

IS WEDDING CAKE VALID TODAY? THE LEGAL FUNCTION OF WEDDING RITES

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ON THE DISTINCTION BETWEEN CUSTOMS AND TRADITIONS OR NATURAL LAW

In 1816 Jacob Grimm wrote poetically that “law and poetry have risen from the same bed”.¹ Grimm’s saying stemmed from his teacher Friedrich Carl von Savigny’s teaching of law, according to which each nation’s law was a part of its culture as a whole. Such law was subjected to historical changes, as was the whole culture. On the one hand, such teaching of law was clearly opposed to the traditional concept that law is based on natural law. In fact, natural law was to be valid eternally and everywhere and be equally binding on everybody. The understanding of law, which like any historical phenomenon was emerging, changing and disappearing, was actually drastically different from the former. However, Savigny and Grimm did not want to leave the shaping of the content of law only to the will of the state’s legislators.

Of Savigny’s prolific literary legacy, one oft-quoted citation is his saying that “the whole of law emerges in a way that prevailing linguistic usage somewhat erroneously calls customary law. This means that law is first created by customs and popular belief, then by jurisprudence; thus everywhere by quietly working forces, but not by the will of the legislators.”²

We will hereby leave aside the legal history of Germany at the beginning of the 19th century and the legal-political goals and aims of Savigny’s teaching,³ and instead focus on two aspects, first and foremost the fact that law is “first” created by “customs and popular belief”. Thus Savigny deemed the primary, original form of the expression of law to be customary law. The legislators that introduced general obligatory norms, as well as the estate of lawyers, who have special competence and who use this to peacefully solve con-

flicts, are phenomena that have emerged during the course of the development of (western) human culture. Law is primarily and initially created by the participants in the community of law, i.e. by the people themselves. In fact, they do not withdraw from this activity even when state legislators and trained lawyers step onto the stage. It is not without reason that we claim that lawyers are conservative and laws always lag behind reality. Thus crime precedes punishment, and by the same token other legal institutions generally first exist in practice, and only then are attempts made to regulate these new legal relationships with laws. In this respect the originally archaic folklore or customary law also continues its existence in a society organised into a state.⁴ Even beside the rationalised and professionalised modern law there is space for customary law that is shaped by people themselves.

Yet the question is why Savigny deemed the concept of “customary law” (Ger. *Gewohnheitsrecht*) to be the expression of “somewhat incorrect linguistic usage”. The German word *Gewohnheit* means ‘habit, custom’, consequently something that is done simply because people are accustomed to it. But to be a custom or a customary act is not sufficient to be assessed in the category of lawfulness or unlawfulness. A legal custom differs from a simply habitual act by being normative – a notion that inevitably belongs to any law. Accordingly, behaviour is legal only if the category of “must” (Ger. *Sollen*) interferes. As a rule, customary law is the so-called unwritten law (Lat. *ius non scriptum*) and does indeed become visible in customs and social practice. Nevertheless, it is no less normative than a modern law passed after parliamentary proceedings. Thus a legal custom differs from tradition simply by the fact that a custom is normative. Customs are not observed merely because of habit or expediency, but because we ‘must’ behave as they prescribe.

Thus we need to distinguish between ‘tradition’ and ‘custom’. In a custom, the valid customary law becomes visible, and therefore customs are always connected to the respective legal consequences. Breaching of a custom will also lead to a legal consequence, sanction or obligation to redress. Society may also connect some consequences with traditions. These, however, are not binding, as there is no legal ‘must’ therein. The difference between traditions and customs also becomes clearly apparent when they change. Tradi-

tions simply change. In the case of customs, however, their normative element, the norm of customary law, becomes invalid. After the norm has ceased to be valid, customs may continue their life as traditions for a long time, but then they are no longer normatively binding. Here we may also have traditions which are in the process of becoming customs. Such non-normative traditions offer us an opportunity to study the customary law on which they are based, or which is emerging, or which may also have become invalid by the time we do the research.

ON THE CUSTOMARY LAW BACKGROUND OF WEDDING RITES

Rationalised written law can be learned through various texts (legislation, commentaries, court decisions, manuals, textbooks, etc). The essence of the unwritten law, however, is precisely the absence of written texts. Thus such law requires different forms of expression. As mentioned above, customary law becomes apparent in the specific, repetitive practices of behaviour.⁵ Such legally significant behaviour often occurs in a ritualised form. On the one hand the specific form demonstrates that the behaviour is normatively bound. We can here think of the strict formal rules of writing a will, to give an example from the domain of written law. On the other hand, this certainly also serves mnemo-technical purposes which are also necessary for legal certainty. For instance, wedding rites are to a significant extent ritualised with any people, but especially so with peoples that have been peasant societies for a longer period of time (cf. Schmidt-Wiegand 1978). The reason cannot only be the wish to celebrate the occasion in an appealing and memorable way for those concerned. Rather, many wedding rites indicate their initial legal content.

The limits of this article do not unfortunately enable us to conduct a thorough legal analysis of the traditional Estonian wedding rites. We will therefore give only a few examples.

Researchers of wedding rites always note the grand and boisterous wedding procession that first goes from the groom's home to the bride's home, feasts there for some time and then returns with equal noise to the groom's home together with the bride, to con-

tinue there with ‘the second end’ of the wedding.⁷ Those who had eyes to see and ears to hear could not help noticing the wedding procession. Given the festive noisiness of the wedding guests and the bright and loud colours of their clothes, one of these senses would have been sufficient. Certainly anybody would now understand and remember that one maiden is changing clan, which represents her rights and legal capacity.

Indeed, archaic law does not consider an individual to be a subject of legal capacity. Rights can only belong to clans. This is probably also the reason why the bride and the groom, the main actors in the wedding, act as passive participants in the wedding rites. Researchers of customs primarily call attention to the passive role of the groom compared to the best man, groomsmen and the rest of the groom’s clan. From the legal point of view, however, the passivity of the groom is completely understandable. In archaic law we cannot say that ‘he takes a wife’. We should rather call it a situation in which ‘a wife is taken for him’ and this is done by his clan or family. The same idea is, in fact, expressed in a circumstance that Estonian wedding researchers have also frequently called attention to: despite several centuries of Christianity, even at the beginning of the 20th century Estonians did not consider church weddings to be an important part of the wedding process. The bride and groom went to church either before or after the wedding: this event had no particular place in the wedding rites.⁷ The principle the church preached – that marriage was a union created by the free and sovereign will of two individuals – had obviously not taken root in the normative consciousness of the people.⁸ The legal change of status was still connected with the wedding run by the clans.

It was naturally primarily the woman’s legal status that changed. As mentioned above, her rights now derived from a completely new clan as the subject of law. In this respect nothing changed in the life of the newly wed man: he still belonged to his clan. The woman, however, changed the legal community, which was the real subject of rights. This fact was obviously to be announced to the neighbourhood as clearly as possible.

Nevertheless, in the wedding rites there were aspects, primarily connected with the bride, which were not advertised loudly to the village, but which still played a decisive role. In the traditional Esto-

nian wedding the rites connected with coifing the bride were considered especially important. Indeed, coifing has to be regarded as the turning point in a woman's life. The coif (bonnet) was the sign of a wedded wife, and from that moment the legal status of a woman also changed in an internal way, as it were. From that point on she had all the rights, but also all the obligations of a wife. In other words, the coif (bonnet) referred to the honour of a wife. Honour as a value connected with inner feelings is a phenomenon of very recent legal history, and is mostly connected with the free individual placed in the centre of the modern social order. All previous law recognised external honour, which would also have been expressed by external signs. The coif indicated the status of a wife, and in this respect it would have been unthinkable, for instance, for a wife to go out without it.⁹ This would have meant that she was either cheating (pretending to be someone else) or even that she was simply not there. A person outside the status he/she belonged to and without the sign to indicate it was legally unthinkable. It therefore becomes clear why in many Estonian regions coifing was performed somewhere out of sight (for example in the sauna) or why in some places there was a tradition of hiding the bride behind an embroidered cloth until coifing.¹⁰ It was indeed a situation where the person was in a sense non-existent. She was not purely a member of her parents' family and under the protection of the law of its clan, but she had not yet become a member of the new community of law either. This was not expressed until the coif. Until coifing the bride was not only easily exposed to magical forces: legally she did not exist at all because the law only recognised the legal status expressed by external signs.

Naturally, reference to the customary law which was valid then or is valid even now can be found in other popular traditions as well, not only wedding rites. Thus material collected by ethnologists, anthropologists, etc. may also be a valuable source of information for those interested in legal ethnology. The legal and legal-historical interest of research is thereby still directed towards the normative nature of the traditions as part of customary law.¹¹

LIMITATIONS OF LEGAL RESEARCH INTEREST

Let us now return to the question posed in the title. Researchers of popular traditions have noted (and mostly with regret) that as a

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result of urbanisation, an impoverishment of traditional rites is also taking place in the countryside, and even in comparatively closed communities. Thus even on the small Estonian islands, several old rites have disappeared or been replaced by new ones that have nothing to do with the local character or colour. The wedding cake is one of such “intruders”: namely, even in island weddings a wedding cake, which is made in town, is often distributed to people instead of self-made presents (dowry). In such a situation ethnographers can truly say that traditions become ‘impoverished’. Nothing of the sort can be said about legal customs, though. They may lose their normative basis and in this respect customary law as a norm, a legal rule that secures their obligatory nature, is no longer valid. In this respect customary law is characterised by the same automatism as any legal norm. The norm is either valid or invalid: there is no third alternative. A legal norm cannot be ‘a little’ valid, not even a norm in customary law. We can thus claim that in the island society the norm that requires distributing self-made presents to wedding guests has lost its validity.

However, can we now claim that there is a new norm that requires distributing the wedding cake to the guests? Obviously not. Distributing the cake is clearly not stipulated by the normative ‘must’. However, it still seems that “distributing something” has until today also been a norm in impoverished island weddings. In this respect there is still a difference with urbanised wedding rites, where even the wedding as such does not belong to the field of their obligatory norms. At least this is the way it seems.

The very word ‘seems’ indicates the limits of the legal research. The norms of the popular customary law are unwritten and ‘become visible’ only in specific societal practices, in customs. We can, however, never claim with certainty that something or other is done in a certain manner because they are normatively bound or simply because of habit. Even to establish repetitiveness may be unimaginably difficult. Thus it is no wonder that folklore is not a very popular object of research for lawyers. It is only with great effort that we can find in this field some clarity, which lawyers are so used to in their everyday work.

Comments

¹ [---] *Dass Recht und Poesie miteinander aus einem Bette aufgestanden waren, hält nicht schwer zu glauben* (Grimm 1816). It is approximately from this time that we can speak of legal ethnology. On the history of legal ethnology, its tasks and method, see Tarkany-Szücs (1995).

² Cf. Savigny: [---] *daß alles Recht auf die Weise entsteht, welche der herrschende, nicht ganz passende, Sprachgebrauch als Gewohnheitsrecht bezeichnet, d. h. erst durch Sitte und Volksglaube, dann durch Jurisprudenz erzeugt wird, überall also durch stillwirkende Kräfte, nicht durch Willkür eines Gesetzgebers* (Savigny 1814: 13–14).

³ On the characteristic features of Savigny's teaching of law and the consequent tasks for legal science and academic education in law with reference to relevant literature, see Luts (2000: 48–81).

⁴ On different theoretical approaches to customary law (F.C.v. Savigny, J. Austin) see Watson 1995. He also deals with the question of when a custom becomes law and to what extent Savigny's understanding of customary law can be considered valid.

⁵ In the legal literature the consistent decision-making practice is often also viewed as customary law. In this article this part of customary law is excluded.

⁶ Ingrid Rüütel has summarised the wedding rites of the island of Kihnu in a table which gives a good overview of their temporal order and location (the home of either the groom or the bride) (Rüütel 1995), for research in German see about Estonian wedding rites see Schroeder (1888).

⁷ On the wedding traditions and church marriages in southeastern Estonia – in Setumaa see Sarv 2000: 163–187, esp. 167–170, generally in Estonia see Tedre 1998: 409–433, esp. 416–427.

⁸ On the clerical approach to marriage and the church's difficulties in imposing this on the European peoples during Christianisation, see Hattenhauer (1992: 153–157).

⁹ There are numerous examples of what happens when a bride leaves home without her coif. Here are some of them:

She was burned because she had breastfed her child bareheaded. (RKM II 77, 77 (28) < Kihelkonna parish (1958))

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The churchgoers saw a bareheaded woman. They took her to the moor and burned her. Passers-by are throwing trash on the grave. (RKM II 75, 281/2 (19) < Mustjala parish (1958))

A woman who has run out bareheaded was declared a witch and burned. A grey bird flew out of the fire because the woman was innocent. The place was then dubbed crossfield. (RKM II 99, 83 (3) < Kihelkonna parish (1960))

¹⁰ *The first half of the wedding party was finished when the bride left. The bride was washed clean in the sauna and then made beautiful: a big white kerchief was put on her head so that she would not find her way back to her parents'* (RKM II, 17, 505/8). For more detail about that in Kihnu, see Rüütel (1995: 333–336).

¹¹ About various attempts to approach this topic, see Dundes Renteln & Dundes (1995). It has unfortunately not been possible to find out how many of the authors are lawyers.

Abbreviations

RKM – folklore collection in the Estonian Folklore Archives, collected in 1945–1995.

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