

Al-Qawaa'id wal-Usool al-Jaami'ah wal-Furooq wat-Taqaaseem al-Badee'ah an-Naafi'ah.

The Basic Rulings and Principles of *Fiqh* – The Beneficial, Eloquent Classifications and Differentiations

Foundation -9

**By Sh. 'Abdur Rahmaan ibn Naasir As-Sa'di (rahimahullaah)
(d. 1376 A.H./1956 C.E.)**

Discussion based upon:

- 1-Sh. Ibn Sa'di's original explanation**
- 2-Our Sh. Muhammad ibn Saalih Al-'Uthaimin's Commentary, and**
- 3-Full explanation by our Sh. (Dr.) Sami ibn Muhammad As-Sghair (summer 1427 A.H./2006 C.E.)**

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Basic Rulings and Foundations of Fiqh-9

All Praise is due to Allaah, and may the *salaah* and *salaam* be on Prophet Muhammad, his household, the noble companions and those who follow them until the Day of Resurrection. This is a continuation of the explanation of *The Basic Rulings and Principles of Fiqh – The Beneficial, Eloquent Classifications and Differentiations* by Imam ‘Abd ar-Rahman ibn Naasir as-Sa’di (*rahimahullaah*).

Foundation nine is entitled:

The ‘urf (that which is commonly known, commonly received, conventional, commonly used, or in the common parlance) is referred to in every ruling legislated by The Legislator which is not specified by a limit nor distinguished by an interpretation.

When there is neither a limit set nor a clear, distinguishing interpretation, then the ‘urf becomes a reference and is considered. The issue of the ‘urf and *shara*’ (legislation) is divided into three categories.

- 1) If The Legislator states that the reference is the legislation, then it must be referred to, even if the people are accustomed to the ‘urf.

Example: An ‘urf establishes that all girls who have yet to reach the age of puberty are to be obliged in marriage, without a choice. Despite this, the reference must be the legislation in this case.

- 2) If the legislation states that the reference is the ‘urf, then the ‘urf must be referred to.

Examples:

- a) Regarding the husband’s relationship with his wife, Allaah (ﷻ: *subhaanallaahu wa ta’aalaa*) said (in the translation of the meaning):

﴿And live with them honorably (*bilmaruf*)﴾

Surah an-Nisa’ (4:19)

No limit was set in this verse; as such, we refer to the ‘urf concerning spending and maintenance. Similarly, the Prophet (ﷺ: *sallallaahu ‘alayhi wa sallam*) said:

“They (the wives) are entitled to maintenance *bilmaruf* (according to the ‘urf)”¹

¹ Part of a *hadeeth* reported in *Saheeh Muslim* (English translation no. 2803, book 7)

- b) Hind, the wife of Abu Sufyaan (may Allaah be pleased them) complained to the Prophet (ﷺ) that Abu Sufyaan was miser and asked if she could take from him that which would be sufficient for her and her children without his knowledge. The Prophet (ﷺ) said:

“Take what is sufficient for you and your children bilmaruf (in accordance with the ‘urf)”²

- c) The *hirz* is that which is conventionally used by people to protect their wealth. If someone steals from a *hirz*, then the punishment is applied to him. However, the limit of the *hirz* was not specified; it is left to that which is conventional, and it differs. For instance, the *hirz* for gold, diamonds, silver and other precious things is stronger than for that which is lesser in value.

Moreover, the *hirz* differs according to the strength or weakness of the authority and whether that authority is just or tyrannical. If the authority is strong and just, then the *hirz* is light, making even the least thing sufficient as a *hirz*; if the authority is weak or oppressive, then the strength of the *hirz* must be increased. In some places when the *adhan* is called, the people simply cover their commodities with a sheet and go for prayers. In other countries where the authority is weak or oppressive, they must put locks to protect their wares.

The *hirz* for cattle is a fence; if they are within that fence, they are in their *hirz*. Anyone who steals one of them will be subjected to the punishment as he took it from a *hirz*. Similarly, at the corner of a road, a building is under construction. If someone steals a bag of cement from it, then he has taken it from a *hirz* since it is conventionally considered as such; therefore, he is to be punished. Similarly, a car parked in front of one’s house is according to common convention a *hirz*.

Thus, the *hirz* was not specified in *sharee’ah* and is left to the ‘urf.

- 3) The Legislator did not specify anything as a reference. In these matters, we refer to the ‘urf.

Examples:

- a) The Legislator did not establish specific wordings for trade, contracts, marriage, revoking a divorce before the end of the waiting period, and pledges.
- b) No amount is specified for the *mahr* (dowry). As such, we refer to the ‘urf.

² Agreed upon. Reported in *Saheeh al-Bukhaari* (vol. 7, *hadeeth* no. 277 & 283) and in *Saheeh Muslim* (English translation no. 4251 & 4253, book 18)

The Duration of Menstruation

Women either have regular menses or are *mustahaadah* (i.e. suffer from non-menstrual vaginal bleeding). The length of menstruation for a woman is determined in four ways, each of which is based on the ‘urf since Allaah (ﷻ) did not specify a duration.

1. If a woman has a regular length of time for her menses, then she refers to that. The Prophet (ﷺ) said to Umm Habeebah bint Jahsh when she complained to him concerning her bleeding which continued after the menstrual period:

“Keep away from prayer the length of time that your menses prevent you, then take a bath and offer the prayer.”³

Example: A woman has a regular menstruation of six days per month. However, on one occasion, she bled for 10 days (i.e. four days longer than her regular menses). Therefore, she should sit for those six days after which she takes a bath and prays during the remaining four.

2. If a woman does not have regular menses, then she determines the length of her menstruation by the type of blood seen. If the blood’s description and characteristics are that of menstrual blood, then the ruling is that of menstrual blood; if the blood does not have the same characteristics as menstrual blood, then it is not considered as such, and most women are able to distinguish between the two types.
3. If a woman is unable to distinguish between the types of vaginal blood, then she refers to the duration of the menstruation of her female relatives (e.g. her mother, sisters, and aunts).
4. If a woman has no female relatives, then she refers to the regular number of days for the women in her community.

Example: If the duration of menses for the women in her community is between 5 and 10 days, then she takes the medium.

In all of these previous examples, we referred to the ‘urf since The Legislator did not specify a duration.

Issues Falling Under This Foundation

This foundation is a fundamental matter in transactions, rights and in other than that. All of the rulings require knowledge of two things, namely their specifications and interpretations. If The Legislator made a ruling on a matter, as obligated, recommended, permissible, disliked or forbidden, and He specified, interpreted, or distinguished it, then we refer to that. For instance, The Legislator commanded the *salaah*, mentioning its merits and rewards and specifying how to perform it, including the details of its rulings; as such, we refer to what Allaah (ﷻ) and His Messenger (ﷺ)

³ Reported in *Saheeh Muslim* (English translation no. 658 & 659, book 3)

said. The same applies to *zakaah*, *siyaam* (fasting), and Hajj. However, if The Legislator gave the ruling but did not specify, then it was left for the slaves in that which they are commonly accustomed.

Relations with People

Allaah (ﷻ) commanded us to be good to parents, relatives, orphans, the poor, wayfarers, and mankind in general. The reference in these acts of righteousness is that which is known by people, namely the *'urf*. For example, with stronger relationships of kinship, there must be greater effort exerted in joining and keeping the ties. There may be some relatives who it is required to visit only once every two months or once a week. However, we visit our parents everyday. In addition, the neighbors for a person living in an apartment are those to his right and left as well those above and below him. Other than that are not neighbors, and the statement that the neighborhood extends to the fortieth house is very weak.

Doing good to people was left general. The Prophet (ﷺ) said:

*“Every act of goodness is sadaqah (charity).”*⁴

This is an explicit statement from the Prophet (ﷺ) that all kinds of goodness a person does to the creatures are *sadaqah*. However, no limit was set, leaving it to the *'urf*.

Contracts and Trade

Regarding contracts, there are conditions set by The Legislator, including acceptance by both parties. However, He (ﷻ) did not stipulate any specific wordings for them. Any actions or wordings which denote a contract and its acceptance fulfill the objective. Similarly, in contracts where possession is a condition, it is based upon what people consider possession, and it differs with respect to the commodity. For instance, concerning that which can be transferred or moved, its possession is through transferring or moving; as such, possession of a watch is by taking it. Likewise, the possession of things that can not be moved, such as real estate, is through the seller evacuating it.

In buying and selling, the definition of defects, fraud, damage, and cheating is based upon the *'urf*. Whatever is commonly known to be negligence or transgression the ruling follows. For example, if a person is trusted with something and he is negligent or transgresses, then he must provide a guarantee.

Finding Lost Objects

If a person finds something, then he must make it known for a whole year. If no one claims it during that time, then he possesses it. The Legislator did not specify how to make it known; as such, he can make it known by placing ads in the places where people sit, including the *masajid*. It would be insufficient to put an ad in the

⁴ Agreed upon. Reported in *Saheeh al-Bukhaari* (vol. 8, *hadeeth* no. 50) and in *Saheeh Muslim* (English translation no. 2197, book 5)

newspaper because not everyone reads it. Likewise, it would be insufficient to place an ad on the internet as not everyone uses it.

Endowments

The reference in spending the benefits of a *waqf* (endowment) is the conditions set by those who established it. The conditions that are in agreement the *sharee'ah* are permissible while those that are contrary to it are *haraam*. If the conditions set for an endowment are *haraam*, then the supervisor must oppose them as otherwise he would be concurring with them. For example, endowments for soccer players, singers, or movie actors are not permissible. As such, its supervisor must not utilize them in such ways.

If the conditions for a *waqf* are permissible and its supervisor opposes them, his action falls into one of three categories.

- 1) If the endowment's supervisor opposes the conditions for that which is better, then this is permissible.

Examples:

- a) Someone made an endowment of dates to be given to the fasting people attending a specific *masjid*. Later, the fasting people who come to that *masjid* became few. If there were other *masajid* with more attendants, which had greater needs, then the endowment can be moved there, as it would be more beneficial.
 - b) An endowment is made for the seekers of knowledge in a specific place. The supervisor then finds seekers of knowledge who are needier or reside in a more honored place, such as Makkah or Madinah. It is permissible for him to transfer the endowment there.
- 2) If its supervisor opposes the conditions for that which is equivalent, then this is not permissible.

Example: An endowment was made for the poor people in a specific *masjid*. Subsequently, the supervisor moved the endowment to another *masjid*. There is no additional benefit so his action is *haraam*.

- 3) If the supervisor opposes the conditions of an endowment for that which is less, then by all means this is not permissible.

Example: An endowment was made for the seekers of knowledge. However, its supervisor changed the endowment to benefit the poor instead; this is not permissible as he changed it to something that was less since the benefits from the seekers of knowledge transcends them while only the poor benefit under the new conditions.

If the conditions of an endowment are unknown because either no conditions were set initially or due to the loss of the documents associated with it, then we refer to the *'urf* regarding its spending.

Example: If we know that an endowment in a certain community is used to cover the costs of the pilgrimage for those who have not performed it or for sacrificial animals, then we go by that as it is the *'urf*.

Similarly, if the affairs of a property have been run by a specific person for a long period of time and later someone else comes claiming ownership of it without a proof, then this is an issue related to the *'urf*. As such, we do not rule for the claimant, unless he brings a clear proof.

Mahr

In cases where a woman was entitled to a *mahr* (dowry) but it had not been specified or had been specified in a *haraam* way, then she is given the same *mahr* as her peers; this differs according to times, places, and women but is based upon the *'urf*.

Conclusion

The ninth foundation in Imam 'Abd ar-Rahman ibn Naasir as-Sa'di's book, *al-Qawaa'id wal-Usool al-Jaami'ah wal-Furooq wat-Taqaaseem al-Badee'ah an-Naafi'ah* (The Basic Rulings and Principles of *Fiqh* – The Beneficial, Eloquent Classifications and Differentiations), is entitled:

The *'urf* (that which is commonly known, commonly received, conventional, commonly used, or in the common parlance) is referred to in every ruling legislated by The Legislator which is not specified by a limit nor distinguished by an interpretation.

All Praise is due to Allaah, and may the *salaah* and *salaam* be on Prophet Muhammad, his household, the noble companions and those who follow them until the Day of Resurrection.