SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 1-13

ANALYSIS OF THE ORIGIN AND BASIS OF CUSTOM, AS A SOURCE OF LAW

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Received 29.10.2024; accepted 02.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.211

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Abstract

If we do not start our understanding of the legal phenomenon from the source – the Roman law, we will not have a correct perspective on the evolution of modern legislation. A strong argument in support of this statement is the fact that a large part of the institutions of the Napoleonic Code, which was the foundation of Romanian civil law, were taken over from the Roman law.

This study aims to analyze the origin of custom as a source of law, by investigating how the sources of Roman law arose and, more particularly, evolved. Thus, in the first section, we will note that, in the history of Roman law, custom has experienced a very interesting dynamic, generated by the social and political organization in different eras: for many centuries, custom was the only form of expression of the rules of Roman law, then with the unprecedented development of the exchange economy, the law took its place. Notwithstanding, after the establishment of the Dominate, in the background of the general decline of the Roman society, custom regained its former importance.

In the second section, the historical perspective will give way to the general theory of law, so that we will try to grasp the basis of custom from its features and the way in which this source of law is recognized and enshrined.

Key words: *custom, origin, continuity, experience, basis.*

INTRODUCTION

"For the student who comes into contact with the world of the law for the first time, but also for the scientist who has devoted his life to research in one of the legal branches, the Roman law is the beginning without which one cannot conceive, explain and understand the present and cannot foresee the future of law" (*The. Sâmbrian, 2004, p. 27).*

The immeasurable value of the Roman law is the result of the native inclination which the legal experts of Rome showed for the "art of the good and the equitable", and it is often asserted that just as the Greeks were a people of philosophers, so the Romans were a people of legal experts. Thanks to the genius of the Romans in the field of the law, the legal categories and concepts they created have been successfully taken up and applied in both feudal and modern society. Therefore, later legal experts have borrowed from the arsenal of Roman law a great number of constructions and principles of universal value which form the basis of today's rules. These constants in the law are proof of the refinement of the Roman praetors and jurisconsults, who created legal instruments so well elaborated that they have become the basis of a universal cultural heritage, found in the legal systems of very different peoples.

This legal consciousness is the source of positive law, both customary law, which arises unconsciously and latently, and written law, as a conscious act of the legislator.

Beyond the fact that the Romans are the ones who created the alphabet of law and rigorously formulated concepts, abstract categories on the basis of which the entire subject can be organized, principles of law that are the pillars of any legal system, the specialized literature has also emphasized the exceptional vitality of Roman law by the fact that the study of this legal system represents a large field of verification of theoretical theses on the genesis and general evolution of law (*E. Molcuț, 2011, p. 10*). Since the legal phenomenon evolves in close connection with the other components of the social system, being influenced by them and, in turn, exerting influence on them, researching the evolution of Roman law helps us to understand these interdependencies.

Thus, we will see that the emergence or disappearance of certain sources of law, or the more important or less important role they played at a given historical moment, were determined by the social and economic conditions, the power relations in society, the entire social background (*E. Anghel, 2021, p. 49*).

I. ORIGIN OF CUSTOM, AS A SOURCE OF LAW

In its evolution, from the establishment of the city to the codification performed by Emperor Justinian, Roman law had the following formal sources of law: custom, statute, magistrates' edicts, jurisprudence, senatus consulta and imperial constitutions.

In very ancient times (the age of royalty and republic), when the economy was natural, legal custom was the only source of law for a long time. Since the 5th century BC, law has become the main source of law, better adapted to the democratic organization of slave society.

Once with the development of the exchange economy, however, custom and law lag behind social relations that have become complex, so that legal norms find their expression in the edict of the praetor and in case-law. These two sources of law proved to be the best tools for adapting the old, rigid and formalistic

system of law to the demands of the changing practice and for reconciling the need for reform with the conservative spirit of the Romans. Through the jurisconsults' art of interpreting the old civil law, which the Romans could never abandon, and through the genius of the praetor who, by procedural means, managed to revive the old legal system, new legal institutions were created and Roman law reached its golden age.

In the classical age (the age of the principality), distinguished by the concentration of all power in the hands of the prince, the sources of law known from the ancient age (which are losing their importance, although they are still preserved) are supplemented by senatus consulta and imperial constitutions, legal forms of expression of the imperial will.

In the post-classical era (the age of Dominate), when the emperor proclaims himself dominus et deus, the imperial will becomes the main source of law, so that the rules of Roman private law take the form of imperial constitutions. But, amid the general decline of Roman society, the exchange economy also declines and there is a return of the law to custom.

As far as legal custom is concerned, the importance of this source of law in Roman law has undergone significant fluctuations, generated by the social and political organization in different historical eras: for many centuries, custom was the only form of expression of the rules of Roman law, then with the unprecedented development of the exchange economy, its place was taken by law. But with the establishment of the Dominate and the decline of Roman society, the custom regains its former importance.

The strength and uniqueness of Roman law managed to create a wonderful connection between the past and the present, breaking out of the age of antiquity and, thanks to the rigor, skill and sharp legal mind of the Roman praetor and jurisconsult, it has been the inspiration for many legal systems.

Roman law is the broadest field of study for the evolution of legal institutions because "no one still considers law as a result of chance or as an arbitrary creation of the legislator. Law, like language, customs or religion, is a social phenomenon that goes through the same phases as the society in which it develops, being born, progressing and declining with it" (*C. Stoicescu, 1931, p. 11*).

Therefore, Roman law was not an abstract product of the mind, its institutions being inspired by the nature of things and a sense of equity. There is a Roman tradition in the legal consciousness of European peoples, with modern law being a bridge between past and present. However, "when we claim the existence of a Romanist tradition, we do not mean, as has been mistakenly thought, that our consciousness reflects classical Roman law or Justinian law in its institutions and principles, but we mean the Roman nature of our legal thought and culture, which has influenced the conceptions and spirit of different times. Law is the product of tradition and progress, and tradition contains the legal wisdom of past generations,

perpetuated through the thread of history" (*Emil Cristoforeanu, în V. Hanga si M.D. Bocșan, 2006, p. 44*).

Nowadays, when we live in a maelstrom of normative acts, generating chaos and instability, when we are powerless in front of excessive regulation, we believe that it would be useful to look to the past and to seek in the vitality and universality of Roman law the answer to the question: how could the Romans create such a strong legal system, without a model to inspire them?

The evolution of Roman law was influenced by three factors: the conservative mentality of the Romans, their practical spirit and the creation of legal institutions based on considerations of equity, of good faith, expressing the three principles: *honeste vivere, alterum non laedere* and *suum cuique tribuere*.

Being a deeply conservative people, attached to traditional values, it took the genius of the praetor and the finesse of the jurisconsult to adapt the rigid and formalistic Roman civil law to the demands of a changing social life. Sometimes, this formalism was considered to be a reflection of the soul and intellectual qualities of the Roman people, the civil law being strict, rigorous, conservative, unchangeable; we recall that the Law of the Twelve Tables was in force for 11 centuries.

This explains why it was necessary for the Romans to resort to procedural means and scientific research, which they created in the spirit of equity and good faith, so that towards the end of the republic, the edict of the praetor and case-law fulfilled the functions of a legal filter, capable of bringing the provisions of the old laws into line with the new social realities: jurisconsults have extended the scope of legal regulation by way of interpretation, and praetors, by sanctioning new subjective rights, by way of procedure. The strength of Roman law is due to the fact that its sources have evolved according to the requirements of practice, responding to the needs of society, and not according to standards of legislative technique.

"What is more difficult to explain is the unique phenomenon in history, that a foreign and long-dead law should come to impose itself on foreign peoples, neither by force nor by the support of faith, with such an effect that it has rules in their own homes and taught them legal education for centuries. Roman law had long since buried itself with the people who created it, when new nations dug it up and brought it into their lives at a turning point in history that marked the beginning of the modern age. There was a slow but decisive turning-point in the evolution of the general spirit, when the medieval world became acquainted with the principles and luminous distinctions of Roman law, which had offered more guarantee of civil liberty and equality than the feudal regime of Germanic origin for centuries before" (*I.C. Cătuneanu, 1927, p. 7*).

By being referred to in Roman texts as *mos maiorum* (custom inherited from the elders), *inveterata consuetudo* (ancient custom) and *ius non scriptum* (unwritten law), the custom also existed in the Gentilic era, but it was moral rather

than legal, because there was no state to enforce it by force of law. At that time, customs were based on traditions, meant to regulate simple relationships in a primitive society, and were willingly observed because they expressed the interests of all members.

After the foundation of the state, some customs, which were in accordance with the interests of the ruling class, were sanctioned by the state and turned into legal customs. It is very interesting to note that the legal norms of the state era are mainly the codification of the non-legal customs of the pre-state era, as we can see if we study the provisions of the Law of the Twelfth Table: it sets out, in a summarized form, customs formed hundreds of years before and enshrined through application in the practice of the courts.

The primitive Roman was a farmer and shepherd, his whole life was centered around these occupations, and his wealth consisted of the land he owned, his slaves and his work animals; these were res mancipi, things considered precious, valuable at that time. Money did not yet exist, there was little exchange, the family was centered around the pater familias, so the law was correspondingly primitive. In a closed agricultural society with no commercial trade, legal relations were rarely concluded. As such, the rules of conduct, in the form of custom, concerned the organization of the state and the family, primitive property and labor relations. As legal acts were rarely concluded, they took solemn forms, full of gestures and rituals, and the subject of obligations was poorly represented.

Therefore, for two centuries, from the founding of the state and until the adoption of the Law of the Twelve Tables, the only source of law is ius non scriptum, the legal custom, created by the repetition of certain behaviors, then enshrined in the practice of the courts. It is from here that we can deduce that, at the beginning of its evolution, Roman law was a creation of judicial practice, and the Law of the Twelve Tables did not create a new legal system, but codified a customary system established by the work of the courts.

Towards the end of the Republic, in the context of the diversification of social organization and the development of the exchange economy, the old customs imposed by social practice proved inapplicable, and more subtle, more abstract forms were needed in order to find unitary solutions to cases of great diversity. Therefore, the law became the main source of law. All this transformation in the physiognomy of Roman legal institutions could not be realized directly, because the Romans believed that law is immutable. This explains the fact that the texts of the Law of the Twelve Tables, although they had become anachronistic, could not be amended or repealed, but were adapted to the new realities by means of indirect procedures, namely by means of the creative work of the praetor and case-law.

Furthermore, the Romans, being conservative and traditionalist, did not abandon their customs. In this regard, jurisconsult Salvius Iulianus argues that custom expressed the will of the whole people and fulfilled both a creative and an

abrogating function, because in those cases where we cannot use written laws, what has been introduced by customs must be observed. Through this text, the jurisconsult recognizes custom as a source of law, placing it on the same level as the law because both sources were approved by the will of the people: the law by vote, and custom by deeds.

In addition to customs and laws, the dynamics of Roman society brought with it two new sources of law, the edicts of magistrates and case-law. By the time the Aebutia Law was passed, even though the old, rigid and formalistic law had become inapplicable, the Romans did not allow it to be changed. Since the Romans considered that the praetor, the most important judicial magistrate in charge of organizing trials, could not create law, he had the difficult role of adapting the old forms to the needs of practice, indirectly, by subtle procedural means designed to modify substantive law.

This explains why the Romans usually expressed their legal norms indirectly, either by procedural means, which gave rise to praetorian law, or by prudential interpretation, which gave rise to case-law. In this way, the evolution of Roman law was marked by continuity: the laws passed by the people could not be repealed or amended, but only adapted to new social realities through procedural means and scientific research.

Today, if we look at the Anglo-Saxon system of law and the Romano-Germanic system of law, we will notice an essential difference: while the Anglo-Saxon system has taken over the spirit of Roman law, being distinguished by continuity, the Romano-Germanic system has borrowed only the concepts and institutions of Roman law, without taking over its spirit. Therefore, in continental law, the main source of law is the legislation, which provides direct legal regulation and gives the development of the law a marked discontinuity. (*D. F. Văcăroiu, 2006, p. 356*).

Returning to imperial Rome, the dynamics of the sources change with the establishment of the emperor's legislative monopoly, in the form of imperial constitutions. Notwithstanding, on the background of the general decline of Roman society and a return to the practices of the natural economy, custom regained its importance as the appropriate form for regulating social relations that evolved slowly and simplistically.

At this time, customs were enriched with elements of the customs of conquered peoples, which the Romans allowed only if they did not conflict with the fundamental principles of Roman law. However, emperors often intervened to ensure the triumph of the law, for example, Emperor Trajan re-established a law in the province of Bithynia dating back to the time of Pompey, which conflicted with local customs. Over time, the principle according to which the application of local customs is not allowed if they contravene Roman laws was formulated. Emperor Constantine decides that the power of ancient custom is not to be disregarded, but its application must not contradict the law or the reason of law.

Emperor Julian established that custom is to be observed only insofar as it does not contravene public order.

In the 4^{th}-5^{th} centuries, "vulgar" law played an important role in the provinces, with a vulgarization (simplification) of Roman law at the local level, which gradually developed into a customary system (*V. Hanga, M.D. Bocșan, 2006, p. 48*).

On the other hand, in imperial times, court practice can create a legal rule to the extent that the consistency and unity of solutions can become a custom.

In the opinion of jurisconsult Ulpian, the long-established custom must be respected as a right and as law in those cases where the written law is not sufficient. Jurisconsult Salvius Iulianus emphasizes the binding nature, pointing out that an ancient custom is not unreasonably preserved as law: "An ancient custom is not unreasonably preserved as law (and this is the law which is said to be established by custom). If the same laws are not binding on us, for no other reason than that they were passed by the will of the people, then all those which the people have passed without any written law will rightly be binding; what difference does it make whether the people manifest their will by voting or actually by deeds? It is for these very good reasons that the principle according to which laws are repealed not only by the vote of the legislator, but also by their obsolescence, by the tacit consensus of all has also been adopted".

It has been pointed out that ius scriptum derives from "the categorically expressed will of the legislator", but ius non scriptum also derives from the same will, with the difference that it is '"presumed only, since it allows the existence and perpetuation of certain customs representing consuetudo, mos majorum" (*C. Stoicescu, 1931, p. 16*).

These definitions reveal the nature of the custom: usus, the long-standing repetition of the same manifestations, and opinio necessitatis, the belief or consensus that the practice is mandatory, representing a rule of law. Therefore, custom results from the repetition of identical facts. Classical jurisconsults justified the custom by its antiquity, vetustas, without specifying how long and how many acts are necessary to determine this antiquity.

Later, the foundation of the binding force of custom was sought in its rational nature. In a constitution of Emperor Constantine, it was decided that: "what was introduced not without reason, but was established firstly by mistake and then by custom, shall not apply in similar cases".

II. THE BASIS OF CUSTOM, AS A SOURCE OF LAW

As we noted in the first section, historically, law developed in close connection with custom. Moreover, as a social rule, custom preceded law.

Mircea Djuvara wrote: "Nothing is more important for the scientific horizon of a man of law than a sense of legal relativity, as this study reveals. Such a feeling alone puts legal institutions in their true legal form. It is therefore

necessary to study their historical source, the evolution by which they have come to be what they are, and the way in which they appear in other legislations" (*M. Djuvara, 1995, p. 101*).

The legal phenomenon cannot be grasped in its entirety only through a systemic, purely technical approach, but must also be viewed from the perspective of the social and historical traditions. Apart from the values imprinted by history, law would be an artificial construction. In order to interpret the basis of creation in law, it is necessary to analyze the historical conditions and the entire social background in which the law emerged and evolved.

The idea that law is a historical product brought together the followers of the German Historical School of Law, Savigny and Puchta, "When we find a history based on documents - wrote Savigny - we recognize in them the law specific to the people to whom it applies, like the language and customs of that people". Therefore, the law is not an arbitrary product, which circumstances or human wisdom create. According to the representatives of this school, the doctrine of Grotius were to be followed, it would mean that for every human activity there are rules of natural law, which we would have to discover in order to dress them in the form of the law, which would turn natural law into a purely subjective conception.

The law is born and develops like language, undergoing continuous transformation in a slow evolutionary process. The historical school exerts an overwhelming influence on the way law is understood and defined, on its spirit. Problems of law are now beginning to be treated from a historical perspective.

The history of law is linked to the history of the people. In every society, in every country, the applicable rules of law are a faithful mirror of the state in question, reflecting its heritage, its development, its culture. As Puchta noted - "Just as the life of peoples changes over the ages, so the law, a branch of this life, also changes with the times, develops with the people to which it belongs and adapts to the different phases of its development". In his definition of law, Puchta notes its purpose, which is that law determines and decides the relations between individuals.

The ideas of the historical school of law have strongly influenced the way of conceiving and explaining the formation of law, the stages of its development and the forms of systematization of German law. However, in spite of this influence, the historical school could not completely annihilate the ideas of natural law, later conceived as a rational law, made up of general guiding ideas derived from the reasoning dictated by justice, equity and common sense (*N. Popa, 2020, p. 94*).

In modern law, the followers of the sociological school have given great importance to custom, considering it as the most appropriate source of law to express the dynamics of social facts. The positivist school, however, greatly reduced the role of custom by placing law at the center of the sources.

ANALYSIS OF THE ORIGIN AND BASIS OF CUSTOM, AS A SOURCE OF LAW

Mircea Djuvara wrote that to disregard experience in the science of law is an absurdity, since law cannot be created by rational deductions alone. “The understanding of the legal phenomenon must start from the practice of specific cases. Legal science must start from the concrete towards the abstract and not vice versa if it wants to reach the truth”.

In order to understand the basis of custom as a source of law, we will start with its definition. Specialized literature defines custom as a rule of conduct established in human coexistence through long-standing usage. Custom is observed and applied by the consensus of the members of the community, who believe in the fairness of its regulation because it reflects the way of life, values, traditions and experiences accumulated over time. Therefore, custom is the fruit of a community's life experience, which repeats a practice constantly and consistently, often unconsciously, and thus, through repetition, they come to the conviction that the rule is useful and must be followed (*N. Popa, 2020, p. 175*).

Customs are patterns of behavior as they express the needs of social groups and are imposed on members because they reflect the specific values of the group. In contrast to customs, habits are individual routines, which are behaviors that occur in certain situations and do not encounter negative reactions from social groups (for example, a person usually wakes up at 7 in the morning, eats and drinks tea, then leaves for work at 8 in the morning). Customs, however, are patterns of conduct that imply some constraint in recognizing group values and respecting them.

As an essential feature, legal custom is a source of unwritten law and is generally embodied in oral formulas, and its authority is based on the fact that it is the result of long-standing and unquestioned practice (*N. Popa, 2020, p. 138*). But not every repeated behavior becomes a rule of customary law. Therefore, for a custom to become legal, two essential conditions shall be required:

a) an objective (material) condition: it must consist of an old and unquestionable practice (longa diuturna inveterata consuetudo), followed repeatedly and consistently by the members of the community as a habit

b) a subjective (psychological) condition: the practice in question must be considered mandatory (opinio necessitatis) and must be observed as a legal norm, subject to legal sanction. Thus, a simple practice, even if it is constantly observed as a tradition, is not a custom if the psychological condition of being considered mandatory is not met, and can be imposed by means of coercion. We mention in this respect simple customs, such as leaving a tip, a practice which, although it is constantly applied, cannot be considered mandatory and liable to be enforced by legal sanctions.

These requirements are sometimes supplemented by the condition that the rule of conduct imposed by repetition and regarded as binding must be precise or as accurate as possible.

Custom has an informal nature, it is a spontaneous, intuitive, impersonal creation, since it is not born from the act of will of an authority, like the law emanating from the legal consciousness of a legislator; it springs from the spirit of the community and this spontaneous nature is not lost even if the customs were subject to codification.

Custom is born from the generalization of particular facts, as Professor Mircea Djuvara explains very suggestively: it is based on specific cases, which are then referred to, being evoked as precedents. A general notion is thus derived, made up of what is common to repeated specific cases. This is the general rule established by custom, which will be applied in future cases through case-law. Because, in the author's opinion, the case-law is the deep formal source of positive law, it is the one that interprets and applies the rules, whether they are customary or statutory (*M. Djuvara, 1995, p. 265; I. Boghirnea, E.-N. Vâlcu, 2022, p. 41*).

The law is "an organism that lives a life that does not appear clearly, entirely, in the light. This life, however, is the real life of the law, and positive law, which we know and study emanates from it". By researching the sources of law, Mircea Djuvara describes positive law as "the secretion of the legal consciousness of the society in question", pointing out that positive law is born from this consciousness, whether we are referring to customary law, which is born unconsciously and latently, or to written law, which results from the conscious action of the legislator (*M. Djuvara, 1995, p. 275*).

By analyzing the formal sources of law - custom, law, doctrine and case-law -, the author emphasizes that, as far as custom and doctrine are concerned, they manifest themselves as positive law thanks to case-law. Therefore, custom is established by case-law: custom is based on the tacit approval of the legislator, being a kind of tacitly consented law, as described by Fr. Geny. It is the state authority that enshrines the custom through the sanction assigned by the courts, even if it does not formulate the rule derived from an old recognized practice. On the other hand, constant case-law can create customs.

Not all customs created by society become sources of law. The precondition for custom to be recognized as a source of law is that the customary rule must not be contrary to public policy and morality. The mechanism of the passage of a custom from the general system of social norms into the system of sources of law is marked by two important moments: a) either the state, through its legislative bodies, recognizes a custom and incorporates it into an official rule; b) or the custom is invoked by the parties, as a rule of conduct, before a court of law and the court validates it as a legal rule (*N. Popa, E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, 2023, p. 151*).

The party claiming the custom must prove its existence, any means of proof being admissible (evidence by witnesses, written evidence), their probative force being left to the judge's discretion.

Therefore, custom must be enforced through public authority: either the legislator or the courts must recognize the customary norm. It is sometimes possible that, when a new law is enacted, the legislator may abolish certain customs, or no longer recognize their validity. In this respect, in legal literature, a distinction is made between cutuma secundum legem, cutuma praeter legem și cutuma contra legem.

Consuetudo secundum legem applies by virtue of the law, in cases where the law itself refers to custom. In Romanian law, this kind of custom is the most common, the rule being that custom applies in so far as the law refers to it (*S. Popescu, 2000, page 151*). If there is a conflict between custom and law, the law always prevails. Custom plays an important role in the interpretation and application of the law as it can sometimes help to clarify the meaning and application of the law in specific situations.

The role of custom is emphasized today when interpreting whether the exercise of a subjective right complies with the coordinates of the law, so that the subjective right is exercised in accordance with social customs and mores. In this case, the custom of the place becomes a benchmark on the basis of which to judge whether the exercise of a subjective right is in accordance with the law or, beyond the law, abusive.

Consuetudo praeter legem applies when there is a lacuna in the law, which is a rare situation given that, according to the principle of analogy, where the law has lacunae, the general principles of law apply, and not a customary rule.

Consuetudo contra legem refers to the situation in which a custom contradicts the law; in this case the question of the binding force of the custom in relation to the law arises, and the answer is different depending on whether we are considering a suppletive or, on the contrary, a mandatory legal rule. In the first situation, custom may prevail over a law if it is proved that the parties intended to derogate from the provisions of the law and to comply with the customary rule. In the second situation, Romanian law does not recognize as a source of law a custom which contains a rule of law contrary to public order and good mores, nor a custom which contradicts the law.

CONCLUSION

Law is connected to history and social environment. There are many factors that lead to notable differences between legal systems, most of them non-legal: psychological, geographical or religious. To imagine that the law must be the same everywhere and always the same is a false conception, according to Ihering. The perception of law often varies from one people to another, from one continent to another. Each of the types and families of law revealed by historical development has its own specific features, determined by a set of factors that influence the law, giving it dynamism, an evolutionary nature, distinctiveness. By abstracting, we will find that institutions, concepts and principles originating in

Roman law have survived in the societies that created them, by being applied throughout a millenary evolution.

These legislations which are historically and spatially dissipated are nowadays united by the Roman legal thesaurus, which represents the common heritage of our legal consciousness. This legal consciousness is the source of positive law, both customary law, which arises unconsciously and latently, and written law, as a conscious act of the legislator. The difference lies in the fact that, while the Anglo-Saxon system has taken on the very spirit of Roman law, evolving through case-law, the Romano-German system has borrowed only the concepts and institutions of Roman law, without taking on its spirit. Therefore, in continental law, the main source of law is the legislation, which provides direct legal regulation.

In conclusion, there cannot be legislation common to all societies, but "there exists in the legal relationship that something which necessarily subsists everywhere" and that "something" are the legal permanents, the constants of law, the object of study of the legal encyclopedia (M. Djuvara, 1995, p. 6).

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