CUSTOMS - AS FORMAL SOURCES OF LAW. SPECIAL VIEW AT THE INTERNATIONAL TRADE CUSTOMS

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Abstract
The scientific analysis of customs is still and will continue to be relevant, especially in commercial matters, the new Civil Code consecrating it this time as well, making express reference to it.
The legislator of the new Civil Code stipulates that custom is understood as common law or tradition as well as professional usage and we note that in civil matters it uses the term "local custom" and in matters of civil or commercial contracts the term "customs".
In the present study we aim to make a theoretical analysis of customs, with special regard to international trade customs.

Keywords: *international customs, common law, tradition, binding legal rule, formal source of law, real source of law*
JEL classification: [K00]

1. Introduction

The research on the sources of law drew a line of demarcation between the source of law, in the material sense, and the source of law, in the formal sense.

In the specialized literature, the question was asked whether the legal rule is a "*free creation of human will*" or whether the legal norm is imposed on the will of people "*from the outside, through the action of existing factors prior to the act of legislation*" (Naschitz, 1969, p.19). In order to understand the process of drafting legal norms, it is necessary to unanimously admit the existence of external factors that influence the concrete act of creation of the legislator, regardless of their name: "sources of constitution", "the *given* of the right", "the nature of things", "sociological substrate of legal regulation" (Naschitz, 1969, p.20) "real sources" (social, economic, cultural, ideological, etc.).

As for the sources of law, *in a material sense*, they represent "the force from which the objective law appears", which determines its appearance, and in a broader sense, all the elements or agencies that contribute to the "germination" of the law (Cornu, 2014, pp. 978-979).

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The renowned researcher of legal phenomena, Prof. George Ripert, said that the real or material sources are the "*creative forces of law*", i.e., the configuration factors of law or the ultimate causes of law (Mazilu, 2000, pp. 218-219).

So, the real source represents the substance from which the rules of law derive, which is "the very life of human communities and their material and moral needs, the will of these communities to see the ways of satisfying these requirements regulated" (Vlachide, 1994, p. 26).

By sources of law, *in the formal sense*, is meant the external form that legal norms take, that is, the source in which they are formulated.

The purpose of the legal norm corresponds to the finality of the law, i.e., ensuring social coexistence that guides people's behavior in the direction of promoting and strengthening social relations according to the ideals and values that govern society

The legal theory of the sources of law distinguishes written sources from unwritten sources, official sources from unofficial sources, direct sources and indirect sources (Popa, Eremia, Cristea, 2005, p. 163).

2. The analysis of custom from the perspective of the general theory of law

As for custom (common law)[1] it is an unofficial, unwritten source, being an indirect (mediated) source of non-state origin, it must be confirmed by a state authority to become a source of law (Popa, Eremia & Cristea, 2005, p. 163).

The publication of customs in (un)commented collections, studies by authors who note in writing the customs or judicial decisions in which a custom was applied does not mean that they have been changed into written sources. However, their sanctioning by the state transforms the customs in the form of the texts of normative acts by changing their status from unwritten sources to written sources.

Prof. Gerard Cornu defines the custom [lat. consuetudo] as "the norm of objective law based on a popular tradition (*consesus utenditum*), which presupposes a constant and long practice (*longa diuturna invederata consuetudo*), the collective being convinced of its binding feature and having a conscience fixed on what is just and necessary (*opinio necessitatis sive necessitatis*)" (2014, pp. 283).

"The custom of the land", as it was called in the old Civil Code, is born from the repetition of the same value judgment, the same "legal idea" (Djuvara, 1999, p. 313) in a large number of successive individual situations and repeated over time, extracting what is common from these concrete causes, creating the general norm thus formed in the form of custom, with precedent value (Djuvara,

[1] The new Civil Code puts the equal sign between custom and custom, but not every custom is also legal, therefore, we believe that the legislator of the Civil Code should have used the phrase "legal custom" in art. 1 para. 6.

1999, p. 313). Thus, the custom is applied to future situations, finding a similarity between the new case and the old previous situations.

A non-unitary practice, with regard to a certain type of social relationship, cannot have as its purpose the shaping of a custom, but unitary and long-lasting practices, with regard to one and the same social relationship, but different from one region or another, can leads to the formation of different customs. That is why, in specialized literature, customs have been classified according to the territory on which the custom is applied and the number of participants, into general customs, regional customs and local customs (Ciobanu, 1991, p. 20).

As a source of law, custom has a higher value than the law, from a moral or intellectual point of view, since it is fixed and accepted, voluntarily, by the community (Vlachide, 1994, p. 26).

Therefore, the authority of custom takes away from its own value, because it could be preserved for a long time by tradition, as "law from the ancestors", compared to normative acts that have a short duration in time.

Therefore, the simple repetition over time of a uniform practice is not enough to be able to form a custom, but the belief of the collective that it complies with mandatory rules of law (*opinio juris sive necesitatis*) (Ciobanu, 1991, p. 21) is needed, being about a psychological, subjective element.

Thus, the two elements of the custom, the generalized and uniform practice as well as the *opinio juris*, represent a sequence of stages through which the same factual situations pass, in the end, resulting in time the customary norm (Diaconu,1977, p. 95). The set of these customary rules, customs or legal traditions form the consuetudinary law or the customary law (Hamangiu, Rosetti-Bălănescu & Băicoianu, 1996, p. 11).

In the sense of the current Civil Code, "customs" means tradition and professional usage (art. 1 para. 6 of the Civil Code).

In the 21st century, in our country, the legislator of the new Civil Code[2] makes express reference to customs in over 40 texts, using names such as: "customs"[3], "habits of the place"[4], "consuetude"[5].

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[2] Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part 1, no. 505/12 July 2011 with subsequent modifications and amendments

[3] For example: art. 603 regarding the rules regarding environmental protection and good neighborliness provides "The property right obliges to comply with the tasks regarding environmental protection and ensuring good neighborliness, as well as to comply with the other tasks which, according to the law or *custom*, fall to the owner".

[4] For example: art. 613 which regulates the minimum distance for trees in para. 1 provides that "In the absence of provisions contained in the law, urban planning regulations or local custom, trees must be planted at a distance of at least 2 meters from the boundary line, with the exception of those smaller than 2 meters, from plantations and fences are you coming". Also, the same phrase is used by art. 662, art. 1349.

[5] For instance: art. 1682 marginally titled "Snack sale" provides in para. 1 that "the sale under the condition that the good corresponds to the buyers' tastes is concluded only if he has made known

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The new Civil Code states that customs are formal sources of law, that is, they are applied and interpreted by the courts only to the extent that they are incorporated into the normative legal act. If the law makes express reference to them and if they are in accordance with public order and good morals (art. 1 par. 3-4), they can be applied by the courts.

The fact that courts apply a custom gives it the character as a binding legal rule (Hamangiu, Rosetti-Bălănescu & Băicoianu, 1996, p. 12).

Therefore, only through jurisprudence can the custom be legitimized or established, under the guarantee of the state, and eventually, under the pressure of sanctions, thus becoming positive law (Djuvara, 1999, p. 314).

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3. The international trade customs – as formal sources of international trade law

As for the commercial usages, (Militaru, 2013, p. 34) to distinguish them from custom, they represent "the tacit way in which the parties understood to agree as it results from a proven practice and assume continuity and constancy over time and uniformity (Macovei, 1980, p. 21).

They have a conventional character and must be proven before the courts, like any legal fact, while the custom can be invoked directly before the courts, as the normative acts refer to them.

Commercial customs find their application in the practice of international trade, especially in maritime trade, which involves port customs such as, for example: provisions of charter contracts, ship rental contracts, contracts that have as their object general or special goods (Rauschi, Popa & Rauschi, 2000, p. 24)

Some author (Hamangiu, Rosetti-Bălănescu & Băicoianu, 1996, p. 12) consider that, in commercial matters, when the law is silent and does not contain applicable provisions, "*the judge will have to apply the general or local custom*", thus considering that the custom has "a subsidiary application of the second degree", these customs filling the gap, until the legislator will regulate these situations in this way.

In the specialized literature (Diaconu, 2009, p. 8) commercial usages are classified as follows:

- Depending on their extent in space they are distinguished:
  - Internal customs applicable only within the territory of a state;
  - International customs applicable in international trade.
- Depending on their area of application they may be:
  - General commercial customs used for all international commercial relations. For instance: the customs on the goods' quality (Macovei, 1980, p. 21).
  - Special commercial customs when are applied in relation to certain areas of activity (branches), the object of the contract or the parties' professions (Diaconu, 2009, p. 8). For instance: the customs of stockbrokers or the customs used by importers or exporters of seafood, coffee, fish, etc.

- Local commercial customs applied in a certain harbour or a certain region.

The most eloquent example is represented by the international rules regarding the interpretation of commercial terms Incoterms[10] (*International Commercial Terms*), the uniform rules and customs regarding documentary credits, the General Conditions of Sale and model contracts developed under the auspices of the UN Economic Commission for Europe, the General Conditions and Standard Contracts adopted by international trade associations (Macovei, 1980, p. 22).

Mircea N. Costin and Călin M. Costin (Costin, Costin, 2007, p. 106; Dobre, 2010, p. 65) define uniform international commercial usages as "*rules through the repeated use of some contractual clauses in harmony with the customs practiced in various commercial centers and which international commercial practice has valued by operating a certain standardization and their unification, achieved through various methods, such as: the adoption of uniform conditions of a general nature, the elaboration of standard contracts regarding special groups of goods, the inclusion in a specific international contract of general delivery conditions*".

These methods for standardizing and unifying customs were created because they were susceptible to different interpretations (Macovei, 1980, p. 22). International trade customs eliminate lengthy negotiations, simplifying and facilitating the conclusion of commercial contracts (Macovei, 1980, p. 21).

The most significant are those that regulate the conditions of delivery of goods, external payments as well as insurance of goods in international transport.

As for their use, international trade customs can be inserted into contracts in the form of referral clauses or fixed clauses that can be found in standard

[10] In 1936, the International Chamber of Commerce in Paris published for the first time the INCOTERMS International Trade Rules – which included 11 international commercial terms, also known as "delivery clauses". The revised version was adopted at the CCI Congress in Vienna in 1953 and is known as INCOTERMS (1953), this being the first basic version of the rules that have international recognition, which included nine commercial terms: *Ex Works, a l`usine*; *Franco Vagon; Free Alongside Ship, Free on Board, Franco Bord; Cost and Freight/Carriage Paid to; Ex Ship, Ex quay/Duty Paid*. In 1967 two terms were added: 1. *delivered at frontier.../rendu frontiere ... /named palce of delivery at frontier/lieu de livrasion convenu a la frontiere* and 2. *delivered duty paid/rendu droits acquittes*. In 9976 was added the *FOB airport/ FOB aeroport*. In 1980 were added: 1. Free carrier.../franco transporteur ... and 2. freight/carriage and insurance paid to; Fret/port paye, assurance compromise, jusqu`a (...) also revising the term of Freight/carriage paid to (...). The Incoterms (International Commercial Terms) – the 2000 edition is added to them. The International Chamber of Commerce meeting in Paris in September 2010 launches the publication *INCOTERMS® 2010*, which establishes a practical guide to help users in choosing more easily the most suitable rules for international commercial transactions. Pursuant to these rules, in the U.S. and Canada RAFTD customs apply.

contracts and in the general conditions of delivery, but only within the limits of the internal regulations of the national legal systems.

According to the Principles of UNIDROIT (the International Institute for the unification of private law)[11], the contracting parties are obliged to respect the usages on which they have agreed (art. 1.9 paragraph 1 in conjunction with 1.1. which provides that the parties are free to conclude a contract and determine its content).

In the area of international trade law, customs are used because international conventions and the internal law of states, in this matter, do not contain sufficient regulations due to the diversity of commercial relations, customs having the purpose of filling the legislative void or specifying certain legal regulations.(Dobre, 2010, p. 66).

However, commercial usages also have a certain degree of "imprecision and uncertainty", that's why they are trying to fix them through standard clauses and their international codification. For example: some international trade customs are established by judicial and arbitral decisions, others are drafted and codified by experts from the Chambers of Commerce and Industry (Dobre, 2010, p. 67), or by international bodies such as the Paris International Chamber of Commerce (Niță, 2012, pp. 63-72).

Some international trade usages are used to establish the rights and obligations of legal subjects participating in legal relations under international trade law, others have the role of applying or interpreting the concepts used in the international trade contract.

Conclusion

As a conclusion, customs have an indisputable practical applicability in the stability of the international business circuit and it is current, enjoying a special position in the hierarchy of formal sources of law, because they address a business community.

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