THE ROLE OF CUSTOMS IN THE SHIITE JURISPRUDENCE AND LEGAL SYSTEM IN IRAN

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ABSTRACT

“Custom” is the first legal source to acknowledge all intellectuals. Nowadays, by organization of social system and development of human civilizations and also expansion of written laws and various aspects of social life, not only the customs territory not fade, but also internal and evolutionary international legal systems ’s contemporary strengthening customary role in resolving conflicts and gather provisions, diagnosis concepts, subject emphasis.

KEYWORDS: Custom, Habit, Shiite Jurisprudence, Legal System of Iran, Civil Law

FIRST TOPIC: OVERVIEW

Definition of terms

In right knowledge, following definitions are provided for “custom”:

1. “The rule that is customary rule gradually and spontaneously among people or groups of them”\textsuperscript{2}
2. “Unwritten and respected set of rules that can be extracted from states behavior against each other”\textsuperscript{3}

Distinction of custom and law

Lawyers have been referred the following cases for explanation and comparison of custom and law:

1. It is possible that custom does not have logical or rational basis, such as preparation of dowries by family’s bride.
2. Basically, custom develops gradually over time and in people’s belief. Accordingly, copies of a custom require a long period, but copies of law may occur in the shortest possible time.
3. Custom is originated from public behavior and determination and law solely caused by the legislator.
4. The rules of custom stipulated by custom and habit are not clear and systematic, but rules are the basis of stipulated laws.
5. Custom and habit are different according to the region, but the law is enacted for general population in different regions.

Conflict between custom and law

In conflict between custom with law texts, law is precedence and in cases where the common law is inconsistent with the spirit of the law, there are two modes.

When custom is in conflict with the spirit of the complementary laws, custom is precedence and in dealing with custom and imperative laws, custom and spirit of law should be compared and the most obvious and the most obvious be the basis of interpret.

SECOND TOPIC: TYPES OF CUSTOM

Custom is a phenomenon that is originated from social needs that people usually do it repeatedly and voluntarily and without hate. This social phenomenon that has become a legal rule over time and benefit from a necessary power, has terms and types that are named in law and Islamic rights and its validity and have been used.

Literal custom, practical custom: custom are divided into two types, literal and practical customs.

Literal custom

Literal custom, dialog custom or usage custom that was named as “contact custom”, “verbal habit” in the past and is attention in verbal circle, included the use of the term or phrase from a language other than its original meaning is a word or words in such a way that a particular color to be different from and as a result of literally conscious. Like use “son” for male child and “responsibilities” word for liability.

Article “224” of civil law stated that “The meaning of words is predicate contracts”.

Practical custom

Practical custom that is against literal custom is a custom that is shown in special parts of people’s operation and society assimilates its behavior with that. Some divide custom into two types: 1) customs applied to daily life, 2) transactions custom. Customs applied to daily life is custom that is common and usual in personal
or social life of people and they act accordingly. These customs and habits although are considered as legal cases, it may be origin of several legal works and play role in rationalization of transactions, like use states and animals in any region that can help for explanation and clearing of vague points of contract. Transaction customs meant that the intention of the composition and creation or liquidation rights and dismantled it. Such as marriage, sale, bills and submit.

Specific practices, commonsense: convention on the validity of the species is divided into general and special.

Species common sense: common sense in terms of time, place and meaning are used in two ways:
1) Norm for ages and at all times since it is a common-law lawyer until now current.
2) Cities custom and it is ethical in all the territory of the Islamic current.

Customs of the country, Convention country in which the local norm is used, the realm of conventional current nation and all the people, or most people have adopted it in action. Some lawyers customary practices cities parts of the country tend to count.

Religious practices: Norm among all or most of the followers of a religion called; Religion or its followers are living in a country or several countries. Like the barrage inheritance is considered blasphemy in Islam. The norm is that in fact, religious rules, though - the place is beyond debate; Lake Scientists from some kind of "common sense" and "Muslim tradition" is considered.

Special custom type: special custom has been divided into three types according time and location and group that accept it:
1) Special time custom: it is custom that was common some time and it has obsoleted in other time.
2) Special location custom: any custom that emerges in special circumstance for fulfillment of people’s need and expands under the influence of environment become fundamental factor and causes legal results and consequences. In other words, any custom is associated with a particular social and geographic territory in a way that no outside influence. So, custom that is common in certain region is called “special location custom”. Like common customs between all or most people of a region, this custom that is used in transactions is called “city custom” in jurisprudence knowledge. Nowadays, this custom is called “local or indigenous custom” in right knowledge.
3) Special class custom: right custom as may be restricted to the inhabitants of the land, can regardless of that land, be common between certain group of people that selected certain profession or particular circumstances that link them. The owners of the characters and techniques and various social groups in the country, although they must follow the rule of unit law, but as a professional association and trade groups that have according to the requirements of the business class specific groups will follow the convention that the nature thus the nature of this part of their social life. So the only difference between conventional and customary and routine specific trade or most of them all those groups and classes listed it among themselves and to work overtime," certain customary trade, " they say . As scholars of jurisprudence principles, best practices, customs and banking and etc.

Scholars custom or judicial custom

Sometimes it become between scholars (religious jurists, lawyers) that when facing a problem, follow a principle always and respect it as a universal jurisprudence principle. This common custom between religious jurists and lawyers is called judicial custom. This custom is out of mentioned discussion. However, some scholars considered it as custom types.

Legislator custom

Legislator custom which is the legislation time custom is defined as follows: what was common and usual in prophet time. This custom-if we can call it custom- be considered literal custom. Some scholars without presenting any reason was included it in special custom, but it should be noted that being religious is the fulfillment of roles; it must be species norms of the religious which in this case will be the subject of debate.

Formal and undoubted custom

Undoubted custom: “Whenever certain elements of the common law is established in such a way that the result is repetitive and familiar with it, it’s ugly and disruptive as opposed to the custom”. In other words, undoubted custom is a custom that it has become as a
habit for society because of repetition. The law considered undoubted custom valid and order its following. For instance, about transactions, article 220 civil law says contracts not only parties to run something that requires to be explained, but also all the results which by virtue of custom and habit or law contract is obtained. Undoubted custom like law should be followed and its confirmation is not essential.

Formal custom: formal custom is a custom that has been accepted by the parties. For example, operatives put the sales location near transactions. Formal custom is considered as foreign even and someone that profiting it, should prove the existence of the custom and the judge is not obliged to investigate.

Prevailing and common custom

If a custom be so that all people accept it and no one oppose it, it called common custom, but if most people accept it and there be some opposes, it called prevailing custom.

Former custom, coincides custom, modern custom: the custom is divided into three types according occurrence time:

A) Former custom: a custom that is before the occurrence of the event and then is cut off.
B) Coincides custom: a custom that is when occurrence. This custom has the necessary ability to influence events.
C) Delayed custom: a custom that emerges after occurrence and during the event. In contrast to the customary practices affecting the ability of the beneficiaries is not coincidental. This custom is called “imperious custom”, too.

1- Mishap custom: it is a custom that emerged after the advent of Islam and legislation. In other words, this custom is a custom that there is no trace from it during Imams, but nowadays, it is respected in personal and social relationships. Like copyright, this custom is called imperious custom.
2- Subjective custom, ruling custom

With help to clarify an issue or a decree of legal norms, customs matters and he has been named. Convention theme, which is conventional and organized around a topic that texts are not clear, obvious, but the norm ruling, the common-law rule that a proposition is uttered. Like pulling owe it checks that the Gnostics. The UAE telling sign of all conventional norms are ruling.

Since the ruling norms ruling indicates that overall, the general public even for someone who does not believe in it are binding.

Contrary to subjective custom that is not necessary for someone who does not believe.

Accurate custom, corrupt custom

Accurate custom is a custom that is not opposed with law and legislate texts and by doing it, no interest deceased or corruption, this accurate custom agrees with the real interests of the people and their rights. As mentioned in first topic, some of the jurists’ practices and the proper manner not differentiate rationally and consider the two into one. Corrupt practices, common-law which are contrary to the law and was not compatible with it, and shall be led astray and propagate corruption. This is a common custom among the people.

Transmitter custom

Norms for acceptance or rejection of it by the legislator and the judge also may be sub species:

A) Legislate the traditional religious practices are ethical and legislate properly attested to by the lawyer is admitted.
B) Mardu customary, conventional, is not accepted by the legislator and the judge also gave incorrect testimony.
C) Morsel customary, conventional, the legislator about the acceptance or rejection remains silent and not testifies to its truth or falsity.

Note:

Here we should point out that each of the topics listed not limited to certain types of practices and any customary several subject it can possibly be overlapping. For example, the norm (whether verbal or practical) may be general or specific and yet is dominant.

A) Customary legal rules source.

It is clear that before the emergence of customary law and legislation and the legal rules of society and the rights of originally emerge, customs of its people has emerged. Thus, group life and social needs of
human beings and the rules that the provider is required to provide. Respect the rules and regulations for all population is essential and in such a way that defies is not necessary did it. The scope and enforcement of regulations over time and gradually became customary rules emerge. Later, the bases of rules of customary law were so many rights that formed the legal system. So in all legal systems of the world (religious and secular) tradition almost as an independent source of value is important.

B) Customs basis and source of legal rules.

Therefore, some believe that tradition, aside from the fact that it is a source of law principles. They say that humans have needs and demands of social life; we always try to meet that need and to preserve their own interests and their own rules of conventional fixed build. According to their nature, they adhere to the customs and traditions that rape; what is the custom and habit before they need to agree and also by his natural powers guarantee the public interest. The provisions of the conventions by which it is born out of the public conscience, stability and durability, it becomes more and to place all its own paragraph see. The "conscience of society" that is manifested in the common law, customary law binding force of legal rules and one is placed and where the rights of the credit contract, may be one source of the base only a plurality is still valid. Hence the custom of lawyers introduced as a source of rights can no longer be regarded as a legal basis. As some schools customary rights land west of the conscience of the community, the legal basis is known. The legal systems of the people with customary acceptance of his spiritual power are to make compulsory. The same psychology as a binding force of custom as a source of legal rules is removed.

C) Source and foundation of customary law and its possibility.

Therefore, some believe the tradition, the heritage from generation to generation and continuously expands transfers intangible element that rights, has constructive role in the maintenance of the monitoring to but Possibility ability to source and has no foundation. The followers of this tradition of thought, speech or source been vain and fruitless; These are among the fundamental principles and norms rather than legal rules, is not constructive. But representatives of the principles that pre-existed in the consciousness of people it considers necessary for social life Endo is therefore inevitable that his reputation from the principles of the common law the basis of its creation have been able to obtain. The SPI fee thought to any of the sources of law is not only a way of thinking and perception of organizational rights, rule of law, the rules are considered. Thus, only the technical means to actualize the principle of law that can be interpreted on the principles of human rights.

Custom and legal Emirates

Obviously, sometimes after a while of using the disability laws in anticipating and fulfilling the legal requirements are obvious. Therefore the law is practiced in many countries and it pays to complete synopsis. Sometimes referred to customary law explicitly allows courts to appeal the sentence as it is customary to respect the rule of law. The natural custom and habit of coming on the rules of law, and customary law gradually absorbed over time in some legal texts and organizing and leading Ordinance, it is clear that many of the UAE, including these positive judgments or issues which are common in conventional affair between people are getting validation. Nevertheless credit legislation in the customs legislation of the monuments, the value and validity of the grant does not mean something is invalid; but their inherent common law rights. Scholars’ rights situation in such a way that evens some believed that a judicial presumption that can only be based on common law judge is binding.

RESULTS

The legal system in Iran and Shiite jurisprudence, the legal system is considered as the history, customs of the role is important. Yet this system of customs and habits primarily "driven" and "resource" state law would not be right, but the Islamic regime and the rule of law based solely revelation of God and of all rules and regulations of the law. Yet the rejection of going to extremes and use the "custom" and emphasized the distinction between proper practices of corrupt practices, the norm ever since the legislator Shiite jurisprudence and consequently the Iranian legal system, the role of Decree exploration, identifying concepts and instances, parties will have to recognize issues and interpretation.
REFERENCES


