ATLANTIS PRESS

Advances in Social Science, Education and Humanities Research, volume 498

Proceedings of the XIV European-Asian Law Congress "The Value of Law" (EAC-LAW 2020)

Legal Customs as a Form of Environmental Law and Natural Resource Law

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ABSTRACT

This article researches the development of a custom from a tradition and a stable rule of conduct as a result of its systematic prolonged multiple repetition for a long time, authorized by the state in a legal norm, thereby formed to a custom it becomes a legal provision. A custom becomes a full-fledged form of law only by sanctioning. There are three ways of its formalization by the state: direct, judicial, and silent authorization. The focus of the research is whether a custom can regulate social relations and be a source of law especially of an environmental and a natural resource law. A custom has played a role as the regulative measure and management of natural resources. It becomes legal when it is fixed or not fixed in the rule of law, but been applied as a legal one, when the rule of law indicates that. The main conclusion is that the custom is a rule of conduct that is widely used in any area of activities, regardless of whether it is fixed as a rule of law or not, it can be applied in the field of environmental and natural resource law, not only by the analogy of the law, as the courts have done before, but also directly. And both ways of consolidation, formal and informal ones, are taken into account in practice.

Keywords: *legal custom, environmental law, natural resource law, source of law, regulation by a custom, legislation*

1. INTRODUCTION

There are several legal systems or legal families: the Anglo-Saxon, which is based on a precedent (when a case resolved by the court in the past became an example for the similar or the same-plot cases in the future, that are solved the same way as the first one) and the Roman-Germanic (adopted Roman law), its main source of law is legislation and rule of law [1].

The main source of law for the Russian Federation is legislation, a legal act, derived from Roman law, thus, our system of law takes its basis in the Romano-Germanic legal family. Their specific is that custom or customary law is included as a form of law [2].

Historically a custom has become a rule of conduct. When such a rule of conduct is sanctioned by legislators, expressing it in legislation, it is enshrined in law, so the custom becomes legal. Thus, the legal custom is a stable rule of conduct, formed as a result of its prolonged multiple repetition, authorized by the state in the form of a legal norm, thereby it became a legal provision [3].

A custom becomes a full-fledged form of law only by sanctioning. It can be formalized by the state in several ways. Those ways are: direct authorization (the state's sanctioning in general, it is a process when the rules of custom are enshrined directly in the rule of law or refer by rule of law to them), judicial authorization (when making a decision, the court refers to the custom, fixing it in the judicial act which is a form of detection and recognition of the norm done by a public authority – a court) and "silent" one (made by people, when customs arise as a sense of a certain behavior in certain situations existing in the community of people, interacting with each other for a long period of time and its non-performance or conducting contrary to it is condemned by society) [4].

2. MATERIALS AND METHODS

Research on various issues, related to environmental law and natural resources law, requires a comprehensive methodological approach and the use of relevant legal frameworks and concepts. Therefore, in this paper, the authors employed a number of special judiciary methods (such as the method of interpreting the norms of environmental and natural resources law, normative dogmatic and formal legal methods) in order to examine

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legal customs as a form of environmental law and natural resources law. The broad methodological approach and the use of an extensive regulatory framework allows us to reach scientifically sound conclusions, and enable us to make inferences that have practical and predictive potential. A thorough review of the relevant literature discusses some fundamental works on the general theory of law, as well as the studies in the field of international law, among many others.

3. RESULTS

It is important to realize that if some behavior is contrary to the general principles of law, especially reasonableness and justice, it will not become a custom since the majority will not accept it, a tradition cannot be imposed by force if it is contrary to human nature.
According to A. Martens, the international customs are the rules and procedures that are established in international relations on the basis of their constant and uniform application to their essentially identical cases… Signs of international custom are: the long existence of practice; uniformity, permanence; the universality of practice; conviction of the legitimacy and necessity of the appropriate action [5].
L. Oppenheim noted that custom is the original source of international law and treaties as a source of international law originating from custom [6].
According to Jean-Louis Bergel, the General principles may be guiding or corrective [7].
Custom played a role as the regulative measure and management of natural resources as a part of the relationship with nature in developed areas always taking into account geographical and climatic characteristics, playing the role of a specific form of protection, as well as a preventive measure, it was unwritten, but respected by all members of society and been supported by the force of coercion. The offender could be punished on behalf of society. Been enshrined in the rule of law, and been violated, it led to the mandatory adverse effects - an imposition of sanctions.
Historically, all rules were originally customs, later they were legitimized by the state and became legal customs or rules of law. Important customs were incorporated into legislation in a systematic manner. All the earliest legal acts are the examples of collections of customs, The Laws of Hammurabi, The Laws of Manu, The Laws of 12 tables. In Russia, it is *Russkaia Pravda*, adopted in 1016. It focused on the protection of the right of ownership directly and on the environment indirectly.
Its norms provided a huge penalty for breaking the boundary signs in forests (those signs were installed to indicate the boundaries of land plots), a huge penalty imposed on a violator for violating a *bort* (a hollow tree with the honey of wild bees), for plowing the field boundaries and for the destruction of the tree with boundary mark. This penalty imposed on a violator was even greater than for killing a peasant (*smerd*).
There was a prohibition of destruction of the wood, which was in property of the person having the greatest power - the *knyaz*.
It is appropriate to make an analogy to modern law: according to art. 8 of the Forest Code of the Russian Federation, forest areas within the lands of the forest Fund are in Federal ownership [8].
Later, we find a division of forests into different categories, for example, the *Sobornoye Ulozheniye* of 1649 provided for a capital punishment for cutting trees in the protected forest. Protected forests were a means of protection against raids that is why in fact it was aimed at the defense of the state (it is clear that cruelty of a sanction provides a defensive function).
Reserved forests at the moment have acquired a different meaning. For example, the need to protect valuable and precious forests and specially protected areas of forests, where the strictly limited activities, related to carrying out work on the geological study and development of hydrocarbon deposits, are allowed, and the using of subsoil resources should be according to the licenses obtained before December 31, 2010, those activities are permitted for a period not exceeding the term of validity of such licenses (under art. 8.2 of the Forest Code of the Russian Federation), subdivision of forests into species for the intended purpose and the establishment of categories of protective forests depending on their useful functions, under art. 1 of the Forest Code of the Russian Federation [8], as well as focus on the priority reproduction of valuable data in accordance with the law under art. 26 of the Federal Law of 04.12.2006 N 201-FZ "On the introduction of the Forest Code of the Russian Federation" [9]. *Russkaya Pravda* envisaged a fine for the destruction or damage to the board (for cutting down such a tree under art. 75), under art. 69 *Prostrannaya Pravda* entrenched a fine for stealing beaver and fish from another person's nets.
The custom introduced into the law was the collection of *yasak*, a tax collected from the peoples of the Volga region, Siberian region, and the Far East region, been collected in kind of furs. And there are many examples that could be traced in history as the development of legislation.
Let us consider a legal custom as a form of law and a source of natural resource and environmental law in detail.
The Statute of the International Court of Justice describes customary international law as "a general practice accepted as law".
Previously, Russian legislation did not contain such definition as "custom", but only "business customs" or "customs of trade" under art. 5 of the Civil Code of the Russian Federation [10]. "Business customs" or "customs of trade" were recognized as the rule of conduct that was established and widely applied in any area of business activity, regardless of whether it was set forth in any document, even if it was not stipulated by the legislation (under art. 5 of the Civil Code of the Russian Federation, as amended on December 29, 2012, invalid now) [10].
Now the custom is recognized as a rule of conduct that has been established and is widely used in any area of business or other activity, regardless of whether it is recorded in any

document (article 5 of the Civil Code of the Russian Federation) [10].

As it was explained by the Plenum of the Supreme Court of the Russian Federation in Decree No. 25 of June 23, 2015, “On the court’s application of a provision of section I of part one of the Civil Code of the Russian Federation”, a definition of a ‘custom’ which could be applied by a court within resolving a civil dispute, by virtue of article 5 of the Civil Code of the Russian Federation should be understood as a widely used rule of conduct exercising civil rights and exercising civil obligations not only in business, but also in other activities, not stipulated by law, but been established and that could be defined in its content [11].

Also, the Supreme Court of the Russian Federation indicated that the custom is applicable as recorded in any document (published in the press, set out in a court decision in a particular case containing similar circumstances, attested by the Chamber of Commerce and Industry of the Russian Federation), and existing independently of such fixation ... According to clause 2 of article 5 of the Civil Code of the Russian Federation, customs contrary to the basic principles of civil law, as well as provisions of laws, other legal acts or contracts, cannot be applied [10].

Thus, unlike the previous edition, the scope of customs has been expanded; now they can be used not only in business but also in other activities. Thus, custom can be applied in the field of environmental and natural resource law, not only by the analogy of the law, as the courts have done before, but also directly.

There are examples of direct consolidation of the use of customs in environmental and natural resource law.

By virtue of the provisions of art. 11 of the Forest Code of the Russian Federation citizens have the right to stay in the forests for free and to harvest and collect wild fruits, berries, nuts, mushrooms, and other suitable for eating resources (food forest resources) and non-timber forest resources for their own needs [8].

This is one of the examples of the formation of custom, elevated to the rank of legal custom. Part 2 of the same article refers to the obligation to respect the fire safety rules in forests, rules of sanitary safety, reforestation rules, and rules of forest care, which are necessary for the rational use and protection of forests [8].

By virtue of the provisions of art. 221 of the Civil Code of the Russian Federation in accordance with local custom when berry picking, catching fish and other aquatic biological resources, picking up or harvesting other publicly available things and animals are allowed in a certain territory, the person who has collected them has the ownership of them [10].

The water legislation also enshrines the right of the common use of water objects of general use for personal and domestic needs (article 6 of the Water Code of the Russian Federation) [12].

According to art. 13 of the Federal Law of July 24, 2002, No. 101-FZ “On the turnover of agricultural land”, a land plot can be formed within the decision of the general meeting of the participants in common ownership, if the project for land survey, the list of owners of the land plots and the size of their shares in the right of common ownership of land plots were approved by this decision [13]. The formation of such a land plot is based on the customs prevailing in the area. In addition, when a land plot is divided between the owners of a building located on it, such a division takes place not only in proportion to the ownership rights to the building but also according to the established order of use of the plot, in fact, within the custom of using of this land, if such a division meets the other legislative requirements. An allocation of land in kind can be done the same way when it is based on the land share of the land user.

The construction of fences along the border of the land plot is not imputed duty of the land user, but in fact, it is a custom, manifested in fencing the land plot from possible claims of third parties.

Art. 23 of The Land Code of the Russian Federation contains a general rule as the provisions of the establishment of a public easement for haymaking, grazing farm animals in accordance with the established procedure on land plots in terms, the duration of which corresponds to local conditions and customs [14].

Procedural rules also have a provision of guidance on the use of customs. According to art. 11, 23 of the Code of Civil Procedure of the Russian Federation the jurisdiction of the judge of the peace is the cases on the determination of the use of property; traditionally, when resolving such disputes, the judge of the peace resolves them on the basis of the established usual order and the basis of customs of trade-in cases stipulated by the regulatory legal acts [15].

There are similar rules in the legislation of an arbitration procedure (in art. 13 of the Code of Arbitration Procedure of the Russian Federation), in art. 6 of the Federal Law of July 24, 2002, No. 102-FZ “On Arbitration Courts in the Russian Federation”, in art. 28 of the Law of the Russian Federation "On International Commercial Arbitration” [16].

There are many customs that have not become legal, which are common in the territories with a predominance of the population with traditional culture, in the mountainous areas of the Russian Federation. For example, in the Republic of Dagestan the Laws "On Land", "On Land Reform", "On Peasant (Farm) Farming" reflect trends in the development of land law in the direction of rational use of land, support for traditions and customs, due to the peculiarity of the region (not a huge, but small spots of land in the mountains, terraced agriculture, multinational composition, respect for religion and elders) [17].

The development of traditional culture is also associated with a particular religion. There is a connection with the way the population treats the environment in areas where Buddhism prevails, in which nature takes on special significance, for example, in Buryatia, Kalmykia, and Tuva. There is widespread practice - the consolidation of the possibility of using a custom to lead a traditional way of life that is the historically established way of life support of small peoples based on the historical experience of their ancestors in the field of environmental management, the distinctive social organization of residence, an original culture, preservation of customs and beliefs [18].

According to art. 1 of the Federal Law of 07.05.2001 No. 49 “On the Territories of Traditional Nature Use of Russia's northern indigenous and minority peoples, Siberia and the Far East of the Russian Federation” the customs of the indigenous peoples of the North, Siberia and the Far East of the Russian Federation are the traditionally established and widely used rules of the traditional nature management and traditional way of life of the indigenous peoples of the North, Siberia and the Far East of the Russian Federation [19]. This law establishes the priority of the legal regulation of relations, the customs of small nations if such customs do not contradict federal legislation and the laws of the subjects of the Russian Federation. According to art. 13 of this law, the usage of natural resources located on the territories of traditional nature management is carried out by persons that belong to Russia's northern, Siberian and the Far East indigenous and minority peoples to ensure the maintenance of the traditional way of life in accordance with the legislation of the Russian Federation, as well as the customs of those peoples. According to art. 4 of these Federal Law decisions on the internal organization of the community of Russia's northern indigenous and minority peoples, Siberia and the Far East of the Russian Federation and the relationship between its members can be established on the basis of the traditions and customs of those peoples if they do not contradict federal legislation and the laws of the constituent entities of the Russian Federation and do not prejudice the interests of other ethnic groups and citizens [19].

According to art. 14 of the Federal Law “On Guarantees of the Rights of Indigenous Minorities of the Russian Federation” when a court considers cases with participation of persons that belong to Indigenous Minorities as plaintiffs, defendants, victims or accused, the traditions and customs of these peoples can be taken into account, contrary to federal laws and laws of the Russian Federation [20].

A similar custom is enshrined in article 30 of the Forest Code of the Russian Federation, where it is established that in places of traditional residence and economic activity of persons that belong to indigenous peoples of the North, Siberia and the Far East of the Russian Federation and leading a traditional lifestyle, these people have the right of free provision of wood for their personal needs; when forests are used in the traditional habitat of small indigenous peoples, the Forest Code guarantees the protection of their traditional way of life (art. 48) [8].

According to Article 25 of the Federal Law of 20.12.2004 No. 166 “On Fisheries and the Conservation of Aquatic Biological Resources”, in order to ensure the traditional way of life and the traditional economic activities of the indigenous minorities of the North, Siberia and the Far East of the Russian Federation they can make fisheries without providing with a fishing area (providing with a fishing area is obligatory for fishing under Russian legislation). It is carried out without permission for the extraction (catch) of aquatic biological resources, with the exception of the extraction (catch) of rare and endangered species of aquatic biological resources [21].

According to article 54 of the Water Code of the Russian Federation, persons belonging to the indigenous peoples of the North, Siberia and the Far East of the Russian Federation, and their communities in the places of their traditional residence and traditional economic activity have the right to use water bodies for traditional nature management [12].

The Federal Law of July 24, 2009 No. 209 “On Hunting and the Conservation of Hunting Resources and on Amendments to Certain Legislative Acts of the Russian Federation”, establishes that hunting in order to ensure the maintenance of the traditional lifestyle and the implementation of traditional economic activities is carried out freely (without any permits) in the amount of hunting resources needed to meet personal consumption [22].

4. CONCLUSION

All rules of law, given above, are the examples of previous traditions that have been developed for a long time and their usage is a result of their systematic repetition. This is the way how a tradition becomes a custom.

There is a pattern reflecting the fixation of the custom in the rule of law after a long period of testing, adopting and accepting of the custom by society. It happens only when a custom does not contradict the moral characteristics of this community of people, tacit, it will be fixed in the legal norm. Those customary norms of behavior, which are traditional for a particular locality or community of people, become norms of law as a result of their consolidation.

The custom becomes legal when it is fixed or not fixed in the rule of law, but been applied as legal when the rule of law indicates that. Thus, there are two kinds of a custom, a legal one, when it is enshrined in the rule of law as a result of a legislative consolidation, and custom, that exists and prevails in the area, when the law, indicating its presence, refers to the possibility of its applying even if it is not enshrined in the rule of law. Both of them are a form (source) of environmental law and the natural resource law, taken into account in practice.

ACKNOWLEDGMENT

This article was prepared with financial support from the grant of the President of the Russian Federation No. MD-721.2018.6.

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