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THE PRESENCE OF CUSTOM AS A LEGAL SOURCE FROM "COUNTRY LAW" TO MODERN CIVIL LAW

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Abstract

Custom has been one of the most important formal sources of law in the legal history of many societies. It refers to the rules of conduct and practices that have been developed and followed by a community over time, without being codified in written laws. However, the importance of custom in legal systems has changed over time, and it no longer occupies the same central place in many jurisdictions today. The customs and traditions of a society play a significant role in determining the norms and rules that are adopted as part of positive law. The study of custom can help shape not only specific legal norms but also the general legal concepts and principles that guide a community. Each society has its own traditions and customs that influence the form and content of its positive law. The study of custom can therefore help to identify the distinctive features of a national or cultural legal system. Understanding and analysing a community's customs, customs and traditions are crucial to revealing the roots and values of its legal system, thus contributing to a better understanding of positive law and its national specificity.

Key words: *custom, formal source, Country Law, law, modern law.*

INTRODUCTION

Custom is the oldest formal source of law; it precedes positive law and underpins its normative construction. Custom is an ancient practice considered socially just, but it is not as formalised as jurisprudence, which is based on court decisions and interpretations of written law, often characterised as "*an immemorial practice, considered as law from the ancestors*" *(Djuvara M., 1999, p. 422).*

The literature distinguishes between *custom secundum legem*, *custom praeter legem* and *custom contra legem (Dogaru I., Dănişor D.C., Dănişor Gh., 2007, p 40-42).*

Custom secundum legem refers to situations where customary rules can become part of the law when they are taken over and sanctioned by state authorities with legislative powers. This is the situation that we find in the provisions of Article 1 of the new Civil Code, which establishes a very clear hierarchy of sources of civil law, in which customs are mentioned second. The legislator has defined the concept of customs in the meaning of the Code, specifying in paragraph 6 of the same article, which states that *custom means custom and professional usage*. The legislator himself gives practitioners the legal possibility of using three concepts that designate the oldest source of law: custom and usage.

Custom praeter legem acts in the absence of a law (legislative gap) and supplements or replaces legal norms in an area. When the law does not cover a specific situation, *custom praeter legem* can become a source of law. However, *custom praeter legem* cannot contradict or override existing legal rules; it fills gaps in the law or provides rules for situations not explicitly covered by the law.

Custom contra legem refers to custom that is in opposition to an existing legal rule or an interpretative law. In general, custom cannot contradict or override legal provisions. However, in certain cases, *custom contra legem* may be valid, but only if the law is not mandatory and if the custom is not contrary to fundamental principles of law or public policy.

As far as Romanian law is concerned, custom as a primary rule of conduct has appeared since the period of Geto-Dacian law, being inextricably linked to the existence of society at that time. Subsequently, during the period of the Dacian-Roman coexistence, a period when Geto-Dacian customary law was combined with Roman law, custom, as a rule for organising community life, was applied only insofar as it did not contravene the provisions of Roman law, in particular the rules of public order.

I. LEGAL CUSTOM – SOURCE OF LAW IN THE FEUDAL AGE

During the Middle Ages, the law applied in the Romanian Countries was based on two main formal sources: customary law, and written law, consisting of canon law and Byzantine nomocanonical law, contained in the pravile (rules).

Feudalism was the period of maximum normative power of custom, in the form of Jus Valachicum or the Law of the Country, a regulation recognised both in the Romanian Countries and in the legal systems of neighbouring states where we find Romanian communities. These rules originate from a practice of social life that has been established over several centuries, based on the basic occupations that covered the entire territory inhabited by Romanians. These laws of ancient origin, with elements of customary law, are the culmination of a long

evolution of territorial and political organisation. Such laws, mainly of an agrarian and pastoral nature, are proof of the fact that the institution of Romanian law was deeply rooted in the consciousness of the people of the time in terms of its age, its spread, and its logic.

This customary law also bears some characteristics, first, it is a unitary law from a geographical point of view, a Romanian law common to all Romanians who lived on the territory of the Geto-Dacian kingdom or on the territories of neighbouring states (south of the Danube, in the Carpathians, Serbia, Moravia, Poland). We also consider that the County Law is a unitary law from a social point of view because it is about applying customary law equally to all social categories. The most significant differences in legal treatment are to be found in criminal law, where the death penalty (manner of death) varies according to the social status of the offender. For the noble class the punishment was the cutting from the head, and for the common people it was hanging *(Ene-Dinu C., 2023, p. 44).*

The law of the Land also contains a territorial and real estate character of the law because the old Romanian law was formed in the rural settlements, those that kept continuity even after the withdrawal of the Roman rule from Dacia. In the right of possession and use of land we find the genesis of all the institutions of unwritten Romanian law. The territorial and immovable character of the law expresses the link between the law and a territory inhabited by a population politically organized on a certain territory *(Cernea E., Molcuţ E., 2013, p. 57).*

The originality of the County Law as a Romanian creation can indeed be supported by the fact that it was formed on the Daco-Roman legal background, which laid the foundations of some distinctive features of this legal system. After the Aurelian retreat, the territory of Dacia was inhabited by Dacian-Romans, who brought with them elements of Roman law. The amalgamation of Roman law and indigenous Dacian traditions created a unique basis for the further development of Dacian law. As the Roman Empire went into decline, Dacian-Roman legal institutions were taken over by the village communities and adapted to new living conditions. This process led to an organic development of the legal system according to local needs and traditions. With the disappearance of the state institutions imposed by the Roman Empire in the region, the Dacian-Roman legal rules lost their binding value. They were no longer imposed by state coercion. When the Romanian feudal states were founded, these rules regained their legal value and binding character. This was due to their sanctioning by the state authorities, who took over and developed the legal system. The County Law evolved in an original way in the historical and legal context of Romania, rooted in the daco-Roman traditions and adapted to the new historical realities. It contributed to the formation of a distinct legal system and to the development of a Romanian legal identity.

With the passage of time and the diversification of social relations, the need for codification along Byzantine lines arose. This type of codification was imposed on the territory of the Romanian Lands due to several factors: social-political, ecclesiastical, geographical, and cultural. However, when the Byzantine law transposed by pravile (rules) conflicted with the customary regulation, the custom was applied with priority: "*the judge sometimes judges against the pravile, for this custom of the place. Things are done according to the custom of the place, at least if it is against the custom of the pravile ...*" (*Cartea românească de învățătură 1646. Ediție critică. Adunarea izvoarelor vechiului drept românesc, 1960, p. 35).* Until the adoption of the law codes, Byzantine law manuals and collections of nomocanoane were used in the Romanian Countries, works that influenced the old Romanian law until the 19th century.

Terminologically, customary law is expressed differently in the feudal law system. In documents written in Romanian, the Slavic term "*zakon*" is rendered as "*law*", "*leage*", but does not have the "*meaning of written law*" *(Hanga Vl., 1980, p. 202)* Later, in developed feudalism, a clear distinction was made between custom (*zakon*) and law (*written law*) *(Mititelu, 2014, p. 17).*

Here are some examples of the existence of custom as the main source of law, together with written law, whether in the form of pravile (rules) or in the form of "*royal law*":

- Matei Vlastares's alphabetical syntagma was applied in the Romanian Lands around the middle of the 15th century. In 1451, the oldest manuscript of the Syntagma was written by the grammarian Dragomir and edited in Targoviste by order of the ruler John Vladislav II. Two more reproductions were made in Moldavia, one by a monk in 1474 at the Neamt monastery and the second in Iasi in 1495 by the grammarian Damian.

- Andronachi Donici's manual, considered a genuine rule, contains both canonical and nomocanonical legislation. The provisions of this collection of rules also considered the provisions of the County Law since both the principles and rules of classical Roman and Byzantine law are found in the customary law of the Romanian area *(Mititelu, 2019, p. 102 - 109).*

- In a document signed by the ruler Vasile Lupu, express reference is made to both "*leage*" and "*pravilă*" (rule) representing written law. From the use of both terms: "*leage*" and "*pravilă*" (rule), it follows that the notion of "*leage*" meant customary, customary law. In Vasile Lupu's conception, "*law*" was identical with "*custom*" and "*pravila*" (rule) with "*royal law*". There is no doubt that written law took precedence over customary law, which had dominated "*for centuries the system of sources of law*" *(Popa, 2004, p. 9).*

- For Dimitrie Cantemir "*...custom and Byzantine law, with their different historical individuality, formed a duplex jus, a double system of law, of Moldavia, and not the two formal sources of a historically and technically unique system of law*" *(Georgescu Vl. Al., 1980, p. 226).*

- In his Reforms, the ruler Constantin Mavrocordat often invoked the existence of two main formal sources: customary law and written law.

- In the Pravilniceasca Condică, the reforming work of the phanariot ruler Alexander Ipsilanti, the custom of the land appears as a formal source, together with the provisions of Byzantine law. Customary law is the main source of this law. Although it is a feudal legislative work, the content of its regulations reflects the ideas of the new principles of law circulating in Europe at the time, in particular the ideology promoted by Montesquieu and Beccaria. Regarding the presence of customary law in this code, it was regulated that, in accordance with the custom of the land, the surviving spouse received, as heir, part of the estate of the deceased, both in Moldavia and in Wallachia.

- The Caragea Law is the normative act that abrogated the Pravilniceasca Condică of Alexandru Ipsilanti. In this piece of legislation too, customary law merges with Byzantine law and, from a legal point of view, marks the end of the feudal legal period. There is a superficial regulation of some legal institutions, which fully reflects the mentality of the time and can also be explained by the fact that, in essence, these matters were known by custom.

Professor Vladimir Hanga's opinion on the role of custom in feudal law should also be mentioned, according to which "*custom*" was the "*main source*", because "*written legislation appears later and has a canonical and feudal character, confirming the domination of feudal lords and social inequality*" *(Hanga Vl., 1980, p. 202).*

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CONCLUSION

The quality of custom as a source of law must be analysed only by relating the system of law to the various historical periods of the development of society, in the light of the criterion proposed by Poirier - dependence on the typology of systems of social organisation (Popa N., 2020, p. 174-175). In terms of legal force, it cannot be argued that custom is inferior to law. However, in the modern era, the scope of customary regulation has narrowed in comparison with the law. This restriction of the application of custom as a source of law in certain branches of law or fields of activity is due to express regulations, according to which custom is excluded from creating rules derogating from the law.

These rules are imposed by the legislator precisely out of a desire to meet the needs of modern societies for precise rules, strictly determined in content and duration, and for uniformity in the legal system. The content of custom is often uncertain, or different from one geographical area of a state to another. In contrast, the law gives subjects of law precision and certainty in content and interpretation. These characteristics of the law are not absolute, and it is also subject to different types of interpretation or unconstitutionality. The supremacy of the law in the state is also conferred by the continuous nature of legislative creation, unlike in the past, when the legislative function was intermittent.

Although we cannot deny the role and importance of custom in the system of sources of law, society's need for normative speed is satisfied by the law, which, unlike custom, does not need a long period of time to acquire normative force..

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