


THE DIACHRONIC ANALYSIS OF INTERACTIVE RELATION BETWEEN 'URF AND SĪRA 'UQALĀIYYA IN THE JA'FARĪ SCHOOL OF LAW

CAFERİ MEZHEBİNDE ÖRF VE SĪRA 'UQALĀIYYA (AKLA DAYALI ÇIKARIM) DELİLLERİ ARASINDAKİ ETKİLEŞİMİN ZAMANSAL ANALİZİ

SUMEYRA YAKAR

DR. ÖĞRETİM GÖREVLİSİ, İĞDIR ÜNİVERSİTESİ, İLAHİYAT FAKÜLTESİ, TEMEL İSLAM BİLİMLERİ ANABİLİM DALI,
ASSISTANT PROFESSOR, UNIVERSITY OF İGDIR, FACULTY OF THEOLOGY, DEPARTMENT OF ISLAMIC STUDIES,

sumeyrayakar@hotmail.com

 <https://orcid.org/0000-0001-8335-6819>

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Abstract

The article seeks to identify changes and expansions within the scope of particular legal principles of Ja'fari school of law from classic times until present period. The additional aim is to show the place of custom ('urf) during the transformation procedure from theory into practice throughout history of the school. The main question that the research intends to answer is that whether 'urf protected its initial role in the legal area or its role experienced alteration during the application procedure from theory into practice. Firstly, the research clarifies the status of 'urf and various categories depending on its usability and validity for legal deduction. Additionally, the research analyses particular legal principles of Ja'fari school of law such as *ijmā'*, *maşlahā*, *aşl al-barā'a*, *istişhāb*, *sira 'uqalā'iyya*, and *sira mutasharri'a* that lead confusion because of involving some mutual points with 'urf. The sketching of a theoretic outline that runs from past to present period provides considerable insight into legal attitudes towards the shifting status of 'urf within the Ja'fari school of law. The paper also intends to scrutinise the similarities between the principles of *sira 'uqalā'iyya* and 'urf in order to show the changing status of 'urf in the Ja'fari school of law. Both the transformation of the legal status and validity of 'urf in the methodology of Ja'fari school will be considered, along with the interplay between religious rules and emerging customs.

Summary

In the Ja'fari school of law, jurisprudence is not conceived as a civil act, but is instead held to be a religious practice that orientates towards eschatology and theology. The scholarly focus has converged upon the proposition that human society would not reach the true path and salvation unless limitations on the actions and appetites of each individual were first put in place by Islamic ideology (that is explained by the Prophet and *Imams*). From the point of Ja'fari scholars, God has sought to impose boundaries upon human activity by putting in place five categories which encompass positive law in its entirety: absolutely forbidden actions (*harām*), indispensable or expressly commanded actions (*wājib* or *farḍ*), admissible or permitted actions (*mubāh*), recommended or desired actions (*mustahabb* or *mandūb*) and reprehensible or offensive actions (*makrūh*). In the absence of solutions or rulings that can be achieved through the application of legal texts and methods, the principle of custom ('urf) emerges as a valid source in response to the impossibility of restricting social issues that pertain to the jurisprudence. At this point, the resort to 'urf which is applied as a legal principle in urgent circumstances may become an indispensable part of Islamic law that helps to validate the given solution or to categorise the permissible acts within the Ja'fari school of law.

The application of 'urf might be considered as an affirmation of the position which holds that primary issues of faith (*i'tikād*) should be determined with reference to the original Islamic sources including the Qur'an, the Sunna, *icmā'* (consensus), *'aql* (reason) according to Ja'fari school of law. However, here, it should be remembered that the scholars frequently advocate flexible and pragmatic approaches in the sphere of social relations (*mu'āmalāt*). The implementation process of rules for cases pertaining to social relations can be said to have given credence to 'urf being applied directly as a legal principle or as a subsidiary factor that relates to the interpretation of various legal principles. It is quite conceivable that the application of 'urf will result in changes to legal methodologies and temporary legal rulings that had previously given by the early scholars of Ja'fari school of law. The flexible nature of Islamic law in the scope of *mu'āmalāt* authorises the scholars to interpret the legal

sources (in harmony with the necessities of time and place) by using various legal methodologies. It is in fact the case that scholars are required to acknowledge the changing needs and habits of contemporary time during the jurisdiction process by preserving the formal framework of religious sanctity.

The scholars have sought to set out the principles in more detail along with the conditions of their implementation. These principles relate to cases in which the true ordinance of God is not clear or deduced from the main sources of Islamic law. At the initial and foundational periods of the school, the classical Ja'fari scholars openly referred to *'urf* as an independent source of ruling. However, the scholars of later and contemporary period have avoided to address *'urf* directly but prepared a substructure with *'urf* in order to use it during the interpretation of procedural and secondary sources. Among these sources, especially the principle of *sira 'uqalā'īyya* has gained a prestigious position and expanded the range of its validity in legal area according to explanations of recent Ja'fari scholars. The principle of *sira 'uqalā'īyya* in operating as a legal constraint, prioritises the local conditions of the region and simultaneously operates at the level of theory and practice. The analogical and etymological comparison between the principles of *'urf* and *sira 'uqalā'īyya* clarifies that *'urf* (which finds its origin in the daily practices of people) is considered more vulnerable than and *sira 'uqalā'īyya* (which finds its roots in the rational practices of people).

The article seeks to identify changes and expansions within the scope of particular legal principles of Ja'fari school of law from classic times until present period. The additional aim is to show the place of custom (*'urf*) during the transformation procedure from theory into practice throughout history of the school. The main question that the research intends to answer is that whether *'urf* protected its initial role in the legal area or its role experienced alteration during the application procedure from theory into practice. Firstly, the research clarifies the status of *'urf* and various categories depending on its usability and validity for legal deduction. Additionally, the research analyses particular legal principles of Ja'fari school of law such as *ijmā'*, *maṣlaḥa*, *aṣl al-barā'a*, *istiṣhāb*, *sira 'uqalā'īyya*, or *sira mutasharri'a* that lead confusion because of involving some mutual elements with the principle of *'urf*. The sketching of a theoretic outline that runs from past to present period provides considerable insight into legal attitudes of the scholars towards the shifting status of *'urf* within the Ja'fari school of law. Both the transformation of the legal status and validity of *'urf* in the methodology of Ja'fari school will be considered, along with the interplay between religious rules and emerging customs.

Keywords: Islamic Law (*Sharī'a*), Ja'fari School of Law, *Sira 'Uqalā'īyya*, Iran, Custom (*'Urf*)

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Öz

İslam hukukunun kuruluşundan günümüze kadar gelen dönemde, zaman, mekan ve toplumlarda meydana gelen değişmelerle birlikte hukuk usulünde kullanılan fer'i delillerde de gelişmeler meydana gelmiştir. Kur'an, sünnet, icmā' ve akıl Caferi mezhebinin aslı delilleri olarak her dönem geçerliliğini korumasına rağmen, *maṣlaḥa*, *istiḥsan*, *istiṣhāb*, *ihtiyāt*, *ikhtiyār*, *sira uqalā'īyya* gibi fer'i deliller klasik dönemden günümüze terminolojik değişimler göstermiştir. Araştırma klasik dönemden günümüze Caferi mezhebinde hâkim olan fer'i delillerin kullanımında ve anlaşılmasında zaman içerisinde meydana gelen değişiklikleri açıklamayı amaçlamaktadır. Çalışma

hükümlerin teoriden pratiğe aktarılmasında örfün ('urf) fikhî bir delil olarak kullanımındaki değişik yaklaşımları vurgulamakla birlikte, çağında otorite olarak kabul edilen, örf delili üzerinde görüş bildirmiş Caferi alimlerin bu farklılık ve değişimler üzerindeki açıklamalarına değinmektedir. Caferi mezhebinde kullanılan *ijmâ'*, *maşlaḥa*, *aşl al-barâa*, *istişhâb sira 'uqalâ'iyya*, veya *sira mutasharri'a* gibi fikhî delillerle örf arasındaki benzerlik ve farklılıklar açıklanarak, özellikle günümüzde Caferi alimlerce sıklıkla başvuru olan bir delil olarak *sira 'uqalâ'iyya* örfle bağlantılı şekilde fikhî bağlamda analiz edilmiştir. Pratikteki uygulamalardan da destek alan teorik bir çerçevenin çizilmesi Caferi mezhebindeki genel eğilimi yansıtmakla birlikte örfün fikhî bir delil olarak Caferi alimler tarafından kullanımını açıklamaktadır.

Özet

Caferi mezhebinde hukuk anlayışı kanuni bir adalet uygulamasından daha ziyade, kaynağını teolojik temellerden ve ahiret inancından alan dini bir uygulama olarak kabul edilmektedir. İnsan toplumunun, her bir bireyin davranışlarının sınırları İslami hükümler tarafından belirlenmediği müddetçe doğru yola ve kurtuluşa ulaşamayacağı anlayışı alimlerin hâkim görüşü olarak diğer alanlarda olduğu gibi Caferi hukuk sisteminde de kendisini göstermektedir. Caferi mezhebinde kabul edilen görüşe göre doğru olan dini hüküm ve uygulamalar ise hazreti peygamber ve masum imamlar tarafından inananlara açıklanarak öğretilmiştir. Dini hükümler Allah'ın emirlerine uygunluğuna göre kesinlikle yasaklanmış *haram* fiiller, yapılması açıkça emredilen *vacip/farz* fiiller, yapılmasında sakınca olmayan *mubah* fiiller, yapılması tavsiye edilen *mendub/müstehab* fiiller ve yapılmasında sakınca olan *mekruh* fiiller olmak üzere beş temel gruba ayrılır. Fıkıhın asıl kaynak ve metotlarıyla geçerli bir hükme ulaşamaması durumunda, örf ve örfle bağlantılı olan ikincil statüdeki deliller geçerli birer kaynak olarak fıkıh alanında kendini gösterir. Sosyal hayatta karşılaşılan sorunların sınırlandırılmasının imkansızlığına bir yanıt olarak, Caferi alimlerce kullanılan örf ve örfle bağlı deliller alimlerce verilen hükümlerin geçerliliği artırılmış ve toplum içinde yaygın olan fiillerin fıkıh alanında *mubah* olarak kabul edilmesini sağlamıştır.

Sorunlu durumların ortaya çıkmasıyla örf veya örfle bağlantılı olarak verilen hükümlerin, örften daha ziyade İslam hukukunun ikincil kaynaklarıyla bağlantılı kurularak açıklanması, fıkıhtaki yöntem ve metot eksikliğini gizleme çabası olarak anlaşılabilir. Caferi mezhebinde, örfle bağlantılı delillerin İslam hukuku alanında kullanılması, temel kaynakları Kur'an, sünnet, icmâ ve akıl olan itikat yani temel inanç alanı dışındaki sosyal ilişkiler alanını kapsayan *muâmalât* ile ilgili konularda kesinlik kazanmıştır. Sosyal alanla ilgili olarak verilen hükümlerin uygulanmasında örf doğrudan bir fikhî delil olarak kullanılmakta ya da farklı fikhî delillerin yorumlanmasında yardımcı ve tamamlayıcı bir faktör olarak başvuru olan bir kaynak olmaktadır. Zaman ve mekâna göre değişim gösterme imkânı olan konularda, bölgesel faktörlerin yardımıyla çözüme ulaşma imkanının fıkıh tarafından alimlere verilmesi, İslam hukuk hükümlerinde değişimleri de beraberinde getirmiştir. Hükümlerde meydana gelen değişim alimlerin mezhep içi görüşlere ve temel kaynak olarak kabul edilen eserlere yaklaşımlarına göre farklılık göstermektedir. İslam hukuku tarafından genel çerçevesi çizilen konularda değişim gösteren faktörlerin hüküm üzerindeki etkisi, çözüm dinin temel prensipleriyle aykırılık göstermediği sürece kabul görmektedir.

Fıkıh alanında hüküm vermek için kullanılacak delillerin şartlarıyla birlikte ayrıntılı olarak açıklanması, hakkında net hüküm bulunmayan konuların çözümünde temel prensipleri belirler. Caferi mezhebinin kuruluş devrinde ve ilk dönemlerinde, alimler bölgesel ve zamansal faktörleri içeren örfle doğrudan başvurma yöntemini benimserken, sonraki dönemlerde ve günümüz Caferi fıkıhında alimler örfle doğrudan atıf yapmaktan çekinmişlerdir. Bu yaklaşımın benimsenmesine ek olarak,

değişime açık problemlerin çözümünde başvuru olan ikincil delillerin yorumlanması için örfe uyum gösteren bir fıkıh metodolojisi benimsenmiştir. Caferi mezhebinde kullanılan *icmā'*; *'aql, maşlahā, aṣl al-barā'a, istiṣlāh, istiṣhāb, sīra 'uqalā'īyya*, veya *sīra mutasharri'a* gibi fıkıh metodolojisinde kullanılan delillerin tanımı ve kullanımı zaman içerisinde değişiklik göstermiş ve bu farklı kullanım metotları karşılaşılan sorunlar için verilen hükümlerin delillerinin açıklanmasında belirginleşmiştir. Bu fıkıh delilleri arasında özellikle *sīra 'uqalā'īyya* prensibinin son zamanlarda Caferi alimler tarafından fıkıh bir delil olarak sıklıkla kullanılması, bu delile fıkıh alanında prestijli bir konum kazandırmış ve bu prensibin geçerlilik alanını mezhep metodolojisinde genişletmiştir. Fıkıh bir terim olarak *sīra 'uqalā'īyya* toplum içerisinde görüşleri kabul edilen, söz sahibi, sağduyulu, liyakat vasfını barındıran kimselerin onay vermesi veya uygulaması sonucunda bir fiilin bir pratiğin toplumda yaygınlık kazanarak benimsenmesidir. Caferi mezhebinde *sīra 'uqalā'īyya* prensibinin fıkıh bir delil olarak kabul edilmesinin temelinde, toplumda yaygınlaşan uygulamaların temelinde mezhebin dördüncü temel delili olan aklın bulunduğu ve akla dayanan fiillerin liyakatli insanlarca tekrarlanmasının bu uygulamalara fıkıh olarak geçerlilik kazandıracağı anlayışı hakimdir. Bu ön kabule birlikte, *sīra 'uqalā'īyya* bölgenin yerel koşullarına önem vererek hem teori hem pratik alanlarda kullanılabilen yasal bir denetleme mekanizması olarak mezhep içerisindeki fıkıh geçerliliğini artırmıştır. Caferi mezhebince *sīra 'uqalā'īyya*'nin örfle kıyasla daha kuvvetli bir delil kabul edilmesi, zaman ve mekânın değişimine açık hükümlerin belirlenmesinde ve bu hükümlerin fıkıh olarak açıklanmasında *sīra 'uqalā'īyya* prensibine doğrudan atıfta bulunmak şeklinde kendisini göstermiştir.

Araştırma klasik dönemden günümüze Caferi mezhebinde hâkim olan feri delillerin anlaşılmasında ve kullanım metodlarında zaman içerisinde meydana gelen değişiklikleri açıklamayı amaçlamaktadır. Fıkıh alanındaki hükümlerin teoriden pratiğe aktarılmasında örf ve bünyesinde örfü barındıran prensiplere fikhî bir delil olarak hüküm çıkarma sürecinde başvurulması ile ilgili yaklaşımlar derinlemesine analiz edilmiştir. Çağında otorite olarak kabul edilerek örf ve *sīra 'uqalā'īyya* delili üzerinde görüş bildirmiş Caferi alimlerin görüşleri bu alimler tarafından yazılan birincil kaynaklardan tercüme edilmiştir. Buna ek olarak, Caferi fıkıh alanında kendi devrinde otorite kabul edilen alimlerin zaman içerisinde fıkıh delillerde meydana gelen farklılık ve değişimler üzerindeki açıklamaları, klasikten günümüze kadar gelen eserlerle birlikte değerlendirilmiştir. Caferi mezhebinde kullanılan *icmā'*, *maşlahā*, *aṣl al-barā'a*, *istiṣhāb*, *sīra 'uqalā'īyya*, veya *sīra mutasharri'a* gibi fikhî delillerle örf arasındaki benzerlik ve farklılıklar açıklanarak, özellikle günümüzde Caferi alimlerce sıklıkla başvuru olan bir delil olan *sīra 'uqalā'īyya* fikhî bağlamda analiz edilmiştir. Bu çalışma temel olarak pratikteki uygulamalardan da destek alan teorik bir çerçeve çizerek Caferi mezhebindeki genel eğilimi yansıtmakla birlikte, *sīra 'uqalā'īyya* teriminin fikhî bir delil olarak Caferi alimler tarafından kullanımını açıklamaktadır.

Anahtar Kelimeler: İslam Hukuku, Caferi Mezhebi, Akla Dayalı Çıkarım, İnan, Örf.

INTRODUCTION

The issues concerning faith (*i'tiqād*) and worship (*'ibādāt*) areas are primarily determined with reference to the main sources of Islamic law including the Qur'an, the Sunna, consensus (*icmā'*), and reason (*'aql*) according to Ja'fari school of law.¹ The scholars (*'ulamā'*) frequently advocate flexible and pragmatic approaches in the sphere of social relations (*(mu'āmalāt)*) and have an opportunity to apply the secondary sources of Islamic law including *maşlahā*, *aşl al-barā'a*, *istişhāb*, *sıra 'uqalā'iyya*, and *sıra mutasharri'a* in Ja'fari school of law. The issues pertaining to *mu'āmalāt* area can be said to have given credence to the various interpretation of scholars depending in the methodology of their affiliated schools.² The scholars who blindly implement the standard legal rules of his school without acknowledging changing times and circumstances will ultimately damage legal functionality that is built in Islamic law. The alteration within the nature of various legal principles might be interpreted as an effort to conceal the need for innovation in the school's methodology.

There is a paucity of English literature on the diachronic transformation of *'urf* and the connection between the principles of *'urf* and *sıra 'uqalā'iyya* in the Ja'fari school of law. Most of the scholarly literature on the Shi'i school has tended to focus upon faith issues, *imams* approvals, application of reason, debates between *uşūlī* and *akhbārī* approaches or sectarian divides. By listing the most authoritative jurist and judges, Modarressi's *Introduction to Shi'i Law* provides a general outline of Jā'fari literature and methodology.³ He scrutinises that rationalist scholars, in particular Ḥasan al-Ṭūsī, succeeded in integrating legal methodology and rational analysis into Jā'fari jurisprudence by rejecting the authority of single tradition (*āḥād khabar*). Calder⁴ and Newman⁵ demonstrate the divergence of rationalist

¹ The Shi'i tradition consists of various subbranches including Zaydi Shi'a, Ismā'ili Shi'a and Imāmi Shi'a. The followers of Imāmi Shi'a is also known as *Ithnā'ashariyya* or Twelver Shi'a with regard to their emphasise on the belief of twelve *imāms*. Although these names are used interchangeably within the scholarly area concerning with faith or sectarian researches, the scholars of legal area (*uşūl al-fiqh*) refer to the Ja'fari school of law in order to address the followers of Imāmi Shi'a. Since the paper is concerned with legal methodologies and practices rather than faith issues, Ja'fari school of law is used throughout the paper. See Ethem Ruhi Fiğlalı, "İsnā'şeriyeye", *Türkiye Diyanet Vakfı İslam Ansiklopedisi* (Ankara: TDV Yayınları, 2001), 23/142-143 and Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbārī Shi'i School* (Leiden: Brill, 2007), xv-xvii.

² Aymen Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concept of 'Urf and 'Adah in the Islamic Legal Tradition* (New York: Palgrave Macmillan, 2010), 12; Id, "Custom, as a Source of Law", *Encyclopaedia of Islam* (Accessed March 02, 2020).

³ Hossein Modarressi al-Ṭabāṭabā'ī, *An Introduction to Shi'i Law: A Bibliographical Study* (London: Ithaca Press, 1984), 18.

⁴ Norman Calder, *The Structure of Authority in Imāmi Shi'i Jurisprudence* (London: University of London, School of Oriental and African Studies, PhD Dissertation, 1980), 9-16.

⁵ Andrew Newman, *The Development and Political Significance of the Rationalist (Uşūlī) and Traditi-*

and traditionalist approaches when they stress the authority of the jurist in their researches. Although Gleave's *Scripturalist Islam* provides a comprehensive account of the chronological development of particular *shar'ī* methodologies and principles by offering bibliographical insight into opinions of various Jā'farī scholars, his scope of analysis does not cover the principles of 'urf and *sīra 'uqalā'īyya*.⁶ His another contribution, *Inevitable Doubt*, brings out differences between the Akhbārī and the Uṣūlī theories by comparing the two eighteenth-century Jā'farī scholars.⁷ In the book, he clarifies the distinct epistemological attributes, *shar'ī* methodologies and doctrines of the two thinkers, Yusuf al-Baḥrānī and Muhammad Baqir al-Bihbahānī. Moussavi's *Religious Authority in Shi'ite Islam* provides a considerable amount of knowledge related to the hierarchical establishment of the Jā'farī scholars and their socio-political roles and the intellectual development of Jā'farī school of law.⁸ There is, however, a clear academic lacuna on the transformational alteration of legal principles in general, the principles of 'urf and *sīra 'uqalā'īyya* specifically. The article, therefore, aims to fill the scholarly gap by scrutinising the transformational process of the principle of 'urf into *sīra 'uqalā'īyya*. The main reason of this methodological shift towards the application of 'urf is connected with the vulnerable character of 'urf in comparison with *sīra 'uqalā'īyya*. After the foundational period of Jā'farī school of law, the scholars tend to show an attitude to refer more legitimate and less fragile legal principles that affected the status of 'urf in Jā'farī school of law. The usage of 'urf results in changes to the basic legal decisions that previously constituted the grounds of Islamic law. Libson links this spatial and temporal context with increasing intellectual capability of scholars and their attitude of not blindly following the authoritative compilations and decisions of past schools of law (*madhhabs*).⁹ It is in fact the case that scholars tend to acknowledge the changing needs and habits of contemporary time during the jurisdiction process by preserving the formal framework of religious sanctity.

The Jā'farī scholars seek to identify or categorise the definition of terminological words in order to reduce the complex nature of legal sources. Al-Shahīd al-Awwal (1333-1384), an authoritative and classical Jā'farī scholar, clarifies the predominant method of Jā'farī '*ulamā'* on the issue of interp-

onalist (Akhbārī) Schools in Imāmī Shi'ī History from the Third/Ninth to the Tenth/Sixteenth Century (California: University of California, PhD Dissertation, 1986), 10-26.

⁶ Gleave, *Scripturalist Islam*, xviii-xxiii.

⁷ Robert Gleave, *Inevitable Doubt: Two Theories of Shi'ī Jurisprudence* (Leiden: Brill, 2000), 3-14.

⁸ Ahmad Kazemi Moussavi, *Religious Authority in Shi'ite Islam: From the Office of Mufti to the Institution of Marja'* (Kuala Lumpur: Istac, 1996), 5-22.

⁹ Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Cambridge, London: Harvard University Press, 2003), 70.

retation by explaining that the origin of the meaning of the word (*lafz*) itself is always connected to its literal (*haqīqī*) meaning.¹⁰ The metaphorical (*majāzī*) or homonym (*mushtarak*) meaning is only referred to when external evidence of its usage is provided. Additionally, the *haqīqī* meaning is comprised of three different categories; legal (*shar'ī*), linguistic (*lughawī*), and customary (*'urfī*), – the same applies to the metaphorical meaning, with the exception of letters (*hurūf*). The letter does not have a metaphorical meaning because its meaning always relates to its original usage. Al-Shahīd al-Awwal also states that with regard to names, it is sometimes the case that the essence of the name is strongly connected with the *shar'ī* meaning – relevant examples include the five daily praying (*ṣalāt*) whose name derives from prior religious understandings. In some instances, the essence of the name is connected to the linguistic roots of the verb as *lughawī* meaning – relevant examples include selling items (*mabī'un*), subject (*fā'il*), object (*mef'ūl*), or divorce (*ṭalāq*).¹¹ In instances that require the analysis of two different meanings, customary and legal meanings need to be addressed separately. This division enables scholars to use *'urf* as a legal tool by means of reason (*'aql*) and also provides *'urf* with heightened legitimacy within jurisprudential interpretation (in particular its verbal variation).

1. TYPES OF 'URF ACCORDING TO JA'FARĪ SCHOOL OF LAW

A common approach among Ja'farī *'ulamā'* generally considers customary assumptions in a way that establish the basis for repetitive activities and practices.¹² From Ja'farī point of view, custom (*'urf*) is divided into six main categories which vary in accordance with character, compatibility, validity or comprehensibility and which are comprised of *'urf ṣahīh*, *'urf fāsid*, *'urf āmm*, *'urf khaṣṣ*, *'urf amalī* and *'urf qawlī*.¹³ When the nature of custom establishes compatibility with the religious doctrines and orders, it is considered to be legally acceptable and is referred to as valid custom (*'urf ṣahīh*). Upon entitling a specific practice as being *'urf ṣahīh* (the evaluation is done by contemporary Ja'farī *'ulamā'*), it becomes legal principle, establishes the limits of permissibility. The scholars and believers obtain an opportunity to resort to it in the absence of legal regulation or evidence by avoiding personal desires and wrongdoings.¹⁴ Therefore, particular Ja'farī scholars

¹⁰ Al-Shahīd al-Awwal, *Al-Qawā'id wa al-Fawā'id* (Qom: Maktaba al-Mufid), 152.

¹¹ Al-Shahīd al-Awwal, *Al-Qawā'id*, 153.

¹² For example, the determination of the duration or time of menstruation is generally decided with reference to customary interpretations rather than textual deductions. More information see, Al-Shahīd al-Awwal, *Al-Qawā'id*, 149.

¹³ As'ad Kāshif al-Ghaṭā'i, *Al-'Urf Haqīqatahu wa Hujjiyyatahu* (PDF), 7 (Accessed 15 March 2020)

¹⁴ Muḥammad Muṣṭafā Shibli, *Uṣūl al-Fiqh al-Islāmī* (Beirut: Dār al-Nahḍa al-Arabiyya, 1986), 330.

treat *'urf ṣaḥīḥ* in a similar manner to the concept of *maṣlaḥa* (public interest) and they emphasise the same root of these two principles which is the rationally provable doctrine upholding interests and protecting against corruption.¹⁵ However, as oppose to *'urf ṣaḥīḥ*, invalid custom (*'urf fāsīd*) has never been accepted as legitimate by the legal dimension because of including non-religious elements or harmful practices such as honour killing and usury. While *'urf fāsīd* is a widely observed practice, its invalidity is connected with causing harmful consequences, legitimising prohibited actions, opposing the divine law or sometimes rejecting religiously obligatory rulings.¹⁶ The issue of whether the item complements or contradicts Islamic values and orders is the key question which instructs the creation of these two categories.¹⁷

General custom (*'urf 'āmm*) is a practice that is followed by the majority of individuals within a wide number of areas. In the view of Ja'farī scholars, this feature establishes it as being very valuable. However, it might include elements which belongs to either *'urf ṣaḥīḥ* or *'urf fāsīd*, but the responsibility of drawing lines between these two types is the duty of Ja'farī *'ulamā*. In the absence of available legal sources, general custom (comprising only *'urf ṣaḥīḥ*) is referred to as being the main guidance for the solution. This applies because the practices are mainly rooted in rational inferences or reason. Consideration of the strongest or most common *'urf* becomes the determining criterion relating to the extensive number of acts that are concerned with the identification of praying times, measurement or numeration, the payment of dower or weighing.¹⁸ However, the consideration of a specific custom (*'urf khāṣṣ*) that is commonly practiced by specific groups within a location creates clear disagreement among Ja'farī *'ulamā*. When it clashes with the textual sources or revealed law, it is required to be rejected upon the grounds of involving non-religious elements. If the reason enables it to possess legal weight, which is not counted among unlawful actions, it may obtain validity after the rational analysis of Ja'farī scholars.¹⁹ Announcing Eid al-Fitr in the middle of the month of Sha'bān month, picking fruits before the ripening season, protecting crops during the day or securing bazaar areas with guards are all prominent examples of legally accepted local *'urf*.²⁰

¹⁵ Akram Muḥammad Arani, *Naqsh 'Urf Der Tafsīr qawānīn Khānda* (Tehran: Nashr Mizān, 2014), 34.

¹⁶ 'Abd al-Karīm Zaydān, *Al-Wajiz fi 'Uṣūl al-Fiḥ* (Beirut: Mu'assasat Qurṭuba, 1987), 253.

¹⁷ Mahmud Saljooghi, *Naqsh 'Urf Der Huqūqi Madanī Iran* (Tehran: Mizan Legal Foundation, 2014), 30.

¹⁸ Al-Shahīd al-Awwal, *Al-Qawā'id*, 147.

¹⁹ Al-Ghaṭā'i, *Al-'Urf*, 11.

²⁰ Al-Shahīd al-Awwal, *Al-Qawā'id*, 149.

The practical custom (*‘urf ‘amali*) is an actual and regular practice in which individuals become familiarised with a certain way of life and habitual conditions (in addition, it also refers to identical activities and mutual rights).²¹ It is also important for *‘urf ‘amali* to align with the linguistic norms – majority of Ja‘farī scholars, with the exception off Al-Shahīd al-Awwal,²² agree that this is essential to obtain legal accountability. It is permitted to change the ruling when the *‘urf* and *‘ada* changes – this is because particular practices (e.g. the exchange of money, the measurement systems, and the maintenance of wife or relatives) are all connected with the specific time period of the country.²³ The verbal custom (*‘urf qawli*) refers to phrases, terms and words that are used in a society and whose meanings are grasped by the community and linked to context and reason. The *‘urf qawli* is definitive, specific and renowned among the masses – as such, it does not require extensive examination nor literal analysis. The common tendency behind this assumption is that it is not possible for a single word to simultaneously possess both literal (*haqīqī*) and metaphorical (*majāzī*) meaning.²⁴ The priority of customary rather than literal or linguistic meaning becomes necessary if there is no clear way of abandoning the customary (*‘urfi*) meaning.²⁵ With regard to homonym (*mushtarak*) meaning including customary and linguistic understandings, if the literal meaning of the verbal act has a distinguishable character for the decision (e.g. different subjects, as if what I ate or what he ate) or conveys information about their quantity, the meaning intrinsically carries or includes customary elements and situational contexts.²⁶ When there is a conflict between the customary and literal meaning of the word, it is possible to abandon the latter by considering people’s custom, habit and usage. From Ja‘farī point of view, the analysis of verbal *‘urf* does not therefore require extensive literal scrutiny to obtain the customary intention, which can be obtained through superficial or surface analysis. As Al-Shahīd al-Awwal claims, there is no difference between the legal validity of verbal (*qawli*) and practical (*‘amali*) customs in Ja‘farī school of law.²⁷ This is why the use of *dabbah* for a horse as *‘urf qawli* is held to be equivalent and treated equally with the will of a person requiring serving charity food consisting only regional dishes as *‘urf ‘amali*.

²¹ Al-Ghaṭā‘ī, *Al-‘Urf*, 8.

²² Al-Shahīd al-Awwal, *Al-Qawā‘id*, 150.

²³ Al-Shahīd al-Awwal, *Al-Qawā‘id*, 152.

²⁴ Al-Ghaṭā‘ī, *Al-‘Urf*, 8-9 and Al-Shahīd al-Awwal, *Al-Qawā‘id*, 152

²⁵ Muḥammad Mustafā Shibli, *Uṣūl al-Fiḥ al-Islāmī* (Beirut: Dār al-Nahda al-Arabiyya), 326.

²⁶ Al-Shahīd al-Awwal, *Al-Qawā‘id*, 158; Zaydān, *Al-Wajīz*, 253.

²⁷ Al-Shahīd al-Awwal, *Al-Qawā‘id*, 150.

2. LEGAL JUSTIFICATION OF 'URF AND OPINIONS OF JA'FARĪ 'ULAMĀ

'Urf can be used either as a practical and independent legal principle or as a dependent secondary source (which is referred during the interpretation of various legal principles and these principles obtain power through 'urf).²⁸ Especially contemporary Ja'farī scholars tend to place particular emphasis upon the Qur'anic words 'ma'rūf and 'urf with the intention of demonstrating that customary practices are acceptable from the perspective of the religio-legal dimension while also stressing the interchangeability of the two terms. The terminological usage of 'urf within the Qur'an according to interpretations of Ja'farī 'ulamā refers to acceptable and correct deeds, avoidances, practices, speeches and thoughts.²⁹ It consists of advisable or recommendable activities and its validity relies on the verse: "Take what is given freely, enjoin what is good ('urf), and turn away from the ignorant."³⁰ On the other hand, the terminological usage of ma'rūf addresses the society's standard and usual practices as opposed to recommended deeds. The usage of ma'rūf is more prominent than 'urf within the verses and it is generally used to provide advise upon socially accepted common trends concerned with communal life, economy, family, individual and social activities.³¹ Taking into account the references from Qur'an, whether in the form of ma'rūf or 'urf (which are both integrated at a conceptual and practical level), Ja'farī 'ulamā have sought to maintain a flexible attitude and acquiescent response towards the customary acts of the community.

A well-known Ja'farī scholar Taqī Al-Ḥakīm argues that rationally approvable good deeds are also good in the sight of God because of the logical connection between rational and shar'ī regulations by referring to the ḥadīth ("Whatever Muslims regard as good, it is good in the sight of God.")³² The vast body of legal texts which refer to 'urf as a source of law reiterates the need to acknowledge the proposition that the permissible and positive customs embody rational truth. In explaining the legal and rational link between public interest (maṣlaḥa and 'urf), Shibli observes that the Prophet establishes the limits of valid 'urf during the time of revelation, and this is embodied in the approval or rejection of a particular Arabic practice.³³ If

²⁸ Arani, *Naqsh 'Urf*, 38.

²⁹ Arani, *Naqsh 'Urf*, 20.

³⁰ *English Translation of the Message of the Qur'an*, trans. Syed Vickar Ahamed (Illinois: Books of Signs Foundation, 2007), al-A'rāf 7/199.

³¹ Arani, *Naqsh 'Urf*, 21; al-Baqara 2/180, 229, 232, 233, Āl 'Imrān 3/104, al-Nisā' 4/25, 19, al-Luqmān 31/15, al-Mumtahina 60/12.

³² Arani, *Naqsh 'Urf*, 43, 50; Al-Ghaṭā'i, *Al-'Urf*, 21; Muḥammad Taqī al-Ḥakīm, *Al-Uṣūl al-Āmmati li-Fiqh al-Muqārim* (Mu'assasa Āl al-Bayt, 1979), 375.

³³ Shibli, *Uṣūl al-Fiqh*, 335,336.

the community's agreement upon a particular practice produces social benefit or reduces harm, it becomes a religiously valid source that functions in accordance with the rational limits put in place by the Prophet.

The validity of *'urf* and its legal status in Ja'fari school of law mainly originate within three points: firstly, those which address the direct statements of the Prophet or *imāms* that relate to *'urf*; secondly, those that reflect the notion of classical and famous Ja'fari scholars (including *marjī' taqlīds*); and finally, those that are presented in the Ja'fari legal verdicts (*fatwā*) through *'urf*. The narrations or legal verdicts of *imāms* are the primary prove-nances that are referred to in order to legalise the use of *'urf* in the solutions concerning maintenance, dower, custody, or possession. As an example, the permissibility of the Nowrūz celebration in Ja'fari understanding is established with reference to *imām* Ja'far's opinion that states: "Every day in which we do not disobey the God is *eid*."³⁴ The positive appraisal for the customary celebration is underlined by the fact that it establishes chronological links between Nowrūz day and the acts of Prophets and *Imāms* – these include the day of allegiance in Ghadīr, the victory of Nahrawān, or the existence of Dajjāl.

The second category of legal proofs includes the theoretical statements of famous Ja'fari scholars and their practical verdicts that enable to reach the solution through *'urf*. Al-Ḥillī (1250-1325), prestigious and authoritative Ja'fari scholar, reflects further upon the meaning of religious ordinances. He states:

"The consideration of *'urf* is done one of the two ways (the prominence of metaphorical usage with customary consideration and the appropriation of names for particular thing with customary consideration), it is not permissible to prove a third method (for the usage of *'urf* in the linguistic explanation). If the truth is reached by means of *'urf*, the original proofs exist with it."³⁵

In lending further support to the use of *'urf* for the linguistic definition of legal terms, Al-Ḥillī approves the use of customary words (such as referring to a pregnant camel as *'mazāda'*) as indicating an established tendency within the community. In explaining permissible and edible food, Al-Ṭūsī (1201-1274), well-known notable scholar, states:

"In case of lacking evidence in the *sharī'a* regarding permissibility or prohibition of eating the meat of certain animals, the reference is made to

³⁴ Abū Ja'far Muḥammad ibn al-Ḥasan ibn 'Alī Al-Ṭūsī, *Miṣbāḥ al-Mutahajjīd* (Beirut: Al-Alami Library, 1998), 512-515.

³⁵ Al-Ḥasan ibn Yūsuf Ibn al-Mutahhār (al-Ḥillī), *Nihāyat al-Wuṣūl ilā 'Ilm al-Uṣūl* (Qom: Maktaba Al-Tawhīd, 2004), 1/244-245.

the Arabs' customary practices and usage ('urf and āda). In other words, what the Arabs consider as good food is lawful and when the food is unpleasant, it is forbidden. When there is no evidence mentioned in the customary practices or jurisprudence, the scholars' resort to analogy where they compare the item with its closest possible similarity and thus deduct the ruling of either permissibility or prohibition."³⁶

Al-Ṭūsī's approach to edible food sets out specific criteria that relates to customary practices and his direct reference to custom clarifies a number of important conditions.³⁷ He considers the concept of 'urf as being the first applicable reference which lies beyond the shar'ī sources; however, he then situates reason (aql) in second place and presents it as a legal tool that enables comparison of the two most similar cases depending on local 'urf. In highlighting this, Al-Ṭūsī demonstrates that there must be an option to select from among the practices; by logical extension, compulsory or obligatory acts are not sufficient to infer customary practice as a legal source.

Al-Shahīd al-Awwal explains, when 'urf is analysed as a legal principle, it can be understood as a common tool within presented decisions or as an explanatory criteria in the determinative process.³⁸ Communication styles, consideration of citations (the opinions of third parties), eye witnessing, and scale can, under particular circumstances, be considered as important reference points for 'urf when it functions as a legal principle. Ṭabāṭabā'ī (1904-1981), famous Ja'farī scholar, provides further clarification by adding that "[c]ustom is the prevalent beautiful traditions and practices among the wise men of community, unlike the rare and unacceptable things that society and conventional wisdom reject."³⁹ In referring to the practice of knowledgeable person, he connects 'urf with other Ja'farī legal principles which is known as sīra 'uqalā'yya and reflects acts of wise people. 'Irāqī, a twentieth century Ja'farī scholar and writer of *Maqālāt al-Uṣūl*, claims:

"Imitation reflects the act of human being for the situations in which people do not have enough information about it. It is a natural and subjective tendency that exists in the behaviour of all human beings. Sīra, urf and 'uqalā also cover the same meaning from legal approach."⁴⁰

The comparison of 'urf with taqlīd highlights the natural root of 'urf that is derived from people's imitative and repetitive acts. Al-Ṣadr clarifies:

³⁶ Abī Ja'far Muḥammad ibn al-Ḥasan ibn 'Alī al-Ṭūsī, *Al-Mabsūṭ fī Fiqh al-Imāmiyya* (Beirut: Dār al-Kitāb al-Islāmī, 1992), 6/278.

³⁷ Al-Ṭūsī, *Al-Mabsūṭ*, 6/279.

³⁸ Al-Shahīd al-Awwal, *Al-Qawā'id*, 151.

³⁹ Muḥammad Husayn Al-Ṭabāṭabā'ī, *Al-Mizān fī Tefsīr al-Qur'an* (Beirut: Mu'assasat al-'Alamī, 1997), 8/384.

⁴⁰ Saljooghi, *Naqsh 'Urf*, 24.

“*Sīra ‘uqalā’iyya* is a specific term that explains the general approach of reasonable religious people and others towards a certain behaviour. Having no legal proof plays a positive role in the formation of this tendency, for example, the knowledgeable religious people would take the words of the speaker at its face value without digging deep into it. . . . It is not the result of legal statement, but as a result of various factors and other influences that is embraced according to the penchant and activities of reasonable people. Therefore, the general trend which is presented by *sīra ‘uqalā’iyya* is not confined only to the realm of religious people, because religion was not one of the factors which led to the establishment of this tendency.”⁴¹

Here, it will be noted that Al-Şadr evaluates the concept of *‘urf* within the framework of *sīra ‘uqalā’iyya*. He emphasizes that practices must be compatible with religious ordinances and underlines that the permissibility of customary practices should be considered with reference to society’s benefits and interests. If it is discovered that the practice is hostile to the public interests, it either has to be corrected by other practices or replaced entirely by new *‘urf*. Al-Anşārī, a modern Ja’farī scholar, encourages jurists to rule on cases by applying reason (*‘aql*) to uncertainties arising from the absence of an indicator in the classical sources.⁴² The principle of presumption of permission (*aşl al-barā’ā*) and presumption of continuity (*istişhāb al-ḥāl*) are addressed positively by scholars who attend to the disputes. This is shown by the fact that when there is no statement that permits or prohibits the disputed issue. The presumption of continuity for repetitive customs and the presumption of permission for indefinite legal concepts both also further the impression that *‘urf* has been accepted.⁴³ Aranī observes:

“*‘Urf* is an expression of consuetudinary behaviour or public methods among community members on performing or avoiding a particular practice whether in the form of speech or deed.”⁴⁴

Madani, a twentieth century Ja’farī scholar and the writer of *Mabānī wa Kulliyāt ‘Ilm Ḥuqūq*, provides further clarification:

“In the terminology of jurisprudence, *‘urf* is an expression that covers the particular speech or behaviour of the whole community or majority of people within a place of the community. In other words, when a particular norm becomes habitual practice among people, the act should be qualified

⁴¹ Al-Şadr, *Al-Mu’ālim*, 168, 169.

⁴² Zackery Mirza Heern, “Thou Shalt Emulate the Most Knowledgeable Living Cleric: Redefinition of Islamic Law and Authority in Usuli Shi’ism”, *Journal of Shi’a Islamic Studies* 7/3 (2014), 321-344, 327.

⁴³ Murtaḍā al-Anşārī, *Farā’id al-Uşūl* (Qom: Bāqirī, 1998), 343.

⁴⁴ Saljooghi, *Naqsh ‘Urf*, 25.

within the range of mandatory (norms) that certifies the recognizable authority of 'urf."⁴⁵

Finally, Saljooghi, a contemporary Ja'fari scholar, clarifies:

"'Urf is an element and method of jurisprudence on the social ground because it only becomes referable source for legal rights and laws in the case of focusing this (social) point."⁴⁶

The theoretical grounding for the reference to 'urf is set out clearly in the linguistic sphere where it is justified as the interpretation and understanding of the peoples' responses and behaviours toward religious ordinances. To take one example, the acceptance of local words for those who cannot pronounce the required formulas (for marriage, divorce, or selling) or the approval of locally prevalent behaviour for deaf or dumb members of community supports the place of 'urf within the Ja'fari school of law.⁴⁷

3. THE DISTINCTION BETWEEN 'ĀDA (USAGE), 'AQL (REASON), IJMĀ' (CONSENSUS), MAŞLAḤA (PUBLIC INTEREST) SĪRA 'UQALĀIYYA (RATIONAL PRACTICE) AND 'URF

Consideration of 'urf in legal area comes with a lot of cognitive complexity by its very nature because it shares particular mutual points with other legal principles of Ja'fari school of law such as usage ('āda), reason ('aql), consensus (ijmā'), public interest (maşlahā), rational practice of reasoned people (sīra 'uqalaiyya), and rational practice of Muslim scholars (sīra mutasharri'a). Analysis of these different legal principles not only shows the influence of 'urf in a broad sense but also elucidates its transformational structure throughout the legal history. The Ja'fari 'ulamā' generally analyse the complex relationship between 'urf and 'āda with reference to three categories.⁴⁸ The followers of the first opinion maintain that there is no distinction between the definition of 'urf and 'āda – this applies because these two terms are taken to be synonymous with one particular meaning. The approach establishes that what people know and use in abandonment, actions and speech can be considered to be 'urf and referred to as 'āda.⁴⁹ Advocates of the second approach insist on that the definition of 'urf and 'āda can be distinguished. They proceed to assert that customary acts can be conceptualized as 'āda and speech or verbal expressions are viewed as

⁴⁵ Saljooghi, *Naqsh 'Urf*, 26.

⁴⁶ Saljooghi, *Naqsh 'Urf*, 53.

⁴⁷ Al-Shahid al-Awwal, *Al-Lum'a al-Dimashqiyya* (Qom: Dār al-Fikr, 1994), 35.

⁴⁸ Saljooghi, *Naqsh 'Urf*, 53.

⁴⁹ 'Abd al-Wahhāb Khalāf, *Ilm Uşūl al-Fiqh* (Qairo: Dār al-Qalem, 1942), 89-90; 'Abdullah bin 'Abd al-Muhsin al-Turki, *Usūl Madhhabī Imām Aḥmad* (Mu'assese al-Risāla, 1990), 583.

‘urf. Those aligned with the third opinion suggest that the distinction pertains to general or particular meaning of the word. They suggest that this applies because *‘ada* can, to a greater extent than *‘urf*, be considered and engaged in general terms.⁵⁰ The traditional Ja‘farī *‘ulamā*’ mainly follow the third variation and therefore emphasise the practice’s generality or particularity. A linguistic scholar, Ibn Manẓūr (1233-1312) refers to the reliability of general *‘urf* without mentioning *‘ada* and notes that it might be conceived as an advantage upon the grounds that it will assist individuals to find a confidential and peaceful path.⁵¹ It appears as the combination of traditions, desirable activities and useful methods that pervade society and clearly contrast with the exceptional and rare actions that both the community and social consciousness have designated as evil acts. Ṭabāṭabāī (1904-1981), the renowned Ja‘farī scholar, further clarifies that *‘urf*, as the practice of the entire society, contains formally recognized activities of society.⁵² Al-İşfahānī (-1108), a twelfth century classical Ja‘farī scholar, asserts that *‘ada* is a noun that renders acts or reactions that are repeated until they become consistent, easily achievable or natural deeds.⁵³ The main underpinning doctrine within the classical Ja‘farī school of law maintains that *ma‘rūf* and *‘urf* relate to acceptable, good and positive deeds because good conduct can be designated as the most common character-trait of human beings. Saljooghi, a modern Ja‘farī scholar, further emphasises on the distinctive nature of *‘ada* and its position within contemporary Ja‘farī school of law. He states:

“*‘Ada* is certain consuetudinary behaviour in which the effect and repetition of certain practice becomes (habitually) achievable for a person. And then, following the same style for the performance of act makes it *‘ada* (habitual). It does not need any explicit intentional practices because each time upon satisfying the conditions, *‘ada* has been automatically performed as in the past.”⁵⁴

The terminological understanding advanced by the majority of scholars refers to the commonality or generality of *‘urf* that is required if it to be recognized as a legally valid source. By insisting on this opinion, they exclude *‘ada* because of its individual or local character. Although the majority of classical Ja‘farī scholars privilege the status of *‘urf*, there are contemporary scholars who do not differentiate between the meaning and usage of

⁵⁰ Ṣāliḥ ibn ‘Abd al-‘Azīz Al-Manṣūr, *Usūl al-Fiqh wa Ibn Taymiyya* (Egypt: Dār al-Nashr, 1985), 512.

⁵¹ Saljooghi, *Naqsh ‘Urf*, 19.

⁵² Arānī, *Naqsh ‘Urf*, 20; al-Ṭabāṭabāī, *Al-Mizān fī Tafīr*, 8/380.

⁵³ Abū al-Qāsim al-Ḥusayn ibn Muḥammad al-Rāghib al-İşfahānī, *Al-Mufradāt fī Gharīb al-Qur‘ān* (Mecca: Maktabatu Nizār Mustafā al-Bāz, 2009), 457.

⁵⁴ Saljooghi, *Naqsh ‘Urf*, 54.

these two terms by advocating the first opinion. The Civil Code of Iran considers the two terms to be synonymous, to the point where they are interchangeable.⁵⁵ Mahdi, a contemporary Ja'fari scholar, provides further clarification by observing that whenever *āda* and *'urf* are used together, the former addresses the legal relationship between two or more people whose are not part of a class or group; the latter, meanwhile, addresses the familiarity which is inherent within a particular class, community or group.⁵⁶ Although the Iranian Civil Code maintains that the two words are interchangeable, modern Ja'fari school of law (prioritising the classical tendency) generally refers to *'urf* and sometimes invoke *āda*; it is rare, however, for both words to be used simultaneously. It is important to acknowledge that according to opinion of Ja'fari scholars, *āda* mainly possesses an individual character and is performed by a limited number of individuals such as local custom (*'urf khaṣṣ*). From legal perspective, this is significant because it prevents scholars from considering it as a legally valid source. While *āda* originates within natural conditions, personal desires or special events, general custom (*'urf āmm*) conceivably originates in reason or the opinion of wise individual whose ideas and practices are followed by laymen. It could be argued that the distinction between the two terms originates within the compulsory, hidden and mandatory character of *'urf*. Rather than emphasising the division between the linguistic definition of two terms, contemporary scholars pay attention to three main conditions: firstly, it must be a particular or definitive act; secondly, it must be reiterated by the majority of individuals; and finally, it must be grounded within voluntary, rather than obligatory, conduct.

The distinction between the principles of consensus (*ijmā'*) and *'urf* needs to be acknowledged. The main discrepancy pertains to their origins because *'urf* relies on collective acts of society while *ijmā'* derives its authority from the religio-rational deduction of scholars.⁵⁷ However, a practical consensus begins to emerge in situations in which the inhabitants of a particular period and knowledgeable individuals are familiar with an act and practice it regularly. This initially takes the form of *'urf*, which is later superseded by a large number of *āda* and *'urf* by taking on the appearance of practical consensus. Although the latter, on obtaining religious prestige, leads to *'urf* being considered within the framework of consensus, a legally

⁵⁵ The Civil Code of the Islamic Republic of Iran, National Legislative Bodies (1928), Article. 54 (The rest of the circumstances concerning the exploitation of the property of another shall be as laid down by the owner or demanded by custom and usage.) See more Articles: 220, 280, 356, 357, 456, 667, and 1131.

⁵⁶ Arani, *Naqsh 'Urf*, 29.

⁵⁷ Shibli, *Uṣūl al-Fiqh*, 328.

valid consensus is still required (even if it is to be accepted and produced by the religious scholars). Indeed, while changes within *‘urf* are acceptable, comparable adjustments of *ijmā‘* do not meet with similar approval, with the only exception being the alteration of social benefit.⁵⁸ In advancing the accepted assumption of collective righteousness, the relationship between *ijmā‘* and *‘urf* appears to be distinctive to a certain extent, and this is embodied within the allusion to *sīra ‘uqalā’iyya*. The capability of reason to differentiate between positive and negative objects has been used as a proof to argue that there is no contradiction between reason (*‘aql*) and *‘urf*. Custom and rational foundations must have authority, credibility and reliability if they are to function as a legal grounding that can be approved by a lawgiver. In his evaluation of eatable foods, Al-Ṭūsī places *‘urf* at the first line of sources in the absence of textual solution, but he aims to strengthen *‘urf* with *‘aql*. This consideration supports the idea that *‘urf ṣahīḥ* is evaluated under the scope of *‘aql*.

Individual reasoning of human’s interpretation is mainly discretionary while public interest (*maṣlaḥa*) is generally rooted in rational interpretation of religio-legal sources and easiness of the community.⁵⁹ In being considered under the *maṣlaḥa*, *‘urf* may become recognisable as it will enable the community to perform their usual activities with a greater degree of ease. In addition, the Sunna’s approval for the acts of the *imāms* or *ma‘šūms* (innocent leaders of the society according to Ja‘farī school of law) is understood to be a legally valid proof which even encompasses customary norms (such as permissibility of celebrating Nowrūz festivals). This applies because according to Ja‘farī school of law, the *imāms*, in providing their decision, do not consider particular *‘urf*, but instead take into account the benefits that accrue to the Muslim community. It should be recognized that the relationship between *maṣlaḥa* and customary practices have not been closely scrutinised by Ja‘farī scholars because the majority of them view *‘urf* as being an element of *maṣlaḥa*. Shibli acknowledges the role of *‘urf* in abolishing tribute (*kharāj*) and clarifies that although the main proof is linked to *maṣlaḥa*, the interpretation of *‘urf* impacts understanding of this concept.⁶⁰ The principle of *maṣlaḥa*, which upholds what is appropriate and forbids what is wrong, plays an important role by preserving the safety of the region and encouraging scholars to ignore the infusion of customary norms into religious interpretations.

The legal validity and recognition of *‘urf* and *sīra ‘uqalā’iyya* within

⁵⁸ Shibli, *Uṣūl al-Fiqh*, 329.

⁵⁹ Shibli, *Uṣūl al-Fiqh*, 123.

⁶⁰ Arani, *Naqsh ‘Urf*, 33, 34.

the Ja'farī school of law represent variety according to dependent or independent nature of 'urf. Al-Ghaṭā'ī, the nineteenth century Ja'farī scholar, divides general 'urf into two categories by addressing *sīra 'uqalā'iyya* and *sīra mutasharri'a* within a single category. The principle of *sīra 'uqalā'iyya* involves the renowned deeds, explanations and practices of both knowledgeable Muslims and their counterparts within other religions – both fall within the framework of general 'urf. The argument is that since the rationality is the main contributor to the creation of common practice, the practices might be resorted in order to obtain legal solutions.⁶¹ The principle of *sīra 'uqalā'iyya*, in being established as a general tendency amongst people, does not derive from legislative statements or religious motivations, but rather from justifications or methods taken from legitimate statements. It is this natural character that leads to its formation and implementation.⁶² However, the consideration of *sīra mutasharri'a*, to the same extent as *ijmā'*, originates within the validity of inductive methods. This positive approach within the Ja'farī school of law frequently leads to legal statements being asserted with *sīra mutasharri'a* rather than 'urf within the textual interpretation procedure. At this point it should be noted that addressing *sīra mutasharri'a* principle rather than 'urf, increases the reliability and validity of ruling from religio-legal dimension. Al-Ghaṭā'ī, in addition, argues that the general 'urf and *āda* is known as *sīra mutasharri'a* and maintains that this does not deter the customary and legal elements of the practice.⁶³ When it actualizes and fulfils the conditions, it is recognized as evidence; however, if it does not satisfy the requirements, it is not considered during the legislation process.⁶⁴ In explaining *sīra mutasharri'a*, Al-Ṣadr notes:

“[W]e sustain the possibility of error, negligence and even tolerance. If we know that the two individuals are following the same behaviour or opinion in the time of the legislation and performing the noon prayer in a similar vein on the day of Friday, this increases the reliability or validity of the proof.”⁶⁵

From Ja'farī point of view, performance time of noon prayer on Friday relays on the *sīra mutasharri'a* in accordance with religious statements that indicate the clear influence of the decision. It is, therefore, obvious that the approach of Ja'farī scholars towards the deduction method of *sīra 'uqalā'iyya* (having no connection with legal sources) clearly differs from the concept

⁶¹ Al-Ghaṭā'ī, *Al-'Urf*, 9, 15, 16.

⁶² Muhammad Bāqir Al-Ṣadr, *Al-Mu'ālim al-Jadīda li-Uṣūl* (Tehran: Maktaba al-Najāh, 1975), 169.

⁶³ Al-Ghaṭā'ī, *Al-'Urf*, 10.

⁶⁴ Al-Ṣadr, *Al-Mu'ālim*, 168.

⁶⁵ Al-Ṣadr, *Al-Mu'ālim*, 168.

of *sira mutasharri'a* (having limited connection with legal sources).⁶⁶ The acceptance of gifts, arrangement of different receptions for female and male messengers, congregation spaces, drinking from owned rivers and streams, donation amount, designation of scores, farewell courtesies, opening of doors, welcoming the guests, picking of fruit upon noticing the appearance of ripeness, praying in the desert, preservation methods of foods from severe conditions or taming of animals, in each of these areas, *sira 'uqalā'iyya* has an important customary role. Compensation contracts, concept of possession, division of property in the aftermath of woman-initiated divorce, downloading of authorized materials from the internet, equality of marriage, observance of dower, title, height of standing place for the *imām* during prayers, or a wife's permission for her husband to work at night are some areas that are most frequently referenced by *sira mutasharri'a*. There is a distinction between renting animals, objects and substances, and it is frequently necessary to refer to customary practices in order to identify the conditions, prices and requirements that correspond to each of these items. As an example of this consideration, *'urf* can be recognised in the words of 'bequest' and 'endowment' because upon a person's authorisation to use an endowment to construct a mosque, the will is conceptualized with reference to customary conjecture whose only purpose is to construct a mosque. The same situation applies to guests when the owner brings foods – guests are not required to ask for permission before consuming them peculiar to local *'urf*.⁶⁷

Ja'fari scholars, however, have avoided invoking *'ada* and *'urf* in their later works and they have more frequently engaged with *sira 'uqalā'iyya*, a quite recent concept of customary understanding. While classical scholars initially used *'ada* and *'urf* during the foundational period of the Ja'fari school of law, later ones have preferred to use *sira 'uqalā'iyya* principle over a longer period of time.⁶⁸ This is why the majority of recent Ja'fari literature does not devote an independent section to *'urf*, but instead prefer to focus upon *sira 'uqalā'iyya*. Al-Şadr further explains the hierarchy of legal proofs and places *sira 'uqalā'iyya* at the lowest level by excluding *'urf*. He observes:

“The confirmation of texts revealed from the Prophet and infallible

⁶⁶ Al-Şadr, *Al-Mu'ālim*, 169.

⁶⁷ Al-Shahid al-Awwal, *Al-Qawā'id*, 148.

⁶⁸ Al-Shahid al-Awwal, *Al-Qawā'id*, 41. The changing nature and usage of *'urf* and *sira uqalā'iyya* throughout the history of Ja'fari school of law is explained in detail. For further insight refer to, Sümeyra Yakar, *The Implicit Role of Custom ('Urf) in the Islamic Jurisprudence of Saudi Arabia and Iran: A Comparative Study of Mu'āmalāt (Marriage and Divorce Rules)* (Exeter: University of Exeter, Institute of Arab and Islamic Studies, Pd.D. Dissertation, 2019), 96-107.

imam with *tawātur* creates legal decisions and this is categorized in the framework of linguistic proofs. With the same approach, the linguistic type of indirect inductive methods includes various categories such as consensus (*ijmā'*), famous (*shohrat*), news, information (*khobar*), and biography or practice (*sīra*)... On the one hand, legislative practice (*sīra mutasharri'a*) is the behaviour of the religious public in the time of ruling such as the agreement of previous scholars to perform the noon prayer time in the place of Friday prayer or the annulment of tribute payment from inheritance. On the other hand, the *sīra 'uqalā'iyya* with its unique style differs from the *sīra mutasharri'a*. The concept of *sīra mutasharri'a* is the outcome of legitimate (*shar'i*) statement, so that it is considered as an exploratory factor. However, the *sīra 'uqalā'iyya* is attributed to the general tendency that is found in the particular practices of reasonable people.⁶⁹

The *sīra mutasharri'a* is, therefore, the behaviour of one religious individual during the time of ruling. The religious identity of the individual and the fact that it is followed by the majority of the community are considered to sufficiently prove the adequacy of the *shar'i* statements. The given decision for the particular behaviour or practice is tolerated upon the basis of a legitimate statement.⁷⁰ The reliability of proof increases or even attains a high level when the practice is generally implemented by the entire religious community during the legislation process. It is maintained that when the practice is pursued by the majority of the religiously devout, it is not possible for it to include error and negligence. Although a specific '*urf* originates within social practices rather than *shar'i'a*, the absence of legal proof or the silence of legal sources are used as proofs to justify the legal approval of its practice.⁷¹ The scholarly position upon '*urf* can be summarised as entailing that a customary case becomes legally credible and its usability extends in harmony with the situation that needs solution.

Take into consideration the analyses of above-mentioned principles, the thematic interpretation and willed expression of '*urf*, two main styles of its usage becomes prominent: it is either recognised as an object by itself in the form of direct style (which is common during the classical period) or in the form of indirect style mixed with legal principles (which is common during contemporary period). The Ja'fari school's methodological structure privileges reason as a legal tool and this authorises the religious scholars to refer to direct and semi-independent '*urf* when there is no textual source. The freedom to use semi-independent '*urf* in non-textual disputes and the

⁶⁹ Al-Ṣadr, *Al-Mu'ālim*, 149, 165, 166, 169.

⁷⁰ Al-Ṣadr, *Al-Mu'ālim*, 167, 168.

⁷¹ Saljooghi, *Naqsh 'Urf*, 46, 47.

validation of these decisions by scholars help to explain the legal diversity. In addition, the second style, which is accompanied by reason (*‘aql*) is also widely used by the *‘ulamā*, along with concepts of public interest (*maşlahā*), rational practice (*sīra ‘uqalā’iyya*), accepted purity or exemption (*aşl al-barā’ā*), continuance (*istişhāb*), necessity (*darūra*). The chronological development of *‘urf* as a legal principle shows parallelism with the enhancement of legal methodology that Mallat considers mutable nature of Islamic law.⁷² The application of these principles within the traditional sources of the Ja’fari school enables *‘urf* to be indirectly infused into the legal scope with an indirect and dependent way. It could be claimed that Ja’fari scholars remain receptive to all styles of *‘urf* when there is an absence of textual sources. In the recent period, however, the vulnerable nature of *‘urf* from legal viewpoint leads scholar to refer to the principle of *sīra ‘uqalā’iyya* which find its origin in the rational deduction methods.

CONCLUSION

The legal rulings of scholars appear as a synthesis of quotations from the Qur’an and the Sunna which attempt to rationalize the motivation for either acceptance or rejection of acts with reference to various legal principles. It should be acknowledged that the acceptance of the *Imāms*’s words within the *ḥadīth* sources sometimes opens the way to customary reflections since their expressions include elements from their own community. The acts, consents and words of *Imāms* provides legal grounding for the extension of customary influences over religious rituals. For Nowrūz celebrations, the contemporary Ja’fari scholars used the *ḥadīth* of *imāms* in the expectation that this would permit different solutions. The last section relates to the manner of reasoning with procedural and secondary principles when the legal norms are not deduced from those four basic sources (the Qur’an, Sunna, *ijmā’*, and *‘aql*). The scholars have sought to set out the principles in more detail, along with the conditions of their implementation. These principles relate to cases in which the true ordinance of God is not clear or known. These legal principles broadly enable contemporary Ja’fari scholars to achieve considerable adaptability and flexibility of law when encountering changes and new issues. When no provision exists in the legal sources for a case under consideration, the scholar has to, by implementing the principles of the Ja’fari school of law and operating within the limitations

⁷² Emine Enise Yakar, “Chibli Mallat. Introduction to Middle Eastern Law. Oxford: Oxford University Press, 2007, XXVII + 455 pages.”, *Marmara Üniversitesi İlahiyat Fakültesi Dergisi* 57/2 (2019), 114.

established by its methodology, render a verdict that secures justice in a practical way.

There is a scholarly consensus which holds that particular behaviours and exercises can be considered as a driving force. The placing of *'urf* within the type of indirect inductive methods enables the *sahīh 'urf* to gain legal validity. Upon encountered a novel issue, the Ja'farī scholars have sought to embrace legal compatibility and practical precedent, with both being privileged over a rejectionist stance. The reliance of Ja'farī school of law on reason, therefore, has an important contribution to make any attempt to identify how *'urf* has been advanced within the methodological hierarchy. It could be argued that *'urf* is a positive internal principle which helps to establish a legal mechanism – from this perspective, it no longer appears as a negative external force that attacks Islamic principles. The approaches in the Ja'farī school of law shows how *'urf* is used as a preventive measure to guide and inspire predominant public trends and deter the community from wrongful behaviours that fall beyond the scope of legitimate practices. At the initial and foundational periods, classical Ja'farī scholars openly referred to *'urf* as an independent source of ruling. However, the scholars of later and contemporary period have avoided to address *'urf* directly but prepared a substructure with *'urf* in order to use during the interpretation of procedural and secondary sources. Among these sources, especially *sīra 'uqalā'iyya* principle has gained a prestigious position and expanded the range of its validity in legal area according to explanations of recent Ja'farī scholars. *'Urf*, in operating as a legal constraint, prioritises the local conditions of the region and simultaneously operates at the level of theory and practice. Additionally, the directive character of it enables authorities to apply *'urf* as an influential material and supplementary mechanism that can be used to create Islamized communities and societies. The peculiar customs, along with the existence of different legal schools of law within the Muslim geography have provided a more sustainable explanation for the diversity of the legal opinions within the religious framework.

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