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

CAFER İ MEZHEBİNE ÖRF VE SĪRA ‘UQALĀIYYA (AKLA DAYALI ÇIKARIM) DELİLLERİ ARASINDAKİ ETKİLEŞİMİN ZAMANSAL ANALİZİ

SUMEYRA YAKAR
DR. ÖĞRETMİĞ GÖREVLİSİ, İĞDIR ÜNİVERSİTESİ, İLAHİYAT FAKÜLTESİ, TEMEL İSLAM BİLİMLERİ ANABİLİM DALI,
ASSISTANT PROFESSOR, UNIVERSITY OF IGDIR, FACULTY OF THEOLOGY, DEPARTMENT OF ISLAMIC STUDIES,
sumevrakar@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 intents 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 ījmā’, mašlaḥa, āṣl al-barā’a, istiṣḥāb, sīra ‘uqalā’iyya, and sīra 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 intents to scrutinise the similarities between the principles of sīra ‘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 (ḥarām), indispensable or expressly commanded actions (wājib or fard), admissible or permitted actions (mubah), 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’ān, the Sunna, ījmā’ (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 sīra ‘uqalā’iyya 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 sīra ‘uqalā’iyya 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 sīra ‘uqalā’iyya clarifies that ‘urf (which finds its origin in the daily practices of people) is considered more vulnerable than and sīra ‘uqalā’iyya (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’, maslaḥa, aṣl al-barā‘, istiḥāb, sīra ‘uqalā’iyya, or sīra 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, Sīra ‘Uqalā’iyya, Iran, Custom (‘Urf)

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Öz
İslam hukukunun kuruluşundan günümüze kadar gelen dönemde, zaman, mekan ve toplumlarla meydana gelen değişimlerle birlikte hukuk usulünde kullanılan fer’i delillerde de gelişmeler meydana gelmiştir. Kur’an, sünnet, icmā‘ ve akil Caferi mezhebinin aslî delilleri olarak her dönmeyi geçerliliğini korumasına rağmen, maslaḥa, istihsan, istiḥāb, iḥtiyāţ, iḥtiyyāţ, sīra uqalaiyya gibi fer’i deliller klasik döndemden günümüzde terminolojik değişimler göstermiştir. Araştırma klasik döndemden günümüzde Caferi mezhebinde hâkim olan fer’i delillerin kullanılışında ve anlaşıltısında zaman içerisinde meydana gelen değişiklikleri açıklamayı amaçlamaktadır. Çalışma
hükümlerin teoriden pratiğe aktarılmasında örfün (‘urf) fikhi bir delil olarak kulla-nmiddaki değişik yaklaşımları vurgulamakta birlikte, çağında otorite olarak kabul edilen, örf delili üzerinde görüş bildirmiş Caferi alimlerin bu farklılık ve değişim- ler üzerindeki açıklamalarına değinmektedir. Caferi mezhebinde kullanılan *ijma*, *maslaḥa*, *aṣl al-barā', istişhab sira* ‘uqalā’iyya, veya sira *mutasharri’ı* gibi fikhi delil- lerle örf olarak kabul edilen, farklı yaklaşımları vurgulanmasıyla, özellikle günümüzde Caferi alimlerce sıkıla bağırlanılar bir delil olan sira ‘uqalā’iyya örfle bağlantılı şekilde fıkhi bağlamda analiz edilmiştir. Pratikteki uygulamalarından da destek alan teorik bir çerçeveyi çizmekte Caferi mezhebindeki genel eğilimi yansıtmakla birlikte örfün fikhi bir delil olarak Caferi alimler tarafından kullanımını açıklamaktadır.

**Özet**

Caferi mezhebinde hukuk anlayışı kanuni bir adalet uygulamasından daha ziyade, kaynağı teolojik temellerden ve ahiret inancından alınlık bir uygulama olarak kabul edilmektedir. İnsan toplumunun, her bir bireyin davranışlarının sınırları İslami hükmüler tarafından belirlenmediği sürece doğru yola ve kurtuluşa ulaşma-mayacığı anlayışi alimlerin hakim görüşü olarak diğer alanlarda olduğu gibi Caferi hukuk sisteminde de kendisini göstermektedir. Caferi mezhebince kabul edilen görüştüne göre doğru olan dini hüküm ve uygulamalar ise hazreti peygamber ve masum imamlar tarafından anılacak şekilde açıklanmaktadır. Dini hükümler Allah’ın emirlerine uygulanamakla göre kesinlikle yasaklanmış *haram* fililler, yapılması açıkça emredilen *wajib* fililler, yapılmasına sahıh olan *mubah* fililler, yapılması tavrda edilen *musthāb* fililleri ve yapılmasına sahıh olan *mekruh* fililler olmak üzere beş temel gruba ayrılar. Fıkhi asıl kaynak ve metotlara geçerli bir hüküm ulaşılammersini durumunda, örf ve örfle bağlantılı olan ilkiçin statüdeki deliller geçerli birer kanon olarak fikih alanında kendini gösterir. Sosyal hayatta karşılaştırılan sorunların sınırlanılarak imkansızlığına bir yanıt olarak, Caferi alimlerce kullanılan örf ve örfle bağlantılı alimlerce verilen hükümlerin geçerliliği arttırmış ve toplum içinde yaygın olan filillerin fıkhi alanında mubah olarak kabul edilmesine sağlamıştır.

Sorunlu durumların ortaya çıkmasıyla örf veya örfle bağlantılı olarak verilen hükümlerin, örften daha ziyade İslam hukukunun ilkiçin kaynaklarıyla bağlantılı kulu-cularak açıklanması, fıkhi teorinin metot eksikliğine gizlense de, bu durumun anlaşılmaması durumunda, örf ve örfle bağlantılı olan ilkiçin statüdeki deliller geçerli birer kanon olarak fikih alanında kendini gösterir. Sosyal hayatta karşılaştırılan sorunların sınırlanılarak imkansızlığına bir yanıt olarak, Caferi alimlerce kullanılan örf ve örfle bağlantılı alimlerce verilen hükümlerin geçerliliği arttırmış ve toplum içinde yaygın olan filillerin fıkhi alanında mubah olarak kabul edilmesine sağlamıştır. Sorunlu durumların ortaya çıkmasıyla örf veya örfle bağlantılı olarak verilen hükümlerin, örften daha ziyade İslam hukukunun ilkiçin kaynaklarıyla bağlantılı kulu-cularak açıklanması, fıkhi teorinin metot eksikliğine gizlense de, bu durumun anlaşılmaması durumunda, örf ve örfle bağlantılı olan ilkiçin statüdeki deliller geçerli birer kanon olarak fikih alanında kendini gösterir. Sosyal hayatta karşılaştırılan sorunların sınırlanılarak imkansızlığına bir yanıt olarak, Caferi alimlerce kullanılan örf ve örfle bağlantılı alimlerce verilen hükümlerin geçerliliği arttırmış ve toplum içinde yaygın olan filillerin fıkhi alanında mubah olarak kabul edilmesine sağlamıştır.
değişime açık problemlerin çözümünde başvurulan ikincil delillerin yorumlanması için örfle uyum gösteren bir fıkı metodolojisi benimsenmiştir. Çafi mezhebinde kullanılan icmā’, ‘uql, maslaha, aşl al-barâ’a, istiṣlâh, istiṣḥâb, sīra ‘uqalâ’iyya, veya sīra mutasharri’r’ib gibi fıkı metodolojisinde kullanılan delillerin tanımı ve kullanımı zaman içerisinde değişiklik göstermiş ve bu farklı kullanım metotları karşvalsan sorunlar için verilen hükümlerin delillerinin açıklanmasında belirginleştirmiştir. Bu fıkı delilleri arasında özellikle sīra ‘uqalâ’iyya prensibinin son zamanlarda Çafi alimler tarafından fıkı olarak bir delil olarak sıkıla kullanılmaması, bu delile fıkı alanında prestijli bir konum kazandırılmış ve bu prensibin geçerlilik alanını mezhep metodolojisinde genişletmistir. Fıkı bir terim olarak sīra ‘uqalâ’iyya toplum içerisinde görüşleri kabul edilen, söz sahibi, saygı duyulan, liyakat ulu, barınan kimselerin onay vermesi veya uygulaması sonucunda bir fiilin bir pratiğin toplumda yaygın kazanarak benimsenmesidir. Çafi mezhebinde sīra ‘uqalâ’iyya prensibinin fıkı bir delil olarak kabul edilmişin temelinde, topluma yaygınlaşan uygulamaların temelinde mezbhebin vérdúcü temel deli olan aklın bulunduğu ve aklı dayanan fiillerin liyakati insanlarca takrârlanmasının bu uygulamalara fıkı olarak geçerlik kazandıracağını anlayışi hakimdir. Bu ön kabule birlikte, sīra ‘uqalâ’iyya bölgesinin yerel koşullara önem vererek hem teori hem pratik alanlarda kullanılabilen yasal bir denetleme mekanizması olarak mezhep içerisinde fıkı geçerliliğini artırmıştır. Çafi mezhebine sīra ‘uqalâ’iyya’nın örfi kiyasla daha kuvvetli bir delil kabul edilmiş, zaman ve mekânnın değiştirime fıkı hukümlerin belirlenmesinde ve bu hükümlerin fıkı olarak açıklanmasında sīra ‘uqalâ’iyya prensibine doğruan atıfta bulunmak şekilde kendisini göstermiştir. Araştırma klasik dönemden günümeüze Çafi mezhebinde hüküm olan feri delillerin anlaşılması ve kullanılan metotlarında zaman içerisinde meydana gelen değişiklikleri açıklamayı amaçlamaktadır. Fıkı analizindeki hükümlerin teoriden pratiğe aktarılmasında örf ve bünyesinde örfünün barındıran prensiplere fıkı bir delil olarak hüküm çıkarma sürecinde başvurulması ile ilgili yaklaşımlar derinlemesine analiz edilmiştir. Çağında otorite olarak kabul edilen örf ve sīra ‘uqalâ’iyya delili üzerinde görüş bildirmiş Çafi alimlerin görüşleri bu alimler tarafından yazılan birincil kaynaklardan tarcüm ve benimsenir. Çafi alimlerin çalışma temel olarak pratikte uygulanmalarından da destek alan teorik bir çerçeve çizerek Çafi mezhebindeki genel eğilimi yansıtmakla birlikte, sīra ‘uqalâ’iyya teriminin fıkı bir delil olarak Çafi alimler tarafından kullanılıını açıklamaktadır. Anahtar Kelimeler: İslam Hukuku, Çafi Mezhebi, Akla Dayalı Çıkarım, İran, 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 maṣlaḥa, aşl al-barā’a, istiṣḥāb, sīra ‘uqalā‘iyya, and sīra 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 sīra ‘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 usūli 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 Hasan 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

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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 (usūl 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 Fığlalı, “İsnāşeriyye”, 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), xx-xvii.

² Ayman Shabana, Custom in Islamic Law and Legal Theory: The Development of the Concept of ‘Urf and ‘Ādah 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-Ṭābātābā’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 (Usūlī) 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‘i* methodologies and principles by offering bibliographical insight into opinions of various Jā‘fārī scholars, his scope of analysis does not cover the principles of ‘urf and *sīra ‘uqalā‘iyya*. His another contribution, *Inevitable Doubt*, brings out differences between the Akhbarī and the Usūli theories by comparing the two eighteenth–century Jā‘fārī scholars. In the book, he clarifies the distinct epistemological attributes, *shar‘i* methodologies and doctrines of the two thinkers, Yusuf al-Bahrānī 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‘fārī scholars and their socio-political roles and the intellectual development of Jā‘fārī school of law. There is, however, a clear academic lacuna on the transformational alteration of legal principles in general, the principles of ‘urf and *sīra ‘uqalā‘iyya* specifically. The article, therefore, aims to fill the scholarly gap by scrutinising the transformational process of the principle of ‘urf into *sīra ‘uqalā‘iyya*. 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‘iyya*. After the foundational period of Jā‘fārī 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‘fārī 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 (*madhhab*). 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‘fārī scholars seek to identify or categorise the definition of terminological words in order to reduce the complex nature of legal sources. Al-Shahid al-Awwal (1333-1384), an authoritative and classical Jā‘fārī scholar, clarifies the predominant method of Jā‘fārī ‘ulama’ on the issue of interp-

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*p.Akhbārī* Schools in Imāmi 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 (lafẓ) 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 (sharʿī), linguistic (lughawi), and customary (ʿurfī), – the same applies to the metaphorical meaning, with the exception of letters (ḥurūf). 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 sharʿī 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 lughawi meaning - relevant examples include selling items (mebīʿun), subject (fāʿil), object (mefʿūl), or divorce (talāq).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 ʿurf as a legal tool by means of reason (ʿaql) and also provides ʿurf 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‘fārī ‘ulamāʾ generally considers customary assumptions in a way that establish the basis for repetitive activities and practices.12 From Ja‘fārī point of view, custom (ʿurf) is divided into six main categories which vary in accordance with character, compatibility, validity or comprehensibility and which are comprised of ʿurf ṣaḥīḥ, ʿurf fāṣid, ʿurf āmm, ʿurf khaṣṣ, ʿurf āmalī and ʿurf 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 (ʿurf ṣaḥīḥ). Upon entitling a specific practice as being ʿurf ṣaḥīḥ (the evaluation is done by contemporary Ja‘fārī ‘ulamāʾ), 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‘fārī scholars

10 Al-Shahīd al-Awwal, Al-Qawā'id wa al-Fawā'id (Qom: Maktaba al-Mufīd), 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-Ghāṭi, Al-ʿUrf Ḥaqīqatahu wa Ḥujjīyyatahu (PDF), 7 (Accessed 15 March 2020)
14 Muḥammad Muṣṭafā Shibli, Uṣūl al-Fiqh al-İslāmî (Beirut: Dār al-Nahḍa al-Arabiyya, 1986), 330.
treat ‘urf saḥīḥ in a similar manner to the concept of maslaḥa (public interest) and they emphasise the same root of these two principles which is the rationally provable doctrine upholding interests and protecting against corruption. However, as oppose to ‘urf saḥīḥ, invalid custom (‘urf fāsid) 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 fāsid 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. 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.

General custom (‘urf ʾāmm) is a practice that is followed by the majority of individuals within a wide number of areas. In the view of Jaʿfarī scholars, this feature establishes it as being very valuable. However, it might include elements which belongs to either ‘urf saḥīḥ or ‘urf fāsid, but the responsibility of drawing lines between these two types is the duty of Jaʿfarī ‘ulamā. In the absence of available legal sources, general custom (comprising only ‘urf saḥīḥ) 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. However, the consideration of a specific custom (‘urf khāṣṣ) that is commonly practiced by specific groups within a location creates clear disagreement among Jaʿfarī ‘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 Jaʿfarī scholars. Announcing Eid al-Fitr in the middle of the month of Shaʿbān 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.

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15 Akram Muḥammad Arani, Naqsh ‘Urf Der Tafsir qawānīn Khānda (Tehran: Nashr Mizān, 2014), 34.
16 ʿAbd al-Karīm Zaydān, Al-Wajīz fī ‘Uṣūl al-Fiqh (Beirut: Mu’assasat Qurtuba, 1987), 253.
17 Mahmud Saljooghi, Naqsh ‘Urf Der Huqūqi Madani Iran (Tehran: Mizan Legal Foundation, 2014), 30.
18 Al-Shahīd al-Awwal, Al-Qawā'id, 147.
19 Al-Ghāṭāʾī, 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 ʿāda 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 qawlī) 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 qawlī 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 (haqīqi) and metaphorical (majāzi) meaning.\(^{24}\) The priority of customary rather than literal or linguistic meaning becomes necessary if there is no clear way of abandoning the customary (‘urfī) 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 (qawlī) and practical (‘amali) customs in Ja’farī school of law.\(^{27}\) This is why the use of ʿdabbaḥ for a horse as ‘urf qawlī 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-ʿUrf, 8.
\(^{22}\) Al-Shahīd al-Awwal, Al-Qawāʿid, 150.
\(^{23}\) Al-Shahīd al-Awwal, Al-Qawāʿid, 152.
\(^{24}\) Al-Ghaṭā’ī, Al-ʿUrf, 8-9 and Al-Shahīd al-Awwal, Al-Qawāʿid, 152.
\(^{25}\) Muhammad Mustafā Shiblī, Uṣūl al-Fiqh al-Islāmi (Beirut: Dār al-Nahda al-Arabiyya), 326.
\(^{26}\) Al-Shahīd al-Awwal, Al-Qawāʿid, 138; Zaydān, Al-Wajīz, 253.
\(^{27}\) Al-Shahīd al-Awwal, Al-Qawāʿid, 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). Especially contemporary Ja’fari 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’ān according to interpretations of Ja’fari ‘ulamā refers to acceptable and correct deeds, avoidances, practices, speeches and thoughts. 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.” 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. 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’fari ‘ulamā have sought to maintain a flexible attitude and acquiescent response towards the customary acts of the community.

A well-known Ja’fari 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.”) 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 (maṣlaha 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. If
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‘fārī 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‘fārī scholars (including marjī‘ taqlīds); and finally, those that are presented in the Ja‘fārī legal verdicts (fatwā) through ‘urf. The narrations or legal verdicts of imāms are the primary provenances 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‘fārī understanding is established with reference to imām Ja‘fār’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 Dājjāl.

The second category of legal proofs includes the theoretical statements of famous Ja‘fārī scholars and their practical verdicts that enable to reach the solution through ‘urf. Al-Ḥillī (1250-1325), prestigious and authoritative Ja‘fārī 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 ‘mażada’) 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 shari‘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 ‘Ali 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 deduce 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. Tabātabā’ī (1904-1981), famous Ja‘fari 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‘fari legal principles which is known as sīra ‘uqalā‘iyya and reflects acts of wise people. ‘Irāqī, a twentieth century Ja‘fari 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 ‘Ali al-Ṭūsī, Al-Mabsūṭ fi 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 Muhammad Husayn Al-Ṭabāṭabā’ī, Al-Mīzān fī Tefsīr al-Qur‘ān (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.”

Here, it will be noted that Al-Ṣadr 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-Anṣārī, a modern Ja’fari scholar, encourages jurists to rule on cases by applying reason (‘aql) to uncertainties arising from the absence of an indicator in the classical sources. The principle of presumption of permission (aṣl al-barā’a) and presumption of continuity (istiṣḥāb 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.

“A ‘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.”

Madani, a twentieth century Ja’fari 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-Ṣadr, Al-Ma‘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-Anṣārī, Farā’id al-Uṣūl (Qom: Bāqirī, 1998), 343.
44 Saljooghi, Naqsh ‘Urf, 25.
within the range of mandatory (norms) that certifies the recognizable authority of 'urf'.

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.”

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.

3. THE DISTINCTION BETWEEN ‘ĀDA (USAGE), ‘AQL (REASON), IJMĀ (CONSENSUS), MAŞLAHA (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 (maşlaḥa), 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. 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.

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-Shahīd al-Awwal, Al-Lum'a al-Dimashqiyya (Qom: Dār al-Fikr, 1994), 35.
48 Saljooghi, Naqsh 'Urf, 53.
49 'Abd al-Wahhāb Khalāf, 'Ilm Uṣūl al-Fiqh (Qairo: Dār al-Qalem, 1942), 89-90; 'Abdullah bin 'Abd al-Muḥsin al-Turki, Uṣūl Madhhabī 'Ilmām 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 ‘āda 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 ‘āda 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. Ṭabarānī (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-Iṣfahānī (-1108), a twelfth century classical Ja’farī scholar, asserts that ‘āda 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 ‘āda and its position within contemporary Ja’farī school of law. He states:

“‘Āda 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 ‘āda (habitual). It does not need any explicit intentional practices because each time upon satisfying the conditions, ‘āda 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 ‘āda 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, Uṣūl al-Fiqh wa Ibn Taymiyya (Egypt: Dār al-Nashr, 1985), 512.
⁵¹ Saljooghi, Naqsh ‘Urf, 19.
⁵² Arani, Naqsh ‘Urf, 20; al-Ṭabarānī, Al-Mizān fi Tafsīr, 8/380.
⁵³ Abū al-Qāsim al-Ḥusayn ibn Muhammad al-Rāghib al-Iṣfahānī, Al-Mufradāt fī Gharīb al-Qur’ān (Mecca: Maktabatu Nizār Muṣṭafā 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 khass). 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

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\(^{55}\) 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, Nagsh ‘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. 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 ṣaḥīḥ 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. 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 maṣūms (innocent leaders of the society according to Ja’fārī 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’fārī 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’fārī 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. 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

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58 Shibli, Uṣūl al-Fiqh, 329.
59 Shibli, Uṣūl al-Fiqh, 123.
60 Arani, Naqsh ‘Urf, 33, 34.
the Ja’fari school of law represent variety according to dependent or independent nature of ‘urf. Al-Ghaṭā’ī, the nineteenth century Ja’fari scholar, divides general ‘urf into two categories by addressing sira ‘uqalā’iyya and sira mutasharri’i within a single category. The principle of sira ‘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 sira ‘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 sira mutasharri’i, to the same extent as ijmā’, originates within the validity of inductive methods. This positive approach within the Ja’fari school of law frequently leads to legal statements being asserted with sira mutasharri’i rather than ‘urf within the textual interpretation procedure. At this point it should be noted that addressing sira mutasharri’i 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 sira mutasharri’i 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 sira mutasharri’i, 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’fari point of view, performance time of noon prayer on Friday relays on the sira mutasharri’i in accordance with religious statements that indicate the clear influence of the decision. It is, therefore, obvious that the approach of Ja’fari scholars towards the deduction method of sira ‘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-Najâh, 1975), 169.
63 Al-Ghaṭā’ī, Al-‘Urf, 10.
64 Al-Ṣadr, Al-Mu’ālim, 168.
65 Al-Ṣadr, Al-Mu’ālim, 168.
of *sīra 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, *sīra ‘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 *sīra 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 *‘āda* and *‘urf* in their later works and they have more frequently engaged with *sīra ‘uqalā‘iyya*, a quite recent concept of customary understanding. While classical scholars initially used *‘āda* and *‘urf* during the foundational period of the Ja’fari school of law, later ones have preferred to use *sīra ‘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 *sīra ‘uqalā‘iyya*. Al-Ṣadr further explains the hierarchy of legal proofs and places *sīra ‘uqalā‘iyya* at the lowest level by excluding *‘urf*. He observes:

“The confirmation of texts revealed from the Prophet and infallible

\(^66\) Al-Ṣadr, *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 *sīra 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 Legal 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 (ijmāʿ), famous (shohrat), news, information (khabar), and biography or practice (sīra)… On the one hand, legislative practice (sīra mutasharriʿa) 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 ʿuqalāʿiyya with its unique style differs from the sīra mutasharriʿa. The concept of sīra mutasharriʿa is the outcome of legitimate (sharʿi) statement, so that it is considered as an exploratory factor. However, the sīra ʿuqalāʿiyya is attributed to the general tendency that is found in the particular practices of reasonable people.\(^{69}\)

The sīra mutasharriʿa 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 sharʿi 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 ʿurf originates within social practices rather than sharʿi, 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 ʿurf 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 ʿurf, 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 Jaʿfari school’s methodological structure privileges reason as a legal tool and this authorises the religious scholars to refer to direct and semi-independent ʿurf when there is no textual source. The freedom to use semi-independent ʿurf in non-textual disputes and the

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69 Al-Ṣadr, Al-Muʿālim, 149, 165, 166, 169.
70 Al-Ṣadr, Al-Muʿālim, 167, 168.
71 Saljooghi, Naqsh ʿUrf, 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 (maṣlaha), rational practice (ṣira ‘uqalā’iyya), accepted purity or exemption (aṣl al-barā‘a), continuance (istiṣḥāb), necessity (ḍarūra). 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. The application of these principles within the traditional sources of the Ja‘fārī school enables ‘urf to be indirectly infused into the legal scope with an indirect and dependent way. It could be claimed that Ja‘fārī 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‘ān 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 hadīth 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‘fārī scholars used the hadīth 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‘ān, 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‘fārī 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‘fārī school of law and operating within the limitations

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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 saḥīḥ ‘urf to gain legal validity. Upon encountered a novel issue, the Ja’fārī scholars have sought to embrace legal compatibility and practical precedent, with both being privileged over a rejectionist stance. The reliance of Ja’fārī 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’fārī 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’fārī 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’fārī 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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