



Constructive Custom and Its Role in Restricting Will: Emphasizing Family Law”¹

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Introduction

The domain of custom sometimes pertains to a shared understanding of words and phrases or their interpretation. In such instances, the criterion is the mental familiarity and common discernment of everyday language—essentially, the colloquial meaning and prevailing usage. This type of custom plays a key role in elucidating and interpreting expressions and anything that acts as a linguistic surrogate—such as writing, gestures, and the like. Moreover, custom may function in various contextual dimensions—for example, determining insanity and its degrees, fear of physical harm, familial roles, a woman's status, undue hardship, and so forth. Additionally, custom—especially as a rule-creating custom—can, alongside identifying, clarifying, and resolving ambiguities in matters of legal rulings, function in the normative domain, serving as a source of obligation and commitment. This raises several interrelated questions: What scope does the “domain of customary obligations” encompass? To what extent are these obligations binding? Under what conditions do these obligations take effect? And how does a norm-creating custom relate to terms like ‘ma‘rūf’ (customary) or ‘mutā‘raf’ (accepted), and how does this institutionalized custom fare when it conflicts with statutory

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legislation or religious rulings? Despite the widespread application of norm-creating custom, the scarcity of scholarly sources leaves many ambiguities in its wake. Hence, it becomes essential, for a holistic understanding of customary norms across domains, to identify and assess norm-creating custom as well.

Literature Review

Although there have been studies on custom, this research narrows the focus to norm-creating custom with an emphasis on the domain of family law—an area that appears to lack prior exploration.

Methodology

This study employs a doctrinal-analytical methodology, reviewing jurisprudential and legal viewpoints. It analyzes the content of custom-related concepts, distinguishes among categories of custom, and considers hierarchical legal norms.

Findings

Norm-creating custom pertains to practices adopted by individuals that generate an expectation of obligation regarding performing or refraining from certain acts. In other words, it is identified as “commonly practiced norms and customary directives.” If these norms relate to habitual directives and behaviors among societal actors—such as routines and protocols in interpersonal or commercial interactions—they qualify as norm-creating or constructive custom. However, for such customs to hold binding power, certain conditions must be met. In addition to being known and established (the material element) and exhibiting flexibility and dynamism, the material element is tied to the formation and evolution of the custom amid social habits and traditions. The behavior must become habitual among the populace. For behavioral obligations derived from routine practices and instructions to be binding, they must also satisfy rational acceptability, and lack legal or religious prohibition. An imperative norm-creating custom, as the term implies, meets two criteria:

1. It encompasses obligation and commitment, and cognitively, individuals bound by the custom perceive it as mandatory;

2. In societal perception, the level of obligation is such that rational actors consider deviation impermissible—whether by contract or otherwise. The foundation and intensity of this commitment may derive from the moral and cultural underpinnings of the custom. Its serious taboo in the collective consciousness elevates it from mere discretionary or conventional custom to a mandatory rule. These customs often align with sound ethical norms and are recognized legislatively. In contrast, discretionary norm-creating custom is of lower rank—through various forms such as foundational conditions or implicit terms, parties may lawfully contract otherwise.

Once a norm-creating custom is established, its content becomes something “good, customary, and fit for observance.” When coupled with injunctions like “*live with them on customary terms*” (wa ‘āshurūhum bil-ma‘rūf), it conveys the meaning: “treat women in accordance with customary and societal standards.” However, adopting customary matters is contingent upon their innate consonance (“fiṭrah”) and approval by rational societal actors. Moreover, even if norm-creating custom is recognized, one of its most significant challenges is that it cannot be relied upon if it contravenes mandatory legal or religious foundations. This is because the rank of legal and religious imperative rules is such that norm-creating custom cannot override them. For instance, a custom prohibiting marriage with an adopted child cannot conflict with a religious allowance permitting such union. The imperative nature of matrimonial rules in religious law prohibits a custom from overriding them.

Conclusion

It appears that norm-creating custom finds legitimacy in legal voids—areas of “*ma lā naṣṣ fiḥ*”—where law is silent; otherwise, it is invalidated when conflicting. Given the hierarchical distinction between imperative and discretionary provisions in religious and legal texts, a major challenge arises when norm-creating customs conflict with external rules from law or religion. The query then becomes: How do customary obligations relate to religious and legal obligations? In a discretionary scenario, norm-creating custom takes precedence over complementary law and ranks after imperative rules and contracts—such

customs are waivable, and contracting otherwise is permissible. If it is imperative, it takes precedence over contracts and personal will—it cannot be waived. But if either discretionary or imperative custom conflicts with imperative legal or religious rules, it constitutes invalid custom and is nullified.

Keywords: creation of obligation, rational acceptance, imperative norm-creating custom, discretionary norm-creating custom, subject-oriented custom, *ma'rūf*, *mutā'raf*.

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