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An Evaluation of the Jurisprudential Application of "the Faithful's Practice"

Muḥammad Taqī Fakhlaʿī*

Professor , Department of Islamic Jurisprudence and Principles of Islamic Law, Ferdowsī University of Mashhad, Mashhad, Iran..

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Abstract

The Faithful's practice is taken as the general manners of the religious people who live in the divine legislation era whose religiosity mode is the only reason for the occurrence of such a practice. The deep-rooted jurisprudential heritage manifests the strong position of this institution in the domain of inference. In addition to analyzing the most essential legist bases in confirmation of the Faithful's practice, the present study has challenged the main instances of its jurisprudential application. At the end, it can be asserted that the installed limitations in the authorization of this institution have severely limited its argumentation and so, absolute jurisprudential reliance on it is very scarce.

Keywords

The Faithful's practice, The Wise, Authorization, Contemporaneity, Application, Jurisprudence

* ***.Author, Email****: fakhlaei@um.ac.ir*

Introduction

With the Faithful's practice, we mean the general practice of the religious people who live in the divine legislation era whose religiosity mode has caused the establishment and maintenance of such a practice (Muẓẓaffar, 2008, vol. 3: 176; Ḥakīm, 1997: 192-193; Ṣadr, 1975: 167).

Although the majority of the Muslim jurists have not allocated a separate discussion to the conditions for the authenticity of the Faithful's practice, a reflection on the jurisprudential argumentation method can familiarize us with the conditions needed for the confirmation of this institution. Meanwhile, it seems that conditions such as coexistence of the practice with the divine legislation era, unprovability of the practice prohibition by the Infallibles (a), freedom of the legislator to offer his decree, freedom of the practice from being driven out of evidence or imitation, and the dependence of the referent of the practice on narration and its existence in the absolute devotional affairs are among the main legist bases of the Faithful's practice confirmation.

Nonetheless, analysis of the foregoing bases in the jurisprudential inference process reveals that the Faithful's practice has wrongly found a worthwhile status in the jurisprudence sphere, because due to the limits imposed on its authorization, it is practically impossible to find the existence and endurance of the bases of its authorization significantly in the jurisprudence sphere.

The study at hand aims at analyzing the most important legist bases of the Faithful's practice authorization and exploring its jurisprudential efficiency in the light of some of its main applications and so, familiarizing the audience with the most crucial problems of reliance on this institution so that an appropriate ground is formed for judging its jurisprudential applicability. Finally, an example of the general jurisprudential reliance is scrutinized.

The necessity of the contemporaneity of the practice with the legislation era

Devaluation of the "common sense" as an independent reason that exists along with other reasons (Mughnīyah, 2000: 171; ʻAlīdūst, 2005: 169, 201) causes the practice to be subsumed under the "traditional practice". This way, the practice seeks all its validity from its referent (i.e. the traditional practices), and this is in need of insisting on the necessity of attaching the practice to the Infallibles' eras.

The common legist view is to vote for the non-conditioned authoritativeness of the Faithful's practices after ascertaining contemporaneity (Muẓẓaffar, 2008, vol. 3: 179; Ṣadr, 1987, vol. 2: 235; Najm Ābādī, 2001, vol. 2: 258; Ḥakīm, 2000: 76). However, what causes problem for argumentation is to ascertain that the principle of the contemporaneous practice coincided with the legislation era (ascertaining the contemporaneity).

There are many ways to ascertain the contemporaneity, such as perceiving the inherent facts and generic inclinations common among the wise as the origin of the practice, the difficulty of changing a practice to an opposing practice, historical narrations and evidences in the public history domain, jurisprudential narrations, and the majority decrees, induction of a unitary practice from the social conditions of the different societies and generalizing it to other wise societies (Ṣadr, 1985, vol. 1: 247-250; Id. 1996, vol. 4: 238-241).

However, even if all these solutions are perceived as sound, they can only help prove the contemporaneity of the intellectuals' practices, while the application of the Faithful's practice which regards the absolute religious affairs does not originate from any aspect of the pure intellectual disposition.

The third solution might be considered as the best mechanism for the confirmation of the contemporaneity of the Faithful's practices, since many historical books, jurisprudential narrations, and majority decrees reflect the social manifestations of the previous societies, or lead the researcher to discover the existence of some practices through suggestion of the collective questions.

Nevertheless, it can be seen that the scholars have intense

disagreements over adoption of the foregoing solution and so, this solution cannot also be so helpful in the confirmation of the contemporaneity. Consider the following example.

One of the decrees discussed by the jurisprudents is the "defiling the defiled". The dominant stance is the spread of impurity from the defiled to other stuff (Hamidānī, 1995, vol. 8: 7; Khu'ī, 1989, vol. 2: 222; Sabziwārī, 1992, vol. 1: 448; Tabrīzī, n.d. Vol 2: 321; Āmulī, 2001, vol. 1: 472), and the consensus claim (Bihbahānī, 2005: 179; Muḥaqqiq Ḥillī, 2000, vol. 1: 307), the usefulness and frequency of the received narrations (Bihbahānī, 2005: 179; Sabziwārī, 1992, vol. 1: 448), and the institutionalization of this issue in the minds of the Faithful have created such a dense atmosphere that some have considered the foregoing stance as one of the requirements of the jurisprudence (Rouḥānī, 1991, vol. 3: 348; Ṣāfī Gulpāygānī, 2006, vol. 2: 322).

Some have asserted that historical studies show that the Faithful's minds tended toward ruling for the spread of all impurities (both natural and prescriptive) (Ḥakīm, 1995, vol. 1: 479). It seems that this group of scholars used historical studies on the Faithful's practices in the divine legislation era to prove their claim.

However, some believe that the attachment of such a ruling to the Imām 's era cannot be taken for sure. It is evident that after a ruling is issued by the legal authorities at a certain period and the followers' observance of it, its institutionalization in the minds of them is certain. Therefore, there is no necessary relationship between this tentative belief and the reception of the ruling by the Faithful from the Infallibles (a) (Khu'ī, 1989, vol. 2: 223; Id. 1997, vol. 3: 205-206; Hamidānī, 1995, vol. 8: 18-19).

Another scholar asserts that if we perceive this practice has appeared from the time of Waḥīd Bihbahānī or a little before that, the attainment of the practice before him and during the time of Imām s' companions is impossible, because there is no sign from such a practice in the books of history or narration (Najafī Iṣfahanī, n.d.: 676, 677). He also writes to the late Balāghī,"Among the early scholars, I have not found even one person to rule for the defiling of the defiled, let alone a consensus in this regard" (Khu'ī, 1989, vol. 2: 224).

Accordingly, the suggestion of the contemporaneity of the discussed tentative belief and practice is unacceptable. In particular, how is the occurrence of this institutionalized yet tentative belief possible without the help of those jurisprudents who are among the notables of the Faithful?

It can be construed from the foregoing discussion that the claimed practice faces vital doubts with regard to the realization of the issue and its contemporaneity with the legislation era, and so, it cannot be used as a method to ascertain the inference of the ruling from the practices of the Infallibles (a).

Therefore, we believe that definite ascertainment of the contemporaneity is not an easy undertaking, because none of the religious authorities has talked about it, and what is only for sure is the provision of solutions to ascertain the contemporaneity of the intellectuals' practices. If in a rare case and due to a certain reason such as a historical narration it becomes possible to definitely ascertain the attachment, provided that there is no other problem, the authorization of the Faithful's practice is fine. Otherwise, a speculation about the contemporaneity cannot authorize the attachment.

Freedom of practice from evidence and imitation

An investigation of the instances and a careful examination of the jurisprudential argument method reveal that to ascertain the contemporaneity, the jurisprudents have tried to take the existence of practice at a certain point of time as an indication for its presence in the early eras of Islam, as if through the inference principle, they have found it possible to find the agreement of the present practices with those of the legislation era. With the inference principle we mean the adoption of the practices of the earlier groups by the subsequent groups, in a way that if this sequence is continued, it can indicate the presence of that issue in the early days of Islam.

However, it is probable that with the suggestion of the reasons for the referent of the practice, the possibility of ascertaining the contemporaneity and inference of the ruling from the Infallibles (a) via the aforementioned method is obviated, because in this scenario, it is

probable that the practice has had roots in the jurisprudents' ruling based on the then-existing evidences, and the existence of the practice in fact reveals the quality of the inference of the legal authority and the subsequent observance, not the Infallibles' decree. It is with such an analysis that freedom from evidence can be considered necessary for the authorization of the Faithful's practice. Consider the following example in this regard.

Imām Khumeinī deems "the Faithful's practice" the main reason for the natural impurity of the People of the Book, which has provided the possibility of proving the contemporaneity of this practice through inference principle. He declares that, "There are many reports on the natural purity of the People of the Book which are putatively and intellectually possible to be coordinated with the reports implying the natural impurity of the People of the Book – through interpretation of the latter set as indicators of repugnance – and it is improbable for such an issue to be unknown for the prominent jurisprudents. Nonetheless, it is seen that the legal authorities do not pay attention to the narrations for the purity and have ruled for the natural impurity of the People of the Book, and this indicates that they have disregarded some qur'ānic verses and narrations in the suggestion of their ruling. Rather, the evidence for their ruling and also their adopted criterion in dealing with the purity reports should have had an aspect beyond intellectual investigation; this is nothing but finding the impurity as an institutionalized concept in the early eras of Islam" (Khumeinī, 2000, vol. 3: 394).

This assertion of Imām Kumeini shows that the dependence of some jurisprudents on the narrations does not constitute the basis of their ruling, but rather, the ruling is based on the eminence of the pro-impurity class in their time, in a way that any class has taken that stance from the class before it and this sequence goes back to the era of Imāms (a). It is this way that we ascertain a ruling is by the Infallible (a) (Khumeinī, 2000, vol. 3: 415).

It is observed that he has reviewed the dependence of the Faithful's practices on the evidence and imitation and so, in reliance on the Faithful's practice and by rejection of other reasons, he has tried to

prove the contemporaneity of the practice through inference principle and establish the argumentative status of this institute.

However, it should be noted that although the common sense combination of the conflicting narrations is a clear mechanism in the foregoing discussion and the jurisprudents' refraining from it can be a sign for the lack of attention to the received verbal reasons at the ruling position, there are other investigative aspects that can be used as a resource for the ruling of these two groups. These include interpreting the reports for impurity as instances of the precautionary concealment, preference of the reports implying impurity over the preferable ones that agree with the Book, ascertainment of the certainty of the issuance of the narrations that imply impurity due to their accumulation, and rejection of both groups of narrations and referring to the verse as a general reason (Ṣadr, 1971, vol. 3: 243-244).

This way, the assumption of the reliance of the ruling on the existing narration evidences is possible through these investigative aspects, and one cannot claim the definite existence of the relevant practice by founding the ruling on other reasons.

Therefore, if the contemporaneity cannot be proved through procedures such as historical narrations, suggestion of evidences at the same level of the Faithful's practice will be a serious deterrent in basing it on the legislator's stance. However, ascertaining the contemporaneity due to a certain reason, it seems that the evidence-basedness of the practice is not against its validity, but rather, in this assumption, the Faithful's practice – as a definite implication of the word or act of the Infallible (a) – is also considered among the evidences.

The unprovability of the definite prohibition

It is evident from the emphasis of the scholars on the necessity of the contemporaneity that all acceptability of the Faithful's practices should be assessed in relation to the affirmative stance of the Infallibles (a). However, since the contemporary Faithful's practices have originated from a religious feeling that is away from emotions arising from blamable innovation and illusion, the mere confirmation of contemporaneity indicates the agreement of the legislator, unless the

definite prohibition is proved by a certain reason from the Book or the traditions. Consider the following example.

Regarding the "natural purity or impurity of the People of the Book", many sound narrations have been articulated for their purity[1] – turning them into the useful or frequent narrations – and if they are complete in their argumentation dimension, they unquestionably prohibit the Faithful's practices that testify the natural impurity of the People of the Book[2].

As Āqā Riḍa Hamidānī says, due to their frequency and accumulation, the evidence or argumentation of the reports for the purity of the People of the Book cannot be weakened, and we are sure that almost all of them have been truly issued. The only doubt is in the reason for their issuance; the celebrated scholars have not used them as they are considered as the instances of the precautionary concealment (Hamidānī, 1995, vol. 7: 256). He asserts that in none of the purity reports one can find a sign for the precautionary concealment, let alone concluding the impurity based on their implication of the precautionary concealment (Ibid.: 254).

Nonetheless, Imām Khumeinī asserts that the outstanding companions have seen and listened to Imāms (a) and have devotionally followed what they had received from the Descendants of the Prophet (a). Therefore, their refrainment from the purity traditions is either due to the weakness of the evidence or – if the issuance of the traditions can be ascertained due to the frequency of the narration – the weakness of the agreement on the reason for the narration issuance, such as its being an instance of the precautionary concealment. This assertion is strengthened when we note the agreement of the opponents on the natural purity of the People of the Book (Khumeinī, 2000, vol. 3: 396).

Nonetheless, the just stance is to reject considering the narrations for the purity of the People of the Book as instances of the precautionary concealment, because with the advent of Islam, there has been no

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[1] *These include the narrations received about the permissibility of marrying the People of the Book (Ḥurr ʻAmilī, 1988, vol. 20: 536) and permissibility of conducting the funeral ablution of a dead Muslim by a Person of the Book (Ibid.: 515).*

[2] *In previous lines, we got acquainted with this practice in the words of Imām Khumeinī.*

motivation to conceal this issue. Moreover, a glance at the historical books reveals the deep amalgamation of the Muslims of Medina and other places with the polytheists and other ranks of pagans after the Treaty of Ḥudaybiyyah, in a way that the existence of marital relationships between them is undeniable. Therefore, if their natural impurity was an accepted point during the lifetime of the Prophet of Islam (a), it should have been openly discussed by him (Ṣadr, 1971, vol. 3: 242-243).

The conclusion of this section is that even if we ignore the minor premise problems (i.e. lack of contemporary practice), since the evidence and implication of the narrations for the purity of the People of the Book is complete, prohibition of the discussed practice is definite and so, it is useless.

Lack of any obstacle to the legislator's articulation of ruling

In authorization of the Faithful's practice, the outward power of the Infallible (a) to reject it as well as the lack of any obstacle such as precautionary concealment should be present so as to make the prohibition of the invalid practices possible (Āshtīyānī, 2004: 149).

Meanwhile, we face some jurisprudential references that are troubled by the precautionary concealment. Consider the following example.

Relying on the practice and history books, some assert that from the early eras of Islam up to now, the Faithful's practice has been established on the socialization with the opponents, eating food with them, saying prayers in their ranks, etc., and the existence of such a practice implies the purity of the religious opponents (Bihbahānī, 2003, vol. 4: 524; Khu'ī, 1997, vol. 3: 153; Khumeinī, 2000, vol. 3: 428).

However, I believe that although the true stance is the natural purity of the religious opponents, if in an unlikely scenario some could prove their impurity, then the practice cannot be used to prove their purity, because reliance on the Faithful's practice in such a situation faces a serious obstacle, that is, the "tolerant precautionary concealment".

In other words, in the legislation era Faithful's consideration of those teachings that emphasize the necessity of the tolerant

precautionary concealment and the emphasis of the Infallibles (a) on socialization with the Sunnīs brings about a strong tolerant approach in dealing with the opponents to religion.

As an evidence for the foregoing assertion, consider the following words from the author of Miftāḥ al-Kirāmah. He suggests, "The books of practice and history connote that many companions have had intense enmity toward the Commander of the Faithful (a) and his descendants both during and after the lifetime of the Prophet (s). Nonetheless, it is undeniable that the Shī'a combined with and consulted them. Therefore, it is more accurate to say that this has been due to the intensity of the need to companionship and the abundance of the precautionary concealment." ('Āmilī Gharawī, 1998, vol. 2: 46).

Reliance of the referent of the practice on narration

One of the other conditions for the authoritativeness of the Faithful's practice is that the topic of the practice should be an issue which is based on narration, not a secondary issue that is inferred from the general rules. If the latter is the case, then the ruling inferred by the legislator cannot be taken as definite, but rather, the occurrence of the practice can be rooted in the general rules of the derivative jurisprudential principles. Consider the following example.

Another topic to which the Faithful's practice is applied is the lawfulness of the blood remaining in the body of an edible animal after beheading it. The assertions seemingly rule for the purity and lawfulness of this blood in an absolute way, without limiting the ruling to the blood that is considered as part of the meat (Muḥaqqiq Ḥillī, 2000, vol. 36: 377; Muḥaqqiq Sabziwārī, 2002, vol. 2: 614; Muḥaqqiq Kurkī, 1993, vol. 1: 63). But Ayatullāh Khu'ī does not accept the absolute lawfulness of the blood remaining in the sacrificed animal, and believes that there are evidences from the Book and traditions on the absolute unlawfulness of the blood, unless the blood that is considered as part of the meat (Khu'ī, 1989, vol. 3: 16).

Meanwhile, relying on the Faithful's practice, some jurisprudents insist on the accuracy of their opinion and assert that from the early days of Islam onward, Muslims have ignored the blood remaining in

the sacrificed animal – after the legal sacrifice is finished and the common amount of blood has left the corpse (Khu'ī, 1989, vol. 3: 10).

What are important here are the basis for realization of the practice and the Faithful's criterion for not avoiding the meat blood. Have the Faithful taken the devotional stance as the basis for their non-avoidance, or have they considered general principles such as the principle of distress and constriction to reject the necessity of avoidance? Two assumptions are possible in this regard.

1. *Avoidance of the meat blood naturally causes distress and constriction, and the Faithful has relied on this criterion to assert that avoidance is not necessary. In this assumption, the criterion for the obviation of the duty is the necessity of personal distress and constriction and each of the Faithful, after finding the avoidance as distressing for himself, can ignore avoiding the meat blood. However, the unlawfulness ruling is still true for those who are not distressed with the avoidance of blood.*
2. *It is possible to say that although personal experience of distress can obviate a distress-based ruling, it cannot be a general reason for the lawfulness of the meat blood, because the reason for negation of distress is not a reason at the ruling confirmation stage, but rather, the personal distress is the criterion for confirmation or rejection of rulings in post-legislation period. Nonetheless, many jurisprudents rely on the Faithful's practice to rule for the lawfulness of the meat blood – in a general sense – and this obviously rejects the necessity of avoidance for all people, even if the avoidance of blood is not distressing for the majority of people. According to this ruling, it can be possibly asserted that the jurisprudents' ruling for the lawfulness of consuming the blood that is remained in the corpse of a sacrificed animal – provided that lack of distress and constriction is seen in some responsible people – shows that their evidence cannot be a case of distress and constriction whose criterion is realization of personal distress and constriction. Rather, the jurisprudents' evidence is the Faithful's practice. Existence of such a practice strongly suggests that there has been*

a report about the speech and act of an Infallible (a) that ascertained the lawfulness of the meat blood; one which has been forgotten by the lapse of time.

In these cases, although it is possible that reliance on the generalities of the distress and constriction principle – as the underlying reason for the ruling – causes and leads to legislation, due to the possibility of the existence of other motivations, it is reduced to an incomplete reason. It is evident that in such cases, the ruling will not revolve around the underlying reason, and lack of distress in some people will not prove their duty to avoid the meat blood, but rather, the ruling for the lawfulness of the meat blood results from the realization of a practice by the Faithful who have refrained from avoiding it due to the devotional tendencies, and so, the lawfulness ruling is applicable to all people.

The author believes that since practice – if realized – is the general performance of the religious community, its establishment on the unnecessariness of avoidance of the meat blood shows that the distress-based nature of the problem could not have been the general reason for the lawfulness ruling, because if the latter has been the case, the criterion will shift to the realization of personal distress, a criterion that cannot be used as the basis for realization of a general approach; Rather, the existence of a practice undertaken by the majority implies the existence of a devotional reason. Therefore, the reason has been based on the ruling, speech, or act of an Infallible (a) which has come to be the basis for the realization of the practice.

All in all, with suggestion of such possibilities, the implication of the practice on the aforementioned issues is doubted.

Separation of the intellectual and legal stances (the application of the Faithful's practice onto the absolute devotional affairs)

It was mentioned that the Faithful's practice is only attributed to a phenomenon whose exclusive, general cause of creation has been the religiosity of its creators, without any other origin. Therefore, its dealing with the absolute devotional acts is the necessary condition.

Ignorance of this issue has caused digression and untrue application of the Faithful's practice to the intellectual stances.[1]

The author believes that with the Faithful's practice acting based on the intellectual stances, the Faithful's practice can no more be authorized as the criterion for the identification of the cause based on the effect[2]*, because it is possible that the practice has its roots in the pure intellectual tentative beliefs.*

In other words, ignorance to inquire and question the legal stance by all the Faithful – based on possibilities and the induction logic – is impossible and so, practice per se has relied on the legislator's stance and does not need inquiring about prohibition. However, this assertion will not be true in cases where tentative belief is an unshakable issue in intellectual stances, since if this is the case, the depth and scope of the tentative belief strengthens the hunches about the collective ignorance of the inquiry in a way that this brings about imaginations about the agreeing stances of the legislator. This said, it is clear that the authorization of the Faithful's practices that act upon the intellectual stances need the confirmation of an extra perspective (i.e. inquiry about the prohibition) (Hāshimī Shāhrūdī, 2009, vol. 2: 247). Consider the following examples.

Example 1: some believe that the only reason for permission of paying the Fifth tax by an equivalent sum of money is the Faithful's practice (Makārim Shīrāzī, 1995: 399; Seifī, 1996: 234). However, on second thought, the foregoing discussion can be justified through the

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[1] *It has been said in this regard that the sameness of the referents of the Faithful's practice and the intellectuals' practice prevents suggestion of the Faithful's practice as an independent reason for the intellectual stances; rather, with regard to suchlike issues, the legislated practices will be based on the intellectual foundations (Khumeinī, 2003, vol. 2: 202; id., 1994, vol .1: 315; Hā'irī, 1997: 393; Mu'min Qomī, 1998, vol. 2: 102).*

[2] *The legists have found the implication of the Faithful's practice in agreement with the legislator's stance similar to the implication of the a-posteriori argument. The reason is that we talk about the Faithful contemporary to Imām's (a) era who have had the ability to obtain the religious knowledge through sensory or near-sensory ways. On the other hand, it is supposed that practice has been held with regard to an absolute legal issue and if it is supposed that it does not satisfy the legislator, this can be taken as the sensory ignorance by many people, a supposition that is rejected due to the possibilities and the induction logic, because the abundance rejects all sensory probabilities (Ṣadr, 1996, vol. 4: 242).*

intellectual stances, without analyzing it through the devotional atmosphere resulting from the Faithful's practice.

Discussion of this issue is mostly related to the "manner of attaching the ruling". Therefore, the discussion can be based on such an introduction.

The frequent ruling by the jurisprudents is the applicability of the Fifth tax to the property itself (Anṣārī, 1994: 278; Narāqī, 1994, vol. 10: 138; Ḥakīm, 1989, vol. 1: 472; Khu'ī, 1997, vol. 25: 284; Yazdī, 1988, vol. 2: 398). In this case, the Fifth tax applies to part of the property and is a right in the property that belongs to the beneficiary of the Fifth tax, one that is considered as a joint or general right in a given material. Based on this assertion, the primary principle is lack of permissibility of spending the property or paying the Fifth tax by an equivalent sum of money, unless the agent has got permission from the beneficiary of the Fifth tax (Fāḍil Lankarānī, 2002: 184; Musawī Khalkhālī, 2006, vol. 2: 284). However, the absolute majority of the scholars believe that the property owner is able to choose if he wants to pay the Fifth from the property itself or the equivalent sum of money (Yazdī, 1988: vol. 2: 398; Khu'ī 1997, vol. 25: 285; Makārim Shīrāzī, 1995: 396). They justify this exception in the devotional atmosphere that has resulted from practice as following:

> *The common belief among the Faithful about the payback of the Fifth tax of the mines, marine products, etc. is not paying part of the minerals or jewels themselves. Rather, the common belief is to pay the price of these. This very belief is true about the business profits even after a year has passed. The reason is that the common belief among the Faithful is not paying the Fifth tax from the clothes, carpet, etc. itself, but rather, they have paid a sum of money equivalent to the fifth of their property (Makārim Shīrāzī, 1995: 399-400; Seifī, 1996: 233; Sabziwārī, 1992, vol. 11: 428).*
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> *Nonetheless, we believe that the application of the Faithful's practice in the foregoing discussion faces a serious problem: wrong mixture of the intellectual and legal stances. Consider the following analysis.*
>
> *The topic of the foregoing discussion is the applicability of the*

Fifth tax to the property itself, which has been accepted by the majority of the jurisprudents and has caused them to try to analyze the possibility of permitting the payment of the Fifth tax with an equivalent sum of money within the devotional atmosphere that has resulted from the Faithful's practice. They believe that the linguistic context and the manner of interpretation of the literal reasons that have led to the obligation of paying the Fifth tax refer to its applicability to the property itself. However, we believe that the implication of the literal reasons for the applicability of the Fifth tax to the property is deeply doubted[1]*. On the other hand, even if we accept the initial appearance of the qur'ānic verses and narrations for the applicability of the Fifth tax to the property itself, we cannot forget the situational indications of the legislation era in the interpretation of the words used in the legal reason that leads to the failure of this appearance. That is to say, it seems that ruling for the necessity of paying the Fifth tax in each of these specific fields has not been due to the introduction of the Fifth tax to the property, but rather, it has appeared as a result of the common sense stances. In other words, the payment of the Fifth in the legislation era was*

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[1] *The reasons for the obligation of paying the Fifth tax can be categorized into several groups.*

1. *Reasons that include the preposition lam, such as the 41st verse of the Spoils of War chapter. It has been said in this regard that the true meaning of the preposition lam is the specificity of interpretation and it does not have any implication on the ownership or right over the property (Sabziwārī, 1992, vol. 11: 455).*
2. *The narrations that include the preposition min. it has been said in this regard that concerning the meaning of min in the received narrations, it is possible that the meaning of ala or fi or the mere originality is intended and there is no manifestation of it in each of these meanings (Ibid.: 456).*
3. *Narrations that include the preposition ala. It has been said in this regard that what is understood from the preposition ala is nothing more than general originality and there is no implication on the ownership or right over the property for the owners of the Fifth (Ibid.).*
4. *Narrations that entail the preposition fi. It has been said in this regard that it is possible that the meaning of fi in these narrations is causation or containership and so, the result is that its implication includes ownership or right over the property (Ibid.).*
5. *What includes the phrase "Al-Khumsu lanā" (the Fifth tax is ours). The preposition lam in these narrations generally shows specificity which does not imply ownership. On the other hand, the referent of the Fifth tax in these narrations can be either the property itself or its equivalent sum of money (Ibid.).*

usually done through paying part of the property and this is more general than the introduction of the Fifth tax into the property; in fact, it has been a necessity of the business and sustenance-making of that era. Based on this assertion, there would be no need to analyze this issue within the realm of devotional acts.

In other words, the introduction of the financial rights is not among the absolute devotional acts specific to the holy Sharī'a of Islam, and it has been common in various societies before the advent of Islam. The common necessity in suchlike financial rights has not been the possessability of the property, rather, for the wise, these rights have changed into the worth of the property. The reason is that in the initiation, the wise viewed the property as connected to its owner and it is then that the rights of the tax beneficiary can be applied to it. In other words, the wise rely on the principle of secondary possession to prove the ownership of the whole property by the property owner. It is only after the ascription of the Fifth tax that a right for the tax beneficiary appears toward the worth of the property, a sum of money that the property owner should pay. Accordingly, the property is the source for requesting a right from its primary owner, but this does not make the property to belong to the tax beneficiary.

Therefore, it is appropriate to delegate judgments about suchlike financial systems to the common belief and intellectual bases, of course until there has not appeared a certain reason – such as the legislator's prohibition – against the intellectual tendencies.

The second example: the question of "the permissibility of prayer in open lands" is among the points about which the Faithful's practice has numerously been relied upon by the scholars. It has been said that if refraining from saying prayers on the open lands is problematic and distressful for people but saying prayers on such lands does not bring about damages to the owner of the land, saying prayers in such a situation is permissible, and it is not conditioned to requesting a permission from the owner (Kāshif al-Ghiṭā, n.d.: 206; Hamidānī, 1995, vol. 11: 21; Yazdī, 1988, vol. 1: 583).

Meanwhile, some jurisprudents have conditioned such prayer in

the open lands only if the owner's dislike or prevention is not evident, even if the owner is minor or crazy (Khumeinī, n.d., vol. 1: 148). Some others have added to the owner's lack of clear dislike and prevention the eligibility of his permission (Khu'ī, 1997, vol. 13: 57-58; Hamidānī, 1995, vol. 11: 21-22). On the contrary, there are some scholars who reject the opinion that humans have true ownership in the creation domain and so, disregard the dislike of the owner and deem sufficient the permission of the legislator (Kāshif al-Ghiṭā, n.d.: 206; Yazdī, 1988, vol. 1: 583; Muḥaqqiq Dāmād, 1984: 451). According to them, saying prayers in the open lands is acceptable all together.

After it became clear that the foregoing issue is void of any specific supporting text, it has been argued that the definite practice of the Faithful is for using the open lands – in a way that the owner is not damaged – although the user does not know if the owner is content or not (Ḥakīm, 1995, vol. 5: 442; Khumeinī, n.d., vol. 1: 148; Hamidānī, 1995, vol. 11: 21; Khu'ī, 1997, vol. 13: 57).

However, we believe that a review of the jurisprudential inference manner as well as the general common-sense rules reveal that what has really happened in this issue is a general procedure by the intellectuals who have relied upon the speculative reasoning evidences such as the seeming evidences in ascertaining the owner's content.

In other words, one of the points that has been attended by the jurisprudents is whether in ascertaining the owner's content, if a true knowledge or ruling – such as attainment of knowledge through assertion of reasoning evidences – is necessary or a mere attainment of an absolute conjecture suffices. There are several assertions in this regard.

Permissibility of using another person's property is conditioned to ascertaining the owner's content (Musawī 'Amilī, 1990, vol. 3: 216).

It is possible to rely on seeming evidences only with regard to the place; by the seeming evidences we mean the same speculative

reasoning evidences that follow the speculation on the owner's content and have found a significant common-sense manifestation in the issue of finding out the owner's content (Shahīd Thānī, 1981, vol. 2: 585).

To rule for the permissibility of use, attainment of the absolute speculation is enough, because the received arguments imply the impermissibility of using another person's property if the user has found out that the owner is not content (Narāqī, 1994, vol. 4: 403).

The author of this article believes that from among the foregoing three assertions, the one that is closer to reality and is easier to be perceived by the intellectual circles is sufficiency of reliance on the seeming evidences in ascertaining the contentment, because such evidences have a common-sense manifestation in the attainment of the owner's contentment, while for many masters of different religious circles, the validity of knowing the owner's permission is because of its methodology (Hamidānī, 1995, vol. 11: 11-12; Narāqī, 1994, vol. 4: 401). This way, the owner's contentment brings about the lawfulness of use. However, acceptance of the third assertion by the intellectual circles is not possible, because such a stance is incompatible with the general rules concerning the owner's control over his property.

Accordingly, it should be emphasized that the openness of the land, lack of any wall for such lands, and lack of any gate are the best typical speculative reasoning evidences that have led all intellectuals to speculate or ascertain the owner's contentment, and so, relying on the seeming evidences, they have ruled for uses such as saying prayer on such lands when it does not harm another person.

It might be said that the unlawfulness of using someone else's property without permission is a logical premise that has been accompanied by the general practice of the intellectuals, and it is natural that any interpretation of this principle should be done by the intellectual circles. Therefore, to interpret the term permission and the ways to get it, we should refer to the common-sense and intellectual understanding of it. What is clear in the common-sense understanding is that the seeming evidences have been deemed sufficient for the

attainment of the permission. On the other hand, openness of the lands and negligence of their owners in protecting and walling them is a speculative reasoning evidence for the owner's permission. According to this interpretation, such uses are out of the scope of the reasons for the unlawfulness of the oppressive use.

In light of such an interpretation, the notables' assertion on the impermissibility of use when the owner is reluctant and prevents such use is meaningful, because in this scenario, according to the opinion of intellectual circles, the reasons for the unlawfulness of the oppressive use of someone else's property are sound and can be applied.

It is possible to say that some jurisprudents have deemed permissible the use of the open lands even if the owner does not permit, and by rejecting his true ownership, have disregarded his prevention or reluctance. The stance of this group of scholars is certainly rooted in a devotional reason, and since there is no text to support this attitude, the notion of the realization of the Faithful's practice is strengthened. In other words, the textual context indicates their consideration of the Faithful's practice that will allude to the consent of the true owner of the lands (i.e. God) due to the lack of the legislator's prohibition. However, in the present author's opinion, the implication of the Faithful's practice based on the foregoing interpretation faces a minor premise problem. In other words, doubting the attainment of such a practice is essentially posed by the Faithful, because as it is said before, no religious person can be found who continues using someone else's land even if the owner is just reluctant to permit.

An instance of the absolute jurisprudential reliance on the Faithful's practice

Based on what was said before, it can be clearly seen what a jurisprudent needs to take into account when he uses the Faithful's practice. Now, it is worthwhile to have a look at an example of the absolute jurisprudential reliance on the Faithful's practice.

According to the majority of scholars, the Wife Circumambulation is not obligatory in the Lesser pilgrimage (Ḥillī, 1991, vol. 11: 367; Muḥaqqiq Ḥillī, 2000, vol. 18: 78 & vol. 19: 407; Kāshif al-Ghiṭā, n.d.,

vol. 2: 446; Anṣārī, 2004: 74; Shahīd Thānī, 2000, vol. 1: 364; Musawī ʻAmilī, 1990, vol. 8: 198; ʻIrāqī, 1993, vol. 3: 340; Khu'ī, 1989, vol. 5: 119). The main reason put forth by the jurisprudents is the received sound tradition.

It is only possible to rely on a narration to justify the obligation of the Wife Circumambulation in the Lesser pilgrimage. The narration is as following.

> *Muḥammad b. Ḥasan Ṣaffār from Muḥammad b. 'Isā from Sulaymān b. Ḥafṣ Marwzī from Imām Hādī (a) narrates that: when a man goes to Pilgrimage, enters Mecca, carries out the Greater Pilgrimage and circumambulates Ka'bah, says two units of prayer behind Maqām Ibrāhīm (a), does the ritual running between Ṣafā and Marwah, and does haircut, everything becomes lawful to him other than women. To make them allowed to him, he must do the Wife Circumambulation and say prayers (Ṭūsī, 1970, vol. 2: 244).*

According to the opinion common between jurisprudents, this narration is weak due to the Sulaymān b. Ḥafṣ being unauthorized (Muqaddas Ardibili, 1982, vol. 7: 138; Fayyāḍ, n.d.: 417). It is only the late Khu'ī who has considered it valid (Khu'ī, 1989, vol. 5: 120). However, the implication of this narration on the claimed stance (obligation of doing the Wife Circumambulation in the Lesser Pilgrimage) is not also acceptable, because this narration is about the obligation of doing the Wife Circumambulation in the Greater Pilgrimage, not the Lesser Pilgrimage (Ṭūsī, 1986, vol. 5: 163; Khu'ī, 1997, vol. 29: 169).

Nonetheless, some believe that even if we consider sound the evidence and implication of this narration, there appears a conflict between it and the narrations that imply lack of obligation as a result of which and by reference to the principle of acquittance, the ruling will be for the lack of obligation (Fayyāḍ, n.d.: 417). However, Khu'ī's interpretation is different. He believes that in the foregoing assumption, the ruling for the lack of obligation is still true. This is not because of the conflict or negligence of both stances that brings about reference to a practical principle, but rather, it is due to the application of the Faithful's practice to the issue (Khu'ī, 1989, vol. 5: 120). In other

words, the Faithful have favored abandoning the Wife Circumambulation in the Lesser Pilgrimage, and believe that if the ruling for obligation was true, due to the excessive involvement of the Faithful with it, it should have been among the most obvious obligations. Therefore, the applicability of the Faithful's practice to this issue leads the jurisprudent to rule for the lack of obligation in this regard, while the narration implying the obligation does not have the ability to confront the definite reason. This way, there will be no conflict, let alone reference to a practical principle.

The present author believes that reliance on the Faithful's practice is sound in this regard, since ascertainment of the realization of this practice and its attachment to the legislation era – in the light of the great involvement of the Faithful with the Pilgrimage rituals – is not difficult; because if it was obligatory, we would see its reflection in the useful or frequent narrations. Existence of the sound narrations along with the Faithful's practice is not against its authoritativeness, because as it is said before, the evidential practice can be useless only when the ascertainment of the attachment condition is not possible except through the inference principle.

Conclusion

Contrary to what Muslim jurisprudents assert, the application of the Faithful's practice faces serious doubts with regard to the realization of the issue or soundness of the authoritativeness conditions, and investigation of some instances can perhaps lead us to undue mixture of the intellectual and legal stances, a problem that has afflicted most jurisprudential texts. Another finding obtained from the investigation of the instances is the untrue combination of the instrumental and independent applications of the practice as a reason so that paying attention in some jurisprudential instances leads us to apply the Faithful's practice to understand and make others understand. On the other hand, suggestion of other reasons from the Book and the traditions might decrease the applicability of the Faithful's practice as an evidential practice to a mere jurisprudential corroborator.

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