

## Eurocodification of the Legal Framework in Albania during King's Zog Monarchy (With a Special Attention to the Civil Code)



Law

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### Abstract

One of the most important challenges that the Albanian State had to accept in the first decades of its creation, was the preparation and the approval of a legal framework that was supposed to place several public and social rules. The Albanians did not experience the humanist period from 14th to 16th century as other European populations, because it was interrupted by the Ottoman occupation. So the only governmental tradition which survived during this epoch were the Canons: The Canon of Lekë Dukagjini (Kanuni i Lekë Dukagjinit) and the Canon of Skanderbeg (Kanuni i Skënderbeut). Albania gained its independency from the Ottoman Empire, but still the country was ruled by Sheriat (Shariat from Arab, šari'a, shari'at), most of all because of the fact that there was not a national legal framework until 1930. After the proclamation of the Monarchy and the approval of its Statute (Constitution), started the work on the preparation of different codes; the crucial one: The Civil Code. This process was the first step for the Albanian Legislator to compare the secularity of the European legal framework to the Ottoman Empire one. In Albania, there was a such coexistence between the old empiric laws, the religious traditions and the tribal laws survived from the past; a mixed regime like the diversity of the population itself.

### 1. Introduction

The Albanian medieval cities of the coast, were governed by Statutes and Regulations (*statuta et ordinationes*), according to the Saint Marc Republic until the end of the humanist Middle Ages. The judicial regime was organized by the model of cities-communes from the 14<sup>th</sup> century in Durrës, Danjë, Drishtë, Shkodër, Ulqin, Tivar and Kotorr. A part of the Statutes of these cities are published, some of them are being reconstructed<sup>123</sup>, from tangential sources, mostly from other acts cited as legal references<sup>124</sup>.

During the centuries of Ottoman occupation, the only ethno-judicial tradition survived by then, were the canons: The Canon of Lekë Dukagjini, *Kanuni i Lekë Dukagjinit* and the Canon of Skanderbeg, *Kanuni i Skënderbeut*<sup>125</sup>. The resistance to survive in front of Sheriat, *Shariat* was so big that the Ottoman Empire was obliged to set up a Special Office in Shkodra, which was supposed to interpret laws and orders from these two Canons. The scope was to avoid direct confrontation with the population of North Albania mostly, because they were particularly ruled by these Canons. This institution was called *Xhibal (Djibal)*<sup>126</sup>.

This kind of resistance had also a religious meaning, because by stopping the Ottoman occupation, the population of North Albania could save their Christian belief and their autonomy, consacrated by the Canons<sup>127</sup>.

Albania found itself in a legal framework vacuum, by the foundation of the independent Albanian State (1912). The saint law of Sheriat was formally abrogated, but there were missing the most important codes, so from 1912 to 1930, they still used some of the rules of the former regime. Albania of the epoch had to choose between the eurocodification or the inertia of Sheriat. This very complex process was started after the proclamation of the Monarchy in 1928 and the approval of the new Statute/ Constitution.

<sup>123</sup> See *Statuti di Scutari della prima metà del secolo XIV con le addizioni fino al 1469 / Statutet e Shkodrës në gjysmën e parë të shekullit XIV me shesat deri më 1469*, a cura di Lucia Nadin, con saggi di Oliver Jens Schmitt, Giovan Battista Pellegrini e Gherardo Ortalli, trad. Pellumb Xhufi, ediz. II, *Onufri*, Tiranë 2010; Milan Šufflay, Victor Novak, *Statuta et ordinationes capituli ecclesiae cathedralis Drivastensis*, në *Arhiva za arbansku starinu, jezik i etnologiju; istoriska serija*; knj. II, sv. 1, Beograd 1927.

<sup>124</sup> Sinanaj, D., *Çështje të së drejtës së pronës dhe trashëgimisë në Shqipëri, 1920-1939, Me një vështrim retrospektiv të Shqipërisë parashtetërore*, Phd Thesis, Tiranë 2015.

<sup>125</sup> Hasluck, M., *The unwritten law in Albania*, Cambridge 1954, p. 15. 59. The Canon of Skanderbeg was less consistent than the Canon of Lekë Dukagjini, but it had the force of a law.

<sup>126</sup> Capra, S., Gjomarkay, Gj., Xoxa, A., *Albania proibita*, ediz. *Mimesis* 2000, p. 74: *Allora il Kanun fu sostituito dal codice ottomano Xhibal e continuò a vigere solo nelle regioni che per secoli sarebbero state difese con le armi.*

<sup>127</sup> Jacques, E., *Shqiptarët. Historia e popullit shqiptar nga lashtësia deri në ditët e sotme*, shtëpia Botuese Kartë e pendë, Tiranë, p. 200.

### 1.1. Some discussions on the Civil Code

According the 2<sup>nd</sup> paragraph of the Article 32 of the Monarchy Statute, the Albanian government created a Commission to prepare the Civil Code and the law of its application<sup>128</sup>.

As it was expected to be, the Judicial Commission had an important role on the progress of the work that had to be done before the approval by the Parliament of Albania. We also have discovered that the Special Commission was the one which elaborated this code, and considered it like *the precious stone of the Albanian legal justice*<sup>129</sup>.

The Civil Code was going to be discussed in two rounds and it was going to be voted *en block*. At the beginning of the new Parliamentary Session, in March 1928, the opinion to this code was uniform for the majority of the deputies.

One of the most relevant scope of this code was the fact that it should be approximated to other laws in force, but *also to the new social life*. The Albanian Civil Code entered in force the 1st of April 1929. It was approved by a qualified majority, except two deputies Kolë Mjeda and Zef Gera. The last ones did not accept this code because it did not respect their religious beliefs.

In the report of the Special Commission, it is accentuated the fact that the society has changed and the old legal framework was not appropriate to the new circumstances. The social development pointed out that the past judicial regime had a lot of problems, so the civil reform was necessary immediately. In this report, the Commission says that *The Civil Code is the mirror of the social organization and tradition, in front of the development of its self*<sup>130</sup>.

One of the most crucial aspects of this code was the judicial security and the independency of the Judicial Power. Concerning the judicial security, the respect of human rights was in the center of attention, but most importantly the right to property and heritage. According to the Commission's report, no one would accept to violate these principles. The rights proclaimed by the Statute were intangibles.

During the Parliamentary Session of 12th of March 1928, there were some contrasted ideas on the new legal initiative, from the religious considerations, to moral and principle ones, such as divorce, or cohabitation. It is important to understand that, before approving this code, was important to take into account the cultural level and the ignorance of the population. This code was seen so complex that the deputies also proposed to organize several internships to learn how to use and apply it<sup>131</sup>.

### 2. A general overview of the Civil Code

The Civil Code was a natural need to develop the society, after the consolidation of the Monarchy. This code was a crucial legal reform, because the religious way of conducting the society was not appropriate anymore.

This code, as we already said, was prepared by taking into consideration the European model of codification, most importantly because the Albanians were fed up by the social regulation by religious references. Before the entry in force of this code, Muslims were ruled by *Fikhu regulation*, orthodoxies from

<sup>128</sup> AQSH, F.146, V. 1928, D. 87, fl. 75, *Mbledhja 5, E hanë, 12 Marc 1928, Bisedim mbi Kodin Civil për herën e dytë* (dalë nga komisioni).

<sup>129</sup> AQSH, F. 146, V. 1928, D. 87, fl.76.

<sup>130</sup> AQSH, F. 146, V. 1928, D. 87, fl.76.

<sup>131</sup> AQSH, F. 146, V. 1928, D. 87, fl.80.

the survived *rules of Byzantine Empire*, and Catholics by *the Canonical right*<sup>132</sup>. The uniformisation of the legislation had the scope to equally treat everybody in front of the law, but this was a very difficult challenge.

For the first Albanian Civil Code, French Civil Code of Napoleon has been the most important model of approximation. The Special Commission, competent of its preparation, after making this decision, accepted also the fact that it was necessary to have an approach to two European experiences such as the French Code and other latin Codes, but also the German Code (01.01.1900) and Suisse one (1912)<sup>133</sup>.

The German and Suisse practice were also accepted because some institutions were better developed in their codes either than the latin ones (more freedom for judges, special provisions for moral persons etc). Anyway, it was difficult to transpose them to the internal legislation, because they were created to be applied in federative and cantonal regimes, and Albania was not one of them.

The French Civil Code was considered that it was very developed, easy to understand and to be applied. To justify this choice, the Commission expressed that the French Code was also an example in the past, to other European States like Italy, Spain, Belgium, Portugal, Romania, or other countries outside Europe, such as Japan, Egypt, and some states of South America. In addition, considering that France had a judicial tradition for more over than 100 years, it had a very rich jurisprudence. Such thing would have helped the everyday work of the Albanian judges, in similar or analogue cases.

Concerning the Italian Civil Code, the Commission precised the fact that it had an important role on the preparation of the Albanian one, because the majority of our judges knew the Italian language very well, because they studied abroad, or they studied to Italian schools in Albania. From the Italian Civil Code, the Commission took into consideration the provisions on the interpretation and application of the laws, the first 11 articles of the code.

### 2.1 Family

The social organization made before the proclamation of the independency in North Albania, divided property in three categories. Considering that the cell of the society was the tribe, the most important property was the one in possession of it, then the property of the close family, and the last one the private/ individual property<sup>134</sup>.

The institution of family was treated by the new Civil Code differently, more precisely on the equality of men and women. Now on, both sexes had the same rights, because they both contributed on the formation and development of the family. There was not conceivable anymore that women did not have the same rights as men. This code did also provide the cases of divorce, the prohibition of polygamy and other kind of legal relationship between husband and wife, even if the religious institutions were categorically against.

In addition, this code had some provisions on the equality between natural children and legitime ones. Natural children, born outside the marriage, had the same rights concerning alimony and heritage<sup>135</sup>, as legitime children born from the civil institution of marriage. This kind of provision, before the entry in force of the code, was absolutely prohibited by the Ottoman law. A child born outside marriage did not have any rights to be recognized as a subject with property and heritage rights. According to this code, adopted children were also considered as legitime ones.

<sup>132</sup> Frashëri, K.: *Ahmet Zogu, vështrim historik*, bot. M & B, Tiranë 2014, p. 132.

<sup>133</sup> AQSH, F. 155, V. 1927, D. IV-758, fl. 13.

<sup>134</sup> Nopça, F.: *Fiset e Malësisë së Shqipërisë Veriore dhe e drejta zakonore e tyre*, bot. Eneas, Tiranë 2013, p. 492.

<sup>135</sup> AQSH, F. 155, V. 1927, D. IV-758, fl. 3, *Raport justifikues*, 29.02.1927. Komisioni përbërës nga Mehdi Frashëri, Agjah Libohova, Thoma Orrolloga, Faik Dibra.

Moreover, regarding the right to inherit, Sheriat did not made any specific provisions on this. We could find some relative provisions on different laws, but not such kind of regulation as the new Civil Code<sup>136</sup>. The *Mexhele* (*Medjelè*, from tr. *mecele*, mind *convente*) did not precise the circle of successors in case of a legacy. In any case, it was very difficult to divide the part of each successor when a heritage was opened. The Civil Code had the mission to help and avoid these obstacles on the procedures abovementioned.

## 2.2 Inheritance

The new legislative changes on the inheritance were necessary, mostly because of the injustices made by the Sheriat in the past. This one precised that the male member of the family had the right to inherit twice than the female member. The female member of a family was very vulnerable; the male member was seen as the replacement of the father, as the position of chief of the family and the person who inherited the last name.

Sheriat made a huge regress on the provisions regarding the heritage on female members of a family. It is enough to remember that the female member, according to *Shkodra Statutes* had the right to inherit from the age of 12<sup>137</sup>.

The heritage of the new Civil Code made some provisions on recognizing the horizontal and the vertical circle of persons who had the right to inherit. For example, in case that one of the children of the *de cuius* was dead at the moment of the division of the heritage, his/ her children substituted him/ her, and were successors for the partition of his/ her dead parent. So, it was predicted the succession by substitution. This is a new element, taken from European provisions, which demonstrates the different approach of this code and the novelties introduced by him. Normally, the nephews of the *de cuius* were excluded, but with the new code, not anymore.

Sheriat did not precise the circle of successors, but with the provisions of the Civil Code, the right to inherit would be possible until the parents of sixth grade. If *de cuius* could not have any parents of sixth grade, his/ her property were inherited by the State. It was considered that, *de cuius* had not any parental obligations anymore, so the State would use it for the best, in the name of general interest. The State was considered as a member of the family, which had the legal obligation to protect it. So, at the same time, the State gained the role of successor in the example abovementioned.

The law on wills, of 05.05.1922, even if it presented some modern provisions, did not make a clear the separation from Sheriat, mostly because of the fact that it did not precise the circle of successors. In this law, *de cuius* could give in heritage one third of his/ her property in favor to any person outside the parental grade, and two third of it, would be the legal reserve for the parental circle without any distinction between them<sup>138</sup>.

For the legal heritage, were specifically provided the equality between men and women, the rights of the husband/ wife as successor in front of other parental successors, the specific rights to inherit for the children of *de cuius* and the limitation of the right to inherit until parents of sixth grade.

For the testamentary heritage, were specifically provided the legal reserve, the right to inherit of a moral person, mostly in case of religious communities, the application of the rules concerning the division of the property in heritage etc.

<sup>136</sup> AQSH, F. 155, V. 1927, D. IV-758, fl. 4.

<sup>137</sup> Articles 166, 186 and 196 of Shkodra's Statutes: **Article 166:** *Everything that husband and wife earn, are considered being in co-ownership, half of the property is for the husband, and half for the wife;* **Article 186:** *Girls and wives have the right to will from the age of 12;* **Article 196:** *The wife who has kids, has the right to will its property, and to take apart 1/5 of it, if she did not already transferred it to her daughters.*

<sup>138</sup> AQSH, F. 155, V. 1927, D. IV-758, fl. 6-7.

### 2.3 Other legal provisions on the right to property

Concerning real estates and the rights linked to them, Mexhele contained some provisions to distinguish different categories of them, distinguished their place to *the Book of selling* for servitudes, *the Book of Shirqet* for the division, and *the Book of Gazbi*, for the right to access<sup>139</sup>.

Moreover, the former legislation did not include provisions on *Usufruct*, even if it was considered as an important civil institution. *Servitudes* were not fully treated, because the provisions of Mexhele were satisfactory with the regulation of good neighborhood and the respect of higienic conditions.

According the joint tenancy, Mexhele did not provide a fully legal regulation, and more importantly, did not foresee rules on the division of this kind of property. With the law on wills, the provisions of Mexhele were improved, because there were added new rules on real estates and the division of the co-ownership property.

It was also predicted the case when one of the joint tenants decides to sell its partition. In this case, he/she had the legal obligation to propose this sale to his/ her other joint tenants, before proposing it to a third party. In the new Civil Code there were some provisions on the rights and obligations of joint tenants on the administration, the possession, and the division of the estate.

According to the prescription, in the old Ottoman legislation, there were not any provisions made by it, except the Code of Lands, which in the Article 78 predicted a *haki-karar*<sup>140</sup>, as a right to prescript of the modern days. In the European legal framework of the epoch, it was predicted that the legal possessor in trust, after some point became owner. This could not happen in case of Mexhele.

In the Ottoman regime there was a Register of Property showing the extent, value, and ownership of land for taxation, but with the Civil Code, it was possible the Transcription System, as the French and Italian model. The register system organized in the epoch of ottoman occupation, and the regulation on land patents were not considered as a useful system anymore, because they did not provide full rights for the owner of the real estate. In addition, the transcription system would facilitate the relationship of the owner with third parties.

The borderlines of lands, which were indicated in this register, were not complete and clear, mostly because of the fact that superficies were not precisely and exactly measured. These imperfections caused conflicts between owners of close lands, or third contractors who wanted to buy a real estate. The passage of ownership was very difficult, because the majority of lands were not in reality the same as they were registered in this register. The transcription system made possible for everybody to be aware of his/ her property, his/ her rights and obligations<sup>141</sup>.

When the Civil Code entered in force the 1st of April 1929, the framework on the transfer of property, and the rights related to it, changed in a surprisingly way. This Code helped to formalize the process to transfer the rights to property, mostly in case of a selling contract; which is nowadays one of most important ways to transfer a property from a person to another.

Just before the entry in force of this code, the transfer of property was made by a declaration of the owner in front a special commission. One of the member of this commission was a representative of Cadastre, the Register of Property. This commission was also competent on the release of the property certificate for the

<sup>139</sup> AQSH, F. 155, V. 1927, D. IV-758, fl. 7.

<sup>140</sup> AQSH, F. 155, V. 1927, D. IV-758, fl. 12.

<sup>141</sup> AQSH, F. 155, V. 1927, D. IV-758, fl. 29.

buyer. These kind of provisions obstructed the publicity principle, because third parties, interested in a transaction like selling a land, could not object such action.

After the entry in force of the Civil Code, the new legislator filled this legal gap, by creating the transcription institute. This process was made by a employee of mortgage, who also responded and guaranteed the legal rights of third parties, in case of any claims. Moreover, the transcription would make possible that the contracts could enter in force after the approval of the notary and the precised date and time written in the contract. After the signature, the transcription ended by making public the action of the contracting parties.

According to the law On Mortgages, of 17<sup>th</sup> of April 1929, each Prefecture and Sub-Prefecture had a mortgage office<sup>142</sup>. Article 27 of this law precised that, *in all Prefectures and Sub-Prefectures, there is a mortgage office, which includes territorially the respective Prefecture or Sub-Prefecture*. Each person, interested in asking any information, should ask to this office, in case he/ she needed different kind of documents, by making a written request. Concerning mortgage fees, Article 7 expresses that they were obligatory and they needed to be paid in these offices. This payment was not returnable, except the case when the act of transfer was declared invalid. There were three categories of fees: fixed fee, gradual fee and proportional fee.

### 3. Conclusions

The right to property has not always been codified. That is why, people tried to make the best by making rules and precising the rights and obligations by themselves<sup>143</sup>.

In the Roman Law, property was seen as a full power to the object or estate *dominium proprietatis*, by assigning to the owner three powers such *asius utendi, fruendi and apotendi*. This is the milestone which made possible the transposition of the definition of property until the Civil Codes of nowadays, by considering that the right to property is an absolute right, that no one can interfere.

The right to property takes an important place in a judicial regime and in the relationship between parties, owner of several estates<sup>144</sup>. Property was the essential factor to a good and developed economy, and the land was the essence of production for the epoch. The start of a healthy relationship regarding property was one of the most important things, which was taken into consideration by the legislator.

Moreover, this right created a new social relationship of economical character, which was protected by the entry in force of the Civil Code of 1929<sup>145</sup>. This means that, the intervention of the State was necessary to protect the owner's interests.

The Civil Code of 1929 did not resolve the problems that the Albanian legal framework had at the epoch. Its scope to eurocodificate the internal legislation, by organizing a modern society was partially successful. One of the most important goals of this code was the interruption of the old regime, the legislation of the Ottoman Empire. This was crucial for the development of the Albanian state and society, which did not come back to Sheriat anymore.

<sup>142</sup> Selenica, T.: *Shqipëria në 1937*, Tiranë 1938, p. 577.

<sup>143</sup> Statovci, E.: *Marrëdhëniet pronësore juridike në sendet e paluajtshme*, Prishtinë, 2009, p. 27.

<sup>144</sup> Gjata, R.: *E drejta civile, sendet dhe pronësia*, Tiranë, 2011, p. 45.

<sup>145</sup> Nuni, A.: *E drejta e biznesit*, Tiranë, 2006, p. 422.

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