

Islamic Law and Custom:

Historical Account From the Time of the Prophet Till Present

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Introduction

Islam was revealed to the Prophet over a period twenty three years of his life, of which thirteen were in Makkah and ten in al-Madinah. After this period in which the revelation was completed. Islamic law has gone through several phases of development up until recent times. The scholars of Islamic law have categorised the development of Islamic law traditionally into six major stages named as follows: *foundation, establishment, building, flowering, consolidation and stagnation and decline*. These stages occur in the following historical periods:

- a) Foundation :the era of the Prophet (609-632CE)
- b) Establishment :the era of the *Khulafa' al-Rashidin*, from the death of the Prophet to the middle of the seventh century (632-661CE)
- c) Building :from the founding of the Umayyad dynasty (661CE) until its decline in the middle of the 8th century CE
- d) Flowering :from the rise of the Abbasid dynasty in the middle of the 8th century CE to the beginning of its decline around the middle of the 10th century CE
- e) Consolidation : from the decline of the Abbasid dynasty at about 960CE to the invasion of Baghdad by the Mongols in the middle of the 13th century CE
- f) Stagnation : from the sacking of Baghdad in
and decline 1258CE to the present time¹

¹ Some scholars have divided this development into seven stages in which the last stage was further divided into two. The stagnation and decline stage is from the sacking of Baghdad to the codification of the Islamic law in which the *Majallat al-Ahkam al-Adliyyah* was written by the Ottoman Government and the final stage is from that time until the present time. See al-Zarqa', *Al-Madkhal al-Fiqh al-Aam*, vol.1, p.147

These stages illustrate the development of Islamic law from the time of the Prophet until the present time, with stage four being regarded as the climax of the development after which the decline can be observed.

3.2 The Prophetic Period (609-632 CE)

In this period Islamic law went through two phases of development, the first of which was when the Prophet was in Makkah and the later period was when the Prophet was in al-Madinah. During the Makkan period, which starts with the beginning of the Prophethood and ends with the Prophet's migration to al-Madinah, most of the revelation focused on building the ideological foundation of Islam. Therefore, the basic topics of the Makkan revelation all reflect the principle of building faith in God. Among the basic topics in this period are: the unity and existence of God, life after death, stories of previous peoples, challenges to the pagan Makkans to imitate the style of the *Qur'an* and formal prayers.² There are not many aspects of Islamic law discussed in this period. Therefore, there are no obvious traces of the usage of *urf* in this period except that the Muslims continued to use the same custom of the Arabs before there were any rulings imposed on them by God.

After the Prophet migrated to al-Madnah and the spread of Islam, the revelation became more concerned with the organisation of the Muslim community. During this period many rulings of Islamic law were revealed by God as the need for such law increased. It was then that the last three pillars of Islam, which are fasting in the month of *Ramadan*, paying the *zakah* and performing pilgrimage were revealed. Indeed the prohibition of intoxicants, pork, gambling and the punishments for adultery, murder and theft as well as many other laws were also revealed during this time.

² Shalabi, *Al-Madkhal fi al-Ta`rif al-Fiqh al-Islami*, p.51-5

The sources of Islamic law during this period were either the *Qur'an* or the *Sunnah* of the Prophet. The *Qur'an* was sometimes revealed in terms of general principles which may be applied to various aspects of Islamic law. In this respect, the *Sunnah* has the role of explaining the intent of the *Qur'an*, either by statements of the Prophet or his actions. For example, the *Qur'an* commanded the Muslims to perform regular prayers without describing how they should be performed, so the Prophet prayed among his followers and told them, "Pray as you have seen me praying."³ On certain occasions, the Prophet may deduce rulings (*ijtihad*) based on the general principles of the *Qur'an*. However, the *ijtihadat* of the Prophet may be confirmed by the revelation if correct or corrected by God if incorrect. An example of the *ijtihad* of the Prophet which was corrected by the *Qur'an* is that of the *zihar* divorce. It was related that Khawlah bint Tha'labah said, "My husband, Aws b. al-Samit, pronounced the words: 'You are to me like my mother's back.' So I came to the Messenger of God to complain against my husband. However, the Messenger of God disagreed with me and said, 'Fear God, He is your cousin.' I continued complaining until the verse was revealed:

"God has indeed heard the statement of the women who disputed with you concerning her husband and carried her complaint to God, and God hears your discussion. Surely God hears and sees all things. If any men among you declare their wives like their mothers, (*i.e.zihar*), they cannot be their mothers. None can be their mothers except those who gave birth to them. They use bad words and falsehood..."⁴⁵

In the above example, the Prophet accepted *zihar* as a valid form of divorce and had told Khawlah to accept it. However, God declared it invalid.

At this stage of the *fiqh* development, the Companions of the Prophet were also permitted to make their *ijtihad*. Indeed, this was encouraged by the Prophet to prepare his Companions to carry on the

³ Al-Bukhari, *Sahih*, vol.1, p.345, no.604

⁴ *Qur'an*, 58/1-3

⁵ This *Hadith* was related by Abu Dawud in *Sunan Abu Dawud* vol.2, p.266, no.2214

application of the *Shari'ah* after he left them. This can be noticed on several occasions in which the Prophet has allowed his Companions to give judgements on certain matters. It was reported that Al i b. Abi Talib said, "God's Messenger sent me to Yemen as a judge, so I asked, 'Oh Messenger of God! You are sending me and I am young, and I have no knowledge of giving judgements?' He replied, 'God will guide your heart and keep your tongue firmly (attached to the truth). When two litigants sit before you, do not decide until you have heard what the other has to say in the same way you heard the first, for it is more suitable for the correct judgement to become clear to you.'"⁶ Yet in another *Hadith* Abi Saïd al-Khudri was reported to have said, "The Qurayzah tribe surrendered on the condition that it would be Sa'd b. Mu'adh who would pass judgement on them. So, the Messenger of God sent for him. When Sa'd approached the mosque riding on a donkey, God's Messenger said to the Ansar (Muslims of al-Madnah), 'Stand up to receive your chief.' And he said to Sa'd, 'These people have surrendered on the basis of accepting your decision.' Sa'd said, 'Execute their warriors and take their women and children as captives.' On hearing that the Prophet said, 'You have judged according to God's judgement.'"⁷ The above citation indicates that both the Prophet and his Companions practised *ijtihad* during this stage in the development of Islamic law. However, it should be noted that the *ijtihadat* of the Prophet are not considered as an independent source of law, because their validity depended on divine revelation for confirmation. Indeed, the *ijtihadat* of the Prophet were basically a means of giving his Companions lessons in the methods of *ijtihad* and the Companions' *ijtihadat* at this stage were basically for practice.

The usage and consideration of *urf* at this stage of the development of Islamic law can be observed through the recognition and modification of certain pre-Islamic Arabs customs by the *Qur'an* and the *Sunnah*. Among matters which were recognised and modified were certain aspects of criminal and evidence law such as the incorporation and modification of the blood-revenge (*al-tha'r*) practice into the institution of *qisas* in Islamic law, the practice of *diyah* and also the concept of *qasamah*. The other

⁶ Ibid, vol.3, p.301, no.3582

⁷ Muslim, *Sahih Muslim*, vol.3, p.966, no.4368

matters that were involved were family law and many rulings relating to the commercial law (*mu'amalat*) which was discussed earlier.⁸ The *ijtihad* of the Prophet also gave a substantial consideration to the customary practice of the people at that time. Among the examples is the judgement that was given by the Prophet in the case of Khawlah with regard to *zihar* as mentioned earlier.⁹ Even though the judgement of the Prophet was corrected by God, initially the Prophet has given his judgement based on the custom of the Arabs at his time. This indicates that the custom can be referred to as an original source of law if it does not contradict the text and the principles of Islam. Among the other examples of the judgements of the Prophet which were based on *urf* is the permission of the contract of *salam*¹⁰ which was widely practised in al-Madnah. This type of contract is the contract to sell something which does not yet exist, but, according to a *hadith*, the Prophet allowed it to be practised.¹¹ The Prophet gave an exceptional ruling on this type of contract because it was a general practice of the people and was required in the society. These are among the examples of the usage of *urf* in this early stage and indeed there are many other occasions in which *urf* have been given consideration. In fact the customs which were prevalent during the lifetime of the Prophet and were not directly overruled by him are regarded as having received his tacit approval and become part of what is known as *Sunnah taqririyyah*.

3.3 The Era of Khulafa' al-Rashidin and The Major Companions (632-661 CE)

⁸ Please refer to chapter two of this work

⁹ See page 4

¹⁰ *Salam* is an advance sale in which the price is determined but delivery postponed

¹¹ Ismail, Mohamad, *Subul al-Salam Sharh Bulugh al-Maram*, v.3, p.97

The era of the *Khulafa' al-Rashidin* and the major companions begins from the Caliphate of Ab_ Bakr. During this stage the Islamic empire extended to Syria, Jordan, Egypt, Iraq and Persia. Thus, most of the populations of these regions embraced Islam and the Muslims were brought into contact with new systems, customs, cultures and patterns of behaviour which were totally different from the place where Islam had started. The consequence of this was the rise of many problems which had not occurred at the time of the Prophet. To resolve these problems, the Caliphate relied on decision by consensus (*ijma'*). Normally when faced with a new problem the Caliph would follow the following steps to solve them:

1. They would try to find a specific ruling on the problem in the *Qur'an*.
2. If they could not find the answer there, they would try to find the solution in the *Sunnah* of the Prophet, the sayings and actions of the Prophet.
3. If they still did not find the answer, they would ask the people whether they had heard any rulings of the Prophet on such problems.
4. If they still did not find the answer, they would then call a meeting of the major Companions and try to get unanimous agreement on a solution to the problem.
5. If, however, no agreement could be determined, then the scholars would make their own *ijtihad*.¹²

In this period, as can be observed, the sources of Islamic law increased to include *ijma'* as another source of the law. Indeed, the Companions also utilised *qiyas* (analogical reasoning) in making decisions as Caliph 'Umar is reported to have ordered one of his governors to use *qiyas* as mentioned in his letter which was sent to Abu Musa al-Ash'ari in Kufah in which he said, "You must know the similarities and likenesses (*al-ashbah wa al-amthal*) and compare (analogy) between different matters."¹³

As far as the usage of *urf* is concerned, the *Khulafa' al-Rashidin* and the Companions preserved many pre-Islamic social customs and traditions and have also adopted and established some useful foreign

¹² See Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in*, vol.1, p.62-3

¹³ Ibid, vol.1, p.63

customs. Indeed, they preserved the pre-Islamic customs that were practised during the time of the Prophet. For example, the measurement of grain continued to be regarded as *kayl* (measured by capacity) and gold and silver were considered *wazn* (measured by weight). Many of the pre-Islamic commercial transaction which did not violate Islamic principles were also preserved, such as the contract of *salam* already mentioned.

Among other examples of the usage of *urf* is the customary practice of setting up a limited partnership (*mudarabah*). This kind of contract was practised by Umar and Uthman and other Companions¹⁴ and was later developed by the *fuqaha*’ as a legally defined institution with the necessary terms and conditions for its different branches. Malik b. Anas (d.179AH/795CE) has also mentioned some of Umar's judgements based on *urf*. One example is the payment of *diyah* (blood money) which was based on the prevailing custom. Those who used gold had to pay a *diyah* of approximately one thousand dinars while those who used silver had to pay approximately twelve thousand dirhams. According to Malik, the Syrian and Egyptians used gold in their commercial transactions, while the Iraqis used silver.¹⁵ These usages might have influenced Umar's decision. However, for those who still dealt in a cashless economy, payment had to be taken from their real wealth, which were camels. At the time of the Prophet and Abu Bakr, blood money was paid only in the form of camels¹⁶ as that was the existing custom. But Umar amended the blood-money payment system because of the new conditions that occurred at his time with the consideration for the traditional method to be continued for those who needed it.

¹⁴ See Al-Shafi'i, *Al-Umm*, vol.7, p.114

¹⁵ Malik, *Muwatta*’, p.647

¹⁶ *Ibid*, p.647

Among the examples of the acceptance of a foreign custom by the Companions is the implementation of the *diwan*¹⁷ (public registries) system by Umar. Al-Mawardi, the prominent Shafi'i scholar (d.450AH), states that once Umar received a large amount of *sadaqah* (charity gift) from Bahrain. He consulted the Companions on how it should be managed. One of the Companions suggested that the *diwan* system be established and Umar agreed with that suggestion. In another narration, it was reported that a Companion, Hurmuzan from Persia, was familiar with the Persian *diwan* system and explained it to Umar. Yet in another report, Khalid b. al-Walid, who was also at the meeting related what he had seen in Syria, where apparently the Byzantine rulers had their own *diwan* system. Umar accepted these suggestions and established the *diwan* system in al-Madinah.¹⁸

The above account on the usage of *urf* in the era of the Companions indicates the gradual development of the theory of *urf*. The Companions followed the way of the Prophet in which they preserved the customs which were not in contradiction with the teachings of Islam. The *Qur'an* and *Sunnah* methodology which provides general principles rather than giving a specific rulings on a matter gave a wider choice to the Companions to incorporate the *urf* of the people in their rulings which changed according to the change of time and place.

3.4 The Era of the Formation of *Madhahib* (Schools of Law)

This era occurs in the third and fourth stages of the development of *fiqh*. It is in this period that the two different approaches towards Islamic law began. It saw the disputes between *ahl al-hadith* and

¹⁷ From this word is derived the word *dawwana*. Umar instituted the first *diwan* in Islam to organise the pay, register the fighting forces and set the treasury in order. The register covered the people of al-Madinah, the forces that participated in the conquest and those who emigrated to join garrisons in the provinces, together with their families. A committee of three genealogists carried out the registration by tribes and pay depended on past services to Islam and relationship to the Prophet. Registration by tribes continued till the end of the Umayyad period. The first *diwan* was *diwan al-jund*. See *Encyclopedia of Islam* (new edition), vol.2, p.323

¹⁸ See Al-Mawardi, *Al-Ahkam al-Sultaniyyah*, p.249

ahl al-ra'y.¹⁹ It was during this era that *fiqh* took shape as an independent Islamic science and the famous Islamic schools of law were established namely: the Hanafi, Maliki, Shafi'i and Hanbali schools. It was in this era that the different sources of Islamic law were identified and some legal differences developed between the major schools of law separating them from each other.

Beside *Qur'an*, *Sunnah*, *ijma'* and *qiyas*, the other sources such as *istihsan*, *istislah*, *urf*, *'amal ahl al-Madnah*, *istishab*, and *sadd al-dhara'i'* were developed by the above schools. The Hanafi school is renowned for the principle of *istihsan* in which there is scope for exercising and appreciating *urf*.²⁰ Abu Hanifah himself has considered many customs of the people in his rulings particularly in matters pertaining to the commercial law (*mu'amalat*). He is reported to have said that *urf* determines and interprets the actual meanings of the legal terms commonly used in the society. However, custom has no legal effect if it is contradicted by a *nass* (*Qur'an* or *Sunnah*).²¹ In the later period the scholars of the Hanafi school have developed the principle of *urf* and relied upon it in the treatment of many cases. Muhammad al-Shaybani (d.189AH/805CE), the prominent Hanafi scholar, considers custom to be a source that should be considered in making decisions. Some of his statements are often quoted by other scholars. For instance: "*urf* is decisive"; "evidence derived from custom is like that inferred from *nass*"; "what is known by *urf* is like the condition laid down by *nass*"; "a general statement may be specified by the evidence of custom"; "custom is valid to particularise a general rule."²² Ibn 'Abidin (d.1252AH/1836CE), another famous scholar from

¹⁹ *Ahl al-hadith's* stand is to avoid making legal rulings on an issue if clearly defined texts from *Hadith* or *Qur'an* related to the issue were not available. The laws whose reasons (*'illah*) were identified by God or His Prophet were used in analogical deductions (*qiyas*) whereas those left undefined were not. *Ahl al-ra'y*, on the other hand, felt that where revealed texts were not available or subject to interpretation, they could use reason to establish a legal ruling. It should be noted that these two trends were merely extensions of trends which first appeared among the Companions.

²⁰ See the discussion on *Urf* and *Istihsan* in chapter six

²¹ Al-Sarakhsi, *Al-Mabsut*, vol.9, p.17

²² Hamidullah, *Muslim Conduct of State*, p.35, citing al-Shayban, *Sharh al-Siyar al-Kabir*, vol.1, p.194, vol.2, p.296, vol.4, pp. 16,23-5

the Hanaf school, was among the first jurists to deal specifically and exclusively with this subject in his treatise *Nashr al-Urf fi Bina Ba'd al-Ahkamal 'ala al-Urf*²³. In this treatise he deals with most of the issues of *fiqh* based on *urf* and *'adah*. Ibn Nujaym (d.970AH/1563CE), another Hanaf scholar also has discussed *urf* at length in his renowned book *al-Ashbah wa al-Naza'ir*.²⁴

Malik b. Anas, the founder of the Maliki school, also has relied extensively on *urf* in his judgements. In fact he has made the *amal* (practice) of the people of al-Madinah as a legal source that he relied upon in his judgements. This is reflected in his work *al-Muwatta'* in which he has relied upon *amal ahl al-Madinah* on many occasions.²⁵ Indeed, the concept of *amal* was developed by the Maliki jurists to the extent that *amal* was applied in a broad sense to include the *urf* of all nations and areas.²⁶ According to Coulson, the concept of *amal* developed from the centre of Qayrawan and was consistently applied by the *quds*.²⁷ Beside the usage of *amal*, *urf* also was developed in the Maliki school by including it among the various bases of the Malik doctrine of public interest (*masalih al-mursalah*). This doctrine was discussed by al-Shatibi (d.790AH/1388CE) at length in his famous work *al-Muwafaqat*. Al-Shatibi also has addressed the importance of considering *urf* in making judgements. Indeed, the customs which help to achieve the community's common welfare are included in *masalih*, and they play an important role in fulfilling the purposes of the *Shari'ah*.²⁸

²³ Ibn 'Abidin, *Majmu'ah al-Rasa'il Ibn 'Abidin*, pp.112-45

²⁴ Ibn Nujaym, *Al-Ashbah wa al-Naza'ir*, pp.101-14

²⁵ See the discussion on the relationship between *urf* and *amal* in chapter six

²⁶ Ibrahim, Ahmad, *Sources and Development of Muslim Law* in Singapore Malayan Law Journal, 1965, p.33

²⁷ Coulson, *Muslim Custom and Case Law*, in *The World of Islam*, vol.6, (1959) no.1-2, p.22

²⁸ Al-Shatibi, *Al-Muwafaqat*, vol.2, pp.200-208

The third prominent founder of the Islamic school of law, al-Shafi'i was also reported to have utilised the *urf* of people and his followers also have developed this theory. Even though al-Shafi'i does not discuss *urf* as a legal source or as an authentic legal argument, in his renowned works *al-Risalah* and *al-Umm*, there is evidence that he accepted *urf* as a valid argument. For instance, in discussing the subject of *ijtihad* in his treatise, *al-Risalah*, al-Shafi'i admits that a decision should be made according to the particular circumstances of a given place and time which are different from others.²⁹ Ibn al-Qayyim (d.751AH/1750CE) has reported the statement of al-Shafi'i on the condition of a person who is qualified to give a *fatwa* (legal opinion) in which he said,

"It is not permitted for a person to give a *fatwa* in matters of God's religion unless he is knowledgeable in the Book of God, the abrogated and abrogation..... and knowledgeable in the different (customs) of the people (*ikhtilaf ahl al-amsar*)...."³⁰

The above statements indicate the importance and significance of *urf* in making decisions according to al-Shafi'i. In the later period the scholars of the Shafi'i school have also developed the theory of *urf*, for instance al-Juwayni (d.478AH/1085CE) has pointed out the significance of customs and traditions by saying that *ijma'* is proved by uninterrupted *urf*.³¹ Al-Suyuti (d.911AH) another Shafi'i disciple, was the first Shafi'i jurist to acknowledge the importance of *urf* in the social life. He has discussed the subject of *urf* at length in his work *al-Ashbah wa al-Naza'ir*. According to al-Suyuti, the *fiqh* maxims that he discussed were considered by Qadi Husayn b. Muhammad as the foundation of the Shafi'i school of law.³² One of the maxims that was discussed is the maxim: "custom is arbitrator" (*al-'adah muhakkamah*). Under the heading of this maxim, he discussed *urf* and *'adah* and emphasised that there are many legal issues that can be solved by referring to this source.

²⁹ Shafi'i, *Risalah*, pp.297-8

³⁰ Ibn Qayyim, *I'lam al-Muwaqqi'in*, vol.1, p.46

³¹ Juwayni, *Ghiyath al-Umam*, p.39

³² Suyuti, *Al-Ashbah wa Al-Naza'ir*, p.7

This theory was also developed by the scholars of the Hanbali school. Even though there are no clear and definite opinions from Ahmad b.Hanbal on *urf*, the scholars of this school have used *urf* in their judgements. For instance Ibn Qudamah (d.682AH/1284CE), the prominent Hanbali jurist, described both his opinion and that of Ahmad b.Hanbal in his book *Al-Mughni*. He mentions that Ibn Hanbal accepts weak reports if he found that they correspond with local custom.³³ Indeed, Ibn Qudamah himself recognises *urf* and utilises it in many of his legal opinions.³⁴

Ibn Taymiyyah (d.728AH/1327CE) and Ibn al-Qayyim al-Jawziyyah (751AH/1350CE) also accepted *urf* in theory and practice. Ibn Taymiyyah has discussed *urf* in his book *al-Fatawa*³⁵ and has demonstrated on several occasions cases in which *urf* should be used. An example of taking custom into consideration occurs when he discusses the subject of travelling. The definition of travelling according to him should be determined according to the prevailing *urf* as there is no limitation specified by the *Shari'ah*. Ibn al-Qayyim also gave several examples on the usage of *urf* in his writings. For instance, to determine whether commercial goods are defective or not should be referred to *urf* of the people. If the *urf* says it is defective then the purchaser has the right to replace it. However, if the defect is very minor and it is not considered as a defect in *urf*, then the retailer has the right to refuse the replacement. Indeed, Ibn al-Qayyim states that those who issue rulings by only reporting what is stated in the books without considering the *urf* and *'adah* of the place and the particular circumstances of people are misguided and misleading others.³⁶

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³³ Ibn Qudamah, *Al-Mughni*, vol.6, p.485

³⁴ *Ibid*, vol.3, pp.561-2, vol.6, p.485, vol.7, p.18

³⁵ Ibn Taymiyyah, *Majmu' Fatawa Sheikh al-Islam Ibn Taymiyyah*, vol.19, pp.243-47

³⁶ Ibn al-Qayyim, *Al-Turuq al-Hukmiyyah fi al-Siyasah al-Shar'iyyah*, vol.3, p.89

The above account of the development and utilisation of *urf* by the prominent founders and followers of the four respective schools of law again demonstrates the evolution of the theory of *urf*. Indeed, it is in this era that many legal maxims about *urf* were written by the scholars that indicate the importance of appreciating *urf*. There is no doubt that this theory is a very important one that can be utilised as a supportive source in Islamic law. Even though it is not an independent source of law, *urf* has played a significant role in the development of Islamic law. The development of this theory has continued from this era which is the era of the formation of the *madhahib* till recent times.

3.5 The Era of *Majallat al-Ahkam al-Adliyyah* to the Present time

Majallat al-Ahkam al-Adliyyah is a codification of laws made in the time of the Ottoman Government which was completed in the year 1876CE and was declared as the law of the Empire. This codification which was based on the Hanafi school of law was gathered from various Hanafi works of *fiqh*. This law consists of one thousand eight hundred and fifty one articles which was divided into three main parts. The first part contains the discussion of the definition and classification of Islamic law. The second part discusses the legal maxims in Islamic law and the final part contains the rulings related to Islamic commercial law (*mu'amalat*).

As far as the theory of *urf* is concerned, the *Majallah* has mentioned several legal maxims that are directly related to the theory of *urf*, which should be taken into account in making decisions on matters pertaining to Islamic law. The maxims that were mentioned are as follows:

1. Custom is an arbitrator (article 36)
2. Public usage is conclusive evidence and action must be taken in accordance therewith (article 37)
3. The matter which it is customary to regard as impossible is considered to be impossible in fact (article 38)

4. It is an accepted fact that the terms of law vary with the changes of time (article 39)
5. In the presence of custom no regard is paid to the literal meaning of a thing (article 40)
6. Effect is only given to custom where it is of regular occurrence or when it is universally prevalent (article 41)
7. Effect is given to what is of common and constant occurrence; but not to what happens infrequently (article 42)
8. A matter recognised by custom is regarded as though it were a contractual obligation (article 43)
9. A matter recognised by merchants is regarded as being a contractual obligation between them (article 44)
10. A matter established by custom is like a matter established by law (article 45)³⁷

This reference to the theory of *urf* in the Majallah indicates that it is being utilised by the scholars at that time in order to make legal judgements. This also demonstrates the importance of *urf* as it covers many aspects of law particularly the commercial law.

The development of this theory can also be observed in the period after the Majallah was written (1876CE) until the present time. Most of the *usul al-fiqh* literature that was written by the modern scholars has included a section on *urf* in their discussions as a supporting source of Islamic law. Most of these scholars have discussed *urf* by including the opinions of the past scholars on this theory. For instance Zarqa' has allocated a special chapter that discusses this theory under the heading of *al-Nazariyyah al-Urfiyyah* (The Theory of Customary Practice).³⁸ Also Khallaf,³⁹ Badran,⁴⁰ Zaydan,⁴¹ Abu Zahrah⁴² and other prominent contemporary scholars have exhaustively discussed this principle in their writings.

³⁷ See chapter five for further discussion on these maxims

³⁸ Al-Zarqa', *Al-Madkhal*, vol.2, pp.832-940

³⁹ Khallaf, Abd al-Wahhab, *Ilm Usul al-Fiqh*, pp.89-91

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The above discussion on the development of *urf* from the Prophetic period to the present indicates that this theory has evolved gradually from the time of the Prophet until recent times. There is no doubt that this principle will be continually developed by the scholars as it is an important instrument that should be considered in making many judgements. It is certain that this theory is one of the most important supporting sources in Islamic law and has to be taken into account in making judgements and introducing new legal solutions to novel problems.

⁴⁰ Badran, Abu al-‘Aynayn, *Usul al-Fiqh al-Islam*, pp.224-233

⁴¹ Zaydan, Abdul Karm, *Al-Waijz fi Usul al-Fiqh*, pp.252-258

⁴² Abu Zahrah, Muhammad, *Usul al-Fiqh*, pp.254-258