

# CUSTOM AS A SOURCE OF LAW: ARGENTINEAN AND COMPARATIVE LEGAL SYSTEMS

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I.	INTRODUCTION .....	651
II.	SOURCES OF LAW .....	652
III.	CONCEPT .....	652
IV.	HISTORICAL EVOLUTION .....	653
V.	CONSTITUENT ELEMENTS .....	654
	A. <i>Material</i> .....	654
	B. <i>Subjective—Opinio Juris et Necessitatis</i> .....	655
	C. <i>Axiological</i> .....	655
VI.	THE LAW AND TYPES OF CUSTOM .....	655
	A. <i>Custom Secundum Legem</i> .....	655
	B. <i>Custom Praeter Legem</i> .....	656
	C. <i>Custom Contra Legem</i> .....	656
VII.	THE ARGENTINEAN CIVIL CODE, ARTICLE 17 .....	657
	A. <i>The Code of Dalmacio Vélez Sarsfield</i> .....	657
	B. <i>The Reform of the Decree/Law 17.711</i> .....	659
VIII.	LABOR AND EMPLOYMENT LAW .....	660
IX.	BURDEN OF PROOF .....	662
X.	LATIN AMERICAN LEGISLATION .....	662
XI.	COMPARISONS BETWEEN SOME LATIN AMERICAN LEGISLATIVE NORMS .....	663
	A. <i>Venezuela</i> .....	663
	B. <i>Mexico</i> .....	663
XII.	CURRENT TENDENCIES .....	664
XIII.	CONCLUSION .....	666

## I. INTRODUCTION

The purpose of this article is to reflect on custom as a source of law in the Argentinean and comparative legal systems. The study of custom has been divided into three sections. The first section locates custom among the sources

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of law, defines its concept, and analyzes its historical evolution, the elements that comprise it, as well as the modalities it can assume in its relationship with the law. The second section thoroughly examines the reception given to the custom by Dalmacio Vélez Sarsfield in the Argentinean Civil Code (1871) redacted by him. Subsequently, we consider the reform of said Code, driven by Guillermo Antonio Borda through the Decree/Law 17.711 of 1968. In this framework, a brief reference is developed regarding the position that custom has in Argentinean labor and employment law. The third section focuses on recent situations generated in Europe and Latin America related to custom and concludes with its revaluation as a source of law.

## II. SOURCES OF LAW

The expression “source of law” dates back to antiquity and its meaning has differed according to the desired result.<sup>1</sup> In the present article, reference is made to this expression in its *formal* aspect, understanding as such those norms or rules of positive law from which rights and duties to others emanate.<sup>2</sup> In this sense, as expressed by Julio César Cueto Rúa, sources of law are those “instances observed by judges, legislators, public officials, and administrators when they must assume the responsibility of creating a legal norm . . . for a concrete case.”<sup>3</sup> As a result, among the sources of law we find positive law and custom.<sup>4</sup>

## III. CONCEPT

In defining custom, the doctrine unanimously maintains that it is “the constant and uniform observance of a [rule of conduct] by the members of a social community, with the conviction that custom responds to a legal necessity.”<sup>5</sup>

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1. See LUIS DíEZ-PICAZO, EXPERIENCIAS JURÍDICAS Y TEORÍA DEL DERECHO [LEGAL EXPERIENCES AND THEORY OF LAW] 110, 111–18 (3d ed. 1999). The origin of the term “sources” as applied to the field of law is found in the *Tractatus de Legibus* of Cicero (I century, A.D.). The modern idea of legal sources arose in commentaries that were, in turn, produced in Title II of the 1st Digest and were generalized in the European literature of the XVIII and XIX centuries with Savigny, Puchta and Vallet de Goytisolo. *Id.*

2. GUILLERMO BORDA, TRATADO DE DERECHO CIVIL [TREATY] 59 (14th ed.) (Editor’s Note: this source has not been verified).

3. JULIO CUETO RÚA, FUENTES DEL DERECHO [SOURCES OF LAW] 13, 20 (Abeledo-Perrot 1994).

4. GUILLERMO E. GARBINO ET AL., 1 CÓDIGO CIVIL Y LEYES COMPLEMENTARIAS: COMENTADO, ANOTADO Y CONCORDADO [CIVIL CODE AND COMPLEMENTARY LAWS: DISCUSSED, ANNOTATED AND AGREED] 90 (4th ed. 1993).

5. Enrique V. Del Carril & Mariano Gagliardo, *La Costumbre como Fuente de Derecho* [Custom as a Source of Law], 56 E.D. 26 (1974) (citing ROBERTO DE RUGGIERO, INSTITUCIONES DE DERECHO CIVIL [INSTITUTIONS OF CIVIL LAW] 80 (4th ed. 1929)).

In this sense, putting into evidence the comprising elements that turn an act or omission into legally binding conduct, it is affirmed that a “custom is the reiteration of spontaneous forms of conduct by members of a determined societal group, with the conviction that it comply with a legal rule since it pertains to a legal necessity.”<sup>6</sup>

On the other hand, there is an important difference between customs and simple social usages, with regard to the nature and intensity of sanctions.<sup>7</sup> The simple social usage does not impose sanctions or, in the case that it does, these are very slight.<sup>8</sup> They are a small malaise in the majority of cases. In contrast, “a custom causes [major upheavals] in the community and imposes sanctions to transgressors.”<sup>9</sup> It is not a difference in nature or genre, but merely of kind.<sup>10</sup>

#### IV. HISTORICAL EVOLUTION

The importance of custom as a source of rights and obligations has varied significantly over time, characterizing itself by its permanent tension with positive law.<sup>11</sup> Thus, three historical moments are recognized. In the first stage, marked by an absolute legislative decentralization, custom was considered superior to the law.<sup>12</sup> In the first societies, which were less evolved and therefore more homogenous, custom appears as the exclusive source of the law accepting as binding immemorial uses received by means of tradition.<sup>13</sup> With the later cultural development and outburst of written law in the Roman legal system with the Law of the XII Tables, the transition from consuetudinary law to written law took place and custom and the law became equals.<sup>14</sup> Finally, as the interpersonal relations became more complex, heterogeneous and numerous, it was necessary to determine, with more precision, the content and extent of

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6. Eugenio O. Cardini, *La Costumbre en Nuestro Derecho Civil* [*Custom in our Civil Law*], 122 L.L. 1091, 1094 (1966).

7. Julio César Castiglione, *La Costumbre Jurídica* [*The Legal Custom*], 2000 L.L.N.A. 730, 732 (2000).

8. *Id.*

9. *Id.*

10. *Id.*

11. Carlos Alfredo Hernández, *Orden Publico y Buenas Costumbres: La Costumbre Como Fuente de Derecho y las Buenas Costumbres Como Estándar Jurídico* [*Public Order and Good Customs: Custom as a Source of Law and Good Customs as the Legal Standard*], 3 REVISTA DE DERECHO PRIVADO Y COMUNITARIO 181 (2007).

12. *Id.*

13. GARBINO, *supra* note 4, at 90.

14. *See* Del Carril, *supra* note 5, at 804–05; *see also* Hernández, *supra* note 11, at 181–82.

rights and obligations.<sup>15</sup> This way, the lack of certainty and uniformity of customs made it possible for the law to be considered the superior source.<sup>16</sup> In addition, the peak of the rationalist positivism inspired by the Napoleonic Code of the XIX Century and the German Code of the XX Century, allowed the legislative technique to be perfected gradually, whereas the field of custom continued narrowing down.<sup>17</sup>

## V. CONSTITUENT ELEMENTS

Scholars understand that not all customs are considered a source of law. A usage must “necessarily rely on specific elements that characterize a consuetudinary norm, otherwise it will not be considered mandatory.”<sup>18</sup> The characteristic elements of custom are: material, subjective and axiological.<sup>19</sup>

### A. Material

- 1) Constant and Uniform Operations: Requiring a repetition of constant, homogenous and uninterrupted actions. As such, it is important to follow a similar line of conduct with respect to identical situations;<sup>20</sup>
- 2) Generality: It is required that the usage be accepted by the greater number of people in identical cases and not only by a determined sector;<sup>21</sup>
- 3) Duration: The importance of this element has varied through time, becoming indispensable when custom was considered to be under the realm of adverse possession.<sup>22</sup> Nevertheless, the modern approach does not require a fixed term, upholding that it is not necessary, thus leaving this element open to judicial discretion as a matter of fact;<sup>23</sup>

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15. GUILLERMO A. BORDA, MANUAL DE DERECHO CIVIL: PARTE GENERAL [MANUAL OF CIVIL LAW: GENERAL PART] 46 (14th ed. 1999).

16. Hernández, *supra* note 11, at 181.

17. See generally BORDA, *supra* note 2.

18. GARBINO, *supra* note 4, at 91.

19. See Del Carril, *supra* note 5, at 804–05; see also GARBINO, *supra* note 4, at 91–92.

20. GARBINO, *supra* note 4, at 91–92.

21. *Id.* at 92.

22. The Canonical Laws (Cannons 27 and 28) have set a forty year period for the *praeter legem* custom and a period of a hundred years for the *contra legem* custom. GARBINO, *supra* note 4, at 92. La Ley de Partidas [The Law of Items] (Points 1, 2 and 5) demanded a 10 or 20 year period. Del Carril, *supra* note 5, at 805. It was defined that custom “. . . is non-written law that men have used *luengo tiempo* [for a long time] . . .” Castiglioni, *supra* note 7, at 735.

23. Cardini, *supra* note 6, at 1094; Del Carril, *supra* note 14, at 805.

- 4) Public: The law shall not be secretly applied. This arises in a parallel way to the requirement of *publication* of written laws;<sup>24</sup> and
- 5) *Patientia Principis*: The Government tolerates the custom.<sup>25</sup>

### B. Subjective—*Opinio Juris et Necessitatis*

“It is the general conviction that the usage that is followed is a legal rule that must be accepted as such, or otherwise would be mandated and coerced.”<sup>26</sup> This element allows for the distinction between custom and mere usage or practice.<sup>27</sup>

### C. Axiological

Custom means exemplarity when it follows patterns of conduct considered rational and moral by society.<sup>28</sup> In this sense, all types of worthless behavior must be discarded (for example, non-payment of debts or taxes) and the absolute freedom of customs must be restrained through diverse limits, such as through general principles of law and human dignity.<sup>29</sup>

## VI. THE LAW AND TYPES OF CUSTOM

In general, three kinds of relationships between custom and law have been recognized.<sup>30</sup> These are the customs *secundum legem*, *praeter legem* and *contra legem*.<sup>31</sup>

### A. Custom *Secundum Legem*

This is custom which is expressly recognized within the law and which becomes valid as soon as the legislation allows it to operate.<sup>32</sup> The law remands the custom, subordinating its operation to the approval of the legislator.<sup>33</sup> In

24. Hernández, *supra* note 11, at 188.

25. Cardini, *supra* note 6, at 1094.

26. GARBINO, *supra* note 4, at 93

27. *Id.* at 92–93.

28. See Del Carril, *supra* note 5, at 805; see also ANTONIO VAZQUEZ VIALARD ET AL., TRATADO DE DERECHO DEL TRABAJO [LABOR LAW TREATY] 432 (1982).

29. See Del Carril, *supra* note 5, at 805; see also DÍEZ-PICAZO, *supra* note 1, at 148; Philippe Le Torneau, *Derecho y Ética [Law and Ethics]*, 99 C LL.1 (2008).

30. Cardini, *supra* note 6, at 1095; see also Castiglioni, *supra* note 7, at 737.

31. Cardini, *supra* note 6, at 1095.

32. *Id.*; see also Castiglioni, *supra* note 7, at 737.

33. Castiglione, *supra* note 7, at 737.

fact, the inclusion of custom into the text of the law is what grants it its obligatory force, thereby eliminating the subjective element of *opinio iuris et necessitates*.<sup>34</sup> In this case, it is not actually a source of law.<sup>35</sup>

### B. Custom *Praeter Legem*

This type of custom arises spontaneously at the margin of legal dispositions, completing the legal gaps in cases of unregulated matters or matters deficiently regulated by the law.<sup>36</sup> Historically, the custom *praeter legem* was always relegated to a subordinate level of importance. Thus, the codification process of the XIX Century served to solidify the principle of supremacy of written law over other sources of law and to conceive the “supremacy” of the legal order.<sup>37</sup> In cases of legal gaps, it must be resorted to elements of existing norms, such as the analogy to another legal norm and general principles of law, but never to external sources like custom.<sup>38</sup> Nevertheless, in our opinion, the negation of the custom *praeter legem* is excessive and incompatible with the reality of the law. Indeed, in instances where the law has not anticipated solutions, legal relations are ordered spontaneously and fill those gaps.<sup>39</sup> At the present time it is admitted with total value, nevertheless maintaining the supremacy of the law.<sup>40</sup>

### C. Custom *Contra Legem*

It is defined as custom which negates a rule of law.<sup>41</sup> Between the various types of custom, custom *contra legem* is the one that has always been the subject of great academic discussion and which has consequently resulted in antagonist positions with respect to its validity and the possibility of reversing the law.<sup>42</sup>

For those authors who adopt a monist position and interpret the law merely as a system of positive rules, it is not acceptable for custom to prevail over the

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34. GARBINO, *supra* note 4, at 94.

35. *Id.*

36. Cardini, *supra* note 6, at 1095.

37. Hernández, *supra* note 11, at 194.

38. Castiglione, *supra* note 7, at 737.

39. See generally Guillermo A. Borda, *El Derecho Jurisprudencia General*, in, LA REFORMA DEL CÓDIGO CIVIL 28 E.D. Jurisp. Gral. 817, 820.; see also GARBINO, *supra* note 4, at 95.

40. Garbino, *supra* note 4, at 95.

41. *Id.*

42. Del Carril, *supra* note 5, at 806.

law and cause the latter to lose its effectiveness. Those authors embrace the principle of legislative preeminence.<sup>43</sup>

On the other hand, those who defend the system of plurality of sources maintain that if law is considered to be both a norm and a legal reality, then custom, as expression of that reality, can abrogate the law.<sup>44</sup> Thus, when the law arises from a political system and from a social framework, it could not contradict the customs or the legal sense of the community, without suffering a serious decline of its authority.<sup>45</sup> The custom *contra legem* would be the right to resist unfair laws.<sup>46</sup>

In our opinion, the second posture is the correct one. Indeed, when there are certain differences between the social feeling and legal norms, the result may well be the abandonment of the law and the creation of an opposite custom.<sup>47</sup> In this sense, to deny that the laws can be abandoned or that society can create opposite conducts to those of written norms is to ignore the social dimension of the law and the principle of reality.<sup>48</sup> We deem that it would be clearly impossible to accept the fiction of a binding law when it in fact does not function to deter its subjects from not following and respecting it.<sup>49</sup> Nevertheless, we cannot forget that legal order, through its norms, impels towards a certain direction and that the evolution of custom need not be necessarily promoted by the law.<sup>50</sup> Normative cannot be reduced to normality.<sup>51</sup>

## VII. THE ARGENTINEAN CIVIL CODE, ARTICLE 17

### A. *The Code of Dalmacio Vélez Sarsfield*

In its original language, Article 17 of the Civil Code established that “the laws cannot be repealed entirely or in part, except though by other laws. Usages, customs, or practices cannot create rights, except when the laws

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43. I MIGUEL S. MARIENHOFF, *TRATADO DE DERECHO ADMINISTRATIVO* [ADMINISTRATIVE LAW TREATY] 306 (5th ed. 2000). [Editor’s Note: This Source has not been verified.]

44. See GARBINO, *supra* note 4; see also Del Carril, *supra* note 5, at 801–11.

45. GARBINO, *supra* note 4, at 95.

46. AMADO ADIP, *CONFLICTO ENTRE LA LEY Y COSTUMBRE* [THE CONFLICT BETWEEN CUSTOM AND LAW] 43 (2nd ed. 1975); see also GARBINO, *supra* note 4, at 96.

47. It is important to distinguish *imperative* norms from *dispositive* norms, accepting the value of the custom *contra legem* only regarding the latter. The derogation of *imperative* norms does not proceed as a result of being in the public order. That way, the labor law assures minimum standards for the worker that cannot be modified through any other conventional dispositions or customs. See GARBINO, *supra* note 4, at 96.

48. Imerio J. Catenacci, *Desuso y Desuetudo*, L.L. 1994-C 232 (1994).

49. Castiglione, *supra* note 7, at 737.

50. Le Torneau, *supra* note 29, at 3.

51. *Id.*

specifically refer to them.”<sup>52</sup> For the writing of this article, D. Vélez Sarsfield resorted to the legislation of Spanish origin (*Novísima Recopilación*), the Chilean Code of Andrés Bello, the Austrian Code and the Dutch Code, as well as the Project of Goyena.<sup>53</sup>

The drafter only admitted the custom *secundum legem*, as indicated by the article, denying any value to customs *contra legem* and *praeter legem*.<sup>54</sup> However, with respect to the latter, the jurisprudence paved the way for numerous consuetudinary norms, as was the case of the names of certain individuals, such as the last name of married women, (whose omission was considered to be a serious insult and cause for divorce), the legal regime applicable to cemeteries, salaries, and the labor and employment regime.<sup>55</sup>

With respect to the restrictive deference given to the custom by D. Vélez Sarsfield, we believe that it responded to the historical frame in which the Civil Code was legitimized, immersed in the prevailing criteria of legal positivism of the XIX Century.<sup>56</sup> Thus, the situation was “coherent with the national project being developed because the latter was grounded in the absolute respect of private ownership [the supremacy of the rule of law] and the rigid affirmation of the principle of freedom of contracts.”<sup>57</sup>

According to rationalist authors of that time, recognizing the mandatory effect of the custom would violate Articles 19 and 22 of the National Argentinean Constitution which establish that no person shall be “compelled to do what the law does not command, or be deprived of that which the law does not prohibit,” and that the people do not deliberate or govern except by means of their representatives.<sup>58</sup> To recognize custom as a source of rights and obligations would imply jeopardizing the aforementioned principles, since the people would be able to directly establish the legal norm instead of doing so by means of their representatives.<sup>59</sup>

This position has been subject to later revisions and criticism, indicating that the term law as mentioned in Article 19 refers to every legal rule containing

52. Cardini, *supra* note 6, at 1097; see also Hernández, *supra* note 11, at 201.

53. Cardini, *supra* note 6, at 1100.

54. *Id.* at 1099–1100.

55. See *id.* at 1100–03. The married woman was registered under her maiden name. With the maiden last name, her identification card would be expedited, but the customary norm imposed the use of the marital name. GARBINO, *supra* note 4, at 95.

56. Hernández, *supra* note 11, at 194–95.

57. During the same time, 1872, the great writer Jose Hernández published the first part of *Martin Fierro*, a masterpiece of Argentine gaucho literature.

58. CONST. ARG., Ch. I, art. XIX & XX, available at <http://www.senado.gov.ar/web/consnac/consnac.htm> (last visited Apr. 3, 2009); Borda, *supra* note 39, at 819–20.

59. *Id.*

an obligatory character, regardless of whether or not it is enacted by the legislative branch (decrees, regulations, jurisprudence).<sup>60</sup> With respect to Article 22 and the republican principle of government, it is not against admitting customs as a source of the law.<sup>61</sup> In any event, we must emphasize that D. Vélez Sarsfield did not ignore the importance of the custom, as he demonstrates in the note to Article 167 of the Civil Code when he refers to the role of the law, sustaining that it is “to maintain and to increase the power of the customs and not to enervate or corrupt them.”<sup>62</sup>

*B. The Reform of the Decree/Law 17.711*<sup>63</sup>

Almost a century after the passing of the Civil Code,<sup>64</sup> the reform introduced by the Decree/Law 17.711<sup>65</sup> prompted a new spirit in the civil legislation. Thus, it recognized a system of plurality of sources, being these, the law, usages, customs, and the general principles of law.

When modifying the previous Article 17, it established that “usages and customs cannot create rights unless the laws specifically refer to them or in legally unregulated situations.”<sup>66</sup> The text of new article 17 establishes a general principle and two exceptions.<sup>67</sup> As a rule, it maintains the preeminence of the law as hierarchically superior to the custom as a source of the law (“the usages and customs cannot create rights”).<sup>68</sup> As a first exception, the reform maintained the custom *secundum legem* in its original language (“but only when laws refer to them”).<sup>69</sup> The legislative innovation came with the inclusion of the second exception, by expressly accepting the binding authority of the custom *praeter legem* in those cases of “legally unregulated regulations.”<sup>70</sup> With the reform, the custom *praeter legem* was elevated by admitting judicial rules in addition to statutory norms.<sup>71</sup>

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60. *Id.*

61. *Id.*

62. Castiglione, *supra* note 7, at 736.

63. Law No. 17711, Apr. 26, 1968, [CXVI] B.O. 1.

64. *Id.*

65. *Id.*

66. Del Carril, *supra* note 5, at 809.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*; see also Borda, *supra* note 39, at 819.

71. Jorge Mosset Iturraspe, *El Plexo Normativo: El Finalismo de las Leyes, los Usos y Costumbre (En el Proyecto de Unificación)* [The Regulatory Plexus: The Finality of Laws, Uses and Custom [In the Unification Project)], D.L.L. 1087, 1088 (1987).

With respect to the validity of the custom *contra legem*, the Decree/Law 17.711 suppressed the solution devised by D. Vélez Sarsfield by repealing Article 17, which established that “the laws cannot be repealed entirely or in part except by other laws.”<sup>72</sup> This way, the controversy regarding its admissibility remains open.<sup>73</sup> In effect, the silence of the reformed article “opens the door to the possibility of an exceptional recognition of the abandonment of the law as derogatory of the law.”<sup>74</sup>

On one hand, the jurisprudence has been particularly critical of the school of thought that proposes a favorable interpretation of the custom *contra legem*.<sup>75</sup> On the other hand, more favorable towards the custom *contra legem*, is the very author of the reform, Guillermo A. Borda, guided by a less formal and more realistic approach to the legal world.<sup>76</sup> Furthermore, in response to the criticism that resulted from the legislative silence regarding this issue, Borda argues that if the law expressly establishes that it can be repealed by the custom, this would “imply an anarchical principle because it would suggest that merely disobeying the law would cause it to lose its binding effect.”<sup>77</sup>

### VIII. LABOR AND EMPLOYMENT LAW

It is interesting to emphasize that the Argentinean legal system not only recognizes custom as a source of law for civil legislation, but also in other legal disciplines of its other branches, such as labor and employment law.<sup>78</sup>

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72. Borda, *supra* note 39, at 819.

73. *Id.*; Hernández, *supra* note 11, at 196.

74. Borda, *supra* note 39, at 820.

75. Hernández, *supra* note 11, at 196. For example, the maneuver realized by a person causing a railroad accident—in this case, by passing two other automobiles that were waiting for the train to pass and intending to cross it while the barriers were down, in zigzag and without first observing if a convey was approaching—is not common sensical. Even though this could be habitual on the part of pedestrians and vehicles, the maneuver that the victim has realized in order to cross the tracks does not alter its condition as illegal and violative of the Decree/Law 13.893, since it is known that the custom *contra legem* cannot generate laws. See Alicia N. Descote, *Daños y Perjuicios [Damages and Prejudices]*, L.L. 590, 590 (1998).

76. Hernández, *supra* note 11, at 196. “One case of *contra legem* custom, if well within the field of Constitutional Law, is the non-application of jury trials, pursuant to art. 24 of the National Constitution.” CONST. ARG., Ch. I, art. XXIV, available at <http://www.senado.gov.ar/web/consnac/consnac.htm> (last visited Apr. 3, 2009).

77. Borda, *supra* note 39, at 820 (citing to JEAN CRUET, *LA VIE DU DROIT ET L'IMPUISSANCE DES LOIS [THE LIFE OF THE LAW AND THE IMPOTENCE OF THE LAW]* (5th ed. 1908)). “Yes, it is true that nonuse obliterates laws, but it is better to not say so.” *Id.* LABOR AND EMPLOYMENT LAW.

78. In the case of the Argentine Republic, the Contract Labor Law (Article 1) and other Latin American laws that have accepted custom as a source of law are: México (Article 17); Brazil (Article 8); Colombia (Article 19); Costa Rica (Article 15); Guatemala (Article 15); and Nicaragua (Article 11). *Ley Federal del Trabajo [L.F.T.] [Federal Labor Law]*, art. 17, *as amended*, *Diario Oficial de la Federación [D.O.] [Official Journal of the Federation]*, Apr. 1, 1970 (Mex.), available at

Historically, custom has carried out a central role in the area of labor and employment law.<sup>79</sup> In its *praeter legem* function, together with the dispositions of the civil law, it constituted the system of norms applicable to employment relationships in the periods prior to the birth and development of labor and employment legislation.<sup>80</sup> Nevertheless, when confronted with the current phenomenon of legislative inflation and collective bargaining within public labor law, the custom has lost its preeminence.<sup>81</sup> The general principle is the admission of the custom as a formal source of law, while there are exceptional situations that arise when the social sentiment departs from the positive labor and employment legislation and confronts the principle of legislative supremacy.<sup>82</sup>

Similar to civil law, labor and employment law accepts the same classification of the custom as *secundum legem*, *praeter legem* and *contra legem*. With respect to the characteristics of labor and employment custom, the doctrine holds that the same is local, since it is only accepted in a determined geographic and professional area because it refers to a specific activity.<sup>83</sup> Consequently, its application by analogy does not apply to different situations.<sup>84</sup> Within this background we find the denominated “company usage” generated

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<http://www.ordenjuridico.gob.mx/Federal/Combo/L-130.pdf> (last visited Apr. 3, 2009); Decreto No. 5.452, May 1, 1943, D.O.U. 9.8.1943, art. 8 (Brazil), available at <http://www.planalto.gov.br/ccivil/Decreto-Lei/Del5452compilado.htm> (last visited Mar. 27, 2009); Decreto 3.743, art. 46 of 1950, Código Sustantivo del Trabajo [Substantive Code of Labor], art. 17, June 7, 1951 (Colom.), available at [http://www.secretariasenado.gov.co/senado/basedoc/codigo/codigo\\_sustantivo\\_trabajo.html](http://www.secretariasenado.gov.co/senado/basedoc/codigo/codigo_sustantivo_trabajo.html) (last visited Apr. 3, 2009); Código del Trabajo [Labor Code], Law No. 2, art. 17, Aug. 26, 1943 (Costa Rica), available at <http://www.mopt.go.cr/documentos/Maritimo-Portuaria/L.2.pdf> (last visited Apr. 3, 2009); Código del Trabajo [Labor Code], Decreto No. 1441, art. 15, 1947 (Guatemala), available at <http://www.mintrabajo.gob.gt/org/leyes-y-convenios/leyes-ordinarias/codigo-de-trabajo> (last visited Mar. 27, 2009); Código del Trabajo [Labor Code], Law No. 185, art. 11, Sept. 5, 1996, La Gaceta [L.G.] No. 205, Oct. 30, 1996 (Nicaragua), available at [http://www.construccion.com.ni/files/ley/1204139277\\_Codigo%20del%20Trabajo%20de%20Nicaragua.pdf](http://www.construccion.com.ni/files/ley/1204139277_Codigo%20del%20Trabajo%20de%20Nicaragua.pdf) (last visited Mar. 27, 2009).

79. Vazquez, *supra* note 28, at 438.

80. *See id.*

81. *See* Diego M. Tosca, *Fuentes del Derecho del Trabajo* [Sources of Labor Law], in I TRATADO DE DERECHO DEL TRABAJO, TEORÍA GENERAL DEL DERECHO DEL TRABAJO [TREATY OF LABOR LAW, GENERAL THEORY OF LABOR LAW] 557 (Rubinzal & Culzoni eds., 2005). While providing the example of the prohibition of receiving gratuitous payments (tips), imposed by the gastronomic ruling approved in Decree/Law 4.148/46, ratified in statute section 12.291 (currently repealed by statute section 22.310). According to Articles 2 and 4, its perception constitutes failure to execute the labor contract and justified its dismissal. *Id.* Nevertheless, the disposition was never fulfilled and in practice, the workers of the particular sector observed that benefit. *Id.*

82. *See id.*

83. JUSTO LÓPEZ ET AL., I LEY DE CONTRATO DE TRABAJO COMENTADA [CONTRACTUAL LABOR LAW DISCUSSED] 20 (1977); *see also* Tosca, *supra* note 81, at 556.

84. LÓPEZ, *supra* note 83, at 20.

by the repeated and uniform conducts of each company.<sup>85</sup> In each one of them arises an institutional order made up of unwritten rights and obligations that binds the employed work force.<sup>86</sup> These company practices become true rules with binding effect when they are expressly recognized in first instance by the jurisprudence and later by the positive legislation, as has been the case with salary practices and their binding effect for the future, the leaves of absence longer than legally mandated and the disciplinary authority which allows an employer to suspend a worker.<sup>87</sup>

#### IX. BURDEN OF PROOF

The burden of proof of a custom is subordinated to its notoriety in each specific case. Thus, when a judge has knowledge of its existence because it has been recognized by judicial precedent or treated in a particular fashion by a qualified doctrine, it becomes a matter of law and the court can, and must, apply it as the obligatory legal norm, with no need for proof (*iura novit curia*).<sup>88</sup> Nevertheless, if the existence of the consuetudinary norm has been contradicted or if the judge does not know it or has invoked it as a standard of interpretation (as is the case with commercial law), the proof is the very existence of the facts, shifting the burden to the alleging party by proving its material constituent elements.<sup>89</sup>

#### X. LATIN AMERICAN LEGISLATION

The relevance of the custom as a source of law varies significantly according to the type of legal system. In the scope of comparative law, it has great importance in the common law system, in Islamic law and the law of recently decolonized countries in which the colonial legislation (imported, imposed) is complemented in light of the local consuetudinary norms<sup>90</sup> (for example, African Law).<sup>91</sup>

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85. Tosca, *supra* note 81, at 558–59.

86. *Id.*

87. The cases were primarily dealt with pursuant to the jurisprudence and then through Contract Labor Law. *Id.* at 559; *see also* Vazquez, *supra* note 28, at 439–41.

88. GARBINO, *supra* note 4, at 97; *see also* Cardini, *supra* note 6, at 1096–97.

89. *Id.*

90. MARIO G. LOZANO, LOS GRANDES SISTEMAS JURÍDICOS, INTRODUCCIÓN AL DERECHO EUROPEO Y EXTRANJERO [THE GREAT LEGAL SYSTEMS, INTRODUCTION TO EUROPEAN AND FOREIGN LAW] 164–65 (Alfonso Ruiz Miguel trans., Editora Debate 1993) (1982).

91. *Id.*

On the other hand, with respect to Latin American countries, they share common historical and cultural values.<sup>92</sup> Because custom is a relevant part of the culture, we can see the existence of a common legal base to the countries of the Mercosur<sup>93</sup> and Latin America in general.<sup>94</sup> Therefore, there is a *Latin American legal system* of Hispanic-Roman-local character, constituted by legal norms and shared principles of law.<sup>95</sup> In this sense, it is typical of the Latin system that statutes are considered the main source of law, superior to the custom, and non-legislated matters are governed by the consuetudinary law.<sup>96</sup>

## XI. COMPARISONS BETWEEN SOME LATIN AMERICAN LEGISLATIVE NORMS

### A. Venezuela

“Laws can only be repealed through other laws; and neither its abandonment nor custom or contradictory usage can be alleged to excuse its non-observance, no matter how old or universal they are.”<sup>97</sup>

### B. Mexico

Custom is admitted in some cases as a delegated source of law. For example:

[W]ith reference to Article 17 of the Federal Labor and Employment Law, in order for the custom to be invoked as such, and demand its recognition and definite implementation, it is necessary that the following circumstances concur:

- a) That there be a repeated and uninterrupted usage for a considerable time;
- b) That such usage be done with the consent of the parties;
- c) That the consensus be constituted as the governing norm in certain relations; and

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92. RICARDO LUIS LORENZETTI, *LAS NORMAS FUNDAMENTALES DE DERECHO PRIVADO* [THE FUNDAMENTAL NORMS OF PRIVATE LAW] 224 (Rubinzal & Culzoni eds., 1995).

93. *Id.* at 225.

94. *Id.* at 224.

95. *Id.*

96. GARBINO, *supra* note 4, at 91.

97. Cod. Civ. Título Preliminar de las Leyes y sus Efectos, y de las Reglas Generales para su Aplicación [Civil Code Preliminary Title of the Laws and its Effects, and of the General Rules for its Application], No. 2.990, art. 7, July 26, 1982 (Venez.), available at <http://www.cajpe.org.pe/RIJ/bases/legisla/venezuel/ve20a.htm> (last visited Mar. 21, 2009).

- d) That the usage does not contradict other legal or contractual dispositions . . . .<sup>98</sup>

## XII. CURRENT TENDENCIES

During the XIX Century, the codified legislation neglected custom as a source of law by considering it incompatible with the judicial construction of the rationalist positivism. However, contemporary times marked by a strong globalization of legal norms, the overcoming of national barriers, and an increase in multiculturalism, place custom as a subject of great importance.<sup>99</sup> Within this new framework, the question that has raised concerns is the meaning and extension of the term “custom.”

On the one hand, current European law shows a greater social and legal pluralism resulting from the increasing number of immigrants.<sup>100</sup> Plurality of languages, religions, moral lifestyles and standards has impacted the law and has produced a modification of great importance in the concept of custom. A clear example of the new limits and meaning was present in the recent decision of a French court which annulled the marriage of a Muslim couple because the bride had lied about her virginity.<sup>101</sup> The husband, reacting to the Muslim cultural requirement to consider the virginity of the woman until marriage a legal obligation, denounced the situation and asked for the annulment of the union.<sup>102</sup> The Court annulled the marriage on the grounds that the husband acted “under an objective error.”<sup>103</sup> Previous jurisprudence has permitted the annulment of marriages for completely different situations, such as when one of the parties has lied about his or her divorced status, when one of the parties

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98. ENRIQUE CRUZ MARTÍNEZ & MARIO CRUZ MARTÍNEZ, ESTUDIOS EN HOMENAJE A DON JORGE FERNÁNDEZ RUIZ: DERECHO INTERNACIONAL Y OTROS TEMAS 83 [STUDIES IN HONOR OF DON JORGE FERNÁNDEZ RUIZ: INTERNATIONAL LAW AND OTHER MATTERS] (2005) (citing to *Semanario Judicial de la Federación y su Gaceta*, t. XI, Junio 2000. Tesis: I.60. T. J/31, p. 492), *disponible en* <http://www.bibliojuridica.org/libros/4/1628/7.pdf> (última visita 27 de marzo de 2009); *Ley Federal del Trabajo*, *supra* nota 78.

99. Hernández, *supra* note 11, at 183–84.

100. *Id.* at 184.

101. *Anulan la Boda Porque la Novia no era Virgen* [Nullity of a Marriage Because the Bride was not a Virgin], LA NACION, May 31, 2008, at 1, available at [www.lanacion.com.ar/exterior/nota.asp?nota\\_id=1017153&origen](http://www.lanacion.com.ar/exterior/nota.asp?nota_id=1017153&origen), (last visited Mar. 27, 2009). Keep in mind that France is a secular country through its excellence under which all signs pertaining to religion have been prohibited (such as Islamic veils, kipas, and crucifixes, etc.) within the administration of public schools. TRIBUNAL DE GRANDE INSTANCE DE LILLE, *Chambre 1 07/08458, JUGEMENT DU 01 Avril, 2008* at 1.

102. *Id.* at 2–3.

103. *Id.* at 3.

had previously engaged in prostitution, or when one of the parties was a convict sentenced to forced labor (1862).<sup>104</sup>

This decision demonstrates the current process that most European Union countries face with respect to the existence of new values and imported cultural patterns, and the gradual acceptance of such as legally obligatory in both the national and communitarian legislative systems.

On the other hand, in the general Latin American system, the multiculturalism generated by the massive immigration of the XIX and XX Centuries, is nowadays a subject of analysis, particularly emphasizing the matter of rights of the original indigenous peoples.<sup>105</sup> Thus, in the case of Argentina, in the 1994 reform of the National Constitution, Article 75, Section 17 was enacted, establishing in pertinent part that it corresponds to the National Congress:

To recognize the ethnic and cultural preexistence of the Argentinean indigenous peoples. To guarantee the respect of their identity and the right to a bilingual and intercultural education; to recognize the legal existence of their communities, the possession and ownership of the land which they traditionally occupy . . . these will not be alienable, transferable, nor susceptible to encumbrances or embargoes . . . .<sup>106</sup>

In this sense, the doctrine and the national jurisprudence asks whether the new constitutional system allows the indigenous communities to have their own private legal system with a consuetudinary source, departing from the legislation common to the rest of the nation's inhabitants.<sup>107</sup>

Those authors whose answer is positive, consider that Article 75, Section 17 of the National Constitution recognizes a special regime, clearly operative, meaning a historical compensation that must be applied to all its extent.<sup>108</sup> Also, this position maintains that the property regime consecrated by the mentioned article is a new regime that supersedes the traditional concept in which the individual relation prevails, making its inclusion in the Civil Code

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104. *Id.*

105. Hernández, *supra* note 11, at 183–84.

106. CONST. ARG., Ch. IV, art. LXXV, § 17, *available at* <http://www.senado.gov.ar/web/consnac/consnac.htm> (last visited Apr. 3, 2009); *see* Hernández, *supra* note 11, at 185.

107. *See* Hernández, *supra* note 11, at 185; *see also* “Comunidad Mapuche Huayquillán c/ Brescia Celso y otro s/prescripción adquisitiva” JUZGADO DE PRIMERA INSTANCIA EN LO CIVIL, COMERCIAL, LABORAL Y DE MINERÍA CON COMPETENCIA EN LA FAMILIA DE LA V CIRCUNSCRIPCIÓN JUDICIAL DE LA PROVINCIA DEL NEUQUEN (Sentencia Firme) Aug. 18, 2004.

108. *Id.*; *see also* Hernández, *supra* note 11, at 185.

unnecessary and inconvenient.<sup>109</sup> In fact, it must be interpreted according to the customs of the indigenous peoples since those communities have very particular ties with the land of their ancestors.<sup>110</sup>

We consider that the recognition of the preexistence of indigenous peoples, as well as other social groups that invoke for themselves their own legal and differentiated statutes by reason of ethnicity or culture, is a subject of great importance. As such, it requires concrete positive action and usually puts at issue the existence and survival of the nation.<sup>111</sup> For example, the recognition of the communitarian property of the Argentine indigenous peoples would imply a modification of the legislation and legal principles of private property contained in the Civil Code.<sup>112</sup>

### XIII. CONCLUSION

This article has been analyzed through the broad interpretation of the term “law,” understanding that it is a complex system integrated by a plurality of different sources. From this perspective, the intimate entailment between law and custom is understood, creating among them a deep degree of complementariness that varies according to the time, place, idiosyncrasy and habits of each society.<sup>113</sup> Thus, the relaxation of the customs drives the proliferation of positive norms, known as legislative inflation, typical of our time and opposite to the principles of legal certainty.<sup>114</sup> However, the excessive resorting to custom over law can result in anarchy.<sup>115</sup>

The positivist postulates of the XIX century, such as the belief in the perfection of the work of the legislator and that the legal ordering is only made up of positive norms, gradually demonstrated their inaccuracy and became subject to a series of legislative reforms.<sup>116</sup> In the particular case of Argentina, through the reform in 1968 of the Civil Code, there was an attempt to revalue custom as a source of law and to stop demeaning it.<sup>117</sup>

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109. Comunidad Mapuche Huayquillán, *supra* note 108.

110. Commission No. IV of the XVIII National Civil Law Week (Editor’s Note: this Source has not been verified).

111. MARÍA ANGÉLICA GELLI, *CONSTITUCIÓN DE LA NACIÓN ARGENTINA, COMENTADA Y CONCORDADA* [CONSTITUTION OF THE ARGENTINE NATION, DISCUSSED AND AGREED] 573–74 (2d ed. 2004).

112. *Id.*

113. Miguel Anguel Ciuro Caldani, *Reflexiones Sobre la Ley y la Costumbre*, in *JURISPRUDENCIA ARGENTINA*, 4 J.A. 789, 790 (1979).

114. Le Torneau, *supra* note 29, at 3.

115. Ciuro Caldani, *supra* note 114, at 795.

116. *See generally* Castiglione *supra* note 7, at 736.

117. *See* Castiglione, *supra* note 7, at 736.

In our opinion, custom, in a globalized and dynamic world, acquires pivotal positions unthinkable in past years and leads to a new analysis and reconsideration in the area of law. For example, as product of vast European migration, a question arises with respect to what cultural patrons are elevated to the category of legally obligatory, as in the case of native indigenous communities the recognition of groups with their own legal statutes.

In this sense, we have considered that custom is an important source of law in the present legal system and as such, judges, lawyers and scholars shall have to pay greater attention to it, since it is a spontaneous way to regulate legal relations and to agglutinate in a basic nucleus those coinciding values that allow participation in a social setting.<sup>118</sup>

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118. J. C. CUETO RÚA, LA ACTITUD DE LOS JUECES FRENTE A LAS COSTUMBRES Y LAS NORMAS CONSUETUDINARIAS [THE ATTITUDE OF JUDGES AGAINST CUSTOMS AND CUSTOMARY NORMS], 80 J.A. 156 (1996).