

Examining the Conflict Between Predominant Practical Custom and the Rationales of Legal Rulings in the Tension Between Tradition and Modernity

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In traditional Imami jurisprudence, the concept of ‘urf (custom) has long been recognized under specific conditions. Although custom was not regarded as an independent source of ijtihād (independent legal reasoning), it was at least acknowledged under the scope of rational evidence by jurists and mujtahids. However, following the encounter of Muslim societies with modernity and the emergence of its social institutions—which brought profound transformations to human life—the notion of “predominant practical custom” (al-‘urf al-‘amalī al-ghālib) gained increasing attention, particularly in the domains of social and political affairs. Some traditional scholars completely rejected modernity, while others, often labeled as intellectuals, embraced it wholeheartedly. Beyond these extremes, certain uṣūlī jurists sought to theorize this relationship systematically. The present study undertakes an analytical examination of the methodical opinions of contemporary mujtahids within the ongoing struggle between tradition and modernity. The major positions identified include: the theory of “fixed textual rulings and changeable non-textual rulings,” the theory of “manṭaqat al-farāgh” (the domain of legislative discretion), the theory of “jurisprudence of public interest” (fiqh al-maṣlaḥa), and the idea of “permanence of devotional rulings and changeability of transactional rulings.” Among these, the first two theories adopt a minimalistic approach toward custom, whereas the latter two—developed in response to jurisprudence’s practical engagement with social and political matters—promote a maximalist approach that reinforces the role of custom. After elucidating the shortcomings of each theory, the study proposes a fifth approach grounded in the distinction between ta’sīsī (innovative) and imḍā’ī (approbative) rulings. This framework is recommended for further scholarly inquiry as a potential means to resolve the tension between certain traditional jurisprudential rulings and the predominant practical customs of the modern era.

Keywords: dominance of modernity; predominant practical custom; manṭaqat al-farāgh; fiqh al-maṣlaḥa; conventional nature of imḍā’ī rulings.

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1. Introduction

The debate between tradition and modernity in Iran began less than two centuries ago. Given the wide scope of tradition—both religious and national—and the distinctive characteristics of modernity, this broad topic encompasses multiple dimensions. Consequently, a variety of issues have emerged regarding the relationship between tradition and modernity, and numerous studies have been conducted around these issues. A general review of such studies reveals three main orientations in analyzing the tension between “religious tradition” and “modern custom”: (1) an inward-looking perspective from within religion, (2) an internal view from within modernity, and (3) an intermediary approach addressing both.

Through each of these perspectives, it is possible to explore various theoretical and practical aspects of the interaction or confrontation between religious teachings and the dominance of modernity. Iranian intellectuals, too, have approached this subject from one of these perspectives, each motivated by different considerations. Naturally, their varying interpretations of “tradition” and “modernity” have significantly influenced how they explain the degree of mutual impact between the two. Thus, in some of these studies, one finds typologies and classifications of viewpoints, their interactions, and the practical implications of each (Alidoust, 2009; Kadivar, 2008; Sohrabi Far, 2016).

With the emergence of modernity in religious societies, particularly the encounter of Muslims with new social and political structures, it became evident that some religious propositions were inconsistent with the achievements of modern human sciences. This incongruity was most apparent not in the realm of faith or ethics but in *Shari‘a* and jurisprudential rulings. Gradually, modern culture prevailed over traditional societies and became the dominant culture among Muslims. Following these transformations, serious disputes arose among religious scholars regarding the appropriate way to engage with modernity. To address this dilemma, various theories—such as the notion of *manṭaqat al-farāgh* (the domain of legislative discretion) or the theory of *fiqh al-maṣlaḥa* (jurisprudence of public interest)—have been proposed (Khomeini, 2013; Vase‘i, 2005). Some of these frameworks even gained legal endorsement in Iran, and alongside concepts like

“traditional jurisprudence” (*fiqh sunnatī*) or “Javaheri jurisprudence,” new terms such as “responsive jurisprudence” (*fiqh-e pāsvokh-gū*) and “dynamic jurisprudence” (*fiqh-e pōyā*) became well known. Nevertheless, due to divergent interpretations of religious texts and differing methods of *ijtihad* among jurists, the majority of issues concerning the formulation of *Shari‘a* rulings in the modern era remain unresolved. Among the diverse aspects of this challenge, one key issue is the understanding of the “status of custom (‘urf) in Imami jurisprudence.” Since custom is not explicitly among the four primary sources of *fiqh*—the Qur’an, the Sunnah, reason, and consensus—serious questions arise regarding its relationship to those sources and the extent to which *Shari‘a* rulings may be influenced by it. The present study addresses the most contentious question concerning the influence of custom on *fiqh* amid the tension between tradition and modernity from the perspective of Imami jurists. Accordingly, the central research question is formulated as follows:

“Does the custom resulting from the dominance of modernity possess *Shari‘a*-based authority (*hujjiyyah shar‘iyyah*) in cases where it conflicts with the evidences of legal rulings according to Imami jurists?”

To obtain a systematic answer to this question, the following subsidiary questions are examined:

- What are the necessary conceptual and propositional presuppositions required to confront the main research question?
- What is meant by “custom arising from the dominance of modernity” in the realm of social behavior?
- To what extent are the prevailing theories on this subject coherent, precise, and methodologically sound?

2. Literature Review

Various studies—including books, dissertations, and articles—have been conducted regarding the role of custom in Imami jurisprudence. However, most of these works merely compile the opinions of earlier jurists with minimal analysis, and their authors rarely consider the implications of the modern era. Nevertheless, after extensive review, several works were identified that contain notable and occasionally innovative discussions about the influence of custom on *fiqh* rulings. These works, arranged chronologically by publication date, include:

— *An Introduction to Custom*, which, in addition to linguistic and technical definitions of custom, classifies the opinions of jurists and legal scholars regarding its status in jurisprudence (Golbaghi Masouleh, 1999). However, the author shows little concern for issues relating to the tension between tradition and modernity.

— *The Status of Custom in Fiqh*, a relatively comprehensive work in terms of terminology (Vase'i, 2005). In the third chapter, the author examines "the validity of practical custom," and in the fourth, "the application of custom in jurisprudence and legal theory." Yet, the book does not specifically discuss the dynamics of modern custom or its conflict with the evidences of rulings.

— *Fiqh and Custom*, which provides a more analytical approach than the two previous works (Alidoust, 2009). Although it does not explicitly answer the present research question, the third part of the book—titled "Doubts, Questions, and Challenges"—offers valuable material analyzing and critiquing views on the conflict between tradition and modernity.

— The article *The Status of Custom in Law with an Approach to the Thought of Imam Khomeini*, whose title accurately reflects its content (Malekzadeh & Ahmadiou, 2012). However, its research question is narrower in scope than that of the present study.

— The doctoral dissertation *The Implementation of Divine Limits (Hudud) in the Age of Modernity*, which examines the conflict between traditional jurisprudential rulings and modern custom from a legal perspective (Takyeh Fard, 2021). Most of its content is compilative rather than analytical, though its second chapter discusses the theory of *fiqh al-maṣlaḥa* in greater detail.

From these five works, relevant points—each cited appropriately—will be referenced or critiqued within the present study.

3. Conceptual and Propositional Presuppositions Related to the Research Problem

Before addressing the theories proposed to resolve the research question, and considering the diverse approaches of jurists and *mujtahids*, it is first necessary to clarify the key conceptual and propositional premises underlying this study. These notions and principles have been previously discussed in theological, exegetical, and

sometimes jurisprudential works, but in this research, they are treated as foundational assumptions:

a. Definition of "Religion."

In this study, "religion" refers to Islam as understood within the school of the Ahl al-Bayt (peace be upon them)—not the school of the caliphs. The term "Shi'ism" refers specifically to the Imami school, not to Isma'ilism, Zaydism, or other branches. Likewise, the term "jurists" (*fuqahā*) or "mujtahids," without any qualifier, refers to Imami scholars with differing intellectual orientations, both *uṣūlī* and *akhbārī*, who, according to the well-known view, recognize four main sources of jurisprudence: the Book of God (Qur'an), the Sunnah (sayings, actions, and approvals of the Fourteen Infallibles), reason, and the consensus of early scholars. Accordingly, "custom"—which, under certain conditions, is considered a source in Hanafi jurisprudence—is not, in itself, a source of *ijtihād* among the Imami jurists (Fadil Miqdad, 1984; Fayz Kashani, 1981; Gharavi Esfahani, 1995).

b. Division of Jurisprudential Topics.

Imami scholars have long divided *fiqh* issues into two main categories: "acts of worship" (*'ibādāt*) and "transactions" (*mu'āmalāt*). This classification appears to have originated with Sallar al-Daylami, a student of Shaykh al-Mufīd and a contemporary of Shaykh al-Ṭūsī, in his book *Al-Marasim fi Fiqh al-Imamiyyah* (Sallar al-Daylami, 1984). Two centuries later, this division was institutionalized among Imamīs by the author of *Sharā'i' al-Islām* (Muhāqqiq al-Hilli, 1987), and subsequently gained fame through widespread adoption. Later, during the late Ḥilla school, scholars such as Fadil Miqdad and Fayz Kashani in the Safavid era proposed alternative classifications for jurisprudential topics (Fadil Miqdad, 1984; Fayz Kashani, 1992). Although their approaches were methodologically sophisticated, they did not achieve wide acceptance. More recently, Sayyid Muhammad Baqir al-Sadr introduced a notable fourfold division of jurisprudential subjects (Sadr), yet the traditional dichotomy between "acts of worship" and "transactions" continues to dominate the seminary's jurisprudential system. As will be shown, most theorists addressing the conflict between tradition and modernity also employ this twofold classification.

c. Fixed and Variable Legal Rulings.

Sharī'a rulings are generally divided into two categories: "fixed" and "variable." This duality constitutes one of the key assumptions adopted by many Imami scholars in

addressing temporally and spatially contingent issues. Despite opposition by some earlier scholars (Zargarinezhad, 1998), it gradually gained broad acceptance in modern times. During the era of the Imams' presence, when questions were directly addressed to them, this distinction was of little practical importance. Consequently, there is no explicit textual statement outlining the criteria for determining which rulings are immutable and which are subject to change. Hence, jurists hold diverse and often conflicting views on the basis and application of this classification. Nevertheless, accepting this dual structure implies that transformations within societies and changes in lifestyle inevitably lead to modifications in certain jurisprudential rulings or render some rulings obsolete. Undoubtedly, modernity represents a pivotal moment in such transformations, as the pace of change in social institutions before its advent was not nearly as pronounced.

4. The Meaning of Custom ('urf) in the Tension Between Tradition and Modernity

In the jurisprudential works of early scholars, little attention was given to the concept of "custom" ('urf) and its status within *fiqh*. However, in the later works of legal theorists (*uṣūlīs*), new discussions gradually emerged, and diverse classifications of 'urf were introduced. Understanding these classifications is of great importance, as they shape our perception of "custom" and our judgment regarding its definitions (Vase'i, 2005).

To clarify this point, if one sets aside the linguistic meanings of the term 'urf and examines its technical meanings among jurists, various definitions emerge. These definitional differences stem from the diverse conceptualizations of 'urf by scholars. In fact, most disagreements regarding its definition arise from the emphasis on certain types of 'urf and the neglect of others. Each scholar or thinker, by focusing on particular classifications, formulated a definition broad enough to encompass the types of custom most relevant to their perspective. Consequently, later scholars—facing a wider range of customs—found it easier to critique earlier definitions, as those definitions failed to account for newer categories (Alidoust, 2009).

According to contemporary research, the main classifications of 'urf consist of seven binary and three ternary divisions:

— Binary divisions include: "verbal and practical," "precise and approximate," "valid and invalid," "subjective and legal," "established and conventional," "expert and non-expert," and "recognized and unrecognized."

— Ternary divisions include: "general-general, general, and particular," or "consistent, prevalent, and shared," or "prior, concurrent, and subsequent" (Alidoust, 2009; Vase'i, 2005).

However, not all of these classifications are relevant to the study of the tension between tradition and modernity. The 'urf emerging from modernity—which transforms social relations and lifestyles—consists of both valid and invalid behaviors that impose themselves upon previous social and familial structures and become widespread to the fullest extent. As Anthony Giddens defines modernity, it encompasses "new forms of urban life and the establishment of modern social organizations that first appeared in seventeenth-century Europe and, through their remarkable diffusion, crossed geographical boundaries and imposed their characteristics on other societies and cultures" (Nouzari, 2000).

Therefore, among the above-mentioned classifications, only three are relevant to the present research problem:

— The division of 'urf into "verbal and practical," where only *practical custom* is considered in this study.

— The division into "valid and invalid," both of which are included here. The criterion for this distinction lies in conformity (or lack thereof) with the *Shari'a*, particularly with the apparent meanings of religious texts.

— The division into "consistent, prevalent, and shared," of which the second—*prevalent custom*—is the focus of this discussion. According to definitions, when a behavior is accepted by all members of society without opposition, a "consistent custom" ('urf *muṭṭarid*) arises; when most members accept it and few oppose it, it is called "prevalent custom" ('urf *ghālib*); and when it is accepted by only half of the society, it becomes a "shared custom" ('urf *mushtarak*) (Saljuqi, 1968; Vase'i, 2005). With some reflection, it becomes clear that only the second case has clear empirical examples, since in large societies, the other two are difficult to measure due to behavioral diversity.

In brief, the *ʿurf* arising from modernity can be described as the *prevalent practical custom*, whether valid or invalid. Therefore, a definition of *ʿurf* that reflects these characteristics—while distinguishing it from similar concepts such as habit (*ʿādah*), the conduct of rational agents (*sīrat al-ʿuqalā*), and social customs—suffices for explaining the meaning of *ʿurf* in the modern era.

Among the various definitions provided for *ʿurf*, the one given by Fayz Kashani appears most relevant to the present study, despite his *akhbārī* orientation and opposition to *ijtihād*. In his Persian work *Āyineh-ye Shāhī*—written to examine the rational soul and its moral training through the five governing principles of reason, nature, *Sharīʿa*, custom, and habit—he defines *ʿurf* as follows:

“Custom is a rule established by the common people among themselves, which they deem obligatory to follow and consider deviation from it reprehensible, even if it is contrary to nature and difficult to observe. Each person fears the reproach of others for violating it, and this rule differs across times, regions, and nations—sometimes in harmony with reason, religion, and nature, and sometimes not; sometimes accepted by the wise, and sometimes not” (Fayz Kashani, 1992).

From this definition, several key characteristics of *ʿurf* can be inferred:

— *ʿUrf* belongs to the realm of action, not theory; thus, Fayz Kashani’s definition excludes theoretical custom as discussed by later *uṣūlīs*.

— *ʿUrf* possesses a binding or obligatory quality. This feature distinguishes it from mere habit, and Fayz consciously points to this distinction, since in the same text, he discusses custom alongside other concepts such as habit.

— The *ʿurf* of civil societies is not fixed but varies according to time, place, and ethnicity.

— *ʿUrf* may align or conflict with nature, reason, or *Sharīʿa*; hence, it can be divided into valid and invalid, sound and corrupt, or lawful and unlawful forms.

Nevertheless, some researchers, while acknowledging the comprehensiveness of Fayz Kashani’s definition, have objected to his use of the term “established” (*waḍʿ*) at the beginning of the definition. They argue:

“If by ‘establishment’ he means *waḍʿ taʿayyuni*—a designation that occurs through frequent repetition and common use of a word or act accompanied by an explanatory context—the problem is that this limits the

origin of *ʿurf* to a single mechanism. Yet, customs may arise through various means. But if he means *waḍʿ taʿyīnī*—the result of a deliberate collective decision, such as through legislation by representatives in a parliament—the problem is that the definition fails to exclude law itself.” (Vaseʿi, 2005).

It seems that the first interpretation of the critic is correct, while the second involves unnecessary overextension. Fayz’s intention by *waḍʿ* clearly corresponds to *waḍʿ taʿayyuni*—the natural emergence of a particular behavior through widespread practice in society. The use of the word “rule” (*dastūr*) in his definition shows that he does not refer to verbal custom but rather to practical custom, indicating behavioral dominance that arises from the collective will of a society, not from governmental or legislative decrees implying *waḍʿ taʿyīnī*. The clearest evidence for this is Fayz’s statement that *ʿurf* is a rule established by the general populace, not by rulers or legislators. Obviously, what is established by the people refers to the *waḍʿ taʿayyuni* resulting from repeated social practice. Therefore, Fayz Kashani’s definition of *ʿurf* indeed succeeds in excluding non-relevant cases.

4.1. The Relationship Between Predominant Practical Custom and the Sources of Ijtihād

Among the public and in everyday discourse, “practical custom” is sometimes conflated with “habits” or “social rites and rituals.” A similar mistake occasionally occurs among specialists, who at times blend *ʿurf* with the “conduct of rational agents” (*sīrat al-ʿuqalā*). In general terms, the concept of *ʿurf* differs from each of those three, though at the level of instances there are notable overlaps between *ʿurf* and each of those notions. Scholars have paid greater attention to the relation of *ʿurf* to habit and to the conduct of rational agents, and, as a result, various views have been articulated. However, since neither *ʿurf*, nor habit, nor the conduct of rational agents counts among the independent sources of *ijtihād*, surveying those opinions does not substantially assist in analyzing issues tied to the tension between tradition and modernity. Rather—given the aim of this article—we must focus specifically on understanding the relationship between “predominant practical custom” and the sources of *ijtihād*.

Put differently, because *ʿurf* has standing in Imami jurisprudence only instrumentally—not

independently—understanding its relationship to the four canonical sources of *ijtihād* as conceived by *uṣūlī* jurists is crucial. It is clear that consensus (*ijmāʿ*) in its technical sense within legal theory, even if accepted, bears no connection to *ʿurf*, and the relation between the two is one of disjunction. By contrast, sound *ʿurf* shares common ground with the conduct of rational agents; therefore, the relation between *ʿurf* and reason can be described as partly overlapping subsets.

Understanding *ʿurf*'s relationship with the Qur'an and the Sunnah, however, is not straightforward. Elucidating its relation to these two foundational sources requires serious reflection and theoretical framing. Some later jurists and contemporary thinkers have developed distinctive *ijtihād*-based approaches responsive to the profound transformations of the modern age; revisiting these views, in terms of their implications for *ʿurf*, helps to lay bare the challenging margins of the problem of conflict between modern custom and revealed texts.

5. Conceptions of How Jurists Face Predominant Modern Custom

In Iran, beginning in the late Qajar period, two broad reactions to the emergence of modernity and its attendant transformations can be observed. One group of religious scholars adopted total confrontation and even construed modernity as a Western-organized movement aimed at destroying religion. In opposition to this extreme stance, another group—often called *monavvar al-fekr* (enlightened intellectuals)—became entirely captivated by the new world in view of certain observable effects of modernity and its striking expansion. Predictably, these two extremes produced nothing but erasure of the central question and a deepening rift between traditional religionists and graduates of the new schools.

Over time, as religious scholars and thinkers reflected more carefully, a space opened for theorizing the relationship between tradition and modernity. Avoiding the aforementioned extremes, scholars working from within a religious framework proposed new approaches to mediating tradition's engagement with modernity. The most methodologically articulated intra-religious approaches—where the theorist, as an advocate of religion, seeks to preserve rites, rulings, and ethics in the new world—include: the fixity of textual rulings and the mutability of non-textual ones, *manṭaqat al-farāgh* (the

zone of legislative discretion), *fiqh al-maṣlaḥa* (jurisprudence of public interest), and the fixity of devotional rulings alongside the mutability of transactional rulings.

Each of these ideas entails a particular view of the place of *ʿurf* in jurisprudence and of how to employ it in *ijtihād*. The explanation and critical evaluation of each view are as follows.

5.1. The Function of Custom in the Simple Theory Distinguishing Non-Textual from Textual Rulings

Muḥammad Ḥusayn Gharavī Nāʾinī—an expositor of Shaykh Anṣārī's school and a supporter of the Constitutional Movement in Qajar-era Iran—authored *Tanbih al-Ummah wa Tanzih al-Millah* toward that end. This work is regarded as a key text for research in Islamic political philosophy. By “admonition of the community,” Nāʾinī sought to alert Muslims to the necessities of the *Sharīʿa*, and by “purification of the nation,” he aimed to deliver the populace from the peril of despotism (Amin, 1982). Although the primary locus of his views in that work lies in political and social matters, his theorizing about distinguishing fixed from variable rulings inaugurated a new chapter for the conduct of rational agents and the application of *ʿurf* in jurisprudence—an influence discernible in later theorizing.

Nāʾinī's position may be summarized as follows: jurisprudential rulings divide into fixed and variable.

— **Fixed rulings** are those to which the *Sharīʿa* texts allude—explicitly or implicitly—and that, in any case, have a pedigree within revelation. Most political and even social issues do not fall into this category (Gharavi Na'ini, 2003).

— **Variable rulings** concern matters for which no ruling is observed in the religious texts; jurists have either remained silent about them or, in some cases, have advanced judgments on rational grounds. According to Nāʾinī, in contrast to fixed rulings, variables fall outside the jurist's remit; determining them devolves upon the ruler. The ruler, after consulting experts, issues rulings on these matters. Preferably, such matters should be entrusted to the nation's legislative assembly, so that representatives, considering temporal-spatial conditions and public interests, enact laws for each issue. Conformity of such statutes with *Sharīʿa* becomes moot; yet these variable rulings, once enacted, are akin to fixed

rulings in that they are religiously binding (Gharavi Na'ini, 2003).

The details of Nā'īnī's exposition indicate that his genus for the fixed/variable division is transactional rulings. In his view, the rulings of worship are all textual and belong to the fixed category, to be derived by jurists; his proposal addresses transactional rulings, a substantial subset of which (political and social matters) he counts among the variables.

5.1.1. *Appraisal of the Simple Theory Distinguishing Non-Textual from Textual Rulings*

Based on the fixed/variable dyad and the relegation of most political and social issues to the variable category, Nā'īnī's theory seeks to free the hands of the Islamic ruler and the legislature to make use of *'urf* in many political and social laws. Nonetheless, several serious ambiguities appear in his view:

First, Nā'īnī's criterion for distinguishing fixed from variable rulings invites reflection. He does not adequately explain whence he derived this criterion or whether he has textual or rational proof for it. The debate here is not over the **principle** of dividing rulings into fixed and variable—though that division has its critics—but over the **criterion** for assigning particular instances to each category.

Second, even if one accepts Nā'īnī's proposed criterion, what should the governing authority do when, in a given case, one jurist claims a verse or ḥadīth pertains to the matter, while another, denying any connection, deems it variable? In facing such a framework, political authorities might pressure the clerical establishment to refrain from opining on certain textual matters as well, thereby widening the field of legislation for the state and gradually curtailing the social and political oversight of religious scholars.

Third, while Nā'īnī's proposal appears to entail reliance on *'urf* in variable matters, it cannot readily be taken to imply reliance on *'urf* **within jurisprudence**, because it removes variable rulings from the jurist's jurisdiction. Enactment by the Islamic ruler in Nā'īnī's time (late Qajar and early Pahlavi) or referral of such matters to the national legislature is not, strictly speaking, a jurisprudential exercise—indeed, this is commonplace in secular legislatures today. One might think Nā'īnī held a secular view of government, especially since he regards checking parliamentary statutes against *Shari'a* as

unnecessary; but this reading of his position or motive is incorrect, for he ultimately holds adherence to parliamentary laws to be religiously obligatory (Amin, 1982).

Perhaps such ambiguities—and kindred concerns—explain reports that, late in life, Nā'īnī sought to collect copies of *Tanbih al-Ummah wa Tanzih al-Millah* (Amin, 1982). Murtaza Motahhari, however, attributed Nā'īnī's silence to the book's perceived incompatibility, in the eyes of some seminary figures and laypeople, with the prerogatives of the religious authority (*marja'iyah*) (Motahhari, 1999).

5.2. *The Function of Custom in the Theory of Manṭaqat al-Farāgh*

Although elements of this view can be found in the works of eminent jurists such as Muḥaqqiq Nā'īnī, the expression "*manṭaqat al-farāgh*" appears for the first time in the writings of Sayyid Muḥammad Bāqir al-Ṣadr. In an Arabic treatise—translatable as "A Preliminary Jurisprudential Glance at the Draft Constitution of the Islamic Republic of Iran from a Juridical Perspective"—and building on the fixed/variable dyad, al-Ṣadr proposed a new threefold scheme to systematize contested rulings, rulings concerning novel issues, and also governmental rulings.

According to al-Ṣadr, the rulings needed by contemporary society fall into two broad classes: either a ruling about them is found in the Qur'an and the reports of the Infallibles, or no ruling is observed in the revealed texts. The first class then divides in two: rulings derived from explicit texts upon which Imami jurists agree, and rulings that are matters of *ijtihād* over which jurists disagree because texts differ or are not explicit. Thus, in the present era, three categories of rulings arise, each with a distinct path to identification and enactment:

a. **Textually certain rulings:** Since Imami jurists concur upon them—like the obligation to fast in Ramadan—these rulings are fixed and invariable across times and places, being definitive divine commands.

b. **Textually probable rulings:** Because of divergent texts or lack of textual explicitness, Imami jurists disagree over these rulings—for example, the Friday prayer during the Major Occultation, which jurists have variously deemed an individual obligation, a discretionary obligation, recommended, or prohibited, based on scriptural inference. Such positions should be

deliberated within the national legislature composed of qualified decision-makers; its members, considering the public interest and contemporary exigencies, select one view. Al-Ṣadr appears to treat the upshot here as “fixed,” insofar as the final ruling still results from a jurist’s *ijtihād* grounded in the primary sources (Sadr, 1979).

c. **Rulings of the *manṭaqat al-farāgh*:** These are topics for which no ruling appears in the revealed texts. They lie outside the jurist’s remit, and any of the normative statuses—obligatory or prohibitive—may be possible. For such matters, one must turn from the outset to the national legislature. After due investigation and review of each non-textual matter, the qualified decision-makers should enact a law for it with the public interest in view. Finally, these statutes must be endorsed by jurists to ensure no conflict with the general principles of the *Sharīʿa* and fixed religious rulings; upon such confirmation of non-contradiction, they count as *Sharīʿa* rulings (Sadr, 1979).

5.2.1. *Appraisal of the Manṭaqat al-Farāgh Theory in Relation to Custom*

With a little reflection on the three categories of rulings just mentioned, it becomes clear that the predominant practical custom—arising from the dominance of modernity—can play a substantial role in shaping two of those categories. Wherever the national legislature becomes involved, the likelihood that predominant practical custom will influence rule-making increases. This is entirely evident in the third category and needs no further explanation; but even in the second category, legislators will naturally favor, among competing juristic opinions on a given issue, the view whose practical implications align more closely with the prevailing behavior of the populace.

At the same time, certain ambiguities appear in Sayyid Muḥammad Bāqir al-Ṣadr’s view:

— First, what justifies treating the rulings agreed upon by jurists as fixed? Is consensus among jurists sufficient evidence to identify fixed rulings? In such matters, is no distinction conceivable between *taʾsīsī* (innovative) and *imḍāʾī* (approbative) rulings? And why should we not differentiate between rulings of worship and rulings of transactions—which rely far more heavily on social custom?

— In the second category, where jurists’ deductive opinions diverge, why should a council composed of

those same jurists not determine a practically operative resolution? In strictly devotional rulings that do not significantly conflict with predominant practical custom, what problem arises if each legally responsible person acts according to the fatwā of their own marjaʿ—and, indeed, what need is there for unification? If the legislature or a council of qualified decision-makers selects one view on a disputed issue, what becomes of the statute if, later on, the jurist(s) who held that view, through fresh *ijtihād*, withdraw from it? If the disagreement in some such issues stems precisely from divergent rulings reflected in outwardly reliable reports, is that fact alone not evidence that certain rulings in the second category are variable? One might argue that the reliable but conflicting ḥadīths were issued by the Infallibles under differing circumstances and conditions, and thus those rulings are, by nature, variable.

— If, by hypothesis, there is no related text for topics in the third category, why must statutes enacted by the qualified decision-makers or the legislature be ratified by jurists? Al-Ṣadr’s presentation seems to tie the criterion of fixed versus variable to whether a ruling is textual or non-textual; yet some jurists, applying the same criterion, have considered checking non-textual rulings against the *Sharīʿa* to lack scholarly basis (Gharavi Naʿini, 2003).

5.3. *The Function of Custom in the Theory of Fiqh al-Maṣlaḥa*

In the two preceding theories, the title of “public interest” featured prominently when explaining and legislating variable rulings and drawing on custom. Although those views were not built upon the concept of *maṣlaḥa* as such, a third theory subsequently emerged in which the notion of interest is far broader and casts a wider shadow over jurisprudential rulings. This theory can be traced in some scholarly works of Imam Khomeini and, more prominently, in his statements and letters from the mid-1980s. Before advancing the theory of *fiqh al-maṣlaḥa*, Imam Khomeini articulated discrete points about the use of custom in jurisprudence—points that can be evaluated within the framework of traditional *fiqh* and legal theory and thus have limited utility for explicating *fiqh al-maṣlaḥa*.

The intellectual setting for *fiqh al-maṣlaḥa* differs markedly from the traditional frameworks of *uṣūlī* jurists, a contrast Imam Khomeini himself

acknowledged. Perhaps the most salient passage in his authored scholarly works that indicates—or leads to—the theory of *fiqh al-maṣlaḥa* appears in *Kitāb al-Bayʿ*:

“Islam is identical with governance in all its dimensions, and the rulings—which are the laws of Islam—are themselves but one dimension of governance; indeed, the rulings are secondary desiderata and instruments for implementing governance and expanding justice.” (Khomeini, 2013)

Two important points in this brief passage illuminate the contours of *fiqh al-maṣlaḥa*:

First, the end of Islam—and indeed its very essence—is governance: the aim of the Prophet’s and the Imams’ endeavors was the establishment of government; accordingly, jurists and religious scholars must strive along the same path, and upon the establishment of a religious government, they must mobilize all religious programs and concerns to preserve and elevate the state in the service of expanding social justice.

Second, divine rulings—both devotional and transactional—are secondary desiderata; therefore, in light of the exigencies of governance and its preservation and elevation, and in view of custom as shaped by temporal and spatial conditions, they may be modified or even suspended.

In essence, the theory of *fiqh al-maṣlaḥa* took shape in the 1980s after the religious government began to confront the practicalities of administering society. For this reason, various aspects and formulations of the theory can be traced chiefly in the later volumes of *Ṣaḥīfah-ye Nūr* (Khomeini, 2010). In this conception, *maṣlaḥa* is not confined to the public interest of citizens but also encompasses state interests; the governing authority, given the exigencies of the modern world and the pursuit of justice in a religious society, may alter even textual rulings. In January 1988, Imam Khomeini wrote to the sitting president:

“The government may unilaterally annul religious contracts that it itself concluded with the people when those contracts conflict with the interests of the country and Islam; and it may prevent the implementation of any matter, whether devotional or non-devotional [transactional], so long as its implementation conflicts with the interests of Islam.” (Khomeini, 2010)

5.3.1. Appraisal of the *Fiqh al-Maṣlaḥa* Theory in Relation to Custom

Some studies have presented *fiqh al-maṣlaḥa* as a solution to problems in legal science and governmental rulings in the modern age, emphasizing the theory’s practical efficacy (Takyeh Fard, 2021). In some of Imam Khomeini’s explicit statements—alongside his affirmation of *fiqh-e jawāherī*—time and place are described as two decisive elements in *ijtihād* and as signs of the dynamism of Imami jurisprudence (Khomeini, 2010).

Traditional jurists, however, have expressed other concerns about *fiqh al-maṣlaḥa*, particularly regarding insufficient attention to the fixed/variable distinction—especially in worship. Moreover, the practical experience of this approach has not always been welcome within religious society, since the determination of those interests was removed from the purview of seminary and academic scholars and delegated to a council—the Expediency Discernment Council—whose members have often been political figures lacking the requisite expertise in *fiqh* and law.

Although this theory offers legislators a clear path for drawing on predominant modern custom, its principal aim is safeguarding the Islamic system, not resolving the issues at stake in the tension between tradition and modernity. Historically, the highly slippery concept of “interest” (*maṣlaḥa*) does not boast an admirable record in Islam; in many cases, it has operated to the detriment of the Ahl al-Bayt and the Imami school.

5.4. The Function of Custom in the Theory of Fixed Worship and Mutable Transactions

In his article “From Historical Islam to Spiritual Islam,” Mohsen Kadivar critiques earlier views and proposes a new framework for engaging tradition with modernity. He argues that if divine rulings—transmitted through the Book and the Sunnah—are re-examined through a teleological lens, a suitable pathway emerges for engaging tradition with modernity and, in other words, for safeguarding religion under the dominance of modernity. By setting aside certain historically bound rulings that no longer yield benefits—and may even be deemed unjust—we can move toward a spiritual Islam (Kadivar, 2008).

Kadivar's proposal builds on the traditional distinction between transactions and worship and emphasizes the concept of justice. In this theory, the rulings of worship—whether disputed or agreed upon—remain, as before, within the province of jurists; however:

“The rulings governing the sphere of transactions cannot be regarded as entirely *tawqīfī* and devotional in such a way that the human intellect recognizes no interests in them and submits to them solely by pure obedience—especially because the rulings of transactions are approbative rather than innovative. That is, Islam either endorsed wholesale, or with certain reforms, the pre-existing customary rulings—so much so that these rulings may be viewed as a marginal commentary on the custom of the age of revelation.” (Kadivar, 2008)

On this view, since the custom of the Prophet's time in Arabia—like the custom of any other time and place—enjoys no intrinsic sanctity, there is no necessity today, given the profound transformations of human life and social customs, to adhere to jurisprudential rulings grounded in that earlier custom while disregarding the requirements of modern social institutions.

5.4.1. Critique of the Theory of Fixed Worship and Mutable Transactions

This theory, more than the preceding ones—whose primary focus was political—directly addresses the issues specific to the modern era and the anxieties arising from the tension between tradition and modernity. It is clear that Kadivar's formulation of this theory is influenced, and to some extent indebted, to the sociopolitical structures of secular systems. Like many reformist Muslim thinkers, he appears content with the experience of separating religion from the state in certain Western countries, and thus he has not sufficiently clarified or refined the presuppositions of his own theory (Kadivar, 2008).

To elaborate, the idea of the “fixity of acts of worship and mutability of transactions” rests upon three binary divisions of *Sharīʿa* rulings: (1) *ibādāt* (acts of worship) versus *muʿāmalāt* (transactions); (2) fixed versus variable; and (3) *taʿsīsī* (innovative) versus *imḍāʾī* (approbative). However, without providing adequate justification or explanation, Kadivar treats the last two distinctions as equivalent in their instances and merges them with the first distinction. The result of this conflation yields two propositions:

— The rulings of the domain of worship are *taʿsīsī* (innovative) and therefore “fixed.”

— The rulings of the domain of transactions are *imḍāʾī* (approbative) and therefore “variable.”

As can be seen, each proposition contains two separate claims, and Kadivar presents all four as if they were self-evident or at least already established. The claim that all rulings of worship are *taʿsīsī* and all rulings of transactions are *imḍāʾī* is novel and lacks precedent in the classical *fiqh* literature. Kadivar offers no proof for either of these assertions.

By contrast, the two other claims—that “innovative rulings are fixed” and “approbative rulings are variable”—had already been expressed by the author of *Tahrīrāt fī al-Fiqh* (Khomeini, 1997) and can also be inferred from certain lectures of Muḥaqqiq al-Nāʾinī (Gharavi Naʾini & Kazemi Khorasani, 1996). Kadivar, however, cites neither of these sources and seems to have been unaware of them.

It should be noted that according to the view of Sayyid Muṣṭafā Khomeini—which also has roots in Nāʾinī's jurisprudential lessons—one may speak of “fixed innovative rulings and variable approbative rulings.” In this perspective, all rulings of worship and a small portion of transactional rulings are *taʿsīsī*, while most transactional rulings are *imḍāʾī* and therefore dependent upon custom and the conduct of rational agents (Fadil Miqdad, 1984; Fayz Kashani, 1981). This approach appears more coherent and less vulnerable to the objections directed at the four previously discussed theories. Unfortunately, however, it has not been adequately examined or systematically explicated. Curiously, some scholars, through mistranslation of Ḥājj Āqā Muṣṭafā Khomeini's words, have claimed to refute his view in a brief paragraph (Alidoust, 2009). Another researcher, while passing lightly over the core of this theory, has provided an extensive analysis and critique of the evidential validity (*ḥujjiyyah*) of *imḍāʾī* rulings (Arab Salehi, 2019).

Accordingly, it is recommended that the theoretical framework of “fixed innovative and variable approbative rulings” (*thubūt taʿsīsī wa taghayyur imḍāʾī*)—its presuppositions, implications, and methodological consequences—be explicated in a dedicated future study.

6. Conclusion

This study yields the following results:

a. With the dominance of modernity and the encounter of Muslims with new social concepts and institutions, jurisprudential rulings—more than beliefs and ethics—have come under challenge. To view modernity from an intra-religious perspective and to avoid extremes in dealing with its characteristics, one must, within the framework of legal theory (*‘ilm al-uṣūl*), adopt a methodical approach toward accepting or rejecting instances of “predominant practical custom.” The dichotomies of “fixed and variable” and “innovative and approbative” in the classification of *fiqh* rulings serve as essential premises for engaging with this complex debate.

b. The ideas of Muḥaqqiq al-Nā’īnī in *Tanbīh al-Ummah wa Tanzīh al-Millāh* and of Muḥammad Bāqir al-Ṣadr in the “*Manṭaqat al-Farāgh*” theory both rest upon distinguishing textual from non-textual rulings. Yet both theories explain the relationship of custom only with non-textual rulings. Neither provides a solution for addressing the interaction of modern custom with textual rulings, even though many of the practical challenges facing religious adherents in the modern age concern rulings explicitly grounded in the Qur’an and the Sunnah.

c. The theory of *fiqh al-maṣlaḥa* has been formulated in several ways. While certain versions of it give considerable attention to the temporal and spatial elements of modernity, the inherently slippery concept of “interest” (*maṣlaḥa*), when invoked for the purpose of preserving the Islamic system, has often been misinterpreted by political actors and sometimes by the system’s opponents. Based on the practical experience of the Expediency Discernment Council over the past few decades, this theory risks removing certain social and political rulings from the domain of jurists and legal scholars, thereby transforming portions of *fiqh* into state-centered jurisprudence.

d. The idea of “fixed worship and mutable transactions” contains within itself a mistaken presupposition—namely, that the rulings of worship are innovative and fixed, while the rulings of transactions are approbative and changeable. The practical experience of this theory can be observed in secular societies, where both its positive and negative implications can be discussed.

e. The concept of “fixed innovative rulings and variable approbative rulings,” which can be inferred from some of

Muḥaqqiq al-Nā’īnī’s lectures and explicitly appears in the writings of Sayyid Muṣṭafā Khomeini, seems free from the flaws of the four previously discussed theories. It provides a clearer path for explaining the status of practical custom arising from modernity within Imami jurisprudence—on the condition that the implications of this theory are further developed through thorough research and deliberation by specialists in jurisprudence and law.

Authors’ Contributions

Authors contributed equally to this article.

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Transparency Statement

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