



Folk Custom and Judicial Harmony —Taking the Jiangyan Court’s Judicial Application of the Custom as an Example

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Abstract

Taking the Jiangyan Court’s introduction of folk custom as an example, this paper tries to explore in detail the attitude of judiciary to the custom in the context of the mainland. The judiciary citing the custom in a conscious way does not only comply with the social subject’s demand for claim, but also reflects the rational way of thinking of “the value of freedom”. It is also an important measure to achieve the “harmonious justice” and to seek judicial “righteousness” and “legitimacy”.

Keywords: Folk customs, Customary law, Harmonious justice

Since last century, the mainland has gradually accepted the civil law system of legal formalism. The judicial conduct has strictly been in accordance with the statute and the judges basically have no discretion. In recent years, the Jiangyan City Court in Jiangsu province has made a beneficial attempt to cite folk custom into the trial, mediation and implementation. It has made a systematic collection of materials more than ten thousand Chinese characters concerning the formation and history of the custom or practice. As for the typical cases in the judicial trials, it has enacted six copies of The Guidance of Introducing Good Custom into Civil Trial, involving the return of marriage dowry, the support of the elderly people, the division of common family property, the executive and confidential tasks, etc, (Note 1) and made a great achievement. (The zero appeal of fifty-seven cases of dowry is a good case in point.) (Note 2).

Many scholars believe that the Jiangyan Court should not practice the “folk law” besides the statutory law, and the grass-roots court’s issuing “The Guidance” is suspected of “judge-made law”. Those judges participating in and the scholars supporting what Jiangyan Court has done hope to give a scientific and authoritative interpretation of such problems as: “Can the custom be applied prior to the statutory law?” “How to deal with the custom against the “new trend” or contrary to the traditional political concepts?” “Do the technical rules made by grassroots courts belong to the ‘judge-made law’?” I think that the first and most important thing is to clarify the conceptual problem of “the judiciary’s attitude to the custom”.

1. Judiciary introducing the custom conforms to the social subject’s demand for rights.

Early in the Qin Dynasty in China, good officials should be asked to be honesty and righteous to be in line with the law means and console the people. Law enforcement agencies were required to concern with the life-like custom. The custom formed in social material conditions is a phenomenon of law right. It has ethical features and can constrain the law creation. The customary law right expressing the due rights has independent status in the basic social structure and the existing system of rights. It is a legal evaluation scale, and the criterion of judicial justice, too. It is a prelude to produce and renew the existing right prior to the legislation and judiciary in reality. Customary law right reflects the people’s requirements for subjectivity, value, and dignity. The people with will and purposes, conscious of their activities, strive to grasp their existence and subjectivity value in the phenomenon world, and have self-confirmed “self-awareness and man-consciousness”. (Gong, 1998, p.240). The subject sees obtaining the due right as confirming the self-value. Through passion, thinking, and the longing for a certain purpose, they have formed their target of coherent value. The custom condenses the abstract human dignity with “constant acts”, and continually objectifies the objective world and internalizes it into its own value, and makes use on right occasions with the interests of the subject

as the standard in the social communication. (Note 3).

Compliance with the customary law right results from the broader field, where man's value and dignity are expressed—the communication in the civil society. Civil society is made up of families, communities, factories, companies, which are composed by private spheres of life and the external security, and other social organizations, which have developed directly from production and exchange. It is the basis on which the state, law and other superstructures come from and exist. The customary rules, as the most important means to adjust the production and exchange of the commodity, as a matter of fact, are the subject's demand for right in the commodity exchange. Marx once explained the nature of the law right fixed by customary form in the course of exchange. He said, "the relation of law right, with a form of contractual right is of will relation reflecting the economic contact". The "good" civil commercial law should reflect the subject's demand for right and interests in the production and exchange of commodity and the customary law right by the various institutions within its system.

The state institutions respecting the custom can be expressed in the legislative activities. It should concern and recognize the living customary claim existing in the society by judicial activities, in particular, those customary law rights which have not been adopted by the legislation. The respect for the custom in judicial practice is, in essence, the action show of the concept to comply with the social living conditions. When the statutory law lags behind and departs from the social living conditions, "strictly abiding by the law" or "rigidly implementing the law" would tramp on the idea of the rule of law such as justice and equity. Complying with the changing social life styles besides the custom should become the fundamental criterion of judicial conduct. In fact, the Supreme People's Court in recent years has used some practice of the common law countries for reference and begun the experimental scheme of employing "professional judges", expanded the function of judicial interpretation, increased the degrees of the judicial precedents invoked, and explored the judicial path to the custom by setting up the programs of legal interpretation and "the judicial application of the custom", as should be affirmed. (Note 4).

It is believed traditionally that one of the main functions of law is to guide the behavior and thought of the social groups by means of the "nomocracy thought" and the "new trend", rather than yield to the "illegal aspirations" through the traditional "outmoded conventions and bad customs" or even "feudal superstition" of social groups. With the rapid socio-economic development, the effect of popularizing the law has been increasingly expanded and the law specialization is getting deeper and deeper, and lots of the folk customs has become history. But what should not be overlooked is that there have appeared the problems of the uneven economic development, urban and rural gaps, the negative effects of law popularity and the embarrassment of the law's self-adjustment. The legitimacy of the "new trend" can not be formed by some institutions or organizations. It should follow or originate from social life itself. The "legitimacy" of either "the new trend" or "the stereotypes" should be measured by social life itself. Under the premise without violating the public interest and the interests of a third person, both the legislature and the judiciary should respect all the customs that can promote the development of production, be helpful for the commodity circulation, appropriately resolve the disputes and benefit for the harmonious coexistence of the social subjects.

2. Introducing the custom into judicial activities shows a rational way of thinking.

The Jiangyan Court introducing the custom into judicial activities is not vulgarly pragmatic and it is not "for realistic effectiveness while ignoring the justifications" or an act of formally "making potential". It is a conscious and rational way of thinking. (Sui, 2005, pp.276-291). They know that citing the custom into the judicial conduct can bring about effectiveness after experiencing mechanical judiciary and the implementation. The new knowledge evolution school, represented by Hayek, thinks that the legal system needs to respect the existing system of rules besides the custom, and stresses to build the self-spontaneous social order. While the rational constructivists with Descartes, Rousseau and Hobbes as the representatives stress that the transcendental pure reason has the functions of constraints and deduction to the existing system. The view that the effectiveness of action wholly or mainly depends on the clear prerequisite which can be stated in words and construct a three-paragraph deduction is apparently not consistent with the fact. The social institutional system "results from obeying those habits, practices and customs that are not invented or aiming at achieving such sorts of purposes". (Note 5).

The exposition that "system should leave room for the custom" embodies the value of freedom. "Why a free society can be able to play its beneficial role, to a large extent, depends on the existence of various freely-developed systems." As far as the techniques formulated by law are concerned, nothing has proved that the wisdom and abilities with which the legislators have made the system of statutory law are much more than those condensed in the secular custom. The custom has experienced long-term evolution of trials and errors and formed the civilization we have inherited. "After several generations of experiments and trials, the achievement that the custom has made is rich in experience beyond any individuals". (Hayek, 1997, p.71).

The original meaning of "reason" is that the brain has the ability to tell the good from the evil, i.e., the ability to discern what is in line with the established rules. However, "its meaning changed later. It only refers to a kind of ability to make deduction from a clear premise and construct the rule. The misunderstanding of reason has resulted in the

misunderstanding of epistemology and practical behavior. Reason exists in the claim produced in the economic relations and mutual exchanges of the social subjects. "It should project itself in the real world and enrich itself in the history." (Habermas, 2001, p.7). Particularly, the unique social structure of the mainland shows that the system that can be effectively implemented is the rule of folk custom.

Many scholars believe that there are no conditions for the coexistence of the modern society and the old customs, so Judiciary should firmly follow the statutory law and practice, acting upon the statutory law, the special law endowed by the state power subject to regulate its authority. "Customary system provides service for the purpose of social conservativeness...generally speaking, of maintaining a community's way of life and its existing form unchanged." (Milne, 1995, p.138). However, respecting the statutory law does not mean the exclusion of the custom. Respecting the good custom in judicial activities is inevitable for the system operation. The mysterious creation of statute and the abstruse terminology may make the judicial officials and law executors more mechanically copy the provisions so that, in most cases, they will not consider the opinions and disputes of the private party. Therefore, the rules or concepts that are often effectively implemented and achieved are the folk custom.

3. To introduce the custom into judicial conduct is an important measure to realize the "harmonious justice".

The Jiangyan Court, in the course of introducing the custom into the judicial trial, encountered such disputes of ownership as "geomantic omen", "the descendant barrel" and "the niche". If only in accordance with the applicable statutory law or acting on the "new trend" of resisting and clearing up the "feudal superstition", the Jiangyan Court won't support the appeal of the "geomantic omen" or the property demands for taking side with the first son or men for their descendent continuation. However, the above appeal or dispute, if not solved, will cause, to a small extent, the unnecessary family conflicts, and to a greater extent, re-trigger the social chaos in that place. The judicial phenomenon of clinging to the "new trend" while denying the "feudal superstition" has existed constantly and widely, which makes people reconsider the "righteousness" and "legitimacy" in judicial conduct. Although people have been "trained by way of inculcating", the "new trend" still has not formed in the rural areas because it does not agree with the basic and traditional psychological state of the folk society so that it is always wondering away from the scope sensed and controlled by the social subjects. Folk life is also affected or controlled by the traditional old ideas and thoughts, even the "feudal superstition". The so-called "feudal superstition" refers to the concepts formed by political and cultural changes under the specific historical conditions. But the "uniform" cultural conceptual changes have not agreed with the actual social life. Many of them do no harm to the public and national interests. And it does not affect a third person to enjoy and exercise the rights and interests. Even if they can not be grouped into the "good" category, because they do no harm to social welfare, they can be adopted by legislation and judiciary. Thus, the target that "harmonious justice" can make the "feudal superstition" promote the social coordination has been arrived at.

The ancient Confucian and Legalists had different opinions on the means to regulate the social order. However, the Confucian never denied that the bureaucracy law or the statutory law had the function to regulate and control the social order. The ancient Legalists never excluded the control with the custom from the ways of "ruling the people" and "managing the world". The application of statute and the introduction of the custom constitute "the harmonious state and social structure", which was favored by the rulers. Rule of rite in ancient China is, in essence, the apotheosis of the regulation by the custom. And "these rules are considered to be the extension of natural law." Although there are conflicts and contradictions between the custom and the law, as for the entire social order, "the state law is still in a leading and dominant position over the custom... The coordination of the centralization of power and autonomy is just the inherent reasonability of the long-term continuation of the ancient Chinese society. The traditional country saw the cases of household marriage, land claims and debt disputes as evil customs and the governments and judicial organs took "no case" as the ultimate ideal of legal practice. "Chinese philosophy, in nature, prefers to settle disputes with conciliatory attitude. On the one hand, the harmonious concept is on the top list of the value system. On the other hand, people are afraid of conflicts because they mean risks for everyone and can destroy the collective force." (Sprinkel, 2008, p.140) But the rule of custom gets its expansion and extensively favored by the social subjects in the above background. The folk organizations applying the custom does not only express the function of strong coordination and integration, but also truly reflects the process of the scope division, melting and integration adjusted by the custom and the law, and displays the state and social dynamic development trend and value orientation.

The emergence of a country in ancient China is not because there was significant improvement in production tools but had something with the changes of the inherent organizations of the relatives. "The interpenetration, in principle, and the boundary of the two fields are rather indistinct." (Liang, 1996, p.6). The legal adjustment mechanism based on the rural commune system had a prominent feature that the custom occupied an important position. "These customs formed and developed in the daily exchanges will gradually get fixed, standardized and institutionalized after lasting for a certain period of time and obtain increasingly its meaning of law rights." (Gong, 1999, pp.179, 180,182). Traditional monarchs have never subverted the "logical consistency" of human justice. On the contrary, they made use of the legal sense in the old traditional custom to regulate the social life. The state and the society are separated to some degrees.

The state statute and the social custom are organically integrated. The power and function of the government have something organic with the civil participation. Human and the natural orders are compensated each other. All these inevitably constrain the existence and structure of the oriental legal type. The legal ethics is the right demonstration of the special social elements in a way of the law right. Law, as the means of pursuing the moral righteousness, is embodied mainly through the moral status, the adjustment mode and the manner of expression in the customary system. One is the combination of law and morality. That is to say, the law and the custom with morality as the core can develop, remedy the imperfection and complement each other to realize the common purpose of achieving social adjustment, as is still of great significance for the contemporary legal construction system, particularly the creation of civil law and civil judicial conduct. Its humanistic spirit of pursuing the real justice of the law has extraordinary value for “the rational legal order suitable for the secular life and custom”, “the equity awareness of cultivating oneself to appease others”, and creating a new spirit of the civil code and achieving the goal of harmonious justice. Although the traditional legal ethics focusing on the moral facts could damage or even destroy the all-round development of people and the independence of personality. However, the patriarchal ethics stressed the sense of responsibility that individuals must subordinate to the groups, which is conducive to the implementation of the legal system. Group consciousness expresses people’s inevitable demand for the community, which is the right social responsibility of the social subjects needed by the legal system. It is helpful for the social subject to consciously balance the relationship between freedom and responsibility, properly exercise their legal rights, and respect the judicial judgment.

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Notes

- Note 1. The Jiangyan Court adopting the good custom to settle the disputes. *People’s Court Daily*, March 21, 2007.
- Note 2. Zero appeal of the 57 cases of dowry—investigation on the Jianyan Court’s adopting the good custom to settle the dispute of the returning of marriage dowry (2). *People’s Court Daily*, April 15, 2007.
- Note 3. The subject’s self-involvement can be displayed in people’s interactions through the conscious communication of the customary rule and the expression of language.
- Note 4. The 10th article in the “Interpretation of the Supreme People’s Court concerning some issues of *the Marriage Law of the People’s republic of China*” is about the dowry before marriage, which shows an attitude of caution and approval to the folk custom.
- Note 5. The traditional rule represented by the custom can result in good law right relationship. The subject who respects the relationship has profound capacity, which shows that the scope can be completely reached by the rationality.