

# Punto de encuentro

# THE DISSOLUTION OF THE MARRIAGE BOND: PROBLEMS AND DIMENSIONS

## LA DISOLUCIÓN DEL VÍNCULO MATRIMONIAL: FASES Y PROBLEMAS

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Fecha de recepción: 16/10/2023.

Fecha de aceptación: 10/12/2023.

### ABSTRACT

*This article explores the new reality of Moroccan women, which is based on the equal relationship between men and women according to the Islamic and international references. The Commander of the Faithful Mohammed VI formed a Royal Advisory Committee for conducting a fundamental review of the Personal Status Code. Now, it is more than twenty years ago since the Family Code has gone into effect; it has achieved several gains, as it devoted equality and protection of family rights. However, there are some challenges that have emerged because of the implementation of some provisions. This contribution especially analyzes, the reality of the dissolution of the marriage bond and its problems, and the family mediation.*

### KEYWORDS

*Personal status code, Morocco, divorce, family rights, equal relationship, mediation.*

### RESUMEN

*Este artículo analiza la nueva realidad de las mujeres marroquíes, basada en la relación igualitaria entre hombres y mujeres según las referencias islámicas e internacionales. El Comendador de los Creyentes, Mohammed VI, formó un Comité Consultivo Real para llevar a cabo una revisión fundamental del Código del Estatuto Personal. Cumplidos veinte años desde la entrada en vigor del Código de Familia, ha conseguido importantes logros en*

*materia de igualdad y protección de los derechos de los integrantes de la familia. Sin embargo, han surgido ciertos problemas en la aplicación de algunas disposiciones. Esta contribución analiza específicamente, la realidad de la disolución del vínculo matrimonial y sus obstáculos así como la mediación familiar.*

## **PALABRAS CLAVE**

*Código civil, Marruecos, divorcio, derechos familiares, igualdad en la pareja, mediación.*

**SUMMARY:** 1. Introduction. 2. The reality of the dissolution of the marriage bond and its problems. 3. The family mediation. 4. Conclusion.

## 1. INTRODUCTION

The family has been the most important social institution because it is cornerstone for social structure. In addition, it is the basis of the society, through which the culture moves from generation to another. The family is the survival and continuity of society in which parents raise up children according to the values that make them active members who will take advanced steps for the prosperity of society.

Morocco, like other societies, has given full attention to the family institution; it is surrounded with all the guarantees in order to be protected economically, socially and legally. These guarantees find its basis in the primary legislation, which is the 2011 Moroccan Kingdom's Constitution.

The family law has passed through several stages between the years 1957 and 2004 when the last the Moroccan Family Code was amended by the Moroccan Parliament and promulgated the Commander of the Faithful Mohammed VI. In 1957, the family law, the Personal Status Code, had undergone a reform process, which was issued by five *Dahirs* (Royal Decrees), the first *Dahir* was issued in November 1957 and the last one in April 1958. After that, several amendments had been suggested but they were unsuccessful until 10 September 1993 when the Personal Status Code was amended. This amendment focused on the issue of divorce, custody, and the establishment of the Family Council.

In the hope of enacting a law that is capable of defining the new reality of Moroccan women, which is based on the equal relationship between men and women according to the Islamic and international references, the Commander of the Faithful Mohammed VI intervened in the Family Law amendment. For this purpose, he formed a Royal Advisory Committee for conducting a fundamental review of the Personal Status Code. This Committee was a think tank that made up of the well-known male and female scholars and experts from diverse backgrounds and academic field.

Furthermore, the Commander of the Faithful Mohammed VI continuously provided this Committee with enlightening guidance, sublime directives, stressing adherence to the provisions of the Islamic law whose purpose is tolerant. He demanded the Committee to use the Islamic diligence (*Ijtihad*) for deriving rulings that have gone in line with the spirit of modernity and development, taking into consideration the international conventions ratified by the Kingdom of Morocco and published in the Official Gazette.

The results of this supreme royal concern was the issuance of a pioneering Family Code in terms of its legislative provisions and modern jurisprudential legal style. It has provided balanced, fair, and academic solutions and devoted human rights and citizenship for Moroccan women and men alike.

Now, it is more than twenty years ago since the Family Code has gone into effect; it has achieved several gains, as it devoted equality and protection of family rights. However, there are some challenges that have emerged because of the implementation of some provisions.

These challenges necessitate the evaluation of the legal code, reviewing the legal changes that have been brought by the reality of judicial practice, and they have been imposed by the profound transformations of the structure of the Moroccan family. These steps are necessary for formulating thoughtful proposals; this issue was confirmed by the royal speech of His Majesty the King Mohammed VI on the Throne Day on 31 July 2022.

The judicial practice experience have proved that there is an urgent need for amending some provisions and procedures of divorce, as the

dissolution of the marriage bond has witnessed a remarkable increase in Moroccan society especially after amending the Family Code. By the virtue of this code, the procedure of divorce is under the judicial control in order protect the family. However, it has backfired, as the divorce becomes now a real threat to the family members, especially children.

Since the family and social conflicts lead to the disruption of family and socio- economic relations and affect the performance of individuals in the family and society, several countries have adopted alternative dispute resolution (ADR) to end conflict and remedy the harm. The ADR has proven effectiveness in achieving family stability and social peace, and one of them is the family mediation, which is used as an alternative to resolving family disputes instead of judicial procedures.

In order to approach this issue, I decided to break up the topic into two sections. The first one section is the reality of the dissolution of the marriage bond and its problems, and the second one is the family mediation.

## 2. THE REALITY OF THE DISSOLUTION OF THE MARRIAGE BOND AND ITS PROBLEMS

It is well known that the Family Code makes the divorce and divorcement under the judiciary supervision in order to avoid harms that are caused by the arbitrariness in the exercise of divorce right, and to ensure the stability of the family, and to protect it from disintegration. However, the Family Code authorizes the dissolution of marriage bond under strict conditions. Referring to divorce requirement, the law permits the divorcement exceptionally when it is the lesser of two evils.

In this regard, the law obliges the family judges to attempt reconciliation between the spouses in all cases of divorce, except for divorce due to absence. In order to facilitate the reconciliation, the court can seek the assistance of two arbitrators, or the family council, or anyone who is qualified to mediate in the dispute. The Ministry of Justice has hired aid staffs and social assistants in the family departments of trial court; their role is to help is the judiciary in the process of reconciliation in the divorce procedures.

According to the statistics about the family departments in the trial court, which are published by the Ministry of Justice, the total number of types of divorces of all kinds increased to 26,957 cases in 2021. The top type of is divorce is the consensual divorce, with 20,655 cases. In addition, the female asking divorce had increased sharply, in which there are 64,472 cases of divorce due to discord out of 65,078 cases. That is, by more than 90% of the total of judicial rulings issued for divorce.

This is a real problem because of the multiplicity of legal requirements regulating divorce, which makes it difficult for litigants to access justice. According to these statistics, the litigants in the face of the difficulty of distinguishing between them by litigants had used only two types of divorce, which are the consensual divorce and the divorce due to discord. However, the rest of the other types of divorce mentioned in the Family Code remain very limited.

Perhaps, the reason for the increase of the consensual divorce is the awareness of spouses, which moves them to settle their disputes amicably, considering the failure of the marriage does not necessarily mean the failure of the divorce. As for divorce due to discord, its rule is preemptive and conciliatory because it is initially not divorce according to the Article 94 of the Family Code, «If either or both spouses ask the court to settle a dispute that risks to breakdown their marriage, the court must make all efforts to reconcile them.» In addition, the Articles 95 and 96 are devoted to conciliation procedures. Them, article 97, which stipulates that in the event reconciliation is impossible to reach, and the conflict between the spouses persists, the court shall grant the divorce due to discord.

In order not to exaggerate the issue of divorce in a frightening way. The issue of divorce was even before the current Family Code. Before the Family Code went into effect in 2004, there had been a large number of divorce cases. The demands of divorce by women, who were married before 2004, reached 26,914 cases.

Certainly, there was an accumulation of problems related to marital life, so that the divorce was granted in favor of marriages in which marital cohabitation was impossible. The evidence is that there are couples who have spent more than 30 or 40 years demanding the court to dissolve their marriage bond.

However, we must find the reasons and causes of divorce; it is inconceivable that people makes up the causes of divorce, yet they complain about the high rates of divorce. There are economic, social, psychological and cultural causes. However, they differ from one case to another and from family to another; perhaps the most crucial causes are:

- 1) The change in values concepts. For parents and their ancestors, the concept of the marital relationship was a sacred bond and covenant. However, nowadays, this has changed because of the youth's understanding of marriage bond; a several number of spouses do not understand, nor appreciate, this relationship well. Moreover, they do not even give marital relationship the glorification it deserves.
- 2) The weakness of the communication culture, which leads to tensions between the spouses. This indirectly leads to the divorce, which is ominous.
- 3) The domestic violence, or violence in intimate relationships, which involves physical, psychological, and economic forms of abuse.
- 4) The Covid-19 crisis revealed the real situation of the marital relationship, because the quarantine obligated the spouses to stay at home for long periods. This time was enough to burst differences and problems between many spouses. The pause of several economic sectors leads to the increase of prices, which has affected the purchasing power. This was the reason for many families to give up the marital responsibility.
- 5) The last problem is related to the family reconciliation, which demonstrates its ineffectiveness as for resolving the family conflicts.

I would like to point out that family relations are not merely ruled by the legal framework, but they are also ruled by ethics as all human relations, which are affected by the reality of successive economic, social, cultural and educational transformations. These changes have affected the structure of the Moroccan family, which lead the Moroccan legislator to grant the court and the judicial authority the extensive powers to settle family disputes through the reconciliation. Moreover, by the virtue of the Family Code, the Public Prosecution is a chief party in all family cases.

We should wonder about the role reconciliation on a practical level because it realistically witnessed a significant decline in the certificates of

reconciliation; it dropped from 20,000 cases in 2016 to 15,000 cases in 2021 after it exceeded, the decrease is between 15% and 19% of the files of certificates of reconciliation. Certainly, the Family Code tried to fortify the family; it did everything to resolve conflicts and bring points of view closer together in order to protect the marital relations. This can be observed in the Article 81, which urges the judiciary to subpoena the reconciliation procedure and shall be included it in the judicial ruling. In addition, the Articles 82 and 94 of the Family Code oblige the judiciary to carry out reconciliation with the help of the two arbitrators, the Family Council, or anyone who is qualified to reconcile the dispute.

It should be noted that there are constraints on the judges due to the large number of files and cases in the Family Judiciary Department, the lack of human resources, and the difficult circumstances. In fact, it is inconceivable for a judge to have between 200 and 300 cases in the court session. How can s/he study these cases, comprehend the nature of the differences and points of view of the spouses? In practice, the reconciliation requires sessions, visits, not just a discussion in the court session.

One of the difficulties that makes the reconciliation unsuccessful is that it takes place in the Social Assistance Offices, where one of the spouses' colleague, as a civil servant in the office, attends or takes the procedures of the reconciliation. Therefore, how can the spouses reveal their secrets in such a space! Since the reconciliation is obligatory, it has become a routine procedure, not more or less. Why is it routine? Because the role of the judge of dispute resolution has to meet some requirement in psychology and sociology psychiatrist. When we talk about the family judiciary as a private judiciary, it needs special training as well. Yes, the judges have an excellent legal and judicial training, but not in psychology, anthropology. The family judge must be aware of these disciplines and familiar with them.

In most cases of divorce, which are in front of the judiciary, the spouses refuse to express their marital problems, and they just state that the reason for the divorce is a lack of understanding, without revealing some secrets. The reason is the fear of their statements in the reconciliation process, which may affect their position during the trial. This is



because the same judge, who conducts the conciliation, will issue a legal ruling for conciliation or divorce<sup>1</sup>.

All these problems make the reconciliation sessions just a routine stage before reaching the divorce procedures. Thus, the reconciliation becomes pointless and has nothing to do with the purposes of the legislator, which is to preserve family cohesion.

### 3. THE FAMILY MEDIATION

In order to overcome the obstacles of reconciliation on the legal or realistic levels, it is necessary pay attention to the other techniques of alternative dispute family resolutions, especially the family mediation, which should be implement out of the courts.

The family mediation means the endeavors undertaken by a neutral mediator, who is expected to resolve the conflicts between spouses, the mediator provides an assistance to them so that they can assess their legal and realistic positions in the dispute, and they should be aware of the gains and damages underlying the continuation of the conflict.is entrusted to a neutral mediation<sup>2</sup>. The mediator who has experience, integrity, and competence to help the spouses bring their points of view closer through negotiation in a friendly manner based on consensus and dialogue, away from judicial procedures, and the official agencies.

When we talk about the family mediation as crucial institution, we do not ensure that the task of the mediator is not to find a solution, but its role is rather to facilitate dialogue between the parties about the problem. It is not necessary that the two parties reach a solution, but rather they reach an agreement. If they do not agree to keep the marital relationship, they should dissolve the marital relationship in a way that gua-

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<sup>1</sup> Mohamed SALLAM, «The Importance of reconciliation in the Moroccan and Comparative Judicial System», *Al- Kasr Journal*, No. (4 January 2003), p, 66.

<sup>2</sup> Mohamed SALLAM, Lecture in the academic symposium organized by the Faculty of Law in Fez, in partnership with the Ministry of Justice and the Bar Association, on April 4 and 5, 2003, published by for the *Journal legal and judicial information*, No. 2, Fadalah Press, Mohammedia, distributed by Dar Al-Qalam, Rabat, p. 83.

rantees the continuation of a good relationship between parents and children, especially the issues alimony, custody, and visiting children.

The mediator must be a good negotiator and the necessary qualifications and experience to resolve family disputes because these disputes are not on the same levels, there are social, financial, and inheritance disputes. He cannot be a specialist one kind of conflict; rather, he must have the skills of communication, dialogue, and negotiation. Successful and experienced mediators are not necessarily jurists, who are specialize in the law; rather, they have legal knowledge and culture, and they are proficient in communication techniques, family psychology, and psychoanalysis.

Most of the countries have paid special attention to the family mediation, and Morocco is no exception. The Moroccan Ministry of Justice makes efforts to integrate alternative disputes resolutions in the framework defined by the royal speeches; it is to sign a partnership with the international institutions in order to integrate the alternative disputes resolutions in the Moroccan legal and judicial system.

The course of integrating these alternatives disputes resolutions has carried out by the Charter for the Justice System Reform. We should not forget the role of the Moroccan universities as they contribute in the raise of awareness of the culture of alternative disputes resolutions; the universities have accredited several master's degree and professional license whose academic core is the alternative disputes resolutions and family mediation.

In practice, however, we still suffer from a legislative vacuum about the family mediation. Although the Family Code referred to mediation in its preamble, it did not address it as a stand-alone institution. The Articles 81 and 82 mention that the court can assign two arbitrators, the family council, or anyone who is qualified to conduct the reconciliation. This cannot be considered an explicit reference to family mediation, but rather it may be considered implicitly indirectly as a framework of reconciliation.

Therefore, before institutionalizing the family mediation in Morocco, we must benefit the reconciliation cases and experiences we have accumulated in last years, we open up to other experiences of leading

countries in family mediation. In fact, there are countries where 80 % of family cases are resolved through mediation. Why? Simply because the mediation has become a cultural behavior of these societies.

In order to set up the family mediation, it must be is legalizing explicitly into the Family Code within the mechanisms of reconciliation, and, then, the legislator must enact its regulatory law, taking into account the privacy of Moroccan society and the Moroccan culture in dealing with family disputes in particular.

This means, there should be a Moroccan family mediation in addition to private institutions, such as civil society organizations. For example, associations, which have the listening centers for disputing families and provide training workshops for families. In addition, there are the Religious Councils, which have the academic qualifications for helping the spouses to resolve their disputes amicably. Furthermore, the *adouls* (public notaries) play a key role in the mediation because they notarize marriage and divorce.

#### 4. CONCLUSION

In summary, the success of family mediation in Morocco depends on the concerted efforts of the various actors in the legal and judicial field as the judicial reconciliation system has shown to be limited. In addition, the civil society is an important player in the family mediation because it spreads the culture of mediation, creates a culture of dialogue within families, maintains family cohesion, and restores the vital roles of the family, which is crucial for building society. This requires:

- 1) Improving the family justice departments to become specialized family courts, and providing these courts with adequate and qualified human and material resources, institutionalizing the family reconciliation and mediation, and expanding the scope of legal and judicial assistance to facilitate the access to justice.
- 2) The sources of divorce and divorce have to be unified.
- 3) The creation of university departments for scientific research on the subject of mediation.
- 4) The family mediation should be independent from the judiciary.

- 5) The social staffs, who work in reception, and social assistant who provides counseling, should receive training and lifelong learning.
- 6) Providing training and lifelong learning for mediators.
- 7) Issuing a family mediation law, which has to be separated from the Family Code.
- 8) Taking into consideration the educational dimension, which is crucial for educating the community, spreading the culture of dialogue, forgiveness, and tolerance.