

Codification and Legal Sources in the Albanian Legal System: Comparative Approach to Legal Systems

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Abstract

The civil law system entered the codification path during the 19th century, enabling the creation of uniformity, such as drafting a civil code and building a new (national) identity. The structure of the code suggests that it provides a comprehensive, internally coherent set of rules for private law. The adopted civil codes secure lawyers a systematic and coherent foundation for the legal system and legal reasoning. Codification allowed laws to be in an easily identified document easily. Traditionally, the civil law system has been subject to several codification and consolidation processes during different periods in time, influenced from political, social or economic reforms.

In Albania after the proclamation of the Monarchy, work began on the preparation of various codes, with the crucial one being the Civil Code. The first Albanian Civil Code entered in force on the 1st of April 1929. This process was the first step for the Albanian Legislator to compare the secularity of the European legal framework to that of the Ottoman Empire. In 1991, the end of the communist era in Albania was marked by bringing the transformation of the economy into a market-oriented system and the creation of a legal system that protected the right of private property. The Albanian system as a continental system has developed a system based on systematic approach to laws, a procedure known as dogmatic approach. It has created an internal system of laws based on generally codified norms and principles.

The purpose of this paper is to explain the impact of political, social or economic reforms in the codification process and the nature of legal sources in Albania.

Keywords: codification process; legal system; legal reasoning; sources of law.

Introduction

The first great achievement in the era of codification was the enactment of Napoleon's Civil Code of 1804. Codification allowed laws to be in an easily identified document easily. In addition, it limited the judges' role to that of interpretation only, basing its principles on primacy of laws.¹ It was only for the legislature to fill in the gaps of law, not the judges. The Roman law contributed into unifying the laws of the European

¹ Alisdair Gillespie, *The English Legal System*, 4th edition, Oxford, 14.

continent to achieving the historical formation of the European civil law, applicable mostly to the European continent, hence also referred to as the continental system.²

Another system of laws developed simultaneously with the civil law system, was that of the common law. During the twelfth century in Europe, the common law (*ius commune*) was in a reconstruction stage. This reconstruction was due to political and social climate of profound changes of medieval times. The common law developed its own sources of law, deriving from codification and case law experience (*iura propria*).³ The age of codification began during the Industrial Revolution in the eighteenth century; a process of “consolidation” in which a number of legal provisions were collected together. These came as result of concerted effort to draw up a body of rules articulated within an orderly and carefully drafted outline referred to as a “code” authoritatively imposed to constitute the precept, and mark the limit, but most importantly ensured confidence amongst all the citizens (the commoners).⁴

In the 19th century, the civil law system went through the same path of codification⁵ and the Roman law was once again the cornerstone of the codification process. It enabled the creation of uniformity, as the drafting of a civil code and the building of a (new) national identity.⁶ The civil code was structured into a general part comprising basic concepts and principles, followed by detailed rules on particular kinds of interests and relationships. The structure of the code suggests that it provides a comprehensive, internally coherent set of rules for private law.⁷ The adopted civil codes secure lawyers a systematic and coherent foundation for the legal system and legal reasoning. At the same time, for private law matters these codes ensure its citizens a high level of transparency. Most importantly citizens are able to consult the code to discover their rights and be informed on how to create legally binding arrangements with others. Traditionally, the civil law system has been subject to several codification and consolidation processes during different periods in time, influenced from political, social or economic reforms. The process of codification within the civil law system is an unstoppable process of adaptation.

² Vranken, Martin. “Fundamentals of European Civil Law”, Federation press, 2010, pg.32

³ Bellomo, Manlio. “The common legal past of Europe 1000-1800”, The Catholic University of America Press Washington, D.C, 1995, p.32.

⁴ Bellomo, Manlio. “The common legal past of Europe 1000-1800”, The Catholic University of America Press Washington, D.C, 1995, p.2-4.

⁵ The French Civil Code of 1804; the Austrian Civil Code of 1811 (ABGB); the Italian Civil Code of 1865; the Portuguese Civil Code of 1867; the Spanish Civil Code of 1889 and – in the a second wave of codification – Swiss Code of Obligation of 1881; the German Civil Code of 1896/1900 (BGB) and the Swiss Civil Code and the revised Code of Obligations of 1907/1911; the Albanian Civil Code of 1929.

⁶ Vranken, Martin. “Fundamentals of European Civil Law”, 2010, pg.32.

⁷ Hugh Collins, “The European Civil Code”, Cambridge University Press, 2008, p.186.

The codification process in Albania

Albania gained its independency through its declaration of independence, becoming the State of Albania on 28 November 1912. During this period, in some parts of the country the rules of the former regime by the *Sheriat* were used; mainly due to the fact that there was not a national legal framework until 1930. After the proclamation of the Monarchy, the work started on the preparation of different codes, with the crucial one being the Civil Code (on 1 April of 1929). The first Albanian Civil Code entered in force on the 1st of April 1929, approved by a qualified majority of its members.⁸ This process was the first step for the Albanian Legislator to compare the secularity of the European legal framework to that of the Ottoman Empire. The most relevant realm of this code was the private law with main scope to approximate with other laws in force, but also adopting to the changing social life.⁹ In a report of the Special Commission made out of five members, it was recognized that the society had changed and the previous legal framework was not appropriate to the changing behavior. The Commission highlighted various legal problems arising out of the previous regime and emphasized the necessity of an immediate civil reform. The Albanian Civil Code was to mirror the changing social behavior and tradition.¹⁰ One of the most crucial reforms of this code were the security and the independency of the judiciary, with an emphasis on respect and protection for human rights, and equally important the protection of right to property and heritage. The Commission concluded that these rights and principles shall not be violated and must be upheld by the judiciary.

The Albanian civil code reflected the civil code models of other countries in the European continent, such as the French Civil Code, the German Civil Code of 1900 and the Suisse Civil Code of 1912. The civil codes of Germany and Suisse had better developed institutions than the Latin civil codes; with more freedom for judges, special provisions for vulnerable persons and so on. However, the Commission realized that it would become difficult to transpose these civil codes in the Albanian domestic legislation; as these civil codes were adopted for federal and cantonal regimes which did not fit accordingly within Albania.¹¹ The most appropriate civil code to approximate within the Albanian Legal system was that of the French Civil Code developed by Napoleon. In addition, the Commission considered provisions on the interpretation and application of the laws based on the Italian Civil Code (1865).¹² The scope of this code was to codify the internal legislation with that of the European

⁸ The Civil Code was discussed in two rounds and it was 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.

⁹ Danja, Sinanaj, "Eurocodification of the Legal Framework in Albania during King's Zog Monarchy (With a Special Attention to the Civil Code)", *Anglisticum Journal (IJLLIS)*, Volume: 4 | Issue: 6, June 2015, p.283

¹⁰ AQSH, F. 146, V. 1928, D. 87, fl.76.

¹¹ Danja, Sinanaj, "Eurocodification of the Legal Framework in Albania during King's Zog Monarchy (With a Special Attention to the Civil Code)", *Anglisticum Journal (IJLLIS)*, Volume: 4 | Issue: 6, June 2015, p.283, p.284.

¹² Articles 1-11 of Civil Code of 1929 are based on the Italian Civil Code.

civil law with the aim of organizing a modern society. Unfortunately, this attempt was partially successful.¹³

Whereas, the enacted Civil Code in 1981 was inspired by Marxist-Leninist doctrine. Technically, it contained elements of the Soviet model, but it also followed a German pattern reflected in Soviet codifications. After World War II, and before 1981, Albanian civil legislation was enacted in the form of separate statutes. In certain important aspects, the code of 1981 was inferior to other socialist codes because it lacked even those fundamental rules on private or individual activity that were found in most other socialist legislation. In certain circumstances, those rules permitted in some cases the incorporation of new market-oriented solutions.¹⁴

In an attempt to observe the Albanian civil code in a macro-comparative aspect, the first issue worth mentioning is the status quo of rights in relation to the classification of legal systems or families.¹⁵ As mentioned above the civil rights in Albania before World War II belonged to the family of civil law system, i.e. that of the Romanos- France, Italy, Spain, Portugal and the Benelux Countries, as well as, those of the Germanic - Germany, Austria, and Switzerland. The developing changes during the postwar created difficulties for the civil law families. There was a transposition from the Germanic legal system to that of a socialist legal regime.¹⁶ The period of Communism changed significantly the legal system and interfered with private rights, such as the right to property and right to leave ones country. During this period Civil Code of 1981 incorporated elements of the Soviet socialist model, as well as, added elements of the right derived by the Germanic legal system such as the concepts of legal actions as a distinctive feature of the German law.¹⁷

The year 1991 marked the end of the communist era in Albania bringing with it the transformation of economy into a market-oriented system and the creation of a legal

¹³ Danja, Sinanaj, *Anglisticum Journal (IJLLIS)*, Volume: 4 | Issue: 6, June 2015, p.283, p.287.

¹⁴ C.J.J.M. Stolker, *Drafting a new Civil Code for Albania (some personal experiences contrasted with the World Bank's 'Initial lessons')*, 1996

¹⁵ Ardian, Nuni, *Civil Law (textbook)*, Tirana, 2011, p.27.

¹⁶ *Civil Code of 1929 & Commercial Code of 1932*.

¹⁷ Ardian, Nuni, *Civil Law (textbook)*, Tirana, 2011, p.32.

system protecting the right to private property. After the communist era, the first Albanian Civil Code¹⁸ was enacted in 1994.¹⁹

Legal Sources in the Albanian Legal System

The Albanian system as a continental system has developed a system based on systematic approach to laws, a procedure known as dogmatic approach. It has created an internal system of laws based on generally codified norms and principles. This system applies the principle of equality of justice based on written laws, maintaining consistency and coherency. The system is based on the principle that 'There is no punishment without 'prior written law'.

The primary sources deriving from the Albanian constitutional law are those legal acts in force of general importance. They appear in written form and express the will of constitutional bodies. Their aim is to regulate the legal relations arising in the field of constitutional law.²⁰ These sources appear in the form of: constitutional acts; constitutional law; constitutional amendments;²¹ regulations of the constitutional bodies (acts); and Decisions of the Constitutional Court (considered as formal sources).

Material or informal sources can also appear in the form of written acts of international character that produce legal effects in the domestic law of a country if adopted by the internal legal system such as: ratified international treaties that produce legal effects become primary sources.²²

In accordance with Article 116 of the Albanian Constitution Law, the legal system recognizes the following formal sources of law that are effective in the entire territory of the Republic of Albania: (1) The constitution, ratified international agreements, laws (organic/qualified and simple), normative acts of the Council of Ministers; (2)

¹⁸ The structure of the Albanian Civil Code is divided into five books containing 1168 articles. **Book one** 'General Part': Title 1: Subjects (natural persons & legal entities). Title 2: Representation (Agency). Title 3: Legal Transactions (Contracts). Title 4: Prescription. **Book two** "Ownership and Property": Title 1: Definitions of Property; Immovable and Movable Property; Rights relating to immovable and movable property; Registration (recording) of property title; Fixtures (appurtenances) – definition. Title 2: Ownership (general provisions); Acquisition and Loss of Ownership; Registration of Real Estate. Title 3: Co-ownership. Title 4: Usufruct. Title 5: Usage and Habitation Rights. Title 6: Servitudes. Title 7: Remedies for ownership. Title 8: Possession. **Book three** "Inheritance": Title 1: General Provisions. Title 2: Intestacy. Title 3: Testamentary Dispositions. **Book four** "Obligations": Title 1: General Provisions (definition and creation of obligations; joint obligations; alternative obligations; divisible and indivisible obligations; pecuniary obligations). Title 2: Performance and Satisfaction of Obligations; performance of obligations; effect of Non-Performance of obligations; assignment and subrogation; satisfaction of obligation. Title 3: Remedies for Non-Performance; general provision; penalty clauses; pledges; mortgages; Surety ship (guarantees). Title 4: Torts (general provisions; product liability; damages). Title 5: Managements of the Affairs of Others. Title 6: Payments by Mistake. Title 7: Unjust Enrichment. **Book five** "Contracts": (Title 1) Contracts in General (definition and requirements for contractual validity; interpretation of contracts; binding effects of contracts). (Title 2) Types of Contracts (sales; gifts; *emphyteusis*; leases; personal service; transportation; agency; bank deposits; loan; franchising and Simple Partnerships).

¹⁹ Law no. 7850, dated 29.07.1994.

²⁰ Anastasi, Aurela, The Constitution Law (textbook), Tirane, 2004, p.11

²¹ See article 177 of Albanian Constitutional Law.

²² Anastasi, Aurela The constitution Law (textbook), Tirane, 2004, p.13

Acts that are issued by the organs of local government are effective only within the territorial jurisdiction of these organs; (3) Normative acts of ministers and directors of other central institutions are effective within the sphere of their jurisdiction in the entire territory of the Republic of Albania.

According to the Article 4 of the Albanian Constitution Law, the Constitution is the highest law in the Republic of Albania. Its provisions are directly applicable, except when the Constitution provides otherwise. The Republic of Albania applies international law that is binding upon it (Article 5 of Constitution Law).

In the context of the provisions of the Constitution of Albania, law is defined as an 'Act passed by the legislature (Parliament) and assented to/promulgated by the President of Albania'.²³ The President of the Republic promulgates an approved law within 20 days from its submission (Article 84 (1) of Constitution Law). According to the Article 81 of Constitution Law, all members of the Assembly, by three-fifths of votes are approved: the laws for the organization and operation of the institutions contemplated by the Constitution; the law on citizenship; the law on general and local elections; the law on referenda; the codes; the law on the state of emergency; e. the law on the status of public functionaries; the law on amnesty; the law on administrative divisions of the Republic. A law enters into force with the passage of not less than 15 days after its publication in the Official Journal (Article 84 (3) of Constitution Law). An Act, may prescribe how certain activities are carried out and how certain others are to be carried out in specified way. Defined widely the law is a 'general norm mandating or guiding conduct or action in a given type of situation'.²⁴ Pursuant to Article 84 (4) of Constitution Law, in cases of extraordinary measures, as well as in cases of necessity and emergency, when the Assembly decides with a majority of all its members and the President of the Republic gives his consent, a law enters into force immediately, but only after it is made known publicly. The law shall be published in the first number of the Official Journal. According to the Article 101 of Constitution Law, in cases of necessity and emergency, the Council of Ministers may issue, under its own responsibility, normative acts having the force of law for taking temporary measures. These normative acts are immediately submitted to the Assembly, which is convened within 5 days if it is not in session. These acts lose force retroactively if they are not approved by the Assembly within 45 days.

In those circumstances where the legislative branch, i.e. Parliament is not in a condition nor has the necessary time to issue specific laws which generally apply to a specific geographical area or population, it can delegate its sovereignty to a person (minister), government body, and/or local authority. These institutions or bodies are better equipped to regulate the needs of a specific area and group of population. Through

²³ Articles 81-85 of Albania Constitutional Law.

²⁴ W. Twining and D. Miers, *How to Do things with Rules*, 4th Edition, 1999, Butterworths, p. 123.

an express Parliamentary Act, authority to regulate conduct, behavior, and administer specific matters or geographical area is delegated to specific bodies. This process is commonly known as delegated or subordinate legislation. The regulations, rules and decisions issued by these authorities, referred as by-laws, are equally considered authoritative sources of law. Once issued through the specified procedure they are binding upon those addressed. Other examples of delegated legislature are observed within the judiciary branch of power. Certain delegated legislative powers are also possessed by the judicature.²⁵ The superior court has the power of making rules for the regulation of their own procedure.²⁶

Types of legislation (normative acts issued and approved by the respective institutions): (a) Laws are proposed by the Council of Ministers, approved by Parliament of the Republic of Albania and proclaimed by the President of the Republic; (b) Parliamentary decisions are issued by Parliament; (c) Decrees are issued by the President of the Republic; (d) Normative acts, decisions, instructions, regulations and orders are issued by the Council of Ministers; (e) Instructions, regulations and orders are issued by each Ministry; and Court Decisions are issued by the Constitutional Court and the Supreme Court.

According to Article 5 of the Albanian Constitution, Albania applies international law that is binding upon it. This is emphasized by other Articles of the Albanian Constitution, such as Article 116(b) of the Constitution on the hierarchical list of legal acts in Albania, where the international agreements ratified by law have higher legal force than laws or administrative acts that apply over the territory of Albania, or Article 122(1) on the supremacy of the international agreements or Article 123 on the supremacy and direct effect of acts from international organizations, which clearly shows that Albania has a monist system of international law.²⁷

The International Agreements according to the Albanian Constitution may be international agreements that due to their specific object should go through the ratification procedure, or other agreements that despite the object are ratified by Parliament. Thus, there are a category of agreements such as: 1. agreements that involve human rights, peace, military issues, political issues and territory which if are ratified by Parliament are part of the internal legal system and certainly after it is published in the Official Journal (these kinds of the International Agreements have the

²⁵ Article 141 (2) of Albania Constitutional Law: For the unification or amendment of judicial practice, the High Court has the right to select particular judicial cases for review in the joint colleges.

²⁶ Articles 14 & 17 of the Law no. 8588, date. 15.03.2000.

²⁷ Anastasi, Aurela. "Internacionalizimi I së Drejtës Kushtetuese. Klauzolat Kushtetuese të Integritimit të Shqipërisë. Polis. No. 4. (2007): 19.

supremacy over the domestic law²⁸);²⁹ 2. agreements which the Parliament has ratified by the majority of all its members and are published in the Official Journal.³⁰

The international agreements that are ratified by the Parliament are made part of the Albanian legal system and are published in the Albanian Official journal. These international agreements are binding and the judges of the Albania juridical system (judges of the constitutional court, judges of the instances and appeal courts) has to respect the supremacy of international agreements over the domestic laws has long has there are in conflict with them.³¹

In accordance to the Albanian Constitutional Law, a part of international agreement that are ratified and have binding legal effects, there are also international agreements that are not ratified by the Parliament, but that can be signed by the Prime Minister, who only has the duty to notify the Parliament whenever the Council of Ministers has signed those international agreement.³²

Constitution of the Republic of Albania is silent with regard to the definition of the international agreements that are considered as (non) self-executing or directly applicable; it could be deduced that these kinds of agreements do not require the act of the states to enact the law; it will be for the courts to decide case by case whether an international agreements is directly applicable or not.³³

According to Article 123 of the Albanian Constitution, stipulates the right of the Republic of Albanian to transfer and delegate competences to international organizations the state powers for specifics issues to different international organizations on the basis of international agreements.³⁴ Albanian Constitution acknowledges to the norms issued by international organization both the supremacy and the direct applicability in the domestic legal order. However, it sets two conditions for that. First, the agreement for the participation of the Republic of Albania in the international organization must be ratified by the Parliament, and second, the ratified agreement must provide explicitly for the direct applicability of the norms adopted within the organization.³⁵

On the other hand, non-formal sources of law are legally significant materials, which have not received an authoritative or at least articulated formulations and embodiment

²⁸ Article 116 of Albania Constitutional Law

²⁹ Article 121 (1) of the Albanian Constitutional Law

³⁰ Article 121 (2) of the Albanian Constitutional Law

³¹ Article 122 (1) of the Albanian Constitutional Law

³² Article 121 (3) of the Albanian Constitutional Law

³³ Evis Alimehmeti&Fjoralba Caka, *The Relationship between International and Domestic Law in Albanian Legal System*, International Constitutional Law, Torino, 2014.

³⁴ Ibid.

³⁵ Ibid.

in a formalized legal document. It consists of the following: customs or customary law, legal principles and standards, moral convictions and social trends.

Custom is the most important non-formal source of law. Custom can be described as the established patterns of behavior that can be objectively verified within a particular social setting. Usage, or rather the spontaneous evolution by the popular mind of rules of existence and general acceptance of which is proved by their customary observance, is no doubt the oldest form of law making.

Conclusion

If we observe the Albanian codification process in a macro-comparative aspect, the first important issue to be mentioned is the status of private rights at different times. The end of the communist era in Albania, bringing with it the transformation of the economy into a market-oriented system, created a legal system that protected private rights.

The Albanian system has developed a system based on systematic approach to laws, a procedure known as dogmatic approach, creating an internal system of laws based on codified norms and principles. This system applies the principle of equality of justice based on written laws; the system is based on the principle that 'there is no punishment without prior written law'.

Referring to the Albanian legal system, part of the civil law system, judges are limited to the interpretation of the law. In accordance with the Albanian Constitution, the High Court is the only court within the hierarchy of courts that may unify the practices of judges for particular legal issues that have been inconsistently interpreted.³⁶ The High Court has the competence to select specific cases for review in the joint colleges for unification or amendment of judicial practice. The High Court publishes its decision, together with minority opinion.³⁷

In relation to the power of the judiciary to hold a specific legislation incompatible with the constitution, in the Common law, any judge within the hierarchy of courts is competent to hold a particular provision or legislation unconstitutional. In the Civil law system, referring specifically to Albania, there exists a hierarchy of courts: courts of first instance, courts of appeal, the High Court and administrative courts, and in a second pillar exists the constitutional court.³⁸ These Courts render decisions in the name of the Republic and in every case the judicial decisions should be reasoned and publicly announced.³⁹

³⁶ Article 141 (2) of Albanian Constitution Law

³⁷ Article 142(2) of Albanian Constitution Law.

³⁸ Article 135 of Albanian Constitution Law

³⁹ Article 146 of Albanian Constitution Law; Article 142(1) of Albanian Constitution Law.

These judges are independent and subject only to the Constitution and the laws as adopted by Parliament. If judges believe that a law is unconstitutional, they do not apply it.⁴⁰ In this case, they suspend the proceedings and send the question to the Constitutional Court. Decisions of the Constitutional Court are binding on all courts. Hence, the Constitutional Court is the only court that has the authority to hold a specific legislation or provision incompatible with the constitution of Albania. Whereas, in the Common law system the Court of Appeal or Supreme Court is competent to decide on the constitutionality of particular legislation or specific provision.

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⁴⁰ Article 145 of Albanian Constitution Law