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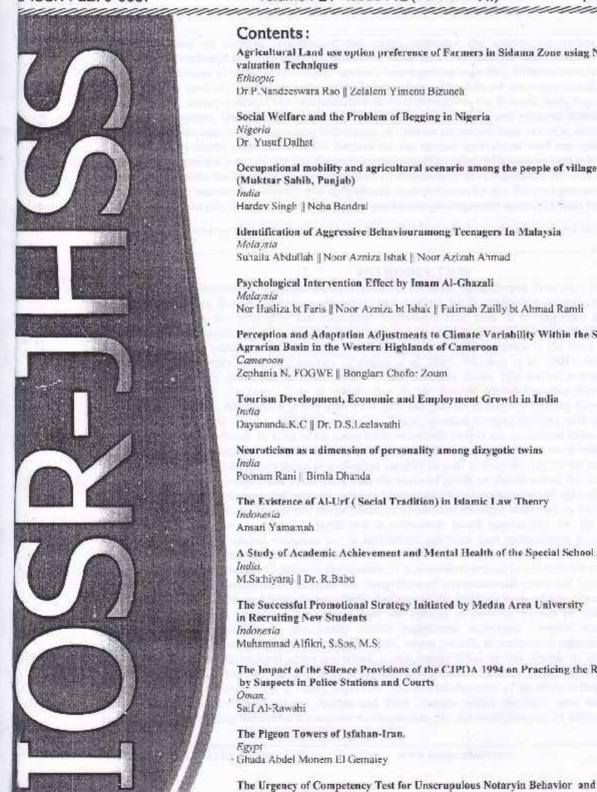## Contents :

The Existence of Al-Urf (Social Tradition) in Islamic Law Theory

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Abstract: *'urf* is something that has been fixed (consistent) in the soul, recognized and accepted by the intellect, and it is an argument and easy to understand. Likewise, the customary notion is something (habit) continued to be done by humans under the laws of human reason and keep repeating. *'Urf* has been entrenched, provisions which are made repeatedly and received by logic in accordance with nature and a healthy mind. *'Urf* is a the manner of the common people or communities. *'Urf* in Islamic legal theory *(ushul fiqh)* gives meaning to the many roles and dynamics of Islamic law. Therefore, the effect of the existence of *'urf* against the establishment of Islamic law should be understood as a knife analysis to understand *nash*, also in the context of the application *tanfiz*.

Keywords: *Al-urf; Social Tradition; Islamic Law; Nash*

I. INTRODUCTION

Islamic law understood as the product of Islamic thought in law, is the result of interaction between *nash* (absolut turth) and the dimension of human thinking. Here, *nash* dimension means Al-Qur'an and *hadith*, while thinking means *istinbath, qias, istihsan mashalih al- murasalah, istshhab, 'urf sadd dzari'ah* and so on. It means that Islamic law is a law derived from revelation on one side, and in another side Islamic law involves humanitarian dimension in providing shape and product of law. The mind pattern in this research covers to *ushul fiqh* as *al-qawa'id al-lughawiyah* and *qawa'id al tasyri'iyyah* and also some arguments besides Al-Qur'an and *hadits*. Furthermore, this thinking pattern is distinguished into three groups:

(1) The thinking pattern of *bayani*,

(2) the thinking pattern of *ta'lili*,

(3) the thinking pattern of *istishlahi*.

The thinking pattern of *bayani* means the thinking which focuses on linguistics (semantics) In *ushul fiqh* rules, this thing has been developed in such a way under the title of *al-qawa'id al-lughawiyah* or *al qawa'id al-istinhathiyyah* which perhaps can be translated freely "Semantik untuk penalaran fikih". It is discussed about semantics (a broadest meaning or narrowest meaning), command sentences (*al-amr*) and prohibition sentences (*an-nahy*), etymology, lexical, connotative, denotative etc. It also covers the meaning of words: universal (*'am*), particular (*khash*), and ambiguity (*musytarak*), and also some techniques in arranging sentences and its meaning .

While *ta'lili* is a way to see what lies behind a provision in Quran or *hadith*. In other words, we want to see what is the *'iliat* (logical ratio), of a rule. The ulema sees that all conditions should be there is its *'illat*, because God may not give the rules without meaning and purpose. In Al-Quran and *hadith*, there are provisions which are mentioned its *'illat* directly. When there is a provision without its *'illat directly*, perhaps there is 'a dark' but it still can be found through deepest contemplation. And it is true that there is still 'dark' and until now it has not been revealed. Most of the regulations are not known their *illat* are regulation of *mahdhah* (pure). Some ulema have formulated ways to find *'iliat* of verses and *hadith* and formulates its category.

While *istsihlahi* reasoning is reasoning that uses verses or hadiths containing "a general concept" as the proposition or guidance such as verses told to be fair, should not harm themselves or others. In *istislahi*, its argument are *mashalih mursalah, sad adz-dzari'ah, 'urf* dan *istishab*.

This research will explore in depth of how one pattern of *istislahi* reasoning, in this case *'urf*, as a proposition to the consideration of a legal product in Islamic law. This research is extremely vital in order to see how Islam laid the sociological dimension which has a significant amount of space in the nature of its legal reasoning.

II. METHODOLOGY

The Overview of History and 'Urf Meaning

Generally, among *Jumhur Ulema* have the same meaning of the term *'urf* with customs, although it does not mean there is no group which specifically distinguishes between them. Al-Jurjani mentions that *'urf* is

something that has been fixed (consistent) in the soul, recognized and accepted by the intellect, and it is an argument and easy to understand. Likewise, the customary notion that something (habit) continue to be done by humans under the laws of human reason and keep repeating. Ibn 'Abidin gives the sense that *'urf* is something that has been entrenched, provisions are made repeatedly and received by logic in accordance with nature and a healthy mind. Subhi Mahmassani states that *'urf* is something that is the manner of the common people or communities. When it is seen how the existence of *'urf* in the Islamic history, it would seem that the dimension of the Islamic history plays a role in the formation of law. It is far before Muhammad SAW is appointed as a prophet, tradition or habit *('urf)* has long been practiced by the Arab community. Even, 'urf has the force of law in Arab society itself. Another example is ' *urf* originating from the time of Ibrahim Prophet, mainly in ceremonies related to the Kaaba and circumcision which is still running sustainable in Arab society and even affirmed by the arrival of Islamic lawThe teaching of Islam brought by Prophet Muhammad does not change throughout the custom in the pre-Islamic era. Traditions or customs that are not contrary to the principles of monotheism are forwarded enforcement in the era of the Prophet. It shows that Islam is not a form of legal revolution that is directly aimed against *'urf* or tradition that has been known and practiced by the Arabs before the advent of Islam. On the contrary, the Prophet Muhammad in his capacity as legislator (law giver) of a new religion, creating many rules that legalize *'urf* (customary law) of Arabs, thus providing a place for the practice of ' *urf* mentioned in the legal system of new Islamic The arrival of Islam is not required to bring a whole new legal code and unique. The Prophet himself has a real desire to complete abolish the system of customary law *('urf)* in pre- Islam. But the pattern is developed not by abolishing the existing tradition but so far it is in accordance with the principles of fundamental Islamic teachings, he remains, and accommodated by Islam. *Taqririyah sunnah* concept itself actually is strong evidence that the Prophet allows some local traditions become acceptable remedy. Though the Prophet does not intervene against some rules in the social environment of Arab society, but the Prophet teaches the public about the value that comes from revelation. Therefore, changes made by him does not conflict with the model of tribal Arab society. In many cases, it is found that the long-running system is not radically replaced with something new. Part of the old system is sometimes still alive (living law) and become part of a new system of Islamic law. Thus, the branches of Islamic law are fulfilled by the decision rule set based on the prevailing custom.In family law, the Prophet Muhammad retains some legal practice that has long been known *(ma'ruf)* by the Arab society before Islam and it just replaces a few things that seem to be inconsistent with the principle/legal reason that makes sense and good moral grounding. Various formations rules derived from the value of the customs/ *'urf* at pre-Islam relating to marital problems, setting gender relations, and the dubious legal status of children born. Therefore, Islam seeks to adjust the rules to the human character. On the basis of this, Muhammad eliminates some legal practices that have been widely practiced since long ago by the Arab nation such as the practice of polyandry, unlawful sexual intercourse, the murder of a baby girl, adoption, divorce repetitive and so forth. Meanwhile Prophet also maintains or modifies the legal practices and others such as polygamy, dowry payment, or notification *(iqrar)* in the case of marriage.

In the criminal field, we see that the entire justice system *qisas* and *diyat* are adopted from the practice of pre-Islamic Arab society. Al-Qur'an and the Prophet's practices may introduce some modifications to this law practice, but the main idea and the underlying principle is not new and has long been practiced long before the arrival of Islam.

III.   DISCUSSION
3.1 *'Urf* as One of the Basic Formation in Islamic Law

If the above description sees the historical aspects of the existence of *'urf* in the Islamic legal system, the following discussion is to see how the existence of *'urf* itself in *tasyri* '(the establishment of Islamic law). Al-Qarafi in his book *al-Furuq* views that the existence of *'urf* is one of the arguments of the legitimacy of Islamic law based on Quran. Based on Q.S al-A'raf verse 199, he holds that the meaning of *'urf* in that paragraph as habits or customs applicable in *mu'amalat*. As al-Qarafi, al-Qurtubi (d. 671 H) said *'urf* is a good habit, which is accepted by reason and the soul to be quiet against him, and the people accept and practice it voluntarily. While Ibn Jizi (d. 741 H) explains that *'urf* as a good act that is part of the customs prevailing in society, and according to Malikiah, customs *(' urf)* can be the basis for determination of the law.With regards to the position of *'urf*, Ibn Mas'ud said that "Everything that is regarded by Muslims, then either precisely Allah". Based on this, it gives birth to some of the rules with respect to *'urf* above. The basic principles in this case is *"al'adatu muhakkamah*, custom is (a source of) law. In addition, there is also an opinion saying that *al-tasbit bi al-'urf ka tsabit bi al-nash* (law), the existence of law because of *nash. 'urf* as a source of law, according to Malikiyah, is a necessity, as opposed to' *urf*, which is seen by the public, means making difficult and pettiness.

In contrast to the Qur'an and the *hadith*, the position of *'urf* serves as a stand-alone proposition *syar'i*. Therefore, the existence of *'urf* as the proposition of *syar'i* still contains differences. But among some scholars accept it by adhering to the rules of ¬al-'*adah muhakkamah*. Although theoretically disputed *(mukhtalaf fih)*, but in reality *'urf* has played an important role in completing the legal requirements.

Imam Malik has made the practice of the people in Medina as a basis in determining the law. Imam Shafi'i when moving to Egypt changes some of his legal opinion (*qaul jadid*) predetermined (*qaul qadim*) while in Baghdad because of the difference of *'urf*. Likewise Imam Abu Hanifah has made *'urf* as the legal basis for its decision. *'Urf* can relate to *muamalah* and not in the field of worship. Tenets regarding the relationship between individuals, groups and communities such as the procedures for marriage, inheritance, commitment or agreement. If a problem concerning the mahdhah worship, such as prayer, fasting, zakat and hajj, the *'urf* is not valid.'Urf which can be categorized as the help of argumentation in the implementation of Islamic law is *'urf* which has no conflict with *nash* in *qath'i*. When *'urf* is contrary to *nash*, the' urf must be rejected, as the habit of doing *tabanni* (to adopt a child and make it the same status as biological children). Habits like this to be strongly resisted in Sura al-Ahzab verse 37. But when *'urf* with *qiyas* conflicting or contrary to the argument *(nash)* which is common, then *'urf* which can generally be used, because *'urf* are among Hanafiyah, can be used to *takhshsish* against the generality of *nash*.Based on what has been stated above, *'urf* can be divided into *'urf shahih* and *'urf fasid*. 'Urf shahih is *'urf* which no conflict with *syara'*. *'Urf* must be maintained in the development of Islamic law and justice as it is in accordance with the needs of society and the common good. On the basis of this *'urf shahih*, it appears *al-ma'ruf 'urfan ka al-masyruth syarthan, wa tsabit bi al-'urf ka al-tsabit bi al-nash*. While the definition of *'urf fasid* is *'urf* which has conflict with *syara'*. This *'urf fasid* cannot be accepted because it is against *syar'i* which has been agreed, as doing usury contract.

'Urf shahih is divided into *'urf 'amm* and *'urf khash*. 'Urf amm is agreed by man at any time, as orders for goods in business transactions (trades), which occurs when the contract between the seller and the buyer, the goods ordered has no substance in front of the two parties. Hanafiyah stipulates that *'urf* is doing *takhshish nash zhanni*. Abu Hanifa accepts *'urf amm* to *takhshish* the generality of *nash zhanni* and leaves *qiyas*. While *'urf khash* is *'urf* applicable on a country situation or a specific group such as *'urf* among traders. *'Urf* cannot to takhshish *nash* in *zhanni*.Abu Hanifa accepts *'urf* as the legal basis as well as other legal sources. He uses *'urf amm* to *takhshish* the generality *nash* in *zhanni*. For example, the Prophet forbade selling something that is not in the possession of a person. However, there has been *'urf* since long, which allows the sale and purchase orders, which means selling something that has no form, such as ordering the beds were no goods. *'Urf amm* like this is to *takhshish* of *nash* generality which prohibits selling something that is not tangible. Thus, the ban is intended to purchase in addition to buying and selling orders which have been the custom. An examination of the impact of the law, *'urf amm* can establish the common rule of law, while *'urf khash* is the basis for the enactment of *'urf* special. Therefore, a general law cannot be determined on the basis of *'urf khash*. When *'urf khash* is different from *syar'i*, then the problem is the same with *'urf 'amm*.

According to *mahzab* Abu Hanifah, there is a principle that a law in the past, defined by *'urf* changed when *'urf* as the basis of the law has changed. Therefore, among the followers of Abu Hanifah happened disagreement on legal matters defined by Abu Hanifah. For example, Abu Hanifah argues that it does not need to take the oath to the witness in court when the witness credible. It is based on the Prophet's words: "Muslims are fair partly over others."It is contrary to Abu Yusuf and Muhammad Ash-Syaibani which argue that it does not enough to rely on the testimony of justice outwardly, because humans have many who dared to hide the truth (lie). Therefore, the witness must be sworn beforehand. Another example, the problem teaches the Koran to uphold the symbols of religion which are not allowed to take a wage/reward because it is worship. It is also in line with the *'urf* at that time that ulema is forbidden to take a salary/remuneration in the teaching of the Koran. On the other hand, usually the ulema have received assistance from the Baitul Mal. But lately, until today, the ulema does not receive any help from Baitul Mal. Therefore, the scholars Hanafiyya *mutaakhirin* allows taking a reward / wage on the teaching Al Qur'an so that the Qur'an is maintained.Similarly to Abu Hanifah, Imam Malik also uses *'urf* as an auxiliary proposition. He argues that *'urf* can to *takhsish* provisions ' am in Al-Qur'an, to taqyid the absolute or leave *qiyas*. Abu Zahrah, Al-Azhar cleric, noted the comparison of *'urf* among the four school of Imam Malik and turned out to be stronger hold *'urf* of the Hanafi school. Similarly, the school of Abu Hanifah, among the Maliki school there is a provision to hold on in this school, when laws are based on *'urf*, then the law changed with *'urf* which it is based.In Medina, there is *'urf* where the husband handed over a dowry before with his wife. Then, when a dispute between husband and wife about whether the dowry has been submitted or not, the Maliki argues that the testimony of the husband received. At the time now *'urf* has changed where the husband first submit a dowry before intercourse with his wife, to avoid negligence husband to provide a dowry. It is because the presence of the habit of handing malpractice husband to his wife's dowry. Therefore, there is also a change in the Maliki school of law. In the event of a dispute between husband and wife about the dowry, the recognition of wife accepted and followed by the oath.

Imam Shafi'i uses *'urf* as the basis for determination of the law, and including the schools of the most widely used to *'urf*. It can be seen in *qaul jadid*. When Imam Shafi'i was in Egypt, he changed his opinion in part he had taken while still in Baghdad. This change is due to differences of *'urf* in both locations. In setting status *hakamain* for example, contained in Surah al-Nisa 'verse 35, when Imam Shafi'i was in Baghdad, he found *hakamain* representatives of both sides of husband and wife in charge of providing advice non-binding

nature. After moving to Egypt, he also specify that *hakamain* is what determines whether reconciled or divorced husband. Another example is the testimony to reconciliation. At first, according to Imam Shafi'i that testimony to reconcile the law is mandatory. Arriving in Egypt, he changed his mind and set the law is *sunnah*. Imam Shafi'i argued that the witness was necessary at a time when going on the denial of marriage, and not against reconciliation. Shafi'ites clerics such as Ibn Hajar al-'Asqalani asserts that *'urf* can be carried out which does not contradict to *nash*.Imam Ahmad ibn Hanbal also noticed *'urf* society although many use the word friend *(qaul al-shahabiy)* in doing *istinbath* law. In *mazahab* Hanbali, *'urf* is used as an auxiliary proposition when there is no *nash* or *atsar*. Ibn Qayyim, a Hanabilah, even said, "who gave the fatwa to man based solely on books as opposed to *'urf*, custom, time, place, their circumstances, then surely the person who gave the fatwa had been misguided and misleading.In general, the jurists adhering to the *'urf* community in consideration of legal decisions. In this regard, Ibn 'Abidin argues that *a mujtahiid* in addition to mastering the texts, must know *' urf* in society. Because many of the problems *ijtihadiyah* based on *'urf*. They need to know *'urf* growing in the population,*' urf* past or *'urf* present (*' urf* contemporary). Most laws change because of the difference in time and *'urf* in society.On legislation at Muslim majority countries, it can be seen that judges always uses *'urf*, and sometimes even too far in using *' urf* in law enforcement. In Morocco, for example, when the bride lost her virginity (not sacred anymore) in the first marriage, the groom can be return to the female parent. In Sudan, there is *'urf* among Kababish on transferring of property inheritance, where treasures are just down to the sons of man. If there are no sons, the inheritance is given to the brother of the other. On the other hand, women do not share the inheritance in accordance with *faraidh*. It is also found here at home is a Muslim majority and a strong hold on customary provisions or *'urf*. In Minangkabau, in inheritance is relegated to the women. According to custom of Kampung Tanah Melayu, the division of inheritance is the result of an agreement by the heirs.When the note further, 'urf developes in the Islamic world there are many conflicting arguments in *qath'i*, as the examples mentioned above, so it can be categorized as *'urf fasid*. Thus, it is not included in the category of *urf shahih*. So it cannot be used with the basic rules of *'al 'adah muhakkamah"*. For that reason, the scholars are detailing the terms of *'urf* in society in order to be categorized as *' urf* which can serve as a helping argument in *syar'i*.

Abu Sinnah determines that *'urf* must meet six (6) criteria to be categorized as *'urf shahih*:

1. It must be a lot of people's habits, uneven, and it is not denied by members of the public.
2. It applies commonly at Muslim world.
3. It does not have a conflict with *nash syar 'i*.
4. When dealing with *tasharruf*, *'urf* should have been there when tasharruf happened.
5. Characteristically binding supporting community.
6. There are no words or deeds (to be agreed upon) as opposed to the content of *'urf* prevailing in society.

Furthermore, Azhar Ahmad Bashir argued that *'urf* accepted as one of the sources of Islamic law as *ijtihadiyah* if they meet the following requirements:

1. Acceptable with steadiness soul by the community, supported by common sense considerations and in line with the demands of the character of human nature.
2. Absolutely, it is general stability in the community and runs continuously.
3. It does not have a conflict with the texts of the Qur'an and *Sunnah*. Thus, *'urf* which is contrary to the *nash* cannot be accepted. For example, the division in inheritance with equalizing section between boys and girls, giving rights and inheritance to an adopted child, and so on.
4. It's actually been there when *ijtihadiyah* formed.
5. Perceived community has a binding force, requires adhered to and a legal effect.
6. There is no requirement which causes *'urf* cannot be applied in accordance with its terms.
   When *'urf* is completely contrary to the provisions of *nash* in Qur'an and *Sunnah* until there is no way to reconcile between the two, then this such *' urf* should be abandoned, and the provision of *nash* is preferred. In other words, the provisions of customary law cannot disturb the provisions of *nash* in Qur'an and *Sunnah*. In this case, it applies in Al-Mai'dah Q.S verse 50: "Is ignorance of law they want, or who is better law than the law of God for those who believe?"

With the restrictions and requirements above, Muslim jurists in all the history of Islamic law period freely use local custom in their legal reasoning. Tahir Mahmood argues that customary /*'urf* often makes a real substratum in various laws. Differences that often arise among Muslim jurists which are of the position of indigenous /*'urf* in Islamic law system. This difference is mainly due to changes in the appearance of custom / *'urf* from one place to another and from one time to another.

3.2 'Urf Seen From Juridical Sociological Aspects

As a part of the source or the arguments, *'urf* in the Islamic legal system will interact between tradition and the teachings of the existing system in Islam. When the terms of *'urf* in one hand and Islamic law on the other hand, it actually reflects the concept of accommodation of Islamic law which is an abstraction of empirical

thinking. Accommodation itself is meant to indicate the harmony situation between individuals or social groups within a community. Interest own accommodation as mentioned by Soerjono Soekanto is to reduce or neutralize the antagonism existing between individuals and social groups, as a result of the disagreement. Second, it prevents the explosion of contention for a while. Third, allow for cooperation between social groups, which as a result of social factors psychological and anthropologist apart from each other. Fourth, the fusion between social groups separated. Islamic law is the law that covers all areas of human life existing in Qur'an and *Sunnah* which are the main points or a value system that orbits of the charge or the contents of Islamic law. Even when you see the record of Harun Nasution that the Qur'an only contains 228 law verses as the source for Islamic law. In addition to Hadith as a second source, then in the subsequent development activities *ijtihadiyyah* an advanced procedure to be able to fill the charge dynamics of Islamic law. So here is the accommodating nature of Islamic law to see the elements of human civilization project in which culture or traditions will contribute to the content of Islamic law which can be manifested at anytime and anywhere. As it is known that the people (humans) are essentially dynamic character, then the so-called social change in terms of sociology will occur in each cycle of human life. Therefore changes in this legislation, including Islamic law, is logical as a result of developments occurring values in society. Jurisprudence itself is touted to have the power to have elasticity provide adequate space for the possibility of legal change over time and from one place to another. As confirmed by Ibn Qayyim al-Jauziy that the fatwa/ laws is subject to change due to the changing times and places.

Changing and reforming Islamic law is closely related to the issue of *ijtihad*, for reciprocation and a fast or slow pace of change depends on the Jurisprudence of high and low frequency of *ijtihad* done by the *mujtahid*. In other terms, the key advances of Islamic law lies in the sincerity of *ijtihad Mujtahids* activity, while the decline is partly due to their weakness in *ijtihad*. Public acceptance of the law will occur when charges the law does not interfere with existing systems and common in a society, or does not cause social inequalities. And vice versa, the existing systems and common is a reflection of a form of society in creating law for the society. In the methodology of Islamic law, it is known as *al-'adah muhakkamah* which means that customary law can be used. The theories above imply the reciprocal relationship between the law and the structure of society. On the one hand, the law can influence society and it may affect the legal community. An expert of the group's philosophy historical-sociological *mahzab*, Savigny, states: "The law comes from inner consciousness of society containing abilities and certain tendencies united inseparably to form an establishment together and unites themselves in language, customs, and mores developed into jurisprudence.

From both sides of the existence of its law when dealing with social change, it occupies one of the following two functions: first, the law serves as a tool to strengthen the stability of society as the implications of the law fall short of social development. This function is called social control. On the contrary, when the pace of legal developments faster than the rate of social change, the law serves as an instrument to bring people into a new era. This function is called social engineering.

IV. CONCLUSION

Islamic law is believed to bring benefit to mankind which will never lose the coverage rules in arranging human life. Because it not only the dimension of normative teachings inspiring a variety of legal products, but also the dimensions of historicity as aspects to give space to the quality of human life. Because *'urf* in Islamic legal theory *(ushul fiqh)* gives meaning to the many roles and dynamics of Islamic law. Therefore, the effect of the existence of *'urf* against the establishment of Islamic law should be understood as a knife analysis to understand *nash*, also in the context of the application *tanfiz*. Because *'urf* as a proposition and it does not a stand-alone as a source of law but its presence will give an explanation on the level of application of existing *nash*.

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