

The role of customs in the system of social norms

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Abstract. The purpose of the study is to determine the essence and role of the norms of customary law (customs) through a comprehensive historical-legal and comparative-legal analysis. The methodological basis of the research was such methods of scientific knowledge as: description and comparative-legal method, which enabled to reveal certain types of social norms, their particularities and characteristic features, as well as the historical-legal method and methods of analysis and synthesis. The result of the work was the conclusion that through the prism of customary law norms, the level of development of the state, the degree of independence of society from the state, as well as the state of legal culture is seen on the largest scale. In addition, the author considers a well-reasoned and proven conclusion that it is required to study customary law and customs to modernize legal theory. The work also gives the author's definition of the category of "custom": a custom is the established models of human behavior in society, which have developed in the course of their multifold repetition. The novelty of the research lies in the author's approach to examining the relationship between customs and the theory of law, as well as in the fact that the norms of customary law and the custom appear to be independent and fundamental methods of social regulation in the system of social norms.

Keywords: society, public relations, social regulation

1 Introduction

The prerequisites for the study of this issue are due to the relevance of the topic. The society throughout the entire time requires certain orderliness and organizing the activities of people involved in the production, exchange and consumption of material goods. Having studied the works of Russian scientists and foreign lawyers, there is a necessity for a detailed study and consideration of the problems of the article. It is assumed that with the help of customary law, the first legal relations and social relations in general were regulated.

A person, as a part of society, and as an independent element, has in its social meaning "freedom of behavior", that is, a person is, first of all, an individual. And the personality always has the ability to act creatively and consciously in a given situation. Society, as a part of the material world separated from living nature, creates its own world, different

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from the surrounding nature. Depending on the circumstances, sometimes the actions of people in the same environment can be not only different, but directly opposite. Therefore, in order to avoid social dissonance, it is necessary to arrange and bring the behavior of people in society to the proper “level of acceptance” of this behavior of one individual by the whole society.

The purpose of the study is to determine the fundamental role of the norms of customary law and customs in the system of social norms. *The tasks of the research* are a) to find customary law in the system of sources of law, b) to analyze and make a comparison between the Anglo-Saxon, Romano-Germanic and traditional systems of law, in the context of a custom as a source of law and a way of regulating relations in society. *The research hypothesis* – the norms of customary law and the custom appear to be independent and fundamental methods of social regulation in the system of social norms. This hypothesis is reflected in the works of various authors and scientists, both Russian and foreign [1-4].

2 Methods

The research is based on the comparative-legal research method. Using this method, general and special features of the subject of study can be found, in the author’s case, customary law in the system of social norms, this method of study covers legal systems as a whole (institutions of substantive and procedural law, branches of law, individual norms, etc.).

For this article, it is important to indicate the presence of customary law in various legal families, and it is also necessary to outline the role of customs.

3 Results

The results demonstrating the importance of customary law in the system of various legal families, as well as the place of customary law in the system of sources of law are shown in Table 1.

Table 1. The role of the customary on different societies.

	Primitive society	Romano-Germanic legal family	Anglo-Saxon legal family	Traditional legal family
Custom	It is one of the first ways to regulate public relations. More syncretic and taboo (prohibition of incest, and the establishment of power in accordance with the customs of the race.)	It is included in the system of social regulation. There is a possibility of referring to the norms of customary law if there is a gap in the legislation. (on the example of Article 5 of the Civil Code of the Russian Federation)	The main source of law is custom, confirmed by judicial precedent, on the basis of which subsequent similar cases are solved.	It is a fundamental way of regulating public relations and forming state power. A striking example is the clerical and theological types of states.

4 Discussion

To achieve a harmonious existence of the individual in society, social norms are created. The general definition, covering all the characteristic features and particularities, was deduced in the works by Marchenko: “the system of social norms reflects the achieved

degree of economic, socio-political and spiritual development of society, they reflect: the quality of people' life, historical and national characteristics of the country's life, the nature of state power" [5], that is, these norms regulate human behavior, build models of what is proper and permitted, determine people's attitudes, and how a person relates to himself or herself and to other people. In other words, social norms are the standards of human behavior and their early and predictable attitude towards what happens or will happen.

There are a number of *signs* of social regulators:

1. general obligatory rules (models) of people's behavior in society;
2. uncertainty of the individuals to whom the norms are directed;
3. multiple repetitions of these norms;
4. arise and change in connection with the historical development of society and the state;
5. norms are formed and have a stable position in the corresponding culture and social organization of people, and, in general, society.

There are a number of factors that have led to the emergence of these regulations. For example, the historical aspect, the political situation in the state and society, the general level of development of society: legal awareness, high moral threshold, as well as achievements of scientific and technological progress. It makes sense to speak about the close connection of social norms with the surrounding reality.

Modern social regulation is a complex system that consists of value orientations, legal norms, and informational impact. The value orientations are based on general universal human ideas about reverence for elders, respect for more experienced and wise representatives of social groups. The norms of law are the norms of positive law and customary law. Customary law includes the norms of morality, traditions, customs, as well as rituals. More details will be given regarding them.

The main general *functions* of social norms can be distinguished:

1. socialization of the personality. Education of generally useful character traits in him or her;
2. motivation of personality behavior. An illustrative example of what the consequences can be for non-compliance with the rules, as well as encouragement for decent behavior and high civil responsibility;
3. standardization of socially approved behavior. Bringing it to the "proper" form;
4. restriction of socially unacceptable behavior that deviates from the norm.

The implementation of these basic functions eliminates the "randomness" and subjectivity of the parties, as well as provides reliability and predictability of behavior [6].

The possibilities of permissible behavior and clear boundaries of what is permissible in social norms are given to an exact extent, therefore, the norm, depending on the nature of its function, acts as a standard of behavior or as expected behavior.

The following types of social norms are distinguished:

- legal norms, expressed in generally compulsory, clearly defined formulations, and the violation of these norms entails a predetermined punishment executed by special state bodies;
- the norms of morality, expressing the ideas of society about the good and the bad, the action of these norms is ensured, as a rule, by the inner conviction of the individual and supported by public attitudes, a subgroup of norms of social etiquette also belongs to them;
- religious norms contained in sacred books;
- customs, i.e., rules of behavior that have become such due to multifold repetitions, not recorded in writing, but known to all members of this society from life practice;
- traditions, i.e., more superficial customs, often ceremonial or ritualistic;
- corporate norms, which are traditions for a particular company (firm), enshrined in its charter or other local documents.

The practice of applying various types of social norms in the tribal system and later, in feudal society, made their implementation directly dependent on the social status of a person in society: what was proper or acceptable for a representative of one class was strictly forbidden to a representative of another (a vivid example, castes in India) [7]. The permissibility of certain behavior also depended on the specific case: for example, killing was a crime, but killing out of just revenge was a socially acceptable act (for example, the implementation of the Talion principle). Self-defense, as nowadays, was an unpunished act (in the general theory), however, representatives of the lower class did not have the right to resist the higher. In other words, the action of social norms in the distant past was associated mainly with the social status of a person.

Public relations of the pre-state type, “forming a system, the parts of which actively interacted and, to a greater or lesser extent, but always, constantly had a religious connotation, were imbued with religious ideas. All forms of human activity sought to be described in rules and obey these rules, deviation from which was prohibited and condemned. The traditionalism of social practice, as well as its dependence on religion, gave rise to the general normativity of human social behavior” [1].

Thus, in contrast to law, morality is “rules reflecting people’s spontaneous ideas about the good and the evil, justice, beauty, duty, honor and dignity, the meaning of life, and other moral ideals” [1].

If moral culture is discussed, then the philosophical category “good” is applicable, through the prism of the good it can be said that society is “healthy” and the individuals of this society are highly moral. In this case, based on morality, society sets the rules in terms of internal ideas about the good and the evil in this particular society.

Surely, morality arises much earlier than law. This is due to the fact that the natural process of establishing connections between members of society presupposed publicly available methods of regulation: “rules of a general nature, based on people’s ideas about the good and the evil, justice, dignity, serving as a regulator and yardstick for assessing people’s activities” [8].

It should also be noted that the legal and social status of an individual was inextricably linked with origin. It was believed that persons from the higher strata of the population were deliberately and a priori of high moral standards, while those from the lower strata were not considered such and were not. This status characterized the individual from the moral point of view, and gave a certain “head start” over others: “Nobility was naturally combined with beauty, just as the concepts of the evil and ugliness were inextricably linked” [8].

But philosophy, moral and ethical standards were not separated from jurisprudence and legislation, even when these social institutions appeared in society, but they did not appear immediately. Until the final form, social norms were closely intertwined with religious norms and moral principles.

Over time, with the emergence of social classes and the state, it becomes possible to create new rules of behavior, more formal and normative, since the norms of customs could no longer reconcile and embrace all social relations. Therefore, it seems necessary to pay considerable attention to such type of social norms as the norms enshrined in laws. Such norms are already considered a positive law, and within the framework of these norms: “production, political, family, labor, management, and others relations, in accordance with the interests of certain estates, take the form of legal relations” [9].

The issues of the genesis of law as a social phenomenon have long worried scientists of various directions: not only legal scholars, but also philosophers, historians, sociologists, and political scientists.

Thus, the theory of natural legal understanding by a source of law designated the very nature of a human. So, the theory of legal positivism, like the theory of normativity, “denied

the identification of the economic and political prerequisites of law, justifying the need for a formal dogmatic approach to its study” [9]. However, it is not possible to theorize about the origin of law without paying attention to its sources.

Yes, legal norms are the result of the development of social norms. That is, in a certain sense, it can be said that law grew out of morality. But even various moral norms had, albeit not quite definite, but still the form in which their content was.

It is true that, before legal norms emerged, the form of existence of moral norms did not have much significance, it could be tales, legends, proverbs and sayings, etc. Legal norms, due to the condition of their formal certainty, demanded special attention to the sources containing these norms.

Surely, to a certain extent, every modern civilization is the result of many years of established traditions, rituals, worldviews, social and political models of society, that is, the product of social norms and rules. In this regard, interest in customary law naturally increases to a greater extent. In the period of general globalization, it is necessary to preserve the peculiarities of origin and ethnic features of the origin and development of the state and law. The custom of this or that country, state, and people is of great importance and plays an important role in this.

In modern times, law is already written (positive) in nature, expressed in legal prescriptions, but this does not mean that customs and traditions are completely rejected or taken out of the regulation of social relations.

A custom is an established, in the course of multifold repetition, model of behavior of individuals, which is of a mandatory nature. The Article 5 of the Civil Code of the Russian Federation defines custom and recognizes it as one of the ways to regulate social relations and the source of law.

In the countries of the Romano-Germanic legal system, there are two approaches to understanding custom and its role in legal reality: the first approach is an excessive exaggeration of the importance of customary law, the second approach is a complete opposition of custom to the language of the law and reducing the role of custom to complete non-perception. This dualism of the approach is due to the fact that in different countries the role of custom was different and, accordingly, in some countries of the Romano-Germanic legal family, the role of custom was significant, in other countries it was not. Understanding the importance of these two approaches in the works by R. David and K. Joffre-Spinozi, it is noted that the approach of the sociological school of legal thinking is “cut off” from reality, but it is not devoid of meaning that customary law is an element for a fair solution to the conflict and with due formalization of customary law into positive law (which is spoken of by legal positivism), a mutually beneficial agreement will be reached.

It should be noted that the Romano-Germanic system is formed from the law of different and structurally heterogeneous systems of different countries and it is worth taking into account the peculiarities of the reception of Roman law in the context of their own development. And the norms of customary law are subsidiary in nature, that is, they are applied if the legislator itself indicates the need to refer to custom, or there is no solution to the issue in the law.

Thus, for example, German law gives an insignificant role for customary law and speaks of its disappearance as a source of law.

In the study of customary law, it is worth noting northern France, where even after the reception of Roman law, “kutyums” predominate [10]. In this regard, it is worth noting that the approach in France in proportionality between the use of customary law and the norms of Roman law took place in their harmonious coexistence, which assumed that in the absence of a solution to the conflict situation and the impossibility of being interpreted in kutyums, the norms of “written wisdom” should be applied, that is, the norms of Roman law. Such a solution to problems was convenient and effective and was most often used in

preparing civil law contracts. This possibility was due to the fact that Roman written law was never categorically rejected, but on the contrary was built into the general system of French law and was applied to the extent possible in the south of France and in coordination with *kutyums* in the north of France.

In Spain, customary law and customs were the main sources of rules of conduct and were based on the peculiarities of the traditions of civil law.

In the countries of the Anglo-Saxon legal family, there is the traditional position of customary law among the sources of law. It is known that the Anglo-Saxon legal system is based on statutory law and precedent, and therefore the role of customary law is assigned after the main sources of law. The recognition of society and the centuries-old tradition allows the custom to exist in the legal system of England today [2]. Thus, for example, in the constitutional law of England there are famous constitutional agreements, which govern the relationship of the monarch with the House of Lords and the House of Commons.

In the works of modern researchers, one can trace a discussion regarding what is considered to be a custom and the norm of customary law, as well as how this relates to current legislation. Interestingly, the American scientist F.R. Tesón in his work speaks about “fake custom” [3], he does not refute or diminish the importance of customary law, but questions some of the customs used by judges, calling them “fake”. He substantiates his statement by the fact that many customs can be misinterpreted, or are based on general principles of law, without any specifics.

5 Conclusion

In general, from the above-mentioned, it can be concluded that interest in customs in legal science is constant, however, it is suggested to focus on the fact that any change in the usual way of social life invariably leads to a surge in legal consciousness, the result of which is the scientific research of legal theorists.

The custom persists and exists throughout the history of the formation and development of various legal systems, plays a large role and has a significant impact on law (in its most general and broadest meaning), is at the origins of developing legal consciousness and legal culture. For researchers and theorists of law, the topic of customs is “uncharted territory”. The interest in this area does not cease, but on the contrary intensifies in connection with greater individualization and the desire for self-identification and self-determination, as well as for the designation of own “cultural code” of the people. And regardless of the form in which it (the custom) survived: oral or written, compiled or uncompiled, local or general, legal or non-legal, the custom has always been repeatedly applied and did not cease to operate.

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