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# Aiming for Certainty: The Kanun, Blood Feuds and the Ascertainment of Customary Law

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# **Aiming for Certainty: *The Kanun*, Blood Feuds and the Ascertainment of Customary Law**

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## Abstract

Customary law is an alternative legal framework to statute or public law. In the past the existence of customary law was viewed as problematic due to the uncertainty which accompanies legal pluralism. Increasingly, scholars are recognizing legal pluralism as simply a reality to be negotiated, rather than a problem. One frequently proposed solution to the difficulties posed by the existence of customary law is to write it down, or ascertain it, in order to provide for legal certainty. This article addresses this goal in three parts. The first part describes customary law and how it functions in its uncodified form in post-colonial settings, specifically in Sub-Saharan Africa and parts of Asia. The second part of the article details the reasons why scholars and public officials have often suggested writing customary law down as a solution and situates these arguments within the contemporary debate on legal pluralism. In the third section a specific case of written customary law, the Albanian *Kanun* of Lekë Dukagjini, is analyzed with a focus on its modern usage in a post-socialist context. The paper concludes noting that ascertainment does not bring legal certainty to customary law in the ways that are anticipated. Writing down an oral tradition or a practice may produce a document for reference, but this does not limit its use nor necessarily increase the predictability of its application. The article also emphasizes the role of customary law in defining group identity in post-socialist settings.

Keywords: customary law; Kosovo; Albania; legal pluralism; codification; post-communism

### **Aiming for Certainty: The *Kanun*, Blood Feuds and the Ascertainment of Customary Law**

All countries around the world have social norms beyond public law that regulate behavior and structure the decisions of individuals within a society. Indeed, legal pluralism, broadly defined as the existence of multiple sets of rules and norms, is increasingly understood as ordinary and normal. In many countries, traditions are so weighty as to fall into a category that we can refer to as customary law. As with most norms, customary law is infrequently written down, it simply exists and everyone knows, or believes they know, what it entails. Where customary law comes to the attention of politicians and policy-makers, it is typically because it provides alternative guidance to statute law or contradicts human rights norms.

Customary law in post-colonial countries is a body of rules governing personal status, communal resources and local organization. It can determine access to land and water, the pool of eligible marriage partners a person might have, and what a child or a spouse inherits. It is, therefore, of both social and economic importance. Customary law can be conceived of as a very strong social norm, while it is possible to break that norm, the consequences, both social and economic, are so high as to prevent noncompliance. Some examples will help illustrate the point. In a famous Kenyan legal case, the government upheld a family's customary right to bury their son in a place that neither he, nor his wife, desired that he be buried (Stamp 1991). In Tanzania, a man, frustrated with a court's attempt to invalidate the marriage he set up for his unwilling daughter, declared that she was now the responsibility of the government and it was the government's obligation to find her a husband (Hodgson 2001). In these cases, which came to light when the actions taken under customary law were challenged in court, we can see the strong bonds of customary practices in establishing the boundaries of the community and regulating behavior within it. The fact that in both these cases customary law was contested in court indicates some of the problems that exist in legally pluralistic societies.<sup>1</sup> Which laws apply and when? Who gets to decide when customary law is respected and when public law takes precedence? These issues must be dealt with somehow in every legally pluralistic society. One of the frequently proposed solutions to the uncertainties posed by legal pluralism is the ascertainment of customary law. Writing the law down allows for the recognition of customary law as a source of norms, but also provides for the legal certainty necessary in public law.

This article has two specific goals. First, it seeks to interrogate the proposal that ascertainment is a necessary step in addressing legal pluralism. This is done through the examination of a case

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<sup>1</sup> Legally pluralistic societies are typically characterized by the presence of both customary and statute or public law. However, an additional layer of complexity can be added by religious law in places like Nigeria or Indonesia where sharia law, customary law and public law are all present and sometimes promote competing norms of behavior. This availability can lead to 'forum shopping' in which people with a conflict choose the law and dispute resolution mechanism which they feel best represents their interests (Benda-Beckmann 1981).

in which customary law has been written and assessing whether its existence in written form led to the expected benefits. Second, the article seeks to contribute to the relatively sparse literature on customary law in post-socialist settings. While there are ample studies of the role and use of customary law in post-colonial settings, far less is known about the functioning and use of customary law in Europe after socialism. These goals will be addressed in the following manner. The first part of this article describes the nature of customary law and how it functions in its uncodified form, the second section details the reasons why scholars and public officials have often suggested writing, or ascertaining, customary law as a solution. The third section focuses on a specific case of written customary law, the Albanian *Kanun of Lekë Dukagjini*. The final section of the paper is a reflection on the role of customary law in modern states.

### **Customary Law**

Much of what we know about customary law comes from the study of post-colonial societies in which customary law was allowed to exist side by side with public law. Indeed, customary law in colonial regimes was typically used as a tool of administering indigenous populations and was encouraged, transformed and sometimes even constructed in ways to assist with domination and rule (Chanock 1991, 1998; Joireman 2011; Mamdani 1996; Snyder 1987). Gordon Woodman notes that classic discussions of legal pluralism, which always conceived of it as problematic, were set in a post-colonial context (Woodman 2012). In the 'new' legal pluralism the context has shifted and we recognize legal pluralism in diverse contexts such as post-socialist states as well as the US and Western Europe. The shifting of contexts allows for the consideration of customary law in a new light.

The use of customary law in colonial settings is distinct from customary law in socialist settings. In socialist countries customary norms were allowed to continue insofar as they did not interfere with public law, but were not encouraged and did not share the same administrative purpose. This is an important caveat to remember when examining the literature on customary law. To be explicit, customary law in countries in Sub-Saharan Africa *thrived* under colonization because it controlled access to important resources such as land, timber, water and labor. It also had its own legally recognized leaders and adjudicators who controlled populations and resources with the consent of the colonial state. In many countries there were parallel court systems for customary cases or assessors whose role it was to bring a traditional perspective into the government courts. The use of customary law under colonial regimes gave it a power that endured into the post-colonial era.

Customary law in socialist states played a different role. From the contemporary cases of customary law in the post-Soviet Central Asian states (Edgar 2004; Ross 1999), to the case considered here, customary law *survived* the socialist era and efforts of states to supplant its use in both family life and the control of resources. Yet, in both post-colonial and post-socialist settings, customary law clearly plays a role in group identity.

In both colonial and post-colonial settings, customary law controlled both people and resources. "A customary law may be defined as a normative order observed by a population, having been formed by regular social behavior and the development of an accompanying sense of obligation" (Woodman 2011: 10). This definition embeds customary law in its relational and behavioral contexts. Customary law is typically uncodified, not existing at all in written form, or incompletely systemized, thereby enabling dynamism in its application. Customary law can shift and change as circumstances demand and adapt to specific contexts (Sage and Woolcock 2012). In a 2002 interview, a senior chief in Kenya recognized that customary law is created and molded by traditional leaders, saying, "Customary law is what I describe" (Human Rights Watch 2003:11). His statement captures both the potential for interpretation that exists and the role that the community and its leaders play in defining what is customary.

Customary law is not unique in its adaptive and dynamic qualities. Most legal systems allow for flexibility and have some ability to accommodate change. Indeed, one of the qualities of common law systems that is lauded as a great strength is its adaptability to changing circumstances (Eisenberg 1988; Hayek 1973; Joireman 2006; Morriss and Meiners 2000; Rubin and Bailey 1994). Because the common law relies on case law and precedent, it can evolve over time in response to contextual changes. Slow evolution over a period of time is a positive quality in a legal system. Unpredictability is not. A lack of consistent and predictable application of legal rules, be they customary or public, impedes the functioning of a vibrant economic system and negatively impacts the ability of people to plan for the future.

The issue of predictability touches on the current debate over whether legal pluralism is a problem or simply a reality. There is a school of thought which argues that legal hybridity is so pervasive that it is impossible to eliminate it. Therefore, the challenge is to develop mechanisms to accommodate it (Berman 2012). While others have defined the contours of that debate (Twining 2012), it is worth noting that the arguments about ascertainment do not align exclusively with one camp or the other, at least if we understand ascertainment in its most narrow context, as a written recording of customary law. In this article, when I discuss ascertainment, I am referring to writing it down and giving it a coherent form. I do not use the broader and more politically charged term of codification - adopting customary law into the public law through legislative action. This is an important distinction to make. Ascertainment

could help us to understand customary law better; it could also assist with specifying the exact points of conflict with public law. Since ascertainment is only a step towards legal uniformity if it results in formalized law, this discussion is separate from the current debate regarding whether legal pluralism is a problem that needs to be solved.<sup>2</sup>

In the realm of legal theory there is broad agreement regarding the interaction of social norms and public law. Norms may suffice for small communities, families and those with face-to-face contact, but larger networks of interaction require more formalized mechanisms to mold and constrain behavior (Weber 1968). H.L.A. Hart argued that primary rules, those that govern conduct, will suffice for interactions between family members and kin groups. However, he posits that secondary rules governing contracts, including rules of definition and adjudication, are necessary to deal with uncertainty and inefficiency as an economy expands (Hart 1997). Whether it matters if norms persist alongside public laws (legal pluralism) was not a question Hart considered, but it is an extremely pertinent question in many societies today that have customary law.

Every society has multiple normative orders as there are a plethora of social rules, religious law, and conventional practices in addition to public law. What is unique in the case of customary law is that it is an alternate forum to state legal rules and often overlaps with or opposes those state rules. Customary law privileges resource claims of recognized members of the group, which can have positive effects on individual well-being and increase the benefits of group membership. There is also an immediacy to customary law that is valued by those in communities in which it functions (Oomen 2005).

Yet, the existence of a state legal system alongside a customary legal system and the dynamic nature of customary law can create problems in description and analysis. Indeed, legal scholars have struggled with even the use of terms to define customary law in its variety of forms and usages. Living customary law is different from codified, judicial and textbook customary law.<sup>3</sup>

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<sup>2</sup> So for example, Namibia had an 'ascertainment' process in which customary law was recorded, but not established as public law. It was then not a problem if the customary law contravened the constitution as the written customary law was not a formalized part of the Namibian legal system.

<sup>3</sup> In wrestling with its different usages, Ubink and Van Rooij come up with the following distinctions. "Codified customary law refers to legislation codifying the customary law of a certain jurisdiction. This provides legal certainty and accessibility to the customary law, while at the same time unifying, simplifying and crystallizing it, often in a formal language that is different from that used in the original community. Judicial customary law refers to the norms developed by judges when applying customary norms in courts and as laid down in national law reports. Here also, customary law is made more certain and accessible, but at the same time can be crystallized, unified and formalized. Textbook customary law refers to authoritative texts written by state administrators or anthropologists, often used by state courts or administrators when trying to ascertain appropriate customary norms. It offers a non-legal and more

Yet, there is an inconsistent use of terms across contexts. Definitional struggles with the specifics of customary law and a desire to recognize it somehow in public policy have led to calls for it to be written down and even for its adoption into public law or codification.

### **Ascertainment of Customary Law**

Calls for the ascertainment of customary law come most frequently from those outside a community or from government officials. In Sub-Saharan Africa there have been frequent appeals for the writing down of customary laws beginning in the colonial era up through the present.

“Since the colonial period, a number of governments - often supported by national or international researchers- have attempted to put parts of customary law into writing with a dual aim: to end the uncertainty and discretion caused by its flexibility; and also, equally important, to come to grips with the content and nature of customary law for their own understanding” (Ubink 2011: 131).

In the contemporary era, as Ghana has embarked upon a reform of their land administration system, there has been a call to ascertain customary law in order to increase the predictability of economic relationships, specifically those related to land (Ghana News Agency 2010). In a few cases, such as South Africa and Namibia, ascertainment and in some areas codification has actually occurred and in South Sudan efforts at ascertainment of customary law with an eye to integrating it into state law are currently underway (Isser 2012). Whether the desire for a clear and written customary law comes from outsiders, as in the colonial era, or from within a community, there are three interrelated reasons given for the necessity of ascertaining customary law: consistency in application, alignment with public law and reduction of uncertainty in order to promote economic development.

Consistency in the application of legal principles is viewed to be an important characteristic of any fair legal system. Legal decisions should align with the agreed upon rights of the people

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formalistic source on the appropriate customary law. Some of the drawbacks of textbook customary law are that they only exist for certain groups and therefore fail to provide as much legal certainty as nationwide codifications, and that they freeze the norms of the groups discussed. Finally, living customary law refers to the norms that govern daily life in the community at the local level. There may be considerable differences between these different versions of customary law, especially between the living and written versions, because living customary norms are inherently dynamic.”



within it. Past and present decisions should be similar, all other things being equal. Consistency is closely related to predictability. If law is consistently applied then people will know, without having to go to court to get a legal decision or seek the intervention of traditional leaders, what is required of them to follow the law. The constant application of laws or norms is of particular importance when there are issues of equity or economic resources at stake. If customary law dictates that it is never appropriate to cut down fruit trees in order to grow crops, then fruit trees should not be cut down. It is a violation of the consistency of the law if some people are allowed to cut down fruit trees and others cannot.

Observed customary law is inconsistent and this is one reason why there is a desire to write it down. Key principles are applied differently based on circumstance, social standing, and interpretation of the traditional leaders involved in its application. Inconsistency of customary law is particularly problematic when it pertains to resource access, such as land, forest and water resources. For example, in Sub-Saharan Africa many women farming customary land have only secondary rights. Some studies have argued that inheritance rights for women are not a problem and that women are able to negotiate customary law and maintain usufruct rights to land through social networking (Khadiagala 2002; Rose 2002). If customary law was consistently applied, women would not be able to continue to farm land belonging to their husbands after those men had died. However, recognition of their need and membership in the community trumps a rigid application of inheritance norms, in many cases to the advantage of these widows. Inconsistent application of customary law can therefore be potentially beneficial as it allows for the maneuverability of the judges and the weighing of multiple social norms in different contexts.

The second criticism of customary law is that it is not aligned with public law and this lack of coherence creates both unpredictability and the possibility of forum shopping in conflict resolution processes in order to get the desired outcome (Tamanaha 2012). This is most obvious in cases where customary law is in direct opposition to public law. In Kenya, for example, the government passed a law that all children of parents who died intestate should inherit equally, regardless of their gender. Yet, even after this bill became law, in many families where a parent died intestate the female children were allocated a smaller share of their parent's property than their male siblings. Female children who wanted to challenge their inheritance could take their cases to court and have them heard according to public law. When gaps like this one, exist between public law and customary law, there is greater possibility for the generation of litigation.

The final criticism of customary law is that it leads to uncertainty. One cannot be certain whether a particular legal principle or decision will hold, or whether it could be reinterpreted by someone else in a different context. The uncertainty which can lead to litigation, or forum

shopping, in order to achieve clarity can also undermine economic development efforts (Tamanaha 2012). If it is not clear that I will be able to farm a particular field five years from now, I may not want to invest in improvements to the field. Since customary law often governs the allocation of community resources, such as land and water, the issue of certainty has economic consequences.

In Australia, desires to recognize and apply Aboriginal customary law have foundered on this issue of certainty (Law Reform Commission of New South Wales 2000). As long as the law is not written, it can change in ways that may not be entirely predictable. Indeed, even after some customary law *was* ascertained it has still been subject to different interpretations by community members.

Not everyone is an enthusiastic supporter of writing down customary law. As mentioned earlier, some appreciate the flexibility in customary law which is enabled by its lack of formalized rules. The very small number of cases in which ascertainment or codification has occurred (South Africa and Namibia) have not lead to any conclusive assessments regarding an increase in certainty in application and use. In Namibia an ascertainment project resulted in a written law of multiple indigenous groups, but these laws were not formalized by an act of parliament and therefore did not become part of the public law of (Hinz 2010). In South Africa customary law was originally codified during the apartheid years and was used much in the way it was in the rest of colonial Africa – as a tool of control. Other ascertainment and codification projects are underway but, on the whole, there are very few instances from which to judge its benefits and disadvantages. It is thus helpful to examine other cases in which customary law has been formally recorded. Albanian customary law, discussed below, is operative in three separate countries with Albanian populations: Albania, Kosovo and Macedonia. All of these are post-socialist countries, two of which, Kosovo and Macedonia, were formerly part of Yugoslavia.

### **The *Kanun* of Lekë Dukagjini**

Albanian customary law, the *Kanun of Lekë Dukagjini* (hereafter the *Kanun*), has been recorded since the early 20<sup>th</sup> century. The basic tenets of the law are written down and are widely available in Albanian, English, and German. The *Kanun* bears the name of an Albanian Prince Lekë Dukagjini (1410-1481) who fought against the Ottoman Empire and was a contemporary of the Albanian hero Gjergj Skanderbeg, the Dragon of Albania. However, while there is an ample historic record of the exploits of Skandebeg and his military opposition to the Ottomans, far less is known about Dukagjini. Both men have legal codes named after them, but scholars agree that neither actually authored the legal codes that bear their names (Fox 1989). Albanian

folklorist, Margaret Hasluck reports that Lekë Dukagjini fought against the Ottoman empire and agreed to surrender only when the Turks promised to respect the Albanian law (Hasluck 1954: 14). This foundational myth would explain why the code bears his name. Some have argued that the *Kanun* originated as far back as the 5<sup>th</sup> century BC (Arsovska and Craig 2006: 224). While not the only compilation of Albanian customary law, the *Kanun of Lekë Dukagjini* is the best known and most frequently referenced.

The *Kanun* was not formalized until an Albanian Franciscan priest, Shtjefën Gjeçov began to write down the provisions of the customary law in 1913. The priest was murdered for his pro-Albanian political views before finishing the work and other monks completed the codification in 1933 and published it with Gjeçov noted as the author (Fox 1989). Despite the fact that most Albanians are now Muslims, the *Kanun* emphasizes the role of the Catholic Church (perhaps the fact that the translator was a priest had something to do with this) and has little to say about Islam. Indeed, in the English translation of the text there is frequent reference to “the Faith and the *Kanun*” as if the two were operating together, yet the faith mentioned is no longer as common in areas where the *Kanun* is considered important. Some consider the *Kanun* to be the foundation of Albanian culture, whether that culture is found in Albania proper, Kosovo or Macedonia all of which have large Albanian populations (Arsovska 2006). Nowhere is the *Kanun* part of the legal statutes of the state.

The *Kanun* has twelve sections: Church, Family, Marriage, House, Livestock and Property, Work, Transfer of Property, The Spoken Word, Honor, Damages, Law Regarding Crimes, Judicial Law, Exemptions and Exceptions. At the heart of the *Kanun* is the idea of honor, and particularly the honor of the family. Related to family honor are then a myriad of other associated issues from the much-lauded Albanian hospitality to the blood feud as the method via which infractions on the honor of a family are rectified or assuaged.<sup>4</sup>

Copies of the *Kanun* are widely available. Indeed, one of the souvenirs available to any tourist walking down Mother Theresa Boulevard in Pristina, Kosovo is a large book with a bright red cover and the Albanian double eagle on the front. The *Kanun* is also widely referenced in conversation and culture. It is, as anthropologist Janet Reinick has noted, “the ultimate authority on Albanian tradition” although few have read it (Reineck 1991: 40). Yet, despite the fact that the *Kanun* exists as a written text, what the *Kanun* says is not as important as what people think it says. In this way, the *Kanun* is used as a totem, much in the fashion that the constitution is used by some Americans who may refer to their “Constitutional Rights,” but never have seriously read or studied the Constitution. Mustafa and Young note that “People deemed knowledgeable about the *Kanun* receive their training in this complex body of

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<sup>4</sup> The blood feud also exists in the Pashtunwali, or Afghan tribal law, where honor and revenge are similarly critical to the customary code.

customary law as an orally transmitted inheritance from the elders without any serious engagement with published manuscripts” (Mustafa and Young 2008: 89). Arsovska (2006) compares knowledge about the *Kanun* to knowledge about the Bible in Western culture where certain parables and metaphors are simply known, even to those who don’t read the Bible. This type of background knowledge transmitted orally lends itself to a variety of interpretations.

A lack of engagement with the written text has distanced the general population from the specifics of its injunctions. The content of the codified *Kanun* is, in some critical aspects, both different and less clear, than what people think. A tragic example of this fact is the gap between the written text and the practice of blood feuds. While the *Kanun* mandates the taking of blood revenge on the perpetrator of a crime or insult to the honor of a family, the contemporary understanding in parts of northern Albania is that the revenge can be taken against any of the relatives of the perpetrator (Mustafa and Young 2008). This particular interpretation of the *Kanun* has serious implications as it means that revenge can be taken against minors for offenses committed by adult relatives. In Albanian areas this has meant that families involved in blood feuds often hide their children at home, refusing to let them outside at all due to the very real fear that the children might be the objects of revenge (“Albanian blood feud kids must hide or risk lives” 2013; Miller 2013). Both male and female children are sequestered at home, even though girls should be exempt from the blood feud according to any interpretation of the text.

Though the *Kanun* is given as a justification for the targeting of children in blood feuds, there are also strong injunctions in the *Kanun* against doing so; “Fathers shall not be killed in place of their sons, nor sons in place of their fathers, but each shall die for his own sin.” (Fox 1989: 172). However, there is ambiguity in the text as this statement is directly followed by the clauses below:<sup>5</sup>

“According to the old *Kanun* of the mountains of Albania, only the murderer incurs the blood-feud, i.e. the person who pulls the trigger and fires the gun or uses some other weapon against another person. The family of the victim could not pursue or kill any of the brothers, nephews, or cousins of the murderer, but only the actual perpetrator. The later *Kanun* extends the blood-feud to all males in the family of the murderer, even an infant in the cradle; cousins and close nephews, although they may be separated, incur the blood-feud during the 24 hours following the murder; after 24 hours the family of the victim must give a guarantee of truce.”

Since the correct practice of blood feuds takes up a significant portion of the *Kanun* (a large section of The Law Regarding Crimes and smaller portions of other sections), it is somewhat surprising that there is a contradiction within the text regarding whether non-perpetrators of a

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<sup>5</sup> This section is also taken from the English translation by Fox.

crime, including innocent children, may be included in the feud.<sup>6</sup> One possible explanation is that in recording the *Kanun*, Gjeçov erred in correctly understanding the custom. However, the weight of evidence suggests otherwise. Conducting a blood feud correctly is important as the avenging of family honor is imperative.

There are both implicit and specific injunctions against including women in blood feuds. Albanian society is patrilineal and women are outside of the line of descent, therefore they cannot be involved in the absolution of an offense upon the family honor. The *Kanun* also makes it absolutely clear that "A woman does not incur blood."<sup>7</sup> However, in the past decade women have been killed to atone for family honor. Recently, a young girl of 17 was killed in Northern Albania to avenge a blood feud (Cohen 2012). In addition to being tragic this case is particularly interesting because it demonstrates not only a lack of understanding with regard to the appropriate conduct of a blood feud under codified customary law, but also confusion with regard to who is part of the lineage. This interpretation of the text of the *Kanun* has dreadful consequences for the societies in which the customary law still has respect. Gjin Marku of the National Reconciliation Committee in Albania, and NGO that works on resolving blood feuds and ameliorating their effects, has observed that "The problem with blood feuds today is that people are using their own personal interpretation of the *Kanun* to suit their needs.... They are abusing the laws instead of following the original script, and this is why you see young women ... becoming targets" (Cohen 2012).

The use and misuse of the *Kanun* is a salient public as well as scholarly issue in contexts such as Kosovo, Albania and Macedonia where there are large Albanian populations and Albanian traditions are highly valued. Blood feuds are illegal, but often sympathetically viewed, and have enormous consequences for the families that are involved. It is estimated that in Albania "20,000 people have been ensnared by blood feuds since they resurfaced after the collapse of Communism in 1991, with 9,500 people killed and nearly 1,000 children deprived of schooling because they are locked indoors" (Bilefsky 2008). This is such a significant social issue that the Catholic Church announced in 2012 that they would excommunicate anyone involved in a

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<sup>6</sup> The blood feud is a popular topic for Albanian books and movies from the classic novel *Broken April* by Ismael Kadare to Josh Marston's 2011 film, *The Forgiveness of Blood*.

<sup>7</sup> Section XXVIII of the *Kanun* reads, "A woman does not incur blood." - "A woman transfers blood to her parents." It is true that according to our *Kanun*, "Blood follows the finger" [i.e. the person who commits a murder incurs a blood feud], but this law does not include women, since "A woman does not incur blood," even if she happens to kill someone. If a woman kills her husband or anyone else, her parents incur that blood. Her husband purchases a woman's labor and cohabitation, but not her life." (Fox 1989)

blood feud (Andoni 2012). There is thus a demonstrated awareness of the significant negative impact of aspects of Albanian customary law.<sup>8</sup>

It is widely assumed that the weakness of state judicial institutions in northern Albania and Kosovo that has led to the increased reliance on the *Kanun* to address conflicts. The argument is often made that if the state were more efficient in resolving conflicts quickly and fairly, there would be no need for people to resort to customary law for dispute resolution. The resurgence of customary law following the collapse of both the Yugoslav and Albanian states lends some credence to this argument (Bilefsky 2008; Sikor et al. 2009; Mustafa and Young 2008).

### **Revisiting Arguments for the Ascertainment of Customary Law**

What should be clear from the above section describing the way the *Kanun* is used and interpreted in contemporary Albanian areas is that writing it down has not had the impact that scholars and policy-makers would have predicted. There is a written text available for consultation, but there is very little engagement with the text. Though there is recognition that a correct or contemporary understanding of the *Kanun* might be of use in ameliorating the negative effects of customary law; there are no attempts to reconcile profoundly divergent understandings of how blood feuds should be practiced; no Talmudic reflections on meaning and application, and interestingly, no attempt to amend or adapt the text to a population that is more likely to be Muslim than Catholic.

Far more influential than the text are individual beliefs of what the text says, typically passed on via oral tradition and contemporary practice. In this regard, Albanian customary law, in spite of being formalized in writing, resembles customary law in other settings around the world where it is unwritten. Albanian customary law is open to interpretation and can be applied in an inconsistent and at times unpredictable fashion.

In the second section of this article, three reasons were articulated as justification for the ascertainment of customary law. These reasons were: to develop a consistency in application; to facilitate the alignment of customary and public law; and to increase predictability. These will each be revisited.

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<sup>8</sup> In Kosovo in the 1990s there was an effort to stop blood feuding led by Professor Anton Çetta and supported by large public demonstrations. Çetta gathered a group of mediators to pacify or bring an end to the feuds. As a result of these efforts there are now fewer blood feuds in Kosovo than in Northern Albania.

Codification of Albanian traditions in the *Kanun* has not led to a consistent contemporary application of customary law. While there are some traditions articulated in the *Kanun* that are widely practiced, such as patrilocality, hospitality and social honor. Other laws articulated on the church, property and livestock are irrelevant to the contemporary culture and quaintly anachronistic. While blood feuds still occur in Albanian areas in the name of tradition, there is little attention given to interpreting or updating the customary law that applies to their practice. Without an engagement in the interpretation of the text, there is no benefit to the written nature of the *Kanun*. If people simply believe what they wish about tradition and custom, or interpret it based on oral tradition, then Albanian customary law is similar to the role of uncodified customary law in other places around the world.

The second reason given for the ascertaining customary law is to facilitate its alignment or incorporation into public law. The argument is made that a clear articulation of customary law is helpful and even necessary to ensuring that both custom and law are respected. Neither Albania nor the Yugoslav successor states of Macedonia and Kosovo have sought to recognize Albanian customary law. Understandings of justice in the public laws of these countries are radically different than understandings of justice in the *Kanun*.<sup>9</sup> Both Macedonia and Kosovo have been more concerned with making their new states compliant with EU laws in order to facilitate their eventual membership. The Albanian case is very interesting and different. In Albania, under the communist regime of Enver Hoxha, blood killings became criminal offenses and there was an effort to stamp out the influence of the *Kanun*. However, when the communist government collapsed in 1991 there was a resurgence of the influence of the *Kanun* (Bilefsky 2008; Sikor et al. 2009; Mustafa and Young 2008). This resurgence of the use and influence of the *Kanun* also occurred in Kosovo, in the 1990s when other forms of law and governance disappeared due to the conflict with Serbia.

The third reason why a written form of customary law is sought is to increase predictability of conflict outcomes, usually with the intent of assuring a more stable environment for economic investment and growth. While the *Kanun* is widely in use for some areas of Albanian tradition, such as marriage and inheritance issues, there are less frequent cases of traditional dispute resolution mechanisms being used for cases of theft, land conflicts and boundary demarcation (Voell 2003). It is therefore unclear as to the degree of impact that Albanian customary law has on economic growth and development, particularly when compared to parts of the world where customary law had a consistent and direct impact on access to resources and intellectual property.

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<sup>9</sup> A point which Sally Engle Merry (2006) notes as characteristic of settings which have legal pluralism – each system having different conceptions of what is just.

The ready availability of a written text of Albanian customary law has not led to a consistent understanding of its rules, a consistent application of its norms; nor a resolution of important ambiguities within the text. Instead, the *Kanun* serves as a totemic representation of Albanian identity, encapsulating what people believe to be traditional without influencing behavior or serving as a dynamic articulation of current practices. It is the existence of the customary law as an item, rather than its specific content, which is most important. Without an engagement with the text itself there is unlikely to be a consistent application.

## Conclusion

Customary law persists despite the existence of public law for a variety of reasons. Key among those reasons are accessibility, speed, cost and, in some settings, preference for the type of justice it provides – often reconciliation rather than retribution - and a mechanism for restoring offenders to the community and curbing destructive behavior in the future (Lubkemann et al. 2011). Customary law is also dynamic, shifting with changes in culture and context. Yet, the downside of this dynamism is unpredictability in its application and use. Thus, some scholars and policy-makers have called for customary law to be written down in order to reduce uncertainty. An examination of the role of the Albanian *Kanun*, a customary legal code that has been written since the early 20<sup>th</sup> century, suggests that the expectations that ascertainment will lead to consistency and certainty in the application of customary law are overly optimistic. A written record of the *Kanun* has not lead to its consistent use, and more troubling, it has not lead to a clarification of the most socially harmful aspects of the law regarding the practice of blood feuds.

What can we learn from the role of the *Kanun* in contemporary Albanian communities? The first important conclusion is that writing a tradition down does not make it definitive or authoritative. This observation may reassure some who fear that the ascertainment and codification of customary law in contexts like Sub-Saharan Africa would cement in place the power dynamics in a community at the particular place and time. In Sub-Saharan Africa, where customary law controls access to critical economic resources such as land, this is a significant concern. Yet, whether it is written or not, customary law is still an articulation of tradition and tradition changes over time in response to changing contexts. Formalizing customary law through writing is unlikely to change its use unless it is otherwise incorporated into statute or public law or recognized by public law in a particular form. Attendant to this conclusion is an observation. Since customary law is typically transmitted orally and there is rarely an engagement with a written code, it should not be entirely surprising to us that there is no development of textual interpretation and amendment once the customary law is transcribed.



A second conclusion is that, though there may be disagreement regarding its content, customary law is a powerful representation of tradition, a totem of the community. Customary law represents tradition and tradition is valuable to personal understandings of identity (Oomen 2005). Francis Deng has argued that "Every individual relies on other members of the family, the lineage, or the clan for his own prospects of being immortalized into a permanent identity and influence. Thus, his group is indispensable to his destiny" (Deng 2011: 295). As a signifier of group identity customary law needs to be treated with care, as with other tangible reflections of group identity such as flags and symbols. Yet, treating it with care does not mean accepting it in its entirety.

The Albanian customary law is a fascinating example of the flourishing of legal pluralism in a post-socialist setting. In spite of substantial efforts to eradicate the traditional practices of the *Kanun*, specifically the blood feuds, but also the inheritance practices and competing customary leadership, these have endured. The post-socialist setting is very different from post-colonial areas as customary law was not used as a tool of domination or control. Indeed, there was little use for it at all during the socialist era, yet it survived and when the regimes in Albania and Yugoslavia disintegrated, customary law revived as a method of conflict resolution and social organization when the state was weak. As governments in Albania, Kosovo and Macedonia become stronger and better able to implement public policy it will be interesting to see what role customary law continues to play. Public policy efforts to channel the use of customary law should focus on a dual strategy of respect for a valued tradition while eliminating the morally repugnant aspects of customary law. As I have argued elsewhere "If customary leaders and customary law are to remain relevant they must align with constitutional standards of equity and citizenship" (Joireman 2011: 68).

States around the world have adopted a variety of approaches in dealing with customary law. Some have recognized it formally in public law, some have recognized its importance in law without demanding codification, and in other countries it has no formal recognition at all, but continues to function. While customary law serves as a critical part of the identity of a people group, it will continue to hold sway over them. However, the actions of a state can channel the influence of customary law through both prohibitions on its application and promotion of its positive aspects, such as the use of respected community leaders as mediators in conflicts. Yet, customary law is not everywhere the same. Unique histories of colonialism or communist rule have influenced its development in a manner often specific to the particular country in which it is practiced. While writing it down can appear to be a formalized 'fix' that will allow a state to get a handle on the precise nature and impact of customary law, experience demonstrates that the nature of customary law as both interpreted tradition and a signifier of identity, resists precise definition that would lead to legal certainty.

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