

## **STUDY AND ANALYSIS OF THE FUNCTIONS OF AL-URF IN UNDERSTANDING AND INFERRING THE RELIGIOUS RULES**

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Religious rules in Shiite jurisprudence are inferred from the four sources of the Qur'an, Sunnah, reason and consensus. But, in addition to these sources, some foundations such as common law (*al-urf*) are also mentioned. Referring to common law is widely used in the words of jurists. Based on it, the question arises here: what are the roles of common law and *Irtikazat* in common law in understanding and inferring the religious rules?

This article seeks to answer this question and tries to study and analyze the functions of common law in understanding and inferring the religious rules. The research hypothesis is that common law and *Irtikazat* in common law are used in understanding the words of religious arguments, subjecting and de-subjecting of common law for the religious documents, proving or denying some rights and other issues that are used by jurists and lawyers in the process of inferencing. One of the findings of the present study is that most

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scholars of the Islamic jurisprudence and law have not distinguished between these two foundations. But, it is more correct that common law is considered from the category of objective matter in the practical life of people, while *Irtikazat* in common law are from the category of subjective matter.

**Keywords:** *Common law; Irtikazat in common law; Inference of religious rules*

## 1. Introduction

One of the most controversial issues in Islamic jurisprudence and principles and consequently in Islamic law is the place of common law (*al-urf*) and *Irtikazat* in common law in understanding and inferring the religious rules. Although the sources of *ijtihad* in Shiite jurisprudence are exclusive, and only four sources – the Qur’an, Sunnah, reason and consensus – are accepted by the jurists, but a search in the words of the jurists reveals the fact that the jurists have repeatedly cited common law and *Irtikazat* in common law in the process of inference. At the same time, there are no clear boundaries between common law and *Irtikazat* in common law, and the two are confused in the writings of scholars of Islamic jurisprudence and law, despite the similarities that exist between them. The functions of common law and *Irtikazat* in common law are ambiguous in understanding and inferring the religious rules. Some jurists and lawyers do not adhere to common law and *Irtikazat* in common law, and others seek to conform the rulings as much as possible to the common law of the present time and have somehow turned to religious secularism. These ambiguities give rise to the main question: What are the functions of common law and *Irtikazat* in common law in inferring the religious rules? To answer this question, in addition to the religious texts, the views of jurists must be examined and analyzed, and a clear picture of their functions must be provided.

## 2. Concepts:

### 2. 1. Common Law / Custom (*al-urf*)

Different meanings have been expressed for *al-urf*: “knowledge and cognition”, “known and common among people”, “an acceptable act from the point of view of intellect or sharia”, “custom and habit” and “confession”.

The word *al-urf* has one of two meanings in all applications of the Qur’an: first, “good and righteous thing” including actions, speech, deeds and thoughts (Qur’an 2: 178, 229, 231, 235, 263; 3: 104, 110, 114; 4: 5, 8; 7: 157; 9: 67, 71,

112), and second, “conventional and common” (2: 233, 236, 241; 4: 6, 25). The Qur’anic meaning of “common law” (*al-urf*) and “known” (*al-ma’ruf*) is valuable, moral, and corrective. Such a thing has been done in the Qur’an and consequently in interpretive and narrative texts. The customary good deeds and words, the knowledge of nature and intellect can be desired by God in this usage. On this basis, it should be said: common law and known / *al-ma’ruf* (every thing that is admirable and righteous) is innate and familiar to reason, and denial / *al-munkar* (disgusting and corrupt thing) is non-natural and unfamiliar to reason (Alidust 2010: 47–48).

Various definitions of “common law” were presented with the same title or titles such as “habit”, “reason” and “manners” in the Islamic jurisprudence and law and we will explain them.

1. Custom is something that is placed in the souls of human beings from the point of view of reason and is accepted by the healthy nature that is not polluted with lust.
2. A custom is a habit of the general public or a specific group of people according to which they have lived and are living, and this habit can be organized in the form of speech or action.
3. Custom is anything that the reason considers good to appear and pure thoughts do not deny it.

In this interpretation, custom is considered the same as topics such as “justice”, “truth” and “chastity” including “goodness” from the viewpoint of the wise people and reason, however, the phenomenon of “custom” may belong to these subjects but it is not the same and united with them.

4. The custom belongs to those who were present at the time of the issuance of sermons and religious arguments and were the direct audience of the message of revelation and the words of the Prophet and the Infallibles.

The obvious mistake of the above statement – which has been made with the aim of limiting the scientific and complex term “custom” – is that the custom in question is a popular phenomenon and not the people themselves.

It seems that the source of the above mistake is the use of *al-urf* in some procedures meaning the wise and the mass of people with a special description, while *al-urf* in this practice is not the same as the above definition.

5. Custom (common custom) is the continuation of the rational actions – because they are rational. The source of custom is sometimes

external coercion that forces the reason in a way, but gradually becomes one of the *Irtikazat* and sometimes it has a religious and revelatory origin, as it sometimes originates from human nature (Naini 1993: 192–193). Equality between custom and rational point of view, heterogeneity between interpretations, failure to fully investigation of the principles, are the challenges facing this definition.

Since the manifestations and applications of custom are different in the Islamic jurisprudence and law, the following comprehensive definition can be provided for it: “It is the continuous and voluntary understanding of basis or judgment of the people that is not considered as a sharia law” (Alidust 2010: 61).

## 2. 2. *Habit*

*Al-adah* / habit is originally Arabic word. Contrary to what may come to mind at first, its meaning is clear and needs no introduction but it is somehow ambiguous. Hence, the linguists’ interpretations of this word are consistent, not the same. Note these three interpretations:

1. Habit is the repeating an action continuously or most of the time without rational attention and unconsciously.
2. Habit is a kind of behaviour that is established in humans and is constantly repeated.
3. Habit is a temper that a person gets used to and does it at a certain time.

All these interpretations can be considered as habit and its usage by people can be regarded as the support for it. There is another ambiguity about this word: its similarity or inequality with the word custom. Since this ambiguity starts from word and the terminologically meanings of these two words, the ambiguity and difference in the words have been also extended to the terminologically uses and have caused inconsistency in the terms. Some have mentioned about the similarity between the two words and some on the difference. The following interpretations illustrate the inconsistency:

1. Some people consider custom and habit as synonymous, in contrast to the group who believe that sometimes habit is assigned to actions and custom is assigned to sayings.
2. When habit is prevalent and inclusive, it is called “general custom” and when it belongs to people or a city, it is called “special custom”.

3. The relationship between custom and habit is a kind of specific and general one, therefore every custom is a habit, but every habit is not a custom.
4. It is wrong to say custom and habit, so the correct interpretation is custom of habit, that is custom resulting from habit and repetition of action; against customs that do not rely on habit, such as the custom of the Imams (AS) or the custom of people and the custom of a city.
5. Custom refers to the obligatory law, while habit lacks obligation. Although custom is not a written law, but it is a well-known method which has a material element of repetition and a spiritual element of obligation, unlike habit which does not have the second element.
6. Although some groups believe that there is a similarity between custom and habit, but the lawyers consider differences between the two, as stated below:
  - a. Both parties to the contract are bound by customary law – even if they are ignorant of it – but there wouldn't be responsibility until habit is not explicitly bounded by the parties.
  - b. Habit must be proven whenever it is claimed.
  - c. The judge's ruling will not be valid if it is contrary to custom, but habit does not have such a condition.

Through studying the writings and functions of these two, it can be claimed that undoubtedly custom and habit are not derived from the Qur'an and Hadith, because no specific terms of these two words are seen in the Qur'an and Hadith. Custom and habit are the words that have been gradually introduced and expressed in religious texts and written and spoken documents of jurists and lawyers. From the very beginning there was no clear boundary between these two terms, therefore there is inconsistency between the two according to the interpretations that were expressed. However, it cannot be denied that in countless cases these two terms had the same use. Even if we consider their spiritual differences when we use them together, but when one of the two is mentioned only, it is also representative of the other and includes its meaning.

Of course, it should be noted that equating custom and habit in the cases that have been established or used for them, is conditional on habit in the sense of continuous and voluntary understanding, basis or judgment of people, otherwise it is clear that habit means repetition or nature (Alidust 2010: 99–100).

### 2. 3. *Intellectual Basis / Sirah of the Wise*

Scholars of Islamic jurisprudence and law have offered various definitions of the Intellectual basis / *Sirah* of the Wise. Muhaqqiq Naini defined

the intellectual basis of the wise as follows: “The manner or *Sirah* of the wise – which is sometimes interpreted as the basis of custom – is the repetition and continuation of the action of the wise because they are intelligent. Following a particular ritual and participating through it is not a condition of this manner. The origin of usage of the wise may be the coercion or command of one of the prophets, or the instinctual necessity that God has placed in human nature” (Naini 1994: 192–193).

Intellectual basis of the Wise, as Jafari Langaroudi defined, is considered as the custom of the wise, the tradition and method of the wise, which is a field of custom and favored by reason, so it does not include unfavorable customs. At present, totalitarianism, which exists in many countries, is an unfavorable custom. He also wrote: “the factors of the intellectual basis of the wise are as follows: action, repetition of action permanently in a specific or unknown place, usefulness or preferable of the action: the action may have been voluntary or natural (*Irtikazi*)”.

Given the shortcomings and controversies that exist in the above definitions, it should be said: “The intellectual basis of the wise is created by them and plays a role in various aspects of their lives” (Alidust 2010: 103). In other words, every social system – due to its systemic nature – is based on principles on which communications, life, evaluations and judgments are made to organize the system.

For example, trusting evidence of situations and conversations among people are the foundations of explanation and understanding in social systems; believing that someone owns a good and accepting the trusty news are among the principles that wise people consider in their lives. Fulfilment of a promise, a sense of commitment and responsibility for the damage done to others are among the criteria considered in the evaluations. Of course, these principles are not the same in range and inclusion, sometimes they are so pervasive that they are not limited to any time, place or ritual, and are rarely limited. It is very clear that these principles do not have the same limitations.

Differences and multiplicities in the principles and foundations of systems are not merely in their generality and extent; rather, inequality can be seen in the impact of these principles and facilities on social order and people’s lives. Some are so effective that its absence leads to the decline of order, the destruction of the people and the destruction of the land. While some are just a habit or custom, they are not really the basis for social order, although in societies they are the norm and the basis for a collective life. The formation of many institutions, special types of government and the election of rulers are examples of these facilities.

It should be noted that some of these manners and methods have no gift for human beings other than disrupting the system and creating complex

networks of insecurity and corruption. Totalitarianism and free sexual relations and dozens of other examples that are considered a custom in some societies can be considered from this group.

It should also be said regarding the division of the Principles of the wise: Some principles are the objective reflection of the intellect and nature or the command of a prophet. This set of principles is generally accepted by the general public and is not limited to specific times, places and individuals. The existence of expediency in these rational principles strengthens these principles. These rational principles have no alternative and are the only way to reform the system of life.

The second set of principles did not arise from the expediency and understanding of the sources mentioned in the previous section. Factors such as convenience, which by themselves neither necessarily agree with expediency nor against it; sometimes even uncontrolled lusts and desires, which are necessarily contrary to expediency and incompatible with the understanding of reason, nature and revelation – are regarded as the source. The characteristics of this type of foundations are unlike the characteristics of the first part: although these principles may have a general position at some point in time or place, they are not endorsed by the wisdom of the wise and even the thoughts of the practitioners themselves, unless it is proven that it does not oppose expediency, although it is not considered as the only way and the best possible path in achieving the goal and reforming the system (Alidoust 2010: 117).

Therefore, the term “principles of the Wise” should be applied to foundations that have a rational origin and should not be used in the foundations of the ignorant or the unwise – only because they are wise.

#### 2. 4. *Irtikaz*

The word *Irtikaz* is to be pronounced like *ifti'ial*. Linguists believe that the word *Irtikaz* means that “something is fixed somewhere” (Wasiti Zubaydi 1993: 72) and also what is fixed in the mind is called *Rakiz* (ibid: 72). Some have defined it as “inserting something vertically”, like inserting a spear into the ground that can be leaned on. Hence, people who work in the mines are called *Rikaz* because they are located in the ground (Ansari 1995: 389).

Therefore, it can be said that this word is used if something is established in something else. This word is also used in the verses of the Qur'an, where God says: “How many a generation we have destroyed before them! Can you descry any one of them, or hear from them so much as a murmur?” (Qur'an 19: 98) What can be understood from this verse is that *Rakaza* is used in this verse in the virtual sense of sound, otherwise it actually means that you do not hear the news.

In the past, the jurists used the word *Irtikaz* to mean to “keep the matter in mind”. For example, Shaykh Mufid considered *Raj’at* meaning the return of the dead and it is one of the meanings of *Irtikaz* in the minds of the legislators. *Irtikaz* can be defined as confirmation a specific concept in the mind of a group of people or most of them or all people. The concept of *Irtikaz* is sometimes just theoretical, such as that two people are more than one person, and sometimes it is a theoretical concept on which action is based, like the *Irtikaz* of acceptance and authenticity of the word of an honest man. The wise men form their lives and deeds on this principle which is in their minds as the *Irtikazi*; and another example of *Irtikaz* is to respect the Ka’ba and the Qur’an from the point of view of Muslims, which is sacred to them and they act according to this *Irtikaz* and anyone who insults the Ka’ba and the Qur’an and does not protect them is severely reprimanded; also, from the view point of the Imamites, the *Irtikaz* related to the sanctity of the Imams is one of these cases (Ansari 1995: 390). The characteristic of *Irtikaz* is that it is not easy to give up. According to Hosseini Sistani (2017), one of the jurists, “*Irtikaz* is a fixed thought that has entered into the minds so much that it is difficult to give it up even if there is a reason to the contrary”. Of course, if a person – a legislator or a non-legislator – speaks clearly and with a convincing statement against the *Irtikaz* and does not accept that customary understanding in a particular case, naturally this statement and reason must be accepted from the speaker and the previous *Irtikaz* must be given up.

Thus, *Irtikaz* is the presence of some concepts in the mind, based on which sometimes a practical way of life emerges, and sometimes, because it is a theoretical concept, a practical way of life is not established (Andalib 2019: 35).

### 3. Usages of Custom

The instrumental effectiveness of custom in Shari’a and Ijtihad is agreed upon by all; we cannot talk about Shari’a and ijtihad and not accept this usage. Of course, the search for cases and instances of instrumental usages leads us to differences in the acceptance or non-acceptance of some cases; therefore, by exploring the instances, it is needed to separate the general accepted cases from the disputed ones, and to organize the discussion of each of them as much as necessary. There are some instances of these usages as follows:

#### 3. 1. Referring to custom in the concepts of words used for reason

One of the definite and generally accepted usages is the authority of custom in interpreting the words and phrases taken in the evidence and

religious documents. As custom is also a competent reference in the interpretation of phrases<sup>1</sup>.

The search of the written and spoken documents of the knowledge of Islamic jurisprudence, principles and law reveals the fundamental role of custom in identifying and explaining religious documents – including the Qur’an, hadith and consensus. Although the authority of custom does not need to be argued in recognizing concepts and phrases, but in order to remove any doubt, it clarifies the matter with an explanation from the point of view of practical wisdom.

Undoubtedly, in notifying the law to the citizens and those who are responsible for that law, any legislator must adhere to the principles and rules of communication and the rules that are common among their audiences, uses their words and phrases and be bound by their custom in communication and also must remind if he has a particular term or method, and otherwise organize his conversation according to the procedure and custom of the people. The saint legislator has followed this procedure. The result of this rational understanding is two statements as follows:

1. The saint legislator does not have a specific method in his legislative communication.
2. The term Shari’a precedes custom (Alidust 2010: 215).
3. *Referring to custom in understanding the related matters, reasons and arguments*

One of the most common and subtle instrumental uses of custom in deriving rulings is its use in interpreting and explaining valid religious arguments and documents. This means that a Mujtahid should instil documents such as the Qur’an and Hadith into people who are fluent in the Arabic language, and consider their understanding and judgment (which we interpret as custom) about that document, and take into account other necessary aspects in Ijtihad.

Customary supervision in the previous usage was within the words and the literal meaning of the valid religious document and what was at consideration was its verbal appearance, not more; but in the usage in question, people’s understanding and judgment of the set of reasons – and in some

1 This efficiency and the second efficiency for custom are based on three undeniable presuppositions: a. the will of the legislator is understandable to us; b. this perception is a kind of proof and document; c. the saint legislator has not chosen any special tools in understanding his intentions (Alidust 2010: 214). It means consensus on a certain sentence and – according to the term of Shiite jurists – a consensus that has a “contract” (Ansari 1995: 182).

cases the set of arguments – are important, hence, custom in this usage is not a verbal one, but a kind of understanding and judgment; an understanding that its source is the words and sentences in the same reason, and also involves many other relations and elements. For example, some jurists believe that, according to the custom, the verse of the Qur'an: "Cooperate in piety and God wariness, but do not cooperate in sin and aggression" (Qur'an 5: 2), indicates the need to eliminate corruption; without that, "cooperation" or "assistance" have a special feature (Musawi Khomeini 1990: 130, 137, 143). It is clear that this usage is not about the word or phrases "do not cooperate" (*la ta'awanu*) or "sin" (*ithm*) and "aggression" (*udwan*), but about the understanding and judgment of the people as an entirety in this verse – even under the supervision of other arguments and the Shari'a. This usage of custom originates from the fact that in their communication people sometimes understand something from the whole reason but each word does not convey the meaning, and when they are placed together, they convey that matter. The limitation of custom efficiency in the former usage can be considered as "imaginary concepts" and its limitation in the discussed usage as "affirmative concepts". In previous and last jurisprudential and legist writings, there is a lot of practical and scientific aspect of this usage; for example, the late Sayyid Murtaza dedicated a chapter to this efficiency in his book of principles entitled: "Chapter on the allocation of the public to habits" – although incomplete – and this efficiency has been mentioned by the later ones with titles such as "refinement of basis of the ruling", "abolition of specificity", "specification of reason", "restriction of reason", "failure to conclude the absoluteness of reason", "acquisitions based on the relationship between sentence and subject" and "customary priority" (Alidust 2010: 231–233).

### 3. 3. Referring to custom in conforming customary concepts to instances

In religious texts, we see thousands of sentences that have subjects based on custom and predicates on religion. There are some examples, such as: usurpation is forbidden; buying and selling are allowed; the deal of idiots is void; blood is impure, etc. In all these cases, the predicates are religious, whether it is a law that did not already exist and was legislated by the legislator, or already existed and approved by the legislator. The terms used by the legislator, whenever they are taken from the custom, their interpretation is left to the custom. For example, custom is considered as the reference for interpreting these cases (usurpation, buying and selling, idiots, blood). Of course, in accordance with the objective materials, we must refer to the real one, for example, what wine means should be referred to the custom,

but whether what is inside the glass is wine or water, one must refer to external reality.

The question is what and who is the legal authority for the application of customary concepts mentioned in religious cases? For example, the legal authority for whether the blood is impure or not, is the legislator, and custom is referred as the authority to what blood is. But, who should judge that this real substance is an example of blood? It should be referred to custom and also what clean water (*kor*) means, we should refer to custom, and whether the water inside the pool is *kor* or not, it should be measured.

Through this explanation, it is clear that the authority of custom in determining concepts other than its authority is in the conforming of concepts to instances. What was in the first function was the first authority, and what is raised now is the second authority (Alidust 2010: 253).

This function has been denied by most jurists because there is no valid reason for the authority of custom in this case and religious commands depend on the truth of the matter, and if people misjudge, the truth will not change (Akhund Khorasani 1988: 227; Hosseini Rouhani 2007: 264; Khui 1989: 276; Borujerdi 1992: 24). However, some jurists, including Imam Khomeini, have accepted this function because they believed that the legislator does not have a specific term or method in talking to others. On this basis, in some sentences such as “avoid blood and wash your clothes from impurity” when the narrator is a legislator, the same meaning is understood as when the narrator is one of the people (Musawi Khomeini 2002: 228–229). Therefore, just as in explaining the concept of blood, one should refer to custom, in identifying one instance of it, one should also refer to custom. For this reason, if the custom considers a case to be “the color of blood” and not “blood”, the rules regarding blood should not be applied for that case.

### 3. 4. *Function of custom in legislative affairs*

God Almighty, as a holy legislator, follows the same customary procedure in legislation, acts like customary legislators and has no new method in legislation. Belief in “considering the custom undesirable in determining and limiting of the majority from the general and absolute ones” and “the manner, extent and adequacy of the expression of the law” are the manifestations of this function. It is one of the functions that has been accepted by all jurists (Alidust 2010: 282–293).

### 3. 5. *Custom in the field of evidence and documents*

The custom is not a document and a reason for discovering the Shari’a, but its efficiency and impact in matters related to authentic documents is

considerable. “Understanding the discrepancy of proofs”, “summing up the arguments and their coordination”, “expanding the meaning of the words mentioned in the reason” are among the manifestations of this function in the field of inference. This function has also been accepted by all jurists (Al-idust 2010: 293–299).

### 3. 6. *Custom in contracts and transactions*

One of the most obvious manifestations of custom in Shari’a and Islamic jurisprudence is its function in transactions and contracts. According to these important sentences, “Keep your agreements” (Qur’an 5: 1); “Believers fulfil their commitments”; “All people have the right to control their property and their souls”; the legislator of Islam has not only confirmed the customs, habits, contracts and conditions that are common in his time and place, but also has opened the way for the acceptance of customs in later times and other places. On this basis, we do not need to provide evidence and examples about the presence of custom in this field. One can refer to the books of jurists to see many examples (Musawi Khomeini 1990: 91).

### 3. 7. *Making custom subjective and de-subjective for implementing documents and rulings and not implementing them*

Other cases in which custom is used are subject-making for evidences and religious documents and implementing the Islamic laws; also, sometimes the subject of a reason or a law disappears through custom and there is no base for the implementing the law and reason. This function creates obligations for profit or loss. In order to be familiar with this function, we will give examples of it through the jurists’ words. For example, Imam Khomeini in following the land and air regarding personal property commented as follows: “using land and air compared with the personal property is within the customary needs. For example, if someone digs a canal outside a personal home or land or endowed one and passes through or takes possession of the basement, the owners or custodians cannot make a claim. If someone builds a building above the normal amount, or comes and goes, none of the owners or custodians have the right to prevent him. Finally, subjection to a personal land is customary in value, and new instruments have no bearing on customary value. But, subjection to the country is very high and the government has the right to prevent the seizure of more than the customary right of a person or persons. Therefore, oil, gas and mines that are outside the customary limits of private property, are not subject to real estate” (Musawi Khomeini 1990: 588). According to an idea about discrimination in rejecting

the deal, Ayatullah Hakim also wrote: “Customary *Irtikaz* is not conducive to discrimination in rejecting the transaction due to a defect and in accepting the transaction, but agrees with discrimination in rent. Therefore, if the lease is terminated before the expiration of the term, the lease is valid compared to the past and the determined rent is fixed”. Making custom subjective can be seen in the establishment of the intellectual rights of authors, innovators and artists. By validating these rights, custom prepares the basis for the implementation of the necessity of respecting these rights, which is a judicial decree (Alidust 2010: 310).

#### ***4. Examples of referring to the Irtikazat of custom***

The search for the words of the jurists shows a large amount of referring to custom and *Irtikazat* of custom, but here we will suffice with just a few examples.

##### *4. 1. Wife’s alimony*

As for the alimony of the wife during the marriage, it depends on the fact that she has not yet gone to her husband’s house. Here, there are arguments that alimony is obligatory, which obliges a man to pay it and on the other hand, *Irtikaz* of the custom is in the opposite because according to it, during the time that the wife is in her father’s house and the alimony is given to her by her father, according to custom, no one obliges the man to pay alimony during this period and no one condemns him for not paying it. This issue is considered as *Irtikaz* of the custom, which is accepted by the couple before and during the marriage. Therefore, this *Irtikaz* prevents the applications and generalities of the obligation of alimony. Some jurists, such as Ayatullah Khui (1989: 287), Tabrizi (2005: 360), Wahid Khorasani (2007: 326), Tabatabai Qomi (2005: 297), Hosseini Rouhani (2007: 535) and Fayyaz (1999: 71), issued a *fatwa* on the non-obligation of alimony in these days: “The alimony of the wife is not obligatory on the husband between the time of marriage and the wedding because according to *Irtikaz* of the custom, alimony is not the responsibility of the husband during this period”.

##### *4. 2. Lien*

The lien is the legal right that in the transaction the parties can keep something that belongs to someone who owes the other party money, until the debt has been paid. The jurists have stated four reasons for the legitimacy of this right: **a.** obligation to give someone else’s property back, **b.** requirement of the

general statement of marriage, **c.** rational judgment resulted from the transaction, **d.** *Irtikaz* rule. Mohaqqiq Naini actually considered *Irtikaz* here as an “implicit condition” in the transaction and explained: “But you are aware that lien is permissible in the exchanges before or after the transaction. But, before termination, it is due to the implicit condition of the parties because it is customarily on the basis of giving and taking the goods and according to custom, it is considered as a matter of *Irtikaz*. Therefore, the seller has the right to keep the something sold to receive the payment and also the buyer has the right to keep the payment to receive the goods” (Naini 1994: 163). About *Irtikaz*, he also explained that customarily *Murtakiz* is who does not give the reciprocal thing in the transaction as long as the something in the transaction has not been given to him, therefore, there is a right for the parties not to deliver the object of transaction until the other party has not paid the debt.

#### 4. 3. Option of loss

Option of loss is one of the rights discussed in transactions and there are several theories about it. Some jurists have proved it by referring to the “defect of will”, that is, the loser is not satisfied with what has happened, and therefore taking property from him is an example of unjust possession. By referring to the “principle of no harm”, others have proved the option of loss. But, neither of these two reasons can prove the option of loss, therefore, some jurists have proved the option of loss by referring to *Irtikaz*. Mohaqqiq Naini (1994) and Ayatollah Khansari (1984) considered *Irtikaz* as an implicit condition in the transaction and interpreted it as of the complete evidence to prove the option of loss. The base of option of loss, according to Tabatabai Yazdi, is *Irtikaz* of transactors. He wrote: “The *Irtikazi* will of the parties to the contract is based on the fact that there must be a balance in financial value between the parties, and this, although not specified in the contract, is a condition authorized in the text of the contract and violation of it is considered as a violation of the condition that causes the proof of the option” (Tabatabai Yazdi 2008: 512–527). He considered the *Irtikaz* in option of loss similar to the *Irtikaz* in option of fault and also wrote: “The imposing condition of equality in exchange contracts is not in the form of a restriction, the violation of which causes the invalidity of the contract, nor in the form of a claimant and motive, the violation of which has no executive guarantee, but is an implicit condition of *Irtikaz*. What the jurists have said in the option of defect is the description of the validity of the implicit condition of *Irtikaz*, and those who trade on the basis that they receive the goods without defects” (ibid).

#### 4. 4. Option of delayed payment

*Irtikaz* rule can be considered as one of the principles of proof in the option of delayed payment. Option of delayed payment means that “if the seller does not pay the something sold to the customer and does not receive the price and the condition of delay of the price is not met, the sale is necessary for up to three days. Therefore, whenever the customer brings the price during this period, he can take it from the seller, otherwise the seller can both cancel the sale without the need to go to a judge or keep the sale and demand the price from the customer” (Hosseini Amili 1998: 244). Some jurists, such as Ayatullah Mirza Jawad Tabrizi, considered *Irtikaz* as the basis of the option of delayed payment and wrote: “When the goods for sale are delivered immediately after the contract but the customer refuses to pay the price, the seller has the right to terminate the transaction because the payment of the price and the non-impediment to payment is an *Irtikazi* condition for the sale of the seller. Also, delivering the goods for sale and not preventing its delivery is an *Irtikazi* condition for the customer’s purchase. That is, both the seller and the customer consider the delivery of the price or the goods for sale on the other side as an integral part of the transaction (Tabrizi 1995: 238). It means that, after the contract, if the seller makes a contract with the goods for sale and the customer refuses to pay the price, the seller has the right to terminate the transaction. Because payment of the price and non-refusing by the customer is an *Irtikazi* condition for the sale of the seller, and also the contract of the seller and non-refusing by the seller is an *Irtikazi* condition for the customer’s purchase.

#### **Conclusion**

In this research, the status of custom and *Irtikazat* and applications of custom were examined to understand and infer the religious rules. According to the words and expressions of the jurists, it is obvious that there are many uses of custom and it also plays a great role in understanding and inferring the religious rules. However, according to these applications, custom is not considered as one of the sources of *Ijtihad*, but rather it is used in the interpretation and understanding of sources such as the Qur’an and hadiths. It is also the most important reference in subject matter for custom. Therefore, paying attention to the custom has many effects on understanding and inferring religious rules, but it is not the source to issue a *fatwa*.

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