Role of legal customs in the system of sources of law

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Abstract: This article discusses the sources of law, its components, legal customs, legal contracts, normative legal documents, and the stages of their development.

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The study of legal custom as one of the oldest sources of law, its nature and nature of application is important not only to eliminate shortcomings of modern legislation, but also for law enforcement practice.

In order to create effective legal regulation, the legislator cannot but take into account the principles of customary law. Historical experience of formation legal custom in the world legal system shows its significant influence on such important segments of legal science, such as law of obligations, business and trade law and others.

The question of the definition of international legal custom causes no less controversy. As a rule, in science such a custom is considered in two main senses: as social norm and as a source of law.

On the example of these branches of legislation, we can trace the colossal influence legal custom for the regulation of commodity - market, debt, property and other relations, considering the genesis of these relations and those customs that eventually became laws or are widely used on a par with the law at present time.

As Yu.P.Brovka notes, international (internationally legal) custom should be considered as one of the main sources of international law. It is a well-established practice of international relations used by states and other subjects of international relations for a long time. law, with awareness of the legal necessity such a practice. At the same time, the author notes that it is the presence of opinio juris that makes such practice mandatory for use [1;3].

Delving deeper into the historical roots of the application customs and their further consolidation in legislative acts, attention should be paid to the study by legal scholars of two important elements - personal and property principles in the essence of responsibility for breach of obligation, as well as such the oldest common among most peoples legal custom as a blood feud.

In our opinion, the above definitions are internationally legal custom affect the main essential features of the phenomenon under consideration, however, they are not able to fully reflect the specifics given source of international law. In particular, one cannot agree with minimizing the value of stereotyping legal behavior in the formation internationally legal custom.

The development trend of civil liability for breach of obligation in its historical development showed the transition from the right of the creditor to the person debtor as a whole to the cessation of personal domination. At first, personal claims evolved into property claims, and then only into obligation claims. by the creditor on the property of the debtor.

How appears to be international legal custom is not limited to the practice of international communication, since far from any examples of international practice communication can be safely called internationally legal customs. So, for example, the practice of communication between two specific states that have not received the unequivocal support of other states and are not used by them in their own bilateral or multilateral relationship, can hardly be named internationally legal custom. [2;1]

Legal awareness in legal science viewed as a species whose property is determined by a special fika of the area of the reflected social. reality. “Jurisprudence is part of (type) of public consciousness, its content opinions are attitudes, beliefs, ideas related to law”.

Legal consciousness, as well as consciousness in general is also a tool for changing social reality in order to satisfy needs, implementation of social interests. But this general formulation functional purpose of consciousness, - according to V.P.Tugarinova, - should be specific because it includes includes several aspects, expressing from relatively different functions". Therefore, in our opinion, the most fruitful legal research can be carried out through the analysis of functions that in their system unity express the essence of the phenomenon.

Shows one of the most important the honor of collective consciousness is the norm activity. It is in this context that consider such forms of normative consciousness, such as religious knowledge, moral and ethical consciousness and etc. Normative in nature is there is also public legal consciousness.

The legal consciousness of society expresses the social purpose of law, the existence the formation of which is impossible outside of consciousness. According to the exact remark of I.A.Pokrovsky’s right “has its general purpose of regulation of interhuman relations”.

As we have already pointed out, the regulatory properties of legal consciousness stem from the social nature of consciousness. Therefore, based on the scientific interpretation of the phenomenon of “consciousness”, the content of the category “legal consciousness” should be interpreted not only on the basis of its understanding

as a reflection of the external, but also from the understanding of the social nature of this phenomenon.

Legal consciousness as such (regardless of the conditional gradation accepted in legal science into public and individual) is a venous, a necessary attribute of organized in state forms society. In this sense, legal consciousness is always social in its essence, as in principle any form of consciousness is social. Public character every form of consciousness follows already from the very understanding that "my relation to my environment is my consciousness", which, on the one hand, "there is only only awareness of the nearest sensual perceived environment, ... and on the other hand, one hundred crown, this consciousness of the need to enter into relations with surrounding individuals is the beginning of the realization that that a person generally lives in society".

The study of consciousness (respectively, legal consciousness as its specific manifestation) as a functional systems suggests the possibility of different approaches. Considered in its various manifestations of legal consciousness, acting as an object of research, it can be reflected and modeled in the mind of the researcher in different ways, act as that functional system, structure and elements which are consistent with the set objectives and research goals. "Being complex in structure, At the same time, legal consciousness is multifunctional in terms of the them roles".

Rational (conceptual) images in abstract form reflect the most common and essential aspects, connections and relations of the objective world, inaccessible directly to the sense organs. Rational images are formed in the process of cognitive activity, which can be considered as figurative thinking. In this context, the formation of an image (figurative thinking) is a specific method of comprehension of reality. It is a process of cognitive activity aimed at reflection of the essential properties of objects (their parts, processes, phenomena) and the essence of their structural relationship.

Images have a characteristic property, which manifests itself in the fact that acquaintance with a finite number of phenomena from of the same set makes it possible to recognize an arbitrarily large number of its representatives. Examples of images can be: river, sea, liquid, society, state, etc. As an image, one can also consider some a set of states of the control object, and this whole set of states is characterized by the fact that to achieve a given goal, the same impact on the object is required. Images have characteristic objective properties in the sense that different people learning from different material observations, mostly the same and independently classify the same objects. It is this objectivity of images allows people the whole world to understand each other.

Legal understanding as a function of legal consciousness is expressed in the knowledge of legal phenomena. The definition of legal understanding through the

category of “cognition” was proposed by M.I.Baitin, who In particular, he pointed out that legal understanding is nothing more than “scientific knowledge and explanation of law as peculiar and relatively solid, holistic, systemic phenomena of the spiritual life of society”.

Based of this approach P.A.Ol proposes to consider legal understanding in two aspects: firstly, as a specific scientific social process knowledge of law, its essence, justification, leading principles and features; secondly, as a scientific category, which was the result of social activity, scientific activity and took its place in the science of jurisprudence.

Legal knowledge contains not only concepts, but also known objective laws functioning and development of legal phenomena, as well as law in general (as a social phenomenon). These revealed laws are represented in consciousness in the form legal ideas.

V.P.Malakhov identifies the following properties of legal ideas:

1) self-evidence - ideas are not derivable in a rational way;

2) self-sufficiency - ideas are not only do not need justification, are not a consequence of something, but also alien to the search for their foundations;

3) universality - ideas permeate the whole variety of social life, expressing it as a whole, and implemented in every single act, action, “as if present in them.” In each specific phenomenon, legal ideas “appear as essences of law”;

4) programmatic character - ideas act as practical installations;

5) stabilizing character - “in the variety of phenomena of legal reality, they appear as their cultural, historical and universal absolute meaning. They are those spiritual and cultural invariants with which real societies are always conformed.

Through assessment expresses a subjective attitude approach to the corresponding phenomenon, a certain characteristic is given to it, it is considered in terms of satisfaction addressing our needs, interests, goals, etc. It should also be noted that assessment of individual moments can be considered as an element of cognitive activities, to some extent feature-defining fold existing ideas about the phenomenon as a whole.

Through values, a positive or negative value for a person and society of the objects being evaluated. Exactly this property of the phenomenon - “value”, which allows it to act as a specific criterion of positive and negative, predetermines its special significance in the legal sphere.

In the social sciences, the values of tradition rationally divided, first of all, into subjective and subjective. subject values act as properties of an object, but they are inherent in it not by nature, not simply because of the internal structure of the object itself, but because it involved in public life man and became, by virtue of this, the bearer of certain social relations. In relation to the subject (person), values serve as

objects of his interests, and for his consciousnesses play the role of everyday landmarks in objective and social reality, designations of his practical relationship with others phenomena.

Along with subject values, which are objects on interests directed at them, as values are also some phenomena of social consciousness, expressing these interests in an ideal form (subjective values). Such values include, for example, the concepts of goodness and evil, justice and injustice, ideals, moral standards and principles. These elements of consciousness are not just describe some real or imaginary phenomena of reality, and you evaluate them, approve or condemn them, require their implementation or elimination, i.e. are normative character.

Various social values rule, are embodied in the rules of law, in an explicit or implicit form values are present in political declarations, influence the processes of making managerial decisions, constitute the basis of legal education, influence the choice of ways to resolve legal conflicts. “Penetrating social being and social consciousness, social values serve as sources, a kind of “control standards” of motivation of people’s actions. Values in a society are formed as an integral part of its socio-cultural sphere, evolving in as a process of the unconscious self organization of society as a whole”.

In this connection, it should be noted that in the process of legal regulation, there is a constantly manifesting subjective side, without taking into account which it is difficult to understand why people within similar socio-economic or historical circumstances, belonging to the same stratum or group and based on common interests, behave differently. Behavior people are highly dependent on their subjective value preferences, ideas about desirable or unwanted events and objects, which express their significance for a person.

In my In turn, the custom of blood feud (the ability of relatives to influence and control the life of a criminal) was transformed into attracting a criminal to measures of public liability in a judicial proceeding. Thus, it can be stated manifestation of the humanization of law in relation to legal customs and their further transformation and consolidation in the rules of law established in the legislative acts of various legal systems.

With the proposed formulation, agree, noting, however, that States are not prohibited from applying custom to refer to the formation of customary practice. Such a mention is by no means case does not detract from the legal significance internationally legal custom and, without a doubt, cannot be interpreted as a case of transition usually legal norms into the convention.

When considering the early periods of codification in foreign countries, one can also trace the construction of, at first glance, wild customs with with all their cruelty in legally enshrined provisions. Thus, certain provisions of the monument of the law

of Ancient Rome of the Laws of the XII tables, which subsequently influenced the codified norms of Russian Pravda, prescribed that in the event of default on an obligation (non-payment of a debt, etc.), the creditor had the right not only to punish the debtor.

At the same time, science notes that the usual norm can be created by practice. only a certain number of states, but to be recognized as a legal norm - by all states. At the same time, however, universal recognition should not be brought to arithmetic perfection

Arbitrariness superiority of the creditor was that, according to the norms of the Laws of the XII tables, if the debtor (primarily a debtor from the lower classes) did not pay the debt, he first received 30 days of freedom (deferment). In case of non-payment within the specified period, the debtor was taken into custody for a period 60 days. Then he was taken to the square in front of the people, where they announced the amount of the debt, calling third parties (perhaps also the debtor's relatives) to redeem the debtor.

In first, international legal custom is a kind of variety) socially custom, which means that it has all the signs of a social custom, namely: normativity (international legal custom, like any social norm is a rule (image) of behavior, regulating relations between people and their communities, which contains a specific norm - a rule of behavior that determines a model of human behavior (human community) in a certain life situation).

If due to the lack of willing the debtor was not redeemed, the creditor had the right to sell the debtor into slavery, or cut off part of the body of the debtor at its discretion. Similar the measure was applied to lazy debtors, not fulfilling in good faith their debt to creditor, violating the terms of the contract (also similar constructions are found in the legislation of many other peoples, for example, they were accepted ancient Norwegians).

An interesting fact is that in ancient times there was an idea that each part of the body the debtor was evaluated and represented a certain value, and with the cutting off of body parts the debtor repaid a certain part of the debt to the creditor. However, despite the presentation on evaluation in one of the fragments of the Laws of the XII tables (Table III, 6) specifies: "If more or less, let it not be imputed to them." [3;2] Thus, the creditor was released from compliance mandatory proportionality of the cost of the elements in question.

These customs and measures, despite their savagery, determine the further understanding and understanding of provisions of debt law. Fearing reprisals and mutilations, the debtor was obliged to conscientiously carry out the working off of the debt established by the agreement, so that the aforementioned bloody fate.

The customs described can be safely called ways to ensure obligations, as well as measures of responsibility for violation of obligations, which are historically correct and dictated by the ideas about fairness, equivalence and enforcement of obligations in the realities of that time.

With the humanization of the right, the fulfillment of obligations began to be ensured by a guarantee, retention of the debtor's thing, forfeit, pledge, security deposit and other means. Detailed regulation of such methods, we can observe in modern Russian civil law, as well as in the legislation of other developed legal systems of the world.

It is noteworthy that when considering the institution of registration of transactions, one can also state the influence on its formation and development of legal customs, primarily as elements of legal consciousness and mentality of individual societies.

The modern concept of registration of transactions in the continental system of law is based on ancient German customs. For example, the custom of making real estate transactions in public when the square in front of the people's assembly, the parties to the deal went out and took with them a child who screamed, attracting the attention of third parties with their cry.

With the development of relations in Germany was introduced the system of mortgage books, and then the system of land books. In France, a system of marks (inscriptions) and records (transcriptions) was introduced. The Russian legislation also gradually developed a system registration of transactions, starting from the period of board Ivan the Terrible, where the Local hut was established to register real estate transactions, run by which was located, including the registration of changes in the sphere of feudal land tenure (local, secular and church, patrimonial, etc.). [4;1]

From modern trading practice, one can cite an example of a widely used custom in the sphere of commodity-money relations, which does not have its own legislative consolidation, but at the same time is stable rule of conduct in modern civil circulation. The habit of purchasing goods from supplier in bulk at a price more favorable than under the terms of the retail purchase agreement sales is one of the key elements of modern commodity circulation, and allows participants relations to carry out mutually beneficial exchange and purchase and sale of goods, works and services. This custom is just one of many examples lawful behavior in the sphere of business relations.

In conclusion, it can be said that legal customs are integral elements of the formation and development of the legal system, law enforcement practice and life society as a whole. Knowledge of the nature of the appearance of a legal custom in foreign law allows us to identify the genesis of many phenomena of jurisprudence.

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