
M. Pleniuk, Doctor of Law, Professor, Head of the Contract Law Sector of the Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine

CUSTOMARY DUALISM: NORMATIVE PRESCRIPTIONS AND LEGAL FACTS

Abstract. *The article is devoted to the analysis of the custom in the private Law of Ukraine as a normative prescription and legal fact. It has been established that the practice of dualism manifests itself in the fact that in the mechanism of legal regulation of civil relations, the custom, on the one hand, can act as a regulator of these relations, and on the other – a prerequisite, sometimes the basis for the emergence, change or termination of civil legal relations.*

Key words: *custom, legal conditions, customary conditions, legal fact, normative prescriptions, normative-legal act, civil relations.*

Custom – typically a stereotype – is characterized by constant, familiar behavior of a social group of people, communities, individual citizens, etc. These are the rules that, through a repeated application, enter into the habitual circulation of people and thus regulate the behavior of society. Custom is always attached to the requirement of tradition and is expressed in a formula: «Do so because others have done so before you» [1, p. 113].

Today, the doctrine knows more than enough examples of customs in law, including their transformation into a legal form. It is believed that the conditions

for the sequence of transformation of customs into law are religion-morality-custom-law.

Exactly on the basis of such approach, on the basis of generalizations of the transformation of custom in the legal system at the end of XVIII century at the beginning of XIX century in Germany under the influence of doctrines of G. von Hugo, C. Savigny, G. Puchta and others the relevant historical school was formed.

On Ukrainian soil, in particular in Western and Eastern Galicia, in the second half of the XVIII century, there was a legal act, which was based on a number

of customs in force in Galicia. Those customs became the basic act for further improvement of the civil legislation in accordance with the style of presentation and taking into account natural law.

In his time, E. Ehrlich wrote that law is a set of established, everyday customs and principles of justice to which all members of society must adhere. At the same time, the law should not be understood as a set of orders and norms emanating from the sovereign power, because the main guarantor of the law is the force in the form of state power. The custom takes the form of public opinion, but it does not always harmonize with politics [2, p. 208]. In turn, Ed. B. Tylor draws attention to the normativity of custom and concludes that the emerging social relations are first regulated by traditions, customs that evolve depending on economic, national, political, religious factors of life and are transformed into norms [3, p. 396].

The modern understanding of customs in the legal space, its normative feature is not a new challenge in scientific discussions. Law regulates relations – this is an axiom. It is also known that the law cannot regulate any emerging social relations. The regulator of such relations, starting from Roman law to the present day, is a social institute in the form of customs, traditions and the like.

According to Article 7 of the Civil Code of Ukraine, civil relations can be regulated by customs, in particular by the customs of business circulation. According to R. A. Maidanik, the custom is the primary or basic source of Ukrainian

law, from which all other sources have come, and which is the critical point of all other sources of law [4, p. 44].

According to the above rule of Art. 7 of the Civil Code of Ukraine, the following features of custom are highlighted in the legal literature: 1) it serves as a rule of conduct, i.e. a social norm establishing necessary, desired or possible conduct of participants of social relations under certain conditions; 2) a customary rule of conduct should be adopted in a certain area of civil relations, i.e. in order to obtain the status of custom, this rule should «work» towards regulation of civil relations in a certain area for a certain, relatively long period of time; 3) this rule should not be established by acts of civil law. [5, p. 98].

In our opinion, civil law custom as a source of law has a legally subordinate role in the system of sources of civil law in Ukraine. After all, customary law as a form of law fills in legal gaps, if necessary. However, customs are queued up for the use of forms of law after regulations and agreements. For example, in the sphere of sports, an example of legal custom as a basis for private legal relations is the «Laws of the Game» (1997), which were adopted by the International Football Association Board (IFAB) [6]. There are other documents that set out customs, including business customs. They have been in force in Ukraine for a long time; there are also those that are “pending” ratification.

As for international customs in the field of sports, it should be noted that, unlike international treaties, taking into account all the variables, and since the

introduction of a unified practice, they are formed over a long period of time and are mainly of verbal nature. A characteristic feature of international custom is the recognition of custom as a source of law by subjects of sporting legal relations. Such an approach, as well as the characterization of the concept of international custom as a source of law, are provided in Article 38 of the Statute of the International Court of Justice of the UN. In particular, it refers to the fact that international custom is the proof of general legal practice which is recognized as a legal norm [7].

From the above, it is possible to underline that the legal custom, including international, takes a special place in the hierarchy of sources of law for private legal relations in the area of sports. Despite the fact that by its weight and importance legal customs are inferior to domestic legislation, international treaties and other sources of law, we believe that in some cases they are the basis for the emergence of private legal relations in the field of sports and the source for the legal regulation of these relations. At the same time, it must be noted that the application of customs, including international ones, in the field of sport is restrained. This partially leads to problems concerning the non-recognition of existing private legal relations in the sphere of sport in Ukraine.

As for the customs in the business sphere, it should be noted that the list provided by the authors [8, p. 77] includes: simple trade customs, classic well-established customs of trade activity, customs of business activity, which

are reflected in corporate codes of conduct, and the like. In Ukraine, the most common is the International rules of interpretation of commercial terms (*Incoterms*), which are used both in the conclusion of foreign trade agreements (contracts) and in domestic civil circulation.

Thus, the importance of customs as a form of law and social regulators, in general, is evident. However, we would like to draw your attention to the fact that the possibility of their application in everyday business activities today is most likely constrained due to the lack of relevant experience.

The Chinese model is appealing to us with regard to the relationship between law and custom. According to Chinese jurisprudence, it is important that the custom «li» does not conflict with the positive law «fa». The disharmony between these categories is considered to be a public and state affliction [9, p. 250].

It is worth noting that in Ukraine, for example, in corporate relations, not only the principles of corporate governance are taken into account for their effectiveness regulation, but also the effectiveness of social regulators, in particular, customs (business customs) and others. Corporate custom, as a rule, is understood to be a custom, the application of which is ensured by corporate action, incentives or sanctions. Corporate custom should be distinguished from those that represent a moral norm, as a corporate custom is a rule developed through the constant uniform repetition of actual relationships. For example, it is customary to wait for 20 minutes for all mem-

bers of a general meeting and, if the majority of the members fail to appear, to take certain actions in accordance with the statutes. On the other hand, the customary rule, or legal custom in the system of sources of law, is characterized by a number of features that distinguish it from other civil law regulators.

In T. V. Kashanina's opinion, the theoretical definition of corporate custom should be interpreted taking into account the application of rules, which are provided by measures of influence on the part of the corporation (encouragement, sanctions, etc.). Therefore, a corporate custom is a rule based on the constant and uniform repetition of any actual relations. It is characterized by the following features: 1) connection with long and uniform observance of known rules that have become a habit; 2) mass enforcement; 3) the requirements of this rule are extended not only to others but also to oneself; 4) it rarely contradicts the norms of morality and state law and order [10, p. 90].

Today it is indisputable that customs, in particular, business customs, are widespread, but most of them are concentrated in the sphere of private international law. Custom is local in nature since it always refers only to a certain area of civil relations (subjects, location, type of activity, etc.), e.g., business customs – sphere of business activities, port customs – port activities, maritime customs, etc.

Unfortunately, we have to admit that the codes of corporate governance (referred to in the Article 33 of the Law of Ukraine «On Joint Stock Companies»

[11], which is understood as a set of principles, standards or rules of conduct relating to the issues of company management and control) are hardly applied in Ukraine. On the other hand, the practice of their implementation, initiated by the United Kingdom back in early 1990, has been actively supported by other countries for many decades [12, p. 366].

In the informational letter dated April 7, 2008 No. 01–8/211 the Supreme Economic Court of Ukraine clarified the custom (the custom of business activities). It is specified that in case if a custom is recognized by the economic court as generally known based on part 1 of article 35 of the Commercial Procedural Code of Ukraine (CPC) it does not require proving. Otherwise, the presence of custom, its application in a certain sphere of civil relations, on a certain territory, etc. according to Article 33 of the CPC of Ukraine shall be proved by the party that refers to custom as a basis for its demands and objections. The established practice of the parties at the performance of the obligatory reinsurance contract on sending of messages on the occurrence of an insured event by e-mail is given as an example [13]. Without delving into the discussion of the distinction between legal customs, business practices and the practice of established relations, we should note that business practices and/or customs, which play the role of additional regulators of corporate relations, are introduced within a certain professional group or a certain type of professional activity. At the same time, in case of the formation of business practices, participants try to fix them in ap-

appropriate documents, introducing their binding effect in the practical activities of the organization. For example, the Principles of Corporate Governance approved by the State Commission on Securities and Stock Market dated July 22, 2014 No. 955 [14], which have no effect of a regulatory act but provide a guideline for the management of a joint-stock company in accordance with international standards. The content of the said principles discloses the essence of the procedure for the joint-stock company's management bodies to exercise their powers of the system of control over their financial and economic activities, information disclosure, observance of the shareholders' rights, exercise of their rights in relations with the relevant bodies of joint-stock companies and the like.

However, given the positive attitude towards customs in the private law doctrine, it is necessary to note the ambiguous approach of the legislator. Thus, in the previous version of Part 4 of Art. 265 of the Commercial Code of Ukraine it was noted that the terms of supply contracts should be laid out by the parties in accordance with the requirements of the International rules «*Incoterms*». Obviously, such mandatory prescription did not stand the test of time, and therefore, in 2012, amendments were made, according to which the parties have the right to use well-known international customs, recommendations, rules of international bodies and organizations to determine the terms of supply agreements unless it is not expressly or exceptionally prohibited by the Code or the laws of Ukraine. In our opinion, such

approach of the legislator is appropriate, because there are no grounds to declare an agreement invalid or not concluded only if no reference to Incoterms rules is made (Clause 3 of the Information Letter of the Supreme Economic Court of Ukraine dd. 07.04.2008 No. 01/8/211 «On some issues of practice of application of the Civil and Commercial Codes of Ukraine»).

Hence, it can be summed up that the fixation of certain rules of conduct in corporate relations by itself is not proof that particular rules represent a custom (a custom of business activities), etc. After all, according to Article 630 of the Civil Code of Ukraine, standard terms and conditions of a certain type of contract, promulgated in the established order, may be applied as business practices only if they meet the requirements of the Article 7 of the Civil Code of Ukraine. In corporate legal relations, a custom, including the custom of business activities, etc., is provided as an additional regulator. After all, most of the provisions of the Civil Code of Ukraine, in particular Articles 526, 527, 531, 532, 538, 539, 613, 627, 652 and others, do not determine the imperatively appropriate rules of conduct but only indicate their existence among the usual rules. In most cases, the parties are given the opportunity to regulate their relations independently. And only if such an opportunity is used independently, and if there is no regulation by the law of the contract, etc., the usual rules apply.

The above approach of applying customary rules is retained in foreign legis-

lation. For instance, Polish corporate law provides that principles of soft law, i.e. provisions which are not generally binding (customs, corporate governance rules, court practice, legal doctrine, as well as the law contained in contracts, provisions of contracts on the application of companies, charters, acts of bodies) should also be considered as sources of company law [15, p. 125].

Considering a custom as a form (source) of law and as a legal fact, we come to the conclusion that custom is formed on the basis of its recurrence, mass performance within the limits of moral norms, rather than «as prescribed». On the other hand, customary conditions, for example, in corporate governance, are considered to be generally accepted rules that facilitate the accumulation of collective experience, experience in con-

ducting interviews, cooperation agreements and the like. Such customary rules may not be considered legal facts and may not serve as a basis for the emergence, modification or termination of civil law relations.

Given this, we conclude that the duality of custom in private law is manifested primarily in the fact that in the mechanism of legal regulation of civil relations, custom, on the one hand, can act as a regulator of these relations, and on the other – a prerequisite, sometimes the basis for their emergence, change or termination. Non-observance of customs, i.e. any action (inaction) or event reflecting socio-individual, concrete and actually existing circumstances of reality, will be considered a legal fact, the occurrence of which will result in legal consequences for the subjects.

References

1. Общая теория права и государства. Учебник. Под ред. В. В. Лазарева. Москва: Юристъ, 1996. С. 113.
2. Поздняков Э. А. Философия государства и права. Москва, 1995. С. 207–210.
3. Тайлор Эд. Б. Антропология (Введение к изучению человека и цивилизации). Пер. с англ, док. И. С. Ивина с предисл. П. Л. Лаврова. Изд. 3-е, сверенное с последним английским изданием. С.-Петербург, 1908. С. 396–397.
4. Майданик Р. А. Система источников гражданского права Украины. Актуальні проблеми цивільного, сімейного та міжнародного приватного права (Матвеевські цивілістичні читання). Матеріали міжнародної науково-практичної конференції: у 2-х томах, Київ, 19 жовтня 2012 року. К.: ТОВ «Білоцерківдрук», 2013. С. 37–46.
5. Погрібний С. О. Механізм та принципи регулювання договірних відносин у цивільному праві України: монографія. К.: Правова єдність, 2009. С. 98–99.
6. Правила гри у футбол. URL: <http://www.rules.com.ua> (дата звернення: 03.10.2018).
7. Устав Организации Объединённых Наций и Устав Международного суда. URL: http://zakon.rada.gov.ua/laws/show/995_010 (дата звернення: 02.10.2018).
8. Методологія дослідження проблем цивільного права та процесу: матеріали наук.-практ. конф., присвяченій пам'яті професора О. А. Пушкіна (26 травня 2012 р.). Харків: Харківський національний університет внутрішніх справ, 2012. 465 с.
9. Кычанов В. И. Основы средневекового китайского права. Москва, 1976. С. 249–253.

10. Кашанина Т.В. Корпоративное право (Право хозяйственных товариществ и обществ): учеб. для вузов. Москва: Изд. группа НОРМА-ИНФРА-М. КОДЕКС, 1999. С. 89–90.
11. Про акціонерні товариства. Закон України від 17.09.2008 р. (в редакції від 11.06.2017 р.). URL: <http://zakon2.rada.gov.ua/laws/show/514-17> (дата звернення: 15.09.2017).
12. Корпоративне право України: підручник. Київ. Юрінком Інтер, 2010. С. 366.
13. Постанова ВГСУ від 04.08.2009 р. №37/111. URL: www.arbitr.gov.ua (дата звернення: 14.10.2018 р.).
14. Про затвердження Принципів корпоративного управління від 22.07.2014 р. №955. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/KL140337.html (дата звернення: 16.12.2018).
15. Корпоративне право Польщі та України: монографія / Васильєва В. А., Гербет Анджей, Ковалишин О.Р. [та ін.]; за ред. проф. В. А. Васильєвої. Івано-Франківськ, 2016. 377 с.

Published: Приватне право і підприємництво. 2019. Вип. 19. С. 55–58.