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THE PRINCIPLE OF EQUALITY ACCORDING TO CUSTOMARY LAW

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Abstract

The purpose of this paper is to summarize the concepts of customary law and analyze how international customary law functions and how the principle of equality is conceived in customary law. For many centuries in the absence of written constitutions and constitutional laws, the norms which regulated state and social activity were customary norms. Repeated over time and continuously, they had the 'legal' power in a certain territory. Customary law is defined as the set of customs, practices and beliefs that are accepted as mandatory rules of conduct by a community. These practices or rules were also used to regulate relations between different states. Even today, customary law is one of sources of law, in cases where we have legal gaps. What is one of the most delicate issues in social arrangements under the influence of customary law is inequality and discrimination against women. This inequality under the influence of customary law still occurs in different countries of the world. Initially, during the work, the definitions of customary law will be given, continuing further with customary international law. One of the important issues to be elaborated is customary law in Albania and how equality and discrimination are under the influence of the norms of of customary law.

Key words: *customary law, customary international law, equality, canons.*

INTRODUCTION

The origin of customary law is very ancient, as an institution in the society of the primitive community, it acted in full force until the creation of state legal institutes. The existence of the Canons was an expression of local autonomy or an

almost formal dependence of the provinces and deep geographical areas where the central imperial authority found it difficult to apply its positive law.

Customary law, as a regulator of social relations, has made it possible in the legal context with its provisions to regulate some areas of family law, expressed in institutes such as: birth, marriage, rights and obligations within the family. Likewise, the treatment of civil law institutes: property, inheritance, obligations, trade, sale, purchase, lease, loan, suretyship, pledge, capucari, usury and damages. Every customary right originates from the customs and traditions of a human community, that is, from practices that have existed for a long time and that, for this reason, have been recognized and accepted socially as binding, taking on the force of law.

Many studies still and today continue to talk about the influences that customary law has or that still continues to be studied in this field. If we were talking about a long time ago, this system of norms would constitute the most important regulatory order in society and in relationships between states. In many states they were in the form of Canons, we take here the case of Albania and the countries that were under the influence of the Ottoman Empire. Over time, these Canons were then replaced by formal constitutions.

I. MEANING OF CUSTOMARY LAW

When a certain legal practice is followed and the relevant parties consider it to be a legal opinion or obligation, it is said to be customary law (*opinio juris*). The majority of customary laws deal with long-standing social norms in a given nation. The collection of ideas, conventions, and practices that are acknowledged by a society as obligatory codes of behavior is known as customary law. On the other hand, the phrase can also refer to areas of international law, such as anti-slavery or anti-piracy laws, where certain norms have been virtually universally accepted as the foundation for action. Selecting the proper methodology to identify which norms and actions truly constitute customary law is a key challenge in the recognition of customs. It is not immediately evident how conceptual analyses of customary law and traditional Western theories of jurisprudence may be usefully harmonised *(J. Comaroff, S Roberts,1981*), and some scholars have characterized customary law norms in their own terms.

Although convergent behavior is typically implied by the concept of custom, not all customs have legal standing, according to Hund. Thus, Hund follows Hart's lead and makes the distinction between social rules which possess both internal and exterior dimensions and conventions, which just possess outward dimensions. Internal factors include worshippers' thoughtful attitudes towards particular actions that they consider required by a shared standard. Externalities are not required, but they do show themselves as consistent, observable behavior. According to Hart's theory, social norms are consequently legally binding customs. Hart highlights three further distinctions between legally

binding social rules and customs (*Hund, J.,1998*). First, there is a social norm that states that customary behavior is frowned upon and that departures are discouraged by social disapproval. Second, when this criticism is accepted in society as a valid justification for following the custom. Thirdly, when individuals within a group exhibit habitual behavior, it's not only because they're doing it or because everyone else is; for some, it's a common standard that needs to be adhered to.

The legacy of mediaeval customaries, which are collections of regional customary law that arose in a particular city or municipal jurisdiction and were gradually brought together primarily by case law before being recorded by jurists, served as the foundation for the contemporary codification of civil law. Local customs became the unquestionable rule that governed specific rights, obligations, and privileges among community members, giving them the legal status (In R. v Secretary of State For Foreign and Commonwealth Affairs, 1982). Common law is a recognized source of law within jurisdictions of the civil law tradition, where it may be subject to statutes and regulations (*Merryman, John, 2007*).

I. CUSTOMARY INTERNATIONAL LAW

A large number of jurists have argued for the expansion of custom because they see it as a helpful tool that can counteract the strict nature of treaty law (*S. James Anaya,1998, p. 44*). Customary law establishes norms that are applicable to all. States may seek an exception to newly established customary law norms by opposing to a developing practice before it becomes a legally enforceable custom. This is known as the theory of ongoing objection. Custom is the main source of international law and has inspired the creation of several regulations governing interstate interactions. The implied consent of states is what gives customary international law its binding power (*Fon V., Parisi F.,2009, p. 279*).

Customary law is formed according to a relatively small number of principles. According to the notion of customary law, custom is any behaviour that takes place outside of the bounds of the law and that people, groups, and states adhere to in their dealings out of a sense of duty to the law. When the application of customary international law (*I. Boghirnea, 2024, p.48*) is necessary to resolve a dispute, an international court confirms the existence of the two fundamental components of a custom. These components are sometimes referred to as the "qualitative" and "quantitative" components of jurisprudence and practice, respectively. States are deemed bound by the ensuing custom when both conditions are met, and international practice becomes recognised as customary international law. Regarding the first formative ingredient, the existence of a stable and largely uniform international practice that many governments have consistently complied with is necessary for the establishment of customary international law. No time limit has been established for compliance; yet, a lengthy period of time serves to both demonstrate that the practice was

consistently followed and to elucidate its purpose and context. Furthermore, states' natural and unforced behaviour should give rise to the practice. Declarations of international law make reference to the universality and coherence of customary law. If behavioural fluctuations make it hard to identify a general practice, then the criteria of consistency is not met. The need for uniformity in terms of expanding and general acceptability is reaffirmed by the most recent cases in international law, which give new norms particular regard. or neighbourhood associations (*Fon V., Parisi F.,2009, p. 282*).

Opinio juris sive necessitatis, which expresses the need that customary activity be regarded by states as satisfying a fundamental norm of social behaviour, is a common term used to identify the second formative factor. As per the opinion juris requirement, governments are required to act with the conviction that the practice being applied is carried out to satisfy a fundamental legal responsibility, and that the state does not follow the practice out of convenience or diplomatic courtesy for a specific duration. The purpose of this condition is to guarantee that customary law originates from a broad agreement among states rather than from an arbitrary and unqualified convergence of state practice. (*Fon V., Parisi F., 2009, p. 283*).

In both historical and contemporary contexts, customary law has been essential in regulating relations between sovereign states due to the absence of a universal legislature and the high cost of draughting and ratifying international treaties. Even though customary law has the power to establish norms that are legally enforceable everywhere, states can gain exceptions to either new or preexisting customary law principles through the use of continuing and subsequent objection doctrines. (*Fon V., Parisi F., 2009, p. 283*).

The term "customary law" in international law refers to the Law of Nations or legal standards that have evolved over time via customary interactions between states, whether they are motivated by diplomacy or aggression. Essentially, it is thought that states have a legal duty to handle their affairs in a way that is consistent with historically recognised behaviour. Additionally, these traditions might alter in response to a state's adoption or rejection of a certain conduct. Some customary law precepts have become prescriptive norms that can only be altered or violated by another standard with a similar degree of power. Some norms, like the ones that forbid slavery and genocide, are said to have universal support, which gives them authority. Customary international law can be distinguished from treaty law, which consists of express agreements between nations to undertake obligations. However, many treaties are attempts to codify pre-existing customary law.

Legal pluralism is the term used to describe the situation when one or more forms of customary law coexist alongside formal law in numerous nations across the globe.

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Customs are the source of law according to Catholic canon law. However, canon law jurisprudence is different from civil law jurisprudence in that it requires the legislature's direct or implicit assent in order for a custom to become legally binding. It is necessary to prove "long usage" under English common law. "Customary rights" is the term used to describe judiciary in practice. Something that has been done for a certain location since ancient times has the potential to become a custom, which is a type of local legislation. The legal criteria that define a custom are precise.

Customary international law is defined as "a general practice approved by law" in the International Court of Justice Statute (Statute of the International Court of Justice, Article 38 1.b) .Generally speaking, two things are necessary for the norm of Customary International Law to exist: state practice (*usus*) and the belief that such a practice is necessary, even though it may be forbidden or allowed depending on the nature of the law as a legal matter, *opinio juris sive necessitatis*, (M Henckaerts, page 4). States' verbal and physical actions together make up a practice that aids in the development of customary international law. According to the term, physical acts include things like standing on the battlefield, wielding particular kinds of weaponry, and facing various kinds of people. The governmental comments on draft treaties, executive orders and regulations, military manuals, national legislation, court rulings with national legal force, directives to the armed forces and security forces, military communications during war, diplomatic protests, official legal adviser opinions, presentations before international courts, statements in international forums, and government positions towards resolutions approved by international organisations are examples of verbal acts. This list demonstrates how the actions of the legislative, executive, and judicial branches can influence the development of customary international law. Acts involving states include negotiations, resolution adoption by conferences or international organisations, and vote announcements. Recall that, with very few exceptions, resolutions are typically not binding on their own. As a result, the assessment of any given resolution during the process of forming the norm of Customary International Law is based on its substance, level of acceptability, and the impact of a state's pertinent practices. A resolution should be given more weight the more support it receives. The standards of behaviour that develop "outside legal constraints and which individuals and organisations spontaneously follow in the course of their interactions" are referred to as customary laws. *(Calde, Nimrah, 2021, p.138).* Customary rules, in contrast to state laws, are typically deemed legitimate due to a universal consensus that following such a code of conduct is beneficial for each individual rather than the use of coercive force. There are some differences between common law and state law. While customary laws differ from group to group, the former is often upheld by an adversarial judicial framework, and the latter prioritises the community and

applies consistently within the nation's territorial authority. These customary laws are limited to "specific legal areas". (*Calde, Nimrah,2021, p. 139*).

II. ALBANIAN CUSTOMARY LAW

The unwritten rules that have governed social interactions in some Albanian provinces for generations are known as customary law. It is a centuries-old historical-social phenomenon that is mostly found in the nation's mountainous areas. The class nature of this right is highlighted by the growth of private property and is ever-evolving, but it always stems from an ancient customary right with deeply ingrained historical origins. The Albanian people's ability to withstand pressure to adhere to the laws of the occupying governments and maintain customary law over an extended period of time is a testament to their determination to defend their existence, language, and culture. Some of the basic features of the social psychology of our people were reflected in Albanian customary law, such as: honour. faith, manhood, hospitality etc. It is another proof of autochthony and individuality of the Albanian people (*Albanian Encyclopedic Dictionary,1985*). As far as is known, Albanians have long been subject to customary law. It is impossible to pinpoint the exact moment that it was used for the first time. She was most likely born very early, though, and this had to have been during the Illyrian era. During that time, a number of institutions were put in place that have proven particularly crucial to the centuries-long operation of this unwritten privilege. Research indicates that the customary law was also in effect during the times when the Illyrian kingdom was losing its independence. There is information on permitting the Illyrian customary law to be applied locally in Roman legal texts. Additionally, Albanian customary law was in effect even during the Byzantine era. Furthermore, numerous sources attest to the implementation of customary law in the Albanian lands concurrent with their legal-state systems during the reigns of the Bulgarians and the Ottoman Empire. Therefore, the canons served as the foundational sources of Albanian customary law during the Ottoman Empire's administration. A plethora of canons were applied in the Albanian regions, but the most popular were the Canon of Lekë Dukagjini, the Canon of Arbër (Skenderbeu) and the Canon of Labëria. Numerous additional canons also functioned in a localised manner. These canons' general institutions were comparable. The canon as the main source of Albanian customary law was in itself a constitution, even more than the constitution, since it contained social and legal norms from the birth of a person to death (*Qerimi I.,2021*).

While these canons operated historically in the Albanian regions, they had a vital role in protecting national identity, non-assimilation and patriotism. It should be emphasised, therefore, that both canon law and customary law were significant at the time they were applied. However, since the Albanian state was established, particularly after 1928 and when the draughting of modern Albanian

legislation in the various legal fields began, the canon is typically only found in national historical archives and museums and must also be protected by UNESCO (*Qerimi I., 2021*). As a by product of social and economic development, our customary law has operated in Albania as a social psychology tool, a right that has expressed the people's ethnic and cultural identity against the rights of foreign invaders, and a means of preserving the original Albanian character (*Elezi I.,1983, p.29*).

The Albanian Canons are unparalleled in their kind and serve as a reflection and indisputable value of the historical-social phenomena of the people, who were conceived and born in particular unique geographical, economic, and national circumstances. As such, they have been and will continue to be a subject of ongoing study and analysis from a variety of angles, resulting in claims and contradictions, conclusions and rebuttals, and agreements and disagreements. The canons are still a holdover from a bygone era, a civilisation characterised by marked gender disparities and injustices, and not infrequently by harsh punishments that were deemed illegitimate, a culture that was dominated by medievalism or even prehistoric times. However, the Canons also bring us the undiscovered historical truths better than any other source since they are a faithful mirror of a bygone era, of a society and its institutions, of morality and social organisation, the hierarchy, and the national cosmos of the mediaeval arboreal populace both historical and documentary (*Merlika R., 2018, p. 12*).

III. EQUALITY ACCORDING TO CUSTOMARY LAW

Customary law frequently contains laws that discriminate against women based on their gender, which is against the equality provisions of the constitution. The theory of dialogic democracy provides useful instruments that can assist a legal system in safeguarding customary law as well as women's equality. The legal system can enhance women's ability to influence their communities' customary law by emphasising the necessity for questioning and discussion within the cultural community. Many nations' customary legal systems seriously jeopardise women's equality rights by approving and upholding laws that discriminate against women in relation to marriage, divorce, property, and a host of other matters (*Williams Susan H., 2011, p. 65*).

Although customary law is very old, it is impossible to date it precisely because some of its key components, such as legal equality, can be traced back to the Middle Ages. Blood feuds among the tribe functioned as equals' vengeance and as the true lawmaker in a society devoid of offices and the police (*Williams Susan H., 2011, p. 13*).

The woman was not equal to the man, according to the Albanian canon. She was first denied the ability to inherit from either her husband's or her parents' families. In addition, it had numerous other limitations and bans on the ability to engage in or establish legal relationships. For example, according to the legal

norms of Albanian customary law, she was not entitled to serve on juries or on councils of elders or the old age. On the other hand, the parties were required to quickly halt fire if it came between them in a direct armed battle. Also, if the honour of any woman was killed or violated, the author of these criminal acts would answer twice, to two families, both the husband's and the parent's (*Qerimi I., 2021*).There is a great deal of discrimination against women in the Mizo society of northeast India. Customary law norms give males and their rights a higher priority. Numerous rights are denied to women, including civil and family rights. Avoid discussing political rights. The woman's marital status and position are intimately connected (*Gangte M., 2016, p. 20*),

Communities that disagree with the legal culture of equality are not allowed to exist under the other strategy, which applies equality principles to all cultural activities. How can a system of constitutional law preserve and uphold women's equality rights while also accommodating and honouring customary law? It is important to consider the power dynamics that exist inside a group as well as the manner in which the legal system interacts with the cultural community to influence the resources, prestige, and power of its subgroups. A systemic result of certain legal cultural appropriation is the reinforcement of traditional community authority figures and their cultural interpretations, often at the expense of the authority and viewpoints of more marginalised groups, such as women. Cultures have always been internally diverse and have shaped and interacted with one another throughout history. Cultures are not primitive entities; rather, they are the result of specific and complex historical processes; (2) Members of a culture internally contest, negotiate, and re-imagine it; (3) Cultures are not isolated, but rather overlap and interact; and (4) Cultures are loose, meaning that the loss or alteration of one strand does not necessarily bring down the whole culture. It is important to consider the power dynamics that exist inside a group as well as the manner in which the legal system interacts with the cultural community to influence the resources, prestige, and power of its subgroups. A systematic result of some legal cultural appropriation practices is the reinforcement of traditional community authority figures and their cultural interpretations, often at the expense of the authority and viewpoints of more marginalised groups, such as women"*(Williams Susan H.,2011, p. 70*).

CONCLUSION

A community's recognised conventions, practices, and beliefs that serve as legally enforceable guidelines for behaviour are known as customary law. Customary law establishes norms that are applicable to all. One of the main sources of international law is custom, which also gave origin to many of the regulations governing interstate relations. States' implicit consent is what gives customary international law its binding force. Some customary law precepts have become prescriptive norms that can only be altered or violated by another

standard with a similar degree of power. Some norms, like the ones that forbid slavery and genocide, are said to have universal support, which gives them authority. Customary international law is distinct from treaty law, which is made up of formal agreements between countries to perform certain duties. Customary law frequently contains laws that discriminate against women based on their gender, which is against the equality provisions of the constitution. Many countries' customary legal systems seriously jeopardise women's equality rights by approving and upholding laws that discriminate against women in relation to marriage, divorce, property, and other matters. A systematic result of some legal cultural appropriation practices is the reinforcement of traditional community authority figures and their cultural viewpoints, often at the expense of the authority and perspectives of more marginalised groups, such as women.

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