Judicial Institutions in Albanian Customary Law and in Comparison with Modern Law (The Canon of Lekë Dukagjini)

Njomëza Zejnullahu

Abstract

This article compares judicial institutions of customary law and modern law. There are many discussions between authors regarding the relation between customary and modern law, specifically the impact of customary law in modern law. The role of the customary law is of crucial importance especially its impact in the positive law of the country. Although, the customary law was practiced years ago, similarities with current positive law are obvious. Many of the judicial institutions in Albanian customary law can be compared with similar ones in modern law, but is also crucial to identify differences between them. Main judicial institutions that served as enforcement mechanisms in Albanian customary law are identified in this article in comparison with respective institutions of modern law. In addition, it is important to view and analyse customary law in regard to its power as governing law in a given period. In this regard, an analysis of the Albanian customary law in view of Hart's rule of recognition is provided.

Key Words: customary law, modern law, judicial institutions, the canon, procedure, appeal

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1. Introduction

The role of customary law and its applicability in human society was for many years the subject of many studies. How customary law is created, what makes people to obey and enforce it, are some of the questions that evolved and have been treated by different authors.

Tomas Hobbes considered that customary laws, or laws that arise from long use, derive their validity from the sovereign's implicit agreement: "It is not the Length of Time that make the Authority, but the Will of the Sovereign signified by his silence"[1]. Later on, Jean-Jacques Rousseau gave a rational explanation for this legitimization, stating that "nothing but the excellence of old acts of will can have preserved them so long: if the Sovereign had not recognized them as throughout salutary, it would have revoked them a thousand times[2].

Throughout history it was not only the role of the sovereign that was discussed by various authors who analyzed customary law, but another parallel was also drawn by the fact of what makes people to obey customary law?

In case of Albanian customs there are some authors who actually base their views on Hobbes and Rousseau, as Margaret Hasluck points out, "the Turkish government, unable to enforce its will, accepted the situation and left the mountaineers to govern themselves, as they had presumably done under their native princes and chiefs" [3]. Albanian customs were the subject of many studies. What is unique and makes it unique is the fact of having the customary law collected and codified in one single document, i.e. the Canon of Lekë Dukagjini (Original: *Kanuni i Lekë Dukagjinit*).

The other fact that distinguishes Albanian customary law relies on the broad enforcement and application of the canon itself, but mostly expanded in North Albania and sporadically in Kosovo. Although the Albanian legal system evolved depending on different economic, historic and political phases, the Canon of Lekë Dukagjini still continues to be present and applicable even nowadays in some Albanian territories, such as Northern Albania and some parts in Kosovo. One of the reasons for the applicability of the canon is considered to be the weakness and unenforceability of the

[1] Hobbes T. (1651), *Leviathan*, Web Edition, the University of Adelaide.
[2] Rousseau J.J. (1762), *The Social Contract*, Prometheus Books 1988.
[3] Masson M. and H.Hasluck (1954). *The Unwritten Law in Albania*. Cambridge University Press.

formal legal system. As stated above, throughout Albanian history, there were different political systems and powers ruling but not always these legal systems were functional or, to put it differently, these legal systems did not reach at all times all classes and territories of Albania. As Edith Durham states "the mountain tribesman has never been more than nominally conquered-and is still unsubdued. Empires pass over him and run off like water from a duck's back"[4]. Albanian customary law through the Canon of Lekë Dukagjini treats many issues that actually regulate social, economic, religious and family aspects.

This article will address only the crucial judicial institutions according to provisions of the Canon, although the Canon regulates also other subjects. Specifically this article is limited to section 11 of the Canon that regulates the Judicial Law and judicial institutions. This article will analyze rules and procedures of the Canon regulating judicial institutions and will also focus on comparative aspects with applicable modern law. The purpose of this article is to summarize the main judicial law institutions in Albanian customary law and compare them with the institutions of modern legal system.

2. The Canon of Lekë Dukagjini

The Canon of Lekë Dukagjini is the most famous published codified document of Albanian customary law. For centuries, in Northern Albania and Kosovo, the Canon of Lekë Dukagjini was applied as custom, giving people the opportunity to keep social order by resolving disputes in community".[5]It is a structured document that included almost all rules and procedures considered as customary law and respected and enforced by the people. The Canon of Lekë Dukagjini remains the most famous compilation of Albanian customary law.[6]The Canon of Lekë Dukagjini was first codified and published by a Franciscan priest, Shtjefën Gjeçovi, born in Kosovo.[7]The term "Canon" etymologically originates from ancient Greek

[4] Durham E. (1908), *High Albania and Its Customs in 1908*, The Journal of the Royal Anthropological Institute of Great Britain and Ireland, 1919.

[5] Yamamoto K. (2007), *Struktura Etnike e Kanunit*, Punim Studimor, Gjurmime Albnologjike.

[6] Elsie R.(2001) *A Dictionary of Albanian Religion, Mythology and Folk Culture*, C. Hurst & Co. Ltd.

[7] Pupovci S. (1972), *Kanuni i Lekë Dukagjinit, përmbledhur dhe kodifikuar nga Shtjefën Gjeçovi*, Enti i Teksteve dhe i Mjeteve Mësimore i Krahinës Socialiste Autonome të Kosovës.

language. There are different opinions related to the inclusion of this word into the Albanian language. Some authors consider that the word "canon" entered the Albanian language through the Turkish language while there are some authors that consider that it came directly from Greek.[8]The Canon is divided into twelve (12) chapters regulating different topics and procedures as follows: Church, Family, Marriage, House, Livestock and Property, Work, Transfer of Property, Spoken Word, Honor, Damages, Law Regarding Crimes, Judicial Law and Exemptions and Exceptions.

The Canon of Lekë Dukagjini played a significant role in controlling the society and managing relations between different tribes and other organization levels in the society. From each chapter of the Canon we can conclude that it governs the respective field of life. The Canon of Lekë Dukagjini was the object of much interest among historians, legal experts and ethnographers, not only in Albania and Kosovo but also abroad.[9]The tribes of the northern areas preserved and respected the Canon as having priority over any other legal system.[10]In this way the Canon took the role of a constitution of a country for centuries.

The Canon is a unique compilation of orally transmitted laws that governed and regulated social behavior.[11] Despite the regulation of the normative part of rules and procedures how to behave and act, the Canon also specified mechanisms and instruments to manage the enforcement process. The importance of the Canon was not only that it used to regulate the main relations between individuals in almost all aspects of life, but it is crucial that it was considered as a consolidated legal system which can be compared with modern institutions and legal concepts.

[8] Ibid, p.20.

[9] Elsie R.(2001) *A Dictionary of Albanian Religion, Mythology and Folk Culture*, C. Hurst & Co. Ltd.

[10] Trnavci G. (2008), *The Albanian Customary Law and the Canon of Lekë Dukagjini: A Clash or Synergy with Modern Law*, page 9, Express Available at: http://works.bepress.com/genc_trnavci/1(Accessed 6th December, 2015).

[11] Elsie R. (2007) *The Rediscovery of Folk Literature in Albania*, History of the literary cultures of East-Central Europe, (Volume 3), page 335-339.

3. Judicial Institutions and Procedures in Albanian Customary Law

Judicial institutions are crucial for effectiveness and enforcement of rules and laws. Even for customs there was always a need for their enforcement. Judicial institutions usually refer to those bodies and institutions that have the authority to decide and deliver judgments as part of enforcement process of the applicable rules. The practice showed that it is never enough to set rules without enforcement measures and institutions.

As the very first impression we may consider that the customary law had no judicial system and probably disagree with the usage of this term when analyzing customary law. However, a judicial system is not only the one that is comprised of structured courts and institutions, judicial law was present even in customary law but conveyed in different forms of institutions and procedures.

Judicial law based on the canon should be analyzed in a material and a formal aspect. It is important to treat the material part in order to clarify the concept and the scope of judicial law in Albanian customary law. Considering the fact that the canon sorts most important institutions, one can claim that the canon set a judicial law system by which institutions we can make close comparisons with modern law and institutions.

The part of the Canon of Lekë Dukagjini regulating the judicial law is comprised of different institutions and procedures. The crucial ones that give specific powers and actually constitute basic pillars of judicial law in customary law are as follows: a) the competence to judge, to be part of a judging body, b) security of the procedure-pledges, c) the right of appeal and d) jurors.

3.1. The competence to judge

According to the provisions of the Canon, "The Canon of the Elders" constituted the concept of judicial law. The elders were entitled to judge and decide on dispute resolution between parties. Based on the canon "the elders" are the senior members of brotherhoods[12] or selected from among

[12] According to the Canon the two basic units of social organization are the house and the clan. The clan can be defined as a group and an exogamous unit whose members used to own some property in common. This group is identified by the concept of "blood", all members of the clan share the same blood and, through blood, some physical and moral characteristics. The house was then divided into two or more equal parts, each with its own entrance on the street, and its own courtyard and kitchen. Each brother, together with

the chiefs of clans and their authority is based on the foundation of legal right of the canon.[13]

From this provision one can realize that the canon does not only specify the individuals that are entitled to judge but also specifies expressively their authority by deriving their competence from the basis of the canon law (tagri kanunar).The Canon specifies and categorizes 'the elders" as judging individuals from the level of the contest that they have to judge and decide for.

In minor cases, the elders of the village, who are members of the same brotherhood or clan, are asked to act, while serious cases which besmirch the honor of the village or the banner must be weighed by the elders of the village and the Chiefs of the Banner.[14]

This structure of adjudicating body, the way that the elders are selected, allows to make a correlation with modern law. With simple analysis one can conclude that "The Elders" in customary law, once they have been chosen as required by the procedure in the canon, are in the same level with judges of today's courts. Also the customary law provided "the elders" acting in capacity of judges the competences, while the same situation we have with modern law where the law specifies the competencies of judges, by granting them specific rights and responsibilities.

Despite of similarities there are also few differences between the concept of "the elders" and judges in modern law. In customary law it was not stated specifically how many elders will judge in one contest, it was more chosen on ad hoc basis and depending on the situation, while modern law contains specific legal provisions stating the number and structure of judges for adjudicating in specific matters.

The concept of dividing cases in" minor" and "serious" is found in modern law a bit modified by having different levels of courts based on the level of the breach of law.

his wife and children, formed a separate social unit, but the former unity of the paternal house was remembered through its labeling as a "brotherhood".

[13] Fox.L (1989) *The Code of Lekë Dukagjini (translation)*, Gjonlekaj Publishing Company.

[14] Ibid, p.188, par. 998, par.1003.

3.2. Security of the procedure-Pledges

Obeying and executing the decision that came from a judicial body and procedure is one of the challenges also in modern law. There is no reason to think that this was not a challenge during the period when customary law was applied. People always are resistant to accept a decision made for them especially when they disagree with that decision. In order to ensure that parties involved in the contest will obey and respect the decision of the elder, the canon had a special mechanism. A pledge was a material token that is placed in the hands of the judging elders, giving them the right to pronounce judgment in disputes between two litigants".[15]A pledge may be a weapon, a cartridge, a watch or even a tobacco-box, as long as the pledge is equal in value to the contested object.[16]A given pledge was not allowed to be withdrawn later. The canon has no provisions that clarify the authority who will decide or a method to define which pledge is equal to the contested object. The aim of this pledge was to ensure that parties will obey and submit to their judgment. The importance of the pledge for the procedure is evidenced with the facts that it is expressively stated in the Canon that "A trial and judgment conducted without pledges has no legal value". As described below, in few situations the party that considers that the judgment was rendered wrongly has the right to disregard it. This will have effect on pledge, since the first elders do not return the pledges, but they are obliged to justify themselves by giving the pledges to a second group of Elders (second instance). [17] If the second elders find the judgment of the first elders unjust, the second group takes the pledges and thus having first elders lost their own payment.

The parallel of pledge with modern law may be found in the modern law concept of parties in civil disputes, where the parties are obliged to raise the issue before the courts on their own. By directing the dispute before the court, parties agree to respect and obey the decision of the court. However in customary law, since there were no structured institutions as we have today, it was required to leave a pledge as a guarantee that parties will respect the decision of the elders. Another connection may be found in the concept of setting the dispute competence with contract. When parties enter into contract they previously agree on the competent authority

[15] Ibid, p.190, par.1018.
[16] Ibid, p.192, par.1022.
[17] Ibid, p.192, par.1039.

(whether it is a court or arbitration) to judge and decide for any eventual dispute.

In view of this the difference is that in modern law, when directing or raising a dispute before the court a pledge is not required, since the obligation to obey and respect the court decision derives from the competencies and the obligatory character of rules and judicial decisions, while in customary law the pledge was required since there was no structured and organized institution that would foresee mechanisms to respect the judgment and would not need a guarantee.

3.3. The right of appeal

In principle, the provisions of the Canon did not recognize the right to judge twice for same dispute. "The Canon does not permit trial after trial and judgment after judgment".[18] This clause may be interpreted that according to the Canon it was not allowed to ask for retrial of the dispute that was once settled by the elders. However, this clause applies in principle, since the Canon has also other specific provisions addressing the same issue. The Canon states that "If you are not satisfied with the judgment, go to St.Paul's (a church in Mirditë where appeals were heard); If you are not satisfied with the judgment go to the Ravine of Orosh (the former seat of the House of Gjonmarkaj); The House of Gjonmarkaj is the foundation of the Canon."[19]In this way, the Canon stated the hierarchy of authorities that would be authorized to hear the parties that were not satisfied with the judgment. St.Paul's church was the second instance while the House of Gjonmarkaj has been treated as "the foundation of the Canon", meaning that it was a supreme authority for final decision. The authority of the House of Gjonmarkaj derived from their historical position as descendants of the Princedom of Dukagjin. The Gjonmarkaj family was one of the leading families of northern Albania and the authority was based on their power and their leading role of the people in northern Albania for the resistance against the invasion of the Ottoman Empire. If we make a correlation with modern law, we can refer to Hart and his statement that every legal system has only one rule that serves as a test for the validity of other rules. This is what Hart calls "rule of recognition". According to Hart, the rule of recognition cannot be disputed since "it can neither be valid nor

[18] Ibid, p.193, par.1034.
[19] Ibid, p. 192, par.1035.

invalid but is simply accepted as appropriate for use in this way".[20]This way, it seems that the authority of the house of Gjonmarkaj and the acceptance of their authority by the community, thus enabling them to set rules as stated in the canon, seems to be the rule of recognition of the canon. As generally known within the community of northern Albania always has been used the term "what Leka said has to be done".[21]

After specifying the hierarchy of the authorities, the Canon also stipulates the conditions for conducting the retrial process when one party was not satisfied with the judgment. "If the owners of the pledges think that the judgment was rendered wrongly and with partiality, they have the right to disregard it".[22] In this case the unsatisfied party may ask to change the elders group and to review the decision of the first elders. The right to disregard the judgment does not mean that this will lead to the non-enforcement of the judgment. This may lead to a retrial of the process with additional elders-second instance. Additional elders may be involved in the respective instances described above as the church of St.Paul, while if the case still cannot be resolved then it will be submitted to the House of Gjonmarkaj, for which we mentioned before that was the foundation of the Canon and the authority that had the right for final and binding decision. [23]

By analyzing this part we can conclude that these procedures are similar to the right of appeal in a modern legal system, not only recognizing the right of appeal but also strictly regulating the instances for decision and the procedure that must be applied.

3.4. Jurors

The concept of jurors is another institution of judicial law in the canon. The role of jurors was one of the most important roles actually constituting one of the authorities that delivered final judgment. According to the provisions of the canon, jurors are people designated by the judges to take an oath and vindicate the accused.[24]The oath serves as a vindication for the accused. This institution arises in cases when there are two parties, one party accusing the other for a violation, while the other claims that the

[20] Hart H.L.A (1961), *The Concept of Law*, Clarendon Press Oxford.
[21] Pupovci S. (1972), *Kanuni i Lekë Dukagjinit, përmbledhur dhe kodifikuar nga Shtjefën Gjeçovi*, Enti i Teksteve dhe i Mjeteve Mësimore i Krahinës Socialiste Autonome të Kosovës.
[22] Fox L. (1989), *The Code of Lekë Dukagjini (translation)*, Gjonlekaj Publishing Company.
[23] Ibid, p.194, par.1041.
[24] Ibid, p.194, par.1044.

violation was not committed. Thus, according to the canon not all disputes require jurors. The procedure with jurors is typical for disputes where the accused party claims innocence and offers to the accuser to prove the innocence through the oath. In this case the concept of jurors becomes relevant. The jurors are individuals chosen by the accused and by the court that serve as a guarantee to vindicate the accused. The jurors swear or take an oath on a sacred object (according to the practice usually religious books like Quran or Bible, but also sacred natural phenomenon like sun, moon etc) that the accused is not guilty and he has not committed the violation for which is accused for. Once the procedure of jurors is completed and the oath was taken the accused is regarded not guilty and their oath serves as a final judgment.

3.4.1. Selection Procedure

The canon expressly specified requirements that must be fulfilled by an individual in order to serve as a juror. The juror must be one a) Who has never been found to swear or take an oath falsely; b) Who has no rancor against either the individual who takes the oath (the accused) or the individual who observes the oath (the accuser); c) Who has never been found to be a glutton who would hang their soul on a hook for a bellyful of bread (i.e. who would not be corrupted by material considerations; d) Who, at least in principle, are men of intellectual discrimination or who can distinguish the truth with relative ease; e) Who are not a woman, since the canon excludes women in this function and f) Who are not under oath or who are hateful.[25]

The canon specifies that in principle, the oath is not taken without warranty, thus leaving space for interpretation, that is the principle but in few cases even without warranty the oath may take place, however the canon does not provide any provision specifying this issue.

The principle of the canon is that "the oath requires warranty, and warranty requires the effort of obligatory investigation".[26]A priest is not placed under oath, but if it should happen that his oath is required, either for his own defense or as a juror, it is considered equal to the oaths of 24 people. If the Chief of the Banner[27] is called to participate in an oath

[25] Ibid, p.194, par.1045.

[26] Ibid, p.194, par.1047.

[27] The Banner is part of a social structure; banner is comprised from different clans and is leaded by one chief.

involving 24 people, the court calls only 12 additional people, since his oath counts for 12 people. The person who leads the jurors is not considered as a juror. The principle of the canon is that "among a hundred jurors, the leader is not included". The jurors do not take the oath, before the leader of the oath claims the obligation toward the court. The leader of the oath will claim the obligation that, if someone induces a juror to swear falsely, he must pay a fine to the church for disgrace or perjury, as well as a fine to the banner or the village, according to the number of jurors. In addition, he must pay to the plaintiff double the amount involved in the case. The final judgment taken from the jurors (including the juror that has sworn falsely remains in force, but the consequences have the negative effect toward the juror not toward the decision.

The court must recognize as jurors members of the brotherhood and village of the person who will take and lead the oath.[28] The accused must go to the houses of the chosen jurors to inform them that they were recognized by the court as jurors. Half of the jurors are chosen by the court, while the other half are chosen by the accused. [29] After the elders/the court have chosen their jurors, they must inform the accused of their identities. In order not to cast doubt on their testimony, the accused must tell the elders whether any of the jurors bear him rancor or bitterness.[30]If the accused states a well-founded objection to one or another of the chosen jurors, the elders of the court are obliged to find a substitute. There may be only up to three substitutions.

3.4.2. Procedure of the Jurors before the Court of Elders

The jurors are informed of the day set for their oath, and the accused is obliged to assemble them. The jurors, before taking the oath, must endeavor to make inquiries wherever possible and examine the accused, so that they will not swear falsely. The jurors have the right to make their own investigation and, if the case is too complicated, they also have the right to postpone the oath for up to six (6) months while continuing their inquiries. In complicated cases of great seriousness and wide implications, the jury has the right to a postponement even of several years. Once the jury completed its investigations and decided either to free/vindicate the

[28] Ibid, p.194, par.1053.
[29] Ibid, p.194, par.1057.
[30] Ibid, p.194, par.1058.

accused by swearing that he is innocent or to refuse their oath, no objections can be made. The decision of the jury, regardless of its nature, must be announced to the accused.

Even if one of the jurors refuses to swear, the defendant loses the case. It is obligatory that if one or more jurors refuse to swear, they must "set the heart of the accused at rest" by taking an oath, if necessary, that their decision is not based on any rancor or bitterness, but only on their fear of swearing falsely.[31]If members of the jury eat bread (with the accused), they are considered to have taken the oath. If the members of the jury are assembled and eat the bread of the oath, the accused is regarded as innocent, the jury then has no other function but to take the oath. If the jury leaves the bread uneaten, the accused is regarded as guilty.

The jury must tell the accuser either to come and observe the oath-taking or else must name the informer. On the day when the oath is taken, the elders give their consent to the process of judgment, but this does not mean that the elders give consent to the decision derived from the oath, since the decision of the jury expressed by the oath is final and binding. No objections are allowed against this decision. The oath must be taken in this order: i. the accused takes his oath in order to set the minds of the jury member at rest; ii. After the accused, those most closely related to him by blood take their oath; iii. The jurors chosen by the court take their oath; iv. finally, it is the turn of the jurors chosen by the accused.

Finally, the words of the oath must be pronounced without any change and according to the form established by the court of elders. As we can see, the process of jurors in Albanian customary law is a well-structured process in function of resolving disputes between parties. There is a parallel that may be made between the institution of the jury in Albanian customary law and jury trial in the modern law. In the modern law we find the concept of jury trial in many jurisdictions in different forms. In the United States, every person accused of a crime punishable by incarceration for more than six months has a constitutional right to a trial by jury, which arises in federal court from article three of the United States Constitution[32], which states in part, "The Trial of all Crimes...shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been

[31] Ibid, p.195, par. 1062-1068.

[32] *The United States Constitution (1787) as amended*. Available at http://constitutionus.com/, (Accessed 5th December, 2015).

committed", while sixth amendment to the United States Constitution, states that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[33]The final purpose of both juries is to decide whether the specific violation or criminal offence has been committed. However, as we have seen, the jury in Albanian customary law actually had two roles: to investigate the case and to take an oath as a guarantee that the accused has not committed the offence that is being charged for. While the jury in modern practice actually has only the role to decide based on the facts and investigations conducted and presented to them by state prosecutor.

In addition, this is not the only parallel that may be drawn between the jury in customary law and modern law, there is also the parallel to be analyzed in the process of selection of jurors. Like in modern law there are some requirements that persons must fulfill in order to have this function, the same is with modern law where there are specific requirements and limitations for people appointed in the function of judges. It is important to analyze shortly also the possibility to substitute jurors. As we have explained, in cases when there are doubts that any member of the jury will not be impartial and just, the accused has the right to ask for his substitution. Here we have an analogy with the possibility in civil procedure to ask for substitute of a judge or member of the jury in jurisdictions that apply jury trial. Albanian customary law did not recognize the principle of equal voting rights for each person, since the priest was considered as twenty four (24) people while the chief of the banner as twelve (12) people.

4. Conclusion

The Canon of Lekë Dukagjini is a good opportunity to analyze the correlation between customary and modern law. It is one of the rare documents that introduce the reader how customary law regulated social, economic, property and all other aspects of life.

Judicial institutions and procedures have many similarities with modern law institutions and procedures, without ignoring also discrepancies that we have identified in this article. Institutions and procedures of modern

[33] Ibid, Amendment 6.

law are structured and they address issues and include principles that are actual and necessary for the status of society and respective economic, politic and historical changes in society. However, we can conclude that the concept of the institution and procedure in customary law is very close to modern law.

The key difference is in the extent of involvement of social, cultural and religious aspect in law. The importance and privileged position of priest (counting his vote as vote of 24 people), necessity of pledge, excluding women from jury and elders function are some of the aspects that illustrate the impact of social, religious and cultural aspects of the specific period in the content of the customary law. This is one of the points that lead us to the question of relation between society, culture, religion in one side and the law in other side. Does the society determine laws or is it the opposite?

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