https://doi.org/10.31410/ERAZ.2024.777

The Place of Custom in French and Tunisian Law

Mădălina-Gabriela Guță[1]

Received: September 22, 2024
Accepted: January 27, 2025
Published: April 5, 2025

Keywords:
Custom;
French law;
Muslim law;
Laws

Abstract: *At first solitary, Homo sapiens soon realized that to survive it had to work with others. This collaboration took the form of human communities based on common interests and values. However, for society to function and develop well, in addition to a system of shared values, there must be a set of rules to guide the behaviour of community members, especially as self-interest can sometimes take precedence over the general interest. The creation of customs- unwritten rules that arise from repeated and accepted practices within the community, has not only ensured that the members of the community live well together, but has also led to its evolution. Thus, by taking a brief trip down through history, custom shows us how legal rules emerged from existing beliefs and customs within the community. So the law of a state is alive, it emerges as a result of social interactions and is not just a set of rules laid down and imposed by a particular authority. Today, it is written law that dominates, but custom continues to play a fundamental role, especially in areas where the law is ambiguous.*

1. INTRODUCTION

The continental-European legal system to which countries such as France, Germany, Spain and Italy belong is the result of the reception of Roman law in Europe. Its formation is deeply rooted in history, based on canon law, largely inspired by Roman imperial public law; the customs of the Germanic tribes of northern France and ancient Roman law (Ciucă, 2019). It is based mainly on written codes - the law is the main source of law; unlike *common law*, which is based on case law - court decisions serve as precedents for future cases and judges play an active role in the creation of law. A benchmark for this system is the creation of the Napoleonic Civil Code of 1804, which became the model for many other codes around the world. It had a significant influence in Africa, particularly in the former French colonies. Examples include the adoption of the Algerian Civil Code of 1834, that of Guinea (1892), Madagascar (1896), and the adoption of the Personal Status Codes of Tunisia (1956), Morocco (1957-1978) and Algeria in 1984 (Halpérin, 2005).

2. DEFINITION AND ELEMENTS OF COMMON LAW

Common law (custom or *consuetudo*) is a custom or practice of the people, which, by "common adoption and acceptance, and by long and constant custom, has become binding and has acquired the force of law in respect of the place or subject of regulation to which it relates". (Black, 1968). From this definition, we can draw many characteristics of common law: repeatability (it arises from general and repeated use within a community, which gives it binding force); collective recognition (it must be recognized and accepted by the population, expressly or tacitly); and flexibility (it can evolve according to the needs of society). Also, common law arises spontaneously within the community and is diverse, thus reflecting its particularities; unlike law which emanates from a public authority. People not only accept custom but obey it because they are aware that in a society

[1] University of Alexandru Ioan Cuza Iași, Faculty of Law, Bulevardul Carol I Street no. 11, 700506 Iași, România

without rules chaos rules. Even strong-willed individuals obey it to avoid conflict or repercussions within their community. (Sapir, 2021).

Common law has two main components: a material element and a psychological element. The material element is the constant and general repetition of a behaviour or practice within a community. Accordingly, the custom must be of a certain antiquity (practised for a considerable period); it must be constant (followed regularly), respected and recognized by those to whom it applies (Germain, 2019). The psychological element of custom is the belief that repeated use is a rule of law (Germain, 2019). People perceive the practice as binding and comply with it. A practice, even repeated, cannot become a rule of law without this internal conviction.

Historically, for centuries in many societies, custom was the main source of law. Today, although custom is a recognized source of law, its importance has been considerably diminished. It plays a secondary role in the written law. In some countries, such as those in the *common law* system, custom still plays a key role compared to countries in the continental European system where written law predominates. In what follows, we will focus our attention on the development of customary law in a country in the continental-European system of law where the motto *"Liberté, Égalité, Fraternité"* was born.

3. CUSTOMARY LAW IN FRANCE

From a legal point of view, France was divided in two: in the north, we had unwritten law (*pays de droit coutumier*) based on the consent of the population, and in the south, written law (*pays de droit écrit*) based mainly on codification, inspired by Roman law (Ginoulhiac, 1859). Before the conquest of Gaul by Julius Caesar in the 1st century BC., (Duval, 1989) the indigenous population was governed by a legal system based on custom that managed to survive until the French Revolution. How did it have such a long "life"?

Perhaps this is because customary law is deeply rooted in the values of a community; values that are reflected in the behaviour of individuals. It is also not a static law as it evolves in response to the needs of individuals, allowing for continuous adaptation to local realities. At the same time, unlike written law which is difficult to change, rigid, customary law is elastic (it does not have to go through a certain procedure to be changed; change is "dictated" by individuals). Last but not least, customary law does not originate from some state authority, which sometimes seeks to satisfy its own interests through the rules it adopts; it comes from the people, more precisely from the generations that have walked this earth. Customs could vary from one region to another, which sometimes led to inequalities in their application and conflicts of interpretation, but this inconvenience did not lead people to abandon them.

The need to clarify and unify these customs became evident in the Middle Ages. Thus, in 1454, Charles VII ordered that all the customs of the kingdom should be set down in writing (Ordinance of Montils-lès-Tours) to reduce the diversity of interpretations and have uniform law. The ordinance was intended to make the judicial system more efficient by shortening trials, reducing costs for the parties involved, facilitating the work of judges (by compiling the customs in a compendium) and, of course, strengthening royal authority by limiting the power of the nobles (Université numérique juridique francophone, s.d.). The drafting process was a laborious one because each province had its customs which made it difficult to bring them together in a common body. In addition, there was fierce opposition from the nobles who felt their privileges were threatened by the attempt to standardize the law (Zink, 2007-2008).

The task of bringing together the different customs into a common body fell to legal practitioners, who worked with representatives of different social classes (nobility, clergy) under the authority of royal commissioners (Grinberg, 1997). Thus, about five years after the adoption of the Ordinance of Montils-lès-Tours (1459), the Custom of the Duchy of Burgundy was drawn up. Every aspect of the life of individuals is included under the dome of this common law. The Custom of Burgundy laid down clear rules on property rights and their transmission; marriage, filiation, inheritance and even punishments for committing offenses (Begat & Depringle, 1652).

In 1510, the Custom of Paris was drafted - a veritable model that would be incorporated into the Napoleonic Civil Code. It not only influenced the customs of other regions but also left its mark on the development of Quebec civil law (Ruggiu). Similarly, the Custom of Burgundy contained provisions relating to family law (*e.g.* community of property of the spouses, termination of community by separation or death of one of the spouses, etc.) or inheritance law (*e.g.* vacant succession; restrictions on the freedom of testament - the impossibility of leaving a will to a concubine or illegitimate child; forced heirship, etc.) (Zoltvany, 1971). Keeping in step with the needs of the community, the Custom of Paris was revised in 1580. The revision focused on the sphere of civil law and contained regulations on movable and immovable property; personal guarantees and mortgages; prescription; guardianship, donations and judgments (Johnson, 1989). With 362 articles, French minister Du Moulin considered it to be "the common law of customs." (Johnson, 1989).

The efforts of jurists to transform customs (unwritten, oral law) into written texts were essential to the development of law in France. As a result of their hard work, the disparities between different legal practices and the conflicts over their interpretation were reduced, thus creating a stable legal framework that favored the evolution towards written law. Although we have only discussed customary law, it coexisted for a long time with Roman and canon law. They interacted and influenced each other. The contact between customary law and Roman law was particularly visible in the 13th century when the latter gradually penetrated the *pays de droit coutumier*. As a result of this interaction, the process of the "Romanization" of customs begins (Poumarède, 1999). At the same time, the jurists of the time used Roman law as a reference to reform and codify local customs, trying to give them a more solid and rational basis (Poumarède, 1999). The dynamic between Roman law and customary law was decisive for the further development of French law.

Customs reigned for centuries in France. Its influence began to wane in the 17th century, just before the French Revolution when royal ordinances initiated a codification movement that diminished the role of custom (Breuil, 2018). It would be dethroned with the French Revolution and the introduction of Napoleon's Code in 1804. The French Revolution created a new legal framework that favored written law over customary law. However, the custom was not forgotten but was incorporated into the Civil Code of 1804.

The Civil Code drew inspiration from existing legal traditions, in particular from the Custom of Paris as well as other regional common law. For example, the code integrated provisions on marriage (which remains a civil and religious contract, as in most customs), parental authority and matrimonial regimes, in particular, that of community, which is present in customary law (Aubry de Maromont, 2019). Also, certain customary law adages have been transposed into the Civil Code. Thus, Article 2279 reproduces the adage "in matters of movable property, possession is equivalent to title" (Code civil des français, 1804). In the field of inheritance law, the forced heirship, called

légitime (part of the *de cujus*'s property was reserved to certain heirs, which limited the freedom of testament), is the result of the harmonious interweaving of elements of Roman law with those of customary law. The drafters of the Civil Code strove to strike a balance between revolutionary ideas and ancient customary law and to create a legal framework in which modern aspirations (equality before the law, property) respect the past and traditions.

Unfortunately, this balance is shattered by the new Civil Code which considerably limits the role of custom. Thus, in the New Civil Code, we find only one mention of custom, in Article 593: "He may take vine props in the woods; he may also take annual or periodical products from the trees; all of which being done according to the usage of the country or the custom of the owners" (Code civil français, 2024). Despite this limitation, it should be recalled that many legal institutions of the present day derive from customary law.

4. CUSTOMARY LAW IN TUNISIA

Initially, like other peoples, the Tunisians were governed by customary law. This legal order was disrupted by the Arab conquest in the 7th century. The conquest left its mark on Tunisian law, religion and culture. After the conquest, several Muslim dynasties passed through Tunisian territory over the years: the Aghlabids (The Editors of Encyclopaedia Britannica, n.d.) the Fatimids and the Hafsids, who influenced the development of law. Muslim law gradually made its presence felt and "overshadowed" customary law. It became the main legal system governing Muslim life for a long time. Islamic law regulates all aspects of individuals' social life (*e.g.* marriage, divorce, inheritance) and religious life (prayer, fasting during the month of Ramadan, pilgrimage to Mecca, etc.).

The dynamics of law changed with the conquest of Tunisia by France. On May 12, 1881, the Treaty of Bardo was signed, establishing the French protectorate in Tunisia (Ikeda, 2015). During the protectorate, France initiated the process of codification - the transition from Muslim (religion-based) law to modern law. French laws were incorporated into Tunisian law, which is particularly visible in the organization of the country's courts. The judicial system was thus fragmented: courts applying Muslim law coexisted with rabbinical courts (for Jews) and French courts (Derouiche, 2013).

During this period, the French mark on Tunisian law became increasingly visible through the codification process. This long, laborious process began with the efforts of "commissions set up within the administration of the protectorate for the codification of Muslim law" (Derouiche, 2013). Their work is visible through the adoption of the Land Law (1885), the Code of Obligations (1906), the Code of Civil Procedure (1910) and the Criminal Code in 1913 (Derouiche, 2013). We note that France did not impose its law but tried to preserve and incorporate local law. This is mirrored in the drafting of these codes, where both French and Tunisian jurists made their contributions. The sphere of application of Islamic law is restricted but it continues to be present in the lives of individuals (it regulates their status).

In 1957, after a long period, Tunisia gained its independence (Larané, 2020) which led to numerous legal changes. Reforms to modernize Tunisian society took place especially during Habib Bourguiba's time (Frégosi, n.d.) as president (he tried to reduce the influence of religious law, especially as Islam is both law and religion). Thus, in 1956, Tunisia abolished confessional jurisdictions (Frégosi, n.d.) but important aspects of Muslim law are included in the personal status legislation (Personal Status Code). This Code is quite progressive, especially as it regulates equality between the sexes in certain areas, mutual consent of the parties to the marriage and prohibits polygamy

(Dahmani, 2022) better protecting women's interests. However, certain areas (inheritance law) remain sensitive as traditional rules favor men, leading to inequalities between men and women. These inequalities continue to be the subject of debate today.

In short, since independence, Tunisia's desire to modernize its legal system by incorporating elements of modernity with tradition has been increasingly visible. The complex process of modernization has been and continues to be fraught with challenges.

5. CONCLUSION

Historically, custom was for a long time the main source of French law, but its role diminished especially after the French Revolution. It comes with a new vision of law (it is predictable, clear and, like custom, can adapt to new social realities. Custom is marginalized in a legal framework that prefers written laws. It is subordinate to written laws and is applied when it does not contravene them or when there are legislative gaps. However, its influence is visible today thanks to commercial law and French overseas territories, where the custom is recognized and integrated into the local legal system (*e.g.* Mayotte or New Caledonia).

In Tunisia, the custom (*'urf*) continues to play an important role to this day. It is recognized as a source of law, even if it does not enjoy the same recognition and power as the Quran and the Sunnah. Jurists can see and use contemporary social practices to interpret religious texts. They need to strike a balance in interpreting texts - an *ad litteram* interpretation can create injustices, especially as many aspects of individuals' lives have changed over time and continue to be in a state of flux. On the other hand, a flexible interpretation takes the jurist away from the 'malign territory' of strict interpretation and opens his mind to knowledge, justice and better application of the law.

Tunisia has not renounced customary law but has incorporated it into its legislation, especially in the area of family law and in some cases inheritance law. Although the Personal Status Code has incorporated principles of modern law with those of Islamic law while preserving local customs (*e.g.* rights and obligations of spouses). The integration of custom into the Tunisian legal system proves that Tunisia has not forgotten its heritage and that a balance can be found between the desire for modernization and traditions.

References

Aubry de Maromont C. (2019). Habitude et codification du droit civil (XVIIIe-XIXe siècles). Aubry de Maromont C.; Dargent F. *L'habitude en droit*, Institut Universitaire Varenne; Fondation Varenne, Colloques & Essais. https://hal.univ-reunion.fr/hal-02295630/document

Begat, J., & Depringle, G. (1652). La Coustume du duché de Bourgongne enrichie des commentaires sur son texte. Chez Pierre Cvsset.

Black, H. C. (1968). *Black's Law Dictionary*. 4th Ed. Rev., Ed. St. Paul, Minn. West Publishing Co.

Breuil, I. (2018, February 7). La coutume, source du droit. Gallica. https://gallica.bnf.fr/blog/07022018/la-coutume-source-du-droit?mode=desktop

Ciucă, M. V. (2019). *Drept privat comparat. Lecțiuni*. vol. I, ed. a III-a, *corrigenda, addenda et incrementa*, Ed. Universității „Alexandru Ioan Cuza," Iași.

Code civil des français. (1804). Édition originale et seule officielle, L'Imprimerie de la République, Paris.

Code civil français. (2024). https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721

Dahmani, F. (2022). Tunisie: la polygamie, nouvelle lubie des politiques? https://www.jeuneafrique.com/1387933/politique/tunisie-la-polygamie-nouvelle-lubie-des-politiques/

Derouiche, B. A. S. (2013). L'enseignement du droit en Tunisie pendant la période coloniale. Centre d'études et de documentation économiques, juridiques et sociales. *Politiques législatives: Égypte, Tunisie, Algérie, Maroc* (1-). CEDEJ - Égypte/Soudan 45-58. https://doi.org/10.4000/books.cedej.367

Duval, P. M. (1989). Autour de César. 1. «La relation des exploits de Jules César. La guerre des Gaules». *Travaux sur la Gaule (1946-1986) Rome: École Française de Rome*, 111-137. https://www.persee.fr/doc/efr_0000-0000_1989_ant_116_1_3655

The Editors of Encyclopaedia Britannica. (n.d.). *Aghlabid dynasty. North African dynasty*. https://www.britannica.com/topic/Aghlabid-dynasty

Frégosi, F. (n.d.). La regulation institutionnelle de l'islam en Tunisie: entre audace moderniste et tutelle etatique, 1-25. https://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/artff.pdf

Germain, I. (2019). Définition et rôle la coutume, source de droit. https://cours-de-droit.net/definition-et-role-de-la-coutume-en-droit-a121608808/

Ginoulhiac, C. (1859). Cours de droit coutumier français dans ses rapports avec notre droit actuel. *Revue Historique de Droit Français et Étranger (1855-1869)*, *5*, 66–79. http://www.jstor.org/stable/43840342

Grinberg, M. (1997). La Rédaction des Coutumes et les Droits Seigneuriaux Nommer, classer, exclure. *Annales Histoire Sciences Sociales*, *52*(5), 1017–1038. https://doi.org/10.3406/ahess.1997.279616

Halpérin, J. L. (2005). Deux cents ans de rayonnement du Code civil des Français? *Les Cahiers de droit, 46 (1-2)*, 229–251. https://doi.org/10.7202/043837ar

Ikeda, R. (2015). Tunisia and Morocco under French Protectorates. *The Imperialism of French Decolonisation. Cambridge Imperial and Post-Colonial Studies Series*. Palgrave Macmillan, London, p.13. https://doi.org/10.1057/9781137368959_2

Johnson, J. (1989). La Coutume de Paris: Louisiana's First Law, *Louisiana History: The Journal of the Louisiana Historical Association*, 30(2) 1989, 145–55. https://www.jstor.org/stable/4232727?read-now=1&seq=5#page_scan_tab_contents

Larané, A. (2020). 20 mars 1956. La Tunisie retrouve son indépendance. https://www.herodote.net/20_mars_1956-evenement-19560320.php

Poumarède, J. (1999). Droit romain et rédaction des coutumes dans le ressort du parlement de Bordeaux. In J. Krynen (éd.), *Droit romain, jus civile et droit français* (1-). Presses de l'Université Toulouse Capitole, 329-345. https://doi.org/10.4000/books.putc.12027

Sapir, E. (2021). *La coutume* (P. Clinquart, Trans.). In C. Baudelot & P. Clinquart (Eds.), *Anthropologie* (Vol. 1). ENS Éditions. https://doi.org/10.4000/books.enseditions.18197

Université numérique juridique francophone. (s.d.). Analyse guidée d'un texte : la coutume. [Ordonnance de Montils-lez-Tours, 1454, extrait de l'art. 125]. https://cours.unjf.fr/repository/coursefilearea/file.php/154/Cours/601_item/globalprintcom.htm

Zink, A. (2007-2008). Les éditions de coutumes a france à l'Époque Moderne. *Ivs Fvgit, 15*, 467-492. https://ifc.dpz.es/recursos/publicaciones/29/26/18zink.pdf

Zoltvany, Y. F. (1971). Esquisse de la Coutume de Paris. *Revue D Histoire De L Amérique Française*, *25*(3), 365-385. https://doi.org/10.7202/303092ar