

FACT OR LAW?

CUSTOMARY LAW WITHIN THE SWEDISH DOCTRINE OF LEGAL SOURCES IN A HISTORICAL PERSPECTIVE

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Résumé : Cet article examine les arguments méthodologiques qui sous-tendent l'utilisation de la coutume et du droit coutumier dans la législation et la jurisprudence du système juridique suédois entre le 16^e et le 19^e siècle. Le concept de coutume fait référence à des normes de comportement dans la société, qui ne sont pas reconnues comme des normes juridiques, car elles ne sont pas soutenues par une *opinio iuris*. Le concept de droit coutumier est utilisé pour décrire les normes pour lesquelles il existe une *opinio iuris*. Alors que la première catégorie de normes n'a pas d'identité juridique indépendante et est utilisée principalement comme circonstance factuelle dans la législation ou dans l'interprétation juridique, la seconde catégorie est reconnue comme une source de droit indépendante dans la doctrine des sources juridiques. Historiquement, la pertinence de l'*opinio iuris* dans la transformation de la coutume en droit coutumier a été débattue parmi les universitaires suédois et l'indépendance du droit coutumier en tant que source de droit a été contestée.

Mots clés : Coutume – Sources du droit – Théorie juridique suédoise – Histoire du droit (Suède)

Abstract : *This paper discusses the methodological arguments behind the use of custom and customary law in legislation and adjudication in the Swedish legal system from the 16th century to the 19th century. The concept of custom refers to norms of behavior in society, which are not recognized as legal norms, as they are not upheld by an *opinio iuris*. The concept of customary law is used to describe norms where an *opinio iuris* exists. While the first category of norms lacks an independent legal identity and is used mainly as a factual circumstance in legislation or in legal interpretation, the second category is recognized as an independent source of law within the doctrine of legal sources. Historically, the relevance of the *opinio iuris* in the transformation of custom into customary law has been debated among Swedish scholars and the independence of customary law as a source of law has been disputed.*

Keywords : *Custom – Sources of Law – Swedish Legal Theory – Legal History (Sweden)*

INTRODUCTION

This text discusses some methodological arguments behind the use of custom and customary law in the Swedish legal system from the 16th century to the 19th century. In this text, the concept of *custom* will be used regarding norms of behavior in society, which are not recognized as legal norms by the population in the sense that they are not upheld by an *opinio iuris*. The concept of *customary law* will be used to describe norms where an *opinio iuris* exists within the population or within a certain relevant group of individuals. While the first category of norms lacks an independent legal identity and is used mainly as a factual circumstance in legislation or in legal interpretation, the second category is recognized as an independent source of law within the doctrine of legal sources. Historically, however, the main question among Swedish legal scholars has been whether any weight or importance should be attributed to the concept of *opinio iuris*. In other words, the question has been raised whether the transformation from custom into customary law, and hence the transformation from fact into norm in a legal perspective, should be attributed to the existence of an *opinio iuris* or whether the concept should be ignored, leaving the transformation exclusively in the hands of the legislator and the courts. On this ground, the independence of customary law as a source of law has been disputed.

I. The Time before The Code of 1734

There is no doubt that the unwritten law has been an important part of the Swedish doctrine of legal sources. It is worth mentioning that even if the Swedish legal system in the Middle Ages was a mixed system of mainly Germanic law and Roman law, and though the Germanic law by tradition has been regarded as oral, the Swedish medieval codes are fairly old in comparison with continental Europe.¹

A prominent example of the importance of unwritten law is found in “[TRANSLATION] The Rules of the judges by Olaus Petri” traditionally attributed to the scholar and reformist Olaus Petri in the 16th century: a set of golden rules that should be followed by a good judge, which are commonly still published in the main edited versions of Swedish statute books.

Rule number 14 reads: “[TRANSLATION] custom of the land, when it does not lead to unjust results could be used in trial”.²

It is not possible to draw any conclusions from the text alone as to whether the unwritten law could be used in competition with the written law or mainly as a subsidiary source. The 20th rule of the judge, on the other hand, stated that

¹ K. Å. MODÉER, *Nordiska rättskällor i konflikt* [*Historical Legal Sources in Conflict*], Stockholm, 2010, p.47-51.

² O. PETRI, *Domarregler* [*The Rules of the Judges by Olaus Petri*], Sveriges Rikes Lag [Swedish laws, Norstedts juridik ed.], Stockholm, 2022, p.70.

custom should be used in the absence of written law.³ This indicates that written law had precedence. The Swedish 17th century scholar Claudius Kloot declared for example in his writings that “[TRANSLATION] where there is no written law, the jurist may use the fair custom of the land.”⁴

As time went on, however, it became increasingly important for the legislator to strengthen his grip on the doctrine of the legal sources and to make sure that the precedence of the written law was respected. During the 17th century the legalism or formalism in legal methodology increased, culminating in the provisions in chapter 1, paragraph 11 and chapter 24, paragraph 3 in *1734 års rättegångsbalk* ([TRANSLATION] the Act on procedure in the Code of 1734), which firstly stated that the judge must judge in accordance with the (written) law and only use custom in cases of silence or obscurity and secondly made it clear that only Swedish law and custom could be used in court. This development had mainly two explanations which will be outlined in the following: first, a situation where the medieval codes were outdated but not updated (which made gaps in legislation frequent), and secondly a fierce competition of legislative power between the king and his royal courts broke out in the 17th century, a battle fought partly with the doctrine of legal sources as a weapon.⁵

The first of the royal appeal courts was Svea Court of Appeal, set up in 1614.⁶ Thereafter several royal courts were created in the provinces of the relatively vast Swedish realm, which stretched into Finland, the Baltics and even northern Germany. The use of custom within the procedures of the royal courts was generally understood as normal, but already in the instruction to the courts of 1615, it was stated that only Swedish custom could be used.⁷ This was a way to

³ ”Der man hafver icke beskriwen lag uppå, der skall man bruka landets skälige sedvänja för lag och döma derefter”. 20th rule of the judge. See also Kreüger, Johan, Försök till utredning av begreppet landssed [In Search of the Concept of Customary Law], *Tidskrift för lagstiftning, lagskipning och förvaltning* [Review for Legislation, Case law and Administration], 1869, p.209.

⁴ ”Ther man hafver icke beskriwen Lagh uppå, ther skal man bruka Lanzens skälige Sedvänjo, för Lagh och döma ther effter.” C. KLOOT, *Then svenska lagfarenbeetz spegel vthi fyra böcker fördeelt och beskrefven aff Claudio Kloot. Medh Kongl. May:ts special privilegio*, Götheborg, tryckt hoos Amund Grefwe, årh 1676 [The Swedish Law, Described in Four Books by Claudius Kloot], p.9 and Lyles, Max Sedvanas omvandling till lag och rätt. HD och sedvanerätten 1859–1886, [From Custom to Customary Law – the Swedish Supreme Court and the Customary Law 1859-1886] in *Rätten och rättsfamiljer i ett föränderligt samhälle – historiskt och komparativt. Vänbok till Rolf Nygren* [M. JÄNTÄRÄ-JAREBORG and M. KUMLIEN (ed.), *Law and Legal Families in a Changing Society – Historically and Comparatively*], Uppsala, 2011 p. 288.

⁵ C. PETERSON, 1826 års förslag till allmän civillag – en svensk kodifikationsstrid? In J. KEKKONEN et al. (ed.), *Norden, rätten, historien – Festskrift till Lars Björne*, [The Debate regarding the Proposed Private Law Codification of 1826 a Swedish Kodifikationsstrid?], Helsingfors, 2004, p. and Modéer, p.86-87, in particular p.90.

⁶ Modéer, p.111.

⁷ See LYLES, p.289 and A. CROON, *Jura Novit Curia – En rättsgenetisk undersökning av den juridiska metodlärans utveckling under 1800-talet* [Jura Novit Curia. A Legal Genetic Study of the Development in Legal Methodology in the 19th Century], Stockholm, 2018, p.111.

deal with the pluralism in the doctrine of the legal sources that already existed at the courts and was an attempt to try circumscribe it.⁸ The pluralism could, as stated above, be attributed to the lack of modern legislation, since the latest code in force at the time in Sweden was from the 15th century.⁹ Scattered legislation of various kinds was the only instrument that courts had at their disposal, and hence they looked for guidance elsewhere or interpreted the statutes rather freely. By doing so, their own case law undermined the status of the written law, as well as the crown they were set to serve – much to the liking of the nobility. This practice only increased until the Swedish king, Charles the 11th wrote a strongly worded letter to the Göta Court of Appeal in 1683, making it clear that from now on only Swedish legal sources were to be used at Swedish courts, and above all the written law of the King.¹⁰ Two years later, in 1685, a committee was appointed with the task of drafting the new code of the realm, which was to become the code of 1734.¹¹ However, as time passed, the political circumstances changed, and when the code was enacted in 1734 the king was long since gone, as well as his empire. The code, however, survived him by many years. The Swedish code of 1734 represents the last attempt of codification in Swedish legal history. In its original version it contained provisions on private law, criminal law, civil and criminal procedure. Though most of its provisions have been changed or repealed and many new laws are to be found outside of the code, it is technically still in force.

II. The Unwritten Law as Natural Law and Data of Interpretation

Customary law had, as shown, been used in its' own right or as a tool of interpretation of the written law. In this second capacity the custom had mainly been regarded as a fact and its normative status or transformation was attributed to the act of interpretation. There is, however, another factor to consider when dealing with the status of customary law at this time in history, namely the relationship between customary law and *natural law*. According to the legal theory of the time, law must like all other phenomena, have its origin in a metaphysical dimension. Hence, *natural law* could be described as absolute morality, a natural entity that transcended time and space.¹² Man could understand the needs of morality as well as of the natural law through rational reasoning. The results of these rational conclusions or of the intuitive understanding could be found in society in the form of custom, which were considered to be traces of natural law. Rightly used, the custom or unwritten law, should be used inductively by

⁸ See LYLES, p.289 and CROON, *Jura Novit Curia*, p.111.

⁹ PETERSON, 1826 års förslag, p.245.

¹⁰ J. SCHEMEDEMAN (utg.), *Stadgar, författningar, bref och resolutioner ifrån åbr 1528 in til 1701 angående justitiae och exekutionsämbrender* Stockholm 1706 [*Compiled Swedish Legislation from 1528-1701*], p.856.

¹¹ PETERSON, 1826 års civillagsförslag, p.245.

¹² C. PETERSON, "Rättslig enhet genom naturrätt", [Legal Unity Through Natural Law] *Juridisk tidskrift*, [*The Law Review*], 1992/93, p.620.

judges, legislators or even scholars to understand the meaning and demands of natural law. Albeit a fact in relation to the written law, the custom had a normative character, to the extent that it mirrored natural law. It was not, however, the existence of a popular *opinio iuris* itself that made it normative, but the fact that the *opinio iuris* mirrored the natural law.

The legislator was advised by certain scholars, not to meddle in the popular custom when it corresponded with natural law. In these cases, there was no need for formalization through legislation. The Swedish jurist Lars Lind claimed for example that:

“[TRANSLATION] It is not against legislation that people measure the rights and wrongs of their doings, but against the natural rationality of their minds. The commandments of law and its prohibitions are too many to be stored in memory, but the sound mind and good conscience is there at every hour, as long as it is not forced out by evil thoughts. Therefore, the legislator seldom forbids something which is known as sound and virtuous by the conscious mind.”¹³

An example of this way of reasoning could be found in a commentary of the Swedish code of commerce by the scholar Johan Holmbergson. Holmbergson claimed that the Swedish legislator, being aware of the customs existing in contract law on real estate, had abstained from legislating on the subject – apparently finding them in line with natural law:

“[TRANSLATION] When the legislator, being aware of the customs according to which these transactions are made, and still not have found it necessary to provide rules and definitions, one could draw the conclusion that the law will protect even purchases of both corporal and incorporeal things, if they are not explicitly excluded, and hence that the rule in 2 § d and c is applicable.”¹⁴

¹³ ”Det är icke Lagarnes föreskrifter, hvarest menniskor i allmänhet mäta sina företag, utan efter det naturliga ljus de äga i förståndet. Lagarnes bud och förbud äro alltid för många att förvaras i minnet: hvaremot sunda förnuftet och samvetet inställa sig sjelfmant vid hvarje tillfälle, om de ej utestängas af en elak vilja. Sällan förbjuder Lagstiftaren med framgång något som sunda förnuftet och samvetet anse oskyldigt.” See L. F. LIND, *Dommarens pröfning efter Sveriges lag eller sättet att utröna lagens rätta förstånd, mening och grund*, ny upplaga [*Judging in Accordance With the Swedish Law or the Correct Way of Finding Ratio Legis, new edition*], Stockholm, 1848, p.7.

¹⁴ ”Lagstiftaren har ej velat tala om fast egendom m). Aterstå således res mobiles, och res incorporales, som ej böra under immobiles. Nu förekommer väl ej i detta kapitel något exempel på res incorporales. - Men skulle lagstiftaren med kännedom av de sedvanor, enligt hvilka äfven dessa såga köpas, säljas och skiftas, ej anser nödigt att igenom någon definition utesluta någon av de gängse begreppen, kan man med säkerhet sluta, at lagen, äfven i anseende til dessa ämnen tagit under sit skydd alla de köp och skiften om både corpoliga och ocorporliga ting, som ej uttryckligen äro för ogilde förklarade, at således om dem alla gäller regeln i 2 §. d. c J. HOLMBERGSON, *Förklaringar öfver Handelsbalken* [*Explaining the Code of Commerce*], Uppsala, 1806 p.18.

If a custom or the customary law differed from the requirements of natural law, it must, on the other hand, be stifled by the legislator and hence also by the judge.¹⁵ The prohibition of customary law in these cases was used to educate and mold the population into a more morally enlightened people.¹⁶ That is why the methodological rules on how to use customary law in judgements had always come with the condition that it should not be unjust or lead to unjust results – the main purpose being that the positive law should be in sync with its origin – natural law. This must be assured by the legislator primarily, when interpreting the custom deciding on the need for further legislation, or in his place, by the judge, when interpreting the legislation or when using customary law independently. The legislator, however, remained the main interpreter and evaluator of popular *opinio iuris*. The same idea is found in the Rules of the Judges, where the 15th rule stated that “wicked or unjust custom may never be anyone’s help, which means that no one should base his claim on it, arguing that many do the same as he does, when what he has does is against the law.”¹⁷ Wrongful customs could never have legal force based solely on continuity and *opinio iuris*, not in positive law, nor in view of natural law, as the binding character of the former was dependent on the latter.

Consequently, the interpretative discretion exercised by the judge did not amount to any real law making or personal influence over the law – the task was only to adapt the law to natural law through gap filling. The use of custom therefore had its limits as described in the code of 1734. The famous professor at Lund university, David Nehrman Ehrenstråle, pointed out that the judge must try to interpret the law and fill gaps by choosing arguments that were in line with natural law. Nehrman based his reasoning implicitly on another of the rules by Olaus Petri (number 9), which stated that what was unreasonable according to natural law, could never be regarded as valid positive law:

“[TRANSLATION] The judge should in dubious cases, when different opinions seem to follow from different readings of the law, found his reasonings upon the natural law, and rather interpret the law equitably than give it a meaning contrary to natural justice: because what is not just could never be accepted as law.”¹⁸

¹⁵ C. PETERSON, *Lagstiftning eller självreglering i ett rättshistoriskt perspektiv*, [Legislation or Self Regulation in a Historical Perspective] *Svensk Juristtidning* [Swedish Law Review], 2001, p. 220-221 and 1826 års civillagsförslag, p.246-247.

¹⁶ *Ibid.*

¹⁷ Sveriges Rikes Lag, p.70.

¹⁸ ”[Domaren] bör [...] i tvifvelachtiga måhl och när olika meningar följa af svårstille regler, sätta then naturliga Lagen til grund, och uthvälja thet, som ther med enligt är, samt häldre så utbyda Lagen, at then stämmer öfverens med billigheten, än tillägga then en sådan mening, som strider emot rättvisan, ty thet rätt och skäl icke är, thet kan icke heller vara lag.” See D. NEHRMAN EHRENSTRÅLE, *Inledning til then svenska jurisprudentiam civilem 1729: Then svenska jurisprudentia civilis 1746* [Introduction to Swedish Jurisprudence] (Facimil), Teckomatorp 1973, p.73.

Nehrman also pointed out that the mandate of the judge to interpret natural law could be derived from the legislator and that, rightly understood, there should be no competition between the two institutions:

“[TRANSLATION] He [the judge] should also remind himself of his duty, which is to find the correct meaning of the law and not what the legislator should or could have said. In such a quest, would he overstep the boundaries of his professional duty, much in the same way as Roman Praetors, who through their interpretations of the law became independent law makers. If the judge seeks anything but the legislator’s intention, he has no honest wish to uphold and further justice.”¹⁹

In conclusion, the judge should, much in the same way as the legislator, refrain from disturbing the organic influence of natural law on people’s sense of morality – mirrored in their customs and customary law. Judges were not to disturb the natural development, nor, and more importantly, were they to question the legislator’s understanding and goals *vis à vis* the implementation of natural in positive law, but to further it.

The methodological conclusion that could be drawn from the reading of statutes and scholarly writings combined, is that, in the light of an understanding of natural law, the legal formalism which dominated Swedish legal methodology after the year of 1734 was not an end in itself, but a mean to create both a political and a methodological demarcation line between the legislator and the judiciary when it came to the interpretation of the unwritten law and hence the use of customs. The legislative act could transform the custom into valid law, or leave the question unregulated, giving room for the customary law to flourish on its own. In a second step, the judge could use custom as a tool of interpretation of the written law, or apply it independently, on the implicit mandate of the legislator. The judge’s interpretation was merely regarded as a secondary legislative act, a second way of acknowledgement of natural law.²⁰ The custom was therefore mainly a factual circumstance whereas customary law existed in a legal sense only when the popular *opinio iuris* was truly respected by the judiciary.

¹⁹ ”[...] Han bör ock påminna sig, det hans syssla är, at uppsöka Lagens rätta mening och ej hvad Lagstiftaren hade bordt eller kunnat säga. Gör han thetta, öfverskrider han the råå och rör, som hans Ämbete föreskrefne äro, på samma sätt, som Romerska Praetores, hvilka med theras uttolckningar stadgade nya Lagar. Söker Domaren något annat, än Lagstiftarens rätta mening, har han ej något redelit uppsåth at främja rättvisan”. See NEHRMAN, p. 73.

²⁰ Modéer, p. 87.

III. The Historical School and the Positivist Outlook on *Opinio Iuris* in the Swedish Doctrine of Legal Sources

The formalistic view, which meant that the popular *opinio iuris* in principle could not, or should not, independently transform a custom into customary law, was challenged by Swedish legal scholars in the 19th century. In 1879 Ernst Victor Nordling claimed that “popular legal conscience” (a concept of which custom was the foremost representative) formed the foundation of all stately and private legislation:

“[TRANSLATION] In each state it exists therefore a common legal opinion, stemming from a common popular legal conscience, the true foundation of all legal developments.”²¹

Contrary to the formalist view of the late natural law era, where the subsidiarity of the unwritten law could be traced back to voluntary political and legislative acts, Nordling attributed the weaker influence and lack of independent use of customary law in modern societies to a more organic political development and to social factors, such as increased specialization and fragmentation of the popular conscience:

“[TRANSLATION] The common popular conscience is not however in all periods of the life of the state capable of taking the form of legal rules; this is but possible under simple conditions, when the general public take active part in the creation and upholding of the law. In such societies, the law consists merely of customary law.”²²

Other Swedish legal scholars had made the same remark, like professor Carl Olof Delldén who had pointed out that “[TRANSLATION] at a certain state of cultural development, the division of tasks will take place both in the immaterial and the material or industrial sphere of society is quite clear, but from that we cannot conclude that any deeper rupture or break should take place in society.”²³ In reality, the claims of Nordling and Delldén echoed the words of Savigny,

²¹ ”Så bildar sig inom hvarje stat en gemensam rättsuppfattning, som hvilar på ett allmänt rättsmedvetande, och detta bildar den allmänna grundvalen för rättsutvecklingen.” See E. V. NORDLING, *Anteckningar efter prof. E. V. Nordlings föreläsningar i svensk civilrätt Allmänna delen H.T. 1877-V.T. 1879* [Lectures on Private Law by Professor Ernst Victor Nordling, Autumn Term 1877 to Spring Term 1879], Upsala, 1882 s. 27. See also Lyles, p.290.

²² ”Detta allmänna rättsmedvetande är ej i hvarje period af statens lif mäktigt att omedelbart taga form uti särskilda rättsföreläsningar; detta är blott möjligt under mycket enkla förhållanden, och där menige man direkt taga del i rättens handhafvande. Där så är, framträder rätten hufvudsakligen såsom sedvänja.” See Nordling, *Civilrätt*, p.27.

²³ C. O. DELLDÉN, *Vederläggning af några inkast mot Rättsforskningens värde och praktiska nytta, Schmidt Juridiskt Arkiv, tjugonde bandet, 1848-49* [A Critique Regarding Some Statements Concerning the Practical Value of Legal Science] 20th Volume of *Schmidt Juridiskt Arkiv* [Schmidt Legal Archive], 1848-1849, p.573 and CROON, *Jura Novit Curia*, p.34 as well as in Swedish Legal Education Reform in the 19th

founder of the German Historical School of Jurisprudence, the ideas of which Swedish legal scholars were now heavily leaning on:

*“Bey steigender Cultur [...] sondern alle Thätigkeiten des Volkes immer mehr, und was sonst gemeinschaftlich betrieben wurde, fällt jetzt einzelnen Ständen anheim.”*²⁴

This didn’t mean, however, that the customary law was to be disregarded. On the contrary, it had its own and prominent place as an independent source of law. The requirement for this status, was a concrete enough custom, a limited population, a concrete time frame and most importantly the existence of *opinio iuris*:

“[TRANSLATION] Furthermore, customary law could also regulate situations that are not decided in statutes, especially in smaller local matters and places and among classes of the population with a common outlook and way of organizing their lives.”²⁵

There was no longer the understanding that the legislator should take charge and transform the popular conscience and its customs into written law. On the contrary, statutes were only one way among many of giving legal weight to customs. Other ways were equally important, not least the local norms following popular *opinio iuris*. In fact, customary law being the most natural source of law and being the closest to the common general or popular conscience (*Volksgeist*), Nordling modelled his understanding of other legal sources on it.²⁶ Much like his German counterparts within the historical school, he regarded both case law and legal scholarship as a sort of professional, legal custom.²⁷ This outlook was only natural: if law were to be perceived as something founded in time and space, rather than in metaphysics, then facts must be at the core of any legal rule, combined with a normative element. Accordingly, different norms in different legal sources could only be regarded as different means of formalizing and transforming these facts into legally relevant norms. The legal element could hence be more or less formal, from the flexible and shifting *opinio iuris* to the formal date of enactment

Century and the Historical School of Jurisprudence, in M. DEVINAT, M. SAMSON, G. AZZARIA (ed.), *Les écoles de pensée en droit, Legal Schools of Thought* Quebec, 2020, p.188.

²⁴ “[TRANSLATION] With cultural development follows a division of various tasks between the members of society. What was before carried out together in a communal fashion, will be assigned to a certain craft, guild or class.” F. C. VON SAVIGNY, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [Of the Vocation of our Age for Legislation and Legal Science], Heidelberg, 1814, p.12.

²⁵ ”Dessutom kan rättsedvänjan här finnas såsom reglerande förhållanden hvilka ej bestämmas af lagstiftningen; i synnerhet inom smärre lokala områden eller bland klasser af människor, som hafva en gemensam lefnadsriktning.” See NORDLING, *Civilrätt*, p.28.

²⁶ See LYLES, p.291-292.

²⁷ NORDLING, p.28-29.

of a statute. This *opinio iuris* could however also be reflected in statutes, case law and, to a certain degree, in legal scholarly writing. Regarding case law, Nordling argued that “[TRANSLATION] Case law has a lot in common with the popular conscience in that she is a custom, all be it more precise and reflected.”²⁸

A consequence of this radical change in the doctrine of legal sources was that the judge no longer, when using unwritten law, had to choose whether to make a fact, a custom, into positive law, or whether to interpret certain facts in society as traces of a norm in natural law and validate it as positive law. The task was from now on (only) to solve a conflict of norms within positive law. Norms could namely have their origin both in the public and private domain, in the form of statutes and case law, on the one hand, and self regulation, on the other. This pluralistic stance in the doctrine of legal sources also had been pointed out by Savigny, who had described the task of the judge of dogmatically oriented scholar as the creation of legal unity out of the multitude of sources – “*die Gesamtheit der Quellen*”. (“TRANSLATION the totality of the applicable sources”).²⁹ However, conflicts between norms called for methodological solutions and, as will be shown, Nordling and other Swedish scholars trusted in the Historical School to provide them.

IV. The Conflict of Norms – Internal or External Ways of Distinguishing Between Fact and Law

Like in the era of natural law, it was for the political and legal branches of the state to decide on the refinement of custom through statutes and case law, as well as on the respect for the customary law as an independent source of law.

In this matter, the resolving of a potential conflict between norms became an immediate question of methodological importance. The scientific needs as well as the practical needs of legal application called for legal unity. There could not, for both practical and scientific reasons, be more than one answer and one applicable rule to each legal question, or, at least, rules of public and private origin could not be used simultaneously, especially not if they led to different conclusions. Hence, the judge must base his legal solution on either a rule stemming from private regulation, i.e. customary law, or from statutory law.

There existed at this time lawyers who claimed that the potential conflict of norms could be resolved by upholding the old more legalistic approach to custom and customary law. They claimed that the root of the problem lay at the double origin (private and public) of legal rules and hence the independent

²⁸ ”Domstolspraxis har äfven i öfrigt mycken likhet med folksedvänjan, hon är en sedvänja mera reflekterad och därför mera noggran, klar och preciserad.” See NORDLING, p.29.

²⁹ F. C. VON SAVIGNY, *System des heutigen römischen Rechts*, [*System of modern roman law*] volume one, Berlin 1840, p.262.

binding force attributed to the popular *opinio iuris* and that the whole conflict could be avoided if the binding force was neglected. Johan Kreuger argued for this methodological stance in the form of a syllogism:

“[TRANSLATION] It has been noted earlier in this text that customs, in order to be regarded as law, needs the acceptance/acknowledgement of the legislator, but that this acceptance does not need to be explicit, in other words, that customary law becomes a source of law in the same manner as other sources of law. If they on the other hand can't count as law without the explicit acceptance of the legislator, the same would be true in the case of the customary law. Could again, on the other hand legal sources in general become law by only the silent acceptance of the legislator or in the form of precedents, then that would also be true for customary law. In Sweden a legal source would not count as law without the legislator's explicit word of acknowledgement and hence the same must be true for customary law.”³⁰

Johan Kreuger argued openly and specifically against the Historical School, claiming that it should be the legislator's or the judges' task to transform the customary fact into a norm, by acknowledging it and making it into either a statute or a precedent. The conflict of norms would then be resolved by concentrating the law making in the strict sense to the stately institutions. Furthermore, by regarding the case law as a mere secondary legislative act, the *monism* in the doctrine of legal sources would make for legal unity and certainty. In other words, the monistic, state-oriented and formalistic approach would provide for a distinction between law and fact, which in turn would resolve the potential conflict of norms.³¹ The custom remained a fact until it was made a norm by getting recognized in statutes or case law. That way, however, the actual legal source would never be the custom itself, but rather the statute or the precedent which confirmed it:

“[TRANSLATION] I cannot accept the conclusions to which the Historical School comes regarding the binding force of customs. They have in my opinion no such binding force in themselves. A custom is nothing but a source from which the legislator gets his inspiration and material. The custom does not stand alone in this regard. As a source of law in this sense could also be mentioned the case law or the so called “jurisprudens”

³⁰ ”Det har ofvan anmärkt, att plägseden, för att gälla som lag, behöfver lagstiftarens accepterande, men att detta ej i allmänhet behöfver vara uttryckligt, eller med andra ord att plägseden är en rättskälla, hvilken blifver lag på samma sätt som rättskällor i allmänhet. Kunna dessa i allmänhet ej blifva lag utan lagstiftarens uttryckliga förklarande, så kan ej heller plägsedan blifva det. Kunna åter rättskällor i allmänhet blifva lag genom lagstiftarens tysta samtycke eller i form af prejudikater, så kan äfven plägseden såhunda blifva lag. I Sverige blir ej en rättskälla i allmänhet lag utan lagstiftarens uttryckliga förklarande. Derfor blir ej heller plägseden i Sverige eller Landsleden lag utan lagstiftarens uttryckliga förklaring.” See KREUGER, *Försök*, p.209.

³¹ See LYLES, p.294.

[fr. jurisprudence] as well as the legal doctrine, who's task it is not only to logically shape the custom and the case law, but which could itself include a constitutive legal element. Without the transformation and acceptance by the legislator custom could never have the status of binding law.”³²

It is not completely evident whether Kreuger commented on the status of the customary law as an independent source of law or on the concept of popular legal conscience (*Volk.sgeist*). The representatives of the Historical School never regarded the *Volk.sgeist* as formally binding in a legal sense, even if it was the ultimate source of law. As have been shown, Nordling would not have objected to Kreuger's claim that other sources of law could be used to transform the needs of the popular legal conscience or *Volk.sgeist* into formal legal norms, but he would have disagreed on Kreuger's formalistic and legalistic stance. Case law, customary law and legal doctrine would by Nordling have been regarded as equally important and independent sources of law and not as mere material for statutory interpretation. It was ultimately this idea that Savigny had tried to communicate in *System*, speaking of a “Kreis” (“TRANSLATION circle”) or ”Gesamtheit der Quellen” (“TRANSLATION, the totality of the applicable legal sources”).³³ The concept or definition of a legal source hence differed between the two writers and if Kreuger discussed the customary law in a strict sense it was clear that their opinions were different.

Although Kreüger's understanding and stance in this matter could be regarded as a conservative and a preservation of the old, formalist natural law paradigm³⁴, it could more probably be understood as at least a partially new stance, due to the emerging pluralist doctrine of legal sources and the new question of conflict between legal norms. As has been demonstrated, the old natural law paradigm didn't regard the conflict or overlap of positive norms as problematic as the unity of the positive law was guaranteed by the correspondence with natural law and not by institutional means. It was mainly in a positivist setting that this unity could be

³² ”I följd häraf kan jag ej heller godkänna det resultat, hvartill den historiska skolan på nämnde premisser kommer i afseende på landssedens bindande kraft i och för sig. Landsseden har enl. mitt förmenande ej någon sådan verkan. Landsleden är icke annat än en rättskälla, derur lagstiftaren hämtar material. Han står i sådant afseende ej ensam. Bredvid honom stå såsom rättskällor dels rättspraxis eller s.k. jurisprudence, dels doktrinen hvilken sistnämndes uppgift ej blott är att gifva en logisk form åt landssed och rättspraxis samt tolka gällande rätt utan ock att sjelf utgöra ett nytt konstitutivt rättselement. Utan att landsleden upptagits och godkänts af lagstiftaren, kan den ej hafva gällande kraft som lag.” See KREÜGER, Huru må man förstå 2 mom. af 11 § 1 kap. Rättegångsbalken 1734 års lag [...] [How is Chapter 1, § 11 of the Code on Procedure to Be Understood?], In *Tidskrift för lagstiftning, lagskipning och förvaltning* [Review for Legislation, Case law and Administration] 1882, p. 575.

³³ SAVIGNY, *System*, volume one, p. 262. See also CROON, *Rättsdogmatikens plats i juristutbildningen eller Om värdet av en kompass*, [On Legal Dogmatics in Legal Education, or On the Value of a Compass] in *Rättsvetenskap — nu och i framtiden* [A. H. PERSSON ed. *Legal Science Today and in The Future*,], Örebro Studies in Law 12, Örebro, 2019, p. 36.

³⁴ See for example LYLES, p. 293.

threatened by a competition between public and private norms such as statutes and customary law. The approach of the German Historical School and its Swedish representatives in this matter was, as will be demonstrated, rather the opposite to Kreuger's. The distinction between fact and law was not a starting point in their legal methodology, but the end – a result of interpretation of the legal sources.

V. The Concept of the Law in Force (*geltendes Recht*) and the Formal and Material Test of Customary Law

In the case of a conflict between a norm, stemming from private law making such as customary law, and a statutory norm, the judge must choose between them. The reason for this was the implicit need for unity that followed from the lawyer's dogmatic or systematic understanding of law. Savigny had defined legal unity as a systematic whole without gaps, overlaps or contradictions.³⁵ This systematic understanding of law could be used both on a macro- and a micro level (that is in a specific case). If the jurist respected the theoretical understanding of law on a macro level, he must however clearly respect it on a micro level as well, or the solution would compromise the unity on a macro-level. This meant on the other hand that the macro level would guide the judge on a micro level and provide him with arguments of interpretation when solving a potential conflict.³⁶ Savigny had in *System des heutigen römischen Rechts* pointed towards two main lines of argumentation, the internal systematic one, and a line of external goal-oriented argumentation.³⁷ As it happened, both these lines could be used in order to solve a conflict between customary law and statutory law.

The systematic line of argumentation could be provided by the statute itself. The legislator could state that the parties had a choice between public legislation and private norms, such as contracts, usage, or customary law. In these cases, the use of unwritten law was depending on the will or acts of the contracting parties, and the potential conflict could be resolved by an internal hierarchy of norms where the unwritten law had potential precedence. Such constructions could indeed be found in the Swedish Contract Act of 1915 and the Sales of Goods Acts of 1905 and 1990.³⁸

In accordance with the importance that the historical school had attributed to the popular legal conscience however, the normative force of any legal source (even statutes) when used in the specific case, must, to a certain degree, be measured against it. The reason for this was, that even if the legal source represented a formalization of the general legal conscience or *Volksgeist*, the

³⁵ SAVIGNY, *System*, volume one, p.263-264.

³⁶ On this, see for example references in CROON, *Jura Novit Curia*, p.59 and *Rättsdogmatikens plats i juristutbildningen*, p.36.

³⁷ SAVIGNY, *System*, volume one, p.213-215.

³⁸ See § 1 of the Swedish Contract Act of 1915 and § 3 of the Swedish Sales of Goods Act of 1990.

formalization had come at a prize. This price was the potential disconnection between “law in books and law in action”. Political procedure and legal formalism meant that the formal law could never encompass society in its totality nor keep up with the constant change of public opinion. For both these reasons, in application of law, the interest of formal and systematic unity must be balanced against the material correspondence with the values of society. Regarding case law, Nordling’s opinion was clear:

“[TRANSLATION] As it is a kind of custom, stemming from a certain limited class, namely the class of the jurists, and hence doesn’t stem directly from the popular legal conscience, there is a risk that it develops in a direction which is not in line with the latter. There are many concrete examples of this problem.”³⁹

Customary law was the source of law closest to the general legal conscience, but it could nevertheless be different from it. This didn’t need to be a problem, but the judge could get the feeling that a custom, from a popular point of view, was unpractical, unsuited or even immoral, to the extent that it couldn’t be accepted as law in a specific case. In other words, there were other sources better suited to solve the legal question, or even by content more acceptable to the popular legal conscience, even when there existed *opinio iuris* regarding the custom in question:

“[TRANSLATION] We oppose those who claim that every custom has a legally binding force. As long as it finds resonance in the general legal conscience this would be true, but not otherwise. It would be misleading to argue that the popular legal conscience give rise to legal rules which then would be binding for eternity. If that were true, one would give law a form which is no longer correct as the general legal conscience is something that could never be bound or limited, but still is moving towards ever higher levels of completion. Without it no legal change would be possible.”⁴⁰

In these cases, the judge must disregard customary law and chose another norm to apply. This meant that customary law didn’t apply in the specific case, but not

³⁹ ”Emedan hon är en sedvänja inom blott en viss klass, rättskiparnes klass, och icke lika omedelbart träder fram ur det allmänna rättsmedvetandet som folksedvänjan, kan dock fara uppstå, att hon utbildar sig i en riktning, som med det samma icke står i öfverensstämmelse. Många rättsliga företeelser kunna tjäna såsom illustrationer härtill.” See NORDLING, p.28.

⁴⁰ ”Vi opponera oss ock möjligt.” See NORDLING, p.27.

that it was disqualified as an independent source of law, nor that it didn't potentially could apply in other cases. It was in this respect that the methodological differences between Kreuger and the historical school became apparent. For Kreüger the custom was a fact until it became a norm. For the historical school, customary law was an independent source of law, and the rule's existence was only depending on the *opinio iuris*. The customary law rule could remain potentially valid, even if it was disqualified as applicable law in the specific case. From that micro-perspective, it was regarded as a fact, but not from the macro-perspective of the whole legal system – where it remained a norm. As have been pointed out, the lawyer could hence solve the conflict of norms by systematic arguments as well as by taking factual circumstances of society into account, when choosing between the application of customary law, or norms stemming from stately institutions. When doing so, the lawyer contributed to the development of the legal system by alternating between the macro-perspective of potentiality of norms and the micro-perspective, where a clear decision were made, which resulted in the application of a valid norm. Thanks to the concept of a *geltendes Recht*, a law in force, it was in the stage of application that the real and final distinction between law and fact was made.

CONCLUSIONS

Customary law has always coexisted in Sweden together with the written law. During a long period, the written law had at least a theoretical precedence. The reason for this was twofold: political on the one hand and methodological on the other. The use of multiple legal sources in case law from the newly founded appeal courts in the 17th century, triggered a need for, or at least an interest in, legal reform to strengthen the power of the Crown over the court's legal application. As a result, Swedish courts were forbidden to use unwritten law, such as customary law, when the written law was clear. To the extent that unwritten law existed, it could be used as an inspirational source and transformed into written law by the legislator. In this capacity, however, customary law was regarded as a mere political fact *vis à vis* the positive law, and its normative transformation took place by the legislative act. The popular *opinio iuris* did not matter from a legal point of view. In hard cases, custom could also subsidiarily be used as a tool of interpretation by the courts. Again, however, it was the facts, the way of handling the situation, that interested the courts merely, not the *opinio iuris* (even if it existed) and the normative transformation took place when the facts were used to interpret the statute.

This narrative, in which the political reality dictated the doctrine of the legal sources, as expressed in the first chapter, paragraph 11 and the 24th chapter, paragraph 3 in *1734 års rättsgångsbalk*, [TRANSLATION the Act on procedure in the Code of 1734] could, however, be nuanced in the light of the theory of natural law. Natural law was both the ultimate source of law and the yardstick,

against which the popular, as well as the legislative understanding of law should be measured. It is therefore possible to understand the developments the 17th and the 18th centuries in a scientific and methodological light. The theory of natural law stated that positive law should mirror the natural law as much as possible. It was the duty of the legislator to make sure that he, and his courts, followed the pre-requisites of the natural law and made sure that the population did likewise. In this context, it was only natural that the legislator took charge and established his right to transform virtuous, and therefore lawful, custom into law, as well as his right to stifle and abolish unlawful and wicked custom, through legislation and case law. The precedence of the written law is here to be understood more as a methodological divide than a political divide between the Crown and its courts. Transformation of natural law through the acceptance of the customary law, that was in line with natural law, was primarily a task for the legislator and only subsidiarily a matter for the courts. The popular *opinio iuris* could not be trusted unconditionally: it had to be measured against the standard of natural law and evaluated. In most cases customary law functioned as a fact in legislation and case law, at least from the point of the positive law. As have been shown however, from the point of view of the natural law, the custom was already normative in a legal sense, because it mirrored natural law and would contribute to its fulfillment in positive law. For this reason, it was possible, and even encouraged in legal theory, that the legislator abstained from legislation in these cases and let the customary law co-exist with the written positive law.

These developments in Swedish legal theory came to a halt with the influence from the German Historical School in jurisprudence. Positivist at the core, the school claimed that the foundation of law was no longer metaphysical but rather the opposite. Customary law, as the closest example of the general legal conscience of a population in a specific time and place, became the baseline of other legal sources, such as legislation, case law and even legal scholarship – the doctrine. The normative test and transformer of custom from fact to norm, was first and foremost the popular *opinio iuris*. The existence of such in a relevant part of the population transformed the custom into a valid norm, to be acknowledged by the legislator and the courts. The role of the legislator's test hence changed with the introduction of legal positivism. *In dubio*, customary law and statute law should co-exist and courts even had the free mandate to choose among the two types of norms, at least in private law. It was hence generally recognized that law could raise out of both private and public initiatives. The strong focus on the popular conscience (*Volksgeist*) however made it necessary for legislators, scholars, and ultimately courts, to question the legal norms, not only their formal merits and applicability in the specific case but also in a wider and more purpose-oriented sense. Norms needed to be not only formally and systematically applicable but also be in line with popular legal conscience and the political needs at the time of application. Hence, the reading of the provision in *1734 års rättsgångsbalk* still

held out, that no application of custom, or indeed of any norm, should lead to unjust or irrational results. Thanks to the increased value attributed to the *opinio iuris* however, it became the task of the jurist to choose, this time not between fact and law, but between two or more legal norms within a pluralistic doctrine of legal sources, by the means of interpretation. The interpretation of the sources doesn't start but should however *result* in a distinction between law and fact in the specific case – between historically applicable law (a fact of legal history) and the applicable law (*geltendes Recht*), the legal norm. The differentiation between law and fact regarding customary law, which earlier took place between natural and positive law, hence moved to the positive law and the distinction became historical, much thanks to the increased value attributed to the *opinio iuris*.