature, range of inclusion, and legitimacy of common law among the jurisprudents of different Islamic schools and sects as well as studying the opponents' reasons for its documentary authority.

Keywords: family laws, common law, Islamic jurisprudence

Introduction

Common law is the earliest form of the society’s laws as well as the essence of all legal systems in the world. Human communities have always existed with laws, and before the birth of legislation, the laws had existed as common laws and customs in humans’ social relationships (Katouzian, 2015: 192); given social life’s needs, humans have created limits and rules meeting their daily requirements. It is essential that the individuals obey and respect these rules and customs and it is not allowable that they disobey the aforementioned rules. Over time, these rules and customs gradually obtained executive guarantee and change to common laws and formed the basis for the legal rules in most of the legal systems (Mohseni, 1978:36). The formation of written rules and laws resulted in the reduced authority of common law as an independent resource in law. However, written laws have never succeeded in dismissing the common law from its historical position in forming the legal systems of different countries. In the post-legislation era, common law continues to be the most important factor in complementing, interpreting, balancing, and giving dynamicity to the written law. In fact, keeping a close relationship between law and common law results in an increased ease in executing laws and maintaining the relationship of the law with both past and future (Golestani, 1980: 227).

The Islamic jurisprudence system is no exception to this rule; in this system, common law is considered not only as a resource for law making confirmed by the holy law-maker in age of prophecy but also as a discovery role justifying the religious will of the law-maker (Ayyazi, 2007: 269). Thus, common law has always been regarded as one of origins or supporting resources of the laws found in the Holy Book and Tradition.

Although applying common law was a common approach in interpreting the texts in the age of companions and followers, theorizing over common law as well as its definition, function, and validity in the Islamic legal system was delayed until the second half of the 2nd century AH. It was in the second half of the 2nd century AH that common law was regarded as one of the inferential sources either as an independent source or a dependent one (Khallaf, 1978: 124; Suyuti, 1998: 182-200; Ibn Qayyim, 1968, 2: 392-394; Alidust, 2007: 169; Mughniyah, 2001: 116-117).

One of the fields having a high potential to be affected by the common law is family and its legal status. Family is regarded as the

smallest and earliest social institution that is the basis for the formation and change of many values and norms in every society. The important point regarding family laws is this very question: what is the position and authority of common law in legislation? The other point is whether common law has a legislating position for family rights or it merely has an explanatory position. The present study aims at answering the aforementioned questions.

Method

The data collection method was a library and documentary research through applying notes. The method employed in the present study is descriptive-analytical through a content analysis approach. Thus, the main and general issues were described, and their content was analyzed and evaluated in a qualitative process. Having referred to the library and searching the resources as well as the research questions, the researchers collected the data in the notes provided for this purpose. Having been classified, the notes were organized as the present study.

Common law; definition and term

The word common law has numerous meanings that can be placed in two main categories; first, continuity and accompaniment and second, peace and calm. In Arabic language, given the continuity and consistency found in its hair, a horse’s mane is referred to as “*Urf*” (literally means common law). Moreover, *Urf* refers to animal’ moving one after another and their getting together as well. Good and proper habits, customs, and affairs are called *Urf*; the humans come to peace and certainty by doing them and very often the entire society follows humans in doing them (Ibn Faris, 1997, 281-284; Jawhari, 1990, 4: 140-141). Moreover, Ibn Manzur states that *Urf* (common law), *Arefe* (good), and *Maruf* (right) have the same meaning and they are all against the wrong; they all refer to something the humans know as good and right, something that guides humans toward peace and calm (Ibn Manzur, 1993, 9, 239).

Given the widespread use of *Urf* in jurisprudence, jurists have provided various definitions for *Urf*. Sunni Islamic jurists have used *Urf* (common law) and habit in the same way (Khallaf, 1985: 89). Sunni Islamic jurists have defined *Urf* as “*Urf* is something that exists in humans’ selves and is accepted by the common sense” (Ibn Najim, 1986: 93; Ibn Abedin, undated, 2, 114; Ansari, 1994, 2: 291). Thus, it is out of question whether *Urf* is expressed in words or in action; it refers to whatever accepted by most of the people. *Urf* refers to whatever word commonly accepted by the public, and on hearing such a

word no uncommon meaning strikes to people's minds (Zoheili, 1996, 2: 828). These actions or promises are fulfilled and applied by all or most of the people in specific conditions, while there is no religious, rational, or legal obligation to fulfill such actions or promises (Omidi, 2016: 275).

Obligation and repetition are included as the conditions agreed for the definition of *Urf*. Thus, *Urf* is an order or rule created by the public; they assume that it is obligatory to follow *Urf* and obscene to disagree with, though it is hard and disagreeable to follow. Whenever one intends to disagree with it, he thinks of being blamed by the other. However, this varies from time to time, from country to country, and even from area to area. *Urf* is sometimes in compliance with wisdom, religion, and common sense and sometimes not. It is sometimes accepted by the public and sometimes not (Qazvini, 1992: 237; Katouzian, 2015: 109).

Late Imamieh jurists have defined *Urf* as the behaviors and habits that are not against the religion (Sadr, 1989: 168-169). This definition indicates a shift in the definition of the word *Urf* toward "the rationalists' decision or behavior" among Imamieh jurists in the last two centuries (Golbaghi, 1999: 136). When *Urf* is defined in a rational way, the public *Urf* is intended. In this sense, the rationalists' behavior refers to the rationalists' continuity in doing an action, as they are accepted to be rationalists by the public; whether they are Muslims or non-Muslims, whether their behaviors are based on principles or jurisprudence issues. Thus, *Urf* decision is not something against rationalists' method and behavior; there is no problem with the validity of the rationalists' method (Kazemi Khorasani, 1988, 3: 192-193).

By comparing *Urf* with the rationalists' decision, one can claim that rationalists' decision is similar to *Urf* as it is conducted by rationalists. However, they are different; as for rationalists' decision, a behavior is accepted that is rationally right, while *Urf* is repeating an action or a behavior that is commonly accepted by the public regardless of being necessarily confirmed by rationalists (Izadi Fard et al, 2009: 48). Thus, the difference between *Urf* and rationalists' decision is the concept and example; both are opposite in concept and have a partial inclusion relationship in examples (Alidust, 2007: 119-122).

By putting the components of the aforementioned definitions, *Urf* can be defined as a habit that has both inclusion and popularity and includes both individual and social interests such that accepted by the public; following *Urf* is thus assumed to be obligatory.

The authority of *Urf*

On the authority and effect of *Urf* in explaining the Islamic laws, Islamic theoreticians do not agree. Most of the jurists have accepted the authority of *Urf* in jurisprudence. However, some do not accept *Urf* as one of the main proofs of laws. From among the proponents of the authority of *Urf*, there is no unanimous agreement over the scope and extent of its authority, and there are different viewpoints about the method of acceptance and the extent of its effect. In the following paragraphs, these viewpoints are briefly introduced and discussed.

Most of the jurists of the Islamic sects and schools (Khallaf, 1978: 124; Abul Ainain, 2008: 104-105; Ibn Qayyim, 1968, 2: 392-394; Mughniyah, 2001: 116-117; Alidust, 2007: 169) have accepted the authority of *Urf* as one of the main proofs and reasons for accepting the Islamic laws, and they do not have much disagreement over the very issue. However, what they do not agree upon is whether *Urf* is an independent reason or a dependent one. In this regard, there are two viewpoints:

A. A group of Usulis as well as some Hanafis maintain that *Urf* is of authority, but it is not an independent proof (Basri, undated, 1: 279; Amidi, 1981, 2: 486). From among Imamieh jurists, some believe in the authority of *Urf* based on rationalists' decision (Kazemi Khorasani, 1988, 3: 192-193; Shahid, 2006, 2: 345) as well as the law-maker's confirmation (Musavi Khomeini, 1997, 4: 382; Sadr, 1410: 169; Alidust, 2007: 169; Mughniyah, 2002, 6: 117). According to Imamieh's first viewpoint, *Urf* is included as one of the ranks of wisdom's ranks, and there is no difference between rational law and *Urf* law. Thus, through the rule of relation, the religious nature of *Urf* is confirmed, and the reason behind the validity of *Urf* is in its discovery from wisdom's order. In other words, *Urf* is a subcategory of independent intellectual reasoning or at least non-independent intellectual reasoning. In the second viewpoint, being a known quotation of Imamieh jurists, the validity and authority of *Urf* depends on the law-maker's agreement and confirmation, and *Urf* and rationalists' decision are reliable only when they are confirmed by the law-maker. The reasons introduced by this group on the dependence of *Urf* include the following: the lack of complete mastery of *Urf* on good and evil (Wase'i, 2006: 99), the necessity for *Urf* to be subject to religion (Alam Al-Hoda, 1984, 1: 306-307), lack of authority in people's action without the law-maker's

confirmation (Hilli, 1986: 148), the lack of validity for *Urf* from the law-maker as an independent reason (Abu Sunnah, 1949: 29-30; Abu Ainain, 2008: 107-109).

B. Most of the jurists as well as the *Ushulis* maintain that *Urf* is an independent authority and reason; they agree on its authority (Abu Ainain, 2008: 105; Gharafi, 1965: 350; Sarakhsi, 1985: 13-14). Among *Imamieh* jurists, those who believe in the innateness of *Urf* maintains that the authority and validity of *Urf* does not depend on the law-maker's confirmation. Those who hold this viewpoint believe that *Urf* order depends on *fitrah* (primordial human nature) and originates from life requirements; any disagreement and incompatibility with *Urf* is regarded as disagreement with social life's needs and interests and result in the destruction of the social system. However, the law-maker never ignores the interests as well as the social system; he does his best to establish the orders based on the aforementioned principle (Mughniyah, 1990: 222; Feiz, 1994: 270 and 210).

The proponents of the authority of *Urf* have referred to numerous rational and scriptural arguments and reasons the most important of which include the following:

A. Scriptural reasons

1. In the verse "Hold to forgiveness; command what is right; But turn away from the ignorant" (Al-A'raf-199), God has commanded the Prophet to obey *Urf*. In the aforementioned verse, *Urf* refers to right customs and behaviors commonly accepted by the public and the society's rationalists have. In this verse, *Urf* refers to all those rare and uncommon behaviors denied by the social wisdom (Tabataba'i, 1983, 8: 380). Moreover in the aforementioned verse, the order's apparent meaning is expressed through its obligation and there is no figurative meaning for violating it (Ibn Abedin, undated, 113/2). Thus, based on this verse, every behavior confirmed by *Urf* is considered as an order unless there is a reason against it (Gharafi, 1965: 193-194). Reflecting on the meaning of this verse brings us to this conclusion that referring to this verse for the authority of *Urf* as a religious reason is in fact referring to words and texts, and it implies that *Urf* is good and acceptable, and there is no rational or religious reason for rejecting and contradicting *Urf*. This indicates the confirmation of *Urf* and its implied validity. The innate sense of *Urf* indicating its validity of lack of validity (intending a far-fetched sense) is not intended.

2. The other reason introduced by those who believe in the authority of *Urf* is this hadith “whatever believed to be good by Muslims is good by Allah as well” (Ibn Hanbal, undated, 1: 379; Hakem, undated, 3: 83). On discussing the principle of “the custom can be the basis for establishing law”, Ibn Najim states that “the basis of this principle is this quotation by the Holy Prophet saying “whatever believed to be good by Muslims is good by Allah as well”” (Ibn Najim, 1986: 46 and 101; Jaicit, 1988: 3001; Tabarani, 1983, 9: 112).
3. The other reason introduced by those who believe in the authority of *Urf* is referring to hadith narrated by Aishah. According to this story, Hind bint Utbah (Abu Sufyan’s wife) complained to Mohammad. Abu Sufyan was not willing to pay her any alimony. The prophet asked her to take from her husband’s properties as much as accepted to be conventional for both herself and her child (Bokhari, 2004, 2: 796; Majlesi, 1982: 232-272). This group believe that if there had been no validity and authority for *Urf*, the holy prophet wouldn’t have invited Abu Sufyan’s wife to take as much as accepted to be conventional (Langeroudi, 1991: 88). In addition, the aforementioned hadith leads us toward a sufficient amount by using “conventional”. By conventional, the holy prophet intended the opposite of *Monkar* (what is believed to be unacceptable and forbidden) which means things that are not appropriate for the individuals based on *Urf* and custom. The allowable amount of alimony intended by the holy Prophet has not been determined for any specific group or area; the amount of alimony is estimated based on a given area and according to the *Urf* of that area through applying a conventional method and considering the peers. The ruler and the judge determining the amount of proper and conventional alimony are required to take into account factors including time, place, the husband’s conditions (in terms of his poverty and affluence) (Nemati, 2010, 1: 667). Moreover, from the Prophet’s hadith, it can be concluded that the sufficient and conventional amount does not merely refer to foods and drinks; it includes whatever the individual needs. Thus, ceremonies and luxuries that have become conventional (through being repeated by the public) will be included as alimony, since depriving the individual from such ceremonies and luxuries will upset the individual. The amount of these ceremonies and luxuries varies from person to person, from time to time, from area to are, and from condition to condition, and it can include medications and things like that (Nemati, 2010, 1: 669).

B. Rational reasons

In addition to the aforementioned scriptural reasons, those who believe in the validity and authority of *Urf* have referred to rational reasons as well. The rational reasons include:

1. Preserving the Arab *Urf*: One of the main reasons for the authority of *Urf* is respecting the customs and traditions that had existed among the Arabs long before Islam. However, the Wise Law-maker has put organized many of these customs including contract of sale, forward sale, *Istisna*, renting, *Mudaraba* (profit and loss sharing), the obligation of *aqila* to pay the blood money and things like that (Zidane, 1998: 254-255; Hakim, 1979: 411; Dukuri, 1988: 3415).
2. The jurists' need for *Urf* in different times and its validity in their *Ijtihad* (discretion), since the jurists' performance (based on *Urf*) means a silence agreement; some jurists express their agreement explicitly and some others show their agreement through silence. Thus, the validity of *Urf* is unanimously agreed upon (Zidane, 1998: 255).
3. The jurists' reference to jurisprudence laws related to *Urf* to confirm its authority including: "*Estemal al-nas hojat yajebo al-amalo biha*", "*Al-maroufo urfan ka al-mashroute shartan*", "*Al-maroufo bayna al-tojjar ka al-mashroute baynahom*", "*Al-taeino belurfe ka al-taeino be al-nass*", "*Al-adato mohakemat*" (items 36-45, *Ahkam Adlieh* quarterly).
4. Referring to denegation of intolerable hardship rule based on verse 78 of Al-Hajj surah. Given the aforementioned rule, some of the scholars have referred to this verse as such that "there is no doubt that avoiding people from doing what they are accustomed to as well as something they have used to organize their social life are the evident examples of intolerable hardship which has been disapproved in the aforementioned verse, and this is exactly the authority of *Urf* (Zidane, 2017: 26). Moreover, expressing disagreement with *Urf* results in numerous hardships and will make it difficult for the religion to be just. Moreover, opposing *Urf* will pave the way for oppression and strictness and is an example of "the impossible and intolerable task" (Shatebi, undated, 2: 212).

By referring to the above-mentioned reasons and criticizing the opponents' views, most of the jurisprudential sects and schools have commonly accepted the authority of *Urf*. However, this does not mean the authority and validity of all customs and traditions existing in the

society. In addition to the classification of different forms of *Urf*, the Islamic jurists have introduced specific conditions for the validity of *Urf*, the most basic of which include popularity, agreement with religious texts, and the existence of *Urf* whenever it is referred to (Sarakhshi, 1985, 12: 196; Jafari Langeroudi, 2001: 138; Abu Sunna, 1949: 56-57; Zarqa, 2008, 2: 784-785).

***Urf* and family laws**

Family is the smallest social unit that is mostly affected by *Urf* in terms of its formation, continuity, and development. The Islamic jurisprudence approach for most of the family laws is considering *Urf* and giving due attention to it. *Urf* is nullified only when it is against the religious texts. Thus, *Urf* is commonly considered as valid unless it is against the religious texts. Different societies have different customs and traditions for the formation as well as separation of the family. These customs originate from the *Urf* of that society. Given the numerous and various customs related to families, it can be claimed that cases such as marriage proposal, equality, Mahr, alimony, and divorce are included as cases that the social customs have the most significant effect in their formation. In the following paragraphs, the effect of *Urf* on these issues will be discussed.

1. Marriage proposal or *Khetbeh*

In Arabic language marriage proposal is referred to as *Khetbeh* which means offering a marriage proposal from a man to woman (Zidane, 1996, 6: 58; Zoheili, 1996, 9: 6489-6492). Religious texts have remained silent on the quality and details of marriage proposal. Except for cases opposing the principles and goals of the Islamic law, religious texts have relegated the details of marriage proposal ceremony to *Urf*. The virgin's silence (interpreted as his permission) and the gifts related to marriage proposal are included as issues the laws of which are subject to change with changes in the Islamic laws.

A. The virgin's silence

One of the issues whose laws are highly affected by changes made in *Urf* (especially in the modern time), is the girl's silence when she agrees to marry. In the past, women were hardly ever seen in public especially in crowded places where men appeared. Except for necessary cases, women were hardly ever seen in public. One of the main signs of women's dignity was their silence in public meetings especially at marriage proposal ceremonies. It was nearly impossible for women to show their willingness for a marriage proposal at the presence of parents.

In a society with this custom, the Islamic jurisprudence interprets the girl's silence as her agreement for marriage. In Islamic jurisprudence, this state is known as one of the exception for the jurisprudential principle of "No statement can be attributed to a silent person" (Shafi'i, 2001, 1: 178; Suyuti, 1998: 142). To justify the difference, jurists have referred to a famous hadith of the Prophet saying, "A widow is more indebted to herself than to her parents. In addition, a virgin girl is asked about her own marriage. However, her silence implies her permission" (Muslim, undated, 3541). According to the aforementioned hadith and the *Urf* conditions of the hadith, the jurists interpret the girl's silence about a marriage proposal as her permission and agreement (Shafi'i, 2001, 5: 179; Juvayni, 2007, 12: 44).

It is worth nothing that by putting emphasis on the manifest meaning of hadith, *Zahiris* (those belonging to a school characterized by reliance on the manifest (*zahir*) meaning of expressions in the *Qur'an* and *hadith*, as well as rejection of analogical deduction) believe that the girl must remain silent if she wants to express her agreement, otherwise, if she utters a single word (indicating her complete agreement or disagreement) the contract of marriage is null and out of question, since it is not in compliance with hadith (Ibn Hazm, undated, 9: 58). However, most of the recent jurists maintain that the girls' silence in the past indicated their agreement. They believe that in former *Urf*, the girls were shy of expressing their agreement about marriage; their silence was interpreted as permission and agreement. However, if we assume that the upbringing methods have changed in the modern time, and the virgin girls are no longer shy of expressing their disagreement, the silence does not suffice in the modern time, and the girls are required to express their willingness and permission. The agency of marriage contract by parents is only acceptable when the girls has explicitly expressed her willingness (Zarqa, 2008, 2: 910-911; Krekar, 2009: 57-58)

B. The gifts related to marriage proposal

The engagement gifts are included as one of the issues widely discussed in details by jurists; the jurists maintain that *Urf* is the basis of issues related to engagement gifts. The jurists maintain that if the man is regretful about marriage and intends to break the marriage contract, there is no obligation for returning the gifts. However, if the woman is regretful about the marriage contract, she is required to return all the gifts she had already received. Thus, if the original gifts do exist, she is required to return them, and if the original

gifts are no longer available, she is required to pay the price of such gifts. As for the gifts and their quality, the jurists have referred to *Urf*. According to jurists, in terms of engagement gifts, people need to follow the customs and traditions accepted by the public. If a condition has been stipulated, people are required to act based on “what is accepted by the public needs to be accepted, though it has not been explicitly expressed” rule (Awaz, undated: 40 and 50; Abu-Ainain, 2008: 255). This has been indicated in the article 1037 of the Iranian Civil Code as well.

In explaining “the gifts that are commonly kept”, the lawyers have stated that these gifts are commonly more expensive and valuable. According to *Urf*, the fiancée is required to keep such gifts, and the fiancées do not intend to own these gifts without on an unconditional basis. Regarding the gifts, the parties agree that breaking the marriage contract is the only condition for the liquidation of the gifts. Thus, breaking the engagement will automatically nullify the gift and the recipient of the gift is required to return what she had received (Katouzian, 1992, 1: 50). Therefore, whenever the original gifts do exist after breaking the engagement, the fiancée is required to return them based on article 803 as well as the parties’ implied term. However, if the original gift is no longer available, and the waste of the gift results from the fiancée’s fault, she is required to pay the price of the gift to compensate the damage, as she is the main barrier of fulfilling the condition and returning the gift. However, if the original gift is wasted without the fiancée’s fault, she has no longer and duty to return the gift or its price; nothing has been conducted against the contract and the owner (recipient of the gift) is not responsible for the loss or waste of the gift.

2. Equality in marriage

Equality and sameness between the couples are included as the issues that are highly recommended in religion. *Kefaat* (equality) originates from *Kef* meaning peer (Ibn Manzur, 1993, 1: 142). In jurisprudence terminology, the equality and sameness of man and women are defined in terms of religion, freedom, mental and physical health, pedigree, job, properties and wealth, etc. (Mughniyah, 2004, 2: 63; Desouki, undated, 7: 497-498). In its negative meaning, *Kefaat* refers to affairs and issues the lack of which brings about disgrace for either of the parties. They include insanity as well as physical problems and diseases (Sherbini, 2000, 4: 273).

It is clear that value criteria are subject to numerous changes over time; it is possible that affairs that were once a main source of honor are now a main source of disgrace. Professions such as astrology, magic, and rubber of masseur were once valuable and prestigious professions greatly respected by kings and rulers. As for the important affairs of the country, the kings avoided taking any measures except after consulting with astrologists and fortunetellers. However, in other eras, magicians, fortunetellers, and astrologists had to hide themselves. The jurists were highly aware and informed about the effect of *Urf* on *Kafaat*. Therefore, they have always emphasized the necessity for giving due attention to *Urf*. Jurists have commented on various issues related to *Kafaat* such as freedom, pedigree, and... They have indicated that slaves and non-slaves are not equal. However, the certainty and decisiveness of some jurists over the inequality of slave and non-slaves cannot be confirmed by applying *Urf*; most of those who were once slaves achieved the highest position such as viziers and even kings (Sherbini, 2000, 4: 273). Thus, based on *Urf*, the criteria of equality in marriage vary in terms family, job, pedigree, etc. Thus, understanding these variations as well as the individual and social difference, the jurists have referred *Kafaat* to *Urf*; equality will enjoy a higher level of flexibility and the goals of forming families will be better fulfilled (Ibn Qudamah, 1984, 6: 483).

3. Mahr (Sadaq)

Mahr is a mandatory payment, in the form of money or possessions paid by the groom, or by groom's father, to the bride at the time of [marriage](#) that legally becomes her property. Mahr is referred to as Sadaq (honesty and sincerity) since its payment indicates the husband's honest willingness to marry his wife (Mughniyah, 2004, 2: 79; Ziali, 1895, 2: 135-138; Bohuti, 1982, 5: 128). The issues and affairs that affect Mahr are the quality of receiving Mahr and the wife's claim for not receiving Mahr. The following paragraphs discuss the abovementioned issues.

A. Receiving Mahr

Receiving Mahr is included as one of the issues that is greatly affected by Urf and custom. One of the principles stipulated in jurisprudence is giving Mahr to someone other than the owner is not allowable unless that person is the owner's parent or lawyer. Hanafis maintain that the *Mahr* of a virgin girl is an exception to the rule: It is allowable for an adult virgin girl's father or grandfather (though they are not necessarily her guardian) to receive her *Mahr*, and it is assumed the

same as being received by the girl, unless the girl explicitly prohibit them from receiving it. Hanafi jurists' justification for confirming their idea is that according to *Urf* and custom, a virgin girl (despite being an adult) is shy of her relatives, and thus her father and grandfather are able to receive *Mahr* without permission and proxy (Abu Ainain, 2008: 256-257). What is commonly observed in different areas is accepting the custom that receiving *Mahr* by the girl's father or even her family is accepted in today's *Urf*. Moreover, given the confirmation of receiving *Mahr* by the girl's family, the courts have appropriate religious and legal rules.

B. The wife's claim for not receiving *Mahr*

Another issue that is highly affected by *Urf* is the payment method of *Mahr*. In Islamic jurisprudence, the amount and type of *Mahr* is based upon the couple's agreement and this is greatly affected by *Urf*. The main principle in *Mahr* is that it is given to either the girl or her parents after the marriage contract. However, since *Mahr* is the woman's right, a part of it can be regarded as a debt and she allow a delayed payment. Thus, *Mahr* is divided into immediate and delayed (as a debt).

However, if the *Urf* of a given community allows a woman to go to their husband's house before receiving the immediate *Mahr* and start their matrimonial life, her claim for not receiving the immediate *Mahr* is accepted based on the *Urf* of that community. Moreover, if the *Urf* of another community does not allow a woman to go to her husband's house, her claim for not receiving her *Mahr* is null and out of question. It is based on the validity of *Urf* that Maleki jurists do not accept the wife's claim about her *Mahr*. According to the accepted *Mahr* of that community, her claim is not acceptable. However, in other sects, the wife's claim for her own *Mahr* is valid and acceptable (Ibn Rushd, 1981, 2: 24-25).

4. Alimony

In jurisprudence, alimony is the money that is spent for life expenses including those of one's wife, children, and relatives. One of the main reasons of alimony in Islamic jurisprudence is matrimony. Supporting one's wife and children calls for the payment of alimony by the husband (Tabataba'i Yazdi, undated, 25: 187; Ziali, 1895, 3: 50; Sherbini, 2000, 5: 151; Bohuti, 1982, 5: 459; Zoheili, 1989, 10: 7349).

Food, clothes, and housing are the main examples of alimony that are agreed by all Muslim jurists and lawyers. Some jurists maintain that only necessary needs of the wife can be included as her

alimony. However, according to some other jurists, luxury things, perfume, and cosmetics can be also included as alimony (San'ani, 1997, 3: 341; Jaziri, 1988, 4: 560-561; Najafi, 1977, 31: 336; Mohaghegh Mirdamad, 1961: 29). Thus, according to both Quran and hadith, the extent and scope of alimony is ordained based on *Urf* (*Al-Baqara*, 233 and 236). Moreover, in some jurisprudence books (Hilli, 1989, 2: 35), the expenses of medications and treatment are not included as alimony. However, in some others books, the expenses of medications and treatment are included as alimony. There is no agreement among jurists over the inclusion of treating diseases that are hard to cure (Musavi Khomeini, 1986, 2: 287). Furthermore, according to some others treatment costs and expenses are not included as alimony (Najafi, 1977, 31: 335). It can thus be concluded that in the present time, according to *Urf*, treatment costs are included as alimony; the treatment and medication costs need to be included as examples of alimony. According to the modern society's *Urf*, it is not acceptable that a man with financial abilities fail to pay for her wife's treatment costs (Parsa, 2001: 80). According to Ibn Makki Amili, alimony is included as one of the cases whose laws and orders that are greatly affected by time and *Urf* (Amili, undated, 1: 151-152).

Article 1107 of the Iranian Civil Code (passed in 1935) has introduced some examples for alimony: "Alimony includes housing, clothes, foods, and furniture that are conventionally appropriate for the woman's status. A servant is also included as an example of alimony if the woman is accustomed to having one or needs one owing to a disease or a paralysis". However, on the 10th of November in 2002, given the new definition of alimony provided by jurists and lawyers, the aforementioned article was corrected: "alimony includes all conventional needs of a woman (appropriate for her status) including housing, clothes, foods, furniture, medical costs, and as servant if she is accustomed to having one as a result of her paralysis or disease".

Like the Iranian law, in personal status laws of Iraq and Syria, the same has been stipulated as well: the husband is responsible for the conventional treatment costs (Sabuni, 1978: 302).

In its 16th meeting, the International Islamic Jurisprudence Academy has issued this law: Given the financial status of her husband, the proper *Urf*, and acceptable social customs and traditions, the wife is entitled to receive the stipulated alimony. The alimony will be null and void only through disobedience (quoted from *Manar al-Islam* magazine, 2005: 35).

5. Divorce

In Islam, despite the fundamental importance of family, through a realistic approach, divorce have been always confirmed as a method for ending one's marital life and starting a new lifestyle in special conditions. However, there are certain conditions and requirements for accepting divorce.

One of the main issues of divorce that is greatly affected by *Urf* is the words and phrases indicating divorce. It is clear that the individuals cannot express their intention unless they use the predetermined words and phrases. Thus, as for divorce, there is no agreement over the words and phrases indicating divorce. The first disagreement concerns the acceptance of divorce with non-Arabic words and phrases and using words other than *Talaq* (divorce), *Sarah*, and ... Most of the religious schools and sects have accepted the occurrence of divorce with words and phrases used in other languages to end a marital life. Moreover, in accepting phrases indicating divorce such as "You (the woman) are *haram* (forbidden) for me" or "*Halal* (matrimony) is *haram* for me", the jurisprudents have referred to *Urf*. The jurisprudents have indicated that if these phrases are applied as divorce in the society, the divorce will be enforced through using these words. However, if people's understanding from these phrases is something other than divorce, divorce is enforced (Rafeei, al-Aziz, 8: 511; Nawawi, 1991, 8: 25).

It is worth noting that some jurisprudents do not believe in the authority and validity of *Urf* in this regard; given the widespread application of words other than *Talaq* among the Muslims, they reject the occurrence of divorce with non-Arabic words and phrases (Nawawi, 1991, 8: 25; Ibn Rafeh, 2009, 13: 452).

In addition to the acceptance of divorce translation in Islamic jurisprudence, the jurisprudents have referred the referents of divorce phrases to *Urf*. According to them if a man says to his wife, "you are *haram* for me", although the sentence is a declarative one, given the understanding implied by *Urf*, the declarative sentence (indicating either true or false information) is interpreted as an exclamative one the utterance of which results in the occurrence of divorce. If a man says "*Ala al-Talaq*", his divorce is enforced although divorce and separation are related to his wife; given the application of such a phrase in *Urf*, its application by a man is interpreted as his divorce request (Abu-Ainain, 2008: 255-257).

6. *Khul*

In Islamic jurisprudence, the divorce right is for the man. However, if the divorce request is by the woman, it is referred to as *Khul*. The literal meaning of *Khul* is taking off one's clothes and shoes (Ibn Manzur, 1993, 8: 76-77). In jurisprudence, *Khul* is a procedure through which a woman can divorce her husband in Islam, by returning the dower (*Mahr*) that she received from her husband, or any other amount as agreed between the husband and wife (Amili Juba'i, 1403, 6: 87; Desouki, undated, 8: 469; Ziali, 1895, 2: 267; Sherbini, 2000, 4: 439; Bohuti, 1970: 552-553).

If a woman requests *Khul*, but she has not mentioned any financial compensation, and the man accepts *Khul*, is the woman required to pay any financial compensation? In such conditions, given the society's conventional understanding of *Khul*, most of the jurists maintain that ignoring the financial compensation should not be interpreted as waiver. They believe that *Urf* has defined *Khul* as the wife's separation in return for granting the *Mahr* or any other thing she had already received. Thus, if the wife does not mention *Mahr* or she fails to define it, this will not waste the husband's right of claiming her *Mahr*. However, given the wife's silence and the husband's permission and agreement for *Khul*, some jurists maintain that the man has no right for claiming anything (Ghazali, 1996, 5: 314-316).

Conclusion

Urf refers to habits and customs that have both inclusion and popularity and includes both individual and social interests such that accepted by the public. *Urf* is powerful to the extent that it is mandatory to obey. For some Muslim jurists, *Urf* is of high authority; its lack of contradiction with religious texts and approving it as an acceptable method can be helpful for solving the legal vacuums as well as the legal developments.

The laws related to family are included as the most important legal issues. Thus, except for cases opposing the principles of religious texts, Islamic jurists respect customs and traditions.

The application of *Urf* in family laws can be summarized in the following cases:

- Interpreting the hadiths and inferring a meaning other than the apparent meaning: the jurists accept *Urf* to the extent that they have ignored hadiths due to the changes made in *Urf*. For example, in hadith, the girl's silence is interpreted as her permission and

agreement. However, given the changes of *Urf*, modern jurists do not accept the girl's silence and they maintain that the agreement is required to be announced explicitly.

- Bounding the generalization of hadiths: In Islamic jurisprudence, retaking gifts is denied; by referring to the related hadiths, some jurists have prohibited it. However, since the gifts of marriage proposals are exchanged for a certain purpose, the jurists maintain that this state is an exception to the aforementioned principle. Thus, they have attempted to bound the generalization of hadiths.
- Explaining the general and overall concepts: Another function of *Urf* is explaining the general and overall concepts whose meaning and scope are subject to widespread changes over time. For example, in Islamic resources, *Kafaat* (equality) and alimony are commonly interpreted based on *Urf*; by doing so, the jurists protect the couple's rights, facilitate the execution of laws, and strengthen the family's foundation.
- The interpretation of words and phrases: In numerous cases, for accepting and interpreting the words and phrases, the Islamic jurists have referred to *Urf* by putting emphasis on people's conventional understanding of the words and phrases. As for the validity of *Urf* in interpreting words and phrases one can point out the following: accepting the translation of phrases indicating divorce, interpreting oblique and implied phrases in marriage, divorce, and *Khul*, ignoring the validity of divorce words and phrases by individuals who were not aware of their meanings.
- Specifying jurisprudence principles: Jurisprudence principles are general rules and principles that are greatly helpful for the jurists in interpreting the laws. However, the legitimacy and acceptance of *Urf* is to the extent that can specify these principles. For example, in some societies the immediate *Mahr* is given to the wife at the marriage contract meeting. If a woman denies receiving *Mahr*, opposite to the well-known jurisprudence principle "Whoever claims something is required to provide his/her evidence, otherwise, he/she needs to deny and repudiate his/her claim", the jurists (by referring to the inclusion of *Urf* in this regard) asks the woman to provide her own evidence, and the man exempt from provide any evidence to prove his claim.

The abovementioned function indicate the acceptance of *Urf* by Islamic jurisprudents for the family laws. By having a proper understanding from *Urf* and its function in family laws, it will be easier to perform and adapt to the religious concepts and principles.

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