

# Research on Judicial Application of Custom as Source of Civil Law

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## Abstract

**Article 10 of the Civil Code stipulates that when resolving civil disputes, if there is no legal provision that can be applied, customs can be used, but only if they are consistent with public order and morality. This provision confirms the legal source status of customs, which is beneficial to completing the legal sources of civil law, maintaining the openness of civil law, and preventing the vacuum of civil rights remedies. It is also beneficial to limiting the discretionary power of judges and upholding judicial justice. When there is no legal reference, customs can also serve as the basis for judging cases. However, there are still problems with the judicial application of customs, such as difficulties for parties to provide evidence, unequal treatment of similar cases, and vague expression of the application of civil customs in judicial documents. Specific measures for improvement can be taken from the perspectives of strengthening the investigation and collection of customs, optimizing the burden of proof for civil customs, and establishing relevant case guidance systems.**

## Keywords

**Sources of civil law, Habit, Judicial application.**

## 1. Introduction

In many places, the Civil Code stipulates customs, such as trading habits, local habits, customs, etc. Article 10 of the Civil Code establishes the status of customs as the source of law. As to whether the custom stipulated in Article 10 is a Practical custom custom or customary law, there are different opinions in the academic circle, including the customary law theory, the customary theory and the view that it can be both a Practical custom custom and customary law.

Scholar Peng Chengxin argues that the "custom" here should be positioned as customary law rather than actual custom, and he believes that the legislative intent of Article 10 is similar to that of Article 1 of the "Civil Law" in Taiwan (civil, if not provided for by law, according to custom; No custom, the law) is the same, therefore the custom should be understood as "customary law". However, the current law of our country stipulates the "trading habits", "customs", "local habits", "customs" and "customary practices", which are only provisions of the law on the actual habits, not customary law. The "good customs shall not be violated" stipulated in the last paragraph of Article 10 also means that customary law shall not violate the principle of public order and good customs. Scholars Liu Zhihui and Zhang Zhipo argue that the custom in Article 10 of the Civil Code refers only to the custom as a fact rather than customary law for the following reasons: First, law, as the superior concept of customary law, can include customary law. Where the law has been established as the source of law in the preceding paragraph of the article, the custom here is distinct from the nature of the law and is therefore a Practical custom custom. Second, the last paragraph of Article 10 of the General Provisions of the Civil Law clearly stipulates that the application of customs "shall not violate public order and good customs." As a folk habit, there is indeed a distinction between good and bad, good and bad, so it needs to go through the filtering procedure of public order and good customs. If the interpretation of customary law is adopted, despite the support of comparative law, it

cannot explain why the law (customary law) still needs to be examined by judges whether it violates public order and good customs. Scholar Gao Qicai thinks that the various customs stipulated in the Civil Code as a whole are both Practical custom customs and customary law, and are the result of double institutionalization.

The "custom" stipulated in Article 10 of the Civil Code has been recognized by the national legislature in accordance with legal functions and procedures, and has the effect and significance of national law, so it has the attribute of double norms, that is, it is a general social norm. It is also regulated by national laws. Some scholars believe that it is not necessary to distinguish between custom and customary law when discussing the relation category of "civil code and civil custom". In Article 2 of the Interpretation of the Supreme People's Court on Several Issues concerning the Application of the General Provisions of the Civil Code of the People's Republic of China, customs are specifically defined, that is, folk customs and practices generally observed by ordinary people engaged in civil activities for a long time in a certain region and industry can be identified as habits. At this point, the definition of habits begins to become clear.

The judicial application of custom is an important but complicated issue, which needs to be further thought and discussed on the basis of summarizing trial practice. This paper starts with the four conditions of the application of habits in the judicial system, analyzes the difficulties in the application of habits in the current practice, and puts forward suggestions to improve the problems. The improvement of relevant rules and systems in the future requires the cooperation of legislation and justice.

## **2. Organization of the Text**

### **2.1. Customary Conditions for Judicial Application**

#### **2.1.1. It is not Required by Law**

According to the provisions of the Civil Code, law is still the dominant source of law, and custom as a supplementary source of law can only be used in the absence of legal provisions. The so-called "not provided for by law" means that the scope of the adjustment of civil customs is not clearly provided for by the current law, and the basis for resolving disputes cannot be found through legal interpretation, analogic application, etc., where the custom can be applied. As stipulated in the Property Law on adjacent relations, where laws and regulations have provisions on handling adjacent relations, such provisions shall prevail; Where laws and regulations do not provide, local customs may be followed. This is a mandatory norm of law. In practice, the discretion of judges is absolutely limited, and they must handle cases strictly according to law to maintain the unity and stability of national laws. As for the establishment time of the passenger transport contract, the passenger transport contract is established when the carrier issues the passenger ticket to the tourist, except that the parties have otherwise agreed or have other trading habits. It can be seen that in the arbitrariness clause, custom can prevail.

The provisions on civil custom in Article 10 of the Civil Code are arbitrary norms, that is, judges can choose to apply custom or not to apply it in the process of handling cases. According to the strength of the mandatory application of norms, the academic circles divide the enactment law into mandatory norms and arbitrary norms. For the order of application, the order of peremptory norms certainly takes precedence over the order of arbitrary norms. But when it comes to mandatory norms, arbitrary norms and habits, who is the first to apply the arbitrary norms and habits? Scholar Peng Chengxin believes that custom is a law that takes precedence over arbitrary norms, and judges can directly invoke custom to make decisions. Scholar Wang Yang believes that the application of law is absolutely priority over the application of custom, and only in special circumstances can custom be applied first. According to the principle of

autonomy of the will of the civil law, the customs formed between the parties can be applied preferentially to constrain the formation and performance of a contract.

### **2.1.2. Do not Violate Public Order and Good Customs**

In theory, scholars generally believe that "public order and good customs" is composed of two parts, one is public order; Second, good customs. From a practical point of view, whether the parties advocate the application of the custom or the court actively applies the custom according to the authority, it must take "public order and good customs" as the standard of review, but whether it conforms to the standard of public order and good customs needs to be judged by the judge, and because different themes may have deviation in the value judgment of the same thing, it will also be different when dealing with specific civil disputes. From the perspective of the development of The Times, public order and good customs are not invariable under the influence of social life, and will be given new connotations with the development of The Times. Therefore, the identification of public order and good customs cannot be separated from social practice, but must be combined with social practice, and should be comprehensively considered by combining legal provisions, social effects of judgment, social core values and citizens' interests. If the behavior of the parties in accordance with the habit is contrary to the basic principles of the public, the concept of rule of law and the spirit of the law, or damages the interests of the social group, such habits should not be recognized.

At the same time, judges need to distinguish between good habits and bad habits when using civil customs to settle disputes. For example, in the case of a dispute between Zhou and Zhou, the plaintiff stopped the defendant from building a house to destroy his own feng shui and affect travel. According to the provisions on the treatment of adjacent relations, the owners of adjacent property shall correctly handle the adjacent relations in accordance with the principles of favorable production, convenient life, solidarity and mutual assistance, fairness and reasonableness. The wall built by the defendant did not hinder the plaintiff's normal passage and ventilation and lighting, and the plaintiff only asked the plaintiff to remove the wall to destroy the feng shui of his own house is not conducive to the development of friendly relations between neighbors, and is not conducive to social stability and harmony. Such habits with feudal superstitions should be broken. At the time of purchase, the buyer has the right to know the situation of the house. If the right to know is violated in practice, the court will terminate the sale contract, which is in line with the living emotions of the Chinese people.

Therefore, when encountering customs and habits, we should analyze specific problems, first determine whether the habit exists, and then measure it with the goodness standards of the general public in society. Some people believe that in order to better identify public order and good customs, we can make use of existing precedents to type research on civil acts violating public order and good customs, and establish a set of type system and judgment standards for violating public order and good customs, so as to promote the application of civil customs in trials.

In addition, the customs of Article 10 of the Civil Code according to the judicial interpretation of Article 2 of the Civil Code are folk customs and practices generally observed by ordinary people. "Custom" is based in substance on the facts of many years of practice and the conviction of ordinary people; Formally, it needs to be recognized by the judicial organ to recognize its legal effect. In practice, whether to apply custom needs to be analyzed according to the specific situation of the case. "Applicable custom" means that the judge has the right to choose whether to use civil custom as the basis of case decision. Only when the parties provide sufficient evidence to prove the existence of the custom and its relevance to the relevant conduct can the custom become customary law when the judge chooses to apply the customary rules to settle the dispute.

## 2.2. The Problems Existing in the Judicial Application of Customs

### 2.2.1. It is Difficult for the Parties to Provide Evidence

There are a variety of customary forms of evidence, including an application for a witness to testify in court or to produce evidence of the same or similar association with the opposing party. For the customary distribution of burden of proof, the court usually adopts the principle of "who advocates, who provides evidence" in the process of hearing. For example, in the labor contract dispute case between Bai and Fan, the first instance judgment of the Intermediate People's Court of Dengzhou City, Henan Province held that: "The contract between the original defendant and the two parties was established, the plaintiff Bai mou should be paid after the completion of the work and delivery as required, although the defendant Fan did not issue an IOU to the plaintiff Bai Mou, but the plaintiff unilaterally made the 'curtain order', in line with trading habits, and the witness confirmed that the defendant recognized after the case owed the plaintiff 20,000 yuan payment." In the end, the court upheld the plaintiff's claim. For example, in the case of Yang Jia, Kong and Yang Yi, the parties applied for local red and white council members to testify in court to prove the existence of customs.

Although the burden of proof of custom should be borne by the parties, in practice, the parties put forward the claim or defense of custom, because of the difficulty of proof or incomplete evidence, the court does not accept the phenomenon is not uncommon. In terms of trading habits, there may be differences and conflicts between the habits of different regions and different industries, and the parties must prove the basis of the selected habits and exclude the reasons for another habit. Meanwhile, trading habits generally occur among specific subjects. If the trading habits of the whole region or the whole industry are involved, only one party can do so without the help of external forces. The effort and cost will also increase. The burden of proof of custom is no exception. Custom itself has the characteristics of unwritten, lack of systematism, regionalism, relativity and diversity. The customs of different regions are formed through the oral transmission and generation of local residents to observe the habits, there is no detailed written records, so the evidence related to customs and habits is mostly the way of the parties to apply for witnesses to appear in court, and the witness testimony compared with other evidence, the proof is weak. This also leads to many correct and valuable habits are difficult to apply in the process of solving civil disputes, and can not play a good social effect.

### 2.2.2. The Content of the Application of Civil Custom in the Judgment Documents is Ambiguous

In judicial practice, judges apply civil customs, and there is a lack of arbitrariness in the name and content expression of civil customs, and in some cases only the text of civil customs is quoted, and the more common expressions are "inconsistent with/consistent with local customs", "inconsistent with/consistent with trading habits", and "in accordance with local customs". Arguments are rarely made about whether the conditions for the habit are met, why the habit is used, and what the content of the habit is. In many judgments, habits are only used as reasoning tools, and there is a lack of demonstration process for the identification and application of habits, which makes habits seem to be a self-evident existence. Even some judges do not understand the connotation of specific habits, and the use of habits is very blunt. In the case of the dispute over the right of recovery between Liu and Qi, the court of first instance made a judgment, after ascertaining the factual evidence, the court of first instance directly stated in the judgment document "according to local customs", and did not make a clear explanation of what the local customs were. This lack of detailed reasoning also leads to different views between the court of second instance and the court of first instance on whether there is a relevant habit and whether the fact can be determined according to the habit, and further leads to inconsistent judgment results between the two courts.

In contrast, for example, in the case of Wang Mou and Long mou's marriage contract property dispute, the reasoning part of the judge stated that "marriage contract, also known as engagement or engagement, is a prior agreement made by both men and women for the purpose of future marriage, and there is no fixed form", which directly clarified the content and form of civil custom. At the same time, it further expounds the value of "marriage contract is an important civil custom". After that, the judge combined the case and civil custom to demonstrate that "in this case, the defendant Long argued that the two parties were not engaged on July 26, 2019, but according to the personnel, scale, and matters discussed at the party at that time, it can be confirmed that the two parties were engaged according to local rural customs, and the defendant Long defended the opinion that the two parties were not engaged, and the court did not adopt it." The analysis of this section of judgment reasoning can be roughly divided into three parts: the clear content and applicable standards, and the effect on civil legal acts. The rigorous logic of the reasoning shows the judge's correct attitude towards the application of civil custom in this case. Such differentiated treatment reflects that the fuzzy content expression in the application of civil custom in judgment documents is mainly reflected in the reasoning and argumentation of civil custom. If there are many such judgments without sufficient reasoning and argumentative content in practice, it will not be able to provide guidance for the application of customs in subsequent judicial practice, nor can it improve the application of customs, and what is more, it will breed law-bending judgments and judicial corruption.

## **2.3. Suggestions on Improving the Application of Customary Justice**

### **2.3.1. Strengthen the Research and Collection of Habits**

Customs and habits are different from written law, and they are not recorded in writing, but also have the characteristics of diversity and regionalism. If judges do not have high professional quality or do not understand customs when applying them, it will be difficult to apply them to judicial practice. To solve this problem and form systematic provisions is undoubtedly the most important thing to promote the application of custom in judicial practice. As early as 2004, the People's Court of Jiangyan City in Jiangsu Province began to pay attention to the introduction of good customs into judicial procedures, and actively explored the laws and characteristics of good customs in the judicial field. Since then, the People's Court of Jiangyan City, Jiangsu Province, has begun to collect widely popular local customs, including living customs, wedding and funeral customs, family separation and property analysis customs, etc., and issued relevant guidance, which has been concerned and promoted by higher courts, and has achieved positive results in judicial practice.

The above practice of Jiangyan City People's Court is worth learning and imitating. People's courts at all levels can accumulate a large number of customary rules from the three major mediation systems, namely people's mediation, administrative mediation and judicial mediation, because many civil mediation will involve the use of customary rules. It can also be done by collecting provisions from written expressions of modern social customs, such as village rules and conventions. At the same time, it is also necessary for professionals with rich legal experience and solid practical foundation to conduct research and collection from the fields with more habits to achieve maximum benefits.

### **2.3.2. Optimize the Burden of Proof of Civil Custom**

"Who claims, who provides evidence" is the basic principle of proof in civil litigation. However, considering the low level of multi-culture and insufficient ability to provide evidence in cases where custom is applied rather than law, the parties should not be required to bear such a strict burden of proof. If we can collect the above words through research, so that the customs of various places can form specific provisions, this will be of great help to the parties and judges to prove and apply. For the habits that are not recorded, the judge can identify and

comprehensively consider the habits claimed by the parties through interviews and investigations and the introduction of expert assistants in combination with other evidence of the specific case. For example, in the "Dispute over the right to burial of cremation" in Chongqing, the court of second instance held that burial as a traditional folk custom in China has a long history and is an important core of Chinese funeral culture. Early burial can let the dead rest in peace and the living at ease, so the appellant's request to return the ashes is rejected, and the defendant is buried in accordance with the agreement, which can realize the concerns and wishes of all parties to be buried as soon as possible.

When the parties take the initiative to propose the applicable habits and provide evidence or the court takes the initiative to apply the habits according to the functions and powers, it is necessary to identify the habits, that is, to identify the habits, and the court should strictly analyze the authenticity, legality, relevance and legitimacy of the habits when identifying. Authenticity identification refers to the identification of whether the habit objectively exists, which can be done by asking the parties to the case whether they know the habit and whether they have objections to the existence of the habit. If both parties know and have no objections, the authenticity of the habit can be determined. It can also be verified by visiting the place where the habit occurs, investigating the local people and wise elders, or consulting the same type of case judgment documents. Legality identification is to identify whether the custom violates the mandatory provisions of the law. Correlation identification means that the habit must be related to the case. If the habit has no connection with the case, even if it exists objectively, it cannot be applied in the case. Legitimacy identification is to examine whether the habit conforms to the provisions of Article 10 of the Civil Code of "shall not violate public order and good customs". It can be judged from the following criteria: First, whether the habit conforms to the mainstream socialist core values, whether it violates the social public's basic value orientation and moral ethics. Second, whether the habit has a large mass base, whether it is generally known and recognized by social groups in a particular region. Third, whether the application of the custom to handle cases will harm the interests of the public and the legitimate interests of individual members of society. After the judge has identified the habit, it must be fully demonstrated in the judgment. The customary evidence, cross-examination and confirmation of the court are stated in the judgment. For the active application of customs by judges in accordance with their powers, it needs to be indicated that the existing law does not expressly provide for this, and according to the relevant legal provisions, it can be invoked in this case.

### **2.3.3. Establish the Relevant Case Guidance System**

Habits can be used as supplementary sources, and cases are the carriers of habits. China is not a country of case law, the court applies the custom in specific cases, in the same or similar cases can not invoke the previous judgment and need to re-identify and confirm the custom used, which not only greatly increases the judicial cost, but also may produce different judgments in the same case, reducing the credibility of the judiciary. The construction of the relevant case guidance system is undoubtedly the best way to improve efficiency and solve the trust crisis.

Shi Pengfei believes that the case guidance system, as a necessary product of active justice, is also of great significance to customary law, which not only establishes the status of the source of customary law to a certain extent, but also helps overcome the disadvantages of different treatment of the same case in customary law. On the one hand, through investigation and research, the basic people's courts are accustomed to accepting more cases, and it has a congenital advantage to collect and compile related cases by classification; On the other hand, the Supreme People's Court issues guiding cases for the specific customs involved in the cases collected and summarized by the basic people's courts, which has a certain impact on the judicial judgment of the lower courts. With the cooperation of the Supreme People's Court and

the basic people's courts, the application of customs in the judicial system can exert the greatest effect.

Taking the top basin adoption case as an example, the plaintiff Shi Fang initiated a lawsuit to confirm the validity of the gift contract, but because the relative of the gift contract is Shi Jun Mou rather than Shi Zhong Mou, the court did not support his appeal. At the same time, the defendant Shi Zhong some time because of rural customs for the deceased Shi Jun a mourning and moved into the house left behind, and up to 8 years. The plaintiff held the notarial certificate of the donated house before the death of the deceased, but never claimed the right to the defendant, indicating that he had known the fact of the death of the top pot, and concluded that the defendant did not illegally occupy the house. As a folk custom, potted funeral is a custom formed in the long-term production and life in some rural areas, and it is a common choice for childless elderly people. According to this folk custom, the potted funeral throwing, da iman and other sacrificial acts are performed by the closest descendants if there is no eldest son, and potted funeral holders often need to undertake related obligations such as mourning the deceased afterwards. And as a child of the deceased can participate in the inheritance of the deceased's legacy after mourning. According to the provisions of Article 10 of the Succession Law, Shifang is the sole legal heir of Shijun, but when Shizhong promised to top basin, Shifang gave up the right of legal inheritance. According to local customs, Shi Zhong can inherit its property by "top basin funeral" and taking care of the funeral. And "top basin adoption" does not violate the prohibitive provisions of the law, nor does it violate the principle of public order and good custom. In the case, Shi Junmou only a house that is regarded as a "murder house", other nieces and nephews all refuse to "top basin", only Shi Zhong Mou and old feelings, promised to top basin, so that Shi Junmou can be buried. Shi Zhong for its uncle Shi Jun top basin funeral events are also in the local legend.

To sum up, if the Supreme Court can select other universal and guiding cases as guiding cases like the "Top basin adoption case", determine the customary law rules, and the guiding cases can influence the judgment of judicial organs at all levels, and then promote the formation of the public's cognition of the customary law rules and the conviction of the law, it will be conducive to the application of customs in justice.

As a habit of social life, habit is the wisdom crystallization summed up by people from long-term life and communication, which has been generally recognized and observed by the public, and is the universal value standard of the society. Under the premise of conforming to the applicable habits stipulated by law, the application of habit to trial and making a decision can not only make up for the shortcomings of the designated law, but also make up for the shortcomings of the designated law. Improving the parties' recognition of the ruling, promoting the resolution of contradictions, can also realize the unity of legal effect and social effect. Although there have been precedents on the application of civil customs in judicial practice for a long time, there are still many problems in the process of application, which requires us to start from the basic theory of customs, correctly understand and grasp civil customs, regulate the entry of customs into all aspects of justice, gather and give full play to the forces of all parties, improve the entity and procedure respectively, and overcome practical problems. We will better safeguard judicial justice and uphold social equity and justice.

The law is limited, the case is infinite. Judicial needs are faced with complicated social disputes, and it is inevitable for judges to resort to extra-legal factors such as habits. Therefore, it is necessary to further think and study on the basis of summarizing the trial practice. The improvement of the corresponding system in the future also needs the cooperation between legislation and justice to ensure the smooth application of Article 10 of the Civil Code.

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## References

- [1] Peng Chengxin, Chen Jidong: On the Customs in Article 10 of the General Provisions of the Civil Law - An Analysis of the "Top Pot Adoption Case" (Journal of the East China University of Politics & Law, China 2017, No5), p.52-53.
- [2] Zhang Zhipo: Legal sources and legal methods of Civil Law -- Doctrinal analysis of Article 10 of the General Principles of Civil Law (Studies in the Rule of Law 2019, No2), p.41.
- [3] Gao Qicai: Customary law in the Civil Code: definition, content and meaning (Journal of Gansu Political Science and Law Institute 2020, No5), p.22.
- [4] Peng Chengxin: On judicial application of custom in General Provisions of Civil Law (Legal Forum, China 2017, No4), p.48.
- [5] Wang Yang: The Concept, History and Practice of Multiple Sources of Judicial Law in China "General Principles of Civil Law" -- the theoretical construction and judicial application of Article 10 (Chinese and Foreign Jurisprudence, China 2018, No1).
- [6] Zhang Ling: A study on the Judicial Application of "Custom" in Article 10 of the Civil Code -- Taking 163 Civil Judgment Documents as Analysis Samples (MS., Chongqing University, China 2022), p.28.
- [7] Wu Xiaofeng, Tang Weijie: China's civil trial began to pay attention to the use of good customs (Legal Daily, China 2008).
- [8] Tuo Xinyu: Study on the Custom and Judicial Application of Article 10 of the Civil Code (MS., Shandong University, China 2021), p.35.
- [9] Shi Pengfei: Elements of "Applicable Habits" under the Background of Civil Code -- an Analysis of "Fen Yang Case" in Sunan Yugur Autonomous County (Ethnic Studies in Qinghai, China 2020, No3), p.106-111.
- [10] Liu Chengan: The Judicial Application of Civil Custom in the Civil Code Era -- Taking the Judgment Documents Citing Article 10 of the Civil Code as the Object of Analysis (Legal Forum, China 2022, No3), p.78.