

## Legislation

### [Question No. 15: Jurisprudence and Legislation](#)

**Is jurisprudence enough for legislation in Islamic State? Or does it need the results of empirical and political sciences and other experiences of human societies?**

The sufficiency of jurisprudence in legislation never means that we do not require the results obtained from empirical and political sciences. Thus, in many cases we may consider various findings and experiences and pick out the most appropriate one, which is consistent with the jurisprudential norms. Jurisprudence is, therefore, sufficient on one hand; for the main function of jurisprudence is setting norms and it has enough resources in this realm. On the other hand, setting norms by jurisprudence is taken place on external subjects and, as we will see, recognizing existing subjects, creating new subjects, transforming subjects, and finding new ways in applying jurisprudential norms are all done through human sciences and experiences.<sup>1</sup>

### [Question No. 16: Praxis and Legislation](#)

**What is the role of praxis, culture, and customs in legislation in Islamic State?**

To know the role of “praxis” in Islamic jurisprudence and law and in legislation of Islamic State, we need to have a definition of “praxis” and its various types, the criterion for its validity, its limits and conditions.

#### [Definition of praxis](#)

Different definitions have been presented for “praxis” (“Urf”). One of them is as follows: “Praxis is what people have conventionalized it and behaved according to it; whether it is speech or action, doing something or refraining from doing it, and it is also called “habit” (‘adat’).<sup>2</sup>

There are, however, some differences between “habit” and “praxis”;<sup>3</sup> it would be getting off the subject to discuss them here. The following parameters and elements have basic roles in emergence of “praxis”:

1. certainty of the practice (including speech, action, doing and refraining);
2. repetition of the practice;
3. generality;
4. intentionality, and not being innate.

## Types of praxis

“Praxis” is of various types, including general and particular praxis; sound and unsound praxis; the praxis based on needs and free from needs; imperative praxis; literal praxis and practical praxis, and so on. Elaborating investigation of all these types is not within the scope of this book, and the reader should refer to the related sources.[4](#)

## The status of “praxis” in the Islamic jurisprudence and law

The sources for finding out and inferring religious decrees and laws in Islam are divided into two types:

**1. Primary sources:** By primary sources, it is meant the sources which are either intrinsically valid such as “reason”, or the Legislator has directly made them valid such as “the Book” (i.e Quran) and “Sunna” (i.e. the Prophet’s sayings and actions, or those of his Companions).

**2. Secondary sources:** These are the sources whose validity is consequential, relying on one of the primary sources; such as Ijma’ (unanimity of the Muslim scholars), Shuhrat (relative agreement), the Muslims’ way of life, the intellectuals’ practice (praxis). On the authority of praxis or the criterion for its validity, all Muslim scholars agree that it is not valid on its own; rather, its validity is dependant on something else. As to the basis of this validity, there are again two different views:

**First.** Some believe that praxis is dependant on Sunna; in that case, what is authentic is the Legislator’s view. Therefore, praxis is “valid” when it is endorsed by the Legislator. As to the general praxis – which has been beheld by the Legislator – His silence and lack of opposition is enough. Praxis or the intellectuals’ practice is thus valid and adducible only if it is not opposed – directly or indirectly – by the Legislator.[5](#)

**Second.** Some believe that praxis is dependant on reason. Thus, based on the principle of concomitance between the precepts of “reason” and those of “divine law”, praxis enjoys validity and authority as well.

Now we are not seeking to judge on the values of the two abovementioned concepts or to state the differences between them. Besides, we cannot enumerate – based on any of the two aforementioned approaches – all the conditions of the validity of praxis here. The common points of these two views are as follows:

1. Praxis or the intellectuals' practice altogether enjoys validity and authority;
2. The validity of praxis is not intrinsic; rather it depends on the other sources. Thus, the rules and scope of its validity and importance is subject to its primary source;
3. If some praxis is opposed to the decrees of reason or divine law, it would be quite invalid, and cannot be adduced.

Therefore, in legislation of the Islamic society we may adduce the praxis; this, however, is under some rules and limitations discussed in detailed jurisprudential and legal sources. Some of the cases where we can apply praxis as a criterion follow:

**First.** Denotations of words, phrases and conceptions. In other words, to find out the notions intended by the Legislator, the words and statements containing legal and jurisprudential decrees are the main source for understanding the praxis.

Some principles and rules in the religious language have been resulted from this reality, called literal principles and rules. The most important ones are Isalat al-zuhur (the principle of appearance), Isalat al-umum (the principle of generality), Isalat al-itlaq (the principle of application), Isalat al-haqiqa (the principle of truth).

**Second.** In judicial laws and procedures, praxis is used as an adducible source and it is – along with the principle of absence – one of the methods for distinguishing between complainant and denier.<sup>6</sup>

**Third.** As for the provisions of contracts, praxis is used as an adducible legal source. The Muslim scholars hold that the provisions stipulated usually in contracts are valid as the basic provisions of the contracts.

**Fourth.** Recognizing the instances of the secondary topics (such as necessity, the degree of importance, loss, impediment, etc.) provides a wide chance for the role of praxis in legislation.

**Fifth.** Some of the jurisprudential decrees are based on praxis. The ratified decrees of Islam – including many legal, social and economic relations – form a wide arena of acceptance and ratification of praxis in jurisprudence and legislation of the Islamic society; for instance, the validity of the mutual granting contract, unauthorized contract, a passerby's use of the perishable fruits under the trees without the consent of the owner, and so on.

**Sixth.** Praxis is considered as the source for interpreting the instances of the decrees, and in some cases, appurtenances and the subject of the decree and its elements and requirements. The professor Amid Zanjani writes:

“Praxis affects thus the decree itself indirectly through the interpretation it provides for the subject or appurtenance of the precept, and sometimes it changes the decrees; such as the impermissibility of the

assimilation to infidels which was true some day by putting on special western clothes. But since those clothes are no longer specific to westerners, becoming popular common clothes in according to praxis, the related decree is no longer true in that case”.

Such an influence does not imply any change in the decree, but it denotes a change in the subject or the instance, whose source is the praxis.

**Seventh.** In the level of international relations and laws, customs and praxes formed gradually in human societies and felt to be necessary – if there are no religious prohibitions for them – are valid.

**Eighth.** In all political and governmental issues, praxis is valid as a legal source. Of course, as we said before, conventional validity is under some conditions. These conditions are divided into two groups:

1. Thematic condition; that is the conditions whereby the praxis is proved. Here, some believe in two essential conditions: “continuous repetition” and “being obligatory”.[7](#)
2. Perceptive condition; that is lack of any prohibitions or oppositions by the Legislator. These two conditions are agreed upon by all Muslim scholars. Some scholars have stated, according to their own personal views, some other conditions for validity of praxis, which cannot be dealt with here.

## Secular Praxis

Another point which is worth mentioning here is the existence of two views on “praxis”: one is “religious praxis” and the other is “secular or laic praxis”. In the former, the “praxis” is considered along with religion and used as one of the sources related to religious law. What was stated before is generally related to this kind of “praxis”.

In the latter view, “praxis” is primarily considered independently; that is the major questions are the followings:

1. Can we use “praxis” as an independent source for legislation along with the Book and Sunna?
2. Here, by “praxis” the merely mean rational aspect of it is not meant; in other words, we do not intend to say since intellectuals are the individuals who enjoy reason, intelligence and insight, they should be used as a source for legislation. Rather, as said before, intellectuals enjoy two aspects; one is the rational–cognitive aspect, and the other is the aspect of feelings and desires. Now the following question is raised: “Can we consider the desires and wishes pertaining to the ‘praxis’ in the process of legislation?” In other words, if in some cases the “praxis” wishes something according to the wishes of the carnal soul, can it be legally validated? In view of the two points mentioned here, the question can be paraphrased as “Can we consider the people’s desires as an independent source for legislation in Islamic State along with the Book and Sunna?”

To answer this question, it should be noted that the ritual decrees of religion can be divided into five

groups: Obligatory (Vajib), Recommended (Mustahab), Permitted (Mubah), Disapproved (Makruh), and Prohibited (Haram).

A. The obligatory and the prohibited things are the essential religious decrees whose violation is regarded as sin. Imam Ali (as) says: “No creature deserves obedience when God is to be disobeyed”<sup>8</sup>; whether that creature is a sovereign or it is a public wish. So, nobody has the right to change these affairs arbitrarily and act against them or to want someone else to act against them. Accordingly, the mere public desire – without the existence of a secondary emergency case or a more important social interest – cannot be the source of legislation against essential religious decrees; rather, the public interference in such affairs is contrary to the essential philosophy of Islamic State and leads to its secularization, because the Islamic State is a system based on divine laws and the divine laws, in turn, are based on real expediencies of human society, not merely on whims and desires. If the public wish is to be considered along with divine laws or precede them, there are no difference between Islamic State and the laic or non-religious ones.

B. The recommended, permitted and disapproved things are in the scope of unessential decrees. In this sphere, the Legislator has authorized the believers to decide according to their own will, choosing a favorite item among various options available. The difference is that for “recommended” things it is preferable to do them, while for “disapproved” things it is preferable to avoid them. As for the “permitted” things, the Legislator has preferred none of them. Thus, preferring each of them is accredited to the individuals. Here, the individual’s desires and favorites can be effective in decision-makings in major social issues and be used as a source for legislation.

<sup>1</sup>. For further information, see Ahmad Va’izi, *Hukumat-e dini*, p.91–101; also Mahdi Hadavi Tehrani, *wilayat va diyanat*, p.46–7; idem, *Bavarha va porseshha*, p. 103–11; *ibid*, questions no. 22–24.

<sup>2</sup>. Khalil Reza Mansouri, *dirasat al-mozu’iyya hawl nazariyyat al-urf va dawriha fi amaliyyat al-istinbat*, p.51.

<sup>3</sup>. *Ibid*, p.52–4; Abul Hassan Muhammadi, *mabani istinbat-e huquq-e islami ya usul-e fiqh*, p.251.

<sup>4</sup>. For further information, see Sayyid Ali Jabbar Golbaghi Masule, *Dar amadi bar urf*.

<sup>5</sup>. In this regard, some provisions have been stated and there are disagreements on some qualities whose elaborate investigation is impossible here.

<sup>6</sup>. For further information, see Abbas Ali Amid Zanjani, *Fiqh-e siyasi-e Islam*, 2, p.219; also *Sharh al-lum’at al-damishqiyya*, 5, p.376.

<sup>7</sup>. *ibid*, p.223.

<sup>8</sup>. *Nahj al-Balagha*, Wisdom no. 165.

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