ROLE OF CUSTOM IN THE FORMATION OF THE DIRECTIVES OF LAW INTERPRETATION

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I. Introduction. General remarks.

In every legal order, there are regulations referring to paralegal rules, which are often of an axiological[1] nature. Although relatively few of these have been retained in Polish law compared to other legal orders of Western Europe, the changes in the axiological grounds of the Polish legal order have lead to a situation when the legislator of the Polish Republic appears interested in restoring the role of long-standing general clauses including the clauses of "good customs" and "principles of fairness", and introducing them to the texts of legal acts of primary importance. It may also mean restoring the role of references, basically lifeless, to "customs", which causes the need to consider the essence of such notions as "custom" and "mores" and the influence of their interpretation upon the application of law.

The role of paralegal rules, being understood in one way or another, in the creation, interpretation and application of law is not limited to the problems of reference. Unwritten rules, often unconsciously used by legal interpreters, are of greater significance for the creation, interpretation and application of law. The following comments are dedicated to this issue in the context of legal interpretation.

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II. Rules of interpretation in the normative conception of law sources.

In a positivistic legal culture, Polish legal culture being an example of the kind, the legal system *in nuce* is a certain corpus of legal norms. On the one hand, the ways of creating and interpreting legal texts decide upon the ruling standards of conduct in a given legal system. On the other, these standards are determined by the method of applying the law. The processes of law creation and legal text interpretation[2] provide a substratum for the mental processes in the course of which law is applied.

While law is being created, legal norms are encoded in some way in provisions of a certain shape. Interpreting legal texts leads to decoding the norms of conduct from these provisions. The rules of norm creation in a given legal system are comprised in the normative conception of law sources of this system. Such rules are partly based on a legal text declared by an act, which constitutes one of the legislative facts according to the normative conception of law sources of a given

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system. Usually, however, the rules constituting the normative conception of law sources of a given system find support in the fact that the view about their binding force is quite widespread in the legal doctrine[3]. It may also be added that the rules of interpretation do not suffice to accomplish the interpretation of a legal text, as certain linguistic, empirical and interactive knowledge is needed for its full understanding [Lipczuk, Mecner & Westphal 2000, 28-29].

Thus, the legal doctrine contributes to the shaping of a required, from some point of view, standard of conduct in a given field.

III. Factors influencing the form of the legal doctrine.

Firstly, the form of the legal doctrine, including the rules ordering to recognise certain facts as law-making and connect them with certain circumstances as regards the norms which are valid in the legal system, is determined by political conceptions attributing sovereignty to certain subjects or groups of subjects. Secondly, the content of the legal doctrine is influenced by praxiological experience accumulated by lawyers in the field of legislation, interpretation of legal texts and law application. Thirdly, the nature of the legal doctrine is formed, to a great extent, by a hitherto existing tradition and an established system of notions, which enable a lawyer to analyse the elements of a given situation, and solve the problems in the field of law-making, interpretation of legal texts and law application[4]. The relationship between the elements determining the content of the normative conception of law sources of a given system and the legal doctrine is particularly complex. It is connected with the fact that the legal doctrine influences the method of interpreting legal texts, and that legal texts provide support for the legal doctrine in terms of limiting the acceptance of some views into the doctrine. Thus, the separation of the doctrine from the legal text or the text from the doctrine in contemporary legal systems becomes impossible.

The role of tradition in the formation of the legal doctrine is revealed, among other things, in its belonging to a certain legal culture. In this respect the nature of the legal doctrine and, consequently, the level of development of the legal culture may be considered in the context of attitudes and behaviours of the citizens and organs of the state. Such attitudes depend on legal consciousness and respect towards the state. In its turn, only a legal system that will meet as many essential requirements imposed on normative systems nowadays as possible may enjoy respect. For most members of a given community such a system will appear in the form of a certain set of provisions. Individual citizens will inquire why these and not other norms are valid mainly due to their observation of irregular functioning of the state organs.

Since the legal doctrine contributes to the formation of a required, from some point of view, norm of conduct in a given domain of law, which is often based on praxiological experience accumulated by lawyers in the field of legislation, interpretation of legal texts and law application, the question arises as to what affects the recognition of certain rules of interpretation as binding. There are two terms known in legal science, whose notions may apply to the formation of the rules. These are the following terms: “custom” and “mores”. So it is necessary to determine whether

and which notions of these terms may be useful to consider the formation of the rules of interpretation.

IV. The notion of custom and mores.

A. The notions of the terms "custom" and "mores" referring to some way of conduct.

The definitions of the terms "custom" and "mores" as terms referring to some way of conduct, and meant to function as reporting definitions for general language are characterised by frequent overlapping of the individual meanings of both terms. A similar situation occurs in the practice of considering customs and mores in law application.

The meanings of the terms "custom" and "mores" are distinguished in cultural studies and legal sciences.

Discrepancy in the opinions expressed about the denotations of the term "custom" and the term "mores" has caused the author to assume an attitude which might be treated as attempting to order the above mentioned opinions.

Two approaches appear possible in this aspect. The first might be based on accepting a presumption, which functions in practice after all, that custom and mores are the same thing. The second might be derived from a recognition that the terms "custom' and "mores" differ in meaning.

According to the practices of general language usage and law application, the semantic identity of mores and custom might be referred to a widely accepted, time-honoured way of conduct in certain circumstances, which is proper to a certain group of people and characteristic of a given region and time-period.

The distinction between the meanings of the terms "mores" and "custom" seems clear, however, in the case when custom is recognised as a widely accepted, time-honoured way of conduct in certain circumstances, which is proper to a certain group of people and characteristic of a given region and time-period; whereas mores is viewed as belonging to the sphere of morals. The meaning of the term "morals" in this respect is practically identical with the notion of "moral culture", sometimes referred to as ethos, way of life or life-style, which is neither morality nor law.

B. "Custom" as a way of forming norms of a certain kind.

The name "custom", as opposed to the name "mores", may also refer to the way of shaping norms of a certain kind. They may be norms of a legal, moral, religious or social nature. In this respect customary norms are the norms which developed by means of custom. It is possible to establish then that as a result of making reference to customs in provisions, mores or other norms formulated in the course of shaping a practice of a certain kind are taken into consideration.

Summing up, from the point of view of research on the formation of opinions about the binding force of some rules of interpretation in the legal doctrine, some conclusions concerning the shaping of customs and customary norms may be of important use.

V. Development of customs.

In legal sciences, the problem of the formation of customs, customary norms, customary law[5], and the notions of custom and mores was a subject of careful

consideration at the time when customary law was domineering as the means of behaviour control. Hence a great number of conclusions already made by the mediaeval school of Glossators are still up-to-date. Works worthy of note on the problems connected with customs appeared only in the 19th century. The content of these ideas is not as outdated as it may seem, although long time has passed since they were formulated. Modern science does not devote much attention to the questions of custom, nor does it offer any interesting new conception of its understanding.

At the period when the "systems" of private law were being prepared (great codification of the end of the 19th century), the conception of customary law was elaborated, which, as we will see, has retained its topicality up to now. This conception or, as a matter of fact, conceptions are often called classical conceptions (theories) of customary law [Studnicki 1949, 12].

The classical conceptions are distinguished by the fact that, unlike the historic school, they assume that **practice** is a constituent of customary law, whereas in the historic school practice was regarded only as indication of the development of customary law. Thus, the external element gains in significance again compared with the internal one.

Advocates of the classical theories clearly fall into two groups:

1) those who favour the so-called theory of conviction (Uberzeugungstheorie)

2) those who favour the so-called will theory (Willenstheorie) [Windscheid Vol. 1, 80].

The internal element is termed *"opinio iuris"* or *"opinio necessitatis"* in both specified trends.

According to the theory of conviction, *"opinio iuris"* is **a common belief that norms which are applied are law, therefore their observance is a legal obligation** [Windscheid,1906, Vol.1, 77 & 85]. State, administrative and judicial authorities are the subjects of particular importance from the point of view of their role in creating customary norms and the norms of the customary law[6]. In its essence the legal conviction is equivalent to the conviction that the norm involved is legally binding**. While the appearance of legal conviction is influenced by the opinion that this and not any other norm is reasonable, it does not exclude considering other motives from the same point of view.**

The theory of will maintains that the source of every law is the will of the society. It is this will that creates the law. The very conviction that something is obligatory from the legal point of view is not enough. The acts of practice emerging from the so-called legal will (Rechtswille), i.e. the will of putting a certain principle into practice, are needed [Brie 1899,146].

The conviction that some norm has a legal force is the most important but not the only motive for the acts of practice. The acts of practice which are the result of habit or the sense of fair conduct are not connected with legal will and, consequently, do not form any customary norms or the norms of customary law.

Within the classical conceptions there are various requirements imposed on practice (the external element). Such practice must be:

1) general

2) permanent
3) uniform
4) reasonable
5) contrary neither to law nor good mores [Ennecerus 1908, 84].

The generality of practice is revealed by the fact that the acts of practice are not isolated. It is not the spread in the whole community that is considered, but the spread within a group of people capable of developing a custom (merchants, actors, lawyers) [Brie 1899, 150]. The uniformity of practice is connected with the elimination of activities that may annihilate practice going in a certain direction. Isolated deviations from the rule are of no significance [B.Windscheid,1906, Vol.1, 85]. The permanence of practice consists in repeating activities for a long period of time[7]. The reasonable character of practice was supposed to lead to observing the rules of reasonable conduct [Windscheid Vol.1, 85].

In the Polish theoretical literature of the after-war period, the dissertation by F. Studnicki is the most comprehensive work, almost entirely dedicated to customs, customary law and the differences between them [Studnicki 1949].

According to F. Studnicki, one can differentiate between the customs which are found in the range of law and the ones which are beyond its reach. As a result, the latter cannot be transformed into law at a given time. The range of law has been changing through history. While establishing the range of law, there are both positive law and the views concerning the range of law that should be considered. The fact that customary norms refer to the matters found in the range of law does not mean, however, that a customary norm will be automatically transformed into a norm of customary law. Customary norms merely stand the chance of such transformation after reaching a certain degree of intensity.

The transformation of customary norms into the norms of customary law takes place smoothly, meaning that it depends on the extent of influence of the factors intrinsic to the custom from the moment of its appearance, and happens without adding any factors which have not appeared previously.

Regular practice of authorities applying a certain customary norm may be a means of establishing an appropriate degree of intensity of the factors which have a decisive influence on the transformation of customary norms into the norms of customary law. However, one cannot rule out the formation of customary law in the matters which so far have remained outside the practice of state organs. Another possible indicator of the appearance of the customary law is *opinio iuris,* which is based on the belief that a given customary norm has become law. And yet it is a secondary element, just a symptom of the already functioning customary law.

VI. Conditions of the development of customary practice of the interpretation of law.

Taking into account the above mentioned findings related to customary norms being in force in a human community, including the state, it should be stated that the binding role of e.g. interpretation rules, which are not expressed in any way in a legal text, requires the formation of something like *"opinio iuris"* or a common belief that the applied rules of interpretation are law, valid legal rules, which makes their observance a legal obligation. The legal conviction in question has to appear

under the influence of the belief that this and not the other rule of interpretation is reasonable, which does not exclude considering other motives for the same reason.

Undoubtedly, the way of shaping the belief in the binding force of certain rules of interpretation will vary depending on the "version" of the legal doctrine in which such belief is meant to form.

In a scientific version of the legal doctrine, the **reasonable character** of a given rule of interpretation will be a decisive factor. It means that the belief in the binding force of the rule of interpretation will emerge under the influence of various conceptions of interpretation: the ones that will formulate the rules of interpretation. According to the cohesion of the specified conception of interpretation and its praxiological quality, it is possible to establish which rules of interpretation are to be recognised as binding and what should be the sequence of their application.

Several conceptions of interpretation have been formulated in Polish legal science. Two of them provide detailed directives of interpretation and even specify the order in which they are applied. The first is a semantic conception existing in two forms: intentional [Wróblewski 1959] and extensional [Woleński 1972]; the second is a derivational conception[8]. Both conceptions partially formulate the rival directives of interpretation, and partially justify their validity.

The fact that numerous conceptions of interpretation have been formed determines the truthfulness of the statement in compliance with which a significant number of interpretation directives and the procedures of their application as well as the idea of necessity of their consideration in law interpretation have been analysed. However, it does not condition the interest in the interpretation conceptions on the part of legal practice. In a judicial version of the legal doctrine, the dissemination of the belief in the binding nature of the rules of interpretation is not a mere consequence of regarding a given rule as reasonable, i.e. the rule whose application in a given situation is appropriately justified. In reality, personal beliefs held by practising lawyers and verified by successive experiences in the practice of legal profession are of crucial importance. This statement allows coming close to establishing what influences the formation of the belief in the binding force of the interpretation rules in a decisive manner. Suffice it to say that binding nature is attributed to those arrangements related to the validity of the directives of interpretation which come from the state organs entitled to issue valid decisions. Generally, these are courts and some organs of the state administration. Court rulings are mostly binding only in a certain case, but this circumstance appears to be insignificant, as it is clear that while adjudicating on a certain case, a court or an organ of first instance will take into account the ruling of a court or organ of second (higher) instance issued previously in an identical (or similar) case. It means that the conviction that certain directives of interpretation possess a binding force can be viewed as formed if analogous solutions appear in most court rulings issued in the cases identical with or similar to the first one, that is when certain practice of interpretation appears. Echoing the advocates of the above mentioned classical conception of custom, one can assume that such practice should be general, permanent, uniform and cannot oppose the law or good mores. It is obvious that the presentation of the main factors affecting the formation of the belief in the binding force in

the scientific and judicial versions of the legal doctrine has an idealistic nature. Decisions of the court or other state organs are analysed in the practice of legal discourse, while some scientific conceptions or their elements are referred to in court rulings.

The directives of interpretation, with the exception of those which merely reflect the rules of recording the norms of conduct in legal provisions[9], are not formulated in legal provisions. It implies that the rules of interpretation are formed by means of custom. Assuming that the formation of the belief in the binding force of a certain directive of interpretation is of primary importance for the shaping of the custom and, consequently, the customary norm ordering to consider a certain rule of interpretation, it should be investigated what influences the development of such conviction.

The process of interpretation does not end together with the application of linguistic rules. The result of linguistic interpretation requires further verification [Zieliński 1998, 17]. For this purpose it should be determined which assumptions about the rationality of the legislator might be applied in a given interpreting situation. If it appears that the results of paralinguistic interpretation (in this case, functional) confirm the results of linguistic interpretation, the process of interpretation is completed. If there appear any discrepancies, the range of these discrepancies should be established. Provided the degree of discrepancy is negligible, one should adhere to the results of the linguistic interpretation. In case of radical discrepancy, when the result of the linguistic interpretation undermines any of the assumptions concerning a reasonable legislator, it is necessary to restore the coherence of these assumptions and, consequently, of the legal system by selecting a meaning of legal norms determined according to the paralinguistic rules.

This verification of the results of linguistic interpretation also takes place in judicial practice and in the practice of the state organs. It means that the formation of the belief in the binding force of a certain directive of interpretation, which is based on the features of legal texts and the role of the state organs emphasised earlier, takes place in judicial practice and in the practice of the state organs, and thus in the judicial version of the legal doctrine. The influence of the views formulated within the scientific version of the legal doctrine is rather insubstantial; establishing the real state of matters obviously requires thorough research in this field. It is also necessary to determine the criteria of correctness in the practice of the formation of the directives of interpretation[10].

Conclusion

Concluding the above considerations, it should be stated that the final result of the interpretation appears to be greatly influenced by the rules formed by means of custom. Therefore, there is a need for research on interpretation concerning the factors which influence the practice of interpretation and the formation of the belief in the validity of the directives of interpretation, as well as the factors which are expected to affect the practice of interpretation and the formation of the belief in the validity of its directives.

Notes

1. Among paralegal rules of reference one can differentiate between the principles of social cohabitation, customs, mores, other social rules and technical directives, and the rules of fairness.

2. In this paper the term "interpretation" is used in its broader sense. It involves giving the meaning of legal provisions as utterances equivalent to a certain set of legal norms (interpretation in the narrow sense); as well as inferring from these norms other norms as their consequences, and resolving the conflicts of the norms of the legal system.

3. In a certain sense the legal doctrine is a continuation of *ius publice respondendi* (known from Roman law), the prerogative to provide answers, which are binding for the state organs, to legal inquiries.

4. The word "system" is used in this case to allow for expansion. Sometimes it is difficult to notice a regular arrangement in the collection of paralegal rules followed by a professional lawyer in his practice.

5. The term "customary law" is used to denote any legal provisions that originate from custom. Thus, English common law is a historically developed variety of customary law.

6. According to the comprehension of custom in the classical conception, the distinction between "custom", "customary rule" and "customary law" was irrelevant.

7. In the Austrian Penal Code from 1787 a provision is found (§12), which states that a custom possesses a binding force provided it has been applied at least three times, with at least 10 years having passed since its first application and no one having objected to this application in the meantime.

8. The conception was initially formulated in the following works: Ziembiński, Z. 1996 *Logical Basis of Jurisprudence*. Warsaw; Zieliński, M. 1972 *Interpretation as the Process of Decoding a Legal Text*. Poznań.

9. They are possible to reproduce by analysing the principles of legislative technique comprised in the annex to Resolution of the Cabinet (rozporządzenie Rady Ministrów) from 20 June 2002 regarding the principles of legislative technique. Also compare: Wronkowska, S., Zieliński, M. 1997 *The Principles of Legislative Technique*. Komentarz, Wydawnictwo Sejmowe (p. 84) and Wronkowska, S., Zieliński, M. 2002 *The Principles of Legislative Technique*. Komentarz Wydawnictwo Sejmowe.

10. One should not, however, abandon the application of linguistic directives of law interpretation if a legal definition is present in the legal text, there is a straightforward indication of the subjects entitled to certain authorities, or if the paralinguistic meaning charges the citizens. The principle *exceptiones non sunt extendendae* should also be kept in mind, as well as the fact that annulling provisions cannot be interpreted extensively.

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