

MARRIAGE ACCORDING TO THE ISLAMIC LAW (SHARIA) AND THE SECULAR LAW

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Abstract

Marriage is the oldest and most important social legal institution. It is the basis of the family and its duty is to perform numerous social functions. Humans, in their life, as a primary goal have marital union, family creation, living conditions, personal and family well-being. Humans complete themselves with a healthy marriage and with the creation of a healthy family. The basis of the family in Islam is the almost precisely defined blood relationship and the marital agreement. Whereas marriage in secular law is a specific union, from the content of which derive its purposes. The purposes of marriage in secular law are: the purpose of cohabitation, the purpose of marital solidarity and the social purpose. Islam shows special care in strengthening the family and protecting it from everything that damages and undermines its structure, because the organisation of the family with its members guarantees the organisation of individuals and society in general. Islam has an average position between categorical prohibition and unqualified liberalization of divorce. While according to Islamic Sharia divorce is an act of the will, of the wife or the husband, to request if the marital relationship has been seriously or continuously disrupted, or when for other reasons it has been irrevocably dissolved. According to secular law, divorce cannot occur otherwise except by decision of the competent court, at the request of one spouse, or both.

Keywords: engagement, marriage, family, Islamic Sharia, divorce.

JEL Classification: K33, K34

1. Introduction

Marriage is the main institution that precedes the family. The family is the union of persons who, due to the bond of marriage, gender, or faith, are engaged together in psychological, moral, economic and legal relations; live in a shared family economy and hold before society social responsibility for each other. From this definition we conclude that marriage precedes the family, and as the basis of the family creates relationships which, in their consequences, are much more complex than the bonds of friendship. In marriage, children who need to be taken care of are born. Conflicts can also arise within marriage, which must be resolved with the intervention of state bodies.

The fact that marriage is regulated by law, means that it has special social significance, as it is considered that marriage is the basis of the family, while the family is the basis of society. For this reason, according to the secular system, special importance is given to the social and legal protection of the family and its members, especially children and mothers. According to Islamic Sharia, the most prevalent factor influencing Islamic marriage is religion. According to prophetic tradition, there are a number of prophetic sayings that refer to family and care towards family. Therefore, Islam treats the family as a social issue on which the future of society depends. Marriage in Islam has a biological and cultural role; therefore, it emphasizes the principle of marriage and family creation. Creating a family is one of the greatest deeds in the tradition of the prophets, which is why the Prophet Muhammad commanded, "But I fast and eat, pray and sleep, and marry women." From the very importance that the family has for the individual and for society, arises the need to protect it from its destructive elements and behaviours. The best way to do this is to behave responsibly towards the duties that each one owes to God, to himself and to others.

2. Material and methods of work

During my studies I have utilized various scientific and professional resources, including university texts, scientific papers and articles, analyses, domestic legislative acts and international acts of public law. The study was conducted with various scientific methods, which are typical for

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scientific research in the social sciences and humanities, respectively public law.

3. Discussion

3.1. Family

There are many definitions of the family by both sociologists and anthropologists of different countries. According to anthropologist George Murdock, the family is “a social group characterised by practical thought, economic cooperation and reproduction. It includes adults of any sex, where both must maintain a socially approved relationship and one or more children, their own or adopted, of the sexually cohabiting adults”. The U.S. Census Bureau defines a family as “two or more persons related by birth, marriage, or adoption who live together”. While Merriam-Webster’s definition of the family is: “The basic unit in society traditionally consisting of two parents rearing their children”. In many societies, the notion of family is only that recognized by law or similar normative systems. Every individual in all societies grows up in a family environment and in every society the vast majority of adults are married or have been.² Family is a vital community of parents and their children and other persons of the kin, and it is the natural and fundamental nucleus of society and enjoys the right to protection.³ Whereas, according to Islam, family is considered a divine institution, the origin of which is from the creation of the first human.⁴ Thus, even in the Holy Book of Islam, the Qur’an are explicitly quoted the words of God, who commands “O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women”.⁵

The Messenger of Allah had said: “Take care of women and be kind to them, because they are related to you.”⁶ To achieve a good start every day the husband must smile when he meets his wife, and vice versa.⁷ In the secular system, the family enjoys special protection, since in every society it represents the basic social group, in which important functions are exercised such as: reproduction; child care and custody.⁸ The state, respectively the society which does not take care of the reproduction of the population, is threatened by survival, respectively by its very existence.⁹ Modern states take a range of measures, ranging from economic, social, cultural, health to legal ones, to ensure the protection of the family.¹⁰

3.2. Engagement

Engagement is a prelude to the marriage contract which means “*Male to female proposal for marriage*”. Usually, the proposal is made by the man who after the engagement act becomes the fiancé, while the woman becomes the fiancée. According to Islamic law, based on the duties and responsibilities of the partners in the marital relationship, it is permissible for a man and a woman to get to know each other before getting engaged. According to the Sharia, betrothal (engagement) must be distinguished from marriage, as betrothal serves only as a period of acquaintance between future partners. Engagement means the request to get married in a way known to people. Engagement precedes marriage and is legalized by God before marriage, so that the two spouses know each other and then take the step of safer and more conscious marriage. The Prophet Muhammad, when informed by a young man that he was engaged, said “go and see her because love will last longer”.¹¹

² Giddens, A., *Sociologjia (Sociology)*, Tirana, 2007, p. 371.

³ Kosovo Law on Family, 2006.

⁴ Kutub, M., *Dilemat rreth Islamit (Dilemmas about Islam)*, Prishtina, 2001.

⁵ The Qur’an, Skopje, 1999, *Surah an-Nisa*, Verse 1.

⁶ Ibid., *Surah ar-Rum*, Verse 21.

⁷ Karni, A., *Mos u Trishto, Psikologji Islame (Do Not Be Sad, Islamic Psychology)*, Gostivar, 2015, p. 395-396.

⁸ Robaj, A., *E Drejta Sociale (Social Law)*, Peja, 2018, p. 116.

⁹ Vidaković, S., *Naši socijalni problemi (Our social problems)*, Belgrade, 1932, p. 33.

¹⁰ Universal Declaration of Human Rights, 1948, Article 16, par. 3.

¹¹ Kutub, M., *Dilemat rreth Islamit (Dilemmas about Islam)*, Prishtina, 2001, p. 34.

According to the secular system, engagement is a mutual promise of two persons of different gender to get married in the future.¹² Engagement is an informal agreement that can be considered as a pre-contract, but that does not produce legal effects in forcing the fiancés to enter into marriage. The moment of the engagement is taken when the mutual promise has been made that they will marry, when they have exchanged gifts as a symbol or purpose of the engagement, or any other form of manifestation of this will according to local custom. The persons who promise marriage should be of the opposite sex and the goal should be marriage which should happen in the future.¹³

3.3. Marriage

Marriage is legal cohabitation, which is based on the moral and legal equality of spouses, on the feeling of love, respect and mutual understanding, as the basis of family unity. The institution of marriage is very unique because, on the one hand, it is individual, and on the other hand it is social.

The basis of the family in Islam are precisely defined blood ties and marriage. Islamic law (Sharia) strictly forbids marriage between persons of the same sex, while it promotes marriage between persons of different sexes, namely marriage between a man and a woman. Moreover, it considers homosexuality as a perverted act and against the natural order, which corrupts human sexuality and is considered a crime against women's rights.¹⁴ Islamic law, in addition to strictly prohibiting same-sex marriages, also partially prohibits the marriage of men and women of different religions.

Thus, a Muslim woman is forbidden to marry a non-Muslim man, and in this context God in the Holy Book of Islam, in the Qur'an commands, "Do not marry idolatresses, unless they have believed."¹⁵ However, the Muslim man is allowed to marry a Jewish or a Christian woman, because the husband is the backbone of the house, more powerful than the wife and responsible for her.¹⁶

According to Islamic (Sharia) law, the prohibition of a Muslim woman marrying a non-Muslim man, and allowing a Muslim man to marry a non-Muslim woman, is justified by the fact that "*the Muslim believes in the origin of Judaism and Christianity as a heavenly religion, regardless of the deviations, while the Jew and the Christian do not accept Islam, the Holy Book-Qur'an, nor the Prophet of Islam*".¹⁷

The secular system defines marriage as a specific community, from the content of which derive its purposes. Marriage is the living union of a man and a woman for the purpose of living together and creating a family. The purpose of marriage is living together and creating a family, marital assistance, and reproduction as a social purpose.¹⁸ In the secular system, marriage is a legally registered community of two persons of different sexes, through which they freely decide to live together with the goal of creating a family.¹⁹ In order to enter into wedlock, it is necessary that two persons of opposite sex in the presence of one another freely declare their will and full consent for marriage in front of the registrar.²⁰ The Registrar of the Municipality, where the permanent residence of the spouses is, records the bonded wedlock in the marriage register, which is then signed by the spouses, two witnesses and the registrar.²¹

The capacity to enter into wedlock according to the secular system is obtained through the capacity to act, which is the age of 18 years,²² while according to Islamic law, the capacity to enter into wedlock is obtained at the age of 15 years.

¹² Kosovo Law on Family, 2006, Article 9.

¹³ Komentari i Ligjit për Familjen i Kosovës (Commentary on the Kosovo Law on Family), GIZ, Prishtina, 2012, p. 43.

¹⁴ Kardavi, J., *Hallalli dhe Harami në Islam (Halal and Haram in Islam)*, Prishtina, 2002, p. 205.

¹⁵ The Qur'an, Skopje, 1999, *Surah al-Baqarah, Verse 221*.

¹⁶ Kardavi, J., *Hallalli dhe Harami në Islam (Halal and Haram in Islam)*, Prishtina, 2002, p. 225-226.

¹⁷ *Ibid.*, p. 226.

¹⁸ Aliu & Gashi, *E Drejta Familjare (Family Law)*, Prishtina, 2007, p. 87-88.

¹⁹ Kosovo Law on Family, 2006, Article 14.

²⁰ *Ibid.*, Article 28.

²¹ *Ibid.*, Article 35.

²² *Ibid.*, Article 15.

3.4. Marriage institution in Ancient Rome

In ancient Rome communities were exogamous, men were allowed to marry only girls born outside the family circle, while girls were allowed to marry men of other family groups.²³ According to Roman law, marriage can be entered into only by persons who were at the age of puberty, respectively women must have been at least twelve years old, while men must have reached the age of fourteen. Roman law defines marriage as the relationship between husband and wife, which constitutes the inseparable union of life.²⁴

3.5. Marriage institution over the centuries

The spread of Christian religion created incentives to preserve the family nucleus.²⁵ The church, as the highest institution responsible for marriage, consistently passed laws and practices aimed at the abolition of tribal marriages.²⁶ Starting from the 4th century, the Church discouraged any practice that expanded the family circle, such as adoption, polygamy, divorce, and second marriages.

The church also stripped parents of the right to maintain tribal ties between predetermined marriages by prohibiting marriages to which the bride strongly disagreed.²⁷ These rules did not apply throughout Europe, but in general this trend was dominant especially in Central and Western Europe.²⁸

After the fall of the Roman Empire, the Church, in cooperation with the state, passed even stricter laws, the purpose of which was to prevent the expansion of the family nucleus, a problem which had taken on greater dimensions due to the fall of the Roman Empire and the strengthening of various clans in Europe. After the 1100s, the power of European empires had consolidated to such an extent that the Church and the State deemed unnecessary the petty control of the institution of marriage. Also, at this time the beginnings of the period of marriage by consensus can be noticed.²⁹

The average age of marriage experienced a continuous increase starting from the 16th century as a result of the stabilization of the population after the black plague and the lack of employment opportunities.³⁰ In the last decades of the 16th century, the average age of marriage was 25 years for women and 27 years for men. In the 17th and 18th centuries, philosophers popularized the idea that the meaning of life lay in finding happiness and that marriages should be based on the love that exists between a couple.³¹ This trend was reinforced by the industrial revolution and the expansion of the middle class in society. Since 1900, family law has undergone a radical change, especially in the countries that are now members of the European Union.

3.6. Spousal relations

Islamic law (Sharia) clearly stipulates that woman and man are equal in the sight of God. According to the Qur'an it is explicitly stated that marriage is an agreement between the two sexes and its aims are, in addition to the continuity of human life, emotional well-being and spiritual harmony. Husband and wife, regardless of physiological and psychological features, have equal rights and obligations to each other. According to the Sharia, in order to have a happy and prosperous married life, the solidarity and mutual contribution of the spouses is needed. The husband should smile when he meets his wife, and vice versa, and that the smile is the forerunner of reconciliation

²³ Puhan, I., *E Drejta Romake (Roman Law)*, Prishtina, 1980, p. 179.

²⁴ *Ibid.*, p. 180.

²⁵ Djupe & Gilbert, *The Political Influence of Churches*, Cambridge University, Press, 2008, p. 132.

²⁶ *Ibid.*, p. 135.

²⁷ Turner, S., *The New Blackwell Companion to the Sociology of Religion*, Wiley-Blackwell, 2010, p. 23.

²⁸ *Ibid.*, p. 31.

²⁹ Djupe & Gilbert, *The Political Influence of Churches*, Cambridge University, Press, 2008, p. 152.

³⁰ *Ibid.*, p. 153.

³¹ Turner, S., *The New Blackwell Companion to the Sociology of Religion*, Wiley-Blackwell, 2010, p. 31.

and happiness.³² Both husband and wife should remember each other's good sides and forget the bad ones. When a man keeps in mind the good sides of his wife while forgetting her flaws, he finds peace and happiness.³³

According to the secular system, by marriage the husband and wife enjoy the same rights and assume the same obligations. From marriage arises the mutual obligation for fidelity, for moral and material assistance, for cooperation in the interest of family and cohabitation.³⁴ In marriage, namely in all personal and property relations, spouses are equal.³⁵ The wedlock is entered into for the entire lifespan. Spouses are obliged to be faithful to one another and reciprocally assist, respect and financially support one another, especially in case that the other is lacking a sufficient material basis for living. Spouses shall develop and live out the feeling of reciprocal solidarity, as well as solidarity towards their own in wedlock or adopted children.³⁶ The spouses also decide on the place of residence by agreement, as well as decide on the maintenance of the common family economy.³⁷

3.7. Divorce

Divorce is the process of dissolving a marriage or wedlock union. Various studies show how separations and divorces have increased by about 25% over the last five years. Also, data published by the US, show that between 40 and 60% of marriages end in divorce. As for the reasons of divorce, both in the secular system and in Islamic (Sharia) law, it is provided that the disruption of the relationship between the spouses and the inability to improve that relationship lead to divorce. As reasons for divorce are mentioned the unbearable life of the spouses, cases of violation of marital fidelity, serious abuse by the spouse, incurable mental illness, etc.

According to Islamic Sharia, many definitions have been set in order to narrow the sphere of divorce as much as possible.³⁸ In this regard, according to Islamic Sharia, divorce is considered an abomination to God, and that this action is allowed only in case of need as a relief, namely when cohabitation becomes difficult and when both parties deem it difficult to improve the relationship between husband and wife.³⁹ So, according to the unanimous opinion which exists within Muslim scholars, divorce is allowed only in case of need, when there is no other better solution to the problems arising between the spouses. In addition, in Islam there are restrictions as to when divorce should take place.

Divorce is not allowed during the female menstrual cycle until the female has completed this period. Divorce is also forbidden even after sexual intercourse during the period of her purity, because there is a possibility of pregnancy, and when the husband realizes that his wife is pregnant, he may repent and change his mind for the sake of the child conceived in her womb.⁴⁰ Therefore according to Islamic Sharia divorce is allowed to be repeated up to three times, after the third time it is not allowed to be repeated. Based on the importance of family and marriage, Islamic Sharia strongly states through the Holy Book (Qur'an) that marriage should be preserved at all costs in addition to the necessity of facilitating cohabitation. Small and insignificant issues are the cause of most domestic problems, and that is why many marriages end up in divorce, not because of incompatible differences, but because of something small and insignificant.⁴¹ It is our duty to live in a real world and not dream of utopia. We, as human beings, can get angry and irritated, show weakness and make mistakes.

Therefore, when we talk about the pursuit of domestic happiness, we must keep in mind the concept of relative joy, not absolute joy.⁴² Here is worth to mention the pure and sociable nature of

³² Karni, A., *Mos u Trishto, Psikologji Islame (Do Not Be Sad, Islamic Psychology)*, Gostivar, 2015, p. 395.

³³ *Ibid.*, p. 396.

³⁴ Family Code of the Republic of Albania, 2003, Article 50.

³⁵ Kosovo Law on Family, 2006, Article 42, par. 1.

³⁶ *Ibid.*, Article 42.

³⁷ *Ibid.*, Article 44.

³⁸ Kardavi, J., *Hallalli dhe Harami në Islam (Halal and Haram in Islam)*, Prishtina, 2002, p. 258.

³⁹ *Ibid.*, p. 252.

⁴⁰ *Ibid.*, p. 260.

⁴¹ Karni, A., *Mos u Trishto, Psikologji Islame (Do Not Be Sad, Islamic Psychology)*, Gostivar, 2015, p. 397.

⁴² *Ibid.*, p. 397.

Imam Ahmad ibn Hanbal. After his wife's death, he said, "She has been my friend for forty years, and during that time, we have not had any disagreements."⁴³ According to the secular system, Marriage may be dissolved by divorce only upon decision of a court.⁴⁴ One spouse or both by mutual agreement may request a divorce by filing a claim with the competent court.⁴⁵ The court examines the request (claim/motion), initially hears from each of the spouses separately, then together without the presence of their representatives, and finally with their representatives, if they have any.⁴⁶

4. Conclusions and recommendations

Many people associate Sharia with the law, but in fact it is the whole normative system of the Islamic religion, as presented in the Qur'an, Sunnah, and Hadiths. Sharia strongly discourages celibacy, even the one for ascetic reasons. The normal, natural way of behaving for a Muslim is for him to establish a conjugal family of birth. The strong emphasis that Islam has placed on marriage can be clearly seen in the context of the purposes for which marriage serves. Consistent with other systems, Islam favours marriage as a means of emotional and sexual satisfaction. The Sharia clearly states that man and woman are equal in the sight of God. Husband and wife, regardless of physiological and psychological features, have equal rights and obligations to each other. According to the Sharia, divorce is considered an abominable act in the sight of God, and that this action is allowed only in case of need as a relief, namely when cohabitation becomes difficult and when both parties deem it difficult to improve the relationship between husband and wife.

The regulation of marital and family relations has similar provisions and distinct provisions in different legislations, and not only in the comparison of secular and religious legislation, but also within the secular legislation itself. The most prominent distinguishing provisions relate to marriage, marital relations, joint property of spouses in case of divorce, as well as the manner of divorce. Scholars are divided and differ depending on their ideological and scientific views regarding which of the ways of arranging marriage and family is better and more coherent. However, everyone agrees with the fact that the family and marriage, as the nucleus of the family, represent the foundation of society.

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14. Family Code of the Republic of Albania, 2003.
15. Kosovo Family Law, 2006.

⁴³ Ibid., p. 397.

⁴⁴ Kosovo Law on Family, 2006, Article 68.

⁴⁵ Ibid., Article 68, par. 2.

⁴⁶ Family Code of the Republic of Albania, 2003, Article 126.