

DOI <https://doi.org/10.30525/978-9934-26-179-4-7>

## FORMATION AND FUNCTIONING OF CUSTOMARY LAW IN THE UKRAINIAN LANDS

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When a national legal system regulating social relations is forming, a special attention must be paid to the analyses of the custom into law transformation, the peculiarities of its emergence and implementation.

Customary law was formed at the beginning of law development, in primitive early class societies. It covered primarily family and marital relations, regulates the use of land and water, property issues. Customary law grew out of customs, those patterns of behavior that have developed over millennia and consolidate the positive experience of mankind.

From ancient times to the beginning of the twentieth century, the peasantry made up the bulk of Ukrainian population. The agricultural type of economy determined the nature of economic and social development for many centuries. Therefore, it was natural that the peasantry itself was the main carrier of the Ukrainian ethnic identity and the source customary law, which was governing all aspects of interpersonal relationships and relations with the existing government.

Very often a peasant learned about the existing official law on an incident only from a judge. And customary law resolving a disputed conflict did not require legal training in its interpretation. The unwritten law was simple and clear to every ordinary, usually illiterate person. That's why it was resorted to most often. Figuratively speaking, the law is «far away», and the custom is always «at hand». The Russian economist and jurist O. Lieontiev drew attention to this «survivability» of peasant customary law. In his study «Peasant Law» he pointed out that the system of legal relations on the basis of customary law will live and regulate the legal sphere of people's life even if the legislator decides from above, not taking the reality into account, to delete customs from the legislation and the current written law [1, p. 37].

We are sharing the opinion of the customary law researcher N. Tolkachova that “customary law is not fully covered by the current written law and cannot be reduced to it. Along with the fact that the part of

customary norms is sanctioned by the state and becomes the part of current law, there are norms that do not receive any official sanction of the state» [2, p. 7]. Thus, customary law is a domestic form of law, legal norms created by the people's life, which are maintained and preserved due to their need in the depths of this life. Customary law is a set of rules and norms of the unwritten law of human coexistence, both sanctioned and not sanctioned by the state, but binding on certain groups of people.

Customary law covered a system of social norms on the behavior and relationships of people in various spheres of life. The sources of its formation were folk customs, the respect for which the Ukrainian people have carried throughout their history. The source of law is the initial stage of the norm, while the system of law (customary law) is the result of its realization. The objective law is developed, expressed and exercised in the form of the two main sources of law – customs and acts. And it is important to remember that customary law is not only more ancient by the time of its appearance, but it also may exist for a long time as the only source of law.

We share the opinion of D. Valieiev opinion, who believes that «customary law arises when there is a certain separation of tribal institutions from the clan or tribe, when the need to typify human behavior within stricter limits has become a condition for the continued existence of the clan or tribe» [3].

The historian of Ukrainian law P. Chubynsky, distinguishing customary law from the source of law, said: «Talking about the sources of law history, we consider the history of artifacts and documents, which are telling us the law, and since the law consists of acts and customs, then under the sources of law history we understand the history of artifacts, acts and customary law» [4, p. 11].

Thus, the genesis of customary law should be sought in the sustainable behavior of a group of people that has developed in the process of their long coexistence. This behavior enters the life and consciousness of a certain group of society and becomes mandatory. From a legal point of view, it should be classified as a «custom».

Established «custom» is the oldest form of people's relations. It does not need to be regulated by the state. Whereas «customary law» in the generally accepted scientific sense requires state sanctions for its functioning and often becomes the basis of the written law, that is, the act.

M. Hrymych, a researcher of the customary law culture of Ukrainians, emphasizes such a feature of customary law as its direct connection with Christianity: “The representative of traditional society knew the seven commandments of God, which constituted the basic legal and moral norm for everybody. A number of other rules were added to it, but in general their

number was limited. There were few norms and rules in traditional cultures, and they were often universal for all peoples around the world, because they contained the optimal model of self-survival in society in particular and the survival of societies in general. However, the forms of their implementation were diverse, and, in fact, these forms were considered customs» [5, p. 14].

Thus, at all times, the people was the creator of customary law and customary legal relations. With the strengthening of the state centralization customary law becomes a source of written law.

It is appropriate to distinguish between customary law and legislation. First of all, customary law does not have a specific author. There is no date for its implementation, it has no permanent sanctions, as it is a public belief. In customary law there is no official promulgation, i.e. publication, which is a mandatory feature of the legislation [6, p. 74].

Thus, the phenomenon of Ukrainian customary law is quite complex and contradictory. This applies to both its origin and application. Therefore, it is no coincidence that each of the scholars who studied this issue (ethnographers, ethnologists, sociologists, and lawyers) interpreted it differently. However, one thing is indisputable – the role of customary law in the normalization of communal, socio-economic life in Ukraine has always been quite significant, if not decisive.

#### References:

1. Lieontiev A. A. *Krestyanskoie pravo: Sistematischeskoie izlozhenie osobennostej zakonodatelstva o krestyanah*. SPb : 1909, 401 p.
2. Tolkachova N. Ye. *Zvychaieie pravo: navchalnyi posibnyk*. Kyiv: VPC «Kyivskiy universytet», 2005. 367 p.
3. Valieiev D. Zh. *Obychnoe pravo i nachalnye etapy ego genezisa*. Pravovedenie. L.: Leningradskiy universitet, 1974, № 6. p. 71–78.
4. Chubinskii P. P. *Ocherk narodnyh yuridicheskikh obychaev i ponyatiy v Malorossii*. SPb.: 1896. 78 p.
5. Hrymych M. V. *Zvychaieie tsyvilne pravo ukraiiintsiv XIX – pochatku XX stolittia*. Kyiv: Aristei, 2006. 560 p.
6. Sokur Yu. V. *Pravovi osnovy torgovelnno-transportnogo pidpriemnytstva v Ukraini (na materialakh chumatskogo promyslu XVII–XIX st.)*: dis. kand. yuryd. nauk : 12.00.01. Kyiv: 2011. 192 p.