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**Are Albanian legal rules on divorce adequate with high-conflict divorces?**

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**Introduction**

The respect for private and family life is a fundamental human right recognized and guaranteed from the European Convention of Human Rights[[1]](#footnote-1), in which Albania became member in 1996.[[2]](#footnote-2) In its narrow meaning the notion of family law, as basically protected by the Convention, means the parents and the children. But in the meaning of the Convention this is not limited only to the parents and children. The jurisprudence of the European Court of Human Rights[[3]](#footnote-3) has accepted that the family life covers all persons who have blood or juridical relationship like marriage.

The right to marry and found family is provided by article 12 of the Convention and is closely related with the right for respect to private and family life as provided by article 8. According to article 12 of the Convention ‘*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’.* The concept of the family life, according to the jurisprudence of the ECtHR, involves the idea to provide protection to spouses from each other. In its jurisprudence the Court has accepted and defined the respect and dignity between spouses during marriage as the fundamental objective according to the article 8 of the Convention, where the Court acknowledged the positive obligations of the State for insuring the effective respect to family life between spouses, especially in the circumstances of a crisis in a couple[[4]](#footnote-4).

Universal Declaration of Human Rights in which Albania is part followed from the International Covenant for Civil and Political Rights has stipulated the obligation of a free and complete consent of the spouses to get married, during marriage and dissolution of the marriage. This principle is partially guaranteed from article 14 of the Convention and article 5 of the Protocol 7, which provides that *’Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interest of the children’.* The wording *‘in the event of marriage dissolution’*, does not imply the obligation of the State to provide the dissolution of marriage or all the other forms of dissolving the marriage.

The Constitution of Albania adopted in 1998, has reaffirmed the positive obligation of the State deriving from the ECHR. Article 53 of the Albanian Constitution states that *’Everyone has the rights to marry and have a family. Marriage and family enjoy special protection of the state.’* ECHR, its protocols and jurisprudence of the ECtHR constitutes part of the internal legal system in Albania in the framework of article 122 of the Constitution of Albania. [[5]](#footnote-5)

**2. Divorce in the Albanian society**

One of the forms of the termination of the marriage is the divorce. The divorce is not a new institution in Albania. This is a very ancient institution known from the Canon of Lek Dukagjini and Skanderbeg and developed through years. In the time of communism the society and finally the court has to do every effort towards the conciliation of the spouses and in the case of the divorce the court was obliged to find the fault and the guilty spouse. After the fall of the communism regime in 1992, the first amendment of the Family Code that time in force has been the abolishment of the obligation of the court to decide on the fault when has not been requested from the spouses. The procedures of divorce became shorter and easier than before. During 1992 till 1996 has been raised the number of the divorces in Albania. Free will to marry and to divorce became true only after the years 1992.

* 1. **Dissolution of the marriage under the Albanian Family Code**

The Family Code of Albania is adopted in 2003[[6]](#footnote-6), after the last one of 1981. The idea of respect to rights and freedoms of the spouses has been launched by enabling them to enjoy the same position in the family. According to the article 1 of the Family Code ‘*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.’*

The family Code of 2003 as the old one stipulates the obligation of loyalty, help and cooperation. According to the article 50 of the Family Code ***‘****Within marriage men and women have the same rights and obligations.**Marriage partners have a mutual obligation of loyalty, for moral and material support, and for cooper*ation in the interest of the family and cohabitation.’

The existence of family life is based on relations due to marriage and relations out marriage, which for the first time has been extended in the case Marcks vs Belgium.[[7]](#footnote-7) According to the article 14 of the Convention is prohibited the discrimination, opening the gate to the evolution of the practices of many contracting States.

The Albanian Family Code regulates more thoroughly the issues related to the consent the spouses should give when getting married, conditions regarding the content and form of the marriage, personal and property relations between the spouses.

According to the article 123 of Albanian Family Code *‘Marriage terminates with the death of one of the spouses, with a declaration that one spouse is presumed dead, or upon the dissolution of their marriage.’*

Spouses enjoy equal rights and responsibilities in relation to their children, and this does not hinder the states to take the respective measures in the interest of the children.

The Family Code of Albania provides different forms of the dissolution of the marriage: **(i)** through the consent of the spouses; **(ii)** dissolution of marriage based on a period of separation and **(iii)** the dissolution of the marriage based on the request of one spouse.

**2.2 Dissolution of the marriage through the consent of the spouses**

Dissolution of the marriage through the consent of the spouses has been adopted for the first time in 1996 according to some amendment on the civil procedural code related with some procedural rules on the dissolution of the marriage.

With the new Family Code, the procedural rules are abrogated and the rules on the dissolution by consent of the spouses are stipulated under article 125 of the Family Code which provides that *‘When spouses agree on the dissolution of marriage, they submit to the court for approval, together with the request, a settlement agreement that stipulates the terms for the dissolution of the marriage.*’ In such cases the spouses or their representative can submit a request to the court.

The court examines the request, initially hears from each of the spouses separately, then together without the presence of their representatives, and finally with their representatives, if they have any.

The court decides on the dissolution of the marriage after determining that each party freely desires to dissolve the marriage and has given their consent. In the same decision, the court approves the settlement agreement that stipulates the terms for the dissolution of the marriage. The agreement must contain the provisions for the care and education of any minor children, financial support for their care and education, provision for alimony if needed and if possible the division of their assets.[[8]](#footnote-8)

If the agreement does not properly provide for the needs of the children or one of the spouses, the court may suspend the judgment for 3 months and request that the spouses make the necessary changes to the agreement.

If in 3 months the necessary changes have not been made, the court may refuse to approve the agreement and dismiss the request for the divorce by agreement of the spouses.

**2.3 Dissolution of marriage based on a period of separation**

According to the article 129 of the Family Code, the spouses may request dissolution of their marriage when they have lived separately for a period of 3 years and in such a case they specify in their request the provisions for child support and alimony.

Only in May 2003 for the first time has been provided the dissolution of the marriage based on a period of three years of separation, because of the emigration of one of the spouses without the consent of the other spouse or the separation de facto of the spouses for many years.

During the years 1992-2002, the court decided the dissolution of the marriage based on the request of one spouse in the case of the separation even for a period of two months minimum or 10 years maximum.

As long as the separation has been not provided by law, meanwhile there was an obligation of the spouses to live together, for the first time, the legislator has been obliged to reflect the reality in the legislation and provide as a form of the dissolution of the marriage based on a three years of separation. Usually, the long separation has been presented as a ground for divorce together with other grounds provided by law, based on the request of one spouse. In such cases the district courts has found that there has been a breach of the spouses obligations.

According to the article 130 of the Family Code in force, the court can refuse to grant dissolution of the marriage, based on separation, if the other spouse proves that the dissolution of marriage will have especially grave moral and material consequences for the children or the other spouse. The request for dissolution may be re-submitted, based on the same cause, if new circumstances arise. The Albanian Family Code considers the best interest of the child as an important principle.[[9]](#footnote-9)

The dissolution of the marriage based on the separation may be requested by one of the spouses, but the other spouse has the right to submit a counterclaim requesting the dissolution of the marriage under others grounds as provided form the Family Code. In such a case is the court, which decides to refuse the grant the first request and accept the counter claim. In this case, the court can refuse to grant the original petition and accept the counter-petition thereby dissolving the marriage.

**2.4 Dissolution of the marriage based on the request of one spouse**

The Family Code of 2003 has stipulated the same grounds for divorce as the Family Code of 1981 providing in the article 132 that *’ 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. ‘*

In the case of the dissolution of the marriage based on the request of one spouse for several grounds starting with continuous quarrels or maltreatment and continue with the repeated violations of marital obligations, the spouse has to prove to the court that because of the over-mentioned grounds the joint life became impossible and the marriage has lost its purpose.

The court may assign fault, in the dissolution of the marriage, only when requested to by one or both spouses. [[10]](#footnote-10)

Almost all of the cases of divorce in the Albanian courts are because of continuous quarrels, maltreatment, severe insults, adultery or repeated violations of marital obligations as provided through the article 50 of the Family Code *such as mutual obligation of loyalty, moral and material support, cooper*ation in the interest of the family and cohabitation.

Continuous quarrels are the most known ground for divorce presented from the spouses in the court. Such quarrels happens because of the difference of the characters of the both spouses, repeated violation of loyalty, violation of the obligation for moral and material support, missing of the cooperation in the interest of the family and missing of the cohabitation.

In the case of the continuous quarrels the spouse has to prove to the court that the family life is not more possible and there is not more scope of the marriage. In such cases the divorce came as breach of the *affection maritalis,* meaning the end of the spiritual relation between the both spouses. In such cases there is a missing of the love, respect and cooperation between the spouses.

With the decision no. 109, dated 17.01.2006, the district court of Tirana has found the grounds for divorce, in the case that the husband didn’t fulfill his mutual obligation in the family and to the children and because of the missing of the respect towards the wife.[[11]](#footnote-11)

 In another case, the district court of Tirana through the decision no.928, dated 11.02.2011 has found as ground for divorce the continuous quarrels based on the difference of the characters of the spouses and the difference in thinking and conceiving family life. The same ground has been presented in another case to the district court of Tirana, followed by the violence. [[12]](#footnote-12) In another case, through decision no.2568, dated 19.03.2012, the district court of Tirana has found the missing of the free will to continue the family life, and as consequence there is no need for any other evidence to prove that the family life is ended in realty. According to the court, it is sufficient the one of the spouses’ convince to come on the terms of the art.132 of the family Code, on the dissolution of the marriage.

 Maltreatment under the art 132 of the Albanian Family Code is considered the violence in all the forms, such as physical, sexual, economic, psychological. The maltreatment in the Albanian families is a very spread phenomenon. Sometimes the maltreatment has been aggravated till the murder of the wife.

Severe insult is a form of the psychological violence, in which circumstances the family life has not sense. In such cases there is a total missing of the respect for the other spouse.

In the case of the repeated violations of the spouses obligations according to the law, when will be proved to the Court from one of the spouses then the court has to decide on the dissolution of the marriage.[[13]](#footnote-13)

On the other hand for the first time article 61 of the Family Code has provided that in the case that one of the spouses clearly fails to fulfill his/her obligations and puts at risk the interests of the family, the court, upon request of the other spouse, can approve urgent measures regarding the spouses. The extent of such urgent measures must be specified and must not exceed 3 years. In this case the court has the discretion to decide on the dissolution of the marriage if has found that during the marriage, the spouse has not fulfilled his/her obligation after failed to execute the urgent measures approved by the court. This is a novelty in the Albanian Family Code, because has created a mechanism to prevent the divorce of the spouses at least for 3 years in the case of the violation of the marital obligations.

In every case, it should be proved that the joint life is impossible and the marriage has no more purpose for one or both of the spouses.

The Family Code for the first time in 2003 has provided the domestic violence and the protection that should be provided to the victim of the violence. Maltreatment is one of the grounds for divorce, but the law requires that it had been reflected in the continuity of the marriage in the future.

In the Family Code there are not provisions that in the case of the domestic violence, the court has to decide upon the request of the spouse for the divorce. According to the article 62 of the Family Code, *‘ The spouse, who is subjected to violence, has the right to request that the court order as an urgent measure the removal of the spouse, that perpetrated violence, from the marital residence.‘*

There are a lot of cases, when the Court decide for a protection order, but has dismissed the request for the dissolution of the marriage based on the violated spouse ‘s request. In several cases, the domestic violence has been finalized with the murder of the violated spouse.

In Albania is adopted the law no.9669, dated 18.12.2006 “On the measures against the violence in family relations”, which regulates the protections of the family members and the measures adopted from the court through protection orders in the case of the violence in the family relations.

 Adultery is another ground for divorce under the article 132 of the Albanian Family Code. The obligation for loyalty and mutual respect is crucial during the marriage. In case of the breach of such obligation, when evidenced as requested by law the court has to decide on the divorce.

According to the article 132, further ground for divorce is the severe criminal punishment of the spouse. There is not e definition, which will be considered severe criminal punishment, but it will be in the discretion of the court. Almost in all the cases when the divorce is based in this ground, is found that the criminal punishment has been not severe as requested by law. For the court, except the fact of a criminal punishment it is important the will of the spouse and the fact that the marriage has lost its purpose. There is not a common practice in the judgment of such cases.[[14]](#footnote-14)

The same is ground of the incurable mental illness. Usually the mental illness is recoverable and it is hard to find the case in which the mental illness can be considered curable or incurable. There is an obligation of the spouse for moral support for the other spouse in support and interest of the family and cohabitation. There is not a common practice of the Albanian court, but usually the courts has based their decision on the expertise of the doctor who found curable or incurable the mental illness of the spouse.

For all the cases raised in the court for the grounds related to the article 132 of the Family Code, there is a margin of appreciation to the court to decide in which case has to decide on the dissolution of the marriage, even there is or not a high-conflict for divorce.

According to the new provisions of the Family Code, there is the obligation of the Court to try a reconciliatory hearing with both spouses personally in attendance.

The judge may hear each of them individually and later on jointly, without the presence of their representatives. If reconciliation is reached, it is noted and the request for divorce is dismissed.[[15]](#footnote-15)

If the plaintiff/spouse is not present at the reconciliation hearing, despite having proper notice of the hearing, a single judge may decide to dismiss the case.

When the defendant/spouse is not present, despite having proper notice, the judge shall postpone the reconciliation hearing and again notify the defendant/spouse. If, the defendant/spouse does not appear after the second notice, except for reasonable cause, the judge, after hearing the plaintiff/spouse and determining that reconciliation of the spouses cannot be achieved, shall set the judicial hearing and order the presentation of necessary evidence at said hearing.[[16]](#footnote-16)

The court can postpone the declaration of its decision up to 1 (one) year when it is not convinced that all possibilities for reconciliation have been made between the spouses.[[17]](#footnote-17)

The novelty of the Family Code it is that the Court has the discretion to do the evaluation of the grounds for divorce taking in consideration the request of one plaintiff spouse and the proves presented from the defendant spouse.

**3. Concluding remarks**

Nowadays in Albania the legislation on the dissolution of the marriage is totally changed reflecting the social changes and the challenges in the Albanian society.

For the first time has been provided by law the dissolution of marriage based on a period of three years of separation and at the same time has been provided the dissolution of the marriage through the consent of the spouses, where the Court has the discretion to decide on the divorce taking in consideration the will expressed from the spouses and the moral and material consequences for the children or the other spouse.

The high conflict divorces under the Albanian practice are due to continuous quarrels, maltreatment, severe insults, adultery, incurable mental illness, lengthy penal punishment of the spouse or due to any cause constituting repeated violations of marital obligations such as the mutual obligation of loyalty, for moral and material support and cooperation in the interest of the family and cohabitation. The spouses in a case of a high conflict divorce, according to the law may request the dissolution of the marriage proving to the Court that the joint life becomes impossible and the marriage has lost its purpose for one or both of the spouses.

Mostly the Albanian legal rules on divorce are adequate with the high-conflict divorce.

Maltreatment, severe insults or adultery are considered as special grounds of divorce, when it has been proved that the marriage has lost the purpose, but at the same time the new Family Code has provided the rules on protection orders in the case of the domestic violence. There is the discretion of the Court to decide on the dissolution of the marriage in the case of the maltreatment, severe insults or adultery which at the same time are considered as domestic violence under the Law on Domestic Violence in Albania. The Court may rule a protection order, but is not presumed that at the same time may allow the divorce.

Taking in consideration the severe reality in Albania, in the article 132 of the Family Code one of the grounds for divorce should be especially provided the protection order of the spouse granted from the Court due to the domestic violence of the other spouse.

Also, the lengthy and severe criminal punishment should be specified, as long as there is not an Albanian practice when it is considered lengthy and the quote of severity.

Other violations of marital obligations, when the joint life became impossible and the marriage has lost its purpose for one or for both of the spouses should be specified the cases in which the spouse doesn’t have a moral and material support, and for cooperation in the interest of the family regarding the parental responsibilities.

After 15 years entering into force the Family Code, and 12 years of the law “ On the measures against the violence in family relations”, according to the Albanians’ court practice faced with the social reality, now it is the time for some amendments in the both laws, which serve for a better family protection for the spouses and children in the case of divorce.

**Bibliography:**

1. European Court of Human Rights (ECHR)
2. Protocol 7 of ECHR
3. Universal Declaration of Human Rights
4. Constitution of Republic of Albania
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6. Law no.9669, dated 18.12.2006 “On the measures against the violence in the family relations”
7. Case S.W vs United Kingdom, 1955
8. Case C.R vs United Kingdom, 1955
9. Marcks vs Belgium, 1979
10. Decsion of the District Court of Tirana no.109, dated 17.01.2006
11. Decsion of the District Court of Tirana no.928, dated 11.02.2011
12. Decision of the District Court of Tirana no.4826, dated 11.06.2010
13. Decision of the District Court of Tirana no.2568, dated 19.03.2012
14. Decision of the District Court of Tirana no 3693, dated 5.05.2010
15. Decision of the District Court of Tirana no.4025, dated 24.4.2012
16. Decision of the District Court of Tirana no.4224, dated 4.06.2007
17. Decision of the District Court of Tirana no. 5297, dated 16.06.2009
18. Decision of the District Court of Tirana no.7299, dated 11.07.2012
1. European Convention of Human Rights ( ECHR) and later in this article Convention. [↑](#footnote-ref-1)
2. Albania has ratified the ECHR and its Protocols by Law no.8137, dated 31 July 1996. [↑](#footnote-ref-2)
3. European Court of Human Rights (ECtHR) and later in this paper ‘Court’. [↑](#footnote-ref-3)
4. Case S.W vs United Kingdom 1955 and C.R vs United Kingdom 1955 [↑](#footnote-ref-4)
5. Art.122 of the Albanian Constitution provides that *’Any ratified international agreement constitutes part of the internal legal system’* and that *’An international agreement ratified by law has priority over the laws of the country that are incompatible with it’* [↑](#footnote-ref-5)
6. Family Code of Albania adopted with the law no. 9062, dated 8.05.2003 and entered into force on 21,12.2003. [↑](#footnote-ref-6)
7. Decision Marcks vs Belgium of the ECtHR ,1979 . [↑](#footnote-ref-7)
8. Art 127 of the Albanian Family Code [↑](#footnote-ref-8)
9. Art.2 of the Albanian Family Code states: *‘In the course of their activities and decisions, parents, competent bodies and courts should consider the highest interests of the child as a principle issue.’* [↑](#footnote-ref-9)
10. Article 133 of the Albanian Family Code [↑](#footnote-ref-10)
11. See, also Decisions of the District Court of Tirana: no 3693, dated 5.05.2010, no 4025, dated 24.4.2012, no. 4224, dated 4.06.2007 etc [↑](#footnote-ref-11)
12. Decision no.1291, dated 13.2.2013 District Court of Tirana [↑](#footnote-ref-12)
13. See decisions of the District Court of Tirana, no 5297, dated 16.06.2009; no 7299, dated 11.07.2012 etc [↑](#footnote-ref-13)
14. See Decision no.4826, dated 11.06.2010, Tirana District Court has decided the dissolution of the marriage under the request of the wife who evidenced that her husband has been arrested from the police and finally punished from a criminal court for fraud and forgery of the documents. She felt insulted and violated in the dignity as long has been mentioned her name. [↑](#footnote-ref-14)
15. Art.134 of Family Code [↑](#footnote-ref-15)
16. Art.135 Family Code [↑](#footnote-ref-16)
17. Art.136 Family Code [↑](#footnote-ref-17)