



Research Article

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Received: 5 February 2021 / Accepted: 10 April 2021 / Published: 17 May 2021

A Comparative Observation: “Kanun” as a Legal and Ethical-Religious System and Today’s Legislation

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DOI: <https://doi.org/10.36941/jicd-2021-0008>

Abstract

How do the characteristic norms of civil, criminal and family law combine with the ethical-moral and religious norms of the Kanun of Lekë Dukagjini. The subjective aspect which makes them binding and the differentiation with customs based on today’s juridical doctrine. Why did the Kanun’s norms make up the legal system of the period? The origin of sanctions and how they started to be incorporated into the customary law of Northern Albania. The role of the Catholic Church on the canonical norms and their application by using instruments which were provided by customary law.

Keywords: Kanun, subjective aspect, custom, legal system, moral system, religious system

1. Introduction: How Can We Make a Comparative Observation and Customs as a Source of Law

Customary law is without any doubt the most ancient of all codes, which have been part of nations and different communities for millennia. This law originates from the primitive community and was born due to the growing the need of people to establish rules which regulated relations between them and community in general.

If we want to make a theoretical analysis of the elements of Albanian customary law which appear in the Kanun of Lekë Dukagjini, in order to compare the terminology with

the terminology of modern legislation, it would be easier for us to refer to the Italian juridical doctrine, because since the beginning of modern case laws, which originate in the codes of the period of Napoleon Bonaparte in France, European law has developed according to these principles, which have almost remained unchanged. Principles which have also acted as the basis for the Albanian modern legislation during the period of the Albanian Kingdom and the legislation in force today.

These principles reflected the laws which were created during the period of the Albanian Kingdom (1928-1938), which represent the first modern Albanian codification and they've also been reflected on the current laws.

2. The Subjective Aspect of Customary Law

The juridical doctrine has two important elements: practical and customary. The first ones, practical, have a narrower use and mainly relate to property law, for instance, the right to take livestock on given pastures or the right to get water from different sources or the right to cut wood in one or several forests.

The second elements, customary ones, have a more extensive use. They consist on a constant and long-term stance taken by persons of a community, persuaded that this stance is legally and morally binding. Based on this conviction, the failure to obey these rules is punishable.

Under juridical doctrine, customs, which act as a source of law, are born from tradition and are shaped through a continuous use by the community. In order for them to exist, there needs to be a material element (objective) and a psychological element (subjective). The objective element consists on a unified and continuous practice, which is followed by people for a long period of time. The subjective element consists on the fact that this practice is followed by the community, which is persuaded that it is binding because it's a juridical rule (Trimarchi 1996).

This subjective aspect is what makes customs a source of law: People are persuaded that such action is obligatory, combined with the time during which these rules are applied in order to turn into customs.

In legal terminology, the word "custom" differs from the day-to-day use.

In this Albanian dictionary, the word "custom" is described as:

–A rule or norm guiding a life style (behaviour, dress code, social relations, etc.), which has been established throughout history and is applied as an unwritten rule by a people; a tribe, a social class, etc and which is passed on from one generation to another;
–Kanun.

As we can see, the Albanian dictionary also includes what jurisprudence considers to be "subjective aspect". For an unwritten rule to be considered as custom, this unwritten law must be applied by subjects with the conviction (*opinion iuris*) that it's a true law and

that failure to apply it would lead to punishments. The subjective aspect has been replaced with a simpler terminology, “unwritten law”, but it is strengthened by the definitions “historically established”, “applied” and “passed on from one generation to another”.

In this context, respecting and applying customary laws must also be understood as a voluntary application. While interpreting these norms, researcher Ismet Elezi notes that “the domination of patriarchal and tribal relations for many centuries had left many traces on the conscience of people throughout generations since the time when customs were applied voluntarily. For many centuries, people were used to respect and apply these customs without feeling obliged to do so, because they reflected their interests and their will” (Elezi 1965). The element of “obligation” is an element which needs to be taken into account. Researcher Ismet Elezi notes that at the end of 19th century and beginning of 20th century, customary laws were no longer being applied willingly and therefore, punishments started to be applied. As it’s clear in many norms, the Kanun of Lekë Dukagjin also provides for cases when the norms are not applied by giving punishments. Thus, from an ethical-moral norm such as “Do not kill”, “Do not steal”, etc, we now have norms such as “If you kill...” or “If you steal...”. Besides the punishments, these norms also provide details of the punishment procedures.

The principle of “voluntary non-compliance” with which Elezi relates the birth of sanctions in customary law is accurate and logical: There’s no reason to issue sanctions for as long as everyone complies with the rules of common cohabitation, but the time when these sanctions were born is not accurate (meaning, if customary laws had started not to be applied at the end of the 19th century and beginning of the 20th century).

There’s very few evidence to determine such moment. Ismet Elezi illustrates this period with decisions taken by assemblies, which include provisions for crimes (Elezi 1965).

Also, the summary of accounts of the Jesuit Mission travelling to Northern Albania shows tens of cases where kanun norms are not being complied with, despite the fact that highlanders were persuaded that these were “laws” which had to be applied. But this is not enough to determine a period of time for such a complex phenomenon. Accounts from the Arber Assembly of 1703 suggest that that the situation had become very serious due to the fact that men now had concubines. If we take the kanun norm brought by Father Shtjefën Gjeçovi, according to which, having concubines was neither accepted by religion, nor from Kanun, we have the testimony of a norm which had failed to be complied with at least two centuries before the period defined by Elezi.

I think in order to determine the origin of sanctions, we should look into the moment when customary laws went beyond a moral-ethical norm and started to take the shape of a law, which was defined as principle determined by states and which needs to be respected by their citizens. Authorities also apply official sanctions against people who fail to respect them (Giddens 1997). When these norms started to take the shape of state

law, by going beyond the customs of agricultural and farming life or the tribal organisation and by applying elements of a penal nature, this is the moment we should look into to determine the origin of the introduction of sanctions. In the absence of the state, self-organisation and self-regulation are also extended in those fields which are typical for state law. Automatically, the “state” authority, which had been missing so far, must be replaced with another self-organised authority so that it punishes offenses. In principle, where there are laws, there are crimes, because crimes could easily be defined as a way of behaviour which violates the law (Giddens 1997). But the contrary is also true. When we speak of a legal system, we must not forget that this is a self-regulating mechanism. Researcher Ricardo Guastini notes that in the absence of a state authority, internal mechanisms are obliged to adapt to replace the authority of the state, which, in a legal system has the following functions: legislative, to draft legal and jurisdictional norms, meaning, to monitor their application and identify cases of violations in the daily life. It also has an executive function, which means it delivers justice in compliance with the breached norm (Guastini 2001). This way, we need to see how “state authority” was enforced through these self-regulating mechanisms, meaning, what are the institutions which enforced customary law. By establishing a date as to when these institutions were established, we could also establish the origin of sanctions. But this is also a complex problem. It turns out these sanctions initially had an interpreting function and (perhaps not at the same time) they have also obtained a law enforcement function. As such, councils of elders, which were set up based on the needs at the time, did not have a permanent composition (Elezi 1965).

3. Kanun as a Legal and Moral-Religious System

A question naturally arises: was the Kanun of Lekë Dukagjin a simple set of rules or did it represent a legal system of that time? Can it be considered as the “law” or the jurisprudence of the time?

Researcher of law, Ismet Elezi has made a clear definition of customary law adapted in accordance with the Albanian reality:

Customary law is perceived as the entirety of norms (rules of behaviour), prescribed, passed on verbally from one generation to another and which have served us to regulate legal relations according to tradition, opinion and the patriarchal authority of assemblies (Elezi 1999).

We find another definition in Italian jurisprudence.

The entirety of rules, models and schemes through which a community is organised, is called a system and the system of this community comprises its laws (Torrente, Schlesinger 1999). At the same time, according to the same authors, the legal norms which comprise this system must have an “authority”, meaning, they must be binding.

We note these elements in the Kanun of Lekë Dukagjini. The Kanun includes a wide

range of rules (an entirety) and these rules are organised. As for the authority, it was unquestionable for the time and within the community. It's been so powerful it has acted as a parallel law and dominated in periods of foreign invasions and also during the time of the independent Albanian state.

All of these elements lead us to the conclusion that the Kanun of Lekë Dukagjini represented a legal system of that time and this legal system was in power across the geographical space in which it has operated. The argument about the sanctions, mentioned above, which are typical of state laws, is an element that shows us about the existence of norms, but also the fact that they were grouped as a *corpus juris*, including in it the entire system of civil, criminal and family law along with respective procedures. This whole set of customary laws provides a diverse mosaic with the same norms, similar ones, different and in some cases, even opposite. The Kanun of Lekë Dukagjini occupies an important place within this mosaic. Today, it's presented to us in the form At Shtjefën Gjeçovi presents it, but nonetheless, it is not complete. It's impossible to collect the entire heritage of customary law passed on every generation in a single work, but when the most important part of this heritage has been collected, the materials enables us to carry out a thorough analysis, bearing in mind the parts which are missing.

The application of the norm also poses a problem, which was mentioned above. Nevertheless, the norm has worked in the absence of the state's authority, replacing it in all aspects of social-economic life. The Kanun of Lekë Dukagjini was not only a legal system, but also a moral and religious system, where the moral norms of the Catholic Church have become one with the customary sets of laws. We draw this conclusion assuming that these elements of religion have not been added by Gjeçovi, but assuming that they've existed as part of the Kanun. To support this argument, we also have the numerous accounts of Jesuit missionaries, which show how they (and the Church in general) used instruments of kanun law to apply norms which related to religious morale, linking these two for centuries in a row (evidence of this has existed at least since the 17th century) forcing them in a way or another to coexist with each other and even act as one. To achieve this unification, the Church used its religious authority, applied sanctions and used its persuasive power by exerting an influence on community leaders. Without a doubt, the fact that the Catholic Church and the Northern highlanders were in conflict with the central Ottoman power, did contribute to this coexistence. In front of a joint enemy which openly supports the "rival" religion and its main goal is to deny this community the freedom to political and social self-organisation, the sense of freedom and the sense of Catholicism have walked side by side and they've made up the very essence of survival in the Northern mountains. For this period of time, we have an important account by researcher Milan Sufflay, who identifies two important aspects in the period of Albanian-Turkish wars: The dissolution of tribes and their transformation into state hierarchy units and the strengthening of the role of the Church (Shuflaj 2004). The legal and religious aspects are not said to have been in conflict with each-other. The only

conflicts which have been reported relate to the application of norms in individual cases. The Kanun of Lekë Dukagjini has continued to play a primary role even after the Proclamation of Independence (1912), despite the fact that its role has weakened with the strengthening of the role of the Albanian state and its legislation. Officially, the Kanun ceased to exist when the Albanian Kingdom issued its set of laws in 1928, but in practice, it has continued to regulate many aspects of life in several areas of the North until the end of World War II. The communist regime made these norms inexistent and they were only used as research topics, while the claim for a return to Kanun in several areas after 1990 is merely a desire of some nostalgics (who in most cases have no knowledge of the content and the norms) more than a reality. During the communist regime, the Kanun almost failed to exist as a legal system, although it has been used by certain individuals in personal relations, but not within the community. The use here is rather atavistic and it is not elevated to a proper legal system. Currently, the Kanun of Lekë Dukagjin has been replaced by a modern legislation comprised of the laws in force.

4. Conclusions

The Kanun of Lekë Dukagjin was a customary law system of the time, despite many things which At Shtjefën Gjeçovi and others have missed during the collection of customary law norms in different areas inhabited by Albanians. The norms Gjeçovi has collected govern many aspects of the daily lives of Albanians in the area where the norms have applied, from birth to death. In the 12 chapters of these norms, we have the basic principles of canonical law (seen in relation to the user–Northern highlanders), criminal law, family law and civil law, including the respective procedures. The subjective aspect of this, meaning, the application of Kanun norms with the conviction that they're legally binding, makes these norms comparable to what are considered to be “customs” in the legal doctrine, but the large content of the norms differentiates them from this category bringing them closer to legal systems. Although it may be said that initially, this customary law had an ethical-moral character, its evolution and the lack of positive law in Northern Albania has enabled Kanun to replace the constitutions and the laws of the period. To trace the origin of the sanctions, we must look into the period when customary norms were not merely ethical-moral norms, but they started to take the shape of laws, which are defined by states as norms which must be applied by their citizens.

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