**A Brief Analysis on Utilizing Religious Customs as the Legal Origin of Civil Law**

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**Abstract.** The Civil Code is the expression of unified spirits and ideology of the ethnical people. In the procedure of making the Civil Code, the legalization of religious affairs is inevitable, and cannot be overlooked. It should be acknowledged that in the process of legalizing religious affairs, the religious tradition and customs have a certain degree of value and status in the history of civil law. This article reviews the transformation of attitude toward the value of religious customs per civil law legal origin, it also reasons the legitimacy of existence of China’s civil law legal origin based on the importance of religious customs, the historical development of religious customs and their parts in the making of civil law, as well as making rules for religious customs as a pre-requisite of civil law legal origin in the procedure of legalizing religious affairs.

1. Introduction

Civil Law is the law above all law; it is the one law that connects us with our social life most closely. The adjustments of legal relationship made in the Civil Law is the most fundamental and important part of the social relationship. As the opener of China’s Civil Code, “The Governing Rules of Civil Code of People’s Republic of China” will be in effect on October 1st, 2017. The making and realization of Civil Code has opened a brand new page in the modern time civil law creation. Religion and ethnical customs are the reflection of historical spiritual outlook of the ethnical people, as well as the realization of Sinification. In the procedure of making Civil Code, the legalization of religious customs is inevitable and cannot be overlooked. Whether the religious customs should be considered the legal origin of civil law, what religious custom content is to be applied within the legal origin of civil law and the relationship between religious customs and civilized manner, are the key points of the legalization of religious affairs in the creation of Civil Code. With the improvement of legal system of China in the recent years, the continuous discussion and progress of custom as legal origin applied in written law of Civil Code has enabled this article to believe that, the value of religious custom has its importance and value in the legalization procedure of religious affairs.

2. The Clarification and Definition of Certain Concepts

Custom and habit are usually considered one idea altogether, which is considered the all-around traditions and manners of spiritual, cultural, public, social, and marital life of a certain ethnic group that are formed gradually and historically. Custom and habit are the ruling mandatory standard, self-governed and disciplined for a certain ethnic group, which reflects the characteristics and process of ethnical development as well as the spiritual outlook and psychological boundary of such ethnic group. It is the most important part of ethnical core value.

As a special social ideology, religions have a deep and long lasting impact on its associated ethnic groups’ joint social life. Religion and ethnic customs have strong and complicated relationships. Some of the ethnical customs are evolved directly from religious rules while some are
still parts of the religious rules; some ethnical customs are combined with the religious rules, such as the rituals of circumcision, burial and nikah in weddings; some ethnic festivals are also religious celebration. However, ethnical customs don’t simply equal to religious rules, in order to distinguish the difference, a throughout observation of history and reality must be done.

Under the circumstances of creating Civil Code, the religious rules and customs presented in this article can be interpreted as customs and rules that were created in the long procedure of labor and life for the ethnic groups, abide regulations and laws of China, and make important roles in promoting the ethnical regions’ economic growth as well as maintaining the social stability.

3. The Expression of Attitude of China’s Legalization in the Legal Origin of Customs and Habits

Looking at the current legal system of China, although it is rare to see a legal written definition of certain customs, the legalization itself has always been acknowledging the value of customs. For long, customs were existing in a subtle form that later would become the legal origin of law making. “Law must co-exist with people’s customs, trade, population, wealth, preferences, habits, religions and relate with the nation’s natural status.” [1]

“Common Chinese People’s Political Agenda” and “Constitution of People’s Republic of China” created in 1949 have given the ethnic groups in China the freedom to keep or change their ethnical customs. The Constitution has also given the ethnic people the freedom to use and develop their own languages. In “Law on Regional National Autonomy”, there are similar regulations as of the ones mentioned above. The article 7 of “Law of National Flag” has stated that “For ethnical regions that do not celebrate Chinese New Year as a traditional holiday, the local autonomous governing institutes make decision on whether the National Flag shall be raised. On the traditional and establishment holidays of the ethnical regions, National Flag may be raised.” In the article 36 of “Marriage Law of People’s Republic of China” it states that “Based on the principles of this law, an ethnical region’s people’s congress and standing committee may add supplementary regulations or make adjustments based on the local region’s marriage and family actualties.” In the State Council’s “Regulations on Funeral and Internment Control”, article 6 states that “Respect ethnical minorities’ burial customs, those who are willing to change the customs should not be interfered. The government respect the Islamic people’s traditional burial customs, made lands for specific cemeteries for such use, also established specific funeral service institutes serve the ethnical people. The government also states that conversion of Islamic people to adapt cremation is absolutely forbidden. “General Principles of the Civil Law” says in article 151: “People’s Congress in the ethnical autonomous regions may add supplementary regulations or make adjustments based on the principles of this law, while combining with the reality of the region’s ethnical characteristics.” Article 50 of “The Marriage Law” says“ People’s Congress of the autonomous regions may make adjustment regulations based on the regional ethnical people’s marriage and family actualties.” In article 14 of “Law on the Protection of Consumer Rights and Interests”, it says “Consumers while purchasing and using products, receiving services, have the right to be respected in terms of personal dignity and ethnical customs.” In rule 2 of article 116: “The legal fruition created by all parties is given if a deal was made, if not or unclear, is obtained through trading customs.” In “Law of Property Right” passed in 2007’s article 85: “Law and regulations are used when they can be applied to the handling of neighbor relationships, if not, local customs may be applied.” This is a new breakthrough; it has established the legal status of customs through the law making a clear written message that customs can be used as direct legal control and reference.

Through these laws and regulations, we may come to this conclusion: first, in the civil law system of China, customs are very important legal origins; second, with the rapid economic growth and complicated social division of labor, customs as legal origin have made subtle changes in terms of value, function and adaptive natures, that their functions are now more hidden than being apparent.

In the File 19 of General Office of the Communist Party of China published in March of 1982, also known as “Basic Opinions and Principles of China’s Socialism Era Religious affairs”, and
General Office’s “Communist Party of China and State Council’s Announcement on the improvement of handling certain religious affairs”, and “Regulations on Religious Affairs” passed by the State Council’s 57th regular conference in 2004, it can be seen that the acknowledgement of religious customs and affairs in legalization is eminent.

4. The Legitimacy of Religious Customs as Legal Origin of China’s Civil Law

4.1 The importance of religious customs

First of all, customs make up the insufficiency of limits and inclusion of law making. Law is a highly abstract and inclusive compilation of rules and regulations people follow in a social environment, customs in the development of civil law has existed before law. Written law reflects the actual social relationship and is consistent and stable; however written law has some flaws, not improved and timely enough, hard to meet the fast changes of the society. Written law’s untimeliness is shown in the following conflicts: while the lawmakers make certain law, confined by the formats and actual subjective conditions, the law could only reflect social life through an untimely manner; at the meanwhile, given the characteristics certainty of written law that cannot be ambiguous, while in the situation that a clear law cannot apply, a handling difficulty could happen. Furthermore, with the property of legal languages it is inevitable that there could be space for controversy, since law often attempts to guarantee and emphasize the normality and refuse to overly admit the differences, the stability of legal standards and principles per the complexity of actual life has affected the proper expression of law applied in reality. The characteristics of customs and habits however could make up for such flaws in helping to solve social disputes. In any society, no matter how important written law is, as the composing part of legal system, it could only maintain and adjust certain rules in the society, customs and habits also are responsible for maintaining social orders. Only when written law is applied along with the habits and other standards for maintaining proper manner and order, could the society’s operation be maintained and protected.

Secondly, the occurrence and changes of customs and habits also promote the written law to develop and improve. Law is improved constantly through the changes of social life improvements; new written law reflects the important social relationships that occur very often in the society. Customs and habits evolve from social and civil activities and is closely associated with people’s daily life and habits, they adapt better with social interaction and activities of people. Habits are standards that hold influence and regulatory power on important issues; it could reflect certain life and social rules of actuality and may provide beneficial reference to the making of law.

Religions are ethnic and population based. In China, multiple religions exist with mass followers and strong population base; religions are very influential among the ethnic people. Customs are also ethnic and population based, to a specific ethnic group, habits are very important aspect of unified spiritual outlook and psychological quality, also have strong population foundation. The importance of religious customs cannot be overlooked in the making of law.

Again, admitting the position and value of religious custom could enrich the legal origin of civil law regulation and the content of the law. The history of development of law has reminded us that it is much anticipated that the lawmakers wish to solve all legal matters through one perfect law code, but in reality this is very hard to achieve. Using the customs as legal origin of civil law is beneficial to the openness and advancement of civil law, in one hand it allows the civil law to be deeply rooted in the social ground, allowing it to adapt to the need of social development; in another it reflects new and important objects in society, enrich the law content and promote the achievement of legal objectives [5].

4.2 Historical evolvement of customs and habits

Habits and Customs are the compilation and conclusion of long term life and social experience; it is a consistent behavior of human labor and life practice. Its effect has been generally acknowledged in the long development history of humanity. The history of human social development has told us that regardless of the society, the level and speed of development, it cannot be fully separated from
the historical development of this society, and many laws are deeply rooted in traditional culture and customs. Engels says in “On Proudhonism and Residential Issues” that “In the very early stage of social development, there was such a need: using one single shared rule to regulate the daily repeated production, distribution and exchange of products, in order to allow individuals to submit to the same condition to produce and exchange. This rule first must represent habits, later it becomes law. As the law is created, there comes the institute to maintain such law – public forces, which becomes nation.” [2] This statement indicates that the evolvement from customs to law is one of the most basic rules in the creation of law. Customs and habits are admitted by national lawmakers to be elevated as will of the nation, the law of the nation. Every ethnicity forms the special customs and traditions through a very long time of social development and labor practice, and then the acknowledgement and usage of these customs have allowed them to evolve into laws and regulations.

Judging from the history of social development and culture of China which is heavily influenced by Confucianism, people hope to reach the ideal status of “No Disputes among residents in the neighborhoods; Old and Young do not argue in public places.” At the then Confucianism dominated social direction, the making of law or customs is mostly using Confucius teaching as the guide, harmonious and dispute-hating attitude affected people’s behavior and choices. Under such circumstances, without a legal force, strong moral value and social conscience are playing a very big part, the power class maintained their rulings and people are willing to be arbitrated based on the common social norm and customs. Today, the dislike and shamefulness to dispute is still taking parts of people’s mind. People, especially the ethnical people who are heavily influenced by religion, sometimes rely more on custom and tradition than trusting law. Therefore in the procedure of a trial, if facing situation that the current law cannot fully apply to or is against the basic legal principles, that could cause adverse effect on parties’ interest and social order, the consideration of custom and habits becomes a critical matter. From this perspective, it is necessary to treat custom and habits as legal origin, especially on creating and explaining the civil law. [7]

Based on the statements above, the historical factor of customs and habits is an important foundation for customs and habits to become the legal origin of civil law.

4.3 In the legalization of religious affairs, the religious custom should be a condition for the legal origin of civil law

Including custom and habits into legal origin system meets the requirement of legislation and actual legal ruling; it is needed to maintain the authority of written law and legal order. Custom and habits follow and reflect human social practice, life and labor in uncountable ways; it is not possible to include all customs and habits into the reference system of legal arbitration. Simple customs cannot fully explain nor demonstrate their own legitimacy, while the traditional customs have the flaw of being over conservative, therefore we must make proper judgement on these customs to ensure the legitimacy and fairness. Such must be done through a proper method of legislature body based on specific conditions.

Not all customs and habits could become legal origin, in order for them to become legal origin, a custom must meet the written law of the nation as well as requirement of principle of proper public manner, and it needs to reflect the unification of the nation and legal characteristics. First of all, we must admit that only the customs that agree with the principle of proper public manner can be used as legal origin for civil laws; second, for those customs that cannot be determined on their effect on making laws, or if they have negative effect or is against the written law of the nation, it must be clarified that they cannot become legal origin.

Wang Liming believes that “In order for habits to become legal origin has to meet the requirement below: 1. Positive condition: long term, consistent, clarified, defined as rule for behaviors and can be proved. 2. Negative condition: not against the mandatory regulation of law nor against proper public manner” [7].

We must establish the value of religious customs and habits as legal origin of civil law, at the same time abolish those religious customs and habits that are backward, not working with the
proper public manner or are against the written law of the nation, achieving the effectiveness in legal practice combining both written law and religious customs and habits.

References