

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

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Abstract

This paper aims to emphasize a dialectic litigation between the positive law and the customary law in regard with inheritance, in the Northern part of the Republic of Albania. The conceptual analyses and boundaries inter alia these laws seem to be very difficult to understand which ones are more applicable. According to research, appears to be the “historical law” more applicable rather than an “applied law” which is regulated within the Civil Code and the Constitution of the country. The right of inheritance is the most visible part and presents how positive law is facing difficulties and obstacles to find application. Albania is very rich in the framework of Customary Law. The focus in this work will be at Kanuni i Lekë Duakagjinit. The legal sources of unwritten and later on written forms of Canons were always present in daily life in this area which regulated the “public” and private life of the individual and the society. The scope of the applicability of Kanuni i Lekës, now days, as an Customary Law on one hand concerning the Right of Inheritance for a woman and on the other hand the non-applicability of the positive law - The Right of Inheritance for woman and man, out speak the juxtaposition. Through the comparative approach will shed light on about the ambiguity upon the concepts. The patriarchal and patrilineal mindset is deeply rooted in the society and gives the arduous task to understand the ambiguity among the history and the present in the sense of legal skeleton.

Keywords: Positive Law, Customary Law, Right to Inheritance and legal norm.

Introduction

Jurists and philosophers are having a distinct point of view about the concept of positive law and more compatibility for the concept of customary law. In academic environment the program of legal studies what it has been studied and researched about the positive law, seems to be acceptable among researchers, that what defines the core of this concept of the positive law is the applicability. The applicability includes all those laws that derive from the Constitution of a country, which comprehends cohesion of the society, state and normative constitutional system, in the present times.

The theoretical approaches will clarify more the conceptual boundaries about the puissance of the application of one law. The case of the Republic of Albania, which is a unitary parliamentary constitutional republic, the positive law in the Northern part rests under the shadow of the customary law. The encounters give a vagueness about the unity and continuity of northern society with the state, and the spectrum of the applied laws. The Right of Inheritance, for woman it is problematic and this right can make the distinction about the powerfulness of the canonical and positive law. The phenomenon of Sworn Virgins, is one of the most strong and vivid testimony about the disregard of applied law.

Positive Law

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Referring to legal philosophers the term of positive law remains a vague term, the deep insights for this notion are highly spoken seriously among the scholars². While for the philosophical branch is given an obscurity to positive law, what does it truly mean from the history until the postmodern era, in terms of timing. For jurist scholars, jurisdiction and the academic milieu, the comprehension of this term seems to unfold in a more clear and framed understanding, and there is less twilight. Predominantly, it means the legal norm or law established by the body of a state that exercises the systematic legislative function, the limits of timing defines the positive law³. The set of norms, laws, rules, statutes including all domains of legal matters, 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 depends on the social facts in the regard of “legal” practices of the community. The legal order is normative and does not take into the 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 positivist⁴. The legal normativity within the legal obligation does not requires some general conceptions of morality or reason, for instance there is no space for the relative concept about legal order. To understand the norm in his eyes, every norm “ought” any norm of religion, custom, moral i.e. the normative system which is law within the substantial notion of norm it is imperatively separated from the norm of certain religion and the norm of certain moral⁵.

Stating this points of views about positive law goes hand in hand with the insights of positive law in Western Balkans countries, and normally Albania, too.

The positive law which includes the whole body of legal norms such as the right to education, the right to inherit, the right to social care, the right to private property, and so on; which is inclusive within Penal and Civil Code of Albania and in the most substantial part, the criteria of demand to be implemented such is requested by a certain legal norm⁶ by the democratic state.

Kelsen’s theory, in the case study of Northern Albania, seems to have other dynamics of comprehending the notion positive law. It appears to be abolished from an Albanian Code, and in the essence of it is the honor. The contradictory impact of the canonical law it is going to be exposed specifically through example of heritage regarding women. Inheritance in terms of Positive Law, in Albania

For the first time the rights of inheritance for women were introduced via Code Civil without any interference from religion or any social code, under the royal regime of Ahmet Zogu, the first steps towards the emancipation of the female figure on the Albanian society, including the rights of inheritance⁷.

After some years later, under the sui generis communist regime, women are having the same legal rights in all of domains with men, including the right of education, the right of work in public institutions and places, including the right of heritage.⁸

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 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 inheritance¹⁰ is guaranteed by 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.

The law has enacted the right to ownership and private property and the registration of it is being facilitated via Notary (the law of 2018).

The legal nature of law is erga omnes, from this point of theory, Albania is fulfilling the request primordial conditions of legal normativity. Hence, the practices of this legal normativity remain very questionable, having in reference the statistics of inheritance, appears to be problematic for women, overall. Women are highly discriminated against on the basis of their gender, they “do not have the right” to private property or any other right to heritage, and this is related to social, traditional and historical norm. This is present also in Kosovo and Albanians in Northern Macedonia.

The status body of legislation is satisfactory¹¹, all the articles are non-gendered based, there is no preference towards men, yet, the discussion rises for the fact that this laws are not noticed and ignored, specifically in Northern Albania. The disregard towards legal norm, presents and it is the main obstacle for the requested changes. One of the main concepts to for the right of inheritance is the right of property private, in this sense the country stays behind. Gender discrimination is more visible in this senses.¹²

Referring to data, it was difficult to find statistics from the side of the official web pages of the state, through the online journal link it was possible to have a general picture about the numbers, yet, there is a lack for the northern part. The statistics are for the all country. Data of State Cadaster Agency, which is based on the digitalization of 43.6% of private ownership in Albania, 19.1% in the name of women and 80.9% on behalf of men¹³. About Ownership of homes and apartments is in a ratio of 18.7 per cent in the name of women to 81.3 per cent in the name of men¹⁴. Until 2019, there had been a lack overall over ownership and private property on the gender basis, this rise second concern about women rights issue. According to the study of World Bank, in 2013, in the sense of overall equality in property rights, there are almost twice as many men landowners than women landowners, and most women landowners have a property share of less than 25 percent. For more than two decades land has been registered in the name of man.¹⁵

The few sources about the data are a high concern about women’s right on one hand and from the other hand is showing the lack of seriousness from the political class given towards this matter. The right

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 European Academic Research, Aleksandër Moisiu* University Durrës. p. 7-8.

¹³ <https://www.reporter.al/2019/08/06/paligjshmeria-dhe-tradita-u-mohojne-te-drejte-e-prones-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.

dynamism it was not given also from the society, the lethargic behavior remain deeply. The legal literacy is missing and it could be the key position to turn the changes into faster speed. The data are mostly done by journalistic instigation, reports from abroad, initiative from academicians and associations for equal rights.

The phenomenon mentioned above of Sworn Virgin, is strictly linked to the fact of being a woman. The socio mentality and economic reasoning of this region stands exactly at the borders of the conceptual analyses of customary law and the positive one.

The fundamental request of a positive law remains the coherence between the legal norm and society. Referring to theoretical approaches about positive law, in this case appears to be an open question upon legality matter.

Customary Law of Lekë Dukagjini, in North Albania

Albania, is one of the richest countries in South Eastern Europe, in the meaning of the Customary Law. Many codes are being applied since XV century, the society was offered and introduced by rules and norms, which some of them are respected even in the XXI century¹⁶. No matter how many political systems were being born and dying, meanwhile.

Three main codes that are relevant to the studies are: Kanuni i Skenderbegut, Kanuni i Leke Dukagjinit and Kanuni i Laberise, each one of them was systematically operating in their zones. The rest of codes had less influence in the society and there is only books and some theories published about the other codifications. Customary Law is identified with Kanunin e Leke Dukagjinit¹⁷

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

The focus will be for the realistic long life of Kanuni i Leke i Dakugjinit, the most dominant code. It was spread in Albania, Kosova and North Macedonia¹⁸ for more than V centuries, nonetheless, the most influenced spaces are in Theth, Shkoder, Bajram Curri, Tropoje Miredite and Kukes – the region of Northern part¹⁹. The Code of Leke, is set of traditional and customary laws of 12 books and 1, 263 articles, which regulates the 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 About the internalization of this Code, the anthropologist Edith Durham says: "... He has left no mark on European history - is purely local influenced the people that "Lekë said so" obtains far more obedience than the Ten Commandments. The teachings of Islam and of Christianity, the Sheriat and Church law, all have to yield to the Canon of Lekë".²¹

¹⁶ I Qerimi. I., Maloku A., and Maluku. E., (2022). "Customary Law and Regulation: Authenticity and Influence", *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 Dukagjini 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 has being approved and defended by the citizens, the normality of accepting this norms with assertiveness from man and woman as well it seems be more than a legal norm!. Woman and man were treated unequally, their identity was/is being perceived through the biological differences and, consequently the unequal positions status socially. The code is giving the supremacy and domination in the hands of man, incorporated 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 treated at her parents' house the same she is going to be treated way at husband's house, woman presents the 'object' in many meanings. She was fully sanctioned about her duties not no rights were given²². 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, was it not allowed by the canonical law. The code about 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 northern part that's it the family which is entitled to be heir, yet, the one who is in charge is the man.

The northern part remain the most affected compare to the central and southern part of the country. The patrilineal and patriarchal mindset co – exists with the breath of this organ. Patrilineality is has been assuring the inheritance through male principality, which is clear and rigid about it. The statistics about the right of inheritance – male domination, stands as strong argument for the conceptual analyses, according to the theory of Kelsen.

Sworn Virgin

The traditional and social normativity of the code give the birth to the phenomenon of Sworn Virgins. Sworn Virgins, in Albanian language, which ad litteram means Virgjeneshat²⁴ e perbetume, as they are called Burrnesha²⁵, 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 relationship during their lifetime, in front of the village council which is composed of 12 men²⁶. For the only reason to have the same rights as man. They will cut the hair, wear man's trouser and start to behave as a man, drink raki in public place, have a cigarette, and after some time they will be unrecognizable physically that they were woman²⁷. Edith Durham, Antonia Young and Rene Gremeaux are foreigners from different domains, who started to write about Burrneshat from the fact of being seen as lookalike as man while been 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. The post social construction is related with the concept of honor. Every single Sworn Virgin, has said it was their own decision. 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. 69.

diminish this phenomenon; there are still few²⁸. The most strong enforces to reduce the influence of the Code, a full abolishment of this phenomenon, was during the communist times. The principle of egalitarianism is the one of the main pillar of this regime which was fronting dichotomy of man and woman of the canonic law and could not reduce the impact of it.

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

Conclusion

In conclusion, through the comparative analyses, the theoretical approaches about the concept of positive law and customary law, in North Albania, this research study brought up to the light that from social construction a very known phenomenon among sociologists, anthropologists, and less for the jurists, 'Burrneshat' can bring more for the notions to the theories about law related to positive law and customary law.

The separation of social and historical norms from the legal norms, related to the theory of customary law gives strikes to the positive law and vice versa. The sanctions from the society, sometimes in the very specific spatial nature are more valid than the legal sanctions, this brings the concepts under other pressure. The validity of legal system is also one of the other criteria that Kelsen is mentioning about the applied law, yet, the validity rest in vain if from the side of the society is not valid. The non-approachable senses and significances among society and legal norms, gives the impression and the stress for the "redefinition" about applied laws. The obscurity of these concepts rises at their borders and its continuity.

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