

Research on the Judicial Developmental Function of Custom as a Source of Law under the Context of the Implementation of the Civil Code

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Abstract: *The general recognition of custom as a source of law by the Civil Code provides a normative foundation for judicial practice to introduce diverse social norms into the adjudication process, making the judicial developmental function of custom an issue of both theoretical value and practical significance. This study finds that custom holds a supplementary status within the system of legal sources. Its validity dynamically emerges from factual practices through judicial procedures and can be categorized into three modes of application: interpretative, empowering, and constructive. The judicial application of custom is not automatic but follows a refined pathway from discovery and identification, through normative justification, to preliminary review. This pathway is delineated by the coordinating boundaries of legality, legitimacy, and coherence, achieving development through synergy with the fundamental principles of civil law. The research demonstrates that the judicial development of custom not only serves to fill legal gaps and concretize the interpretation of legal rules but also acts as a dynamic coordinating mechanism. While maintaining the stability of the code, it promotes a flexible, bottom-up evolution of the private law order, ultimately transforming the Civil Code into an open and responsive "framework order." The systematic construction of this function represents a key direction for the future development of civil law methodology.*

Keywords: *custom; source of law; judicial development; Civil Code; legal gap; private law order; legal dogmatics.*

Introduction

The explicit recognition of custom as a source of law in the Civil Code not only constitutes a legal affirmation of spontaneously emerging social norms but also, at the normative level, establishes an institutional interface connecting state-enacted law with a diverse social reality. However, the codification of the provision is merely the starting point. A significant theoretical and practical challenge lies in how to transform custom as a "social fact" into a "judicial norm" possessing both legitimacy and operability through judicial procedures, and in this process, to realize its function of developing and shaping the legal system. The necessity of researching this issue stems from the fact that the mere statutory invocation of custom cannot automatically ensure the uniformity of legal application or the orderly development of law. Without a precise positioning of custom's attributes as a legal source, a clear delineation of its path for judicial application, and a rational understanding of the limits of its developmental function, judicial practice risks falling into the dual pitfalls of arbitrariness or excessive conservatism. Such outcomes would ultimately undermine the Civil Code's capacity for social integration and order formation. Therefore, a systematic exploration of the judicial developmental function of custom as a source of law holds fundamental theoretical significance. It is crucial for deepening the understanding of legal source theory in the era of the Civil Code, constructing a refined judicial methodology, and comprehending the interactive logic between the private law system and social transformation.

1. The Legal Source Status of Custom in the Civil Code and Its Normative Connotation

1.1 The Hierarchy and Levels of Validity of Custom within the Legal Source System

1.1.1 The Core Status of Custom as a Supplementary Legal Source and Its Conditions for Application

Within the overall framework of legal sources, custom is generally defined as a supplementary legal source. Its core status is reflected in its subordinate and conditional nature in application. The rigid prerequisite for activating the function of custom as a legal source is the existence of an "open gap" in the statutory law, meaning there is a lack of any explicit rule applicable to the pending case. This formal requirement of "absence of legal provision" constitutes the fundamental threshold for custom to enter the realm of judicial adjudication, ensuring the priority and stability of the statutory legal order. The supplementary status determines the methodological role of custom, which lies primarily in filling gaps within the legal system, rather than positively creating general norms that compete with statutory law.

1.1.2 The Dynamic Spectrum from Factual Practice to Normative Validity

The validity of custom is not a static, a priori concept, but manifests as a dynamic spectrum of generation from social fact to normative proposition. A factual practice merely represents a repetitive pattern of behavior and does not possess normative binding force in itself. Only when such a practice is recognized and affirmed through judicial process, particularly after undergoing value-based scrutiny and filtration via the principle of "public order and good morals," can it be endowed with normative validity for adjudication. Therefore, the normative validity of custom is essentially second-order and conferred by the judiciary. Its strength is not fixed but depends on the degree of conviction within the community where the practice exists, the reasonableness of its content, and the rigor of judicial review.

1.1.3 The Theory of Validity Distinction Based on the Judicial Context

At the level of judicial application, the validity of custom can be subjected to a functional distinction. One form of validity manifests as interpreting or supplementing the parties' declarations of intent, where custom serves as a contextual background rule for understanding the actions of private entities. The other form of validity manifests as directly serving as an independent basis for adjudication, used to determine the rights and obligations between the parties. The latter scenario imposes higher normative demands on the custom, typically requiring the practice to possess a stronger foundation of universality, certainty, and legitimacy. This distinction aids in the refined handling of the differentiated requirements for the quality of custom as a legal source across various scenarios^[1].

1.2 Typological Analysis of the Norms Invoking Custom in the Civil Code

1.2.1 The Interpretive Application for Supplementing the Parties' Declarations of Intent

This type of application positions custom as a tool for interpreting juridical acts, especially contracts. Its function lies in providing an objective standard of understanding, based on a specific transactional field or local community, when the parties' declarations of intent are ambiguous or unclear. The purpose is to restore or deduce the parties' true intention. Here, custom does not directly establish rights and obligations, but rather serves as an interpretative aid for ascertaining the core of private autonomy. Its logic of application is the supplementary elucidation of the content of a declaration of intent.

1.2.2 The Empowering Application for Filling Gaps in Juridical Acts

This type is commonly found when the law contains an intentional omission regarding the stipulation of the parties' rights and obligations. By invoking custom, the legislation authorizes judges to directly apply the content of relevant custom as the criterion for determining rights and obligations in situations where the parties have made no agreement and the law provides no specific rule. This application elevates custom from an interpretative background element to the normative foreground, enabling it to directly fulfill the function of gap-filling. Its jurisprudential basis lies in the presumption of the parties' presumed mutual intent or the typical transactional model within that field, representing an extension of the principle of private autonomy within a broader social context.

1.2.3 The Constructive Application Forming an Intrinsic Component of Legal Rules

In this most profound mode of application, custom no longer merely serves as an external

supplement or interpretative tool, but is internalized as the substantive, integral component of certain abstract legal concepts or general clauses. The relevant legal provisions themselves provide no concrete standards; the actualization of their normative content necessarily depends on the investigation and invocation of specific social customs. Here, custom essentially assumes the constructive role of concretizing and contextualizing abstract legal principles or framework provisions, becoming the indispensable bridge connecting legal text with social reality^[2].

1.3 The Coordinating Boundaries Between the Attributes of Custom as a Legal Source and Substantive Legal Rules

1.3.1 The Rigid Boundary of Formal Legality Review

The primary boundary for coordinating custom with existing substantive legal rules lies in formal legality. The normative content of any custom intended to be applied as a legal source must not conflict with mandatory provisions within the current legal system. Mandatory provisions embody the fundamental value judgments and order designs established by the legislature, which cannot be altered or overridden by parties or the judiciary through other norms. If a custom contravenes mandatory provisions, regardless of how deeply entrenched it may be within a specific community, it is excluded as a legal source for violating this rigid boundary of the legal order.

1.3.2 The Value-Filtering Mechanism of Substantive Legitimacy Review

Passing the formal legality review constitutes merely the first step for a custom to acquire qualification as a legal source. More crucially, it must undergo a substantive legitimacy review centered on the principle of "public order and good morals." Public order and good morals represent the minimum ethical consensus and the baseline of order within the legal community. In this process, the judiciary must carefully evaluate the value orientation, interest distribution model, and social effects inherent in the custom. Even if a custom does not violate specific mandatory legal provisions, if its content contravenes social public interest or prevailing moral conceptions, it will still be denied normative force for failing to pass this value-filtering mechanism.

1.3.3 The Implicit Constraint of Systemic Coherence Requirements

The application of custom must also adhere to the implicit constraints imposed by the requirement of legal systemic coherence. This means that a customary norm introduced into adjudication should, as far as possible, harmonize with existing legal principles, analogous institutions, and the value objectives of the overall legal order, thereby avoiding internal logical contradictions or value conflicts. Judicial development does not entail arbitrary creation but involves organic and coherent extension and evolution within the existing system. Consequently, the process of judicially incorporating custom is also a systematic endeavor to contextually and logically integrate it with the overall legal order.

2. The Application Path and Review Mechanism of Custom as a Tool for Judicial Development

2.1 The Discovery and Identification Procedure for Custom as a Legal Source

2.1.1 The Discovery Initiation Mechanism Based on Party Claims

The discovery procedure for custom entering the judicial field typically adheres to the passive initiation principle of "no trial without complaint." The party claiming the application of a specific custom bears the preliminary burden of proof. They must provide evidence demonstrating that the practice objectively, continuously, and prevalently exists within the relevant region, industry, or specific community. This mechanism grounds the discovery of custom within the specific context of the dispute and the parties' asserted interests, avoiding unnecessary proactive investigation and intervention by judicial power into social norms. The design of this initiation mechanism ensures that judicial attention to custom remains linked to the need to resolve specific legal disputes, thereby defining the scope and objective for subsequent identification and review.

2.1.2 Preliminary Screening and Identification Criteria for Normative Quality

The core of the identification procedure lies in conducting a preliminary normative screening of the "factual practice" presented by the parties to determine whether it possesses the basic qualities to become a potential legal source. The identification criteria include the relative certainty of its content, its self-regulatory nature (meaning it aims to govern the mutual relationships among members of a

specific group), and that it does not openly contravene prohibitive legal provisions. This stage does not involve an in-depth value assessment of the custom but performs a formal and structural filtering, aiming to exclude those mere usages that clearly lack normative form or exhibit an apparent conflict with the legal order, thereby ensuring that the material proceeding to the subsequent rigorous review stage possesses basic normativity^[3].

2.1.3 The Review Role and Limits of Judicial Power in the Identification Process

Within the identification procedure, the judge does not merely act as a passive arbitrator hearing evidence but assumes the responsibility of active review and judgment. The judge must evaluate the sufficiency and relevance of the evidence, as well as the degree of prevalence of the proven practice, and apply logic and empirical rules to determine whether the practice preliminarily meets the appearance of a "norm." However, there are limits to the exercise of judicial power at this stage. Its core lies in "identification" rather than "authoritative affirmation"-that is, it involves the preliminary confirmation of the existence of a custom with normative potential, not the final determination of its legal effect in the current case. The precise positioning of this role is crucial for distinguishing the discovery procedure from subsequent review and argumentation procedures.

2.2 The Obligation to Provide Reasoning for Customary Norms in Adjudicative Argumentation

2.2.1 The Responsibility for Normative Justification Beyond Factual Description

When a judge intends to apply an identified custom as a basis for adjudication, they assume a stringent and specific obligation to provide reasoning. This obligation requires the argumentation to move beyond a mere reiteration of the factual content of the custom, delving into the level of "normative justification." The judge must elucidate why, in the specific context of a statutory gap or an authorized invocation, this particular custom is chosen over another, and why the behavioral rule embodied in this specific custom can legitimize the allocation of rights and obligations in the present case. The reasoning must reveal the chain of inference from "social practice" to "adjudicative norm," making public the process of value judgment and interest balancing involved.

2.2.2 The Requirement for Argumentative Integration with the Legal Order

Effective reasoning necessitates the seamless integration of customary norms into the existing system of legal argumentation. This means that a judge cannot invoke custom in isolation but must demonstrate that its application is coherent with the fundamental principles of law, analogous institutions, and the value objectives of the overall legal order. Through this integrative argumentation, custom is "harmonized" into an intelligible and acceptable component within the legal system, thereby enabling the outcomes of its developmental function to gain legitimacy within that system. The aim of argumentative integration is to eliminate potential logical gaps and value conflicts between customary norms and statutory rules.

2.2.3 The Procedural Transparency Function as the Basis for Adjudicative Acceptability

Fulfilling the obligation of thorough and specific reasoning serves a crucial procedural function: guaranteeing the transparency and acceptability of the adjudication. It discloses to the parties and the public the entire internal reasoning process through which localized or industry-specific knowledge is transformed into a universally binding basis for judgment. This process of transparency shifts judicial developmental activity from a realm of hidden judgment to one of rational discourse, subjecting it to the scrutiny and critique of the legal community and broader society. The depth and quality of the reasoning directly determine the authority of the conclusion derived from the judicial development of custom as a legal source and the degree of its social acceptance^[4].

2.3 Pre-Application Review of Custom and Judicial Discretion Standards

2.3.1 The Tiered and Progressive Substantive Review System

The pre-application review of a custom intended for application constitutes a tiered and progressive substantive review system. The first tier is the legality review, which serves as a rigid threshold, requiring that the content of the custom does not conflict with mandatory legal provisions. The second tier is the ethical compliance review, primarily relying on the principle of public order and good morals to evaluate the inherent ethical values and social effects of the custom, thereby filtering out those outdated practices and undesirable customs that, while not illegal, contravene fundamental ethics and public interest. The third tier is the reasonableness review, which involves weighing and selecting the

most appropriate option from among multiple applicable customs that have passed the first two tiers of review. This selection is based on legal internal rationalities such as the principle of proportionality, transactional efficiency, and protection of legitimate expectations.

2.3.2 The Construction of Discretion Standards in Typified Contexts

To avoid arbitrariness, judicial discretion must rely on the establishment of relatively clear standards. These standards can be constructed by considering the type and purpose of the legal norm invoking the custom. In contexts where the custom supplements gaps in juridical acts, the discretion standard tends to explore the "parties' presumed mutual intent" or the "typical transactional model in that field." In contexts where the custom fills gaps in the law, the focus shifts more towards examining the "social benefit" and "distributive justice" promoted by the custom. When the custom is used as a tool to concretize legal concepts, the standard centers on whether the custom can "in a purpose-consistent manner" fill the meaning of the abstract clause. Typified standards provide contextualized guidance for discretion.

2.3.3 The Judicial Creative Space within Review and Discretion

Pre-application review and discretion are not a mechanical application of formulas; they inherently contain a space for judicial creativity. Particularly within reasonableness review and the application of standards, judges are required to perform an "interpretative transformation" or "qualifying modification" of the custom to better align it with the circumstances of the specific case and the value pursuits of the legal system. This process is a concentrated manifestation of the judicial development function. Review is not merely negative exclusion but also positive shaping and reconstruction. Through discretion, judges enable social norms to undergo their final metamorphosis of "legalization" upon entering adjudication, transforming them into a normative force that promotes the development of the private law order.

3. The Interactive Development Between the Judicial Development Function of Custom and the Civil Law System

3.1 The Developmental Function and Limits of Custom in Filling Legal Gaps

3.1.1 Gap Identification and Acknowledgment Based on the Openness of the Legal System

The function of custom in filling legal gaps is predicated on acknowledging the inherent openness of the statutory legal system. The identification of a gap is not a mere factual determination but a normative acknowledgment. It requires the adjudicator to first confirm that, regarding the pending case, the currently effective statutory rules contain an evident omission or contradiction, and that a satisfactory solution cannot be achieved through legal interpretation (particularly systematic or purposive interpretation). Only upon confirming the existence of a "planned incompleteness" does the filling function of custom as an "informal legal source" gain legitimacy for activation. This identification process itself reflects the adjudicator's systemic understanding and judgment, serving as the logical starting point for developmental activity.

3.1.2 The Constructive Transformation from Social Norm to Adjudicative Norm

The gap-filling process is not a simple transplantation of an existing custom but a constructive transformation of norms. The adjudicator must distill and reconstruct the prevalent, descriptive behavioral patterns within society into an adjudicative norm possessing a logical structure of "presupposition-treatment-consequence." This transformation involves clarifying the content of the custom, delineating its boundaries, and precisely adapting it to the facts of the specific case. It requires the judge not only to discover the norm but also to creatively "articulate" it, enabling it to be embedded without contradiction into the existing framework of legal argumentation, thereby accomplishing the leap from social fact to legal proposition. This constructive transformation is the core manifestation of the judicial development function^[5].

3.1.3 The Rigid Limits of the Legal System's Internal Values and Logic

The gap-filling function of custom is not without boundaries; its fundamental limits originate from the legal system's own internal value order and logical consistency. The filling action must not contravene mandatory provisions within the law, which is the baseline of formal legality. A deeper limit lies in the requirement that the normative content introduced by the custom and the adjudicative outcomes it may lead to must be coherent with the fundamental principles of law, constitutional values,

and the evaluative benchmarks of the overall legal order. If the application of a custom would result in a distortion of the legal system's value logic or the hollowing out of its fundamental principles, even if it formally fills a gap, it should be excluded. This limit ensures that developmental activities represent organic growth within the legal system, rather than disruptive subversion.

3.2 The Interpretative and Concretizing Function of Custom in Relation to Statutory Rules

3.2.1 Serving as an Interpretative Benchmark for Indeterminate Legal Concepts

When legal texts employ indeterminate or evaluative concepts such as "transactional practices," "reasonable care," or "good morals," custom plays a crucial role as an interpretative benchmark. It provides these abstract terms with an objective and contextualized concrete meaning. The judiciary, by investigating and invoking the prevalent customs of the relevant field, translates the legislator's general delegation into operational and verifiable adjudicative standards. This process does not create new rules but, rather, within the scope of the legal text's semantic reach, utilizes custom as a medium of social consensus to clarify ambiguous legislative intent. This clarification, in turn, constrains judicial discretion and enhances the predictability of legal application.

3.2.2 Serving as a Typifying and Concretizing Tool for General Clauses and Abstract Principles

For general clauses in civil law, such as good faith and public order and good morals, custom constitutes a key tool for their typification and concretization. General clauses, as "blanket provisions," derive their normative force from being substantiated within specific contexts. Custom, bearing the behavioral standards and ethical concepts that are repeatedly practiced and widely recognized within specific communities, provides general clauses with a rich, categorized set of concrete behavioral models. By linking custom with general clauses, the judiciary can translate highly abstract legal principles into differentiated behavioral guidance tailored to various spheres of social relations (such as commercial transactions, neighborhood relations, and family matters), thereby accomplishing the transition from value to norm.

3.2.3 Serving as Contextual Supplementation for the Actualization of Normative Intent

Even in situations where legal rules themselves appear clear, custom may still play an interpretive supplementary role. It aids in determining the legal significance of specific conduct or in ascertaining the specific manner and standards for fulfilling the parties' rights and obligations. Here, custom serves as a "contextual element" for understanding the background and purpose of a legal act, making the application of statutory law better align with the actual operational logic and reasonable expectations of a particular social field. This type of contextual supplementation ensures that legal rules are not applied mechanically but adapt flexibly to concrete life relationships, thereby realizing the substantiation of normative intent^[6].

3.3 Promoting the Flexible Development of the Private Law Order Through Custom

3.3.1 Serving as a Dynamic Coordinating Mechanism Between Social Change and Legal Stability

The judicial invocation of custom constitutes a crucial institutionalized channel for mediating the tension between the necessary stability of law and the continuous transformation of social life. The statutory law amendment process is rigorous and lengthy, making it difficult to promptly respond to all normative needs arising from emerging social practices. Custom, as a carrier of spontaneous social order, can more agilely reflect evolution in economic models, technological conditions, and social perceptions. By prudently recognizing and incorporating new customs that have attained considerable maturity and legitimacy, the judicial system essentially infuses the private law order with dynamically updated content without disturbing the stability of the legal text, achieving a "silent evolution."

3.3.2 The Bottom-Up Normative Feedback and Order Generation Path

This process embodies a bottom-up path of order generation. Rules are not entirely designed top-down by the legislature but partially originate from the interactive practices of social actors, gaining authoritative confirmation through judicial review. The judicial application of custom enables the private law order to continuously draw normative nourishment from the life experiences and commercial practices of the social community. This feedback mechanism enhances the law's social adaptability and acceptance, imbuing the private law order with greater vitality and preventing a reduction in normative effectiveness due to a disconnect from social conditions and public sentiment.

3.3.3 Constructing an Open and Responsive Private Law System

By institutionally accepting custom, the private law system transforms from a relatively closed rule-supplying system into an open and responsive "learning" system. It acknowledges its own cognitive limitations and establishes procedural interfaces to continuously receive normative information from the social sphere. This openness is manifested not only in gap-filling but permeates the entire process of legal interpretation and development. It enables civil law to maintain its capacity to adapt to complex social realities without losing its core architecture and value coherence, thereby preserving its normative authority and social integration function in a constantly changing environment.

3.4 A Systematic Outlook on the Function of Custom in Judicial Development

3.4.1 The Evolution from Case-Specific Equity to Methodological Consciousness

The deepening of custom's function in judicial development urgently needs to transcend the traditional model of "case-specific equity," which relies on individual judicial discretion and experience, and advance towards a universally binding "methodological consciousness." This means it is necessary to construct a refined set of technical procedures encompassing the identification standards for custom, the allocation of the burden of proof, review processes, and the structure of argumentation. By clarifying the constitutive requirements of custom, its territorial and temporal validity, as well as the rules of evidence for parties' claims and rebuttals, the repeatability of judicial operations and the predictability of outcomes can be significantly enhanced. Furthermore, a tiered process for reviewing custom should be established, including fact verification, norm extraction, compatibility testing with statutory law, and templates for reasoning and argumentation. This approach aims to reduce adjudicative disparities caused by procedural ambiguity while preserving judicial flexibility. This shift can not only strengthen the persuasiveness and stability of judicial documents but also, overall, enhance judicial credibility and legal certainty, steering the judicial development of custom towards systematization and transparency^[7].

3.4.2 Integration into Legal Dogmatics and Clarifying the Hierarchy of Multiple Legal Sources

Systematic development necessitates the deeper integration of custom into the doctrinal structure of civil law. In the general principles section, the status of custom as an informal source of law and its conditions for application should be clearly defined within legal source theory. In the specific books of the civil code, it is necessary to further refine the pathways for introducing custom, its methods of interpretation, and levels of validity by considering specific types of legal relationships—such as transactional practices in contracts, local customs in property rights, and traditional practices in family law. Crucially, methodology must clarify the order of priority and the interactive mechanisms between custom and other legal sources, such as statutory norms, general legal principles, judicial interpretations, and guiding cases. For instance, a "statutory law first-principles supplement-custom fills gaps" hierarchy of application could be constructed, incorporating the principle of proportionality and methods of interest balancing into conflict resolution. This would form a multi-source collaborative model with clear hierarchy and logical coherence, enabling judicial development to achieve an orderly balance between systemic constraints and open inclusiveness.

3.4.3 Positioning as a Dynamic Subsystem within a Framework Order

The judicial developmental function of custom should be examined within the overarching conception of the Civil Code as a "framework order." The Civil Code establishes fundamental value orientations, core principles, and an institutional architecture, while custom, facilitated by judicial mechanisms, generates detailed rules in concrete social practice that enrich this legal framework. From this perspective, the judicial application of custom becomes a dynamic subsystem within the framework order, continuously adapting to social change. The effective operation of this subsystem relies both on the judiciary's prudent identification and justification of custom and on the formation of a feedback mechanism through the accumulation of precedents and doctrinal reflection. Its long-term objective is to shape a paradigm for civil law development characterized by inclusivity, reflexivity, and evolutionary capacity. This aims to enable the Civil Code not only to statically embody values but also to dynamically respond to societal needs, ultimately achieving the status of a "living law" that coexists and co-evolves with society.

Conclusion

In summary, within the context of the implementation of the Civil Code, the judicial developmental function of custom manifests as a multidimensional and dynamic process of normative practice. This process begins with the static confirmation of custom's status as a supplementary legal source and its normative connotation, unfolds through rigorous judicial procedures encompassing identification, argumentation, and review, and ultimately culminates in the dynamic effects of filling legal gaps, interpreting rules, and promoting the flexible development of the private law order. Research indicates that the judicial development of custom is not a simple substitute for or supplement to statutory law. Rather, it constitutes an internal mechanism for the self-renewal and growth of the legal system, operating within the boundaries of value and logic set by that system. Through the mediation of judicial power, it screens, transforms, and integrates social norms. Looking ahead, for the judicial developmental function of custom to mature and become systematized, the key lies in advancing from the experience-dependent "case-specific equity" towards a conscious "methodological construction." This entails further clarifying the order of priority for applying multiple legal sources at the level of legal dogmatics, and developing more refined and stable technical procedures for identification, review, and argumentation. Thereby, custom can be organically integrated into the overall operation of civil law as a "framework order." This will allow the Civil Code to maintain its authority and stability while preserving the enduring vitality to adapt to societal development.

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