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The Attitudes Towards the Customary Law Within Roma Groups in Central Europe

ABSTRACT

The community of Romani people is scattered around Europe. On our continent it is one of the last examples of a social group living basically outside the law. The normative system that is responsible for the regulation of a social order is, instead of law, the customary law – a set of norms called Romanipen or Romaniye. Due to the lack of a common Romani territory and the lack of a written tradition, the Romani customary law has to operate in a very specific context and serve very specific purposes in order to preserve their culture. In my paper I try to answer three essential questions: (1) what are the characteristics of the Romani customary law as a normative system and which concepts are the key ones? (2) What is the relationship between Roma people and their customary law and what are the consequences of such a relationship in the context of the state law? (3) What is the relation between the Romani customary law and the state law?

Firstly, I introduce the main features and foundations of the Romani customary law and its key concepts. A special consideration be given to the concepts of taboo and polluting and their importance for the Roma community and for the communication with the society of a state that they live in.

Secondly, I discuss a specific relation that links the Roma people with their customary law. I point out the status of Romanipen as the core of the Romani group identity. I explain the reasons of such a status and its consequences. A special consideration be given to the consequences that Romani customary law exerts at a moment of clash with a state law and state institutions. I discuss the matter of criminality within the representatives of Roma minority and the difficulties that the state administration encounters during contact with Roma people and vice versa. The subject of Romani marriage and its status within the state law also appears.

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In the third part of my paper, I look into the relation between the Romani customary law and the state law. For this analysis, I use prof. Krzysztof Pałecki's theory of norm and Pierre Bourdieu's concept of habitus. Through the comparative analysis, I try to signal a possible way of the incorporation of the tradition and customary law into the modern legal system. Using the concept of habitus by Pierre Bourdieu, I try to opt for a different understanding of the customary law – not as a backward legal system which is necessarily in conflict with a modern state, but as a specific set of dispositions acquired by people during their socialization.

KEY WORDS

customary law, Roma people, habitus, informal control

I

The community of Romani people is scattered throughout Europe. On this continent, they are one of the last examples of a social group living to a certain extent outside the law. Yet, hasty conclusions indicating anarchy, anomy and lack of social order among the Roma people should not be drawn. As any social group, Roma communities are based on a normativity peculiar to them in which a key element is their customary law, an entirety of rules referred to among others, as the *Romanipen* or *Romaniya*.

This paper consists of two parts – descriptive and problem-based. Firstly, I would like to answer the question: what are the characteristics of Romani customary law as a normative system? I will point out the main foundations of Romani customary law and its key concepts with particular emphasis on taboo, pollution[1] (impurity) and institutions aimed at the resolution of conflicts – a collective authority existing in different variations in many Romani communities named *kris,* and a position typical for the *Polska Roma* group living in Poland named *Baro Śero*. Subsequently, I would like to reflect on the possible relationship between the Roma people and their customary law along with any pursuant consequences. The suggestions that I will propose in this part of my paper are far from being any final answers to the questions above. I rather think of them as an opportunity for discussion on a most important topic –the inclusion of Roma groups into a state society and the role that this could have in the process of the peculiar Romani normativity. The ideas that I would like to consider will be based on theories created by the French

[1] Pollution is a term used in literature to describe a concept of ritual impurity in Romani customary law.

sociologist, Bourdieu, and the Polish sociologist of law Krzysztof Pałecki. The following paper is a theoretical reflection based not on personal research but on available secondary sources – scientific articles and monographs. Due to its character (an introduction to Romani customary law and theoretical speculation about its normative nature), I do not consider this to be a disqualifying flaw.

The most dangerous trap that one might fall into while describing Romani customary law is to make generalisations. Thousands of years of migration from India throughout all of Europe, and lack of a common territory, have resulted in a situation where for almost every rule we would like to express in that matter there is a Roma group somewhere that this rule would not apply to. Because of the above-mentioned dependence on secondary sources, and because of the nature of my analysis, I would like to strongly point out that none of the suggestions that I will propose has a universal character, and it is beyond doubt that the following reflections do not apply to all Roma groups.

Taking Poland into consideration, it is possible to distinguish four main Roma groups living in this country. The longest residing *Bergitka Roma* (upland Roma people living in the south of Poland since the 14th century), the largest *Polska Roma* (in the country since the 16th century), and two groups that arrived during the second great migration from the Balkans in the 19th century – the Kalderash and Lovari. A third wave of Roma migration to Poland took place after 1989, during warfare in the areas of the former Yugoslav.

II

Taking into consideration these reservations, it is possible to carefully argue that for almost all groups of Roma people at a certain time, key concepts of customary law were taboo and pollution. Taboo is a rule impossible to substantiate, a cultural axiom whose violation may result in unpredictable effects[2]. In other words, it is a fundamental cultural prohibition whose violation provokes a reaction from the community. In the context of Roma groups, this reaction is a recognition of a person violating a taboo as a polluted one (*marime*). Concepts of taboo and pollution are inextricably linked, therefore I will analyse them together. They are based on a fundamental binary opposition between purity and pollution as well as in the belief that pollution is a "contagious" condition that may be obtained through contact with taboo objects or people recognised by the community as polluted.

[2] E. Nowicka, *Świat człowieka – świat kultury*, Warszawa 2007, p. 401.

I will describe pollutions and taboos that are present in Roma communities based on laws existing in the *Polska Roma* group as a customary law system named *Mageripen*. Pollutions and taboos among other Roma groups may vary to a certain extent as to the nature, importance or name, but I believe that the following description should provide a general orientation in that subject.

Pollutions among the *Polska Roma* group are divided into categories of large (*bare mageripena*) and small (*tyknemageripena*). There are also known offences so serious that they exceed the category of ordinary pollution and result in a lifetime and total exclusion from the community. Perpetrators of such offences are called Gypsy traitors (informants for state authorities, and police agents) or Gypsy killers/thieves (people who have committed theft, fraud, or murder to the detriment of their own Roma community). In this place it is worth mentioning that *Romanipen* covers the relations only inside the community, and the power of its rules is limited by that. That is why offences against non-Roma people are not relevant in that context and would certainly not be a cause of pollution[3].

Large pollutions in principle are related to sexuality and gender – the most important are women pollution, skirt pollution, parturition pollution – and these are linked to taboo and the impure nature of women as well as their clothing worn from the waist down. Women pollution covers all derogations starting from the most traditional form of sexual intercourse. Skirt pollution is associated to a belief in the polluting powers of women's skirts and, when treated seriously, has a huge impact on the daily life of Roma communities. It is also an effective tool protecting women against men's abuse of power. When a woman acts in defence of her rights (those recognised in Romani customs) she can pollute a man by tossing a skirt over his head. He can purify himself only by compensating the damage he had done. This taboo had significant reflection in daily life even until very recently. Due to the fact that everything that is underneath a skirt becomes polluted, the Roma people, in terms of settled life, have reluctantly accepted apartments in multi-storied buildings. Even when they have, they have preferred the highest floors – the aim was to protect men against being below a woman's skirt. Particular impurity is associated with women during menstruation, during parturition, and sometime after it. Because of parturition impurity, women are isolated from a community immediately after childbirth. They are not allowed to touch kitchen utensils, and the delivery of the baby is always performed by someone from outside the Roma group. Large pollutions also include the violation of food taboos – eating dog

[3] J. Ficowski, *Cyganie w Polsce. Dzieje i obyczaje*, Warszawa 1989, pp. 60–61.

meat and horseflesh as well as any contact with a dogcatcher or a butcher who slaughters horses[4].

Small pollution affects a member of the community who has had contact with prostitutes, seduced another man's wife or used a metal weapon in a fight with another Roma. A number of small pollutions are related to hygiene – it is inappropriate to wash food in the same place as clothes, to use standing water for cooking, and to have sexual contact with people suffering from venereal diseases. On the other hand, it is highly recommended to wash hands after any contact with the lower parts of the body, but washing cannot occur in the same place where kitchen utensils are washed[5].

It is worth noting that anyone who does not follow Romani laws is considered impure and polluted. For Roma to be called *marime* and be punished for that, it is necessary to be witnessed or heard by another member of the given Romani group.

Any additional description of Romani customary law regulations does not seem to be necessary – they are different across various Roma groups, and the level of respect for them varies as well. In Poland, among the longest resident group of *Bergitka Roma,* many of these rules are not remembered anymore. The most durable pollutions which still exist among *Polska Roma*, Kalderash and Lovari living in Poland, are those associated with hygiene and sexual activities. On the other hand, the pollutions associated with women's clothing are nowadays considered backwards by the members of Roma community[6]. However, the above examples should give a sufficient overview of Romani customary law in its material sense.

It may be interesting to look at the great importance of the concept of pollution in this system. In many customary law systems, punishment is based largely on directly implemented social ostracism. Why would Roma people need a concept of pollution as an additional factor? According to Peter Leeson, in order to use ostracism as an effective form of social control, certain conditions must be fulfilled.

Firstly,

> Ostracism is effective when a large fraction of a society's members can monitor their members' behaviour cheaply and thus learn about whom to punish. In this case a rule breaker's status is known publicly and socially coordinated punishment through boycott

[4] Ibidem, pp. 61–63.

[5] Ibidem, p. 64.

[6] M. Godlewska-Goska, J. Kopańska, *Życie w dwóch światach. Tożsamość współczesnych Romów*, Warszawa 2011, pp. 226–255.

> is possible. If only a few individuals can cheaply monitor other society members and thus learn about who to punish directly, communication becomes important to make ostracism effective. When society-wide communication is cheap, the individuals who learn about who to punish directly can inform a large number of others, again permitting a socially coordinated boycott of the rule breaker[7].

Through the ages, this has not been possible, among Roma communities, due to their typical nomadic style of life. The communication between Roma groups was not efficient enough to provide an effective flow of information. Secondly, the exclusion of a transgressor from society should be seen as beneficial for the whole community responsible for that exclusion. Due to the Roma organisation of life centred around *tabor* – travelling camps composed of small blood-related kin – as well as the previously mentioned problems with communication between those groups, it is difficult to achieve such a level of acceptance based on simple ostracism. It is easy to hide a prosecuted individual, as cooperation between groups is not particularly common and family ties are strong. Finally, exclusion from society must be seen by a potential offender as something undesirable and to be avoided. The difficult, nomadic, and highly regulated Roma style of life has not ensured such an attitude compared to settled life.

Leeson concludes that the concept of pollution is a kind of solution for the problems listed above. First of all, in contrast to the simple ostracism taboo and pollution are the metaphysical concepts referring to a sacrum and profanum distinction, therefore religious or magic beliefs. As such they are deeply internalised norms. To a certain extent, this reduces the need for exclusive reliance on social control and the flow of information inside a community. Despite the fact that procedures for the formal "imposing" and "removing" of a pollution exists, Roma customary law is to some degree self-executing. By opposing customary rules, an individual becomes polluted by that very action. It can be said after Rena Gropper[8] that both offence and sin are equivalent in the context that makes pollution inevitable and is effective immediately at the moment of breaking the rules. Of course this all requires a deep belief in the legitimacy of these rules. As I have mentioned, customary law norms are deeply internalised. Limitations imposed on an individual are considerable and the benefits of being in that particular community are small if we do not consider the belief in common taboos and values. That is why, through the ages, only the most faithful survived within the group. Pollution also partially solves the problem of the closest community's attitude towards an offender as well as the offender's

[7] P. Leeson, *Gypsy Law*, "Public Choice" 2012, Vol. 155, p. 279.

[8] R. Gropper, *Gypsies in the City*, Princeton 1975, p. 90.

attitude towards potential punishment. The presence of a polluted person is undesirable for a group because of his capacity to pollute other people and items. On the other hand, society outside the Roma community, which might seem attractive to a potential offender (and which would undermine all sense of punishment that ostracism is supposed to constitute) for a Roma believing in the concept of pollution is a gathering of polluted people who do not follow any rules he believes to be important. Hence, exclusion from a community would be a very undesirable perspective.

Ewa Nowicka writes that:

> [...] the ways and rituals of removing the taboo and ritual cleansing are an important element in many systems of beliefs. Usually attention is drawn to the deeply collective regulatory nature of a taboo and pollution system. It is a type of social control, a maintaining of normative order, and a system of sanctions and values as well as a traditionally determined social structure or even the legal protection of property[9].

Those procedures, that guarantee the imposing or the removal of pollution, and the re-inclusion into the community, exist among Roma groups as well.

In literature, the most widely described aspect is the collective body, the court of Romani customary law, named *kris*. A characteristic of the functioning of the Romani court can be found in the works of Weyrauch[10], Acton, Caffrey and Mundy[11], Marushiakova and Popov[12], Cahn[13], Sorescu-Marinković[14]. *Kris* is a customary law court consisting of the most respected members of community, and it hears cases concerning internal relationships inside the Roma community. Procedures conducted there are related not only to the imposition and the removal of pollution but to economic claims (debts, frauds, and unfair competition) or family issues. Decisions made by the *kris* are binding for the community and the failure to comply results in exclusion from Roma society. Hence, we have the following:

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[9] E. Nowicka, op. cit., p. 410.

[10] W. Weyrauch, *Romaniya: An Introduction to Gypsy Law*, "The American Journal of Comparative Law" 1997, Vol. 45, No. 2, pp. 225–235.

[11] T. Acton, S. Caffreyand, G. Mundy, *Theorizing Gypsy Law*, "The American Journal of Comparative Law" 1997, Vol. 45, No. 2, pp. 237–249.

[12] E. Marushiakova, V. Popov, *The Gypsy Court in Eastern Europe*, "Romani Studies 5" 2007, Vol.17, No. 1, pp. 67–101.

[13] C. Cahn, *Romani Law in the Timiş County Giambaş Community*, "Romani Studies 5" 2007, Vol. 19, No. 2, pp. 87–101.

[14] A. Sorescu-Marinković, *The Court of the Bayash: Revising a Theory*, "Romani Studies 5" 2013, Vol. 23, No. 1, pp. 1–27.

> [...] the basic idea that determines the form and the functioning of the Gypsy Court is the concept of consensus. Every ruling of this court would have been adopted unanimously not only by its members, but by the entire community, including the defendants. Without consensus, the very institution of the Gypsy Court could not exist, as no other mechanism exists that could carry out its rulings[15].

Kris is not, however, present among all Roma groups. Marushiakova and Popov distinguish two factors which characterise Roma groups which have the concept of a Romani court. Firstly, there are groups which still cultivate a nomadic style of life or have a nomadic past – "it is certain that most (but not all) Gypsies who are or used to be nomadic have or had a Gypsy Court, while the court is not known among permanently settled Gypsy groups"[16]. Second, a characteristic feature of these groups is the preservation of the Romanes language –"all groups who have a Gypsy Court speak Romanes, but not all groups which speak Romanes have a Gypsy Court"[17]. These rules, although undoubtedly helpful, are not absolute, as later proved by studies on the Romani court among Romanian speaking groups, Bayash (by Sorescu-Marinković), and a long time settled group – Giambaş – who inhabits Timiş County in Romania (by Cahn).

Among those lacking the concept of a Romani court, there is also the *Polska Roma* group. A single leadership works there – *Śero Rom,* also named *BaroŚero*. This is a controversial topic in literature. Marushiakova and Popov[18], while correctly criticising Acton[19] for statements related to the presence of *Śero Rom* among the *Ruska Roma* group, went too far in calling *Baro Śero* "a fictional, non-existent institution of Gypsy justice"[20]. It is an institution which is indeed exclusive to the *Polska Roma* group, although it is as real as could be. Moreover, this function is still performed – the current *Śero Rom* is *Nudziu*, Henryk Kozłowski, living in Nowy Dwór Mazowiecki in Poland[21]. In many ways, the position of *Baro Śero* is similar to the position of *kris*. The range of issues that it covers, the sanctions that it imposes (pollution, financial penalties, and

[15] E. Marushiakova, V. Popov, op. cit., p. 78.

[16] Ibidem, p. 72.

[17] Ibidem, p. 73.

[18] Ibidem, p. 70.

[19] T. Acton, *A Three-Cornered Choice: Structural Consequences of Value Priorities in Gypsy Law as a Model for More General Understanding of Variations in the Administration of Justice*, "The American Journal of Comparative Law" 2003, Vol. 51, No. 3, p. 647.

[20] E. Marushiakova, V. Popov, op. cit., p. 71.

[21] J. Milewski, *Romowie: przyszłość bez uprzedzeń. Informator*, Stowarzyszenie „Integracja", Suwałki 2009, p. 7.

exclusion from the community), and the finality of the decision and the common use of a ritual oath as a mean of evidence – these are all similar[22]. The election of a *Śero Rom* authority is conducted by an elective gathering of Roma people called the *Romano celo*. Theoretically, anyone among the well-respected Roma could be elected, but in practice the *Baro Śero* title is frequently handed down from father to son.

The above examples show that Romani customary law is a complex system which, through the ages, has been a foundation and a main regulator of social order among Roma groups. There exist both substantive norms, prohibitions and injunctions, and procedures allowing them to impose the consequences of breaking the rules and to resolve conflicts inside the community. The isolation of Roma groups has been fading gradually in Poland since the 50s when state authorities began forced settlement programs and a struggle with the Roma nomadic and independent lifestyle. It is obvious that customary law in the form described above is no longer the only normative guidepost for Roma people. Nowadays, they do not live in such advanced isolation from non-Roma society and enter into relationships with state institutions in terms of their legal rights and obligations as state citizens.

III

Customary law is a very peculiar normative system at the interface of two other systems – law and custom. On one hand, it is more than just a custom, and on the other hand, in the dominating positivistic paradigm of legal sciences, it is denied the value of being a law in the full sense of the word. It is commonly perceived as a relic of the past and analysed mostly in a historic context. Societies that still follow customary law are seen in the best case as anthropological curiosities. It happens frequently that one faces the reasoning that assumes that in order to modernise a community in which customary law is still present and to include it into a given society, it is necessary to completely displace customary law as a regulator of interpersonal relationships, as this is a backwards legal system.

At this point, I would like to reflect on the possible place for customary law in social life and on its relation to state law and the state authorities. I do not intend to provide any definite answers as this may well be impossible, due to nature of the issue. I would rather propose several possible approaches to the subject from a socio-legal point of view. My main goal is to try to change

[22] Cf. J. Milewski, op. cit.; E. Marushiakova, V. Popov, op. cit.; J. Ficowski, op. cit.

the discourse of perceiving customary law as a backward legal system in direct conflict with the modern state. I would like to propose an approach based on the concept of *habitus* by Bourdieu that would compare customary law to a peculiar set of dispositions acquired by people during their socialisation. As such, it would be more durable than its particular norms and would not have to be necessarily perceived as opposed to state law and state authority.

Firstly, I would like to reflect on a situation that may be interpreted as an actual or apparent conflict merging between the rules of Roma customary law and the state law. One of the potential fields of conflict is the Roma way of contracting marriages, especially the young age of the women getting married. As Milewski writes, Roma marriages are still contracted very early and it is nothing unusual for a 13-year old teenager to get married. Girls are perceived as ready to marry when there are signs of sexual maturity, namely menstruation[23]. Marriages tend to be arranged by the couples' parents and sometimes they are even a result of the customary based institution of matrimonial abduction. A boy kidnaps a girl (often with her participation when the goal is to sanction relationships between young people not supported by their parents) for one night and brings her home the next day. Assuming that there was a consummation of the marriage according to Roma customs, the parents have no choice but to accept the relationship. In the case of an arranged marriage or marriage with the parents' acceptance, there is a customary marriage ceremony. Naturally, in any of these cases, marriage is sanctioned in a registry office due to the young age of the bride and/or the groom, as well as the reluctance of the community to engage the state authorities in private family issues[24]. This way, these relationships function outside the law in some measure. Sometimes state authorities express an interest in them. In 2007, 21 year-old Marek K., who comes from the Roma community living in Poland, was sentenced to 8 months in prison, suspended for a probation period of 3 years. In 2003, 18 year-old Marek K. married a 14 year-old Roma girl. A year later, she gave birth to a child, which indicated conclusively that there had been a violation of Polish law, which forbids sexual intercourse with minors under 15 years of age. On the one hand, it is obvious that Marek K., as a citizen, is subject to Polish law. On the other hand, as a member of the Roma community, he shares a belief in the binding force of customary law norms. The marriage between Marek K. and his young wife was conducted in the traditional way and was not registered by any state authority. During the trial, the Association of Roma People

[23] J. Milewski, op. cit., p. 19.

[24] Ibidem, p. 11.

in Poland requested that the court take into consideration the cultural uniqueness of the Roma community, so that it would speak in favour of the accused. This was one of the first cases in Polish courts during which arguments were presented based on a cultural defence position. As Jerzy Zajadło writes[25], a cultural defence is a legal strategy in criminal cases. It involves arguments based on the perpetrator's affiliation with a peculiar cultural group in order to limit his responsibility or mitigate possible punishment. In general, cultural defence is a situation when the authority applying the law takes into consideration the peculiar cultural norms that function in a certain social group that are essentially different from the standards accepted in the society at large. The issue of cultural defence is extremely complicated and its considerations exceed the limits of this paper. In the case mentioned above the judge dismissed the cultural defence arguments put forward, although it is worth mentioning that the sentence was suspended for a probation period of 3 years. Thus, it is possible that despite dismissing those arguments, the judge took into consideration the cultural peculiarity while analysing the social danger of the committed act. Similar cases were heard before courts and state authorities in various countries and ended in various ways. One of the most interesting is the Bucharest social welfare decision in 2003[26] that separated a 12-year-old gypsy girl and her 15-year-old customary-law husband, and forbade them all intimate contact until they reached the legal age of consent, and ordered the girl to return to school (according to custom, after marriage Roma girls should end their education and take care of their husband's house). Another interesting precedent is the decision of the European Court of Human Rights in Muñoz Díaz v. Spain, when the judges stated a violation of the European Convention on Human Rights due to the action of the government that did not admit the validity of the Gypsy wedding and therefore, as there was no marriage, the girl did not have the right to be paid the so-called widow's pension[27].

In the situation of a direct conflict between the norms of state law and the norms of customary law, one may find oneself in a dilemma when deciding which authority to turn to with a civil or criminal case – the customary Roma institutions, or state institutions. To provide a better understanding of this kind of conflict situation, I would like to introduce the socio-legal theories work of professor Pałecki, which considers the functional/content of the relations

[25] J. Zajadło, *Po co prawnikom filozofia prawa?*, Warszawa 2008, p. 139.

[26] *Married Gypsy Girl Banned from Sex*, „The Weekend Australian" 10.04.2003, p. 14.

[27] Muñoz Díaz v. Spain, Application no. 49151/07, European Court of Human Rights 2007.

between the norms. From the point of view of an individual who is forced to make a decision about whether or not to follow the pattern of appropriate behaviour expressed in norms belonging to one or more normative systems, there are important correlations between these norms or "correlations derived from the actual impact of different norms on the process of achieving the intended results of given regulations"[28].

If the desired result of a norm can only be achieved by the simultaneous application of other related norms, we can call it absolute functional integrity. When it comes to effectiveness, one norm (e.g. a legal one) is dependent upon another (e.g. a moral one), and it is necessary to consider them both in order to determine the scope of such effectiveness. If the desired result can possibly be achieved by either the simultaneous application of different norms or only one of them, we may call it relative functional integrity. The previous comment about effectiveness also applies here. Most state legal systems do not recognise customary law as a normative system that may be described as valid or effective. That is why it will be extremely rare to see functional integrity in this case.

It sometimes happens that the desired result can be achieved by applying independent rules that come from different normative systems. Such functional independence is connected with the previously mentioned issue of contradiction and the division of regulatory competence. Here, several situations can be mentioned when a member of the Roma community may seek help by addressing state institutions as well as customary institutions. They are all cases in which the involvement of state authorities is not mandatory – civil disputes or criminal ones subject to private prosecution. There are two possible ways to seek compensation for an offence – either before a state court or before a customary court.

Certainly, there are numerous cases in which applying one pattern of behaviour in accordance with one norm makes it either difficult or virtually impossible to apply another norm. Such a functional contradiction causes the individual in question to break one norm, no matter what decision they make. These may be, for example, criminal offences prosecuted ex officio, which are concealed from the state authorities in order to resolve them within the community and before customary law institutions. There are also situations when customary law norms require actions that are perceived by authorities as a violation of state law, such as the underage marriage problem mentioned before.

The relationships described above are based on the assumption that customary law has a particular status in the Roma community. They make sense

[28] K. Pałecki, *Prawoznawstwo - zarys wykładu*, Warszawa 2003, pp. 180–182.

as long as we talk about customary law as a normative system which is an actual regulator of the area of social life within its competence. We assume that customary law norms are valid in social reality –people not only know about their existence, but know the exact regulating content of the norms, the patterns of conduct they propose, and they perceive this pattern as appropriate and desirable. However, what can be done in a situation when the knowledge of particular norms and patterns disappears, and yet on the other hand making reference to Roma customs and traditions as a whole legacy is still a key element of a self-created identity for the community members?

In my opinion, to describe the status of customary law in these communities, it is necessary to use a different tool than the previously mentioned functional/content relationships. The concept that I would like to propose is Bourdieu's *habitus*. For the purposes of this paper, a basic understanding of *habitus* is enough, as it is the entirety of internalised tendencies and attitudes that shape human perception, thoughts and preferences, expressing itself in daily behaviour, a rule governing social practices that can be distinguished as well as a system of distinction between those practices[29]. In the other words, *habitus* would be a system of foundational schemes of behaviour and reactions, a system of acquired dispositions to act and evaluate in a particular way[30]. This way, it would have a major impact on the normativity generated by a particular society without being a normativity in the strict sense of the word. That is why the idea of the essential functional contradiction between state law norms and customary law norms may not be applied to customary law perceived asa *habitus*.

Is it then possible to discuss customary law as a peculiar kind of *habitus* rather than a system of particular norms? In my opinion, at some point it is. First of all, customary law is a product of a specific type of society that fulfils certain criteria. Generally, it has several extremely important cultural characteristics, such as: (1) the lack of effective state power, (2) the particular value of a kinship system, (3) kin perceived as a metaphysical group of both those dead and alive, (4) kin as an ethical responsibility to participate in the community, (5) a shared animism and/or ancestors cult, (6) a highly respected warrior ethos, and (7) the spoken word being more valued than the written word[31]. Despite the

[29] P. Bourdieu, *Habitus i przestrzeń stylów życia*, [in] idem, *Dystynkcja. Społeczna krytyka władzy sądzenia*, tłum. P. Biłos, Warszawa 2006, p. 216.

[30] S. Voell, *The Kanun in the City. Albanian Customary Law as a Habitus and Its Persistence in the Suburb of Tirana, Bathore*, "Anthropos" 2003, Vol. 98, No. 1, p. 90.

[31] T. Czekalski, *Albania w latach 1920–1924. Aparat państwowy i jego funkcjonowanie*, Katowice 1998, p. 12.

changes that have occurred in Roma communities in recent years, they can still be described by using most of the characteristics mentioned above because the fundamental features of Roma communities are changing very slowly.

Customary law understood as such is not by nature contradictory to the modernisation of a country. The values expressed by it should be, however, taken into consideration by the state. Otherwise, there is a danger of the axiological inadequacy of law[32], which is certainly not beneficial in the context of the effects of any regulation. *Habitus*, in such an understanding, can be particularly durable. Bourdieu states that in more complex societies, more dynamic, with a clearer class of differentiation, *habitus* can be more easily modified by social mobility and change. In more homogeneous societies, *habitus* is rarely confronted with situations that would undermine its legitimacy. A lack of social dynamics, mobility, and class differentiation leads to the reproduction of existing social structures rather than to their change[33].

Certainly among Roma people, the problem is not merely a case of reproducing the existing *habitus*. The previously mentioned case in the Bucharest social welfare system is a good example. The 12-year-old girl who customary married a 15-year-old boy was the daughter of Dorin Cioaba, the so-called head of the Kalderash group living in Romania, a man with great authority among the community. The marriage of his own daughter was arranged by him in 2003. He was strongly criticised by the media but he defended his decision firmly[34]. On the other hand, in a recent statement (March 2014) from a community elders' meeting, he directly states that due to the changes that have taken place in society, this is also a time for a change in the Roma community. He condemned marriages conducted by teenagers who have not yet reached the age of consent, and he encouraged members of the community to invest more in Roma children's education, so that it will not be sacrificed in favour of early marriage[35].

IV

To sum up, I would like to argue for a progressive change in the status of customary law in the social order. Originally, this was the main regulator of social life. With the introduction of state law (for most societies in Europe, this took place during the evolution of the legal system, but for Roma communities

[32] K. Pałecki, op. cit., p. 90.

[33] S. Voell, op. cit., p. 91.

[34] *Married Gypsy Girl Banned from Sex*, op. cit., p. 14.

[35] M. Chiriac, *Romania Gypsy King Bans Child Marriages*, "Balkan Insight" 26.03.2014.

that have lived in relative isolation for a long time, this process has only taken place during the past hundred years), conflict emerged, and functional contradiction between regulations originated from both systems. In this case, customary law was both a normative system and *habitus* – both a way to value normativity and a normativity per se. Over time and the progression of assimilation, these two factions have become detached from each other. Customary law and Romani codes, such as *Romanipen*, are losing their meaning as normative systems, while particular regulations are being forgotten. However, they remain in social life as *habitus*, a scheme of acquired dispositions to act in a certain way. Therefore this certainly has an impact on the perception and appliance of state law in Roma communities, and yet there is no essential relation to functional contradiction.

Moreover, certain advantages of informal control that can be used in maintaining social order can be seen if we take a look at some characteristics of formal social control exercised by state authorities and state law, as well as informal social control based on customary law institutions or dispositions shaped by that law.

Differences between formal and informal social control can be found on several levels: the location of the punishment, the forms of the law, the professional dominance in the punishment, and the right to control. Considering the case of Roma customary law in the context of the location of competence to impose punishment, it can be seen that in the case of declaring an offender *marime*, it is the community as a whole that is responsible for avoiding contact with the offender and for applying in practice the punishment in the form of social ostracism. In a formal system of social control, punishment and control over its execution is entrusted to highly specialised institutions, and society is spared the responsibility for its application. When an ordinary citizen is only an outside observer of the process of the administration of justice instead of an active participant, the possibility of his negative evaluation of this process is higher. He would be less willing to initiate this process and to refer to it as a possible solution. This may result in a higher rate of crimes that go unpunished[36].

In the case of informal control, there is no phenomenon of professional dominance in punishment, or a right to control that is present in formal control. Romani justice depends more on the repair of damage done to society than

[36] S. Caffrey, G. Mundy, *Informal Systems of Justice: The Formation of Law within Gypsy Communities*, "The American Journal of Comparative Law" 1997, Vol. 45, No. 2, p. 259.

on the repair of an offender. There is no attempt to understand or express an offence in terms of the pathology of the perpetrator, but instead there is a conscious action and responsibility for it.

> The situation in which controls are exclusively in the hands of the community concerned can be contrasted to the host society where social control is limited to professionals. Communities have become increasingly denied the right to administer informal controls. This can be seen as undermining when it comes to socializing their members into appropriate forms of behavior. The professionalization of control leads to a situation where people's beliefs about what constitutes appropriate behavior in the process of socialization can be very different. Professional approaches to control and socialization are ones which, by their very status as professional, imply that the knowledge employed is superior to that of the layperson. As a result of this, the understanding of a situation, which professionals and ordinary members of a community will have, are likely to be very different[37].

That is why the institution of formal control is so opposed to informal control –skills and knowledge about normativity are seen by professionals as insufficient for providing effective control. Meanwhile, it is informal control that provides the most inevitable punishment thanks to its continuous presence in every aspect of social life. When control becomes a limited right in the hands of just a few highly specialised individuals (who certainly cannot always be present, as with ordinary members of society) it lets offenders go undetected and unpunished, and it also strengthens the belief that control can and should be avoided[38].

V

As I have tried to demonstrate in the above examples, there are some advantages to informal control and normativity based not only on externally imposed state law but also, for example, on customs commonly shared in a community. Moreover, this is not contradictory to the modern state of law per se. The existence of a normative system of Roma customary law in our immediate environment is a reality. It is sad and unfortunate that this system remains largely unknown to us. It is important to appreciate the practical significance of this issue. In the twenty-first century Roma groups, as well as in other groups which use their peculiar normativity, are no longer isolated from their host country society as a whole. It is usual that whoever comes from

[37] Ibidem, p. 263.
[38] Ibidem.

a culture whose main normative system is unrecognised by the host society is then subject to a legal system created on the basis of Western culture. Contact between such a person and the state authorities and social institutions will be without conflict only if the communication process between all those involved is adequate. To assure this, all those involved should be aware of the context in which they find themselves and which influences them. This kind of awareness can be gained only through knowledge, as most mistakes stem from ignorance and insensitivity.

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