INHERITANCE IN TERMS OF POSITIVE LAW AND CUSTOMARY LAW, IN NORTH ALBANIA

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Abstract

This paper aims to highlight the implementation of the positive law, and the customary law regarding inheritance, in the Northern part of the Republic of Albania. The analysis inter alia of these laws will give the possibility to understand which law is more applicable. It is not easy to understand the scope of applying the above-mentioned laws. The right of inheritance is the most visible part and presents how positive law is facing difficulties and obstacles to find full and proper implementation. Albania is a rich country in the framework of customary law. The focus will be at Kanuni i Lekë Duakagjinit. The written forms of Canons were always present in daily life in this area, which regulated the public and private life of the individual and society. The failure of implementation of the right of inheritance for women as a positive law on one hand, and the implementation of customary law regarding inheritance, for women, on the other hand. This gap tells about the patriarchal socio-mentality, which is deeply rooted in society.

Keywords: positive law, customary law, right to inheritance, patriarchy, and legal norm.

Positive Law

Jurists and philosophers have distinct points of view about the meaning of positive law, and for customary law among them there is more agreement on what customary law means. In the academic environment, what has been studied and researched about the positive law, seems to be more acceptable among researchers, that what defines the core of this concept of the positive law is its applicability. The applicability includes all those laws that derive from the Constitution of a country, which comprehends cohesion of the society, state and rule of law, in the present times.

In the case of Albania, which is a unitary parliamentary republic, the positive law in the northern part rests under the shadow of the customary one.

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Referring to legal philosophers, the term of positive law remains vague; insights about the meaning of the notion are still in the studies[2]. For the philosophical branch, it is seen as a sort of obscurity; what does it truly mean from history until the postmodern era, in terms of timing this law. For jurists, the understanding of this term seems to unfold in a more clear and framed meaning, and there is less twilight. Predominantly, it means the legal norm or law established by the body of a state that exercises a systematic legislative function, the limits of timing defines the positive law[3]. The set of norms, rules, laws, conventions, including all domains of legal skeleton, in certain society and specific time, which are in force.

Hans Kelsen, gives rights to the theory of positive law, highlighting that the law does not eventually depend on the social facts in regard to "legal" practices of the community. The legal order is normative and does not take in consideration the spatial nature. The separation of law from moral, social and natural circumstances and facts, in Kelsen's terms, means the legal order above all, the rest are external factors, and this makes him a distinguished legal positivist[4]. The legal norm within the legal obligation does not require general conceptions of morality. For instance, there is no space for the relative concept of legal order. To understand the norm in his eyes, every norm "ought" any norm of religion, custom, or moral, i.e. the normative system that is law within the substantial notion of norm it is imperative separated from the norm of certain religion and the norm of certain moral[5].

Stating these points of view about positive law, this the meaning of positive law in Western Balkans context, and Albania, too.

The law as it is written within the Civil Code of Albania, includes all the aspects of a civil right such as right to education, right to inherit, right to social care, right to private property; the legislation part is satisfactory and the country fulfills the basic criteria. The lack is in the application part, the criteria of demand to be implemented such is requested by a certain legal norm[6] by the democratic state.

The northern region seems to give other dynamics of understanding the notion of positive law in Kelsen's terms.

Inheritance in terms of Positive Law, in Albania

The first steps towards the emancipation of the female figure in Albanian society starts with the royal regime under the kingdom of Ahmet Zogu, in 1929. The legal aspect for women begins with the rights of inheritance[7]. For the first time this right for women is introduced via Civil Code without any interference of religion or any social norm.

There is a lack of information on how many women used this right, and the state archives of Tirana do not have the historical bibliography about the statistics for this political system.

With the impactful difference this time, women are taking job positions in the public sector, predominantly in the central and southern part of the state, and the northern part remains problematic

[2] Hall, J. (1949). "Concerning the Nature of Positive Law". *Articles by Maurer Faculty*. *Indiana University School of Law*, p. 545- 546.
[3] Hariri, A. (2022). "A Critical Study of Legal Positivism as a Legal System in a Pluralist Country", *Faculty of Law*. p.565.
[4] Green, M. S. (2021). "12 - Hans Kelsen's Non-Reductive Positivism". *The Cambridge Companion to legal Positivism Part III - Central Figures Published online by Cambridge University Press.* pp. 272 - 300
[5] Bix, H.B. (2018). "Kelsen, Hart, and legal normativity ". *Journal for constitutional theory and philosophy of law.*
[6] Nicoletta Bersier Ladavac, (2019). "Sein and Sollen, "Is" and "Ought" and the Problem of Normativity in Hans Kelsen", *The Normative Force of the Factual*, p.5
[7] Civil Code of Zogu, (1929). Article 1. Paragraph 1. Every citizen has their civil rights. Article 1. Paragraph 2. Subparagraph 457. Every individual has the right of inheritance despites the exception by the law.
[8], Constitution of the Socialist Republic of Albania (1976). Article, 33, 40, 41, 50 (Citizens have the right to own property), 52 and 53

Voicing the argument of timing, normativity, and legal order, there is no more positive law in a modern country in the world rather than the Constitution as a supreme legal act and its laws. Referring to the Egalitarian principle of the Constitution of Albania, which says: Article 15. Paragraph 1. The fundamental human rights and freedoms are indivisible, inalienable, and inviolable and stand at the basis of the entire juridical order. For more it is precise the non-discriminatory principles which states Article 18. Paragraph.1. All are equal before the law. Paragraph 2. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic, condition, education, social status, or parentage. Paragraph 3. No one may be discriminated against for reasons mentioned in paragraph 2 without reasonable and objective legal grounds.[9]
Furthermore, the right of inheritance[10] is guaranteed by the Civil Code. The recent Article 360 states: "Legal heirs are children, children's children, spouse, parents, sibling and children of predeceased brothers and sisters, grandparents and other pre-born, persons of disabled for work dependent on the testator, other relatives up to the sixth degree, as well as the state.

As a facility, the law has enacted the right to ownership and private property and the registration of it via Notary (the law of 2018).

Taking in consideration the above cited laws, Albania is fulfilling the primordial condition of the nature of law, which is erga omnes.

The status body of legislation is sufficient[11], all the articles are non-gendered based, there is no preference towards men, yet, the discussion rises from the fact that these laws are not taken into consideration and ignored, specifically in the northern part. The disregard towards legal norm presents the main obstacle for the requested changes. One of the main concepts for the right of inheritance is the right of private property in this sense the country stays behind. Gender discrimination is more visible in these senses.[12]

Taking into account the data, from the official web page it was difficult to find statistics. From an online article, it was possible to have a general picture about the numbers, yet, there is a lack of information for the northern part. The statistics are for the country. Data from the State Agency, which is based on the digitalization of 43.6% of private ownership in Albania, 19.1% are in the name of women and 80.9% on behalf of men[13]. About ownership of houses and apartments, 18.7 % is in the name of women and 81.3 % in the name of men[14].Until 2019, there had been a lack of news over ownership and private property on the gender basis, this raised a second concern about women rights issues.
According to a study by the World Bank, in 2013, in the sense of overall equality in property rights, there are almost twice as many male landowners than women landowners, and most women landowners have a property share of less than 25 %. For more than two decades, it has been registered in the name of man[15].

The few sources about inheritance data are real concerns about women's rights. Mainly, remains in the data done by journalists, reports from abroad, initiative from academicians and associations for equal rights.

[9] Constitution of the Republic of Albania, (1998) with amendments of (2017). p. 8 -9.
[10] Republic of Albania, Civil Code, Article 41 and 42.
[11] https://data.unwomen.org/country/albania
[12] Xheka, A. (2015). "Women and Their Property Rights – Albanian Case". *Albania Euroepan Academic Research, Aleksandër Moisiu" University Durrës. p. 7-8.*
[13] https://www.reporter.al/2019/08/06/paligjshmeria-dhe-tradita-u-mohojne-te-drejten-e-prones-grave-dhe-vajzave-ne-shqiperi/
[14] https://balkaninsight.com/2019/09/03/tradition-denies-albanian-women-right-to-property/#gsc.tab=0
[15] Report (2020). ALBANIA COUNTRY GENDER EQUALITY BRIE, p.46.

The current political class is not addressing the matter with the right power that is in the hand. The society with a lethargic behavior remains deeply in silence and is not giving the adequate feedback upon this issue. Media and NGO are more active to promote and defend these civil fundamental rights. Legal literacy is missing and it could be the key to turn the changes into faster speed.

Customary Law of Lekë Dukagjini, in North Albania

Albania is one of the richest countries in South Eastern Europe, in the skeleton of the Customary Law. Many codes have been applied since the XV century. So society has been introduced to rules and norms, which some of them are respected even in this century[16]. No matter how many political systems were being born and dying, meanwhile.

Among many codes, three main codes that are relevant to the studies are Kanuni i Skendërbegut, Kanuni i Lekë Dukagjinit and Kanuni i Laberisë, each one of them was systematically operating in their zones. The rest of codes had less influence in society, there are books and theories published about their codifications, yet none could compare with Kanun of Leka. The most important remains Kanunin e Leke Dukagjinit[17] and customary law is identified with it.

Jurists and scholars do agree on the matter that the origin of positive law (common / civil) derives from customary law.

The center of point will be for the realistic long life of Kanuni i Leke i Dakugjinit, the most dominant code. This law was spread in Albania, Kosova and North Macedonia[18] for more than V centuries, nonetheless, the most influenced spaces are in Theth, Shkoder, Bajram Curri, Tropoje Miredite and Kukes, the region of Northern part[19]. The Code of Leke, is a set of traditional and customary laws of 12 books and 1, 263 articles, which regulates social and economic life.
The economic, social, cultural circumstances and the natural habitat has been a strong factor for the eternity of the life of this code.[20] Because of the spatial About the internalization of this Code, the anthropologist Edith Durham says: “Lekë said so” obtains far more obedience than the ten commandments. The teachings of Islam and of Christianity, the Shariat and Church law, all have to to the Canon of Lekë”.[21] It is purely local.

[16] I Qerimi. I., Maloku A., and Maluku. E., (2022). “Customary Law and Regulation: Authenticity and Influnce”, *Journal of Governance and Regulation*, p.293.
[17] Çitaku. M., Çeku. O., and Emini. A., (2022). “Blood Feud in Leke Dukagjini and its impact in the contemporary Law in Albania and Kosova”, p.320.
[18] Azizi. A, and Neziri L. (2018). “Between Law and Traditions: the Practice of (Non) Participation of Girls from the Albanian Community in Macedonia in the Family Property Inheritance”. *European Journal of Interdisciplinary Studies*, p.59, 60 and 62.
[19] Cara. A, and Margjeka. M., (2015). “Kanun of Leke Dukagjni Customary Law of Northern Albania”, *European Scientific*, p. 177-178.
[20] Young, A. (2000). "Sworn Virgins: Cases of Socially Accepted Gender Change". *Colgate University and Bradford University, UK,* p.60.
[21] Durham, E., (2019). “Për fiset, ligjet e zakonet e ballkanasve”, *LMG*, p.389.

These codified norms have been approved and defended by the citizens for a long time. Therefore it became normal to accept these norms with assertiveness from man and woman as well. From this perspective it seems to be more important than a legal norm. Women were treated unequally, their identity was/is being perceived through the biological differences, consequently, the unequal positions socially. The code is giving the supremacy and domination in the hands of man, incorporating all domains. Leaving the figure of women in isolation and excluding them from their rights as citizens. There is not a single field that they are entitled to. The marginalization and segregation has been enacted within this code. The way she was/is treated at her parents' house is the same way she is going to be treated at her husband's house. Woman, presents the 'subject' in many meanings. She was fully sanctioned for her duties when she did not accomplish them and no rights were given[22]. There was not a chance for a woman to be entitled to heritage neither from the side of her parents nor from the side of her husband. She was not allowed by canon law. The code of inheritance in Article 20 says: "A wife doesn't receive a share of inheritance either from her parents or from her husband"[23]

Referring to the study of Young, she gives the outlines and explains about the property ownership and inheritance for the northern part. That's the family which is entitled to be heir, yet, the one who is in charge is the man.

The northern part remains the most affected compared to the central and southern part of the country. The patrilineal and patriarchal mindset coexist with the breath of this organ. Patrilineality has been assuring the inheritance via a male principality, which is clear and rigid about it. The statistics about the right of inheritance, male domination of it , stands as a strong argument for analysis.

Sworn Virgin

The traditional and social norm of the code gave birth to the phenomenon of Sworn Virgins. Sworn Virgins, in Albanian language, which ad litteram means Virgjëneshat[24] e përbetume, as they are called Burrnesha[25], are women who do a social transformation. Living a man's life while being a woman, they do take a vow or oath to never get married and to never consider getting in a love relationship during their lifetime, in front of the village council which is composed of 12 men 26.They will cut their hair, wear man's trousers and start to behave as a man, drink raki in public places, have a cigarette, and after some time they will be unrecognizable physically that they were woman[27]. For the only reason to have the same rights as man. Edith Durham, Antonia Young and Rene Gremeaux are foreigners from different domains, who started to write about Burrnesha from the fact of being seen as man while being a woman.
From the moment she takes the oath, she changes the name from a female to male, does all the procedures to be part of the man's world giving up one the female identity for the rest of their life. Afterwards, Burrnesha, will have exactly the same rights as men and normally the right of heritage. Burrnesha, will gain the fundamental right of freedom and living life as she wants for the first time in her life, yet she sacrifices the life of a woman.

There is no link with the concept of transgender, there are no biological changes, only the change of social identity. Post-social transformation is related to the concept of honor. Every single Sworn Virgin has said it was their own decision, when they were asked. It has been many centuries, state and laws couldn't manage to handle or to

[22] Gjecovi. S., "The Code of Kanuni i Leke Dukagjinit", *Franceskan Publishing House the fourth edition,* Article, 22, 23,31, p. 8 -11.
[23] Gjecovi. S. "The Code of Kanuni i Leke Dukagjinit", *Franceskan Publishing House the fourth edition,* p.14-15.
[24] Brujic, M. and Krstic V. (2021). "Worn Virgins of the Balkan Highlands". p. 114.
[25] Young A. (2001). "Women Who Become Man Albanian Sworn Virgins". *Oxford International Publishers.* p. 55.
[26] Simon. E. B., (2020). "Aje Burrneshe!" Patriarchy and the Performativity of Gender in Albanian 'Sworn Virgins", European *Societies* Freie Universität Berlin, p.4.
[27] Young A. (2001). "Women Who Become Man Albanian Sworn Virgins". *Oxford International Publishers.* p. 6

diminish this phenomenon; there are still few[28]. The strongest enforcement to reduce the influence of the Code, a full abolition of this phenomenon, was during the communist times. The principle of egalitarianism is one of the main pillars of this system, which was fronting the dichotomy of man and woman of the canon law and could not reduce the impact of it.

The essential part of the theory of Kelsen, the respect of the legal norms within obligation, would avoid the inequalities of gender gap in all domains.

Conclusion

Through lenses of analysis, and theories about the concept of positive law and customary law in North Albania, this study brought to light that, from social construction, a well known phenomenon among sociologists, anthropologists, and less for jurists, can give more to the notion of positive and customary law.

The separation of customary norms from the legal norms, which is not easy, apparently, strikes a lot of positive law. The sanction from society, sometimes in a very specific area, is more valid than the legal sanction. This brings the legal concept under other pressure. The validity of the legal system is also one of the other criteria that Kelsen is mentioning in the applied law, yet, the validity rests in "vain' if the side of society is not respecting it. The obscurity of these concepts rises at their borders and its continuity.

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