Maida M. Bećirović-Alić*

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COMPARATIVE LEGAL REVIEW OF MARRIAGE IN SHARIA LAW AND POSITIVE FAMILY LAW OF THE REPUBLIC OF SERBIA

Abstract

Comparative legal analysis of natural and positive law has provoked various disagreements and discussions on the topic from the earliest periods of history. Proponents of natural law believed that such a comparison could not be made because natural law is true, irreplaceable and comes from God, while positive law has been regulated by man, following the example of all other rights that exist on earth. Positive law defines marriage as a community of life governed by legal norms, which is an expression of the undoubted interest of society to make marriage a legal institution, and the Qur'an, as a main source of Sharia law, categorizes the institution of marriage on a very precise system based on the strongest and safest principles that guarantee happiness to spouses, peace and morality to communities and society. The aim of the research is to present the understandings of natural-legal and positive-legal theory of law through a comparative analysis of the institute of marriage in Sharia law and law of the Republic of Serbia where the focus on this and similar issues should not be the "compatibility" of Sharia with "universal human rights norms" or *vice versa*, the focus should be on explanation and approaching of norms in order to make it easier to overcome, understand and accept differences.

Keywords: Sharia law, positive law, family law, marriage, family.

* Doktor pravnih nauka, vanredni profesor, Univerzitet u Novom Pazaru, Novi Pazar, Srbija. E-mail: *maida.becirovic@uninp.edu.rs*

UPOREDNOPRAVNI PRIKAZ BRAKA U ŠERIJATSKOM PRAVU I POZITIVNOM PRAVU REPUBLIKE SRBIJE

Sažetak

Uporednopravna analiza prirodnog i pozitivnog prava je od najranijih vremena izazivala različita neslaganja i diskusije na temu. Zagovornici prirodnog prava su smatrali da se ne može vršiti ovakvo poređenje jer je prirodno pravo istinsko, nezamjenljivo i dolazi od boga, dok je pozitivno pravo uredio i uređuje čovjek, po uzoru na sva ostala prava koja postoje na zemlji. Pozitivno pravo definiše brak kao zajednicu života koja se uređuje pravnim normama, što je izraz nesumnjivog interesa društvene zajednice da brak bude pravni institut, isto tako Kur'an kao glavni izvor šerijatskog prava kategorizuje instituciju braka na vrlo preciznom sistemu koji počiva na najčvršćim i najsigurnijim načelima koja garantuju sreću supružnicima, a mir i moral zajednici i društvu. Cilj ovog rada je predstavljanje osnovnih shvatanja prirodnopravne i pozitivnopravne teorije prava kroz uporednu analizu instituta braka u šerijatskom pravu i pravu Republike Srbije gde fokus istraživanja neće biti na kompatibilnosti šerijatskog prava sa univerzalnim normama ljudskih prava, ili suprotno, već će fokus biti na pojašnjenjima ovih normi u cilju lakšeg razumevanja i prihvatanja različitih učenja i shvatanja.

Ključne reči: šerijatsko pravo, pozitivno pravo, porodično pravo, brak, porodica.

1. Introduction

The universal definition of marriage that has been accepted and implemented as such by all legal systems is that marriage is a community of life between two persons of different sexes (woman and man) that has sociological, cultural, religious and legal consequences. In addition, the basic function of marriage is to start a family (families take a variety of forms, including marital and non-marital relationships, and that constitutional considerations play an increasingly important role in family law) and have children (Abrams *et al.,* 2015, p. 1). The only element that varies in modern legal systems is related to the subjects of marriage, because certain countries accept the definition that marriage is a living

community of two persons without specifying gender. The subject of the research is to present positive legal regulations of the Republic of Serbia and regulations of Sharia law governing the institute of marriage, comparative legal analysis, as well as the issue of legal consequences of concluding and terminating Sharia marriage in the state-legal sphere in accordance with positive regulations.

Family law of the Republic of Serbia which regulates marriage and marital relations, extramarital relations, child–parent relations, family property relations, and other institutes related to this topic, provides the following definition of marriage: "Marriage is a legally regulated community of lives of women and men" (Family Law RS, 2005). Several characteristics of the legal concept of marriage derive from this definition. First of all, marriage is defined as a community of life that is regulated by law, according to the letter of the law, therefore, the institute of marriage is intended exclusively for persons of different sexes, and finally, according to the legal definition, the union of the life of a woman and a man is important for the concept of marriage, which means that the basic content and main goal of marriage is to establish a real life community of a woman and a man. Marriage is a community of life in which a woman and a man meet different needs of emotional, psychological, sexual, pro-creative, economic, cultural and other nature. Contrary to Serbian law, Sharia lawyers do not have a single definition of marriage contract. However, all of them are approximate in content and aim to define and determine the basic intentions of marriage in Islam. Their meanings can be summarized in one definition that marriage is a voluntary contract between a man and a woman who according to Sharia can enter into a marital relationship on the basis of which they become allowed to each other and which is concluded to establish a common marital life and procreation (Topoljak, 2015, p. 22), marriage is also defined as a strong bond of healthy human nature, which aims at offspring, strength and distance from debauchery and harmony of male strength and female weakness. Marriage achieves social interests, preservation of the human race, salvation from moral anarchy, salvation from various diseases and peace of mind and contentment (Počuča, 2011, p. 269).

Sharia law advocates that the basic motive for marriage is the rejuvenation of a society with good and healthy offspring and the acquisition of happiness and a pleasant life in a newly established marital union. The Qur'an as a main source of Sharia law is clear and unequivocal about this: "And one of His proofs is that He creates for you, of your kind, women to be humble with them, and that He establishes love and compassion among you; these are, indeed, lessons for people who think" (Korkut, 1977, p. 21). Islam warns its followers that family happiness, raised and healthy children, moral community and society depend above all on the right choice of spouse. That choice must be far from all unreasonable feelings, limited interest, and transient benefit (Topoljak, 2015, p. 13).

Marriage law in the Republic of Serbia, as already mentioned, is regulated by the Family Law (Family Law RS, 2005), which prescribes the basic principles on which the institute of marriage is based. One of the most important principles of marriage, which derives from the principle of autonomy of will, is the principle of free consent to marriage. This principle speaks in favor of the contractual theory of marriage, *i.e.* the presence (statement) of the will is a constitutive element of marriage. Otherwise, a sanction of absolute nullity is envisaged if there was no declaration of will to marry, or relative nullity if there was a flaw in the will, *i.e.* if the will was given under duress, fraud or relevant delusion. This principle is realized through the requirement that marriage and legal relations in marriage and family are regulated by law. Legal regulation of a marriage means prescribing the preconditions and procedure for concluding and terminating a marriage, as well as the legal consequences that occur upon entering into or terminating a marriage. Marriage, in other words, is such a legal institution, due to whose role and importance a social influence should be achieved in determining its content (Draškić, 2015, p. 75). Contrary to the Sharia pattern of regulating marital relations based on the principle of subordination of the husband's will, positive family legislation is inspired by the so-called democratic pattern that implies the principle of equality of will of spouses, which was implemented by the Family Law of RS. From the above definition of marriage, another principle can be clearly crystallized – monogamy. The application of this principle is additionally ensured in Family Law (by standardizing marriage as a marital obstacle) and in Criminal Law (Criminal Law RS, 2005), (by incriminating double marriage). More precisely, our law does not allow simultaneous polygamy (for one person to be married to several persons of the opposite sex at the same time), but successive polygamy is not prohibited, *i.e.* to conclude unlimited number of new marriages after the termination of one marriage. In accordance with the principle of separation of church and state, the principle of secularism envisages the exclusive competence of state bodies to conclude marriages and resolve all disputes related to marriage. The secularity of marriage also implies the rule that the civil form of marriage is obligatory. The constitutional guarantee of rights and freedom of religion (Constitution of RS, 2006) also means that a married couple can decide, before or after the conclusion of a compulsory civil marriage, to conclude a marriage in the religious form of marriage, in accordance with the regulations of ecclesiastical law. Finally, the principle of completeness and permanence should be mentioned, the completeness of marital relations implies the existence of a community of life of the spouses in the personal property sphere. The permanence of a marriage is reflected in the legal concept of marriage as an institution that cannot be established with a limited duration or whose occurrence can be modified by a condition set by the spouse, *i.e.* forever.

Namely, the law envisages situations when a marriage can end "voluntarily" (by divorce or annulment) or "involuntarily" (by death, that is, by declaring a missing person dead) (Panov, 2019, p. 22). It has to be mentioned that despite the fact that Islamic countries have taken similar approaches in adopting family and personal status laws derived from Islamic *fiqh*[1], each Muslim society has its own characteristics, leading to significant differences between the specific *fiqh*-based rule, juristic opinions and textual interpretations implemented in the personal status codes adopted in different countries (Welchman, 2004, p. 17).

2. Conditions and Legal Consequences of Marriage

The right to marry is one of the basic human rights that is guaranteed in the most important international human rights documents.[2] In principle, therefore, everyone is allowed to marry, because married life is a natural form of meeting the diverse life needs of adult members of society, so that the number of preconditions for marriage is declining in most rights in the world, but they still exist in positive law of modern states as well as in Sharia.

In order to be valid and concluded in a legal way, it is necessary for a marriage in Sharia to fulfill some basic elements – *rukn*[3].

A valid marriage in Sharia law is considered to be a marriage that fulfills the three basic elements: offer – *el-idžab* and acceptance – *el-kubul,* two contracting parties – contractors, intention and goal of concluding the contract (Topoljak, 2015, p. 47).

The basic element of the legitimacy of any treaty in Islamic law is the mutual satisfaction and the will for its conclusion, which must be found with the contracting parties. However, these elements are an abstract concept that is felt and rested in the heart, and therefore in a material sense it cannot be seen or felt. It can only be pointed out through certain verbal or practical actions. Due to this fact, the offer – *el-idžab* and acceptance – *el-kubul*, when concluding a contract must be clear and explicit evidence that will indicate and confirm the satisfaction and desire of the contractor to conclude a contract. An offer means a speech first delivered by the contractor, provided that he expresses a desire to marry in this case.

[1] Jurisprudence.

[2] The right to marry is guaranteed by international human rights instruments, such as Universal Declaration of Human Rights, (Art. 16, 1948), International Covenant on Civil and Political Rights (Art. 23, 1966) and the International Covenant on Economic, Social and Cultural Rights (Art. 10, 1966).

[3] *Rukn* in Islamic jurisprudence refers to obligatory act.

On the other side, acceptance means a speech given by another contractor, provided that he expresses a desire to accept the marriage offered. Every contract, even a marital one, has four types of conditions:

1. Terms of concluding a marriage contract – *šurutul-in'ikad*;
2. Terms of validity of the marriage contract – *šurutus-siha*;
3. Terms of realization of the marriage contract – *šurutun-nefaz*;
4. Terms of continuity of marriage – *šurutul-luzum* (Et-Tantavi, 2010, p. 84).

These four conditions of conclusion must be met in the basic elements of the marriage contract, because if any of them were omitted, such a marriage in Islam would be annulled.

Specifically, for a marriage contract, to be valid and produce legal consequences, it must meet two more conditions: the conclusion of the marriage contract is verified with testimony and the woman with whom the marriage is concluded should be Sharia-appropriate for marriage, *i.e.* there is no reason for her prohibition to enter into marriage, whether of a temporary or permanent nature.

The validity of a marriage contract requires the cumulative fulfillment of all the conditions necessary for the validity of any ordinary contract. If an older minor entered into a marriage on his own behalf, that marriage would be correct but conditional and dependent on the permission of his guardian, because such a minor has incomplete legal capacity. If his guardian allowed it, it would be consumed, otherwise it would be annulled. The contractor may marry for himself through a representative and guardian or an unauthorized person.

Most legal experts believe that coming of age is not a condition for the validity of a marriage and therefore argue that a marriage entered into with a minor or between minors is valid when guardians enter into them on their behalf. However, some legal theorists believe that coming of age is a condition for the validity of a marriage and therefore say that any marriage concluded between minors or a minor and an adult is invalid and does not produce any legal consequences (Stevanov, 1976, p. 55) but the legal provisions do not provide a basis for such an interpretation (Mladenović, 1981, p. 295; Đurović, 1988, p. 76).

Modern Islamic laws on family law say that the onset of adulthood in boys or girls begins with the appearance of natural signs that allude to it. According to these laws, a young man and a young woman are considered to be of legal age, regardless of whether they showed natural signs of adulthood or not, when the young man turns eighteen and the girl turns seventeen. However, if a young man claims to have reached the age of majority at the age of fifteen and a girl at the age of thirteen, they will be allowed to marry if permitted by the competent authorities and guardians (Topoljak, 2015, pp. 127-134).

Sharia law prescribes provisions that contain regulations regarding women who are forbidden to marry. Such women can be divided into two categories: women with whom marriage is prohibited forever and women with whom it is temporarily prohibited. According to blood kinship, four categories of women are forbidden in Islam:

1. A descending line of kinship, no matter how much it descended. According to this rule, the following are prohibited: daughters, daughters' daughters, sons' daughters, daughters' sons, etc.
2. Ascending lineage, no matter how much it rose. According to this rule, the following are prohibited: mothers, fathers and mothers, fathers and mothers-in-law, etc.
3. The lateral line of the parents and their descending line, no matter how much it descended. According to this rule, the following are prohibited: sisters, whether they were born by father or mother, cousins, cousins' daughters, etc.
4. Lateral line of grandparents first knee. According to this rule, the following are prohibited: aunts, *i.e.* father's and mother's sisters, father's and mother's aunts, etc. However, according to Islam, they are not forbidden: uncle's, aunt's and uncle's, because they are the second and not the first generation (Et-Tantavi, 2010).

The following verse from the Qur'an is proof that the above-mentioned categories of women are forbidden to a man: *"It is forbidden to you: your mothers, and your daughters, and your sisters, and the sisters of your fathers, and the sisters of your mothers, and your cousins."* (Korkut, 1977, p. 83).

The Qur'an is also precise in that Sharia recognizes and respects kinship through milk. It is said in the Qur'an: "You are forbidden [...] and your mothers who breastfed you and your sisters in milk" (Korkut, 1977, p. 83), and the Prophet Muhammad said the following: "Breast-feeding makes unlawful (for marriages) the same things that blood tie makes unlawful" (Ibn Majah).

The Family Law of the Republic of Serbia prescribes the conditions for concluding a marriage, which can be classified into (1) preconditions for the existence of a marriage, (2) preconditions for the validity of a marriage and (3) marital prohibition (Draškić, 2015, p. 68).

The marriage contract is one of the holiest contracts in Islam. It is concluded between a man and a woman with the goal of staying together forever. In order for this intention to be realized as well and completely as possible, the legislator has prescribed certain obligations and rights for those who conclude it. These obligations and rights can be divided into three types: joint duties of spouses,

duties of the husband towards the wife and duties of the wife towards the husband (Draškić, 2015, p. 77).

The legal assumption that expresses the biological component of marriage in Family law of the Republic of Serbia, Art. 3, is that persons who marry must be of different sexes (Family Law RS, 2005). On the other hand, this condition of marriage validity testifies to the prevailing social orientation that marriage is intended only for persons of different sexes, and that the concept and legal regime of marriage cannot include living communities of persons of the same sex. Although homosexuality is no longer considered a disease, it is considered an important social taboo in most societies. Therefore, many legislations in the world have approached the legal regulation of such communities, which aims to reduce their social stigmatization by subjecting them to the principle of "different, but equal" (Draškić, 2015, p. 79).

Another important precondition for the validity of a marriage is a consistent statement of the will of the future spouses to marry. In order for a declaration of will to be legally relevant, it needs to meet several conditions. The declaration of will of the person entering into marriage should be given in words spoken or written, unlike the rules governing the manner of expressing the will in the law of obligations. In other words, a marriage can never be concluded by certain signs, gestures or by undertaking another action that has the same meaning and the same purpose, nor can the expression of will during the marriage ceremony seem like conclusive actions, *i.e.* acts on the basis of which the existence of a certain legally relevant intention can be indirectly, but certainly established. Exceptionally, if a person who declares his/her will to marry has certain physical deficiencies that prevent him/her from communicating with the officiant conducting the marriage ceremony (for example, a deaf-mute person), as well as if he/she does not know the official language of the community, an administrative body will be assigned to communicate with such a person (Family Law RS, 2005). The declaration for marriage must be given by the spouses at the same time. This means that the statement of one spouse is immediately followed by the statement of the other partner (Panov, 2019, p. 23). The declaration of will to marry must unequivocally and clearly show the existence of a serious intention to marry. Therefore, a statement given in jest and play, as well as a statement given in an incomprehensible or ambiguous manner, does not produce any effect on the marriage (Draškić, 2015, p. 85). The declaration of the will to marry must be given personally by the fiancé/fiancée, since the marriage contract is a special family law contract for which a formal form is required that requires the presence of both future spouses. Exceptionally, only if there are particularly justified reasons (for example, severe contagious disease, stay in a remote part of the world, serving a prison sentence abroad,

captivity, etc.) the competent municipal authority shall allow a marriage to take place in the presence of only one spouse and a proxy spouse. Most modern rights require a special ceremonial form, which in legal theory is referred to as an essential form (*forma ad solemnitatem*). The legal effect of an essential form consists of the fact that, when such a form is provided by law or contract, a legal transaction cannot arise until that form is fulfilled, *i.e.* a transaction not undertaken in that form does not produce any legal effect (Draškić, 2015, p. 87).

Marital disorders are negatively determined facts provided by law which, if they exist at the time of marriage, cause its nullity. Family law literature classifies marital disorders as follows: absolute and relative, removable and unavoidable, temporary and permanent, absolute and permanent – in the sense of whether they act towards everyone (*erga omnes*) or towards certain persons (*inter omnes*) (Panov, 2019, p. 28).

A person who is already married cannot enter into another marriage at the same time, and the marital obstacle is both a valid and an invalid marriage until it is annulled by a final court judgment. The conscientiousness or negligence of a spouse who entered into a new marriage during his/her previous marriage, as well as knowledge or misconceptions about the existence of this marital disorder in the other spouse, are not legally relevant for annulment of such marriage (Draškić, 2015, p. 92).

Marriage cannot be concluded by a person who is not capable of reasoning. The reasons for the existence of this marital disorder are legal (marriage is essentially a contract for the community of life of a woman and a man), moral (protection of the interests of the incapable person) and eugenics (prevention of rusty and lasting genetic consequences) (Panov, 2019, p. 28).

In our positive family law, in Arts. 19, 20 and 21, marital barriers are blood, in-laws and adoptive kinship[4] (Family Law RS, 2005). According to Family Law

[4] Kinship means the right to recognize the natural and social (or only social) relationship of two or more persons, on the basis of which certain rights and duties are based between them. A blood relationship is a natural, biological connection between two or more persons descended from each other (straight line) or from a common ancestor (lateral line). Marriages that would be concluded between blood relatives are considered socially undesirable, because such marriages more often give birth to children with greater physical and mental disabilities. Whether the circle of blood relatives who are forbidden to marry each other will be narrower or wider depends, above all, on moral, customary, religious or traditional understandings about the inadmissibility of such marriages. An in-law relationship is the relationship between one spouse and the blood relatives of the other spouse. Lines and degrees of in-law kinship are determined analogously to blood kinship. Therefore, in the same line and in the degree of kinship in which the spouse is related to a person by blood, in the same line and degree his spouse is in that relationship with that person. The meaning of marital incapacity is that maintaining an already concluded marriage does not jeopardize the chances that one spouse will be able to marry a close relative of the other spouse. Such

of RS, Art. 22, marital interference with guardianship means that it is inadmissible to enter into a marriage between a guardian and a ward, of course, only for the duration of the guardianship relationship.[5] Article 23 of the same Law prescribes that natural persons acquire marital maturity at the age of majority, at the same time as acquiring general business ability. Therefore, a person who has not reached the age of 18 cannot marry.[6]

Juvenile marital disability is, however, remediable marital disability, provided that some of the requirements prescribed by law are met. Namely, the Basic Court is authorized to issue a decision on dispensation from marital disability of a minor in non-litigious proceedings if it determines: (1) that the request was submitted by a person who has reached 16 years of age, (2) that there are justified reasons for marriage and (3) that the minor is mentally and physically mature to perform the rights and duties in marriage (Draškić, 2015, p. 121).

In order for a marriage created by a consensual declaration of the will of the future spouses to be considered valid, it is required that the declared will be free. The property of the will to be free means in matrimonial law that the person declaring the will must not be a victim of coercion or delusion (Panov, 2019, p. 37).

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a prohibition, therefore, indirectly serves to protect harmonious relations in marriage and family and ensures mutual respect between one spouse and the relative of the other spouse. Adaptive kinship (adoption kinship or civil kinship), unlike blood kinship, which represents a natural and biological connection between two persons, is established artificially. The meaning of the legal prohibition for adoptive relatives to marry each other is that adoption establishes the same relationship that exists between a parent and a child. Therefore, kinship after adoption completely imitates blood kinship in terms of calculating kinship by lines and degrees. The legal regime of adoptive kinship as a marital disorder is identical to the one that applies to blood kinship, which means that the adoptee cannot marry all those persons with whom even the adopted child of the adoptive parent could not marry due to marital kinship disorder (Draškić, 2015, pp. 101-103).

[5] This marital impediment was introduced into law for similar reasons that apply to the adoption relationship. Namely, guardianship is a form of special protection intended for persons who are not able to take care of themselves and their rights and interests due to being under age or because they are deprived of legal capacity. Guardianship protection, therefore, is contrary, in its content and social goals, to a relationship that is based on marriage and which implies complete equality of the participants in such a relationship.

[6] It is in the interest of the society to prevent underage marriages as undesirable for several reasons. First of all, because such marriages do not provide enough guarantees that they will be concluded between persons whose psycho-physical maturity is a presumption that marital rights and duties will be successfully performed. In addition, it is quite likely that adolescent pregnancy will adversely affect the state of health of a woman or cause less resilience and poor development of the child. Finally, economic reasons speak in favor of the prohibition of underage marriages, because it is in the undoubted interest of society that every person is educated and thus able to independently provide for the material conditions of their existence, and not to be prematurely burdened with marital and family obligations (Panov, 2019, p. 36).

Once a valid marriage has taken place, it will automatically produce the following joint duties and rights in both legal systems.

The rights and obligations arising from Sharia law are: each spouse has the right to mutual respect and esteem by the other spouse, legalization of family ties by in-law. After a valid marriage, the husband is no longer allowed to marry his wife's mother (mother-in-law) or the wife's daughter, if he had a relationship with her mother, the right to inherit from each other. After entering into a valid marriage, the spouses have the right to inherit from each other, unless there is a Shariah obstacle to it. So, the wife will be obliged to allow her husband to inherit it, because it is his right, and *vice versa*, and in the way it is explained in the literature that deals with Sharia inheritance law (Topoljak, 2015, p. 180). Obligation and right to attribute the child to the husband (father) after such a marriage. It will also be the duty and right of the child to be attributed to the mother in the event that the father denies it if the child is born in a valid marriage.

Sharia law prescribes that the husband, in addition to being obliged to treat his wife nicely, to respect and honor her, is also obliged to give her *mehr*[7] to support her and treat woman fairly if she lives in a polygamous marriage (Es-Sejjid, 2008, p. 346).

The legal system of the Republic of Serbia does not recognize Sharia marriages, but Muslims can marry without any restrictions according to their religious laws and customs, that means that a Sharia marriage in Serbia does not produce legal consequences like a civil marriage but by analogy we can conclude that the legal consequences of a Sharia marriage can be equated with the consequences produced by the institution of extramarital union if all legal conditions are accomplished (Čović, 2020, p. 139) A topic that is often the subject of analysis in Sharia law is marriage of members of Islam with members of other religions.

All Islamic scholars are of the opinion that a Muslim woman is not allowed to marry a non-Muslim, a Christian, a Jew or a member of another religion, as evidenced by verse 10 of Surah Al-Mumtahin – Proven (Korkut, 1977, p. 549).

However, when it comes to men, the provisions for them are different, so basically, Islamic scholars allow marriage to an Ahl al-Kitabiyya[8], while members of other faiths are not allowed to marry men. This is contained among the last verses of the Qur'an: "And you are allowed to eat the food of those to whom the Book has been given, and your food is allowed to them, and honorable believers are allowed to you, and the honorable daughters of those to whom the Book was given before you, when you give them their wedding gifts with the intention

[7] *Mehr* is a wedding gift that a man is obliged to give to a woman at the time of marriage (See: Manić, 2020, pp. 177-195).

[8] A follower of the Book, a Christian and a Jew.

of marrying them and not to commit fornication with them and to take them as concubines[…]"(Korkut, 1977, p. 107). The opinion of the Islamic ulema regarding marriage to the Christian and Jew is unquestionable due to the clarity of the aforementioned verse.

3. Legal Consequences of Concluding Sharia Marriage in the State-Legal Sphere in Comparative Law

It is very important to distinguish the issue of the legal consequences of concluding and terminating a Sharia marriage in the state-legal sphere. When the Archbishop of Canterbury, Rowan Williams, gave a lecture on civil and religious law in England in which he said recognizing certain provisions of Sharia law was "inevitable", he could not have guessed that it would provoke some of the most heated Sharia debates in decades (Ahdar & Aroney, 2010, p. 293).

The story of the application of Sharia in the West is not new. In the late 1970s and early 1980s, the Union of Muslim Organizations formally requested for a special legal system to be applied to Muslims in Great Britain, *i.e.* Sharia. In recent history, the citizens of Great Britain can marry without any restrictions according to their religious laws and customs. However, in most cases, the state will not recognize such marriages. Historically, in addition to the Place of Religious Worship Act (1855), some religious communities have recognized the civil effects of their religious marriages are in certain conflict with the English legal system. One possible solution to such legal conflicts is the Muslim arbitral tribunals, which seek for an adequate Islamic solution, acceptable for both parties, which is within English law (McLoughlin & Abbas, p. 569).

Recently, the Association of Muslims of Canada, following the example of Great Britain, asked the Canadian government to include certain elements of Sharia family law in the Canadian legal system (Karčić, 2008, p. 45). In the European context, "Islamic law", "Sharia" and "*fiqh*" tend to be categorized through aspects of religious "norms" or "values" instead of "rights". Such an approach makes it clear that the incorporation of Muslim norms is subject to a final assessment of the laws and constitution of the state, and will not function as a separate "parallel" legal system. The emphasis on Muslims, instead on Islam, make crystal clear that the main motivator for creating a place for these norms is maximizing personal autonomy and protection of minorities, and that this intention does not, as some theorists state, represent a malicious application of Sharia law in Europe (Malik, 2009, p. 2).

There are two types of legal systems for recognizing religious marriages in Europe: those that do not recognize religious marriages and those that do. In

monistic systems, only civil marriages are concluded, and their state law recognizes only marriages concluded before a civil servant. These countries include Germany, France, Belgium, Ireland, the Netherlands, Switzerland, Hungary, Bulgaria, Ukraine, Luxembourg, Slovenia and Turkey (Martinez-Torron, Cole Durham Jr, 2010, p. 35). In German law, the regulations differ depending on whether they are German citizens or foreigners (Čović, 2020, p. 143).

Some of these systems have followed the system of the US, which is often called "Anglo-Saxon pluralist systems" and include Sweden, England, Finland, the Czech Republic, Slovakia, Italy, Spain, Andorra, Portugal, Malta, and Estonia (Martinez-Torron, Cole Durham Jr, 2010, p. 36). In some of these countries, performing a religious wedding before a civil one is a criminal offense, for example under the Civil Code of the Republic of Turkey, only marriages before a registrar or other civil servant are allowed and recognized, and a religious marriage requires plan to Sharia marry a certificate of civil marriage to be presented. If future spouses decide to perform *nikah*, *i.e.* marry according to Sharia law before entering into a civil marriage, they can be punished under Art. 237 of the Criminal Code and sentenced to imprisonment for up to six months (Yilmaz, 2005, p. 110), the same legal regulations are in place in France, the Netherlands, Switzerland and Bulgaria.

In contrast, English law, for example, recognizes both religious and civil marriage. According to the Marriage Act (1949), the state recognizes three types of religious marriages: marriage entered into according to the rules and customs of the Anglican Church, before a priest and in a public ceremony; marriage entered into according to the customs of other religious communities that are registered in accordance with Places of worship registration act (1855) and marriage entered into according to the religious rules and customs of Quakers and Jews (De Blois, 2010, p. 100).[9]

In order to enter into a Sharia-valid marriage in England, it must take place in a mosque licensed for marriage. Not all mosques in England are licensed to perform Sharia marriages, but some, such as the Central Mosque in Birmingham and the Nur-ul-Islam Mosque in Leyton, are – so the state recognizes Sharia marriages in those mosques. Another more common variant is to first enter into

[9] However, when it comes to divorce, there is much greater potential for conflicts between secular laws and religious norms because two individuals with different interests, rights, obligations under state and religious law and different personal understandings of religious tradition and practice are trying to reach a solution. State laws serve to protect the rights of individuals and may be contrary to religious norms. The parties may apply to their religious courts to terminate the marriage or to annul it, but the state does not recognize that decision (Martinez-Torron & Durham Jr., 2010, p. 37). In some European countries this takes place within mosques in a very informal way, while in countries such as England there are formal Islamic Sharia Councils and Muslim Arbitration Tribunals with specialized staff in charge of resolving inter-Muslim disputes (Wolfe, 2006, p. 440).

a civil marriage accompanied by a sharia marriage. The Muslim Institute in London, one of the leading Islamic scientific institutions in Great Britain, in cooperation with several Muslim organizations, prepared in 2008 a plan of a contract for concluding Sharia marriage in the territory of England (Karčić, 2018).

The Muslim Arbitration Tribunal, known as the MAT, was established in 2007 with the aim of providing an alternative way of resolving disputes among Muslims in the UK. The goal of the Tribunal is to resolve problems on the basis of Sharia law. The Tribunal resolves disputes related to forced marriages, domestic violence, family problems, debts, inheritance, other commercial disputes and mosque disputes. In other words, the Tribunal addresses a number of issues of civil and religious law, in addition to civil divorce, child custody and criminal matters, as well as other alternative ways of resolving disagreements. The Muslim arbitral tribunal is cheaper, more flexible and more discreet than state courts. One of the predominant reasons for the establishment of the Tribunal is that inter-Muslim disputes are resolved in accordance with the teachings of the Qur'an and the Sunnah of the Prophet Muhammad, peace be upon him, and that they are resolved as quickly, equitably and efficiently as possible (Karčić, 2008, p. 111).

The Balkan states regulate this issue in a similar way as other European countries, so Sharia marriage in itself is not valid in Bosnia and Herzegovina (BiH), but Art. 7 of Family Law of the Federation of Bosnia and Herzegovina explicitly states that religious marriage ceremonies can be reported after civil ceremonies (Family Law of the Federation of Bosnia and Herzegovina, Art. 7). The Islamic Community of BiH has given very clear instructions that a Sharia marriage ceremony shall not be held before proof of civil marriage is presented.

The growing movement of people within the European Union has led to an increasing number of marriages between citizens of different countries, and thus to the termination of such marriages. Uneven national conflict-of-law solutions and the absence of international regulations governing divorce with an international element have led to legal uncertainty and unfair solutions for nationals of member states. In order to eliminate legal uncertainty and injustice, the European legislator has started adopting acts regulating this area. The two most important acts still in force today are the Brussels II bis Regulation, which regulates the rules on jurisdiction, recognition and enforcement of decisions in civil matters relating to divorce, legal separation and annulment, and the Rome III Regulation, which regulates the issue of applicable divorce law. These two regulations complement each other and are applied in parallel (Stjepanović, 2020, p. 90).

4. Conclusion

From all the above, it can be concluded that family law and its norms represent the core of the organization of the most important cell of any society, and that is the family. The central institute that is treated in this sense by these norms is marriage, which is protected by the norms of both positive and natural legal systems. What can be noticed in the comparative legal analysis of positive family law of the Republic of Serbia and Sharia law is that the goals of starting a family and marriage are presented through the moral aspect of preserving society from all negative influences but Sharia pays much deeper attention to marriage, its regulation and preserving. The fact is that Sharia is exclusively against equalizing marital and extramarital union, which is argued by the fact that extramarital union destroys the status of the family in the community, which should be a key segment for validity of one society, and in addition prescribes severe sanctions for those who participate in it. On the other hand, the current family laws of democracies give all the freedom to organize personal family life, and sharp criticism has been directed at the norms of Sharia law precisely because of the closed and conservative system and to the existence of polygamy, where the loudest are especially feminist movements, in that sense Sandberg and Thompson assert that the Sharia debate points to wider concerns about two areas of family law in particular: the formalities concerning marriage and the privatization of family justice. What is quite clear from factual situation that Sharia law protects the interests of women and children in the marital community and norms related to marriage and family, especially the segment that sets deadlines, clearly indicate that the goal of Sharia law is to preserve the family as an institution, what is expected if it is considered that Sharia regulations, as regulations of a system of typical natural law, originate from God.

The family, children, as well as all institutes of family law are protected by a plethora of international documents that have been implemented in national legislation, which is also dealt with by special bodies that specialize only in those professional matters. The conclusion that can be deduced from all the above facts is that these two legal systems, in addition to all the differences and specifics that distinguish them, the contradictions of conflict resolution methodology, have common principles and goals of norms and that is legal protection of the family as the basic cell of society.

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