



RESEARCH ARTICLE

UNLAWFUL TERMINATION OF PREGNANCY UNDER THE ALBANIAN CUSTOMARY LAW

*Sevdali Zejnullahu and Andi Duraj

European University of Tirana, Tirana, Albania

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ABSTRACT

Albanian customary law includes the entirety of unwritten norms and rules, passed over generations, which have regulated social relations in a range of provinces of Albania. Albanian customary law is one of the oldest laws, which has also influenced the development and formation of later justice in the Albanian state. The Albanian customary law is divided into several codes (kanuns), the most well-known is the Code of Lekë Dugagjini, the Code of Skanderbeg, etc. If these Codes (kanuns) are analyzed, which are a part of the Albanian customary law, it emerges that they have dealt with topics that still represent an area of interest for foreign and local researchers for our society. Termination of pregnancy or abortion, is today one of the worrying phenomena that human society is facing. Therefore, in this paper, will be addressed the issue of abortion within the framework of Albanian customary law, with particular emphasis on the Code of Lekë Dukagjini and the Code of Skanderbeg.

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INTRODUCTION

General overviews of Albanian customary law in relation to the termination of pregnancy: Albanian customary law is an unwritten folk law, passed over generations, that has served to regulate various legal relationships. Albanian customary law has constantly evolved in line with historical, economic and social conditions, and in itself there is no major difference from other countries in the region. Law enforcers, by settling disputes or various conflicts, referred to previous customs, or established a new standard that would be used for analogous solutions in the future and would thus serve as a judicial precedent. Thus, as a result of historical development, a gradual shift from the ancient customs of the past to the norms of customary law, separation and differentiation of society into classes, whose economic position was sanctioned in customary norms, has been realized.¹ The role and great importance of customary law and its summaries in the Code (Kanun) are evident. Referring to the different codes (kanuns), it can be found a set of rules and norms that regulate the coexistence of Albanians and at the same time help to control and administer the state of anarchy and arbitrariness. This whole mechanism had the shape of a fragile but encouraging legislation and became the basis from which it began to be formed into

subsequent legislation. But as long as the independent state had not yet been formed, there was no constitution and its laws, customary law played the role of the Constitution and laws regulating legal relations not only for a narrow region, but for the entire population. The Albanian customary law constituted an almost complete legal system, including within itself the rules from the civil, criminal, procedural, family domain, and thus becoming a life regulator. Among all these summaries of laws, for us and in the interest of this paper, is the criminal field, and in particular, the data regarding abortion or unlawful termination of pregnancy. The majority of Albanian customary law is summarized in the Code (Kanun) of Lekë Dukagjini, collected and arranged by Shtjefën Gjeçovi. We will dwell precisely in this Code (Kanun), but also in the Code (Kanun) of Skanderbeg as the most important codes in terms of Albanian customary law. But we do not forget to note that in Albania and other ethnic Albanian lands, as a customary law was also recognized the Code (Kanun) of Skanderbeg, the Code (Kanun) of the Mountains, the Code (Kanun) of Labëria (creators of the Laberian Code (Kanun) were its own Lab people).²

Termination of pregnancy according to Code (Kanun) of Lekë Dukagjini

*Corresponding author: Sevdali Zejnullahu,
European University of Tirana, Tirana, Albania

¹ http://sq.wikipedia.org/wiki/Kanuni_i_Lab%C3%ABris%C3%AB

² Dr. Ismet Salihu, Criminal Law, General Section, Pristina, 2005 p.111; Prof. Dr. Ismet Elezi, Code of Labëria, Tirana, 2006, p. 12.

The Code (Kanun) of Lekë Dukagjini has 12 books, 24 chapters, 259 knots and 1263 paragraphs. Criminal norms regulate general criminal law institutions such as guilt, cooperation, punishment, but also special figures of some offenses.³ Therefore, the Code (Kanun) of Lekë Dukagjini rightly is considered the most important monument of Albanian customary law. According to the Code (Kanun) of Lekë Dukagjini, we see that life protection is provided for the termination of pregnancy, albeit indirectly.⁴ In the chapter twenty-two, at the hundred and thirtieth knot we find out about "involuntary manslaughter".⁵ Paragraph 935 of the Code of Lekë Dukagjini says: "If somebody kills the pregnant woman - even involuntary - he must pay 3 purses for the woman's blood and 3 other purses for the fetus." What we learn from this paragraph is that even if the murder is committed involuntarily, this action is incriminated. Even more for the fetus found in his mother's womb, the author of the crime receives the punishment prescribed by the Code (Kanun).

Regarding the kind of guilt, in this provision we are dealing with carelessness and unconsciousness murder. By using the well-known Latin maxim "Argumentum a maiori ad minus" we can conclude that if the murder was deliberately committed, the act would be a very responsible act with the great social danger. Paragraph 936 of the Kanun of Lekë Dukagjini says: "If the murderer balks at paying 3 purses for the unborn child, the code (kanun) permits the women to be opened, in order to see whether the fetus is boy or girl." The provision clearly shows that there is a differentiation of incrimination depending on the sex of the fetus or the passive subject of this act. According to paragraph 936 of the Code (Kanun) of Leke Dukagjini, it was allowed to examine the murder victim in order to find out what gender the pregnancy fetus was. As the following paragraphs show, the punishment for the author of this act depended on the sex of the fetus. The paragraph 937 of the Code (Kanun) of Lek Dukagjini says: "If it is a boy, the murderer will pay 3 purses for the woman's blood and 6 purses for the boy's blood; if it is girl, besides the 3 purses for the woman's blood, he will also pay 3 purses for the blood of the girl."

The reading of this paragraph is astonishing, but at the same time shows a story of the history of the Albanian people. If the history tells us that there was always a difference between daughter and son in Albania, we see that this distinction is traced back to the fetus. The different treatment of the male fetus with that of female becomes clear in the fact that "...for boy fetus are paid 6 purses versus 3 purses for the female fetus." Favoring based on customary law, comes to light also in paragraph 937 of this Code, where with the loss of the boy fetus, the punishment for the author is twice as tougher and heavier than for the murder of the pregnant woman. If we say that customary law stands based on the legislation, we find that in the case of gender distinction, it was very denialable. Current criminal law in regard to the abortion not only does not distinguish the severity of the measure related to the sex of the aborted fetus, but has exceeded this norm by explicitly establishing that termination of pregnancy by the motive of selecting the gender of the embryo is prohibited.⁶ And all this,

to deviate from a centuries-old mentality formed and preserved through customary law.

Termination of pregnancy under the Code (Kanun) of Skanderbeg

Similar to the Code of Lekë Dukagjini, the Codes of Scanderbeg, Laberia, Mirdita etc., pay special attention to life within the uterus. The Code of Skanderbeg contains very rich and important material in the legal field.⁷ In this Code are summarized norms regulating the family, house, obligations, governance, punishments, guilt, damages and church. This code consists of seven sections.⁸ In the Code (Kanun) of Skanderbeg, the rules/norms related to the termination of pregnancy are foreseen in the sixth section - The guilt and damages, in Chapter I. - Damages and guilt against life, in article VI.⁹ In the following we will try to briefly clarify the provisions-paragraphs referring to the termination of pregnancy in order to observe the similarities and differences with other historical legal acts. According to the Code (Kanun) of Skanderbeg, "abortion, under the Code, means woman killing the unborn child" (paragraph 2817). This paragraph has normative nature and talks about the act and its author. This paragraph, explicitly (clearly and well-defined), defines the meaning of abortion. At the same time, the canonical norm also leads us to the author of the action, which in this case, unlike most positive legislation, is the pregnant woman.¹⁰ Further, the Code (Kanun) goes on to say: "A woman who aborts voluntarily puts her parents in blood debt, in man blood debt if the fetus is a male, in woman blood debt if the fetus is female" (paragraph 2818).

This provision makes us understand that abortion, in order to be incriminated, needs another element of criminal offense, that of intentional (deliberate) commission. We find this element in today's legislation, but what today sounds archaic to us is the collective responsibility of this act. "...puts her parents into blood debt..." is nowadays a silly provision and, therefore, undefined in positive legislation, where each person is responsible for his/her actions.¹¹ "A woman, who aborts unintentionally, does not put her parents into blood debt. Not even unwillingly. He or she who directly helps with abortion is on blood debt as the woman who aborts willingly" (Paragraph 2819). The Kanun surprises us with the fact that there is no space for interpretation or misinterpretations of provisions. In this provision of the Code of Skanderbeg, there is a distinction between the types of guilt. In the first part of this paragraph, we notice that in cases where a woman fails to continue her pregnancy, even though unintentionally, then her actions (physical, mechanical or chemical) which caused the abortion, will not be incriminated. This becomes clearly from the second part of the first sentence of this paragraph, which states that she puts her parents in the blood debt. The same provision incriminates the actions of the aides. What is worth mentioning

⁷ Dom Frano Ilia, "The Code of Skanderbeg", Milot, 1993.

⁸ http://sq.wikipedia.org/wiki/Kanuni_i_Sk%C3%ABnderbeut

⁹ Mr.sc. Bajram Ukaj, Unlawful Termination of Pregnancy as a Criminal Offense, Law Journal no. 1, Pristina, 1997 p. 81.

¹⁰ As we will see in the follow-up of this paper, the Criminal Code of Kosovo in Article 152 does not foresee that a pregnant woman may be the perpetrator of this criminal offense.

¹¹ Perhaps, at the time of the implementation of this Code (Kanun), it was more appropriate to anticipate collective punishment, respectively, that parents should account for their daughter's actions. Of course, such a provision would have more of a general prevention character than to be of a retributive character.

³ Ibid.

⁴ Mr.sc. Bajram Ukaj, Unlawful Termination of Pregnancy as a Criminal Offense, Law Journal no. 1, Pristina, 1997 p. 81.

⁵ Gjeçovi, Shtjefën. The Code of Lekë Dukagjini, knot 130.

⁶ Law No. 03/L-110 on Termination of Pregnancy, Chapter IV, Article 14.

in terms of assistance is that according to the Code (Kanun), only those persons who have provided direct assistance for the abortion are responsible. The Code (Kanun) does not give us any accurate information on the type of aid and we think that any kind of direct, physical or psychological aid would incriminate the actions of the aides. However, the provision is clear when it speaks for the penalties to persons who provide "direct assistance" and leaves out of punishment the actions of persons who may have provided assistance indirectly.¹² The newly analyzed provision has the same content as the Criminal Code of Kosovo¹³ that the person who helps the pregnant woman terminate the pregnancy qualifies as the direct perpetrator of this criminal offense. Thus, although his/her actions contribute to the commission of this criminal offense (not as direct actions in the commission of a criminal offense), they will not be considered as acts falling within the scope of the cooperation.

"Whoever provides any mean to perform the abortion is the same as person providing weapon for murder" (paragraph 2820). The paragraph concretizes directly the actions of the person providing abortion assistance. By equating the means provided by a person to commit an abortion with the murder weapon, we easily understand that the degree of social risk is high and equal to the risk posed by the crime of murder. And on this basis I think the provision (paragraph) of the Code (Kanun) equates fetus's life at the moment of intra-uterine to the life of persons who live in a full biological sense. Like the Code of Skanderbeg, Criminal Code of Albania has foreseen as a special offense the provision of means for termination of pregnancy.¹⁴ While in the Criminal Code of Kosovo, the offense of termination of pregnancy, offering of assistance, including the provision of appropriate means for abortion is described in a general manner.¹⁵ Regarding these different legal charts, I personally think that the Criminal Code of Kosovo should also considered as the perpetrator of the offense, not just the person providing physical or psychological assistance, but also the person that provides the appropriate means to terminate the pregnancy.

The Code of Skanderbeg, whose norms we are referring to, also provides that: *"The woman in denial of voluntary abortion and the person who helped her directly by providing means, can be cleared only after swearing under the Code (Kanun). The woman can be cleared when her parents swear for her"* (paragraph 2821). This paragraph analyzed and compared to positive legal norms, appears to be a provision of a material¹⁶ and procedural nature. The procedural character of this paragraph is distinguished when it speaks of a stage where the suspect (woman and aide) must appear before the elders who are judging with the Code (Kanun). If compared to the criminal procedure under the legislation in force, it would be related to the first phase of the main trial before the judge or trial-panel, which speaks about the acceptance/non-acceptance of the guilty plea.¹⁷ This means that until this act of material

and procedural nature has been carried out by the parents of the pregnant woman, the presumption of her innocence has remained pending, which in view of the legislation in force is one of the main principles in Criminal procedure because no one can be identified with the criminal offense until he is given a final judgment.¹⁸ Further, the Code (Kanun) of Skanderbeg predicts: *"Whoever beats someone else's pregnant woman or fires a rifle near her causing pregnancy failure; he owes a "man blood" if the fetus is a boy and a "woman blood" if it is a girl. If the woman also dies, because of the pregnancy failure, he also owes "woman blood". (Paragraph 2822).* The upper provision seems faulty in its wording. It leaves voids that allow for guesswork during the necessary interpretation for its implementation. Thus, this provision does not tell us anything about the consequences of violence or other actions that lead to termination of pregnancy or the death of a pregnant woman when the violence comes from her husband. Thus, based on the maxim *"anything that is not forbidden can be considered permissible"*, it turns out that if a woman aborts her child from the violence exercised by her husband, the latter has no canonical consequence. Based on this paragraph, we conclude that the actions of persons who exert physical violence on the pregnant woman and, as a result of this violence comes to the abortion, are incriminated.

This provision determines the alternative commission of this offense. The provision considers criminal offense the act of violence as well as the action of the person firing rifle in proximity of the pregnant woman, an action that scares her and causes termination of pregnancy. For these two actions, the Code (Kanun) does not make any differentiations and sanctions the person who performs them by *"falling in double blood."* In my opinion, there is an excess of the norm, because for non-equitable social actions the criminal responsibility is the same. I personally think that the physical violence exercised against women should not be equated with a *"firing rifle in her proximity"*, an action that cannot be prejudiced that it is carried out to frighten a woman or to cause termination of pregnancy. *"Person firing rifle to claim blood, for a friend or honor, near a pregnant woman and causing failure of pregnancy, he falls in "unwilled blood". If he fires his rifle for pleasure, than the blood is not called unwilled"* (Paragraph 2823). In the aforementioned paragraphs was noticed the attention that Code of Skanderbeg paid to the pregnant woman and its fetus by providing special protection. The paragraph through which we clearly understand that blood feud in the past was favored self-justice offers protection for the new life that is conceived so as to declare that if a woman aborts as a result of the rifle shooting with which the revenge was taken, the perpetrator has fallen in unwilled blood.

The abovementioned provisions, detached from the Code of Skanderbeg, are not the only ones that Albanian customary laws have produced to protect the mother's and fetus's life in her womb. We find them in the other codes (kanuns) as a true proof that Albanian society throughout history has taken care to establish legal protection (through Kanun), particularly for the pregnant woman and the fetus. We may find the provisions of Albanian customary law, unclear, criticizable and often unacceptable to our modern society, surviving to this day as they were once written. But no one can oppose the fact that they have been basically the necessary basis to set up today's

¹² Indirect assistance according to Prof. Salih, is in those cases where the perpetrator of an offense is assisted through another person, op. cit., p. 398.

¹³ Criminal Code of Kosovo, Article 184, paragraph 1.

¹⁴ Criminal Code of Republic of Albania, Article 95.

¹⁵ Criminal Code of Kosovo, Article 184, paragraph 1.

¹⁶ If we break down this paragraph then we notice that the material condition is to swear in front of the elders of that time, who acted according to the Code (Kanun) in question.

¹⁷ More on the division of stages during the judicial review of the criminal procedure see: Prof.dr. Ejup Sahiti, Law of Criminal Procedure, Pristina, 2005, p. 207.

¹⁸ Murati, Rexhep. Review of criminal proceedings due to new facts and evidence, Prishtina, 2006, p. 75.

legislation to protect the health and life of the pregnant woman and her fetus.

Conclusions

This subject has a social and moral sensitivity, which affect society and thus on the law itself. In this paper we have made a historical chronology of how the termination of pregnancy by Albanian customary law is treated, which now under positive law is foreseen as a criminal offense, and therefore punishable. So we conclude that Albanian customary law has paid special attention to the mother's life, but also to the fetus in her womb, and this argues the truth that Albanian society has taken care to establish legal protection, particularly for the pregnant woman and the fetus.

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