

Issues of Family Law in Spanish-Moroccan Relationships

Juan Simón MULERO GARCÍA
Professor of Private International Law
Faculty of Social Sciences and Law
University of Jaén
Spain

Abstract

In recent years, multiculturalism, immigration, and the phenomenon of globalization have provoked an increase in private international relationships in general and family relationships in particular. In Spain, due to a growing presence of Moroccan nationals, the Spanish system of Private International Law has been forced to respond to situations which arise due to immigration. This has meant implementing foreign law to said family relationships and, specifically, analysing the Moroccan Family Code to discover the legal framework which must be implemented to a marriage in the case of marital crisis. "Social integration" must be given precedence in such solutions, in cases regarding the annulment of the marriage (divorce), as stipulated in the Family Code and for recognition in the forum (Spain) of Moroccan legal decisions on matrimonial cases. Along these lines, Public Policy must allow for the implementation of the Family Code and the recognition of Moroccan legal decisions.

Key words: Family law, international private situations, Moroccan Family Code, divorce, public order.

I. Introduction

Since the last decade of the twentieth century, and due to the phenomenon of immigration, "multicultural societies" in which people from different countries with their own values, culture, way of life, etc., have become more and more common. Here we are referring to people with a nationality different from that of the country where they reside, who are considered, for this reason, foreign, according to the host country's laws.

Private International Law can only provide an adequate response to private international situations by taking into account the solutions contained in the different national legislations that come into play during a private international relationship and, especially, when this relationship is characterized by the socio-economic component of migration. Under this context, the Private International Law of Immigration is born. (ESTEBAN DE LA ROSA, 2007).

Likewise, for the system of Private International Law, the new private international situations linked with immigration pose a challenge, as offering a correct response in occasions means "implementing" a foreign policy, (dependant on the nationality of the foreigner as an immigrant), which follows or responds to a legal tradition different from the Spanish one, as is the case with many Islamic countries. (COMBALÍA/DIAGO/GONZÁLEZ-VARAS, 2011).

The new Private International Law of Immigration plays a specific role, that of the social integration of the people who immigrate. The term social integration is to be understood from a specific perspective according to Private International Law, being a functional notion whereby the person who immigrates is to be integrated into the transnational space of life and family, a space created by the fact that this person has migrated to a foreign country.

For a full "integration" to be possible, we must offer not only equal rights but also a consideration of the particularities of the legal systems of the immigrants' countries, the aim being to recognize in Spain Moroccan legal decisions, for example, relating to the revocable nature of a divorce. (ZAMORA CABOT, 2010). In this case, the Private International Law system is the discipline which offers a response to these "new" private international situations linked to immigration (ESTEBAN DE LA ROSA, 2009).

The social integration of a person therefore must take place both in their country of residence (overseas) and in their country of origin. In this way, Private International Law plays an important role, given that the system must be interpreted in the way which is most favourable to the aforementioned social integration, in the country of origin and the country of residence of the person who migrates.

II. Marriage and Divorce in the Current Moroccan Family Code

In the traditional concept of Islamic Law, marriage is seen to be a contract which enters into full effect once the offer has been agreed (*iyab*) and accepted (*qubul/qabul*), either orally or in any other way which is understood by both parties.

Article 4 of the Moroccan Family Code of 2004 (cf. Official Gazette of the Kingdom of Morocco no. 5184, of February 5), defines marriage as a “pact” so as to differentiate between this and other contracts regulated by the Code of Obligations and Contracts. (Dahir, 13 August 1913, Official Gazette of the Kingdom of Morocco no. 46, September 12). This pact is fundamentally based on consent, and consists of a long-lasting legitimate union between a man and a woman, whose mutual objectives are purity, chastity and the establishment of a stable family, to be achieved through mutual care and through following the provisions laid out in the Code.

The Family Code therefore is the special statute which regulates the marriage pact, and the nullity, annulment, etc. of a marriage is governed by this Code. Furthermore, factors which are not foreseen in this Code adhere specifically to the provisions made by the doctrine of the Maliki School, as stipulated in Article 400 of the Family Code.

For a marriage to be valid no specific requirements are necessary, however express consent must be provided, consistent to the wishes of both parties, as stipulated in Articles 10 and 12 of the Family Code. (GAVIDIA, 2011). There must also be no impediments to the contracting of marriage, as stated in Article 57 of the Family Code, relating to the nullity of a marriage. (ESTEBAN DE LA ROSA, 2009).

Article 13 of the Family Code states the requirements in place for a marriage to be valid. These are specifically the legal capacity of both spouses to marry, the absence of intention or agreement to cancel the dowry, the presence of a marital tutor (where necessary), the presence of two public notaries (*adouls*) at the moment when the offer and acceptance are pronounced by the couple, and the absence of any legal impediments. Not all of these requirements are essential however. The only essential items are the consent, the capacities, the dowry and the absence of impediments.

Provision of consent must be executed in the presence of two public notaries, called “*adouls*.” Their presence is not a requirement for the validity of a marriage, but as proof of the celebration of the marriage, (Article 16 of the Family Code) and as a formality when writing up the marriage certificate, a document which offers proof of marriage.

Likewise, a person gains the legal capacity to contract marriage when they reach the age of eighteen, although on the basis of Articles 19 and 20 of the Family Code, a judge has the power to grant marriages in the case of minors. Although there is no established minimum age to impede the authorization of marriage, it is understood that the couple must be young but post-pubescent. However, for a marriage to be recognised under Spanish law, the minor must have already reached twelve years of age and have the capacity of discernment, in which case the approval of the legal representative (parent) is required. If the minor has not yet reached twelve years of age, the marriage will not be recognised, given that the minor lacks the capacity to act.

A further requirement necessary before a marriage pact is made is the inclusion of a dowry, understood here as the offering made by the groom as a manifestation of his wish to enter into marriage and to establish a stable family. This offering has a symbolic or moral value, not a material one, given that no maximum economic value has been set, as we are not dealing here with a price paid for a wife. (Article 26 of the Family Code).

Also, a marital tutor must intervene where necessary, given that the marriage can be annulled before and after consummation if it took place without the presence of a marital tutor. (Article 61 of the Family Code).

The regulations in place in the current Spanish and Moroccan Law regarding divorce have various factors in common. Under both systems, a couple can end a marriage as long as they reach mutual consent.

Furthermore, both systems allow for the possibility to annul a marriage through the initiative or will of only one of the parties, given that in the current Moroccan Family Code, either one of the parties is allowed to claim the presence of “irreconcilable differences” (without having to offer concrete proof of these) which would allow a judge to annul a marriage, in the same way in which this issue is regulated under the current Spanish Civil Code, following the reform of 2005.

Another important similarity between Spanish and Moroccan law regarding divorce can be seen in the case of its effects and, specifically relating to its revocable character, in the extent to which the regulation provided by the current Family Code to this question is similar to the marital separation currently contemplated in the Spanish Civil Code.

Such common factors should not distract from the fact that differences do exist. The existence of such differences might be explained by the fact that each of the regulations responds to very different traditions: the Muslim tradition in the case of Moroccan family law and the Roman tradition in the case of Spanish law.

In Spanish law different situations of “marital crisis” exist. This heading “marital crisis” constitutes a set of assumptions by which the marriage (held) is abolished, breaking the unity of life and co-habitation which – in principle- marriage supposes. Specifically we are talking about: nullity, separation and divorce; terms which differ amongst themselves, which come under their own legal framework, and which also have effects and measures in common.

The first term, nullity, means the disappearance of a marriage, following a latent crisis, in such a way that in legal terms a marriage, as such, never existed, despite appearances. With a declaration of nullity, the marital ties are not broken, rather a declaration is made that such ties never actually existed.

Separation is the consequence of a conjugal crisis. The marriage, which is valid to all intents and purposes, does not cease to be so, that is to say, it still exists, as do the ties between the married couple. However the effectiveness of the union is broken as certain marital rights and suppositions cease to exist, as does marital co-habitation. Contracting another marriage when in a state of separation is illegal as the marital ties are still in place, and reconciliation of the married couple is allowed

Divorce, on the other hand, is the result of a definitive crisis. In this case, the marriage, which up to now has been valid, ceases to be so. The ties formed by the marriage are broken, either through death or declaration of death of one of the spouses, or through divorce.

Articles 94 to 141 of the Family Code regulate divorce as a means of terminating married life, its effects and formalities. Various forms of divorce must be noted here. Especially significant is divorce on the grounds of *talaq* and *tatliq*, the death of one of the spouses, the existence of a defect (in the celebration of the marriage) and other reasons specified in the Family Code (Article 71).

Talaq (repudiation) refers to the termination of the marriage at the request of both the husband and the wife, as different requisites come into play, with a different procedure, in cases where only one of the couple files for divorce. These latter cases are always subject to judicial review. Up until the reform of the Family Code, carried out and implemented in 2004, it was the husband who had to request the termination of the marriage, a requisite which supposed a privilege for the man and sexual discrimination toward the woman. (OUALD, 2011).

When a couple agrees that the husband must hand this right over to the wife in certain circumstances (abuse, failure to support, etc.), we find ourselves in a situation of divorce on the grounds of *tamlik*.

In this case, the judge will attempt to reconcile the couple and, where this is not possible, will authorise two adouls to formulate the act of divorce on the grounds of *talaq* and will expressly indicate the economic rights of the wife and of the children, in accordance with Articles 84 and 85 of the Family Code. (OUALD, 2011).

There is also the possibility to annul a marriage through mutual consent or in exchange for compensation. In the first case, mutual consent (*talaq*) occurs when both spouses agree to divorce and ask the judge for authorisation so that the adouls can take minutes and witness the procedure of the stated agreement, making it a public document.

Before a judge can decide whether or not a divorce should be granted, an attempt at reconciliation must take place. It is not necessary to prove either the existence of possible prejudices which the husband's behaviour may cause the wife, or to claim the existence of irreconcilable differences.

Divorce in exchange for compensation is a kind of cancellation of the marital contract opted for by the wife, which requires the consent of the husband, who has to accept the offer made by the wife to renounce a part of the dowry (in cases where this is to be paid in instalments), to return that which has already been given to her, or to renounce some of her financial rights.

Tatliq is the other method of annulling a marriage according to the Moroccan Family Code. According to this method, the wife, although not exclusively, can petition for divorce before the judge on the following grounds: 1) When the husband has failed to comply with one or more of the conditions stated in the marriage contract; 2) when the wife suffers some harm on the part of her husband; 3) when the husband fails to comply with his obligations to support his wife; 4) when the spouse is absent (for more than one year); 5) when an illness and/or defect suffered by one of the spouses means intimacy between the couple becomes impossible; and 6) when the husband makes an oath of abstinence and abandonment. (Article 98 of the Family Code).

Divorce on the grounds of *tatliq* is irrevocable however, except in the following two cases:

- a) Oath of abandonment, and
- b) A husband's failure to support his wife.

One of the main characteristics of Islamic Law, and one of the biggest differences when compared to the legal systems of the countries around us, deals with the consequences or the effects of divorce when related to the possibility of resuming marital cohabitation. The revocable nature of divorce aims at protecting marital ties, whilst the irrevocable character aims at protecting the wife against the oppression of her husband, who could take advantage of his right to go back on the divorce at any time during the process. This would impede the woman from starting up again with another person, once she has been freed of the original marital compromise. (MILLIOT/BLANC, 2001).

Both the revocable and the irrevocable forms of divorce have the same effects, except the possibility, as stated above, for the husband to go back on his promise in the first case and in the second (irrevocable), the woman is no longer considered in her role as the wife, rather she becomes a stranger right from the moment the judge announces his decision. This means that if the husband wishes to renew his marriage contract with her, a new contract would have to be drawn up, following the acceptance of the offer by the woman. (Article 10 of the Family Code).

The Family Code deals with these types of divorces in its articles 122 to 127, as it is necessary to refer to each and every method of annulling a marriage foreseen in the current *mudawwana*, given that some of them are revocable and some irrevocable. As a general rule, divorce on the grounds of *talaq* at the request of the husband is always revocable (Article 123 of the Family Code), that is to say, the husband can go back on his intention to annul the marriage during a set period of time corresponding to the legal waiting period (*'idda*).

However, this general rule has the following exceptions: Firstly, when divorce takes place before the marriage has been consummated; secondly, when dealing with divorce on the grounds of *talaq* in exchange for compensation (*julf*); thirdly, when the *talaq* is pronounced for a third time (third repudiation); the fourth exception is that of divorce through mutual consent; and finally when the divorce is the right of the wife which has been assigned to her by her husband (*tamlik*).

In those cases where the husband asks for divorce on the grounds of *talaq*, cases which are always revocable, except in the exceptional situations mentioned above, the husband can go back on his decision to annul the marriage during a set period of time (which corresponds to the legal waiting period or *'idda*), and, as a result, he can ask that the wife return to the marital home.

This issue has caused much debate. We may ask what happens in those cases where the wife does not wish to re-establish married life with her husband. How does the Family Code deal with such situations? "Reintegration" was an absolute right of the husband in the old *mudawwana*, meaning that the wife could not refuse to return to the marital home.

However, the Family Code attempts to rectify this situation through giving the wife the right to refuse to return home and to re-establish married life. In such cases the wife is able to file for divorce on the grounds of irreconcilable differences (*tatliq li-siqaq*).

For the “reintegration” of the wife to take place, they must comply to the following conditions: the divorce must be revocable *talaq* (reintegration cannot take place in those cases where a marriage has been annulled through an irrevocable divorce *talaq*); and also the reintegration must take place during the legal waiting period.

Once this period is over, the *talaq* is considered irrevocable. At the end of the period of *‘idda* (legal waiting period), the marriage ties between a couple are annulled and the woman is deemed irrevocably divorced. (Article 125 of the Family Code). The majority of Muslim theologians consider the legal waiting period to be a time of reflexion, during which the woman is still considered married. Hence the legislator in the Penal Code considers the woman to be married during this period, so that maintaining sexual relationships with other men during this period is considered a crime of infidelity.

Once the period of *‘idda* comes to an end, the divorce is irrevocable. If the husband is still interested in reclaiming his wife, he can do so by marrying her again. This comes under the *ba’in baynuna sugrà* divorce, as regulated in Article 126 of the Family Code. There is another type of irrevocable *talaq*, the so-called *ba’in baynuna kubrà* divorce (Article 127 of the Family Code), in which the couple has filed for a third divorce, a situation which puts an immediate end to a marriage and prohibits the renewal of the marriage contract with the divorced woman unless the *‘idda* (legal waiting period) following a legally consummated marriage with another husband has expired.

To sum up, a divorce granted by the courts is *irrevocable*, aside from in those cases where *talaq* has been pronounced for a third time, when the *talaq* is applied for by mutual consent, in exchange for compensation (*julf*), and in cases where the husband cedes the right to the wife (*tamlik*). Furthermore, a divorce becomes irrevocable when the legal waiting period comes to an end without the husband having returned to the wife on the grounds of non-maintenance (*nafaqa*) or in the cases where an oath of abstinence and abandonment has been made. (Article 122 of the Family Code); and – along the same lines – when dealing with a divorce on the grounds of *talaq* at the end of *‘idda* (legal waiting period). Finally, during the *‘idda* (legal waiting period), it is the husband’s obligation to pay the wife maintenance, and her right to remain in the conjugal home.

Divorce through *tatliq* is always irrevocable, with the exception of cases of divorce on the grounds of non-maintenance and abandonment. Likewise, if the wife petitions for divorce and this is granted by a judge, it is irrevocable: firstly, when divorce is granted on the grounds of harm caused to the wife (irrevocable divorce); secondly, on the grounds of absence of the husband (irrevocable divorce); thirdly, on the grounds that a latent defect (*‘ayb*) or illness suffered by one of the spouses means intimate relationships cannot take place (irrevocable divorce). Divorce through *tatliq* on the other hand is revocable only in the following two cases: on the grounds of abandonment by the husband to the wife or an oath of abandonment (revocable divorce), and for non-maintenance (revocable divorce).

III. Public Policy Applicable To Spanish-Moroccan Family Relationships

Let us start by saying that Public Policy operates as a limit to the (necessary) application of Spanish law to conform to the current multicultural societies (or to immigration). This means that the Policy intervenes to determine the scope of the (mandatory) substantive rules governing the essential content of fundamental rights when it comes to protecting the rights of immigrants present in Spanish society.

For this reason, Public Policy must be adapted to the characteristics of the new societies of immigration, as stated in the doctrine which affirms the necessity of an evolution of the policy, making it more flexible, without affecting constitutional values and whilst seeking fair solutions (BORRÁS, 1998).

We must state here that the possibility of considering all particularities or specificities of foreign law -, according to the tutelage of the free development of personality - is due to the limited character of Public Policy, which acts as a clause (dossier) residual in the application (action) of the imperative rules governing the rights of immigrants (ORÓ MARTÍNEZ, 2009). Along these lines, in the context of private international situations linked with immigration, a new interpretation of Public Policy must be found in order to verify whether fundamental rights can be interpreted in compliance with the value of cultural diversity (foreignness).

The action of Public Policy has changed due to the fact that it is related to the essential content of fundamental rights, in such a way that it can no longer be interpreted along the lines that a foreign law will cease to be enforced because it contradicts the basic principles outlined in the legislation of the forum. Specifically, the action of Public Policy is conditioned by the principle of social integration which allows for the interpretation of the whole system of Private International Law in seeking a response to those international private situations which may arise.

Furthermore, Public Policy acts as a safeguarding clause and not so much as an exception (of rigid character), given that in this context, the essential content of fundamental rights must be delimited. This means that a foreign law cannot be applied when dealing with an aspect relating to the content of fundamental rights, that is to say, once it has been proved that the foreign law is at odds with the superior values of the Spanish law, it will not be applied. However, we must allow for the consideration of the principle of social integration, understood in the proper sense of Private International Law, meaning we must weigh up and verify whether a relationship established in the forum will be recognised in the immigrant person's country of origin (ESTEBAN DE LA ROSA, 2009).

In short, Public Policy acts as a clause, allowing access to the content of the foreign law, enabling a comparison to be made – in relation to the institution from which it originates – with the regulation offered by the legislation of the forum, and weighing up possible incompatibilities with the superior values of Spanish legislation. Here we must quote the Resolution of the Directorate General of Registries and Notaries, of October 26, 2006, in which the registration of a marriage was denied on the grounds that no proof was available that the spouse's previous marital ties had been annulled, a case which would be contrary to Spanish Public Policy (BOE, 13 December, 2006). The case was a dossier open on marriage registration, in which notice of appeal was given against the settlement passed by the Judge in charge of the Central Civil Registry Office, who denied the registration of a marriage celebrated in Morocco on 10th September, 2000.

The husband was born in Morocco in 1972 and held Spanish nationality. His wife was born in Morocco in 1973, of Moroccan nationality. They were urged to present, along with the original copy of the marriage certificate, a document stating that the spouse had been divorced since 7th October 1999, of his own free will, and that the divorce was one of revocable nature. On the 17th January 2005, the person in charge of the Registry Office passed a settlement whereby registration of the marriage was denied due to the existence of previous marital ties. It was not considered to be an authentic divorce given its revocable nature. This means no definitive annulment of the previous ties ever took place.

The Directorate General of Registries and Notaries (DGRN) considers that the application of Moroccan law is incompatible with the Public Policy of the Forum because it does not allow for a full understanding of a person's marital status. Basically, the DGRN considers that, since Moroccan legislation allows for a second marriage, the foreign law dealing with personal statute cannot be applied.

However, Public Policy should not interfere in this case to impede recognition of a decision made by Moroccan authorities to grant a divorce, but should permit registration of the new marriage to take place, abiding by the regulation made in the Moroccan Family Code relating to the revocable character of marital ties.

IV. References

- BORRÁS RODRÍGUEZ, A., “La sociedad europea multicultural: la integración del mundo islámico” en, BORRÁS A./MERNISSI, S., *El Islam jurídico y Europa. Derecho, religión y política*, Icaria, Barcelona, 1998, pp. 163-198.
- COMBALÍA, Z./DIAGO DIAGO, M^a P./GONZÁLEZ-VARAS, A. (coords.), *Derecho islámico e interculturalidad*, Iustel, Madrid, 2011.
- ESTEBAN DE LA ROSA, G., “El nuevo Derecho Internacional privado de la inmigración”, *REDI*, 2007-I, pp. 103-129.
- ESTEBAN DE LA ROSA, G., *Inmigración y Derecho Internacional privado*, Grupo Difusión Jurídica, Madrid, 2009.
- ESTEBAN DE LA ROSA, G., “La multiculturalidad (de inmigración) relevante para el sistema español de Derecho Internacional privado”, *Dereito, Revista Jurídica de la Universidad de Santiago de Compostela*, vol. 16, núm. 2, 2007, pp. 5-26.
- ESTEBAN DE LA ROSA, G., (dir.), *Traducción del Código de Familia de Marruecos*, Ed. Blanca, Jaén, 2010.
- ESTEBAN DE LA ROSA, G., (dir.), *La nueva Mudawwana marroquí: entre tradición y modernidad*, Ed. Junta de Andalucía, Sevilla, 2009.
- GAVIDIA SÁNCHEZ, J.V., “Concepto constitucional de matrimonio, Código de Familia marroquí y orden público internacional español”, en, GAVIDIA SÁNCHEZ. J.V. (coord.), *Inmigración, familia y Derecho*, Marcial Pons, Madrid, 2011, pp.191-207.
- MILLIOT, L./BLANC, F.P., *Introduction á l'étude du Droit musulman*, Dalloz, París, 2001.
- ORÓ MARTÍNEZ, C., “Control del orden público y supresión del *exequátur* en el espacio de libertad, seguridad y justicia”, *AEDIPr*, 2009, pp. 201-224.
- OUALD ALI, K., “La disolución del matrimonio en el Derecho marroquí” en, GAVIDIA SÁNCHEZ. J.V. (coord.), *Inmigración, familia y Derecho*, Marcial Pons, Madrid, 2011, pp. 289-314.
- ZAMORA CABOT, F.J., “Europa entre las corrientes de la multiculturalidad: incidencia del velo islámico en el Reino Unido”, *Huri-Age. The Age of Rights*, Programa Consolider-Ingenio 2010, nº 14, 2011, p. 1-20.