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DECLINE OF THE NOTION OF LEGAL CUSTOM THROUGH THE SPECIFICITIES OF ARTIFICIAL INTELLIGENCE

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Abstract

The present study aims to explore the transformations brought to custom, a traditional source of law, by the emergence of artificial intelligence (AI). The plan of the analysis is structured in two main parts: the first part focuses on the presentation of the notion of custom and its particularities in relation to usage. The second part of the paper develops the concept of AI and its functions, in particular that of the legal algorithm. The central issue around which this article is articulated is the protection of fundamental rights and free will, since AI tends to take the place of the legislator, producing new social rules based only on factual data, which lack the power of abstraction.

Key words: *AI, algorithm, custom, usage, law.*

INTRODUCTION

At a time when humanity is experiencing a technological progress unique in its history, the present work aims to go back to fundamental principles. The custom, the main tool of what we might call traditional law, in which orality played a central role, is put to new tests. With its multiple meanings and meanings, it has over the ages fulfilled both the principal function of law and that of complementing the written rule, when codes came later.

Historically, the custom has been around since ancient law, but it became a real source of law in the Middle Ages *G. Kadige, De la place et du rôle de la coutume dans les droits antiques, în F. Garnier si J. Vendrand-Voyer, La coutume dans tous ses états, La Mémoire du Droit, Paris, 2013, p. 27*).

For example, in France the institution of custom was brought by the Germanic barbarian tribes. In this way, customs characteristic of nomadic

populations took root in the territorial area in which these peoples settled. Of course, with the passage of time and the advent of the monarchy, the barbarian customs were replaced by new rules of law, and the coup de grace came with the codification of customs in the Napoleonic Code of 1804 (*J. Gilissen, La rédaction des coutumes dans le passé et dans le présent, 1962, Université libre de Bruxelles, Bruxelles, p. 15*).

I. CHARACTERIZATION OF THE NOTION OF CUSTOM

Etymologically, the word "*custom*" brings to mind the passage of time, more precisely a legal rule established by constant and long-standing practice. Often, custom is synonymous with *usage* or is understood as a *practice* in a particular area of trade. In order to understand the legal meaning of the term custom, we will try to give it a legal definition (*I.1*), and then to individualize it in relation to other similar legal concepts (*I.2*).

1.1. The legal definition of custom

The concept of custom is found in all legal systems, even if it is not presented in the same way, as it is up to each legal system to define what it means by "*custom*" (*H. Ruiz Fabri, L. Gradoni, Coutume, Répertoire de droit international, Dalloz, Paris, 2017, n°1*).

For example, there are certain legal systems which list their sources, among which reference is made to custom or usage, such as the Swiss Civil Code (*Art. 1*) and the Romanian Civil Code (*Art. 1*) or the Statute of the International Court of Justice (*Art. 38*).

It should be noted, however, that in France, the Law of 30 Ventôse XII on the unification of civil laws in a single body under the title of the French Civil Code, marked by the revolutionary spirit of the time, repeals in Article 7 "*roman laws, ordinances, general and local customs, statutes and regulations*". Thus, despite the fact that the draft law provided for the retention of custom as a source of law, it was excluded from the final text to make room for the new source, the law (*S. Pintor, Réflexions au sujet de la coutume en droit interne, in Mélanges Lambert, t. 1, 1938, LGDJ, p. 372*).

A general definition of legal custom is given in the famous *Vocabulaire Juridique* under the direction of Professor Gérard Cornu. Thus, custom is "*the objective rule of law based on popular tradition (consensus utentium), which confers a legally binding character on a constant practice*" (*G. Cornu, Vocabulaire juridique, ed a 12-a , PUF, Paris, 2016, p. 625*). In other words, a true unwritten "*law*" which does not emanate from the legislative power and which is adopted by a community as such by custom (*diuturnus usus*), giving it a binding character (*opinio necessitatis*).

This traditional concept of custom is based on a Romano-Germanic definition, which is articulated around two elements, namely *a material* and *a psychological element ((J. Gaudemet, Les naissances du droit – Le temps, le*

pouvoir et la science au service du droit, ed a 3-a, Montchrestien, Paris, 2001, p. 47).

The material element represents a constant practice *over time* (*consuetudo*), general and *long-standing*, concerning the resolution of a given situation. Of course, the practice that we observe through the *passage of time* has a relative appreciation, since duration is a factor with a variable geometry, in relation to the size of the population to which we refer and the frequency of repetition. Clearly, a social behaviour that is repeated infrequently takes longer to crystallize into a custom, whereas repetition at short intervals and in a homogeneous group of people means that the practice in question becomes established as a custom more quickly (*P. Deumier, Coutume et usage, Répertoire de droit civil, Dalloz, Paris, 2014, n° 21*).

Next, the material element must be *constant and unbroken*. The constant and uninterrupted or continuous character of the custom means the application of the unwritten rule, unanimously accepted, "*to all similar cases in the region in which its authority is invoked*" (*Commercial Court of Seine, France, May 31, 1929, Gazette de Palais, Paris, 1929, p. 166*).

In addition to the above-mentioned attributes, practice as a material element of custom must also be *current*. Thus, the courts, in their role as arbiters of the application of the law in time and space, ensure that the customary rule, which is alleged to have been disregarded, is not out of date. Moreover, they have a duty to check whether it is mature and fully shaped or is in the process of being formed. The term "*current*" also means whether or not the custom has been maintained after the legislative amendments or whether it has been replaced by another custom (*P. Deumier, op.cit., n° 23*).

Last but not least, the practice must be general in nature. To qualify as a custom, it must not be understood as accepted by all, but adopted by all members of the community. *Per a contrario*, a practice, however old and repetitive it may be, does not qualify as a custom if it remains strictly individual in its application.

The psychological or *moralelement* is characterized by the feeling of duty, of obligation that the subjects of the relationship have to comply with the unwritten rule (*F. Gény, Méthodes d'inteprétation et source du droit privé positif, LGDJ, Paris, 2016*).

Thus, in order for an unwritten societal norm to have the value of custom, it must prove its constancy over time, and the way in which the subjects of law manifest themselves must not change with the passage of time, on the one hand, and on the other hand, the coercive force it releases must be intrinsic to the human being, i.e. not imposed on him by a sovereign power.

Criticized by doctrine, in particular by Kelsen (*H. Kelsen, Théorie générale du droit et de l'État, 1997, LGDJ, Paris, p. 168*) and Gény (*F. Gény, op.cit.,2016, n° 120*), the psychological element represents the sense of duty, the natural and

normal behavior of any individual. It is precisely this element that differentiates custom from the notion of usage or practice.

Indeed, even if the legal norm is the fruit of the elaboration of the legislature or the result of the jurisprudence of the courts, the general, uninterrupted and long-standing process or practice of a group is only fully accomplished when it inspires a sense of duty.

1.2. Individualization of custom

As we have shown above, in order to be able to speak of a customary rule, two elements must be brought together: material and psychological. In the case of custom, the moral element is missing. By way of example, the 1969 decision of the International Court of Justice in a case concerning the delimitation of the continental shelf in the North Sea between Denmark and the Federal Republic of Germany and between the Netherlands and the Federal Republic of Germany, which stated: "*the States concerned must (...) feel that they are complying with what is a legal obligation. Neither the frequency nor even the ordinariness of acts is sufficient. There are many international acts, in the field of protocol, for example, which are almost invariably complied with, but they are motivated by mere considerations of courtesy, expediency or tradition, and not by the sense of a legal obligation*" (*ICJ, February 20, 1969, North Sea Continental Shelf case, ICJ Reports, § 76 and 77*).

As a consequence, the full awareness of being bound by a legal obligation and the belief that the latter requires a specific behavior (*opinio juris*) makes the difference between custom and usage, which lacks this aspect.

It can be concluded that only custom is the source of law, since usage oscillates between a mere fact, a custom in the process of formation or a tacit convention (*P. Deumier, op.cit., 2014, n° 28*).

However, it should be noted that some doctrine advocates abandoning this distinction, considering it purely theoretical (*F.Osman, Les principes généraux de la lex mercatoria, LGDJ, Paris, 1992, p. 424*). The terminology used is therefore merely a question of language adapted to the branches of law. In public international law, for example, we speak of "*custom*", whereas in the law of international trade we refer to "*usage*" (*Y. Derains, Le statut des usages du commerce international devant les juridictions arbitrales, Revue d'arbitrage, Paris, 1973, No 122, p. 135*).

Also, a distinction between the two notions is made by some authors by hierarchizing them (*G. Cornu, Droit civil. Introduction au droit, 13th ed., LGDJ, Paris, 2005, n° 420; Ph. Le Tourneau, Quelques aspects de l'évolution des contrats, in Mélanges Raynaud, Dalloz-Sirey, Paris, 1985, p. 349*). From this perspective, the two notions have the same legal force, the difference being that usage has greater vivacity and flexibility to develop in more compact groups,

whereas custom, by its rigor, is more difficult to produce effects in a dispersed society.

It is worth noting that the Romanian legislator lists, in Article 1 of the Civil Code, in addition to the law and general principles, custom and not custom as the source of law. Thus, under Romanian law, custom is the source of law which imposes an obligation on the parties.

Whatever the angle from which we analyze the comparison between custom and usage, these two concepts acquire legal value only by reference to the law (*praeter, secundum* or *contra legem*).

In practical terms, the three concepts are, first and foremost, *complementary*, with custom having in particular a suppletive role in the absence of legislative provisions. This function, also called *praeter legem* (outside the law), symbolizes the capacity of custom to apply by virtue of a force of its own. However, the development of modern law has increasingly limited the manifestations of custom, whatever the branch. The only source of law which is still alive today is usage, and this is restricted to relations between professionals.

More often than not, the law itself lays down how custom and usage are to be used, the latter having the role of *secundum legem*. The consequences of the implementation of this legislative method are positive, as it strikes the right balance between the general interest protected by the rule of law and the particular needs of different groups of individuals, who are allowed to determine the customary rule they will follow.

Another function that has been attributed to the rule of law is a *subversive* one. The study of cutum *contra legem* poses most challenges for law. First of all, there is a conflict between custom and law when the latter is imperative. On the other hand, custom finds preferential application over the law when the rule of law contained in the text of the law has a pre-established, implicit application. Therefore, what is within the power of the parties to agree by mutual consent when concluding a contract is also within the power of the usages arising from the repetition and generality of the same contract.

We can conclude, finally, that customary law was not lost after the advent of the written civil codes, but continued to develop spontaneously.

II. THE ROLE OF ARTIFICIAL INTELLIGENCE IN LAW

The emergence of new technologies, and in particular Artificial Intelligence, has led to profound changes in all spheres of contemporary society, some of them radical. The field of law has obviously not been exempt from these trends. How AI can become a source of law and what risks legal algorithms entail, we will analyze in the two parts of this chapter.

2.1. Presentation of the AI concept

In addition to "*hybrid*", "*Artificial Intelligence*" is one of the most fashionable terms in current parlance. Being used at every turn, the noun

"*intelligence*" and its adjective "*artificial*" are becoming commonplace. However, it should be noted that AI has no universally accepted definition. (*R. Stancu, Articulating civil liability in the paradigm of artificial intelligence law, International Conference "Towards a Law of Artificial Intelligence. Premise. Actualități. Perspective", Bucharest, April 05, 2024*).

The notion of AI appeared in the mid-1950s, when the mathematician Alan Turing wondered whether a computer would one day be able to "think" or whether it was limited to an "*imitationgame*" of human thought.

From the perspective of the legislator, in particular the European legislator, AI is "*the possibility for a machine to reproduce behaviors associated with humans, such as reasoning, planning or creativity*" (*European Parliament, Artificial intelligence: definition and use, https://www.europarl.europa.eu/topics/fr/article/20200827STO85804/intelligence-artificielle-definition-et-utilisation*).

Another useful definition is that given by the European Commission, which defines AI as "*systems that exhibit intelligent behaviors by analyzing their environment and that take action - with some degree of autonomy - to achieve specific goals*" (*Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe, https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52018DC0237*).

AI technology can be divided into different levels of complexity, starting from the so-called "*weak*" ones, where human intervention is necessary for the program to make decisions, to those considered "*powerful*", which have implemented technology that gives them the ability to self-learn, allowing them to go beyond the limits initially programmed and adapt to new situations, unforeseen at the time of the original program design.

In general, we can reduce the notion of AI to a computer algorithm, a computer program or software that automatically executes the programmer's commands within the limits of certain parameters set in advance (*R. Stancu, Manifestarea de voința la încheierea contractului inteligent*, *Universul Juridic, 2024,https://www.universuljuridic.ro/manifestarea-de-vointa-la-incheierea-contractului-inteligent/*).

It should be noted that there is this reflex to view computer algorithms from an inferior perspective. By placing these programs in a superior position to human intelligence, we lose sight of the fact that they are merely tools created to perform certain functions, without free will.

Referred to in the legal field as Legal *Tech*, artificial intelligence is in fact a system of expertise, as is the case with contract management programs, which reproduces the cognitive mechanisms of a specialist in a particular field through logical reasoning (*E. Barthe, L'intelligence artificielle et le droit, I2D Information, données & documents, Paris, n°1/2017, p. 23*).

Legal algorithms are the result of the emergence of two technologies, namely *machine learning* (ML) and *natural language processing* (NLP). ML is a technology that may or may not be supervised by humans and is based on *deep learning*, a deep and static machine learning. This type of technology is most often used to develop legal algorithms. (*H.Surden, Machine Learning and Law, Washington Law Review, Washington, 2014, n°1*).

NLP is based on ML technology, to which is added a *parsing* technique. However, NLP, even though it indirectly and implicitly detects the meaning of words, cannot deduce logic. For example, licit and illicit are similar concepts for it.

However, what sound the effects of using the algorithm in the sphere of law.

2.2. Can software be a source of law?

During the yellow vest (*gilets jaunes*) demonstrations in Paris in mid-November 2018, the French authorities used a computer program that was able to identify, by analyzing social media data, the organization of protests in the City of Lights before the protesters gathered (*E. Chol, Gilets jaunes : la révolution en algorithme, Le courrier international, 14 December 2018, https://www.courrierinternational.com/article/edito-gilets-jaunes-la-revolution-en-algorithme*).

Moreover, the computer program not only detected the organization of a demonstration of a scale known to everyone, but also proposed legal solutions. Thus, the computer algorithm, by anticipating events and offering solutions before the facts take place, makes justice predictable (*S. Chassagnard-Pinet, Les usages des algorithmes en droit : prédire ou dire le droit ?, Recueil Dalloz, IP/IT/, 2017, p. 495*).

However, in spite of the apparent certainty that the algorithm offers thanks to its implacable mathematical logic, it shows its limits when it comes to "*learning*" the difference between *soft* l*aw* and *hard law*. Yet it is precisely this ability to distinguish between the two types of law that enshrines the dual function of the legal algorithm, which is to provide and to state the applicable rule of law. (*B. Barraud, Le coup de date permanent, la loi des algorithmes, Revue des droits et liberés fondamentaux, Paris, 2017, chron. 35, https://revuedlf.com/droit-fondamentaux/le-coup-de-data-permanent-la-loi-des-algorithmes/*).

The role of the algorithm is to understand the behavior of a group of individuals through the prism of the flow of collected data. It relates strictly to the materiality of the gestures and expressions of the group in question, in the case of the yellow vests, to their demands, and then generates a *complementary norm derived* according to their expectations and the economic situation of a locality or country. However, the program leaves abstract norms out of its calculation (*S. Chassagnard-Pinet, op.cit.*).

By the algorithm's inability to abstract, limiting itself only to the brute facts expressed, e.g., fuel prices too high, travel difficulties, dissatisfaction, the legal

answer it gives is not one of causation, but of correlation. The program provides an accurate reflection of society and not a rule of law. (*H. Croze, Justice prédictive. La factualisation du droit, JCP éd. G., n° 5/2017, Paris, 101*).

In the paradigm of the legal algorithm, the tutelary figure of the legislator disappears, replaced by mathematical formulas that include in their evaluation the relative behavior of humans. When the algorithm identifies a new element, it associates it with a consequence and proposes a rule of law. In this way, the legal rule risks becoming extremely unstable and the law is inundated with rules created continuously by the algorithm (*S. Chassagnard-Pinet, op.cit.*).

As we have shown in the first part of the study, for a societal behavior to become custom and then law, it must be validated by the passage of time. Thus, in order to be able to say that the solution proposed by the algorithm has the value of a legal norm, the computer program must observe a repetition over time, record it in its database, translate it mathematically into computer code and then ensure that it does not lose its value with the passage of time. It is also a sine qua non that the subjects of the right perceive it as an obligation. Obviously, a third condition, in addition to proof of the passage of time and the fact that it is an obligation, is that it must be in the general interest (*B. Oppetit, Sur la coutume en droit privé, Droits, Revue française de théorie, de philosophie et de culture juridique, Paris, n.3/1986, p. 44*).

We can conclude that the function of the legal algorithm is to provide a complementary, derived, automatized and personal rule. In concrete terms, the algorithm plays a complementary role to governance by law, in the sense that mathematical formulas improve the rule of law, adapting it to the new expectations of the times and avoiding the risk of becoming obsolete (*A. Supiot, La gouvernance par les nombres. Cours au Collège de France (2012-2014), Fayard, Paris 2015*).

CONCLUSION

What we call Artificial Intelligence is actually a scientific discipline. By extrapolation, we have come to call AI all the products that result from the research domain of the Artificial Intelligence discipline. However, since we are talking about scientific research, the idea of reproducing human intelligence must be excluded.

In a generally accepted manner, the rule of law is an abstract, mental notion that is meant to frame the behavior of individuals in a certain time and space. With the digitization of society, economies and our lives in general, algorithms have become ubiquitous in the everyday life of modern man. Moreover, computer programs have also penetrated the legal world, participating in the governance of society and taking part in the act of justice.

DECLINE OF THE NOTION OF LEGAL CUSTOM THROUGH THE SPECIFICITIES OF ARTIFICIAL INTELLIGENCE

With the emergence of legal algorithms or Legal Techs, which analyze data from the virtual environment in record time, the legal world is undergoing a profound change. By issuing rules, algorithms thus become sources of law.

It is undeniable that algorithms are producing increasingly accurate results thanks to data mining (a set of data mining and analysis tools designed to extract the most important information), advances in natural language processing and machine learning (machine learning and deep learning techniques inspired by biology and interconnected neural networks). However, one wonders whether in this evolution where only the sky is the limit fundamental rights are protected or whether the free will of each individual in society is affected (G. Conti, W. Hartzog, J. Nelson, L. A. Shay, Do Robots Dream of Electric Laws? An Experiment in the Law as Algorithm, in R. Calo,M. Froomkin, I. Kerr, eds, Robot Law , Edward Elgar, 2016, p. 274).

Then, if what some authors call the "law of algorithms" is a reality, it imposes a caveat, since only a small part of society's members are aware of its existence. Not having the status of a source of law such as law, custom, customs or jurisprudence, individuals do not have the automaticity to verify it. And if they want to be informed, where can they do so? However, the principle according to which nemo censetur ignorere legem requires compliance with the rule developed by the algorithm (B. Barraud, Le coup de data permanet, op.cit., 19).

Through the creation of new technologies, a new legal language is emerging. Returning to our topic, we can say that customary law continued to develop spontaneously after the appearance of civil codes, but the current context forces custom to take on new forms. So, the legal algorithm does not present a direct threat to the existence of custom and written law, but aims at a transformation of the conception of their nature and role.

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