The Jurisprudential-Legal Nature of Custom and Its Reflection in the Substantive Criminal Laws of Iran

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Abstract

Many early, late and contemporary jurists, including Imam Khomeini, have paid special attention to the importance of the role of custom. The place of custom and its dynamics in jurisprudential and legal issues is evident according to the element of time and place. The main question is what is the place of custom in substantive criminal matters? With the hypothesis that the special concept of custom in substantive criminal matters has drawn a special and distinct position for it from other fields of law. The aim is to analyze the concept of custom in the jurisprudential and legal aspects and to explain its validity in the realm of substantive criminal law - especially with regard to criminal responsibility and the determination of punishments. The research method is descriptive-analytical. The results indicate that although custom in criminal matters cannot be used as a jurisprudential or legal source of criminal law to document criminal prosecution or conviction, it is able to play a significant role in the three positions of creating legal rules, the position of interpretation and also the implementation of legal rules.

Key words: custom, criminal law, substance, jurisprudence, law.

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1- Introduction

Knowledge of jurisprudence and law has long been effected by the phenomenon of custom. Customs are gradually being collected, and some have been codified in laws and judicial decisions. Ancient laws such as Hammurabi, Judaism, Manichaeism, ancient India, and Athens referred to custom. Thus, custom takes precedence over other legal sources. Most of the jurisprudential and legal issues contain customary meanings. Many jurists, including Imam Khomeini, have paid special attention to this important issue.

The formation of legal systems in the realm of custom has caused the role and position of custom to remain prominent despite the historical evolution of ideas. In countries with customary law systems, custom is the primary source of law, and in countries with written law, custom is after the law. The legal system of our country is close to the Roman-German legal system (Islami Panah, 1396, 199). The Iranian constitution does not specify custom, but in ordinary law, the word custom and its synonymous words are used repeatedly, which is the reason why custom is common in Iranian law.

The situation of custom in Iranian criminal law seems different from civil law. Acceptance of the principles of legality of crime and punishment has reduced the importance of customary independence in the penal system, and the punishment of individuals based on custom is rejected; But this fact does not mean blocking the effectiveness of customary understanding and the concepts based on it in the field of criminal law. The effectiveness of customary rules in the formation of the three elements of

crime is evident, and this justifies the need to pay attention to it.

Sometimes the legislature, by using specific words such as typically and habitually, as well as words such as public decency, immorality, recklessness, carelessness, has explicitly assigned to the judge the recognition of the judicial nature of a criminal act based on custom. Such as: Article 638 of the Islamic Penal Code approved in 1996. The criterion for recognizing the act of injuring public decency is custom.

Also, in paragraph b of Article 290 of the same law, the court issues a verdict in order to diagnose and establish "typically" deadly behavior, in the position of applying and assessing the crime, referring to custom, such as obtaining expert opinion.

So far, no comprehensive independent research has been done on the subject. This research is an attempt to explain the nature of custom and distinguish its position and function in the Iranian criminal law system and as an answer to the question: First - how can custom as a An independent source along with other sources of jurisprudence and criminal law? Secondly, to what extent and in what fields does custom affect the criminal jurisprudence and substantive criminal laws of Iran?

Custom at the stage of criminal legislation is not very important in written law; Because it is not possible to directly refer to custom in criminalizing the behavior of individuals and document it as criminal prosecution or criminal conviction of individuals.

2- Recognition of custom in legal and jurisprudential dimensions

To analyze the concept of custom in the legal and jurisprudential structure, it is necessary to study its definition.

2-1- Literary and idiomatic definition of custom

The custom of the Arabic word meaning knowledge is well known and good. "Custom is a mystic and is known in a sense and anti-negro, and it is anything that the human soul knows well, gets used to and finds peace" (Ibn Manzur, 1405, 239). The wise men of the society recognize it as a tradition and a good practice among them (Tabatabai, 2009, 397). Custom is defined as the habit of all or most people of a nation in a certain speech or behavior (Jafari Langroudi, 2005, 447). Custom is a rule that has gradually and spontaneously become common among all people or part of them as a binding rule (Katouzian, 1375, 178); (Ziaee Bigdeli, 1987, 47). Most customary interpretations and definitions are external examples, not interpretations of its true meaning or purpose. More importantly, the original originator of custom is the same known and rationally favored thing. Regarding custom, terms such as "the way of the legislator", "the way of the wise", "the centers of the law", "habits and customs" and "tradition of narration" have been mentioned. The building of reason has similarities with custom. But the difference between the two is in the perpetual affirmation of reason. Custom is a repetition of something that is common among people without its validity necessarily being confirmed by reason.

From the international dimension, custom is the first source of public international law and is the basis of judicial decisions in resolving international disputes (Ki Nia 1340,

175), (Rebecca Wallace, 1387,13), (George Schwarzenberger, 1957,26),

(International Law Association, 2006,43), (Ian Brownline, 1998, 19) (Brian D. Le Park, 2010,37),.

Accordingly, according to paragraph 2 of Article 38 of the Statute of the International Court of Justice, custom is the general procedure of states that have been accepted as a rule of law, which may be global or regional or bilateral in relations between the two countries. Repetition of something with their tacit consent (Erfani, 1373, 43).

It seems that from all the definitions, we can consider the common elements, prevalence, nature of an action and behavior, rationality, acceptability and binding of all definitions as certain.

2-2- Types of custom

Types of custom are: general custom and specific custom, correct custom and corrupt custom, practical custom and verbal custom.

In the general custom, where the general aspect is predominant, but in the specific custom, there are special groups of companies that have a special factor or motives, such as special time or special jobs and industries and professions, have brought them together in a round set (Mohammadi, 1996 , 252). Including the specific custom of the union such as lawyers and doctors, the specific custom of time or place, the custom of the legislator and the custom of the legislator.

From the point of view of jurists and fundamentalists, if a certain behavior takes place among the people without considering the divine law and without the intervention of temporal, spatial and racial characteristics, it is called "common custom" or the way of the wise. But if the limits

of divine law are observed in it, it is called "special custom". (Muzaffar, 1370, 174). Another type of custom that is common in Islamic society and among the religious people is called "Sharia law".

Practice is a legal rule that is created by the repetition of an action and the adherence of everyone to it. Such as cash payment of goods at the time of transaction (Jafari Langroudi, 1362, 108). The use of the word without asymmetry in the word and in an absolute way that its customary meaning comes to everyone's mind, is a verbal custom. This connection between word and meaning is called customary connection, and this real relationship between word and meaning is called "customary truth". For example, in our society, the word "rial" traditionally refers to the Iranian currency. For this reason, Article 224 BC. Poems: "The words of contracts are predicated on customary meanings."

Judicial custom implies the equal performance of judges in relation to something that is repeated over the years and, under certain conditions, is a source of law. (David 1364, 146). Another is the custom of jurisprudence, known as the "doctrine", which follows general principles and rules and is the basis for the views of jurists.

2-3- Pillars of custom

Custom has two material and spiritual pillars. The material element or type means the continuous repetition of an action by all. (Del Wakyo, 1388, 303). But repetition is the source of the work when it is accompanied by a sense of obligation to the general public (spiritual or mental element). The criterion for distinguishing the two pillars of custom is a theoretical criterion. But in objectivity, the moment of the

transformation of the material element into the spiritual element is not exactly known.

2-4- Explaining custom from the perspective of Quran and jurisprudence

The Holy Qur'an says to the Prophet (PBUH): "Take forgiveness and command with knowledge and extend it to the ignorant." Most Sunni jurists believe that this is the custom and tradition that the wise have used among themselves to maintain survival and order. Tabarsi says in the following verse: That is, it is famous and everything is liked and known ”(Tabarsi, 1415, 512). The same interpretation can be seen in Shiites.

"Custom is one of the good and beautiful traditions and manners that is common among the wise" (Tabatabai, 1363, 397).

There is no consensus among Sunnis on custom. Hanafis and Malikis have considered custom as one of the valid and important sources of jurisprudence. (Arif Ali Khan, 2006,1)

Imami jurists have considered custom in many issues and considered it as a known issue and have paid less attention to its detailed issues. In this regard, any subject that has not been clearly defined in the expression of the Shari'a, has left its recognition to custom (Walidi, 1389, 174). Sheikh Ansari in the discussion of "the permission of the union of command and prohibition in a single thing" considers custom as a level and a kind of reason and never sees any opposition between the two (Sheikh Ansari, 1404 AH, 151). Therefore, one of the functions of custom is to use it in perceiving and discovering the meanings of words. The first martyr also says: "Sometimes we prioritize custom over the narrated narration of the Infallible (AS)" (Feyz 1387, 105).

Regarding the beliefs of Shiite jurists and Sunni sects, some of the uses of custom can be divided as follows:

• The custom of the Shari'a and the special biography of the Shari'a in presenting facts and rulings;

• The custom of linguists to have a specific language;

• Separating the custom of the religious into two parts: the general custom of the religious without adhering to a particular religion and the custom of the religious to Islam.

2- 5- The authority of custom and the conditions of its validity

The authority of custom determines the scope of application of custom in deriving jurisprudential rules. Various methods have been proposed to prove the authenticity of custom, especially by Sunni jurists. The authority of custom is disputed by the Imams and the public. Some Sunnis, especially the Hanafis, have accepted custom as an independent source in deriving the rules of Sharia, to the extent that in the event of a conflict between custom and analogy, they prioritize custom.

While the Imami jurists do not consider the authority to prove the rulings as proof and do not consider the custom as a proof to prove the obligatory ruling, unless it is proved that it was common in the time of the Infallibles (AS) and it was not forbidden (Boroujerdi, 1412 AH, 141) can be Its cases were limited to the following forms:

• Identify the issue; Such as identifying the poor and the face of God in the use of zakat.

• Interpretation of the will of the parties at the time of concluding the contract.

• Recognize concepts and their limitations, such as alimony, bill, privacy.

By reflecting on the jurisprudential and legal definitions, the following conditions can be considered as criteria for the validation of custom:

Attitude and frequency: The action or speech is repeated by the general public and used by all people in the face of a particular event. This feature is called the "material pillar of custom".

• Action or speech should be done voluntarily, voluntarily and by understanding and intellect, not by instinct or instinct. (Jafari Langroudi, 1397, 87)

• The date of the behavior or speech: If it has been done in a limited time, it is not a custom. With this condition, custom distances itself from customs. (Najafi Javaherkalam, 1362, 31)

Custom must be contemporaneous, not sequential: A custom that governs an event must have occurred before that event. If a custom arises after filing a lawsuit that may take a long time, that custom can not be invoked at the time of sentencing (Bahri, 2002, 110). Accordingly, the conditions stated in the endowments and wills must be interpreted according to the usual custom at the time of writing.

• Do not oppose custom with the specification of the Shari'a or its contractors: If there is a definite rule or text of the Shari'a, it is not possible to act against them according to custom and habit. In general, whenever the practice of custom causes the closure of the religious text, custom becomes invalid (Mohammadi, 1375, 260). According to the rule of "the well-known is customary, the conditionally conditioned" (Mohaghegh Damad, 64, 1406), the customary understanding of a subject and its belongings is among the conditions of association; Therefore, its validity is as long as

the parties have not specified otherwise or the religious reason is not contrary to it.

2-6- Judicial custom and procedure

Customary law and jurisprudence are both sources of law, both are formed over time and in written law need the protection of law (Madani, 1383, 89). The law can destroy jurisprudence, just as it can remove custom from the obligation. The sources of law can be divided into two categories: law and custom. In this case, custom includes legal sources other than law. As a result, judicial procedure is considered part of custom. Just as custom is made by the people and they are made obligatory, so the judicial procedure is created by the judges. Judicial procedure is the custom of judges.

In fact, in judicial decisions, judges use the rules of interpretation and make decisions using law and custom, and these decisions are the agent of judicial procedure over time. Judicial practice is therefore the fruit of the judges' scientific endeavor. Customary law and practice are both the basis of the law. Some laws, such as the single article approved on 3/4/72, may be the subject of lawsuits regarding personal status; They have been basically the same as the previous custom and judicial procedure that the legislator has approved in the form of law.

3- Reflection of custom in substantive criminal laws

Prior to constitutionalism, Iranian criminal law was subject to the orders of governors and kings, sometimes to religious rules and decrees of religious rulers and unwritten customs that prevailed among social, political, and especially judicial institutions. After the constitution, as a result of adapting the law of European countries, it has benefited from various

sources such as the law of France and Belgium, as well as Islamic jurisprudence and local and national customs. (Okhot, 2010, 526) The main basis of Iranian criminal law, Every other legal system is more or less influenced by custom. In the following, we will mention the reflection of obvious manifestations of custom in the substantive criminal laws.

3-1- The manifestation of custom in recognizing the legal element of crime

In order for an act to be considered a crime, it is necessary: First, it must be prescribed by law as a crime and a punishment must be prescribed for it. (Legal pillar of crime). Second, criminal behavior including the act and omission of the act has occurred. It is not enough just to have an idea and a will that has not materialized (material element of crime). Third, it has been done with criminal intent or criminal guilt (spiritual pillar) (Jalaian Saleh et al., 1399). Therefore, the law is the most important element in the development of crime; Because before the official announcement of the law, any kind of behavior is considered permissible and punishment of individuals with any reason is not allowed. The principle of legality is recognized as the foundation of criminal law, and jurists have no hesitation in accepting it. (Jalaian Saleh and Mo'meni, 1400, 237).

Adherence to the principle of legality in criminal law has two general consequences: narrow interpretation and non-retroactivity of criminal law. Observance of this principle means the legislator's obligation to use clear, explicit and unambiguous expressions in drafting criminal laws. But sometimes the violation of this obligation and the use of propositions with complexities in the concept, leads to

doubts in the meaning of the text of the laws and the true meaning of the rulings in the position of jurisprudence. This makes it difficult to understand the true meaning of the words and intentions of the legislator, and ultimately makes it difficult to make a correct judgment and to make the judge have to interpret. Hence, jurists consider the interpretation of laws to be unimpeded in two cases; The first is that the meaning of the law is not clear and the second is when there is doubt in its meaning. (Mansourabadi, 1398, 32) Reference to custom in understanding the subject and belongings of criminal texts and relying on customary understandings in inferring from these texts, is a solution that is used in the framework of criminal law.

In some cases, the meaning of the words in the text of the law has the necessary clarity; But in the position of applying the concept to its external instances, doubts arise. For example, in Articles 651 and 652 of the Penal Code, carrying a weapon by a thief during robbery is one of the aggravated qualities of punishment. Here the weapon is ambiguous in concept; But in the inclusion of some external examples under this concept, especially cold steel, doubts arise that its customary refutation will lead to the emergence of dubious examples. From this point of view, it seems appropriate to consider the examples of cold steel as an honest tool whose first purpose in making it is traditionally used as a weapon. Judicial practice has accepted this approach; As in Manhanfieh, the rulings of the Supreme Court of the country have mainly rejected the external determination of weapons in tools such as sticks and sticks. (Borhani, 1392, 153).

Sometimes the customary understanding of the audience of the law narrows the conceptual scope of the words and does

not accept the unconditional implication of all the people below it. For example, Article 669 of the Penal Code states: "If anyone threatens to kill or injure another in any way ... he shall be sentenced to two years' imprisonment." Here, based on the customary perception of the threat, disabled people who are unable to implement the provisions of the alleged threat due to weakness should be considered as an exception to the ruling mentioned in this article. Accordingly, although the appearance of matter seems absolute and includes all perpetrators of this behavior; But such an application is limited to the conventional view, only to cases where the person has the power to carry out the provisions of the threat.

The words mentioned in the legal texts must be unambiguous and clear. This feature is one of the requirements of the principle of legality. In this regard, the use of allegorical expressions in criminal law is wrong; But it seems that assuming the use of allegorical sentences in the law, the interpretation in recognizing the example should be assumed to be a function of custom, and in fact it is custom that by refining it, various instances determine the meaning of the legislator.

3-2- The role of custom in determining the amount of punishment

Regarding the effect of custom on determining the amount of punishment, the role of custom in the two categories of mitigation and aggravation of punishment is examined separately.

3-2-1- Intensification of punishment in the light of customary criteria

In Iranian law, the intensification of punishment is mentioned in the issue of regulations related to the multiplicity and repetition of crimes. The history of the case was mentioned in Articles 31 and 32 regarding the multiplicity of crimes and Articles 24 to 26 of the General Penal Code approved in 1973 regarding the repetition of crimes. After the revolution, these cases were approved in Articles 24 and 25, respectively, regarding the multiplicity of crimes and Article 19, regarding the repetition of crimes in the Law on Islamic Punishment in 1982. Finally, evidence of the placement of these two concepts can be seen in Articles 131, 132 and 136 of the Islamic Penal Code adopted in 1392.

Regarding the aggravation of punishment for several crimes of the same type, the legislator of 1370, contrary to the Penal Code of 1352, did not provide any solution and only mentioned the phrase "multiple crimes can be one of the causes of aggravation of punishment." However, in 2013, Article 124 was again legislated for the amount of punishment. In compiling the regulations related to material multiplicity and recidivism, the law of 1304 has followed the laws of France and Switzerland. (Okhot, 1389, 526) This is while the legislator of the years 61, 70 and 92 in relation to the determination of punishment, especially in the material multiplicity of crimes, has paid special attention to the texts of jurisprudence.

There are several things to consider in this section in connection with the creation of judicial custom:

First: After the adoption of the Law on Islamic Punishment in 1982 and the creation of a legal vacuum regarding the aggravation of the punishment for committing crimes of one

type, criminal judges acted in accordance with the previous procedure in accordance with Article 32 of the former General Penal Code. However, in case of committing up to three crimes, they applied the maximum punishment and in case of more than three crimes, the offender was sentenced to the maximum punishment plus half (Jalaian Saleh, 2016, 141). For example, in the case of issuing four misplaced checks, the defendant was sentenced to three years imprisonment and a fine equal to the amount of the check with a larger amount, while the maximum imprisonment, according to Article 6 of the Check Issuance Law, was two years imprisonment. . In fact, although a new law has been enacted; Despite the gap in the new law, the courts, following the previous procedure, typically established a judicial custom.

This situation continued until finally the General Assembly of the Supreme Court proceeded to break the custom, as stipulated in Resolution No. 608: By not specifying the law to go beyond the maximum punishment, the court can not exceed the maximum number of crimes.

Second: Regarding the issuance of irrevocable checks in the form of multiple complaints and complaints of private plaintiffs, the practice of some courts was to convict the accused in the form of fraud. Arguing that the offender deceived the plaintiffs into fictitious matters such as having too much cash in a bank account. The courts ruled on the basis of this jurisprudence, until the Supreme Court ruled: "Assigning the title of fraud to issuers of unsecured checks, which is subject to a special law, has no legal justification in various circumstances."

Thirdly, regarding the moral multiplicity of crimes, the subject of Article 31 of the General Penal Code 1304 and Article 131 of the Islamic Penal Code adopted in 1392 and

the unanimous decision of procedure No. 34 stated: "They are paid. Leaving the alimony of the wife and children on the part of the husband in such a case is considered a single act and requires the observance of Article 31 of the General Penal Code."

It can be seen that in this verdict, a severe punishment is considered for a person who tries to leave alimony for his family and children. The use of the word "usually" indicates the consideration of the General Assembly of the Supreme Court to the custom of society, and for this reason the issue is known to be subject to spiritual pluralism.

Fourth: In the case of offenses related to driving offenses, which are considered as offenses, it is apparently against the rule of determining a punishment; For example, if a person has committed two offenses (passing a red light), according to Theory No. 4395/7 of the General Legal Department of the Judiciary, the said punishment will be added together. In other words, this jurisprudence is contrary to Article 47 of the Islamic Penal Code of 1991, which states that the provisions of paragraph 32 of the General Penal Code of 1352 stipulate that the provisions on multiple offenses are not applicable in criminal cases and only criminal offenses together with misdemeanor punishments. O and criminal gather; It has remained in force, which indicates the existence of an executive custom that was applied contrary to the provisions of the law.

3-2-2- Reduction of punishment in the light of customary criteria

Mitigation of punishment The subject of Article 22 of the Islamic Penal Code of 1991 is divided into two types of laws that require the judge to apply mitigation and the judiciary that indicates the judge's authority in mitigation.

Also in judicial relief subject to Article 37 of the same law; If there is one or more reasons for mitigation, the court can reduce or change the ta'zir punishment in a way that is more appropriate for the accused. Of course, the reduction of punishment means that in crimes where the minimum and maximum punishment is determined, the reduction must be less than the minimum. The General Legal Department of the Judiciary in a Theory of Mitigation; Referred to custom.

He also stated in a theory: "In terms of mitigation of punishment and conversion of Islamic punishment, for example, conversion of imprisonment, flogging or fine according to the provisions of Article 22 of the law approved in 1370, the court should consider the physical condition and other characteristics of individuals and customs. "Habit to determine what punishment is more favorable to the accused and fear." (Mehrpour, 1372, 156) It can be seen that in this case, too, the basis for making a decision is custom.

Article 38 of the Islamic Penal Code of 1392 has been established in relation to the qualities of abbreviations, which include cases related to custom:

First: In paragraph b of the mentioned article, the effective cooperation of the accused in identifying partners or deputies, studying evidence or discovering property and objects resulting from the crime or ... is mentioned as one of the aspects of mitigation. In this sense, the measurement of the word "effectiveness" in practice is left to the courts and the judiciary.

Second; In paragraph c, the circumstances affecting the commission of the crime, such as the victim's provocative behavior or speech, as well as the honor motive of the offender, are considered mitigating circumstances. The custom of the community and the custom of the judiciary

are the solution to measuring the provocativeness of a speech or behavior, as well as to identify what attributes can be considered an honorable motive.

Third: In paragraph e, the good record and special condition of the accused, such as old age or illness; Expressed as discount directions. What matters is a good record, determined by the judge and using the custom of the community.

3-3- Application of custom in determining instances of participation and assistance in crime

Criminal behavior is sometimes perpetrated by a single person, and sometimes with the cooperation of other persons, the latter form creates the characteristics of aiding and abetting in a crime. The legislator did not define the deputy, but its examples in Article 126 of the Islamic Penal Code adopted in 1392 in three paragraphs: By means of - c) facilitating the occurrence of crime; Enumerated.

In recognizing and removing the ambiguity of the key words that the legislator has used to introduce the examples of the deputy of crime and participation in the text of the law, the custom of the society and then the judicial procedure is always a beacon for the judges. As;

First, stimulation is synonymous with persuasion and literally means to move. It is important to establish the causal relationship between the stimulus and the stimulus. In practice, the determination of what is considered incitement and was able to force the accused to commit a crime is based on judicial custom and depends on the opinion of the judge.

Second: In the case of threats, in each case, the judge assesses the threat and its impact, taking into account the customs and circumstances surrounding the occurrence of

the crime. According to this, for example, if a sick or elderly person threatens to kill the threatened person if he does not commit a crime, he cannot be considered a deputy if he commits a crime. But if the same patient has authority outside (such as a spiritual steward), in such a way that the possibility of being threatened by another seems strong; The deputy can be investigated in the crime. As a result, the threat is considered customary, which the judge must establish.

Second: Bait is the concept of greed and is usually done objectively. like the; To make someone else willing to commit a crime by making a financial promise. It is customary to identify instances.

Thirdly; Conspiracy is a form of deception without explicitly inciting the perpetrator to commit a crime. The psychological element of the conspiracy, unlike other cases of ignorance, has been deceived. Determining whether the deputy's actions were conspiracy or deception, as well as establishing a causal link between the deception and the criminal act, is customary with the judge.

Fourth: Facilitating the occurrence of a crime means that the deputy commits a current act or omission that facilitates the commission of the crime by the steward. Branch 11 of the Tabriz General Court in Letter No. 2839; He has sentenced two of the bodyguards of the victim to prison, which led to his strangulation by the killer (Sabri, 2002, 86). Accordingly, detaining a person for intentional bodily harm or murder is considered to facilitate the commission of a crime and aiding and abetting. In fact, the above verdict lays the groundwork for a kind of judicial custom.

Sometimes a person interferes with other people with a clear intention, in committing a material act or abandoning a criminal act in such a way that he can be recognized as an

accomplice of a crime in its customary sense (Nurbha, 1389, 214). According to the meaning of Article 125 of the Islamic Penal Code adopted in 1392, participation in the material element is a crime. The fundamental issue is the citation of crime to behavior. The word citation is a customary concept and has been referred to in several cases by the Islamic Penal Code. In other words, according to the custom of the society, the custom of the judiciary, the legal doctrine and finally the custom of the expert, the act has been committed by all the partners. This is the chapter on distinguishing between the concepts of vice and company. As a result, the driver who brought the thief to the scene or drove him away is the deputy. In connection with the ability to rely on and assess the extent of the partner's intervention in criminal behavior, which is the basis for sentencing, it is necessary to examine the contents of the case and the mental and physical condition of the partners.

3-4- Impact of barriers to criminal liability from custom

In the Islamic Penal Code adopted in 1392, the justifiable causes of the crime and the factors eliminating liability are collectively referred to as "obstacles to criminal responsibility". Among these, Articles 146 to 155 are related to the factors that remove criminal responsibility, and Articles 152, 156 to 159 under these factors, including: urgency; Legitimate defense; Rule of law and law enforcement Ohm; Legal order; Conventional punishment of minors and inmates, legal and religious sports operations; Legitimate surgery or medical with consent; Apparently, according to the doctrine of criminal law, they are among the justifiable causes of crime. According to the doctrine, the issues of justifiable causes and factors that eliminate

criminal responsibility are separated and discussed in the next two paragraphs, and we examine the effects of custom on them.

3-4-1- Explaining the factors that eliminate criminal responsibility in the standard of custom

The meaning of factors that eliminate criminal responsibility; It is the circumstances and characteristics of the person who commits the crime that prevent the criminal behavior from being attributed to him and lead to his criminal irresponsibility and punishment.

First: Childhood is one of the factors that remove criminal responsibility. How to determine puberty is sometimes a matter of controversy. In Article 146 of the Islamic Penal Code, the legislator considers the child innocent and emphasizes the non-criminal responsibility of minors (boys under 15 lunar years and girls under 15 lunar years). In determining the age of the child, first the identity card is considered and in case of doubt about the age, the opinion of a forensic doctor (as a special custom) is asked to determine the age of certainty. Judges of the Supreme Court, citing the same (expert custom), while rejecting the age of the person in the identity card, despite the quality of its issuance in the official document; By doubting the maturity of the accused at the time of the crime, they have violated the verdict of the courts of first instance.

Second: Regarding insanity, the history of jurisprudence has gone through various stages in determining the instances of insanity as a factor in removing criminal responsibility in Iranian criminal law. According to the theories of the legal department, the opinion of a forensic doctor about insanity is valid if it is not contrary to the circumstances of the case. In this regard, Article 150 of the Islamic Penal Code of

1392, in line with this belief, emphasizes the theory of forensic medicine. In distinguishing healthy people from free ones, it is the custom of the expert who has always been the basis of the judicial custom. In this regard, we can refer to the issue of mental retardation or epilepsy, which, despite not being mentioned in the law; According to the jurisprudence, by acquiring the theory of forensic medicine, it can be one of the examples of eliminating criminal responsibility.

Third: about coercion and reluctance; According to the provisions of Article 151 of the Islamic Penal Code of 1392, coercion is conditional on "being irresistible." This description is explained by the phrase "intolerable reluctance" which is mentioned in Article 202 of the Civil Code. Regarding the habitual intolerance of a matter, given that the legislator has not specified its cases precisely, and even in the civil law, the cases mentioned, such as age, etc., have an allegorical aspect; It seems that the judge should refer to custom and should find out whether coercion or reluctance has become common; Has it been traditionally intolerable or not?

Fourth: Urgency and necessity, which means compulsion, are considered as one of the eliminating causes under certain conditions. According to Article 152 of the Islamic Penal Code of 1392, anyone in the event of a current or imminent danger such as fire, flood, storm, earthquake or disease in order to protect his life or property or another commits a crime that is considered a crime under the law; It is not punishable, provided that it does not create a danger intentionally and that the act is commensurate with the existing danger and necessary to avert it. It should be noted that the phrase "such" in this article is an implicit reference to custom. It is also up to the judge to determine the

appropriateness of the act committed with the danger mentioned in the article, and it is formed according to customary and personal criteria. For example, when you can break into a house to put out a fire, demolishing the wall of the house seems inappropriate.

3-4-2- Explaining the justified causes of the crime in the customary measure

The meaning of justified causes of crime is objective and external variables that eliminate the crime by damaging the legal element. In this case, both material and spiritual elements have been realized, but the legislator for some reason does not recognize the issue as a crime and removes punishment from such actions (Jalaian Saleh, 2016, 184). We examine the relationship between custom and justified causes in five sections:

First: the rule of law and the recognition of the law oh; In some cases, the legislature does not consider the perpetrator to be punishable by omitting the anti-social character of a criminal act. For example, according to Article 648 of the Islamic Penal Code, persons who keep secrets on the occasion of their profession will be punished if they attempt to divulge a secret. Accordingly, disclosure of professional secrets is a crime. Now, if a doctor reports a contagious disease for the protection of members of the community or by order of a judicial official, this act is not punishable by law. Here, as the legislature has not given any definition of professional secrecy, it determines its jurisprudence and custom.

Also, according to paragraph b of Article 158 of the Islamic Penal Code of 1392, committing a criminal act to enforce the law is not considered a crime. The word "ohm" has been added, which has added to the inadequacy of the

law. It is not clear what the legislator means by ohm? In the legislative hierarchy, the constitution is the most important of the ordinary laws. But in ordinary laws, the most important law is not explained and its determination is left to the perpetrator and the court.

Second: According to paragraph 3 of Article 158 of the Islamic Penal Code of 1392, if the conduct of behavior is a legal matter of the competent authority and is not contrary to Sharia, that act is not considered a crime. In determining who is the legal director, it is necessary to pay attention to administrative custom. If the order is legal but it is illegal, if the order is carried out, according to Article 159 of the Islamic Penal Code, which states that whenever one of the official officials commits a crime, the order and the officer will be sentenced to punishment. The cause of the mistake is acceptable and, assuming it is lawful, has not been punished. What is acceptable depends on the judicial procedure. In other words, it is a judicial custom that, recognizing the mental state of the accused and considering his amount of information and knowledge of the law, decides whether the matter is acceptable or not.

Third: Regarding the discipline of the child by parents and legal guardians; According to paragraph 15 of Article 158 of the Islamic Penal Code of 1392, their actions must be in accordance with the law within the normal limits and within the limits of Sharia. In this regard, according to Article 1179 of the Civil Code, parents have the right to punish their child, but based on this right, they can not punish their child outside the limits of discipline. With regard to these legal articles, the amount and manner of discipline is left to custom. Of course, this custom is constantly influenced by the culture of societies and is different at different times and places.

Fourth: In the case of accidents caused by sports operations, according to paragraph c of Article 158 of the Islamic Penal Code of 1392, if the cause of these accidents is a violation of the rules related to that sport that is not contrary to Islamic law, the criminal description will not be punished. According to this, for example, local sports such as wrestling with chukheh, which is common in some northeastern cities of the country, are customary. These rules are inaccurate and only experts are aware of them. Therefore, in case of occurrence, judicial authorities can use the local expert as an expert. This move of the judge is considered as a reference to a specific custom in a sport.

Fifth: Legitimate defense is another justifiable cause that is provided in Articles 156 and 157 of the Islamic Penal Code of 1392.

Conclusion

The results of the research indicate that custom as a source of rights is an unwritten, general, permanent and at the same time evolving rule that arises directly from the will of the people and the government has less role in creating it. Custom is a set of rules that is created as a result of constant repetition (material element) and adherence to it (spiritual element) and penetrates into the minds of people to a degree that they are convinced, its observance is necessary and non-observance is ugly and guaranteeing. The conclusion that can be drawn from the definitions provided in order to provide a definition of custom in the term is that none of them is comprehensive and expedient in terms of being comprehensive. Types of custom divisions into general and specific, verbal and practical, correct and corrupt were expressed. Considering all the definitions, conditions such as antiquity, voluntariness and voluntariness, order and

frequency, non-contradiction with the stipulation of the Shari'a and its successors, rationality, acceptability and binding, can be presented as criteria for validating custom and certain value of all definitions.

The authority of custom is disputed by the Imams and Sunnis. From the expressions and application of custom and habit in the words of the jurists, it became clear that Sunni scholars, especially the Hanafis, consider custom as a proof and consider it as a practical field. In contrast, Imami jurists often limit the authority of custom to such things as expressing the will of the parties to the transaction and interpreting the subject, recognizing the concept and discovering the Shari'a ruling, and do not give authority to custom in proving the rulings. In other words, they do not consider practical custom as one of the reasons for inferring obligatory rulings; Unless it is proved that what is now practiced by custom has been common since the time of the Infallibles (AS) and has not been forbidden by the Shari'ah. Although the role of custom has been rejected as the source and basis of validity of laws and rules and the only source of trust is the will of the shari'a, There is no doubt that he has been satisfied with the customary understanding and its principles in recognizing and implementing his rules and speeches. Therefore, the role of custom in jurisprudence and law is evaluated both in the position of inferring rulings and in the position of applying and enforcing significant rules. Custom affects laws in two stages, first in the stage of drafting criminal laws, and second in the stage of law enforcement. After the law has been approved by the legislature and public information has been issued, there are sometimes cases in which it is possible to define and identify its examples with the help of custom. Like what behaviors are against public decency or what kind of actions

are typically deadly. Also explain the relative and customary concepts such as fraud, fiduciary duty, urgency, negligence, public morality, vagrancy. Thus, the reflection of custom in the various components of the material element of a wide range of crimes is clear. Custom also plays an important role in individualizing punishment by using legal permits such as mitigation and aggravation of punishment. The criminal court uses the capacities provided by law and individualizes the punishments in accordance with the custom of the society. Judicial custom and procedure also play an important role in recognizing and deburring the keywords used by the legislator in introducing examples of crime and complicity, defining the quantity and quality of justifiable causes of crime and factors eliminating criminal responsibility in the text of the law.

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