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Implementing Islamic Marriage Rules in National Family Laws: A Case Study of Albania's Legal Framework

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Abstract

This paper investigates the implementation of Islamic marriage rules within the context of Albania's legal framework, focusing on the intersection between Islamic marriage practices and national family laws. It examines the issue of gender equality in marriage and divorce under Islamic law, with a particular emphasis on protecting women's rights and interests. The analysis begins by considering Islamic Law through a human rights lens, followed by a descriptive examination of Albania's Family Law as a secular state with a Muslim majority. The paper explores how Albanian Muslim couples, who enter into Islamic marriage contracts, navigate the national legal system during civil marriage registration and divorce proceedings. It aims to identify the legal challenges that may arise in such situations, considering Albanian legal regulations related to marriage and divorce. The study also delves into how family law addresses Shari'ah principles concerning marriage and divorce procedures, as well as the dynamics of gender relations in initiating divorce. Moreover, it investigates the enforcement of mahr (the husband's gift to his wife) provisions stipulated in Islamic marriage contracts and discusses how Albanian judges should respond to such requests. Ultimately, the paper explores the compatibility of enforcing Islamic marriage contracts with the law, while ensuring that their provisions do not infringe upon constitutional and human rights.

Keywords: marriage, divorce, family law, Islam, Shari'ah, contract

Introduction

Gender equality is one of the most important and current debates. However, the Islamic perspective of this issue, is the least understood and the most misrepresented not only by non-Muslims but sometimes also by Muslims themselves. When talking about the Islamic stance on an issue, it is important to distinguish between the normative part of Islam, and the diverse practices of Islam around the world, which may have been affected by different cultural attitudes. This paper will describe the normative part of Islam regarding the role of women in the family and the gender equality in marriage and divorce by analyzing their compatibility with human rights and interaction with Albanian family laws about marriage and divorce, particularly focusing on the divorce procedures in the two normative systems: Islamic law and Albanian family law. One of the aims of this paper is also to challenge the general assumptions about the legal inferiority of women towards men in the Islamic laws and societies.

In the first part of the paper, Islamic rules about marriage and divorce are explained. The section starts with a description of the status of women in Islam, comparing it to the equality of women and men in the family during marriage and at its dissolution, and concludes by describing married women's rights according to the Islamic Law.

The second part of the paper provides for the regulation of marriage and divorce by the international human rights law, focusing on the principle of equality and non-discrimination. The third part continues with a descriptive analysis of the Albanian Family Law regarding marriage and divorce, with a focus on the divorce procedures. Then, the last part of the research provides a comparative analysis of the compatibility of Islamic Law with Albanian Family Law regarding marriage and divorce, focusing on the human rights perspective.

Islamic Law on Marriage and Divorce

The Status of Women in Islam

The analyzes of Islamic Law in this paper is based on the Hanafi school, one of the four Sunni Islamic schools of jurisprudence, being it the Islamic jurisprudence followed by the Albanian Muslim community. The comparative analyses of the different interpretations of the status of women in Islam by other schools of Islamic jurisprudence is out of the scope of this paper.

To understand the role of women in Islam we should go back to the history of creation of mankind. Going through the Qur'anic verses of this history, it is noticeable the equality among men and women:

'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.' (An-Nisa, 4:1) This Quranic verse reveals the story of the creation of mankind which started from Adam, the first man created, and then from his rib was created Eve or Hawwa in Arabic. According to Islamic history, Eve was created while Adam was sleeping from his shortest left rib. Both Jewish and Christian traditions also maintain that Eve was created from Adam's rib.

Besides revealing how the first man and woman were created, this verse of the Qur'an is the basis of understanding the status of woman in Islam. Prophet Muhammad used the story of Eve's creation from Adam's rib as a basis for imploring people to be gentle and kind to women:

O Muslims! I advise you to be gentle with women, for they are created from a rib, and the most crooked portion of the rib is its upper part. If you try to straighten it, it will break, and if you leave it, it will remain crooked; so I urge you to take care of the women. (al-Bukhari, 2020)

Both Qur'an's and the Prophet Muhammad's attitude prove the fact that according to Islam, woman is at least as vital to life as man and that she is neither inferior to him, nor of a lower species (Büyüklebi, 2005)

When trying to understand the role of woman in a society, in this case in Islam, we should bear in mind the difference among the general notions of 'equity' and 'equality' which has a crucial importance. Equality promotes fairness and justice, but it can have its best results only if everyone has the same needs and is completely the same. (Arnesson, 2001, p. 133) While equity is giving everyone what they need to succeed. People are not created identical, but they are created equally. It is impossible to find even two identical men, or two identical women (Büyüklebi, 2005). With this distinction in mind, it is easy to understand that the woman is not inferior to man, on the contrary, she has equal rights and responsibilities as man have, but not necessarily identical ones since their rights and responsibilities are pursuant to their specific needs as women and men. By interpreting Islam, it is noticeable that the attribution of rights to men and women is mainly based on equity. Islam has given to women rights and privileges that they have never enjoyed before under other religious or constitutional systems (Büyüklebi, 2005). As Büyüklebi states: 'The fact that Islam gives her equal-but not identical-rights shows that it takes her into due consideration, acknowledges her, and recognizes her independent personality'.

Throughout history, many scholars, researchers, and other individuals, while talking about women rights and the status of woman in the society, have given reference to the religious considerations about the status of woman. Among them, Matthew Henry, an English minister and Bible commentator, referred to the Christian traditions (which in this case are similar with the Islamic ones) while talking about the role of woman:

The woman was made of a rib out of the side of Adam; not made out of his head to rule over him, nor out of his feet to be trampled upon by him, but out of his side to be equal with him, under his arm to be protected, and near his heart to be beloved. (Henry, 1964)

Marriage in Islam

Marriage in Islam is considered as a contract. Hence, as a contract, it should consist of several elements in order to ensure that both parts of the contract, thus husband and wife, receive their rights. As in every other contract, also in Islam, the first and most important element of the marriage contract is the consent of both parties, in this case spouses. Every Muslim girl has the right to decide about her marriage, and her father or any other member of the family cannot impose her to marry someone without her consent, and ignore her decision. As the Prophet said: 'A virgin must be asked about herself, her consent being her silence.' (Muslim, 2020) According to some transmitters, a girl went to the Prophet and complaining that her father had married her against her will, and the Prophet allowed her to exercise her choice.

Another condition of the marriage is the presence of two witnesses. The marriage should be announced and publicized (Büyükçelebi, 2005). The presence of a representative from the woman's family is also a condition. Both the man and the woman must be legally competent, thus they must be adults and sane. For the marriage to be valid, the Albanian doctrine of Islamic jurisprudence requires that it should be made in accordance to the legislation of the country in which the couple lives. This means that besides the religious marriage, the couple should make also the legal civil marriage in the country where they reside. Another condition of the Islamic marriage is the so called 'mahr', a dowry paid by the husband, which is a way of showing respect of the groom for his bride, his sense of responsibility and his desire to marry her. As it is stated in the Qur'anic verse: 'Give to the women (whom you marry) their bridal-due all willingly and without expecting a return.' (An-Nisa, 4: 4)

The way the Qur'an describes the bond between husband and wife after marriage: 'They (wives) are your garments and you are their garments...' (Al-Baqarah, 2:187) shows the equality among spouses and that each is the support and the protection of one another.

Divorce in Islam

'Until death do us part' The famous verse cited in every Christian marriage, does not apply to the Islamic marriage. While the Catholic Church promotes the indissolubility of marriage, Islam's approach is against extremities. Even though it considers marriage as a consecrate bond, it allows divorce if certain conditions are satisfied. This does not mean that divorce is preferred or normal in Islam but when there is no other way of solving the problems divorce is accepted. As the Prophet said: 'Among lawful things, divorce is most hated by Allah' (al-Masabih, 2020) This means that even though lawful, divorce is the last resort, allowed only under unavoidable

circumstances, when living together becomes a torture for both husband and wife, mutual hatred has taken the place of love and compassion and neither of them can fulfill their marital responsibilities any more. In these cases separation is better, this stated also by the Qur'an: 'But if they separate, Allah will provide for each of them out of His abundance...' (An-Nisa, 4:130)

In order to give spouses a possibility to rethink about their decision to divorce, divorce in Islam passes through two stages. The first time that the man divorces his wife, the wife should still continue to stay at her husband's house usually for a period of three months. This period of time allows the couple to think about reconciliation so that if they reconcile, there is no need to remarry. If during this waiting period they do not reconcile, then they are considered divorced and each of them can marry someone else, or remarry each other. But if they remarry and divorce again, the husband cannot marry his wife again, unless if she marries someone else and divorces from him.

The procedure of the divorce includes also the appointment of two arbitrators which have the obligation of settling the dispute among the spouses. One arbitrator should be from the husband's family and the other from the wife's family. If this is not possible, other people can be appointed. The duty of the arbitrators is to try to find a solution to the dispute among the spouses by trying to reconcile them. But if the reconciliation seems to be impossible, then the arbitrators have the duty to separate the spouses. From the Sunnah, there is a report recorded by Ash-Shafi'i in his book *Al-Umm* from Ubaidah As-Salmani who said: "A man and woman came to Ali ibn Abi Talib and each of them had a group of people with them. Ali ordered them to appoint a male arbitrator from his family and one from her family. Then he said to the arbitrators: 'Do you know what your responsibilities are? If you find that you can bring them back together, then do so. If you find that they should be separated, then do so.'

Thus, according to Shari'ah, divorce without a clear and lawful reason and without exhausting every possible means for bringing the reconciliation, is not allowed. It is clear that divorce cannot be completed in just one day, it should undergo certain stages before the final dissolution of the marriage. This practice is to the common good of humanity. It is not normal that the dissolution of a family be decided in one meeting and in one decision only. Spouses should be left a certain amount of time to rethink their decision and try to resolve the disputes and disagreements among each other.

After divorce, the woman must wait a certain period of time, which varies according to the occasion, before remarrying. After the waiting time has passed, the woman has full rights to marry another person and nobody can prevent her from marrying the person that she chooses. Thus, the divorced woman is completely free to choose whether to marry or not, and also to choose the person whom she wants to marry. No one has the right to interfere in her choice and freedom to remarry. The ex-husband should separate from his wife in kindness and not interfere anymore in her life after

divorce. As Allah says in the Qur'an: 'Either retain them in kindness or part with them in kindness...' (At-Talaq), 'Then (either) retain her in honor or release her with kindness...' (Al-Baqarah, 2:229) and 'For divorced women a provision (shall be made) in kindness, a duty for those who are conscious of Allah.' (Al-Baqarah, 2:241) This also means that the ex-husband should keep confidential every kind of information that, if made public, may damage her interests. The same obligation applies also to the wife about her ex-husband.

The ex-husband, who has already divorced his wife, does not have the right, and is not allowed to prevent her from remarrying someone else. This is clearly stated in the Qur'anic verses:

And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms, and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself. And do not take the verses of Allah in jest. And remember the favor of Allah upon you and what has been revealed to you of the Book and wisdom by which He instructs you. And fear Allah and know that Allah is Knowing of all things. (Al-Baqarah, 2:231)

We explained until now the right of husband to divorce his wife and the procedures which should be followed according to the Shari'ah. But Islam does not prevent women to divorce men either. Also the wife has the right to divorce her husband and free herself from him if it is necessary. If the relation between her and her husband is such that she cannot bear to live with him anymore, the woman has the right to demand the divorce. In this case there is the condition that she should return to her husband the mahr (the marriage dowry) and the gifts that he has given to her according to their mutual agreement.

...And it is not lawful for you to take anything of what you have given them, unless both fear that they cannot keep (themselves) within Allah's bounds; and if you fear that they cannot keep (themselves) within Allah's bounds, it is no sin on either of them about what she gives up to get herself freed (from the wedlock) ... (Al-Baqarah, 2:229)

It is reported that one day, the wife of Thabit ibn Qays, one of the first individuals who converted in Islam during the Prophet's period, went to the Prophet and said: 'O Messenger of Allah, I do not reproach Thabit ibn Qays in respect of character and religion, but I do not want to be guilty of showing anger to him.' She was implying that even though he is a good man, she was unable to get along with him. The Prophet asked her about what she had received from him and she told that she had received a garden. He asked: 'Will you give him back his garden?' And she approved. The Prophet then said to Thabit that he should accept the garden and make the divorce. According to Shari'ah, a woman is allowed to seek divorce from her husband if she has met ill treatment from him or she has another acceptable reason for the separation.

However, the return of the mahr is not always a precondition for divorce. It is haram¹ for the husband to mistreat his wife in order to make her seek the divorce so that she will return him the property that he has given her during their marriage. If at the marriage contract they have agreed not to return the mahr, the husband cannot demand for it. The return of the mahr can be demanded from him only if the wife has committed a clear immorality. The Qur'an explains the situation in this way: '...And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality.' (An-Nisa, 4:19)

Despite the allowance of divorce, Islam has put some limits on the time when it can be done, limits which are in favor of the wife. Thus, according to the Islamic laws, it is prohibited to divorce the wife during her menstruations, before postnatal puerperal discharge or between two menstruation cycles if the husband has had intercourse with his wife following her menstruation period. The reasons for these limits are because since sexual intercourse during menstruation is haram, the idea of divorce may come through the husband's mind during this period because of sexual frustration. (Qaradawi, 2013) Whereas divorce is not allowed between two menstrual periods if intercourse has happened because it is possible that the wife may have remained pregnant during the union, unless she is pregnant and the husband knows. In this case divorce is allowed if deep antipathy exists among them and it is impossible to continue the marriage. (Qaradawi, 2013)

Rights of Married Women in Islam

To sum up, based on what was explained above, every married woman is entitled to live in the house in which her husband lives and to receive from him what she needs to maintain a similar standard of living with her spouse. In the case of divorce, she is entitled to receive financial support from her husband during the waiting period, both for herself and for the children she keeps, irrespective of her own financial status or earnings that she has.

Every woman has also the right to ask for divorce from her husband in accordance with the law, and to seek divorce also in the courts. She is also entitled to inherit from her husband and children according to the law on place. Her husband does not have any rights upon her earnings or property unless if she clearly gives him this right. Confidentiality from her spouse or ex-spouse if divorced, regarding personal information that may harm her, is also her right over him, similarly as his right over her.

Marriage in International Human Rights Legal Framework

The right to marriage and to found a family is guaranteed in the Article 16 of Universal Declaration of Human Rights (UNDHR):

¹ Arabic word for 'forbidden', commonly used in Islamic Shari'ah for actions or things prohibited by Islamic law.

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

This provision guarantees equal rights to both men and women without any discrimination to marriage and to divorce as well.

Similarly, European Convention on Human Rights (ECHR), in its Article 12, contains the right to marry and found a family. But, differently from the UNDHR, the dissolution of marriage is not mentioned. Even though the provision provides a negative right, the European Court of Human Rights, until recently, has interpreted it from a conservative/Christian perspective denying the right to divorce claiming that 'the stability of marriage is a legitimate aim which is in the public interest'. (EGMR 11329/85 - F. v. Switzerland , 1987)The Court has ruled that Articles 8 (Right to respect for private and family life) and 12 (right to marry) of ECHR

'cannot be interpreted in a manner guaranteeing the right to divorce' notably because 'preparatory works on the Convention clearly indicate the will of the High Contracting Parties to deliberately exclude this right from the field of application of the Convention'. (Ivanov and Petrova v. Bulgaria, 2011; (Case of Johnston and Others v. Ireland, 1986)

The International Covenant on Economic, Social and Cultural Rights calls upon State Parties to provide wide protection to the family and its establishment. It provides for special protection of women before and after childbirth:

The States Parties to the present Covenant recognize that:

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. (Art. 10(1) and (2))

Similarly, the Convention on the Elimination of All Forms of Discrimination against Women, has established the principle of non-discrimination and the principle of equality of rights and responsibilities of men and women for entering into a marriage, during marriage and at its dissolution:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory

As a conclusion, except for the ECHR, the International Human Rights Law has incorporated in its provision regarding marriage also the possibility of dissolution of marriage/right to divorce.

Albanian Family Law on Marriage and Divorce

Marriage and divorce procedures in Albania are regulated by the Albanian Family Code, law number 9062 adopted on May 8, 2003. This law is divided into three parts: General Principles, Spouses and Children. In this paper reference will be made to the second part of the Law, which refers to the principles of marriage, rights and obligations of the spouses, marriage and divorce procedures.

Marriage

As one of the fundamental human rights, the right to marriage is prescribed by the Albanian Constitution. 'Everybody has the right to get married' (Article 53). As such, it is a right that is acquired at birth and is undeniable.

Marriage, as a legal cohabitation, is founded on the moral and legal equality of the spouses, in the mutual sentiment of love, respect and understanding, as the basis of unity in the family. Marriage and family enjoy special protection from the state. (Omari, 2007)

The first article of the Albanian Family Code describes the notion of marriage as a legal bound between the spouses. The definition highlights the principle of equality and the principle of protection from the state as two basic principles under which marriage is based. Based on the principle of equality, both spouses are equal in their family relations, meaning that they have equal rights and responsibilities before the law.

The legal age for getting married in Albania is 18 years old, (Article 7) thus one of the main conditions for getting legally married in this country is being an adult. However, for certain important reasons, marriage under this age is allowed under a court decision. Both future spouses should give their free consent for the marriage to be legal. (Article 8) One of the fundamental principles of marriage is the free will. By defining the will as the main principle for the wedlock, shows that marriage is not obligatory, but facultative. Everyone can choose freely whether they want to get married or not. And everyone can choose freely the person with which they want to get married. These rights show the huge freedom that the legislation has provided related to the wedlock.

Similarly, the Albanian Family Law considers marriage as a contract. As such, it should be made in front of a civil registration clerk (article 28) who makes the public announcement of the marriage and with a notarial act under which the spouses declare the way of administration of their financial incomes, earnings and property with the full will of both parts. (Article 69) Spouses can choose the regime of their marital property as community property, separated property or a combination of these two according to the agreement among them. For these reasons, both spouses should be sane, thus able to understand the scope of marriage. (Article 12).

Divorce

A special part of the Family Code of Albania is dedicated to the forms of marriage dissolution, the procedures to be followed and the consequences of the divorce. The dissolution of marriage becomes final after the final verdict of a competent court. The request for divorce at the court can be filed by the spouses or by their respective representatives.

Divorce with mutual consent

One of the cases of divorce according to the Albanian legislation is the will of both spouses. If both of them agree to divorce, they can submit the request to the court for approval, together with a settlement agreement that stipulated the terms for the dissolution of marriage. (Article 125) It can be understood that in the case of reciprocal consent for the marriage dissolution, two legal conditions should be met: the mutual consent of the spouses, and the agreement between them about the consequences of the divorce. Obviously, before the signature of the mutual consent for the dissolution of marriage, a series of discussions should occur in order to leave time to the spouses to rethink about their decision. (FC, Article 134) During these court hearings, the court asks each spouse first separately and then both of them together about their will to end their marriage. (FC, Article 126) In the case of hesitation from either one of the spouses, the court dismisses the request for the divorce with mutual consent (Omari, 2007) Thus, during the hearings the court should verify whether the consent of each of the spouses is real, conscious and free and not under the pressure or blackmailing from the other spouse. Spouses can revoke their request for divorce at any stage and the court hearings. In cases when only one of the spouses revokes their consent, the court will address the spouses towards other forms of divorce.

It is noticeable that the sole will of the spouses to dissolve their marriage is not enough for them to be considered divorced. The Albanian legislator has prescribed that for the divorce to be valid, first a public authority must verify the compliance of the necessary conditions for the marriage dissolution. For example, while considering the case of a divorce, the court must consider whether the spouses have or not minor children. In the first case, spouse should agree on how each of them will exercise their parental responsibilities against their children, by thus deciding who will live with the children, deciding about their growth and education and the way of keeping in touch with the other parent. (FC, Article 127-130) On the other case, when they do not have minor children, the dissolution of marriage is easier and if both spouse give the consent, the court has a less active role and there a lower opportunity to refuse the divorce.

In the case of dissolution of marriage with the consent of both spouses, the spouses do not have the legal obligation of proving in front of the court the reason of their divorce, thus preventing the exposure of their private life and giving the possibility to the spouses to separate with dignity and kindness. In this case, where a mutual consent to divorce exists, the motive of the divorce is considered as not important for the decision of the court. (Omari, 2007) However, despite being the most efficient way of ending a marriage, the case of consent of both spouses is very rare in practice in Albania (Omari, 2007)

Divorce at the Request of One of the Spouses

In cases when spouses do not agree on the dissolution of marriage, each of them can file the request at the court. In this case there should be a cause for the acceptance of the divorce from the court. The Family Code enumerated a list of acceptable causes that can lead the court to decide on the divorce:

Either spouse can request the dissolution of marriage when, due to continuous quarrels, maltreatment, severe insults, adultery, incurable mental illness, lengthy penal punishment of the spouse or due to any other cause constituting repeated violations of marital obligations, a joint life becomes impossible and the marriage has lost its purpose for one or for both of the spouses (Article 132)

However, the list is not exhaustive, by thus leaving more space to the court to judge about the necessity of the dissolution of marriage case by case. In such cases of irretrievable breakdown of the marriage, the court can approve the divorce in any case that it believes that marriage obligations are violated by one or both of the spouses and that marriage has lost its purpose. The law prescribes the possibility to postpone the judgement about the divorce in cases when the spouse is pregnant, upon her request, up to one year after the birth of the child. (Article 137) In cases that spouses, after divorce decide to remarry, they must undertake again all the procedures of a new marriage. (Article 143)

The Interaction of Islamic Laws and Albanian Family Laws Regarding Divorce from a Human Rights Perspective

The concept of indissolubility of eternity of the marriage, as supported and promoted by the Catholic Church has been considered by many modern scholars as a value of the civilization. (Omari, 2007) In this contest, it is universally accepted that the stability of the family as a result of marriage is a valuable condition for the growth and education of children. (Omari, 2007) However, from a human rights perspective, even though divorce is not promoted, neither is it prohibited, in certain cases when the continuation of marriage at any cost, causes the infringement of other human rights.

Contrary to the Catholic Church principle, human rights law, Islamic and Albanian laws allow marriage dissolution. Article 16 of the Universal Declaration of Human Rights acknowledges the possibility of dissolution of marriage by mentioning the principles of equality of rights and non-discrimination for getting married, during marriage and at its dissolution. Whereas the Article 12 of European Convention on Human Rights has omitted the right to divorce and does not include legislation about the dissolution of marriage. The European Center for Law and Justice, (ECLJ, 2014) emphasizes that the primary purpose of the right to marry is to provide a stable social framework for the founding of a family. According to van der Sloot, the authors of the ECHR omitted the right to divorce not because they were against granting of such a right, but because the scope of the ECHR was to provide a list of core rights and

freedoms, not the dissolution or limitation of any of them. (Sloot, 2014) Currently, the principle of marriage dissolution is now considered an absolutely necessary institute in the legal domain of every country. In countries where the Catholic Church has had a very influential position in the state and society, it has been very difficult to reach to the adoption of laws that allow divorce. For example, Italy has approved the dissolution of marriage only in 1970, Germany in 1977, and Ireland only in 1997 (Bonilini, 2004). We must emphasize here that Albania easily adopted the law allowing the divorce not because it considered individual freedom as of fundamental value, but because as one of the former socialist countries, religious influence over legal principles and values was completely lacking. Article 37 of the Albanian Socialist Republic Constitution of 1976, which was in place until 1991, stipulated that "The State recognizes no religion, and supports atheistic propaganda in order to implant a scientific materialistic world outlook in the people". Despite of the different historical reasons and conditions, we must say that both Islamic and Albanian laws allow marriage dissolution, thus being compatible with fundamental human rights and freedoms in this regard. Dissolution of marriage with the consent of both spouses shows the compatibility of the Albanian Family Law and Islamic Law with the constitutional principle of individual freedom and also of international human rights, where the right of the individuals not only to decide to get married but also to end their marriage is under the best interest of the individual and compatible also with the right to live in dignity.

Islamic Law and Albanian Family Code share the same concept about marriage: both legislations consider it as a contract between the spouses. As such, the contract should be made in front of competent witnesses. Thus, as every contract, also the marriage contract can be dissolved if it has lost its purpose. As provided also by the Islamic laws, the Muslim couple who wishes to get together in marriage, should also follow the legal marriage procedures of the country where they live. In this case, a Muslim couple living in Albania should make the civil marriage according to the Albanian legislation, in order to be considered married. This is to ensure spouses with legal protection in cases of divorce and also to provide them with their legal rights and obligations as a married couple in the country they reside, which includes cohabitation rights, property rights and inheritance rights, rights towards their children and any other right deriving from marriage.

On the other hand, even though Shari'ah and Albanian Family Code allow the divorce, this does not mean that it is allowed in any case and without any reason. Both legislations consider divorce as the last remedy and it should be according to certain and clear steps and is not completed in just one stage. This methodology has been chosen to the benefit of the family, in order to leave time to the spouses to reconsider their decision about divorce. Only if this cannot be reached, divorce is declared.

Contrary to Islamic Law, Albanian Law does not require the appointment of arbitrators for settling the dispute among the spouses. However, since Albanian law

does not either prohibit this practice, Muslim couples in Albania can easily use this method as a means for reconciliation before going to the court for the official legal decision for divorce. In both normative systems, each of the spouses can ask for the dissolution of marriage. However, in Islamic law, there are some restrictions on the time when the husband can divorce his wife, restrictions which tend to protect the wife. But there is no time restriction on when a woman can divorce her husband. The only restriction in this case concerns the mahr, the gift that the husband makes to the wife on marriage day. If the wife asks for divorce she should return to the husband the mahr. However, if in the beginning of the marriage they have agreed not to return it, there is no such obligation.

The practice of mahr does not exist in Albanian laws, and since mahr is not given through a legal contract but only by a religious contract or even by verbal contact it cannot be considered under the provisions about the division of property after divorce because Albanian laws on property endowment do not legalize verbal contracts but only written ones. Thus, the contract about mahr that couples make in Islamic marriage, cannot be considered compatible by the Albanian courts as a contract about property rights, in this case, property given as a gift to the wife from her husband. Thus, the return of mahr cannot be demanded on Albanian courts. Both in Islamic law and Albanian Family Law after divorce ex-spouses have the right to remarry each other, or to marry with someone else of their choice.

Conclusions

Despite the slight differences, which are not unexpected, especially when comparing any religious norms with legal norms, Islamic Law and Albanian Law have many similarities regarding marriage and divorce. These legislations share similar core principles regarding the institute of marriage and divorce: both legislations consider it as a contract between the spouses, and it should be made in front of competent witnesses. Thus, as every contract, also the marriage contract can be dissolved if it has lost its purpose. The existence of differences among the legislations is quite normal and expectable, but the nature of the differences is such that does not cause incompatibility or conflicts among the normative rules of each legislation. This makes it simple for Muslim couples to follow their religious obligations regarding marriage and divorce in Albania, and vice-versa, to complete also their legal obligations under Albanian Family Law and completely in synthesis with international human rights without breaching any of the Shari'ah rules in regard to marriage and divorce.

Through the description and analysis of the Islamic divorce procedures, this paper challenges the general assumptions that women in Islam are legally inferior to men and that they are economically depended on their husbands. The tradition of dowries, the right of the women to access to payed labor, the clear separation of the property between spouses is a proof that women are not considered inferior to men. These norms, besides depicting the role that Islam gives to women in marriage, serve also for making divorce process easier. The clear and strict separation of property, not

only makes divorce process easier, but also gives more financial power to women to initiate divorce. As Rapoport claims, (Rapoport, Marriage, Money and Divorce in Medieval Islamic Society, 2005) Muslim women obtaining economic independence, or bringing their husbands to court, or opting out of marriage undermines the general idea of domination of men over women in Islamic laws.

Bibliography

- [1] (n.d.).
- [2] Al-Baqarah, Q. (n.d.). 2:187.
- [3] Al-Baqarah, Q. (n.d.). 2:229.
- [4] Al-Baqarah, Q. (n.d.). 2:231.
- [5] Al-Baqarah, Q. (n.d.). 2:241.
- [6] al-Bukhari, S. (2020, February 20). sunnah.com. Retrieved from sunnah.com: <https://sunnah.com/bukhari:5185>
- [7] al-Masabih, M. (2020, February 20). sunnah.com . Retrieved from sunnah.com : <https://sunnah.com/mishkat:3280>
- [8] An Islamic Perspective on Divorce. (1999). Retrieved from <https://www.mwusa.org/topics/marriage&divorce/divorce.html>
- [9] Andersen, B. (1976, December 28). THE CONSTITUTION OF THE PEOPLE'S. Retrieved from <https://data.globalcit.eu/NationalDB/docs/ALB%20The%20Constitution%20of%20the%20Peoples%20Socialist%20Republic%20of%20Albania%201976.pdf>
- [10] Andersen, B. (1976, December 28). THE CONSTITUTION OF THE PEOPLE'S. Retrieved from <https://data.globalcit.eu/NationalDB/docs/ALB%20The%20Constitution%20of%20the%20Peoples%20Socialist%20Republic%20of%20Albania%201976.pdf>
- [11] An-Nisa, Q. (n.d.). 4: 4.
- [12] An-Nisa, Q. (n.d.). 4:1.
- [13] An-Nisa, Q. (n.d.). 4:130.
- [14] An-Nisa, Q. (n.d.). 4:19.
- [15] Arnaud, A. J. (2001). International Encyclopedia of Social and behavioral Sciences. Encyclopedia of Social and behavioral Sciences.

- [16] Arnesson, R. J. (2001). International Encyclopedia of Social and behavioral Sciences, Vol. 7. International Encyclopedia of Social and behavioral Sciences, 4724-4729.
- [17] At-Talaq, Q. (n.d.). 65:2.
- [18] Beqja, H. & (n.d.). Divorce- Observations and Reflections, Tirana: Dudaj & Rinia. Retrieved from Beqja, H., & Sokoli, L. (n.d.). Divorce- Observations and Reflections, Tirana: Dudaj & Rinia. .
- [19] Bonilini, G. & (2004). Lo scioglimento del matrimonio (3rd edition ed.). Lo scioglimento del matrimonio (3rd edition ed.).
- [20] Büyükçelebi, I. (2005). Living in the shade of Islam. New Jersey: Light.
- [21] Case of Johnston and Others v. Ireland. (1986, December 18). Retrieved from [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-57508%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-57508%22])
- [22] Constitution, A. (1988). Retrieved from https://www.constituteproject.org/constitution/Albania_2016.pdf?lang=en
- [23] EGMR 11329/85 - F. v. Switzerland . (1987, December 18). Retrieved from <https://www.servat.unibe.ch/dfr/em113298.html>
- [24] European Convention on human rights. (n.d.). Retrieved from European Court of Human Rights Council of Europe: https://www.echr.coe.int/documents/convention_eng.pdf
- [25] European court of human rights. (2012, July 5). Retrieved from <file:///C:/Users/User/Downloads/001-111985.pdf>
- [26] Henry, M. (1964, February 20). Commentary on the Whole Bible: Complete and Unabridged in One Volume. HarperSan Francisco: Zondervan. Retrieved from biblegateway: <https://www.biblegateway.com/resources/matthew-henry/Gen.2.21-Gen.2.25>
- [27] Imani, S. K. (n.d.). Retrieved from An Enlightening Commentary into the Light of the Holy Qur'an vol. 1: <https://www.al-islam.org/printpdf/book/export/html/29057>
- [28] Jawad, H. (1998). The Rights of Women in Islam - An Authentic Approach. Jawad, H., The Rights of Women in Islam - An Authentic Approach, London: MacMillan Press, 1998. London: MacMillan Press.
- [29] Matthew, H. (1991). Matthew Henry's Commentary on the Whole Bible: Complete and Unabridged in One Volume. Matthew Henry's Commentary on the Whole Bible: Complete and Unabridged in One Volume. Hendrickson.
- [30] Meuret, D. (2001). A system of equity indicators for educational systems. A system of equity indicators for educational systems', in W. Hutmacher, D.

Cochrane & N. Bottani (Eds.), *In Pursuit of Equity in Education*. Kluwer Academic Publishers .

- [31] Muslim, S. (2020, February 20). sunnah.com. Retrieved from sunnah.com: <https://sunnah.com/muslim:1421c>
- [32] Nations, U. (1966, December 16). International Covenant on Economic, Social and Cultural Rights. Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>
- [33] Omari, S. (2007). *E Drejta Familjare [Family Law]*. E Drejta Familjare [Family Law].
- [34] Qaradawi, S. Y. (2013). *The lawful and the prohibited in Islam*. Al-Falah Foundation.
- [35] Rapoport, Y. (2005). *Marriage, Money and Divorce in Medieval Islamic Society*. Marriage, Money and Divorce in Medieval Islamic Society. New York: New York: Cambridge University Press.
- [36] Rapoport, Y. (2005). *Marriage, Money and Divorce in Medieval Islamic Society*. Cambridge University Press.
- [37] Sloot, B. v. (2014). *Between Fact and Fiction: an Analysis of the Case Law on Article 12 ECHR*. Retrieved from final version published in Child and Family: <https://www.ivir.nl/publicaties/download/1561.pdf>
- [38] Universal Declaration of Human Rights. (n.d.). Retrieved from United nations: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- [39] Women’s Legal Rights Initiative . (2004). Retrieved from FAMILY CODE OF ALBANIA : <https://shorturl.at/fkNRX>
- [40] Youth, C. o. (2016). *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth*. Retrieved from UN women: <https://www.unwomen.org/en/digital-library/publications/2016/12/cedaw-for-youth>