

ISLAMIC JURISPRUDENCE -1

CUSTOMS AND USAGES OF THE ARABS BEFORE ISLAM

TOPIC: PRE- ISLAMIC CUSTOMS

1. INTRODUCTION

The useful pre-Islamic customs of Arabia were recognized by Muslim scholars, so though the custom is not a primary or a secondary source of Islamic Law; it forms the midway between the two categories and is regarded as an important source of Islamic Law.

Customs (Usage), also known as Urf or Ta-amul or Aadat, as a source of law, form an integral part of history of Islamic Jurisprudence. Though they do not command any spiritual authority like that of Ijma, yet a transaction approved by custom is legally operative.

The Hanafis include custom as a source of law under the doctrine of Istehsan (Juristic Equity) and Imam Malik had also based on custom, Mursala (Public Interest). Following conditions must be fulfilled for the proof of a valid custom.

- . It must be ancient
- . It must have general prevalence
- . It should be territorial
- . It must never be immoral
- . It should not be against public policy

Custom as a source of law was supported by Imam Abu Hanifa, Malik, Hanbal, Tufi and Ghazali.

Islam did following things to the pre-Islamic customs prevalent at that time:-

- (a) Either adopted them, which were not against the spirit of Islam, or

- (b) Repealed them, as they were totally against the teachings of Islam; or
- (c) Modified them, in order to bring them in conformity with Islamic teachings.

2. MEANING OF CUSTOM

According to Ibn Najeem:

“Those recurring practices which are acceptable to people of sound mind.”

3. CUSTOMS OF PRE- ISLAMIC ARABIA

We can study the pre-Islamic Arabia in following heads and understand what changes Islam brought in that society.

STRUCTURE OF ARAB SOCIETY

There was tribal system in whole Arabia, with a tendency in certain tribes, which were settling down, however Islam gave the concept of strong state and nationhood to Arabia..

GOVERNMENT

All the legislative, executive as well as, judicial powers were vested in one chief, who was a man who, by nobility of birth, age and reputation for wisdom won confidence and respect of his fellow tribesmen. He was above the law and was free to decide as he wished. While Islam gave separate system of government, in which supreme law giver was God, executive head was just a trustee of the post, while judicial head was separate person, who could any time call the head i.e. chief in cases.

RELIGIONS

Before the advent of Islam, there were many religions like Idolaters, Christians, Magians and Jews, Islam abolished all of them and gave one universal religion.

FAMILY LIFE

Family life starts with marriage and women were not free agents in marriages, there was no restriction as to number of wives, the group marriages were common, further concept of dower was prevalent but it was not the right of woman, different forms of divorces were also there. Islam gave much respect to woman and made her consent compulsory for the validity of marriage, maximum number of wives was limited to four, group marriages were abolished and dower became sole right of wife, while system of pronouncing divorce changed.

(I) Customs Regarding Marriages:

- (a) Man asked another for the hand of latter's ward or daughter and then marries her by Giving her a dower. Islam recognized this custom.
- (b) Husband asked his wife to have Cohabitation with a famous man to secure a noble seed. This custom was abrogated by Islam.
- (c) Number of men less than 10 used to have intercourse with a woman. This custom was abrogated by Islam
- (d) Prostitution was common.
- (e) This custom was abrogated by Islam.

(II) Customs of Dower

The regular form of marriage the fixing of dower for the benefit of the wife was in vogue among the Pre- Islamic Arab. [It formed a part of the marriage contract]

Islam recognized this custom Quran says, "And give women their dower freely".

(III) Polygamy

- (a) It was no restriction to the number of wives in Arab.
- (b) Islam does not allow more than 4 wives for a Muslim at a time.

(IV) Divorce

In Pre-Islamic Arab, there were four modes of divorce which may be pronounced at any time.

- (i) Talaq
- (ii) Ila
- (ii) Zihar
- (iv) Khula

Islam disapproved Pre-Islamic custom and allowed three distinct period under which spouses can patch up and after lapse of third period, talaq is effected.

SUCCESSION AND INHERITANCE

The right of succession was only for male members of the closest degree and among them, who were old enough to claim their shares, the shares were not fixed, further inheritance was distributed on the basis of consanguinity, adoption and even compact. Islam fixed the shares of each heir, included women into the list, while right of inheritance through adoption was abolished.

LAWS AND PUNISHMENTS

All cases were settled by chief, who decided according to status of parties, during decisions oaths played a vital role, while Islam gave a unified penal system to Arabia, in which status had nothing to do, and Qazi had to settle cases as per predefined rules in which oath remained as a minor portion in few cases.

(I) Customs of punishment

(a) Punishment by retaliation commutable to a payment of blood money or compensation.

For the injury. Punishment of Qisas and Diyat is imposed by Islam,

(b) Imputation of right hand of thief. This custom was adopted by Islam.

© Adulterer to be stoned to death if poor, otherwise blackening his faced and flogging Him.

If the person who commits Zina is Muhsan, he is to be stoned to death.

ADOPTION AND LEGITIMACY

Adoption and Legitimacy Adopted child was treated as legitimate and inherited from estate left and legitimacy was through marriage as well as, other sexual relationships in pre-Islamic era, while Islam took the right of inheritance from the adopted child and legitimacy was only through valid marriage and not otherwise.

PROPERTY RIGHTS

Absolute power to dispose of property was recognized in pre-Islamic Arabia in which different types of sale, leases, wills and sarf were prevalent, Islam took all the concepts but with minor changes and emphasis was laid to be fair in all dealings.

SOCIAL EVILS

Before Islam the social evils like female infanticide, drinking wine and usury were frequent, which were totally repealed by Islam.

4. CONCLUSION

To conclude, There is no direct authority to act upon customs and usages in Holy Quran, however indirectly they are recognized. Islam did not altogether repeal the legal system of pre-Islamic Arabia, as many customs which were in conformity with the spirit and teachings of Islam were retained and they became part and parcel of Islamic legal system. Some jurists classify customs into aam and khas, the first having general prevalence, while the second prevails in a particular area, while others classify them as qauli and faili, the qauli being regarding words and terms prevalent at that time, while faili pertains to practices. However, it must be remembered that the customs are treated as a source of law, but in very narrow sense. As, custom may provide a raw material to be considered by jurist, and it cannot be accepted automatically as a law, because firstly it has to be judged in the light of Islamic law and once it is found to be compatible with the set rules of Islamic law, it is accepted, otherwise rejected .