



## The Institution of Marriage Viewed Through the "Lekë Dukagjini Code" and the "Family Code"

Shezeina Rama<sup>1</sup>

Albana Misja<sup>2</sup>

<sup>1</sup>PhD., Faculty of Political and Juridical Sciences, Department of Law,  
"Aleksander Moisiu" University, Durrës, Albania

<sup>2</sup>Judge/Magistrate

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### Abstract

*This paper focuses on the treatment of the institution of marriage through the perspective of the LekDukagjin Code, as well as according to the regulations of Law No. 9062, dated 08.05.2003 "The Family Code," as amended, presenting it as an institution with legal, social, and cultural significance. "Marriage," according to the Albanian language dictionary, refers to the official and public union of a man and a woman in a family. This definition provides a reflection of the institution of marriage, regarding its form as a public act and as an official relationship between two individuals of different sexes in both periods covered in the paper. In a general view, marriage will be treated as a concept, its forms of connection, the role, the will, and the rights of the woman within the institution of marriage, and how the concept and importance of this institution have evolved.*

*Keywords: Marriage, code, law, rights*

## 1. Introduction

### 1.1 General Presentation

The term "kanun" originates from Byzantine Greek, coming from the term "normokanon", which referred to the religious legal norms issued by the Byzantine emperors.

In the Albanian language, it entered through the Turkish word "kanunname", which referred to the secular legal norms issued by the sultans. ( Luarasi,2018,p.258)

The Kanun of LekDukagjini is of significant importance for study, especially for the values transmitted over the years.

The *Kanuni i Lek Dukagjinit* is one of the most well-known Albanian codes due to its widespread use, codification, significance, and also the interest it generates among scholars. It conceptualizes marriage as follows:

To marry according to the Kanun of Lek Dukagjini, means to establish a household, to add another person to the house, both for assistance in labor and for increasing the number of children.

Upon analyzing this definition, it is clearly understood that the person who is to join the household is valued only for their support and contribution to the work, influencing the family's economic level, and increasing the number of children, which is a biological process, specifically referring to the female figure.

Meanwhile, according to the provisions of the Family Code in the Republic of Albania, specifically Article 1, the

term "marriage" is understood as:

"Marriage, as a legal coexistence, is based on the moral and legal equality of the spouses, on mutual love, respect, and understanding, as the foundation of unity in the family. Marriage and the family enjoy special protection by the state."

From the perspective of Law No. 9062, dated 08.05.2003, as amended, marriage is an institution in which spouses are equal in moral and legal aspects, and this institution and the family created by this legal coexistence enjoy special protection from the state.

## 2. Marriage in the Kanun of LekDukagjini

The institution of marriage in the Kanunis treated as the final phase of the agreement between two families, based on the conditions agreed upon during the engagement phase.

Unlike the Family Code, which does not have a legal provision for engagement, the *KanuniiLekDukagjinit* treats the institution of engagement, considering it one of the main institutions of customary family law, which imposed obligations on both parties. (Luarasi, 2018, p.272)

Engagement is seen as an agreement between the families of the young people who will marry, which brings obligations for both families.

The Kanun provided for several obstacles that made it impossible to establish an engagement or marriage. These legal obstacles also had a moral character. They were (Luarasi,2018,p.273):

- a. Kinship ties (from the father) and gender ties (from the mother).
- b. Ritual ties.

If these cases occurred, the marriage connection would become legally impossible. Meanwhile, belonging to different religions was not treated as a legal obstacle for marriage but rather as an ideological one.

In the *Kanuni i Lek Dukagjinit*, four types of marriage are distinguished (Luarasi,2018,p.122-132):

- a. **Marriage with a crown** – preferred by both religion and the *KanuniiLekDukagjinit*. This type referred to monogamous marriage, followed by religious rites; for Christians, it was reinforced by the crown ceremony, while for Muslims, it was according to Sharia law.
- b. **Marriage above the crown** – cases of polygamy, which were prohibited by Catholic and Orthodox religious rites but allowed by customary law in cases where the husband, alongside his legitimate wife, took a second wife above the crown. This exception applied in situations where the first wife could not have children or did not have a male child. Another exceptional case of polygamy occurred in marriages with the wife of a deceased brother. (Luarasi,2018, p.276-277)
- c. **Marriage by abduction** – An illegal way of entering into marriage, often used to avoid the purchase of a bride. The abduction of girls led to severe consequences, such as the killing of the abducting man or his family members, and the beginning of blood feuds. If a girl found her husband without the bride price, she was not allowed to wear bridal clothing because that marriage was considered unlawful according to the Kanun. (Luarasi, 2018, p.277-278)
- d. **Marriage by trial** – A type of marriage specified only in the *KanuniiLekDukagjinit*, and practiced only in remote mountainous areas. In this case, the families of the spouses would come to an agreement, allowing the girl or a divorced woman to live in the husband's family without officially marrying for a trial period, usually one year. The only condition was the birth of a child, and if this did not occur, the woman would return to her family, as agreed by the parties. In exceptional cases, she could remain in the husband's family, but with the condition that he could take another wife to give birth to children. (Luarasi,2018,p.279)

Thus, in analyzing the form of marriage, it is concluded that the spouses did not have any decision-making rights in this connection being formed; the families decided, and they were obligated to follow the will of the families and the agreement they had made. In cases where the provisions of the Kanun were not respected, and a woman was abducted without the family's consent, this could lead to blood feuds. The legitimization of polygamy, directly linked to the lack of children from the wife or the lack of male children, legalized marriage above the crown, thus reinforcing gender differences.

As we observed earlier, it is clear that women had no decision-making rights, and every phase of their life was decided by the family, without the approval or consent of the girl.

## 2.1 Divorce in the Kanun of LekDukagjini

In the *KanuniiLekDukagjinit*, divorce was known by the synonym "thekuiprem," a right of the husband to signify the dissolution of the marriage by cutting his wife's hair or the ends of her braids, a mark that indicated the termination of the marriage and the humiliation of the wife. (Luarasi,2018,p.282)

Divorce, once again, was a decision that did not belong to women, and they did not have the right to request the termination of the marital relationship. It was a decision that was made collectively by the men of the household.

The causes that could lead to divorce varied in different regions, but among them were:

- a. Violation of marital fidelity – If the husband suspected, even without sufficient evidence to prove the wife's infidelity, or if she engaged in actions that were not in line with the moral standards of the time, the husband had the right to request divorce.

Additionally, if the wife was caught in the act of infidelity, the husband had the right to kill her and her partner.(Luarasi,2018, p.281)

- b. Theft – If the wife appropriated anything, whether inside or outside the family, that did not belong to her, it was considered a valid reason for divorce, as it was viewed as a serious and dishonorable act.
- c. Lack of virginity – Virginity was considered a symbol of the woman's honor, and if a woman was found not to be a virgin, she had to be returned to her father's house, and the marriage would be immediately dissolved.
- d. Other reasons for divorce – These reasons were those that the husband and his family would decide upon, meaning they were not necessarily serious causes but could be seen as relative ones that could lead to divorce. Examples of such reasons include the inability to give birth to children, failure to educate children, when the wife did not do the assigned household tasks, when she did not respect her husband and his words, etc.

## 3. Marriage in the Family Code

The institution of marriage in the *Family Code* represents the union between two individuals of the opposite sex, entered into voluntarily, with the purpose of establishing a family and creating reciprocal rights and obligations, which are protected by the state.

The *Family Code* has set forth several criteria and conditions for entering into marriage:

1. Marriage is formed between a man and a woman.
2. Both parties must have reached the age of 18, except in exceptional cases for important reasons, as decided by the court.
3. There must be free consent from both future spouses.
4. Marriage is publicly concluded before a civil registry official, who receives the request for the announcement, except in the cases outlined in Article 29 of the *Family Code*.
5. There must be no legal obstacles to the marriage, which would render the marriage invalid.

Thus, unlike the definition in the *KanuniiLekDukagjinit*, where marriage is an act shaped by family agreements, in the *Family Code*, marriage is a public act, entered into by the free will of the individuals who are marrying, and the participants must be at least 18 years old.

While both the *KanuniiLekDukagjinit* and the *Family Code* include prohibitions on marriage, the *Family Code* has much more clearly defined conditions, which are specified in Article 9 and the following articles:

1. A person cannot enter into a new marriage if their previous marriage has not been declared invalid or dissolved.(Family Code, Article 28)
2. Marriages are prohibited between relatives such as:
  - Between the born and the unborn (brother and sister, uncle and niece, aunt and nephew, as well as children of brothers and sisters). (Family Code, Article 10)
3. Marriage is prohibited between in-laws, such as:
  - Father-in-law and daughter-in-law, mother-in-law and son-in-law, stepfather and stepdaughter, stepmother and stepson, regardless of whether the marriage creating this relationship has been declared invalid, terminated, or dissolved. (Family Code, Article 11)
4. A person suffering from a severe mental illness or having an intellectual disability, which makes them incapable of understanding the purpose of marriage, cannot marry. (Family Code, Article 12)

5. Marriages are prohibited between a guardian and the person under their care while the guardianship continues. (Family Code, Article 13)
6. Marriages are prohibited between adopters and adoptees and their descendants, between adopters and the spouses of their adopted children, between adoptees and the children of the adopter. (Family Code, Article 14)
7. Marriages entered into without free consent, or when one of the spouses is coerced, are invalid. (Family Code, Article 33)
8. A marriage entered into under the misconception of the identity of the spouse is invalid. (Family Code, Article 34)
9. A marriage entered into without the intent of living together as husband and wife is invalid. (Family Code, Article 36)
10. A marriage entered into while one of the spouses is under duress, without which the marriage would not have occurred, is also invalid. (Family Code, Article 37)

Therefore, aside from gender, kinship, and ritual prohibitions, the *Family Code* introduces other prohibitive conditions such as the existence of an ongoing marriage, age, the free consent of the two individuals, duress, and deception. These were not only not considered prohibitive conditions in the *KanuniLekDukagjinit* but were sometimes used to justify the birth of children (especially male children). In the *KanuniLekDukagjinit*, it was even allowed to have another marriage, there were no age restrictions, and the will of the families of the couple took precedence over the will of the couple themselves.

Meanwhile, in the *Family Code*, the only form of marriage is a public one, before the civil registry official, entered into with free consent and as a monogamous union.

### 3.1 Divorce According to the Family Code

In the *Family Code*, divorce is primarily defined as the termination of the joint life of the two individuals who are married. The cases of divorce are as follows:

1. Mutual consent of the spouses. (Family Code, Article 125)

This occurs when both spouses agree to divorce and draw up an agreement that regulates the consequences of the divorce. This agreement is then approved by the court, after the court is convinced that the free will of each party has been expressed and that the provisions of the *Family Code* have been respected.

Also, in the draft agreement, the parties resolve the legal consequences of the divorce, and in case there are children from the marriage, in reference to the principle of the best interests of the child, the agreement will regulate which parent will have custody, and the other parent will have specified visitation days with the child/children and the payment of monthly alimony for them.

Another element that is regulated by the will of the parties in this form of marriage dissolution is the arrangement of property relations between them.

If the court is convinced that the requested matters have been resolved according to the provisions of the Family Code, the court approves the draft agreement and determines the dissolution of the marriage and approves the agreement regulating the consequences of this marriage dissolution.

This court decision is subject to appeal, just like other court decisions.

To conclude, the dissolution of the marriage by the mutual consent of the spouses is carried out in compliance with the legal provisions of the Family Code, without violating the rights of the spouses.

2. Divorce due to the cessation of the joint life. (Family Code, Article 129)

This occurs when the two spouses have lived separately for more than three years. This request is approved by the court if it is determined that no particularly severe moral or material consequences have been caused for the children or the other spouse.

3. Divorce requested by one spouse. (Family Code, Article 132)

This occurs when one spouse requests the divorce due to continuous conflicts, insults, violation of marital fidelity, incurable mental illness, mistreatment, physical violence, or any other reason that constitutes a breach of marital obligations.

The causes mentioned above constitute serious violations of the obligations set forth by the Family Code for marriage as an institution, and as a result, cohabitation becomes impossible, and the marriage loses its purpose.

In the cases provided for in points 2 and 3, one of the spouses addresses the court with a lawsuit for the dissolution of the

marriage, where the court initially schedules a reconciliation session, in which the spouses appear personally, and through this session, the aim is to reconcile them and continue the marriage.

When this session does not lead to the reconciliation of the spouses or a withdrawal of the lawsuit for the dissolution of the marriage, the court proceeds with examining the lawsuit and issues a decision regarding the request in the lawsuit.

It is important to emphasize that in this case, it is the court, after obtaining the opinion of a psychological expert, that determines which parent will have custody and during which periods the child will stay with the other parent. Additionally, alimony is determined, all in respect of the principle of the best interests of the child.

The court aims to avoid any inequality resulting from the dissolution of the marriage.

In these scenarios, the *Family Code* provides a legal framework for the dissolution of the marriage, ensuring that the process is based on mutual consent or justifiable reasons, while also safeguarding the rights of any children involved and ensuring that both parties' free will is respected.

#### 4. Conclusions and Recommendations

In the Family Code, individuals who are about to marry have the right to choose the person they will marry, whereas in the Kanun of LekDukagjin, marriage is seen as a completed agreement between the families of the individuals who would marry, and the consent of the individuals themselves was neither given nor sought.

The Family Code highlights equality between husband and wife, whereas in the Kanun of LekDukagjin, the authority of the husband and the undervaluation of the female figure are noticeable.

In the Family Code, marriage is defined as a monogamous institution, while in the Kanun of LekDukagjin, there were exceptional cases where a husband could have more than one wife.

In the Kanun of LekDukagjin, the institution of engagement is emphasized as an important institution that cannot be bypassed, while in the Family Code, it is an institution that is not clearly defined.

The property regime is determined by the will of the individuals who marry in the Family Code, whereas in the Kanun of LekDukagjin, property was managed and inherited by the husband, including the dowry brought by the wife.

The dissolution of marriage, in the Family Code, is foreseen as a right of the spouses, and it is expressed through a court decision. Meanwhile, in the Kanun of LekDukagjin, the dissolution of marriage was very rare, and the reasons for it were resolved and decided by the council of elders.

- In the Kanun of LekDukagjini, in situations where the dissolution of marriage was very rare, the regulations arising from this fact were not addressed. On the other hand, in the Family Code, there are legal provisions that regulate the consequences that will arise regarding property, surname, custody, children, etc.
- In the Kanun of LekDukagjini, property was important, but women were excluded from it. On the other hand, in the Family Code, in the case of a legal marriage community, property is considered joint, and in the case of marriage dissolution, the spouses benefit equally. In the case of a contractual marriage community, property is regulated by the parties with free will.
- Cohabitation is an institution unknown to the Kanun of LekDukagjini, while according to the provisions of the Family Code, cohabitation is an institution regulated today, specifically in Articles 163 and 164 of the Code.

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