CUSTOM AS THE MAIN SOURCE OF LAW

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Abstract. This article explores the concept of custom as the primary source of law in legal systems around the world. It delves into the historical and contemporary significance of custom as a source of norms, rules, and regulations, and examines its role in shaping legal frameworks. By analyzing various examples and perspectives, the article aims to provide a comprehensive understanding of the importance of custom in legal systems and its impact on the development of laws and societal norms.

Introduction: The concept of custom as a fundamental source of law has been a subject of scholarly interest and debate for centuries. Customary law, rooted in the traditions, practices, and beliefs of a community, has played a crucial role in shaping legal systems across different cultures and societies. This article delves into the significance of custom as the main source of law, exploring its historical evolution and contemporary relevance. By examining the role of custom in legal frameworks, the article aims to shed light on its impact on the development of laws and societal norms, providing valuable insights into this timeless aspect of legal theory and practice.

Legal custom is a rule of behavior sanctioned by the state, which developed as a result of long-term repetition of certain actions, as a result of which it became entrenched as a stable norm.

By authorizing a custom, the state establishes a legal sanction (a measure of state influence) for its non-compliance. This is done in cases where the custom does not contradict the interests and will of the state and meets the interests of society at a certain stage of its development. State sanction is given either by reference to custom in a legal act, or by actual state recognition in court decisions and other acts of state bodies.

If we consider the sources of law from a historical perspective, then the first source preceding all others, including the law, was precisely legal custom.

Legal customs were most often used in antiquity and the Middle Ages, forming the so-called “customary law”.

Under the conditions of the tribal system, legal custom was the main form of regulation of behavior. Compliance with the custom was ensured by measures of social influence on the offender (execution, exile and others) or by the approval of measures applied to the offender by the offended, his relatives or members of the clan (blood feud).

As the tribal and neighboring communities disintegrate and the state is formed, the custom - “world order” - gradually turns into a norm of proper behavior, which presupposes the possibility of choosing the proper implementation. Gradually, the prohibitions and permissions contained in customs give way to norms that define the subjective rights and responsibilities of a person. But during the period of the formation of the state and the formation of law, there was still a pre-class perception of custom, and therefore they were obligatory not so much due to state coercion, but because members of a given community recognize them as such. Laws in that period were derived from custom or equal in force to it. For example, the Laws of Manu instruct kings to establish as law only those practices of Brahmins that do not contradict the customs of the country of families

and castes. Examples of sets of customary laws are the laws of Dracon (Athens 7th century BC), the Laws of the Twelve Tables (Ancient Rome 5th century BC) and others.

At a certain stage of development, customs (more precisely, a certain part of them) acquire a written form, which was often a consequence of the systematization of customs and did not always imply state sanction (“barbaric truths” such as Salic, Bavarian, Russian).

But gradually the custom began to be sanctioned by the state and its observance was ensured by measures of state coercion.

Thus, custom becomes legal as opposed to illegal (traditions, mores, inherited habits, etc.).

Customs were the right of a society experiencing the era of the collapse of the primitive communal system and the formation of classes and estates, since their implementation was carried out by a mechanism developed in society and without the apparatus of the state, and in the early state the social mechanism is not eliminated, but only improved or supplemented and completed, and becomes mechanism of state power. Historically, for every nation, law develops by itself as an established order of relations between people, directly determined by the perceived need to observe general rules (customs) in the process of joint participation in production, exchange, distribution and consumption. These rules were developed under the influence of the objective needs of life, the practical activities of people organized in society. This is how, in particular, ancient Indian, ancient Greek, ancient Roman, ancient German, ancient Russian, etc. law arose. This is evidenced by the laws of Manu, the Laws of the XII Tables, Salic Truth, Russian Truth - acts that mainly consolidated customs. Law initially contained what was acceptable to all members of society - general social justice. And only the strengthening of state law-making and the positions of interests of those in power often led legislation and judicial practice away from the law, its nature, its essence. Custom presupposes time-tested, well-founded norms of behavior. The legislator, naturally, strives to make his decisions sustainable. Medieval philosophy argued: “when laws are established without taking into account the customs of the people, then people will cease to obey and nothing will be achieved” [2]. The prestige of customary law, the unwritten law, in early state society remained for a very long time. This was the case in Ancient Greece, where a “new” written law appeared quite early, which extended to the sphere of judicial and administrative activities. But it was not able to cover the entire legal space in which custom had reigned for centuries, and therefore custom had a wide scope and was in effect for a long time. Orator Lysias in the 4th century. BC e. referred to Pericles in his judicial speech, advised judges to apply not only written laws to criminals against religion, but also unwritten ones, “which no one had the power to abolish yet, and in which no one dared to object” [3]. In fact, the same situation existed in other early states. The Chinese “Book of the Ruler of the Shang Region” (IV century BC) begins with a story about how King Xiao Hun reasoned with his advisers about whether he could change the ancient unwritten laws: “Now I want to change the laws so that to achieve exemplary government... But I’m afraid that the Celestial Empire will condemn me” [4]. Historian A.Ya. Gurevich, in his work “Categories of Medieval Culture,” which highlights the problem of law in a barbarian society, comes to the following conclusion: “No one, neither the emperor, nor another sovereign, nor any meeting of officials or representatives of the land, develops new legal provisions... Consequently, the development of new laws, but the selection of the wisest and fairest prescriptions from the old law - this is how the task of the legislator is understood” [5].

Hostility to new things in law existed everywhere in early states. The new laws being written down actually consisted of processed common law. The public authorities were forced to introduce new social content with great caution. To introduce a newly created legal norm (in a law, judicial precedent, normative agreement), justification was required with reference to traditions and past authorities, to ancient custom, later to the texts of Holy Scripture, to God or famous emperors, etc. It was necessary to justify that it already existed, acted, proved its validity, and is not far-fetched. The new norms had to be presented in the best possible way, tactfully. Not all customs became legal, but only those customs that expressed:

a) long-term legal practice, i.e., they developed in the process of repeated use (for example, within the life of one generation, as was typical for Ancient Rome);

b) monotonous practice, i.e. acquired a stable, typical character;

c) legal views of small groups of people, as a result of which legal customs had local significance;

d) the morals of a given society. In the understanding of Roman jurists, custom is “the tacit consent of the people, confirmed by ancient customs.” The tradition of Roman lawyers was to recognize customs as sources of law in cases not regulated by law. There was also a special law on this matter, which read: “In those matters in which we do not use written laws, we must comply with what is indicated by morals and customs.” In Ancient Rome, despite the development of lawmaking, legal customs found the widest application and had their inherent technical and legal features. The norms of customary law in Roman law were designated by special terms: mores maiorum - customs of ancestors; usus – common practice; commentarii ponifcum - customs that have developed in the practice of priests; commentarii magistratum – customs that have developed in the practice of magistrates; cosuetudo - custom.

References:

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