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Noa Barreda Marín

Universitat Jaume I (Spain)
ORCID: 0009-0002-1014-3243
al415429@uji.es

María Lumbreras Catalá

Universitat Jaume I (Spain)
ORCID: 0009-0008-2128-9436
al415437@uji.es

Alberto Martínez Herrero

Universitat Jaume I (Spain)
ORCID: 0009-0000-8073-3666
al415431@uji.es

The evolution of marriage in Spain from the francoist dictatorship to the present day

Introduction

Spanish marriage has experienced a considerable evolution throughout the years. During the francoist dictatorship, catholic marriage was the only way of getting married which had civil recognition. Once this period ended, ecclesiastical marriage was progressively set aside, in order to embrace new forms of getting married, such as the civil or non-Catholic ones.

This could not have been possible without the Constitution of 1978, which is responsible for laying down the pillars of today's democratic society and granting a wide variety of rights for its citizens, among which the right to religious freedom and the right to marry are of extraordinary importance.

Nowadays, inasmuch as this has been possible, in Spain there is a non-confessional system in which the right to marry has been interpreted broadly, which ultimately leads to a bright future where several ways of contracting marriage coincide:

- 1) A civil matrimony performed in a civil way, which has eventually led to homosexual marriage.
- 2) A civil matrimony performed in a recognised non-catholic religious way.
- 3) A religious marriage performed on the basis of canonical law.

The spanish marriage system during the francoist dictatorship

Context

After the Spanish Civil War (1936–1939), a dictatorship was imposed in Spain, which lasted until 1975. In this regime, all the powers of the State were concentrated in the figure of Francisco Franco and citizens' rights and freedoms were restricted. During this period of recent Spanish history, the organisation of the State was established in the Fundamental Laws, as there was no Constitution¹. One of the most relevant Fundamental Laws was „El Fuero de los Españoles”, whose sixth article established: „The profession and practice of the Catholic Religion, which is the official religion of the Spanish State, will have official protection. No one will be persecuted because of their religious beliefs or the private exercise of their worship. No other ceremonies or external manifestations apart from those of the Catholic Religion will be allowed”².

This precept stated that Spain was constituted as a confessional State, whose official religion was Catholicism. In addition, the practice of other religions was limited to the private sphere, and citizens did not have the right to freedom of religion. This situation had a big impact on the marriage system of the time. The laws related to civil marriage elaborated during the Second Republic (1931–1936) were repealed and the Catholic rite was established as the official way of getting married in Spain.

The main legal precepts that defined the Francoist marriage system were the Concordat signed between the State and the Holy See in 1953 and the articles of the Civil Code related to marriage, many of which were modified once the dictatorship ended.

The way of contracting marriage

First, the 42nd article of the Civil Code declared the existence of two ways of getting married in Spain: the canonical form and the civil form. The civil form could only be used in those cases in which neither of the contracting parties professed the Catholic

¹S. Isanta Crusellas, *El matrimonio civil durante el franquismo* (Trabajo Final de Grado tutorizado por DR. Josep M. Martinell Gispert-Saüch), Repositori Obert de la Universitat de Lleida, Lleida 2018, p. 20.

²Fuero de los Españoles, texto fundamental definidor de los derechos y los deberes de los mismos y amparador de sus garantías, „BOE” No. 199, 18.07.1945, pp. 358–360 (abolished legislation).

religion³. In these cases, only non-baptized or excommunicated people could declare their non-Catholicity. In order to prove it, an official document had to be presented, as the mere statement of not professing the Catholic religion was not considered valid. Marriages contracted by rituals of other religions were not recognized by the State.

All the social implications that contracting a civil marriage in a Catholic confessional State implied must also be considered. As was mentioned before, to hold a civil marriage, the contracting parties had to be officially recognized as not belonging to the Catholic faith. Doing so was considered as a manifestation of opposition to the dictatorial regime, an attitude that could be suppressed by the authorities⁴. Therefore, during the Francoist dictatorship, civil marriage was rarely celebrated.

Civil effects of catholic marriage

Regarding the Catholic marriage's civil effects, the 23rd article of the Concordat with the Holy See of 1953 dictates: „The Spanish State recognizes full civil recognition to marriages celebrated according to the rules of Canonical Law”⁵.

Moreover, the 76th article of the Civil Code stated: „Marriage celebrated according to the norms of canonical law produces full civil recognition upon its celebration. For it to be recognized, the registration of the corresponding marriage in the Civil Registry will suffice”⁶.

Thus, the articles established the civil recognition of marriages contracted according to Canonical law, without the need of subsequent recognition or control made by the State authorities. Although marriage registration in the Civil Registry was also required, it produced a merely declarative effect; since the civil recognition of the marriage started from the moment in which its celebration took place.

Regarding the way in which canonical marriage should be celebrated, the 75th article of the Civil Code recognized the power of the Catholic Church to regulate its validity and its constitution. However, the 45th article established three circumstances in which contracting marriage was prohibited: „First. To the minor who is not freed from previous marriages and who has not obtained the licence from those allowed to grant it. Second. To the widow during three hundred and one days after the death of her husband, or before giving birth, if she had become pregnant and, in the same terms, to the woman whose marriage had been declared null, following the legal separation of the contracting parties. Third. To the guardian of the people that he has or

³D. Espín Cánovas, *Breve exposición de la eficacia civil del matrimonio canónico en el vigente sistema del Código Civil Español y del Concordato de 1953*, „Anales de la Universidad de Murcia (Derecho)” 1954-1955, Vol. XIII, No. 3-4, pp. 843-872.

⁴S. Isanta Crusellas, *op. cit.*, p. 21.

⁵Concordato entre España y la Santa Sede, „BOE” No. 292, 19.10.1953, pp. 6230-6234.

⁶Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil, „Gaceta de Madrid” No. 206, 25.07.1889, modified by Ley de 24 de abril de 1958 por la que se modifican determinados artículos de Código Civil, „BOE” No. 99, 25.04.1958, pp. 730-738.

has had in custody until his or her charge ceases and the execution of the guardianship is ratified by the authorities, except the case that the father of the person under guardianship had authorised in a will or public deed”⁷.

On the other hand, the 24th article of the Concordat of 1953 establishes that the ecclesiastical Courts have the exclusive power to resolve subjects related to canonical marriage, such as nullity of marriage, the separation of the spouses and the dispensation of the *rato* and non-consummated marriage. In addition, it recognizes full civil effects to their resolutions once they are communicated to the corresponding State authorities. These authorities must adopt every measure needed to ensure the execution of these resolutions⁸.

Marriage dissolution

When it comes to the dissolution of marriages, the Divorce Law passed during the Second Republic was repealed. Moreover, the 22nd article of *El fuero de los Españoles* established that: „Marriage shall be one and it shall be indissoluble”⁹.

Thus, the only ways to dissolve a marriage during the Francoist dictatorship were those allowed by canonical law: nullity of marriage, the separation of the spouses and the dispensation of the *rato* and non-consummated marriage. In the case any of these requirements were met, the fifth section of the 4th Title of the Civil Code, relating to marriage, specified its consequences for the spouses and their assets¹⁰.

Women and marriage during the Francoist dictatorship

Another important aspect about the marriage system in force during the dictatorship is the inequality and subordination of women in relation to their husbands. For example, women required their husbands’ authorization to carry out certain legal acts, such as opening a bank account, signing a legal contract, receiving an inheritance or carrying out commercial activities. In addition, the husband was his wife’s legal representative and was the one in charge of managing the assets of the community of property¹¹.

In 1958, the Civil Code was reformed in order to introduce the *consentimiento uxoris*, which moderated the power that the husband had over the community of property. This reform also eliminated other aspects that were in force until then, such as the „deposito” (women’s obligation to leave the family home, or, as was literally called,

⁷ Código Civil...

⁸ Concordato entre España y la Santa Sede...

⁹ Fuero de los Españoles..., p. 359.

¹⁰ Código Civil...

¹¹ M. Moraga García, *Notas sobre la situación jurídica de la mujer en el franquismo*, „Feminismo” 2008, No. 12, pp. 229–252.

„the husband’s house”) in the case of the separation of the spouses, the prohibition of holding guardianship positions and the loss of the custody of her children in case that a widow remarried¹².

The last years of dictatorship

In 1967 the Freedom of Religion Law was promulgated in an attempt to adapt part of the Francoist legislation to the terms contained in the *Dignitatis Humanae* Declaration, included in the Second Vatican Council, which defended freedom of religion as being free from coercion. This law had certain implications for the marriage system, but no substantial reform was made. However, the stringency required to prove the non-Catholicity of the spouses was moderated. In fact, the Civil Registry Regulations were modified so as to consider a mere declaration of those contracting marriage as a valid proof of it¹³.

Although during the last years of the Francoist regime there was a small advance in matters of freedom of religion, Spain remained a confessional State. Therefore, these advances did not have a great impact on society. The same happened with the marriage system, which kept civil marriage subordinate to Catholic marriage.

Democratic transition and civil marriage

The Constitution of 1978. Democratic transition and the right to marriage

Twentieth century Spain, accustomed to the demanding religious formalities that the Catholic Church imposed backing in the Francoist regime, suffered a momentous change regarding the legal institution of marriage in 1978 with Franco’s death and the establishment of a democratic system.

The core element on which this emerging society was configured was the democratic Constitution of 1978, product of the consensus between the different points of view existing in the country so far: those that desired to transcend to a more protective and liberal system and those which wanted to cling to the dictatorial one.

This Constitution establishes the general outlines as well as the limits in which the lawmaker must base itself when developing the institution of matrimony. The following constitutional notes are to be underlined on this matter:

- 1) The configuration of matrimony expressly as a right of the person or *ius connubii*, gathered in the article 32.1 of the Constitution, which establishes that: „Men and women have the right to contract matrimony with fully legal

¹²Ibidem, p. 238.

¹³J. Rives Gilabert, A. Rives Seva, *Evolución histórica del sistema matrimonial español*, <https://noticias.juridicas.com/conocimiento/articulos-doctrinales/11680-evolucion-historica-del-sistema-matrimonial-espanol/> (accessed: 23.06.2023).

- equality". This composition, by not laying down any specific religion or form in order to contract marriage, allows a great flexibility and universality in its legal configuration¹⁴.
- 2) The establishment of matrimony as an expression of the right to religious freedom. This change is significant regarding the Francoist regime, since, as it has been previously expressed, the one and only religion which could be practised with full guarantees was the catholic one, despite the fact that in 1967 a law was approved so as to guarantee certain rights to religious minorities. Marriage, inasmuch as it can be the expression of the person's religion, must be celebrated with the maximal warranties this right enjoys.
 - 3) The configuration of marriage on the basis of the State's non-confessionalism principle. Another characteristic trait of the transition is outlined in Article 16 of the 1978 Constitution, through the non-confessional nature of the State, that is, the separation of the Public Powers from any kind of religious faith. Insofar as marriage is an expression of religious freedom, the State must plan its regulation unaffiliated with religion, as otherwise it would be positioning itself in favour of one of them, and discriminating the other ones. This phenomenon is what many authors call the secularisation of marriage.
 - 4) The legal regulation of marriage in terms of equality. Article 14 of the Constitution proclaims equality among citizens, which, interpreted extensively, encompasses the right to religious freedom in Article 16 of the Constitution and Article 32 of the right to marry. This implies that all celebrations of marriage, regardless of whether it has been chosen the civil or the religious way, must have the same effects and guarantees, independent of the peculiarities of each one. In other words, if there were marriages better equipped, in legal terms, than others, it would be a violation of the right to religious equality.

Civil marriage. Origin and characteristics

The current civil marriage system has its basis and roots in the canonical marriage system, even though in the transplantation it has been dispossessed of its essential notes. Western marriage systems have taken their elements and technical constructions in a process of secularisation of canonical marriage that began in the sixteenth century and continues to the present day¹⁵.

Nowadays, civil marriage is manifested in the state legislation, mainly in articles 42 and following of the Civil Code¹⁶, which have undergone several modifications over the years. Indeed, its modification during the democratic transition was mandatory in

¹⁴ *Ibidem*, p. 16.

¹⁵ V. Camarero Suárez, *Matrimonio canónico y su proyección jurídico-práctica*, Valencia 2012, p. 10.

¹⁶ Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil, „Gaceta de Madrid”, No. 206, 25.07.1889, modified by Ley 30/1981, de 7 de julio, por la que se modifica la regulación del matrimonio en el Código Civil y se determina el procedimiento a seguir en las causas de nulidad, separación y divorcio.

order to adapt the novelties introduced by the Constitution, such as the celebration of marriage between persons of the same sex; the specific regulation of the causes of nullity, separation and divorce; and so on. Specifically, this was possible thanks to „Ley 30/1981, de 7 de julio, por la que se modifica la regulación del matrimonio en el Código Civil y se determina el procedimiento a seguir en las causas de nulidad, separación y divorcio”.

The dispositive writing of article 49 of the Civil Code (*Any spanish may contract marriage...*) guarantees that, from this moment onwards, a facultative system is installed, in which spanish people may opt freely between contracting civil or religious marriage (whether catholic or not, as other religious forms are introduced as well)¹⁷.

The requirements that involve the Spanish marriage system are:

◆ Pillars of civil marriage

Civil marriage is based on the same pillars as canonical marriage:

- 1) Capacity or ability: the capacity of the contracting parties is a negative concept, in the sense that those who are not prohibited by law, that is to say, anyone who is not incurring in an impediment that prohibits them from contracting marriage, has the capacity to contract marriage¹⁸. The specific causes are listed in articles 46 and 47 of the Civil Code: unemancipated minors; those who are already bound by a marriage bond; relatives in a straight line by blood or adoption; collaterals by consanguinity up to the third degree; those convicted of having participated in the malicious death of the spouse or person with whom they had been united by an analogous relationship of affectivity.
- 2) Consent: it is recognized in article 45 of the Civil Code, and it is the efficient cause of marriage, that is to say, the act that originates the marriage bond. It must be manifested between legally competent people, and no human power can replace it.
- 3) Legal form: it consists of the rites or solemnities required by law to give publicity to the marriage. The ordinary form consists of the celebration of marriage before the competent person (manager of the Civil Registry where it is registered or minister of worship, depending on the type of marriage) and before two witnesses.

◆ Celebration

In the marriage celebration phase there are three general lines¹⁹:

- 1) Verification of capacity requirements.
- 2) The rites and effects of marriage.
- 3) Marriage registration.

Regarding capacity, the celebration of marriage in the civil form requires the previous processing of a file before the manager of the Civil Registry (the capacity file) in which it must be indicated if the contracting parties meet the legal requirements

¹⁷J. Rives Gilabert, A. Rives Seva, op. cit., p. 16.

¹⁸V. Camarero Suárez, op. cit., p. 16.

¹⁹In this sense, and for further requirements imposed by the Civil Registry, see: M. Faus y B. Ariño, *Celebración del matrimonio civil*, 2022, Lex.

(capacity, consent and form). This is a speciality of civil and non-catholic marriages, in which an *a priori* control of the fulfilment of the legally established requirements is needed, that is to say, before the celebration of marriage. It should be noted that if any of the contracting parties is affected by mental anomalies or deficiencies, a medical opinion on their capacity to give consent will also be required.

As for the rites and ceremonies, civil marriage is celebrated before the authority designated by the Civil Code and two witnesses of legal age. The celebration consists of the reading of articles 66, 67 and 68 of said Code (which include the most important rights and duties of the spouses), the subsequent request for the consent of the contracting parties and, once granted, the declaration that they are united in marriage, as established in article 58.

As far as its effects are concerned, the celebration not only guarantees the existence of the marriage and the protection of the spouses, but also implies the birth of a legal bond. Therefore, it is understood that matrimony produces civil effects from the date of its celebration (article 61.1 of the Civil Code).

Finally, the marriage must be registered in the Civil Registry. This need for registration is justified in order to protect third parties acting in good faith, since it may be interesting for them to know the existence of the marriage. This is achieved thanks to the publicity effects granted by the Civil Registry, so that the legal effectiveness of the marriage correctly celebrated is declared *erga omnes*.

Civil marriage in European Union Law

Civil marriage is a civil status recognized in all countries of the European Union and, therefore, it has a certain similarity between the different countries. This phenomenon is due to the fact that among the rights and obligations that members of the European Union must assume there is the non-confessionalism principle, which necessarily implies the acceptance of civil marriage. However, national rules on marriage vary from one country to another, especially with regard to the duties and obligations of married couples and the possibility for couples of the same sex to marry²⁰.

Homosexual marriage and civil effects of non-catholic marriages

Brief introduction

As it has been previously explained, Catholic marriage was the leading model until the Spanish Constitution in 1978, which opened the door to civil marriage. Nevertheless, the true progress in the marriage system came with the XXI century, thanks to two relevant regulations:

²⁰ A. Castro Jover, *El sistema matrimonial vigente en los países de la Unión Europea. Una propuesta de sistema matrimonial europeo*, Universidad del País Vasco, proyecto de investigación UPVIEHU 00122.224-HA-8096/2000, 2000.

- 1) Firstly, Law 13/2005²¹, which modifies the Civil Code in order to regulate marriage between people of the same gender.
- 2) Secondly, Law 15/2015²², which implied a new regulation of religious marriage.

Homosexual marriage

Firstly, homosexual marriage will be broached. Consequently, it is needed to focus on article 32.1 of the Spanish Constitution, which establishes that „*men and women* have the right to marry with full legal equality”. Thus, it enshrines the union between people of a different gender. This fact is directly related to the clear discrimination against homosexuality maintained throughout history.

However, society evolves and each epoch faces new concerns. Especially regarding rights, the present society is far richer and more diverse than in previous moments. It has also experienced great progress, of course, in the field of freedom of sexual orientation, a right that has been progressively recognized.

Nonetheless, in order to achieve change, social demands are not enough. A legal embodiment that brings them into effect is also required. For this reason, it is claimed that legislation must advance with society. Therefore, the Spanish jurist José Manuel Otero Lastres pointed out in an interview to a digital media outlet that: „Law is always behind society, it must adapt to the reality in which it lives”²³.

One of the greatest milestones in this regard has been the recognition of marriage between people of the same gender, with full equality with respect to marriage between men and women (including the right of adoption). Through Law 13/2005, of July 1, a second paragraph was added to article 44 of the Civil Code, which states as follows: „Marriage shall have the same requirements and effects whether the spouses are of the same or different genders”. In addition, the Law replaces references to husband and wife by the generic term „spouse”.

It does so precisely with the purpose of adapting legislation to social reality, as has been said before. In fact, it expressly recognizes that „legislators cannot ignore the obvious: that society evolves in the way of shaping and recognizing the various models of coexistence, and that, therefore, the legislator can, even should, act accordingly”. Hence, the reform responds to „the transformation of the dominant values in today’s society” and the „necessary avoidance of any discrimination prohibited by art. 14 of the Spanish Constitution, among which should be taken into account those based on the sexual orientation of people”²⁴.

²¹Ley 13/2005 de 1 de julio de 2005, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, „BOE” No. 157, 2.07.2005.

²²Ley 15/2015 de 2 de julio de 2015, de Jurisdicción Voluntaria, „BOE” No. 158, 3.07.2015.

²³J. Otero Lastres, *El derecho siempre va detrás de la sociedad, debe adaptarse a la realidad en que se vive*, <https://www.laopinioncoruna.es/sociedad/2019/06/04/derecho-detras-sociedad-debe-adaptarse-23767216.html> (accessed: 23.06.2023).

²⁴E. Espín, et al., *Manual de Derecho Constitucional Volumen I La Constitución y las fuentes del Derecho. Derechos fundamentales y garantías*, Valencia 2022, p. 226.

The recognition of homosexual marriage has been possible due to an extensive interpretation of art. 32.1 of the Spanish Constitution, in accordance with Sentence 198/2012 of the Spanish Constitutional Court, of November 6, 2012²⁵. In it, the highest interpreter of the Constitution in Spain, the Constitutional Court, declared the constitutionality of the reform, claiming that it does not imply a distortion of the constitutional institution of marriage, since it only modifies the regime of exercise of the constitutional right to marriage without affecting its intrinsic content.

Recognition of non-Catholic marriage

The second important change that can be appreciated in the present regarding the institution of marriage is the recognition of non-Catholic confessions rites, which are also endowed with full legal effects.

To understand the reason for this, it is necessary to start from the principle of religious freedom, which is considered the most important of human freedoms. Religious freedom is considered a fundamental right in articles 16 of the Spanish Constitution and 18 of the Universal Declaration of Human Rights, and is regulated in detail in LO 7/1980, of July 5²⁶. Mainly, it implies the position that a person takes towards a faith, regardless of its sign manifestation (which can be a positive, negative or even a neutral position). Consequently, people are free to choose the religion they want to practise and the State cannot force them to declare their creed, since there is a principle of immunity from coercion (article 16.2 of the Spanish Constitution).

Freedom of religion has numerous manifestations. Among others, the freedom to profess or not to profess any religion, the freedom to publicly declare or not declare beliefs, freedom of religious information and freedom of religious education. In particular, it is important to make a reference to the freedom of worship, which consists in the right to practise the ceremonies and rites of the freely chosen confession, both in public and in private (article 2 b of the Organic Law of Religious Freedom). This affects any type of externalisation of one's beliefs, such as wearing specific clothing or even getting married through a certain rite.

For a greater guarantee of religious freedom, apart from its recognition as a fundamental right, and therefore inviolable, Spain proclaims itself a non-confessional State (article 16.3 of the Spanish Constitution). This means that, in Spain, no confession has a state character (not even the Catholic religion, which was traditionally linked to the authorities). In consequence, public power respects religious pluralism and,

²⁵ Sentencia 198/2012, de 6 de noviembre de 2012. Recurso de inconstitucionalidad 6864-2005. Interpuesto por más cincuenta Diputados del Grupo Popular del Congreso en relación con la Ley 13/2005, de 1 de julio, por la que modifica el Código civil en materia de derecho a contraer matrimonio. Garantía institucional del matrimonio y protección de la familia: constitucionalidad de la regulación legal del matrimonio entre personas del mismo sexo. Votos particulares, „BOE” No. 286, 28.11.2012, pp. 168–219.

²⁶ Ley Orgánica 7/1980, de 5 de julio, de Libertad Religiosa, „BOE” No. 177, 24.07.1980.

in theory, does not assess or judge the faith, but declares itself unqualified to do so. In summary, «non-confessional nature only indicates that in a specific State there is no Church(es) or State religion(s) or that it ceased to exist»²⁷.

Thus, the non-confessional nature of the State and religious freedom require the secularisation of marriage. This fact involves separating marriage from a specific religion, so the State has exclusive jurisdiction over the institution of marriage:

- 1) On the one hand, in its regulation, since it is the law of the State that establishes the minimum constituents of the right to marriage. In this sense, following the provisions of article 32.2 of the Spanish Constitution, „the law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof”.
- 2) On the other hand, in its jurisdiction (articles 117.3 and 117.5 of the Spanish Constitution), since the jurisdictional power (capacity to carry out justice) is seen as one of the expressions of State sovereignty. It is a unique and exclusive power, which prevents having within the national territory more bodies that can judge.

This does not prevent religious marriages from being celebrated, quite the contrary. It is intended to establish a legal framework that accommodates the celebration of marriage in any religious form, as a manifestation of the fundamental right to religious freedom. In other words, „it is up to the State to determine the requirements for the validity of the marriage, but there may be various forms of celebration”²⁸. For this reason, it is said that the Spanish marriage system is unique, although with a plurality of forms: civil or religious and, in turn, Catholic or non-Catholic.

In this way, as the professor of Civil Law at the University of Oviedo Camino Sanciñena Asurmendi claimed, „it is sought that citizens can choose the form of marriage, without suffering discrimination for reasons of religion, and with identical effects between civil and religious marriage”²⁹.

Requisites of non-Catholic marriage and civil effects

It is worth asking now what this legal framework established by the State is. In this sense, in order to have civil effects, a marriage celebrated in a religious must meet certain requirements (established in articles 59 and 60 of the Civil Code):

- 1) The confession has to be registered in the Register of Religious Entities (RER in Spanish), which is a qualified legal instrument under the authority of the Ministry of Justice and at the service of the collective exercise of the

²⁷S. Petschen Verdaguer, C. Corral Salvador, *Lugar de las Iglesias en el ordenamiento jurídico de los países europeos. Especial atención a las causas de su posición*, „UNISCI Discussion papers” 2004, No. 6, pp. 1-12.

²⁸A. Castro Jover, *op. cit.*, p. 9.

²⁹C. Sanciñena Asurmendi, *Las recientes reformas legales en el sistema matrimonial español*, „Ius Canonicum” 2016, Vol. LVI, pp. 663-694.

- fundamental right to religious freedom. It is regulated by the Royal Decree 594/2015, of July 3³⁰, and, although it is voluntary for entities with religious purposes to enrol in it, the registration is necessary to acquire full legal status.
- 2) The marriage must have been authorised by state legislation or recognized by agreement. For this reason, at first, only Catholic, Jewish, Protestant and Muslim marriages had legal effects in Spain, since they were the only confessions that had cooperation agreements with the State. Regarding the Catholic Church and the Spanish State, the Concordat of 1976³¹ and the Agreements of January 3, 1979³² stand out. Regarding non-Catholic confessions, the Agreements of November 10, 1992³³ on State cooperation with FEREDE (Federation of Evangelical Religious Entities of Spain), FCJE (Federation of Jewish Communities of Spain) and the CIE (Islamic Commission of Spain) can be mentioned.

However, this regime was modified with the reform of 2015. Since Law 15/2015, of July 2, not only confessions that have an Agreement with the State are allowed to celebrate marriage with civil effects, but also confessions registered in the RER and that have obtained the declaration of „notorio arraigo”, being these: 1) the Church of Jesus Christ of Latter-day Saints, 2) the Church of Jehovah’s Witnesses, 3) the Buddhist Church, and 4) the Orthodox Church. The declaration of „notorious roots” determines the significant and effective presence of a confession in Spanish territory and to achieve it is necessary to meet some requirements contained in articles 3 and 4 of Royal Decree 593/2015³⁴.

Once the confessions that can celebrate marriage with civil effects have been seen, it is time to address the formal requirements demanded by article 60.2 of the Civil Code:

- 1) First of all, a previous capacity dossier or record is necessary. In other words, an *a priori* control is carried out to verify that the person who is going to marry meets all the required capacity requisites (included in articles 46 and 47 of the Civil Code). This is a difference between non-Catholic and Catholic marriage, in which the control of capacity requirements is *a posteriori*.

³⁰ Real Decreto 594/2015, de 3 de julio, por el que se regula el Registro de Entidades Religiosas, „BOE” No. 183, 1.08.2015.

³¹ Instrumento de Ratificación de España al Acuerdo entre la Santa Sede y el Estado Español, hecho en la Ciudad del Vaticano el 28 de julio de 1976, „BOE” No. 230, 24.09.1976, pp. 18664–18665.

³² The Holy See and Spain signed four agreements on 3rd January 1979 regarding different topics (such as education and cultural affairs or legal affairs), which contributed to the abolition of the 1953 Concordat.

³³ On 10th November 1992, Spain signed three agreements with the three most important non-Catholic confessions in the Spanish territory. Those agreements were: Ley 24/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Entidades Religiosas Evangélicas de España, „BOE” No. 272, 12.10.1992, pp. 38209–38211; Ley 25/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Comunidades Israelitas de España, „BOE” No. 272, 12.10.1992, pp. 38211–38214; Ley 26/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España, „BOE” No. 272.

³⁴ Real Decreto 593/2015, de 3 de julio, por el que se regula la declaración de notorio arraigo de las confesiones religiosas en España, „BOE” No. 183, 1.08.2015.

- 2) Additionally, the free expression of consent before a duly accredited minister of religion and two witnesses of legal age. What is meant by a minister of worship trained to carry out religious acts with civil effects is regulated in the 1992 Agreements between the State and the respective confessions.

Therefore, a confession that is registered in the RER and has an Agreement with the State or a declaration of „notorio arraigo” can celebrate marriage following its own rites. Furthermore, the contracting parties must provide a previous capacity dossier and give their consent before a minister of worship and two witnesses of legal age. The celebration of religious marriages that have the aforementioned requirements produces the same personal and patrimonial civil effects as civil marriage (art. 61 CC).

However, as in civil marriage, registration in the Civil Registry is required for the marriage to display its effects *erga omnes*, that is, against third parties. The registration is a mere element of making the fact public, but the marriage is celebrated at the same time that parties express their consent, since „marriage shall have civil effects from the time of its solemnisation”. For the registration, it is only necessary to present the certification of the celebration of the marriage (article 63.1 of the Civil Code).

Conclusions

- 1) The fact that Spain was constituted as a confessional State during the francoist dictatorship had a determining impact on the marriage system of the time, not allowing any marriage contracted by rituals different from the catholic one.
- 2) The francoist marriage system placed women in a situation of inequality and subordination in relation to their husbands, which was a restriction to their acts and freedom and an obstacle to their personal development.
- 3) Thanks to the Constitution of 1978, Spanish citizens moved on from a restrictive regime to the current democratic society, which not only recognises the right to contract catholic wedlock, but also a brand-new variety of rights for its citizens, among which the right to religious freedom and the right to equality (especially between men and women) are of extraordinary importance.
- 4) Thanks to the modification of the Civil Code, a facultative marriage system was installed, in which Spanish people may opt freely between civil or religious marriage (whether catholic or not, as other religious forms are introduced as well), as long as they respect the rules regarding capacity, solemnities, celebration...
- 5) The XXI century implied a huge change regarding the institution of marriage. As a result of recognising the freedom of sexual orientation, nowadays homosexual marriage is granted for all citizens with full legal equality with respect to marriage between men and women.

Moreover, since Spain is no longer a confessional State, non-Catholic marriages are also allowed. At first, only Jewish, Muslim and Protestant marriages had legal effects, but Law 15/2015 increased the number of rites that could celebrate marriage with civil effects.

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The evolution of marriage in Spain from the francoist dictatorship to the present day

Summary

The aim of this paper is to present a brief summary about the evolution of marriage in Spain: from Catholic marriage during the years of the Francoist dictatorship (1939–1975), going through the democratic transition and the recognition of the right to marriage in the Constitution of 1978, until the necessity for legislative intervention to interpret the constitutional precept more broadly in order to recognise homosexual marriage. Moreover, what has been and continues to be the impact of non-catholic confessions in the Spanish marriage system will be analysed.

Keywords: marriage, religious confessions, homosexual marriage

Ewolucja małżeństwa w Hiszpanii od dyktatury frankistowskiej do czasów współczesnych

Streszczenie

Celem niniejszego artykułu jest przedstawienie ewolucji małżeństwa w Hiszpanii: od małżeństwa katolickiego w latach dyktatury frankistowskiej (1939–1975), poprzez okres przemian demokratycznych i uznanie prawa do małżeństwa w Hiszpanii, z uwzględnieniem Konstytucji z 1978 r., aż do interwencji ustawodawcy w celu szerszej wykładni konstytucyjnego nakazu w celu uznania małżeństw homoseksualnych. Ponadto przeanalizowany zostanie wpływ wyznań niekatolickich na hiszpański system małżeński.

Słowa kluczowe: małżeństwo, wyznanie religijne, małżeństwo homoseksualne