

CUSTOM AND ITS SIGNIFICANCE IN IRAN

Definition of Custom

The vital and indispensable role which custom plays in many legal systems has attracted the keen attention of prominent scholars of jurisprudence; enriching this practical source of Law. The purpose of this article is to discuss and analyse some reflections on the subject in Islamic Law.

Custom is defined in numerous ways by various scholars. It is described, in principle, as a practice repeated and required by the people, and agreeable to common sense¹.

Custom in Islamic Law

Custom has always played an important role in the relationship of the people. This has been true in British and American Law, in Roman Law to a great extent and in French and Iranian Law to a lesser degree².

Elements of Custom

The three major elements of custom as derived from the above definition are as follows.

1. Repetition
2. Acceptability
3. Imperative nature

1. Repetition: A practice can be assumed as a custom if it is

repeated a number of times. For instance, it is considered a custom to entertain guests with food and drink because this act (courtesy) is repeated over and over again, while on the contrary giving gift to guests is not repeatedly so practised to constitute a custom.

Another example of a custom is when a shopkeeper supplies his customers with bags for goods bought by them. Whereas the customer should produce carton for goods bought, if they are large and bulky. While some stores furnish their customers with carton but it is not a repetitive act and therefore has not become a custom.

2. Acceptability: ordinary members of a community accept certain things. Personal or group behavior and tastes which are extreme can not be regarded as the basis for custom. For instance, hippie style clothing has not yet become accepted because it is not compatible with the sensible behavior of the majority of people.

3. Imperative nature: any practice which a community deem in necessary to be observed is an imperative custom; e.g., in Iran a man makes an offer to a woman for marriage if an act is not regarded mandatory then it would not be a custom. It is generally accepted that the following acts are not custom (1) wearing a wedding ring, (2) wearing mourning clothes.

Examples of Custom in transactions

1. Once an order is placed with a tailor for a suit all material except the lining is provided by the tailor; (e.g., needles, thread, sleeves, and buttons). If the tailor furnishes the lining he charges extra for it.

2. Tipping shop attendants and assistants in the bazaar used to be a custom in the past.

Some writers in Islamic Law³ maintained that custom cannot be recognized as a basic source of Law as the holy Quran, however, it might be considered as a requisite element of Islamic legal system upon the following grounds:

Custom And Its Significance In Iran

1. A number of traditions have been established on the basis of custom e.g., measuring wheat and barley by containers since they are considered bulk goods.
2. Some customs of arabs were accepted by the prophet and in incorporated into the written Law of Islam:
3. The Maleki Sect accepted the way of life of the inhabitants of Medina as complementary to the rules on the ground that they were usage.
4. With the progress of Islam and the conquest of other lands, all customs and traditions which were not in agreement with the holy book (Quran) and the tradition of the Prophet, were abolished. Only those customs and traditions were retained and approved which embodied and restored desirable order.

The validity of customs in shiite Sect.

what does the Shiite profess about the compulsory nature of customs? One of the contemporary Islamic scholars of the shiite sect has this to say⁴:

In Islam, customs carry no legal value and therefore cannot be considered as a religious order. A custom can be a means to express ideas or decisions in a certain matter. For example if a porter customarily carries goods to your front door you cannot expect him to carry these goods into the house. You may only request him to do so contrary to custom.

CONCLUSION:

Study and research of matters that are considered, compulsory custom can be classified as follows;

Firstly: Islamic scholars have dealt with custom in their books extensively.

Secondly: The ottoman Civil code which followed Sect (Hanafi) rules recognized custom and its validity. Article 36 of al Majalleh is based on the theory.⁵

Thirdly: Custom in Islamic Law does not substitute the Law. however it might be used as an indication for decision making. If no Law could be traced to cover a particular case, the judge is not allowed to pass his judgment solely upon a custom. i.e. custom may be taken into consideration in the decision making process but never as a valid basic rule. A Custom can be utilized under the following circumstances:

1. Construing the Law. For instance, attaining maturity is a legal problem, custom may help us to ascertain whether or not a particular person has attained the same or not.

Further more, an operative mistake would affect the validity of a contract, however, to determine a particular item is part of the object of a transaction custom should be evoked, e.g., when the optician sells a pair of eyeglasses custom will define whether the glass case is included as part of the purchase price. A landowner may, even at the loss of his neighbor, utilize his property provided that such utilization is essential to satisfy his needs or required to guard himself against a loss. The Civil code of Iran (including Article 950) provide for a number of disputes to be resolved in accordance with custom⁷.

2. Custom also plays a major role in determining the meaning of contract terms and legal documents. Article 224 of the Civil code says:

«The wording of a contract shall be read according to the meaning understood by customary Law.»⁸

3. To interpret the intention of the contracting parties where the purpose is not clearly specified, and the law does not carry a stipulation about the purpose. Under such circumstances resort to custom becomes inevitable as provided for in some occasions in articles 369, and 375 382 of the Civil code of Iran. (Ba)

Fourthly: Neither the Ottoman Civil code (which is in fact the Law of a Moslem country based upon Hanafi sect and does not encompass all Moslem communities rules. because there exist a great difference

Custom And Its Significance In Iran

between how the Islamic Governments function and what Moslem do as well as the ' Moslem Law) Nor other descriptive books annotating it have ever regarded custom as a source of Law. For example; Eben Najim's book (9) gives us a long narrative on custom with a great deal of examples how custom would operati in Islamic Legal System.

Exceptions are found in this book in cases pertaining to runing water the bulky nature of goods, and money interst, but in general, custom is not accepted as Law. There are several instances in this book where custom is regarded as Law, e.g, eating fruit that falls from trees, presenting gifts to judges before they are apponited as such, and the given of special gratuitues to judges, school teachers or priests. Use of food and drink for guests is also one of the cases mentioned in this book which is cousidered a custom¹⁰.

Consequently, custom is not regrded as Law in Islam. The Ottoman Civil code accepts custom as the basis of Law but Ottoman Civil Law cannot be accepted as the basis of Islamic Law. The Hanafi sect recognizes custom and their values as previously stated Ebn Najim has regarded custom as essential as does the Ottoman Civil code. Ebu Abedin also has analyzed the matter and has regarded common custom as ualid but has hesitated in recognizing particular customs as valid¹¹

Types of Customs

There are various types of custom; some Islamic authors have enumerated nine kinds of customs but will only consider two of them ¹².

1. Oral and practical custom.

An oral custom is a term that means the normal exclamatory ut-terances of the people.¹³ A practical custom normally occurs in transac-tions; e.g., the delivery of gas cylinder to consumer's place.

2. Common and particular custom.

A common custom is one that is practiced by all the people. A particular custom is one that is practiced by a special group of people. For — example, inviting guests to a wedding party is a common custom whereas payment of nursing money is a particular custom

exercised in certain localities. Custom can be called common or particular from the standpoint of time too.

Conflict between custom and Law

In case of conflict between a custom and religious Law which one would prevail? As stated before, the Shiite sect does not recognize custom as a Law, whereas the Sunni sect under certain circumstances considers custom a legal rule; e.g., fruits can be measured on trees on the basis of custom although the weight of the fruit may not be known. According to Sunni Sect; whenever a tradition exists as a result of a custom, if such custom changes then the tradition also changes.¹⁴ For instance, at the time of the Prophet of Islam, wheat, barley and dates were measured in bulk but when this system was changed the form of measuring changed, accordingly as well.

At the silence of Law.

Does custom become a Law when the Law remains silent? In the Civil procedure code of Iran (Article 3) it is stipulated that, during instances where the Law remains silent in a particular case, the judge may resort to custom and thus has accepted custom as common practice.¹⁵ But according to Islam, the lack of rule in certain cases does not necessarily allow custom to control. As stated previously the Shiite sect does not recognize custom as Law. It is the Sunni sect that does accept custom as Law in certain cases.

-
- 1) Ibn Najim (Hanafi), *Ashbah Nazaier*, P. 37.
 - 2) D. Afshar, *Comparative Law*. P. 130-134.
 - 3) D. Mahmassani, *Islamic Law philosophy*, p. 210-211.
 - 4) Kashef Al ghetaa/Tahrir Almiijalleh, part 1 P. 31.
 - 5) Ottoman Civil code, article 36.
 - 6) D. Katuzian. *civil Law*, vol I, P. 156.291.
 - 7) Article 950.

Replaceable things (Misli) mentioned in this Law mean things which are such that seeds; and pricable things (qini) are the counterpart of things nevertheless. The determination of this theory depends upon custom.

- 8) Principles of Islamic Law by the author, P. 39.

8a) Article 369:

Delivery is operative in various ways according to the varying nature of the object sold. it must be done in a way that is accepted as valid according to common usage.

Article 375:

Custom And Its Significance In Iran

Delivery should be made at the place where the contract was concluded, unless another place is required by common usage or unless by a provision in the contract of sale a special place has been fixed for the delivery.

Article 382:

If in regard to the expenses of the transaction or the place of delivery Common usage lays down some rules contrary to those detailed above, or if in the contract some stipulations to the contrary are made, the common usage or these stipulations shall be followed.

The seller and the buyer can also modify the above rules by mutual consent.

9 - 10) Abn Najim Al ashbah Va Alnozater, P. 37-40.

11) Ibn Abideen, vol 11/ p. 120.

12) D. Jafari Langroodi, schools of Law in Islam, P. 89.

13) Principal of Islamic Law by the author, p. 39.

14) Ibn Abideen, vol. 11, p. 120.

15) The courts of justice are bound to take cognizance of the cases in accordance with the provisions of Law and issue judgment of otherwise settle the case. Where the existing Laws of the country are not perfect or are not explicit, or are contradictory, or there does not exist a Law applicable to the case issue, the courts of justice are bound to settle the case in accordance with the spirit and the support of the existing Laws, and established usage the case at issue.

پژوهشگاه علوم انسانی و مطالعات فرهنگی
 رتال جامع علوم انسانی