

Right of the “Above” and the “Below”. On the Border of Customary Law and Custom: The Legal Customs

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ABSTRACT

Recalling certain aspects of the research on Hungarian legal ethnography, the study deals with the relationship between law, customary law and legal custom. Customs of law is a significant field of law, inherited from the ancient legal order and created in the feudal-order society, which existed at the border of custom and formal law. The importance of the living conditions it governed gave rise to the institution of community coercion, which gave its rules a legal character. Eventually, it evolved in the “below” space left to it from the “above” and over time it acquired a tenacity that made it capable of maintaining a legal system in competition with the state, in response to a regulatory question not accepted by “official law.” The compliance and adherence to legal customs was based on the conviction of a community recognizing the need to adopt established rules and not on the competence, prestige, authority, legislative power and privilege of a legislative body.

KEYWORDS

state law, customary law, legal custom, legal folklore

The research began in 1939 released by the Institute of Ethnography of Pázmány Péter Catholic University in Budapest and had great importance in respect of the Hungarian legal history. The appeal from the Ministry of Justice to the Royal District Courts, outlined the scope of the survey in which the Minister pledged his support for the program. Minister László Radocsay considered it important to gather information on folk law, since it “is manifested not only in written laws

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but also in legal customs and traditions.” The “official” definition of folk law at the time also appeared in the ministerial letter. The letter was about “searching for those principles, customs and procedures that live in the public consciousness of the people in favor of or possibly in spite of positive law.”¹

The efforts to implement a systematic programme aiming at collecting legal customs by Károly Tagányi, Győző Bruckner, Ákos Szendrey and István Győrffy were successful by the fact that the ministry accepted the plan and took it under its patronage (KÓHEGYI – NAGY 1997:209). The decision, however, can be assessed as a radical turn not only from a professional-scientific aspect, but also from that of a legislative one. The declaration of equality before the law and the legislation formed in the spirit of it was the basic premise of the civil transformation of 1848. Constitutional development was steered towards centralization by both the people’s representation and the parliamentary government. The leaders of the compromise structure between the Hungarian political elite and the ruler did their best to establish a unified regulation and legal practice in 1867. Codification has become a program of the Government. The right of justice was taken away from the county halls and subjected to the legislative acts of the Parliament as a result of the Act No. 4 of 1869 on judicial power. The legislator’s aloof reticence regarding the hardly-known conceived law, which occupies an adverse position to the folk law in many respects in this situation, can hardly be questioned. The perception of law as an instrument of state power has been a persistent barrier to the recognition and acceptance of folk law. Paradoxically, codification has also led to a revival of research on legal folklore. The field of legal folk customs came into the forefront of drafting private law code, following the example of the German codification practice. The surveys of Miklós Mattyasovszky and János Baross, which primarily intended to form the basis of succession law, can be considered as a starting point and asking questions at the beginning of the 20th century (BOGNÁR 2016:39–47), but had to wait until 1939 when the state became temporarily more permissive in assessing legal folklore. The plan to renew the legal system, which was intended to be based on the people law, rose to a political level at that time. This political development did not happen accidentally, of course. Scholars of ethnography have long worked to make the political public aware of the fact that “the people’s legal system exists independently from substantive law,” which thus “has greater governing power than the substantive law, which is followed or tolerated by the people only out of compulsion, if they know its paragraphs at all” (GYÖRFFY 1939:22).

Legal scholars have been ambivalent about the subject of legal folklore and legal customs. On the one hand, the recognition of customary law, the pillar of the Hungarian historical constitution, has facilitated the interpretation of legal customs and legal folklore, according to the official public law position. Also the lack of codification of much of private law has left ample room for judicial practice and opportunity to reinterpret old law. On the other hand, the largely unexplored and unknown body of law, which was often competing with the positive law in people’s everyday life, was unfamiliar for lawyers who were educated in Roman law and who were trained to respect written law. Among legal scholars, legal historians were the ones who have most understood the importance of exploring legal folk customs, was hardly a coincidence.

¹National Archives of the Hungarian National Archives, Archives of Civil Government Authorities Section K Archives of the Ministry of Justice. 579 General Documents 30.051/1939. I.M. Published in print by BOGNÁR 2016:218–219.



LEGAL CUSTOM IN HUNGARIAN LEGAL LIFE

High degree of ethnic, linguistic and religious fragmentation was one of the defining characteristics of medieval and early modern Hungarian society. Regarding the state of the working classes of society (“the villagers, whom we call serfs”), István Werbőczy, master judge, in his legendary *Tripartitum*,² collection of law defining Hungarian law for centuries holdeth “their condition is diverse, since some of them are Hungarians, some are Saxons and Germans, some are Czechs and Slovaks who are of the Christian faith. Moreover, some are Vlachs and Russians, and some are Rascians and Bulgarians, who follow the aberrations of the Greeks. Above them are Iasi and Cumans who dwell in the kingdom and are equally of the Christian faith. Some of the Russians and of the Bulgarians cling to our faith, and some cling to the aberrations of the Greeks.”³ This colorful social formula (representing approximately eighty-five to ninety percent of the population) managed (organized and directed) by the Hungarian nobility, which, although by European measures is significant, it alone seems small in comparison to the total population. At that time, Hungary’s noble society accounted for 2.5–3% of the population (MAKSAY 1984:291), and it had reached a high of 4–5% across Europe by the end of the 17th century (KOSÁRY 1983:47). Other elements did not constitute a serious social force emerging between the two major social groups that characterized landlord power (urban citizens, foreigners, notables).

The few percent of those with noble privilege thus determined the image of Hungary, they held the machinery of power in their hands, and both the legislation and the judiciary were dedicated to them. When István Werbőczy described the work done on the orders of the ruler in the prologue to the *Tripartitum* emphasizing that it was nothing more than a “summary of the domestic and national rights of noble Hungary,” was no coincidence. In the same book, he stressed with considerable determination that the Creator divided society into two parts, commanders and subjects, rich and poor, and the nobles play a decisive role in this construction. Circumstances, such as the formation of marginal law and the “scattered, incomplete, confused and incoherent statutes,” rulings, laws and legal customs of the country made it the “Bible” of lawyers (and not just the nobility) until the 19th century. Its impact cannot be overestimated.

The proportion of the book of Hungarian customary law devoted to the serfs who constituted the vast majority of society, is an excellent illustration the minor attention paid by the power to the law of the “below.” A compilation of the *Preface* and three parts, a total of 272 titles considered it enough to set forth provisions for serfs in only seven titles. Some articles of *Part Three* dealt with the rights (or rather obligations) of serfs insofar as they affected the right of the nobility to some extent.⁴

The authorities of the serfs could only be their respective landlords, who were obliged to provide law and justice to any complainants, litigants, and seekers of justice under Hungarian customary law.⁵ Thus, it was the lord of a manor and his hallmoot who created and enforced the official right of the society under its authority. The hallmoot, dealing with nearly 90% of

²DECRET. Ung. 1637.

³Pars III. Decret. Ung.Tit XXV.

⁴Pars III. Decret. Ung.Tit XXVII–XXXI.

⁵Pars III. Decret. Ung.Tit 26.



the country's cases, functioned as a general court of first instance until the civil transformation (KÁLLAY 1985:52–53). The powers and competencies of the hallmoot were limited by the personal and territorial rights of the lord of a manor (VARGA 1958:42). The lord of the manor's jurisdiction extended to all persons under his authority and to all acts committed on the property belonging to the manor. He tried all criminal and civil cases brought against his serfs or servants within his jurisdiction acknowledged also by outsiders, and he also adjudicated in cases between his serfs, servants or those living on his property, and occasionally strangers. This right also constituted obligation of the lord of the manor (STIPTA 1997:45–46, 79–81).

The scope of the cases was mainly determined by disputes brought before the hallmoot by the inhabitants of the property; committed and discovered criminal offences; issues related to the rights of lords of the manor; operation of the property and public administration. The law-making practice of the hallmoot, however, could only appear in issues that came before it. In addition to the direct administrative and ownership interests of the lord of the manor and the aspects of law enforcement, it was thus the willingness of society to delimit the zone that could be turned from the community's autonomy and privacy to the hallmoot from the lord of the manor's own free will. What remained outside, however, persisted in the communities' own regularization activities. Recognising this, the lord of the manors for example, gave the right to settle minor matters to the manor municipalities or to superiors thereof (ECKHART 1954:9). Since the scope of personal affairs of the inhabitants of municipalities was more difficult to determine than those under jurisdiction of the lord of the manors, the deed conferring the right of jurisdiction practically contained a list of cases in which the villicus could not act (BÓNIS et al. 1996:16).

The phenomenon is clear evidence of the “below” law-making. The construction of the borderlands have been a kind of barrier to the meeting of the two rights, which also strengthened our conviction. There was a clear need to keep things “inside” in the “below” communities, according to the justification of István Imreh (IMREH 1979:26; MEZEY 2021:261–262). The essence of the village's own law was not only the establishment of substantive legislation, but also the settlement of legislation in the *communitas*, the possible internal resolution of conflicts. The village law of Szentmihály in Udvarhelyszék stipulated that: “No one should sue a thing worth three forints, nor should a serf litigate before the hallmoot, but let all matters be initiated here in the village first, and only those worth it should be referred to the promotion” (VARGA 2007:3; IMREH 1983:304). The dispute between a village member and a churchman must be settled before the parish council, since such a conflict does not belong to an external court or the hallmoot, according to the village law of Berekeresztúr of 1602 (DOMOKOS 2009:346). Marosszék made a similar decision in 1610: the case should be tried in the village and if possible, “have the law first in the county seat and if one of the parties there doesn't like it, might appeal to a vicese.” [The adjudication of the parish was intertwined with that of the village, the model for the seat of the diocese was the village judiciary (IMREH 1983:109).] Villages sought to impede the exercise of the “above” right also by setting up appellate forum for their own cases. The residents of Szentivány and Laborfalva, for example, organized an appeal forum from the nobles living among them to avoid circumvention of the cases (IMREH 1983:87). This need, at the apex of the local legislative “cone,” at the point of attachment to formal law, formed a particular valve that prevented cases from being brought before the hallmoot, and pressed the members of the community to settle their disputes in their own right before their own judge. The importance of this order increased when the lord of the manor or the higher authorities wished to impose



laws on the community. When he did not simply leave or acknowledge the right that had developed and lived “below,” but wanted to interfere in the course of the law. This is when tensions emerged and the aspect of self-determination and autonomous assertion of interests became characteristic (IMREH 1983:10).

“Formal law,” however, for the most part, did not want to deal intensively with the greater proportion of the society’s everyday life, since the superior regulatory intent of the law was missing or was weak. According to the legal historian József Illés, life itself became the main director of living conditions (ILLÉS 1910:23), that is, the custom it has created, for the most part, fell within the coercive scope of the popular community, which has been adopted and made customary, to a lesser extent, by a secular or ecclesiastical legislature (MEZEY 2016:270). György Bónis wrote about this province: “There is a set of rules beyond the layer of positive law and formal law, which the people themselves uphold and declare binding on themselves” (BÓNIS 1939:1). Village communities left without formal law have established their own set of rules, and enforced them through community sanctions. “Legislation was not a state monopoly and larger entities of society built the ramparts of norms in medieval existence” (IMREH 1983:12). Since communities were overly closed due to infrastructural conditions, “small circles of liberties” referred to those privileged or at least to a limited addressee and less to actual openness in the Middle Ages. “Honor,” i.e. respect for the community, the opposite of contempt and exclusion, was not merely a principle. Those who have fallen out of the closed chain of autonomy, for example, have become outcasts with poor hope of being accepted elsewhere under the safety net of another community. Belonging to a commune was not only a matter of residence, perhaps a moral one, but an essential existential condition. This circumstance, which more or less persisted until the advent of the capitalist world that destroyed traditional communities, provided village society an incredible power. Public perceptions were perhaps even more significant than the lord of the manor’s authority in everyday life. Its coercive power and ability to apply sanctions can hardly be questioned. Community law was therefore a law in the strictest sense, an enforced set of the expectations expressed by the villagers. György Bónis testified about the role of the set of rules that he called a legal system, that “at best, it exists in addition to the right to power, but often despite its explicit prohibition” (BÓNIS 1939:1). Nor was there a coincidence of opposition of the authorities, since the law created and applied by the people is not only ancillary in nature, but in many cases also contrary to existing “formal” law. Nevertheless, the bonding to the life of the community itself of those living in the community was incomparably stronger than to the wider environment of power. “People were confused and distrustful of positive law” (ERDEI 1940:169), their life was framed, from birth to death, by peasant law and not by distant, “formal” law (ORTUTAY 1937:18). This also carried the contradiction (which emerged as a community value as opposed to the “formal” law), in addition to the complementary nature of the law (which was given space by the regulatory indifference and permission of the “formal” law). Consequently, legal custom can hardly be considered as part of *consuetudo* the formal customary law. It was the significant difference in the nature of coercive force that distinguished legal custom from customary law. It was the public who imposed coercion behind the norm and not the higher power, the court. This right was not created by bodies empowered with public authority to legislate and were not sanctioned within the executive/legislative jurisdiction available to them. If it happened (i.e. the court adopted a norm in its case-law), legal custom became customary law and lost its autonomous character formed by community coercion (MEZEY 2009:22–23).



István Imreh summarized the substantive and formal criteria for legal practice using the Szekler laws as a model. The village law was linked to the village assembly “at which all who can express their will and are also obliged to keep the laws they have jointly undertaken, they decide matters by their collective agreement” (IMREH 1983:10). Since the villagers agreed to abide by it and agreed on the content, the village law was a rule adopted by “everyone” (obviously the vast majority) and the essence of it was contractual in nature. The compelling force of the rule was the will of the community based on common decision. Over time, the agreement became ancient and traditional. The putting down of the village law was therefore not a constitutive act, but a formal recording of a custom already in force or of a current decision. [“Antiquity,” i.e. practical application was a condition of this, of course (IMREH 1983:9–21).]

As to the most complete and exhaustive definition in Hungarian legal ethnography so far, legal custom (legal folk custom) is ‘a set of rules influencing human behaviour, not created and enforced by the state, the church or other national organization or persons in power, but developed from within through actual practice, expressing the public conviction of the majority, and inherited by it, and used to reconcile interests in social relations, persons, material culture and public affairs (conditions of life) on the basis of the perceived or existing autonomy of various smaller or larger communities of society, enforced by society through mandatory and traditional means of prohibition, permission or command’ (TÁRKÁNY SZÜCS 2003:41).

LEGAL CUSTOM IN THE 20TH CENTURY

The collection work indicated in the introduction, which had begun vigorously with ministerial support (BÓNIS 1941:287; FÉL 1944; TÁRKÁNY SZÜCS 1943:253) was halted by Second World War. Consequently, research became impossible, and some of the results were destroyed (BOGNÁR 2016:35). The research entered a different political environment after the war. Hopes, however, that accompanied a temporary resumption had faded by 1948 and research of legal folklore became meaningless in the system of the proletarian dictatorship, the legitimate source of which was identified in the power of workers and peasants and in the rule of the people (BOGNÁR 2016:35). The all-encompassing and centralized regulatory-controlling will of totalitarian regimes counteracted the recognition of a legal system based on traditional foundations that is difficult to delineate. Kálmán Kulcsár, a leading legal sociologist of the socialist era, rejected the concept of “folk law” with the utmost determination, even in the 1970s, despite the research movement for the scientific processing of existing but unwritten legal customs, ceremonies and symbols launched by Károly Tagányi (TAGÁNYI 1919:3) and the call of Ákos Szendrey for “research in legal folklore, legal system, symbols and norms that continue to live in folk practice without official significance” (SZENDREY 1936:35). Since “state and law cannot be separated from each other, not for formal reasons alone, but because of their common class character,” “folk law” is a “conceptual contradiction against state law,” according to Kulcsár (KULCSÁR 1974:218, 220). Based on this theorem, he challenged the researchers to define the concept of folk law or legal folklore, which perception also determined the direction of legal research. Such an interpretation of law has long guided the relationship of legal historians towards the world of folk law. Kulcsár declared with incredible caution even in 1981, that it is “presumptive” that “some of the traditional rules of behavior may have significance in the complex mechanism of conduct management.” He was willing to consider this right at most as a “customary rule substituting law”



(KULCSÁR 1981:41, 833). On the other hand, Ernő Tárkány Szűcs was very outspoken about the objections related to the exploration of the indicated area. “Ethnographers did not demanded a distinction between legal and non-legal phenomena; lawyers are explicitly ‘reluctant’ from the idea of recognizing another sphere of law that should be researched by scientific methods in addition to state norms; and finally, he considered to be associated with an emerging historical science inferior to the rank of social science” (TÁRKÁNY SZÜCS 1976:86).

Ernő Tárkány Szűcs, as a lawyer, from the seminar of György Bónis, could continue his archival research also processing the results of previous collections in strong political opposition. He could publish his findings only in foreign language, abroad at first, and the synthesis of the results of the Hungarian legal folklore and his own scientific work was published only in 1981, which, with its three editions to date, is the most compelling summary of legal folk customs to date (TÁRKÁNY SZÜCS 1981).

Since the monograph of Tárkány Szűcs, the existence of parallel structures called “above” and “below” in traditional ethnographic-legal-historical terminology has hardly been the subject of debate concerning its scholarship in Hungarian legal ethnography. He pointed out that the basic characteristic of norms derived from traditional spheres is simplicity, the effectiveness of regulation adapted to the everyday conflicts of existing communities. This gives an incredible advantage over state legislation, since the latter’s effectiveness is reduced by the remoteness from the government and the hierarchical inflexibility deriving from it, the factory-like law-making operation that seeks to regulate modern society in a complex way, multiplies the body of law and makes it almost opaque despite its technical possibilities.

The formation of the civil state transformed the system of legal sources, dismantled the orderly environment and questioned the autonomy of the “below.” Nevertheless, there were still norms rooted in tradition and preserved as a customs in folk life even in the middle of the 20th century. Legal researchers were obviously intrigued by circumstances under which legal customs could survive or develop with relative probability. The processes that characterize the mechanism of action of the customary law built into the modern legal system and serve to condition the non-traditional sector have attracted their attention. Rationality of previous legal customs was preserved by the dysfunctionality of the legislature stemming from over-regulation, which regulates existing conditions in meticulous detail (KULCSÁR 1980:311). And, of course, the historical peculiarity of Central and Eastern Europe, which, due to the strong politicization that has developed from the beginning, accompanies the attempts of a dedicated political elite to solve social problems through legal regulation (KULCSÁR 1986:216). This is not least due to the rejection of the “below” by the “above” and the strengthening of its autonomous organization. In this process, norms have emerged that “express legal awareness in a way and are considered as a right, at least in a section of society, and, where appropriate, prevail even against the law” (KULCSÁR 2003:842). Ernő Tárkány Szűcs claimed and proved much more than that. According to Janka Teodóra Nagy, traditional legal history was forced to study the differentiated legal system of serfdom and peasantry. To evaluate particular rights, traditional law, customary law and legal customs in the light of the elements originally included in the scope of legal ethnography (NAGY 2003:855). He achieved this by proving that, without discussing legal customs, the usual historical examination of state law institutions would be one-sided (TÁRKÁNY SZÜCS 2003:822). Not to mention that for many centuries, the law of the “below” detached from the official law of the “above” and the rule of legal customs and village law, which provided a legal framework for the life of a significant part of society, relied on such strong traditions that even the collection of legal customs organized in the 1940’s showed an intensive presence



of folk law. “Smaller and larger communities of society regulated everyday legal situations in a subsidiary manner, independently from the aspirations of the central state power, often redressing its shortcomings. Therefore, the research aims to examine the direct and less conscious but, in any case, sovereign legal formations of the primary strata of society” (NAGY 2019:45–46. XXXL). Ethnography offered a new opportunity for legal history with its special method of analyzing legal folk customs and extending its scope by monitoring the norms of legal folklore not only in their legal institutional form but also in their development (NAGY 2007:18).

The need to create legal ethnography as an independent discipline was the most important message of Ernő Tárkány Szűcs’s professional legacy. Interdisciplinary elaboration of the research of folk law in Hungary brought significant results on this trail in the 1990s; and the Tárkány Szűcs Ernő Legal Cultural Historical and Legal Ethnographic Research Group established and maintained by Janka Teodóra Nagy became one of the important centers thatof. By organizing interdisciplinary conferences and launching the Library of Legal Cultural History and Legal Ethnography (NAGY 2014), the Research Group has created a favourable position for legal ethnography. By coordinating the frontier sciences, such as the history of legal culture and legal archeology, also traditional legal history or legal theory can provide important additions to clarification of concepts as well as to exploration of sources, interpretation of the role of popular law, and the importance of traditional values (NAGY 2003:855–856).

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