Contributions of ʿUrf (Custom) to Politics and Political Structure with a View to Shia Jurisprudence (From the Perspective of Shia Jurists)

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Abstract

Custom or customary practice (ʿurf) is an important phenomenon in Shiite jurisprudence, which became more intertwined with its discourse after the dominance of the Usuli scholars over the Akhbari tradition. The main objective of this study is to provide a comprehensive and independent summary of innovative customary practices and their significant roles in the political realm and the political structure, approached from a jurisprudential and novel perspective with operational attention to them. This leads to the resolution of one of the crucial issues in political jurisprudence. Strengthening the primary (or authentic) role of custom, both theoretically and practically, in the face of its neglect in various political and structural domains is among the key and practical goals. Notably, although, since the recent century, Shiite jurisprudence has developed new terms such as "sīra" (tradition) and "bināʾ al-ʿuqalāʾ" (the established practice of the rational), and as a result, there is relative efficiency of custom in the realms of jurisprudence and ijtihad, the use of custom—especially in the context of political issues and political jurisprudence—has remained scattered. Therefore, the question raised in this research is related to the customary innovations in politics and its structure from a jurisprudential-theoretical approach. What is the role of custom from the perspective of Islamic jurisprudence and Shia jurists in politics and its related structure? What are its innovative aspects from a jurisprudential viewpoint? This is considered a key research question, and providing a substantiated answer to it, while considering the political and social processes of each era

and their role in shaping the theoretical foundations of multiple jurists, will yield important results. In the present work, through a descriptive-analytical method and a jurisprudential approach, we will elucidate the innovative aspects of custom. Accordingly, by considering factors such as revisiting the theoretical framework of jurists and adopting their principles in the political and social events of their time—particularly focusing on the political-social conditions of the Constitutional Revolution and its aftermath—and analyzing their views and opinions when faced with the events and incidents surrounding them, important results regarding the establishment and innovations of custom in politics have been extracted. As a result, aspects such as: the practical application of the principle of "repelling the more corrupt with the less corrupt" (dafʿ al-afsad bi-l-fāsid) in politics based on custom, the establishment of a political system based on general elections and majority rule, the non-separation of religion and politics with an emphasis on custom, the development of laws and customary institutions (such as the consultative assembly and the executive branch) during the Constitutional period, the theoretical attention to enjoining good, forbidding evil, and advice to the Muslim community, theorizing the council and customary consultation in political jurisprudence, and the expansion of the "zone of legal lacuna" (minṭaqat al-farāgh al-sharʿī) to allow for the operation of customary reason after the Constitutional period and in the present era, are among the most significant establishments and innovations of custom in politics and political jurisprudence. These were considered within the intellectual and theoretical framework of some of the jurists of the Constitutional period, such as Ayatollah Nāʾīnī, and some other contemporary jurists. The conclusion drawn from this is that in Shia jurisprudence, custom has had significant innovations in the realm of politics from the Constitutional period onward. Although in some cases, these innovations were based on desperate necessity (iḍṭirār) and the principle of "repelling the more corrupt with the less corrupt," in the view of some contemporary jurists, legitimacy and originality have been granted to them in areas like allegiance, elections, the formation of government, enjoining good, etc. This innovative approach has introduced a new and practical transformation regarding custom in the political realm.

Keywords

Introduction

The issue of custom or customary practice (ʿurf) and its role and position in Islamic jurisprudence is one of the most significant subjects, as a comprehensive discussion of it will lead to a better understanding of the relationship between custom and jurisprudence, and protect from falling into the mirage of extremism or the pit of neglect (Vasei, 2000, pp. 3-42). Islamic jurisprudence and law include issues and rulings that have a customary origin and were practiced in previous societies, even before the arrival of the Prophet, and the Sacred Lawgiver has either endorsed or modified them (Fayadh, 1989, vol. 1, p. 184). Based on this, the position of custom in Islamic jurisprudence is very important, such that it is stated among the primary sources of Islamic law that, in addition to the Quran, Sunnah, consensus, and reason, custom and tradition are also recognized by the Lawgiver in some matters (Bahadori Jahromi & Shabanpour, 2013, p. 161). Of course, Islamic law recognizes the value of custom to the extent that it does not contradict human dignity, the principles of justice, and does not lead to a departure from the domain of Sharia (Nojoumian, 1969, p. 326). Al-Waḥīd al-Bihbahānī is one of the earliest and most effective figures in strengthening the role of custom in the realm of jurisprudence and ijtihad. He examined verbal customs from various angles; however, no one like the author of Jawāhir, Shaykh al-Anṣārī, and Shahid Sadr has been able to fully organize this movement. In this period, the discussion about custom moves beyond its verbal and linguistic use, and Shia jurists introduce the concept of custom under the term (sīrah or bināʾ al-ʿuqalāʾ), which led to the establishment of the Shia school of custom (Saadi, 2016, pp. 51–53). Therefore, in contemporary jurisprudential literature, the term sīrat al-ʿuqalāʾ is commonly used to refer to the concept of custom. A noteworthy point is that, despite the use of custom among jurists in different terms, there has been a lack of practical attention to custom in jurisprudence, particularly in political jurisprudence. Hence, the issue that requires investigation in this study is the examination and clarification of the innovations of custom in politics and political structure from the perspective of Shia jurisprudence. Therefore, given the lack of attention to the role of custom and customary understanding in politics by jurists prior to the Constitutional Revolution, and the subsequent attention to people-centered institutions and methods, as well as the recognition of custom after the Constitutional Revolution, revisiting the theoretical framework of jurists and adopting their principles in political and social events of their time, with the aim of uncovering the custom-based innovations in politics, becomes an important

and novel matter. The necessity of this reevaluation and investigation is to determine what the innovations and establishments of custom in politics are from the perspective of jurisprudence and jurists, and whether the political and social processes of each era have been influential in shaping this subject. Therefore, considering the political and social conditions of the Constitutional period and thereafter, and analyzing the views and opinions of jurists when confronted with surrounding events and incidents to discover innovations of custom in politics, is of great significance.

1. Examining the Concept of Custom and Other Similar Notions

1-1. Literal and Terminological Definition of ʿUrf

Among the lexical meanings of ʿurf are knowledge and understanding, tranquility, peace and stillness, continuity, and succession (Rāghib al-Iṣfahānī, 1972, p. 343). In contrast to nukr, it refers to an action that is deemed praiseworthy by reason or Shariʿa, the continuous nature of something, and an elevated place (Ibn Manẓūr, 1988, vol. 9, p. 239). It also implies succession, connection, continuity, and a good and virtuous act (Ibn Fāris, 1985, vol. 4, p. 28). Additionally, it signifies something recognized and widely practiced among people, or a habit and custom (Amid, 1979, p. 58). An important point to note is that, although initially, there seems to be an intrinsic relationship between some of these meanings, upon closer reflection, this relationship disappears. This is because it is possible for something to be widely recognized and known, but not necessarily be praiseworthy by reason. Therefore, the intended meaning here is a praiseworthy action according to reason or Shariʿa, and a custom commonly practiced by people.

Various definitions have been provided for the terminological meaning of ʿurf, reflecting different interpretations of this term. One such definition is that it refers to the customs that, in ancient times, were part of the habit of a community or a tribe, in such a way that if the people of that tribe willingly adhere to them without changing them, the term ʿurf is applied to it (Pashasaleh, 1994, p. 194). According to Wahba al-Zuḥaylī, ʿurf refers to something that people have become accustomed to and live by, whether it is an action that has become common among them or a word that they associate with a specific meaning. Hence, it includes both practical and verbal ʿurf (Zuḥaylī, 1997, p. 7). Another definition describes it as the repeated performance of a known action over an indefinite period, which arises from the interests of the repeaters (Jafari Langarudi, 2013, p. 489). According to some others, perhaps the best definition is that ʿurf is a way or method that

people have accepted and follow, whether in speech or in practice (Hashemi Shahroudi, 2013, vol. 5, p. 373).

Thus, ʿurf has a general aspect, meaning both verbal and practical, and therefore includes the sīra (procedure) of the rational individuals (ʿuqalāʾ). Furthermore, the establishment and continuity of ʿurf depends on factors such as consistency and widespread practice, continuity, voluntary nature, and not being legally formalized. If any of these factors are absent, ʿurf does not form (Alidoust, 2009, p. 61). Based on the definitions mentioned, the certain aspect of terminological ʿurf is the one with a specific method and approach, shaped by interests, and given the juridical nature of this research, the ʿurf referred to in this study will be the one effective in juristic discussions.

1-2. Relationship of Custom to Habit, Procedure, and Practice of the Rational

The term ʿāda (habit) has a distinct meaning from ʿurf (custom), as evidenced by its use in jurisprudence. From the perspective of Islamic scholars of jurisprudence and law, ʿāda refers to an action that is repeated without intellectual interest and encompasses widespread behaviors and sayings that are repeated without rational implications (Saadi, 2016, pp. 3-22). Therefore, ʿāda includes both individual and social behaviors and sayings, whereas ʿurf has a broader, more social and collective aspect. As a result, ʿāda does not cover personal or individual matters. Considering this point, the relationship between ʿurf and ʿādah is one of general and specific, meaning that not every ʿāda is ʿurf, but every ʿurf is based on ʿāda.

Some scholars of jurisprudential principles (uṣūl al-fiqh) use expressions such as ʿurf al-ʿuqalā (custom of rational individuals), sīra ʿuqalāʾiyya (rational practice), ṭarīqa al-ʿuqalā (way of rational individuals), and bināʾ al-ʿurf (the established practice of custom) to explain rational practices (Hashemi Shahroudi, 1985, vol. 4, p. 234). However, upon closer examination, it becomes clear that the bināʾ and sīrah of rational individuals are considered important examples of ʿurf, in such a way that not every ʿurf is sīra ʿuqalāʾiyya, but rational traditions are among the clear and prominent instances of ʿurf.

1-3. Custom in Imami Denomination

Verbal or usage ʿurf is contrasted with practical ʿurf. The point of dispute among jurists is the practical ʿurf, and whenever ʿurf is mentioned in general terms, it refers to this practical type (Mohammadi, 2002, p. 7). Based on this,

the Imami jurists generally consider the ʿurf that was common during the time of the infallibles and was not prohibited to be valid. In the recent century, the term sīra al-ʿuqalāʾ (established practice of the rational) is often used in place of ʿurf. Some jurists define and approve of it by saying: "The sīra of rational individuals is to refer to the specialists of every science and profession, and jurisprudential matters are no exception. From their perspective, the main reason for the permissibility of following a mujtahid (taqlīd) is the sīrah al-ʿuqalāʾ" (Makarem Shirazi, 2007, vol. 1, p. 496). Based on the research conducted, the main evidences for establishing the validity of ʿurf are the silence of the Sacred Lawgiver (Sadr, 1989, vol. 1, p. 277), the endorsement of rulings by the Sacred Lawgiver, and the knowledge of the infallible about the future (Mohammadi, 2006, p. 263; Khomeini, 2006, vol. 2, pp. 129–130).

1-4. Contributions of Custom to Politics and Political Structure

Since jurists have not provided a specific theoretical framework regarding the role of custom and established practice of the rational in politics, we have generally not witnessed custom-based contributions in the form of a theoretical framework by Shia jurists. The reason for this can be found both in the lack of practical attention to custom by jurists and in the political and social conditions of their respective eras. However, in this study, by examining jurisprudence and the views of some jurists and religious thinkers, and considering the political and social conditions of society, we will address certain issues under the title of the contribution of custom to politics.

2. Practical Application of the Principle of Repelling the More Corrupt with the Less Corrupt in Politics Based on Custom

One of the most important contributions of custom in politics and Shia political jurisprudence should be sought in the Constitutional period. Before the Constitutional Revolution, the conflict among jurists was generally focused on proving the legitimacy of the ruler or king, or the legitimacy of the jurist in political affairs. Some held that the king had the legitimacy to govern, while others assigned the legitimacy in political matters to the jurist. The Constitutional period can be considered the first serious stage in which attention was given to the role of custom and the people in politics.

Although this arena was not approached from the perspective of the original inherent legitimacy of custom, and was instead dealt with in the manner of "repelling the more corrupt with the less corrupt," it is significant and novel in that it marked the beginning of attention to the role of custom in politics within

Shia jurisprudence and theoretical discussions. The first jurist during the Constitutional period to address the role and position of the people and provide opinions on this matter was Nāʾīnī. From Nāʾīnī's perspective, since the oppression of a constitutional government is less than that of an absolute monarchical government, a system should be chosen that is less prone to injustice (Nāʾīnī, 1982, vol. 9, p. 48). According to him, under an authoritarian system, rulers consider the government as their right, and the country under their control as their absolute property. In contrast, in a constitutional or wilāya system, the authority to govern pertains to fulfilling the duties related to the order and protection of the country and is a trust, in which the power is exercised for the general good of the people (Nāʾīnī, 1982, vol. 9, p. 11). Overall, Nāʾīnī supports the constitutional or wilāya system during the Occultation period because he considers it to be a rational and practical matter. Accordingly, he views a democratic system as a system of justice and wilāya (Pourfard, 2005, p. 94). The conduct and views of other scholars of the Constitutional period, such as Ākhūnd Khurāsānī, are also in line with Nāʾīnī's theoretical framework. In general, while jurists such as Ākhūnd Khurāsānī played a major role in supporting the Constitutional movement, the intellectual efforts of Mirzā Nāʾīnī, particularly through his book Tanbīh al-Umma wa-Tanzīh al-Milla, had a significant impact and unique role in this regard (Rafi, 2015, p. 77). These efforts brought about a new transformation in the theoretical realm.

In analyzing this case, it must be said that despite all the events that occurred in the realm of practical and political-social realities, and despite the opinion of some scholars such as Shaykh Fazlullah Nouri, who saw signs of deviation in the religious constitutionalism, the fact remains that a group of scholars who supported the constitutional movement, upon witnessing the radical actions or exploitation of the space created by the new political system, did not retract their support. This serves as evidence of a theoretical perspective different from that of the traditionalist supporters, who sought to find a religious basis for endorsing modern concepts such as freedom, equality, legislation, the parliament, etc. The intellectual debate between the two groups of scholars, who thought within the traditional framework, actually created, for the first time in modern Iranian history, an aspect of the struggle between the old and the new in the realm of political thought (Hashemi & Mehrazar, 2014, p. 175). This intellectual dispute stems from the approach to governance during the occultation period, where two different perspectives are raised among Shiʿa: one sees the governance as prohibited during the

occultation, while the other believes in the necessity of governance in order to preserve the political system on behalf of the Imam. According to Nāʾīnī and the constitutionalist scholars, in terms of usurpation, the constitutional government is as usurped as other forms of government, including despotic regimes, with the difference being that a despotic government simultaneously involves three usurpations: the usurpation of the Imam's authority, the usurpation of God's power, and the usurpation of people's rights, while the constitutional government only involves the usurpation of the Imam's authority. Therefore, it reduces the three usurpations to one (Rafi & Abbaszadeh Marzbali, 1394, p. 88). However, some others believe that Nāʾīnī went beyond merely reducing the oppression in the constitutional system and also worked toward legitimizing the constitutional government (Rafi & Abbaszadeh Marzbali, 1394, p. 88). Accordingly, Nāʾīnī accepted the constitutional government based on the principle of repelling the more corrupt with the less corrupt. Thus, one of the secular innovations in the scholars' discourse is the reference to this principle to emphasize the role and rights of the people and the democratic system. This innovation paved the way for later perspectives that considered the role of popular customs in politics and the formation of popular institutions.

However, from the perspective of some others, Nāʾīnī viewed the issue of constitutionalism beyond merely reducing oppression, and he also worked toward legitimizing the constitutional government Rafi & Abbaszadeh Marzbali, 1394, p. 88). Accordingly, Nāʾīnī accepts the constitutional government based on the principle of repelling the more corrupt with the less corrupt. Therefore, one of the secular innovations in the scholars' discourse is the reference to this principle to highlight the role and rights of the people and the democratic system. This innovation paved the way for later perspectives that emphasized the role of custom in politics and the establishment of customary institutions.

3. Non-Separation of Religion and Politics with an Emphasis on Custom

Custom has always been considered one of the pillars of knowledge, and one of the endogenous sources of Islamic thought was that it could regard custom as a source of knowledge and ijtihad. From the late 19th century and early 20th century, the Iranian Shiʻa intellectuals gradually began to believe that if they entered the secular world, they would become secular, which led to the definition of the duality between secular and religious politics (Miri,

2019, p. 60). During the constitutional period, there was also a kind of misinterpretation of constitutionalism, and its supporters were accused of secularism in both theory and practice. However, great scholars such as Ayatollah Nāʾīnī and Akhūnd Khurāsānī were intellectual supporters of the constitutional movement and, with a religious perspective and theoretical arguments, endorsed the constitution. Accordingly, one of the important innovations in the realm of politics must be sought in the "non-separation of religion and politics with emphasis on custom and its key role," which began to take shape in theoretical discussions during the constitutional period by the scholars of that era. For example, Nāʾīnī, during the period of occultation, supported the constitutional or wilāyat al-faqīh (guardianship of the jurist) system because he considered the issue to be a rational matter. Based on this, he regarded the democratic system as a system of justice and guardianship (Pourfard, 2005, p. 94). In general, although scholars like Akhūnd Khurāsānī played a significant role in supporting the constitutional movement, the intellectual efforts of Mirza Nāʾīnī in his book Tanbīh al-Umma wa-Tanzīh al-Milla had a unique impact and role in this regard (Rafi & Abbaszadeh Marzbali, 2015, p. 77). After the Constitutional era, the formulation of people-centered political views and an emphasis on custom became widespread among the scholars. Sadr is one of those who, in some of his writings, recognized the political rights of the people independently of the jurists because he viewed people as God's vicegerents on Earth, with the responsibility for managing social and political affairs lying with them (Sadr, 1978, p. 9). The difference in opinion between Sadr and Nāʾīnī is that, in Nāʾīnī's view, people engage in political and social activities with the permission of the jurists, while, from Sadr's perspective, people are an independent branch from the jurists. Jurists like Salehi Najafabadi and Montazeri also emphasized the position of the people, the role of custom in politics, and the non-separation between religion and politics. According to Salehi Najafabadi, people, based on their natural rights, choose their leader, and this is a command that the sound and innate reason of every human being issues (Salehi Najafabadi, 1984, Vol. 6, p. 45). Moreover, such sovereignty for the people has been endorsed by religion (Salehi Najafabadi, 1984, Vol. 6, p. 200). He considered government to be a social necessity that arises for the administration of society and comes from the people themselves (Salehi Najafabadi, 1984, Vol. 6, p. 15). He goes further to argue that in a democratic political system, both the people and the leader can propose conditions and grant them validity (Salehi Najafabadi, 1984, Vol. 6, p. 72). This view reveals

the original position of the people in politics with a religious perspective.

An important point is that the aforementioned viewpoints, while maintaining the relationship between religion and politics, also emphasize the role and position of custom, to the extent that these views collectively reveal the role of religion in politics with an emphasis on custom, which negates secularism as a common form of custom. Therefore, the perspective on custom, the emphasis on its position in politics and social affairs, and the relationship between religion and politics with an emphasis on custom have been seriously considered in the discourse of jurists, particularly contemporary jurists. This perspective, which brought about a new transformation in the field of political jurisprudence, laid the groundwork for later scientific and jurisprudential theories in this area by subsequent jurists.

4. Establishing a Political System Based on General Elections and Acting Upon the Majority Opinion

Another important practical and significant contributions of custom (ʿurf) in the realm of politics and society is bayʿa (pledge of allegiance) and elections, where we observe two approaches. Some believe that bayʿa, in terms of essence and function, is comparable to elections, with both reflecting the key role of the people in an Islamic government. On the other hand, some deny any commonalities or similarities between these two concepts.

The pledge of allegiance, from a religious perspective and according to the Prophetic tradition, is divided into three categories:

a) Pledge of invitation: A commitment to invite others and patience in confronting the threats of ignorance.

b) Pledge of jihad: A commitment to obey military commands and endure the hardships of war.

c) Pledge of leadership and governance: A commitment to accepting leadership and governance and obeying the ruler (Asefi, 2006, p. 118).

The discussion lies in the third category.

Another point is that the role of the pledge of allegiance and its legislative position is one of the areas of disagreement among jurists. There are three jurisprudential views regarding whether the pledge of allegiance is a confirmatory act (emphasizing leadership and obedience), a necessary condition (for the validity of obedience), or a condition for the obligation of obedience and the establishment of leadership. The difference between the second and third views is that, if the pledge of allegiance is a necessary

condition for the validity of obedience, obedience to the Imam or ruler is obligatory, but this obligation is only lifted through the pledge of allegiance. Consequently, just as obedience without the pledge of allegiance is invalid, the obligation of obedience is not lifted without the pledge of allegiance —similar to the relationship between ablution and prayer. However, if the pledge of allegiance is a condition for the obligation of obedience, then the establishment of leadership and obedience occurs through bayʿah (Asefi, 2006, pp. 129–131).

Another important point is that illegitimate pledge of allegiance that is obtained through unconventional and irrational methods is outside the scope of discussion. As some have stated, although breaking the pledge of allegiance from a religious standpoint is considered a breach of covenant with consequences, it must be noted that this binding contract is not absolute but conditional on the circumstances to which both parties, even if implicitly or tacitly, have agreed. This is why Imam al-Husayn did not consider the people's pledge of allegiance to Yazid as an obstacle to their uprising against him (Izedehi, 2010, p. 88).

On the other hand, one of the instances of legitimate pledge of allegiance is the pledge of allegiance by the people to Imam Ali. When they approached him to pledge allegiance, he initially refrained and said, "Leave me, and seek someone else... If you abandon me, I will be like one of you, and perhaps I will be more obedient and more attentive to the one whom you appoint to lead you" (Arfa, 2007, p. 317). This statement of the Imam refers to the significant role of custom and the people in the governance process, as it is they who entrust the affairs to those qualified to lead. Given that this event occurred in the presence of the infallible, if the very concept of custom in the form of popular pledge of allegiance in governance and its framework had been illegitimate, it would have been necessary for the Imam to oppose and reject it—especially considering that, according to temporal circumstances and clues, the Imam was not in a state of taqiyya (dissimulation).

To further elucidate the foundational role and importance of the people, it is noteworthy that some jurists, despite adopting the principle of divine sovereignty and accepting the divine appointment of the Islamic ruler, acknowledge the key role of custom and the people in sensitive matters such as the election of the president. Even though the ruler's legitimacy and divine appointment are recognized, the appointment of the president by the ruler would be deemed incorrect, and the national will and the public's determination in this matter are of paramount importance. However, these

jurists do not attribute legitimacy to the people; rather, they maintain that the qualifications of the candidates are verified by the appointed legitimate ruler (the divinely appointed ruler), and then the people elect them. Thus, we witness the combination of divine legitimacy and the will of the people (Javadi Amoli, 2004, p. 495).

Analysis and Discussion: If the legitimacy of the ruler is established and the people are not involved in that legitimacy, then by extension, the right to appoint officials should also belong to the ruler. Therefore, in this scenario, where the appointment of individuals by the ruler is deemed incorrect and the key role of the people in selecting individuals is emphasized, the people's right, along with their role in legitimizing, is also established.

Considering the framework and analysis of the principles and topics mentioned, we conclude that custom and the people in the Shia political system, whether in the form of pledge of allegiance or elections, play a foundational and effective role. In the absence of a specific text (such as the governance of the infallible), they will remain one of the critical pillars of the legitimacy of a religious government.

5. Formulation of Law and Customary Institutions (Parliament and Executive Power)

The Constitutional period marked the beginning of attention to customary institutions, such as the separation of powers, the parliament, and the executive branch, by a group of scholars and jurists. It is noteworthy that although the demand for a constitutional government or one based on law during the Qajar era was inspired by Western ideas and the experiences of European nations and introduced by Iranian intellectuals, some scholars were also influenced by this issue (Movasaghi, 2006, p. 88). As a result, the scholars were compelled to react to these new movements and concepts, which led to a transformation that had not been realized prior to the Constitutional period. Given this, the issue of the Constitution became the beginning of two intellectual factions among the scholars. One group, relying on Shia jurisprudence, opposed constitutional principles such as: law, the parliament, and the separation of powers, and they are referred to as the "Sharia-seekers." On the other hand, there were clergy who supported the Constitution and believed that its principles and modern institutions were compatible with Islamic principles and laws. This confrontation can be considered the most significant intellectual confrontation after the Constitutional Revolution (Rafi & Abbaszadeh Marzbali, 2015, pp. 7–76). Sharia-seeking scholars, after

briefly aligning with the constitutionalists, with the slogan of Sharia-based Constitutionalism, considered Western concepts such as: freedom, the separation of powers, and majority rule to be incompatible with Islamic laws and principles (Movasaghi, 2006, pp. 80–179). In contrast, the constitutionalist scholars viewed the foundations of the Constitution and modern concepts and institutions as compatible with Islamic principles and laws, considering the needs of the time in their analysis and perspectives (Movasaghi, 2006, pp. 80–179). Among those who strengthened the constitutional government and its institutions through scholarly reasoning and logical justification was Nāʾīnī. He argued that in order to bring an end to the despotic system and establish a constitutional government, two conditions must be met. The first condition is a law or decree, and the second condition is the existence of a parliament that can oversee and supervise the enforcement of the law. These two conditions can be considered the fundamental pillars of a constitutional government from Nāʾīnī's perspective. He began to lean towards the formation of a parliament and the creation of new laws for Iranian society, which had not been previously practiced in Iran, as the religious scholars regarded God as the ultimate legislator, and religious rules and commandments as the law. Another important point is that Nāʾīnī's argument for the necessity of establishing customary institutions, including lawmaking and the parliament, is derived from the principle of "the necessity of the necessary means" (the prerequisite for a necessary action), such that the necessary action is the protection of Islam, and the prerequisite is the constitution and the parliament of representatives (Movasaghi, 2006, p. 91). To further support his claim, Nāʾīnī states: "Whenever the preservation of the system and the regulation of the affairs of usurpers and the prevention of their negligence and transgression depend on their legal codification, the establishment of a parliament based on the free and conscious votes of the people is obligatory" (Beheshti, 2007, vol. 8, p. 287). In discussing the "separation of state powers," he accepts both the division of ministerial duties and the separation of the three branches of government (Rafi & Abbaszadeh Marzbali, 2015, p. 96). A noteworthy point is that Nāʾīnī, relying on four legal principles—asl al-ḥurriyya (the principle of freedom), amr bi-l-maʿrūf wa-nahy ʿan al-munkar (the duty to enjoin good and forbid evil), the duty to fight oppression, and the duty to negate foreign dominance—defended the Constitutional Revolution in Iran. By utilizing these principles, he sought to reject the authoritarian government in Islam and theorize a constitutional political system (Zarei & Varaei, 2020, p. 11).

Considering the above, the establishment of customary institutions and the

issue of the separation of powers gain greater significance. In other words, the legal and institutional development in Nāʾīnī's thought must be viewed as originating from his positive approach to the aforementioned jurisprudential principles and his negative stance toward authoritarianism and absolute monarchy. Another important point is that although the views of some of the constitutionalist jurists marked the beginning of attention to customary institutions, this issue was also seriously addressed in later periods, especially during the Islamic Revolution and by the jurists involved in drafting the Constitution. The jurists of the Constitution, based on rational and textual evidence, presented the foundations of Article 6, which emphasizes "governing affairs through reliance on public votes via elections (parliament, presidency, etc.)." The main foundations of this article must be sought in the rational principle that the establishment of government and the ruling system depends on the acceptance of the people, the customary practice of rational individuals in accepting votes and the sovereignty of the nation, and the credibility of the majority vote (Malekzadeh, 2011, pp. 9–145).

In conclusion, we find that the role of custom in the establishment of legal and executive institutions was one of the significant contributions, with its theoretical and initial framework formed during the Constitutional period by the constitutionalist jurists, including Nāʾīnī. This issue was also seriously considered by the jurists involved in the drafting of the Constitution in the modern era, and it not only gained attention in theory but also found operational significance.

6. Theoretical Consideration of Enjoining Good and Forbidding Evil and Advising the Political Leaders of Muslims

This supervisory role of custom, which is referred to as "supervision of the people over the government," holds special significance. In light of the evidence for the obligation of enjoining good and forbidding evil, such as the verse "There has to be a nation among you summoning to the good, bidding what is right, and forbidding what is wrong" (Quran 3:104), which emphasizes calling to goodness and refraining from evil, as well as the implication of the hadith "Each of you is a shepherd, and each of you is responsible for his flock" (Majlisī, 1983, vol. 72, p. 38), the people are obliged to intervene in the general affairs of their society and, in a sense, bear religious responsibility for the goodness and evil of social life. Supervision over the ruler and government officials is one of the important manifestations of enjoining good and forbidding evil. In this regard, some prominent jurists, such as Ayatollah

Nāʾīnī, have referred to the obligatory nature of enjoining good and forbidding evil as a social responsibility of Muslims. He also considers the right to political control and supervision as obligatory to prevent transgression and regards consultation with the wise as a fundamental element of a democratic political system (Pourfard, 2005, p. 132). Sadr also presents enjoining good and forbidding evil as a principle of universal supervision, stating: "Based on this principle, the right of supervision and authority over the government for the people is firmly established." Accordingly, the people, with their keen eyes, place the actions of the rulers under scrutiny, supervise their performance, and enjoin them to do good and forbid them from doing wrong (Sadr, n.d., p. 171). The supervision of the people over the government, also known in Islamic terminology as the duty of "al-Nasīḥah li-Aʾimmat al-Muslimīn" (advising the leaders of Muslims), is today considered one of the most crucial factors in political and economic development within political systems. In fact, the underdevelopment and stagnation of developing countries are often attributed to this factor (Malekzadeh, 2011, p. 158). The necessity and importance of this issue are also evident in Islamic traditions and the practices of the Infallibles. The Prophet Muhammad states in a hadith: "There are three qualities that no Muslim's heart betrays: (1) Sincerity of action for God, (2) "al-Nasīḥah li-Aʾimmat al-Muslimīn," (3) Being with the community" (Kulaynī, 1981, vol. 1, p. 332). This important reminder from the Prophet (PBUH), which is referred to as "al-Nasīḥah li-Aʾimmat al-Muslimīn," serves as a reliable tool for controlling power and preventing its deviation. This highlights the serious supervisory role of custom over the state and political structure through enjoining good and forbidding evil. This matter has also been given serious attention and emphasis by Shia scholars. Imam Khomeini, emphasizing that Islam has set rules and boundaries for the relationship between the state, the ruler, and the people, and has defined rights for each party over the other, states: "Every individual in the nation has the right to directly question the ruler of the Muslims in front of others and criticize him, and the ruler must provide a convincing answer" (Khomeini, 1990, vol. 4, p. 90/189). Therefore, the issue of supervision in politics and the political structure in the form of advice and enjoining good and forbidding evil is an important matter that is seriously emphasized in the texts and hadiths. The supervision of the people over the government is one of the most significant institutional elements of custom in political jurisprudence, which has gained increased attention in the present era.

7. Theorizing Councils and Customary Consultation in Political Jurisprudence

The concept of shūrā (consultation) is one of the important and practical concepts in political jurisprudence, encompassing various dimensions. One key aspect is its relevance to elections and pledge of allegiance in the foundational establishment of governance and the realization of actual sovereignty. Therefore, the jurisprudential basis of elections can also be traced through the discussion on consultation. It is noteworthy that consultation is one of the methods emphasized by Sunnis for selecting the Islamic ruler, whereas from the perspective of Shiite jurisprudence, the consultation adopted by Sunnis during the early Islamic period to appoint the caliph lacks legitimacy—because it operated in the domain of divine rulings and in contradiction to explicit scriptural texts. Thus, while the Sunnis regard consultation as one of the foundations of the Islamic political system, the Shia, due to their belief in the explicit designation (naṣb khāṣṣ) of ʿAlī (peace be upon him), consider it during the era of the Imams' presence as a rational and effective method of political management (Sajjadi, 2008, p. 156).

Of course, with regard to the function of consultation and its role during the occultation (ghayba), there are differing foundational views. However, in the discussion of the textual and rational basis of consultation, what is discernible in the words of jurists and through an examination of the Qurʾan and tradition includes the indication of verse 38 of Surah al-Shūrā ("[conduct] their affairs by counsel among themselves"), verse 159 of Āl ʿImrān ("consult them in the affairs"), and certain statements from Imam ʿAlī addressed to his son, such as: "Combine the opinions of men, then choose the one closest to what is right and farthest from doubt" (Ṣadūq, 1992, vol. 4, p. 385)—all of which pertain to the issue of consultation and its obligation.

According to the jurists, the narrations concerning consultation can be categorized into several types, which collectively refer to: encouragement and exhortation regarding consultation; guidance through reason on its necessity; the use of consultation in all matters—whether political, public, or private—or only in political and administrative matters; and admonitory (irshādī) prohibition against rejecting consultation (Asefi, 2006, vol. 8, p. 403).

Furthermore, the necessity of consultation can also be established through the practice of the rational (sīrat al-ʿuqalāʾ). Based on this, some argue that consultation is not merely a devotional rule introduced by Islam, but rather a rational practice that has consistently guided human affairs throughout history.

Human history testifies that seeking advice and consultation has been a customary practice among rational and wise individuals (Mir-Ali, 2012, p. 143).

Therefore, given that the practice and method of rational people around the world has been to consult in various matters—including personal, social, and political affairs—it follows that, with regard to the welfare of Muslims, consultation in political matters is a necessity. In what follows, we will address the specific obligatory instances of such consultation.

Some scholars, with reference to the verse "consult them in the affairs", hold that while the word al-amr (affairs) in the verse has a broad and expansive scope—including all matters—a rational contextual indicator (qarīna lubbīyya) restricts its application by excluding those matters for which a ruling has already been explicitly determined by the Lawgiver. Accordingly, the Prophet never consulted the people in instances where a clear divine text had been revealed. There are historical examples of this. For instance, during the expedition of Tabūk, after twenty days had passed without a battle, the Prophet consulted with his companions regarding whether to return via the northern route. When some companions asked whether there had been a divine command or revelation in this regard, the Prophet replied: "If I had been commanded in this matter, I would not have consulted you about it" (Mir-Ali, 2012, p. 154).

Therefore, consultation in matters whose ruling has already been specified by God—that is, those that fall within the domain of explicit scriptural text—is not permissible, and the Prophetic practice reflects this principle. Relatedly, from the perspective of some scholars, the scope of consultation (shūrā) is delineated in Surah al-Shūrā, based on the verse "[conduct] their affairs by counsel among themselves." On this basis, the scope of consultation pertains to amr al-nās (the people's affairs), while matters relating to amr Allāh—such as divine laws, rulings, and determinations of what is lawful, unlawful, or obligatory—are solely within God's domain (Javadi Amoli, 2004, p. 433). Among the issues considered amr al-nās are matters related to the implementation stage: How should economic problems like inflation be addressed? How should urban issues like traffic be resolved? How should the country be developed? All these fall within the realm of implementation and consultation (Javadi Amoli, 2004, p. 433).

Accordingly, attention to the role of customary consultation in politics and political structure constitutes an important contribution to political thought. While it found practical and specific application during the Prophet's time, its

theoretical and conceptual framework has become more fully articulated in the modern era, particularly in the thought of contemporary jurists. In cases where there is no explicit divine text, custom—through the mechanism of consultation—plays a foundational role.

8. Expanding the Zone of Legal Lacuna to Allow Greater Scope for Customary Rationality

In the field of interpreting and applying Islam to evolving political and governmental issues, three major perspectives have been offered by Islamic thinkers. The first is the approach of Sadr, which is based on jurisprudential principles (uṣūl). He introduced the concept of minṭaqat al-farāgh (the zone of legal lacuna) and sought to resolve the challenge of political order by establishing governmental obligations within the realm of permitted acts (mubāḥāt) and spaces not governed by binding religious rulings. The second is the philosophical-theological view of ʿAllāma Ṭabāṭabāʾī, grounded in anthropology. He holds that, given the nature of the human being, there exist both constant and changing needs—and Islam provides two types of corresponding responses. The third is the view of Imam Khomeini, rooted in politics and the science of jurisprudential principles, which introduces the role of time and place in ijtihad. He argues that the temporality and fluidity of political issues cause transformations in subject matter (mawḍūʿ) and, consequently, in legal rulings (ḥukm) (Norouzi, 2014, p. 422).

One of the arenas in which custom (ʿurf) plays a foundational and innovative role is in the sphere of the zone of legal lacuna. Sadr is among the jurists who constantly aimed to structure the various aspects of the Islamic society according to Islamic law. While he believed that the political system could be regulated through governmental obligations within the realm of the permitted acts, which ostensibly implies a direct role for the ruler and government, his broader legal theory states that legislation belongs to the people in areas where the sharia has not issued any binding (obligatory or prohibitive) ruling. He termed this space the zone of legal lacuna.

In his work Lamḥa Fiqhiyya (al-Tamhīdiyya), he states that the Islamic sharia is the source of both constitutional and ordinary legislation, and laws are to be enacted on its basis in three forms: (1) Fixed religious rulings (aḥkām thābita) over which jurists do not disagree. (2) Fixed religious rulings over which jurists do disagree—where choosing a particular opinion from among multiple views is the task of the legislative body based on public interest. (3) The zone where the sacred law has issued no binding ruling, encompassing

all cases where the choice of action is left to the legally responsible individuals. This is the zone of legal lacuna. Determining binding rulings in this area—based on the public interest and provided they do not contradict the constitution—is the responsibility of the legislative body (Sadr, 1978, pp. 18–19).

Based on this, Sadr not only grants a role to the legislature (arising from the will of the people) within the zone of legal lacuna, but even in areas of fixed rulings where there is disagreement among jurists. As a result, he indirectly affirms the role of customary rationality (ʿaql-i ʿurfī) within this domain. In some of his other writings, he even goes further and accepts the legitimacy of political organization and parties, though he conditions their legitimacy on factors such as spreading Islamic teachings and effecting social transformation based on religious principles. Emphasizing the people's role in governance, he considers public consent to be the most fundamental pillar of his envisioned government and one of the key bases of its legitimacy. In his view, the people possess the right of general divine vicegerency (khilāfa ʿāmma) on earth, and the establishment of government is a means to realize that vicegerency. Without the consent of the people, he argues, political and religious legitimacy for implementing Islamic rulings cannot exist (Pourfard, 2005, pp. 13, 211).

In sum, given the theoretical foundations of custom's role in political thought and structure—and in light of the arguments drawn from consultation, elections, enjoining good and forbidding evil, sovereignty, and the right to self-determination— custom plays a serious and significant role in the zone of legal lacuna. In the domain where there is no explicit religious ruling or legal text establishing the obligation or prohibition of an act, custom and rational procedures, either directly or through legal and customary institutions, may function authoritatively—allowing, in effect, for the dynamic presence of customary rationality.

Conclusion

The subject of custom (ʿurf) and its role and status in jurisprudence—particularly in political jurisprudence—is among the most significant topics, and a comprehensive discussion of it allows for a better understanding of the relationship between custom and jurisprudence (fiqh). In this process, identifying and analyzing the innovations and customary institutions in politics and political structure—especially through a re-examination of jurists' theoretical frameworks and their methodological bases in light of the political and social events of their time, notably the socio-political conditions of the

Constitutional era and its aftermath, and the exploration of their responses to surrounding events—constitutes the novel contributions of this study.

Accordingly, through examining juridical evidence and political-jurisprudential approaches, the innovations of custom in domains related to politics are clarified. These include: the application of the principle of "repelling the more corrupt with the less corrupt" (dafʿ al-afsad bi-l-fāsid) in political contexts with reliance on custom; the establishment of a political system based on public elections and majority rule; the non-separation of religion and politics with an emphasis on customary reasoning; the formulation of law and the development of customary institutions such as the parliament (consultation body, Majlis al-Shūrā) and the executive branch; renewed theoretical attention to enjoining good, forbidding evil, and advising the leaders of Muslims (naṣīḥat li-aʾimmat al-muslimīn); the theorization of shūrā and customary consultation in political jurisprudence; and the expansion of the zone of legal lacuna (minṭaqat al-farāgh al-sharʿī) to allow greater scope for customary rationality (ʿaql ʿurfī). These represent some of the most significant innovations and customary institutions in political thought and Shiite jurisprudence, which have drawn the attention of Shiite jurists and on the basis of which they have developed their views.

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