
DISUNION AND RELIGION UNDER FRENCH LAW

*"There are rules of law that echo religious precepts,
and with two reasons to obey instead of one, the people will obey all the better"¹*

Historical links between law and religion - Since the dawn of civilization, religion and law have been closely linked: legal systems have sometimes incorporated religious norms, often adapted over time. In France, this link does not appear explicitly in current positive law.

However, many states around the world continue to delegate to religious authorities certain prerogatives that, in France, are entrusted to civil authorities. This discrepancy is particularly evident in family law, especially in matters of marriage and divorce.

The issue of recognizing foreign religious divorces - Under what conditions can French law accept the recognition of divorce decrees established solely by religious authorities abroad?

This article examines the issue divorce to establish the conditions for reconciliation between the French system, now considered secular, and those of foreign countries where the institution of divorce remain subject to religious authorities or jurisdictions.

European framework - Within the European Union, this recognition is subject to European regulations ("Brussels II *bis*"² or "Brussels II *ter*"³). The interpretation of Articles 1 and 2 of the latter Regulation (particularly with regard to the nature of the decision) has led legal scholars to consider that the Regulation is applicable even in the case of a decision on dissolution of marriage rendered by a religious authority⁴, provided that the authority in question is empowered, in the Member State of origin, to render a decision on dissolution of marriage⁵.

Practical scope - However, there is no State in the European Union where divorce decisions are issued exclusively by a religious authority; the question therefore remains largely theoretical in practice.

It is particularly important to consider religious divorces granted in a third country, both in terms of the creation of a situation of *lis pendens* **(1)** and, once the decision has been granted, to obtain its possible recognition in France **(2)**.

¹ Article by Dean J. Carbonnier, Religion, the foundation of law?, Arch. philo. dr. 1993. 17.

² Regulation (EC) No. 2201/2003 of November 27, 2003 concerning jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

³ Regulation (EU) 2019/1111 of June 25, 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast).

⁴ Family Law, Dalloz Action 2023-2024, *op. cit.*, No. 525.43.

⁵ Where these regulations apply, a divorce decision issued by an authority in a Member State is automatically recognized in France (see Brussels *Ia* Regulation, Art. 30(1); Brussels *II* Regulation, Art. 21(1)).

1. RELIGIOUS DIVORCE PROCEEDINGS ABROAD AND THE EXCEPTION OF LIS PENDENS IN FRANCE

International lis pendens and future religious decisions - When divorce proceedings are brought before a foreign religious authority, the question arises as to whether these proceedings, since they were initiated first, would justify the admissibility of a lis pendens exception before the French courts. In the absence of applicable regulations or international conventions with France, Article 100 of the Code of Civil Procedure, transposed to the international order, applies to situations of international lis pendens, and the lis pendens exception is accepted when the decision to be made abroad is likely to be recognized in France⁶.

This text provides: "*If the same dispute is pending before two courts of the same level that are equally competent to hear it, the court second seized must decline jurisdiction in favor of the other if one of the parties so requests. Failing that, it may do so on its own initiative.*"

Conditions for lis pendens and indirect jurisdiction of the foreign court - A situation of lis pendens arises if the following conditions are met:

- the existence of an identical dispute (identity of parties, subject matter, cause of action, and basis of the claims);
- the same dispute is pending before two courts of the same level, both of which have jurisdiction to hear it; in international matters, the jurisdiction of the foreign court is assessed according to its internal rules of indirect jurisdiction⁷.

French courts must therefore assess *in concreto* the nature of the religious divorce proceedings initiated abroad.

Examples - By way of illustration, in 2017, the Court of Cassation [n.b. this is the French Supreme Court] handed down an important decision⁸: the case concerned a Lebanese couple of the Shiite faith who were married religiously in Lebanon. After initiating divorce proceedings before the Shiite Islamic Council in Lebanon in 2010, the wife brought the case before the family court in France in 2011. In response, the husband raised an exception of international lis pendens in favor of the religious authority that had been seized first. The conciliation judge and the Paris Court of Appeal rejected this exception, ruling that, in the absence of a civil court in Lebanon with jurisdiction over divorce matters, a religious decision could not be recognized in France. The Court of Cassation overturned this ruling, noting that a judge hearing an exception of international lis pendens must verify in concreto whether the foreign decision can be recognized in France. The mere fact that the foreign court is religious in nature is not sufficient to automatically exclude recognition of its decision.

This ruling contrasts with an earlier decision in 2011⁹, where a Lebanese divorce proceeding was rejected for manifest violation of public policy (lack of rights of defense and repudiation mechanism). However, in the 2017 ruling, no manifest violation of rights was found, especially since the initial request came from the wife herself.

⁶ Civ. 1^{re}, Nov. 26, 1974, no. 73-13.820.

⁷ With regard to this criterion of indirect jurisdiction, the link with the foreign court must be characterized: the dispute must be clearly connected to the country whose court has been seized.

⁸ Civ. 1^{re}, Jan. 18, 2017, no. 16-11.630; Legal letter no. 690 of March 9, 2017.

⁹ Civ. 1^{re}, Feb. 23, 2011, no. 10-14.101; D. actu. March 14, 2011, *Foreign divorce: the international lis pendens regime to the rescue of the repudiated wife.*

In 2013, the Court of Cassation also ruled on the recognition of a religious divorce granted by a religious authority in Israel between two spouses of Jewish faith and French nationality¹⁰. The husband decided to apply to the rabbinical court for a get. He then extended his application to include a ruling on the financial consequences of the divorce. The wife challenged the jurisdiction of the rabbinical court and filed for divorce with the French family court. The latter rejected the husband's plea of *lis pendens* and declared itself competent. The Court of Appeal upheld this decision, ruling that the applications filed in France and Israel did not have the same subject matter. The Court of Cassation then overturned this ruling, criticizing the Court of Appeal for failing to verify whether its interpretation of the Israeli texts corresponded to that adopted by Israeli positive law: in order to assess whether the subject matter of two proceedings is the same, the subject matter of the foreign proceedings must be examined in the light of the applicable foreign law. In other words, a situation of *lis pendens* may exist in the event of a referral to the Israeli rabbinical court, but only if the latter is likely to rule on the civil consequences of the divorce.

In conclusion, the Court of Cassation generally accepts the application of the principles of *lis pendens* to situations where only a religious authority is seized, as the religious nature of the foreign court does not *ipso facto* exclude the application of the priority rule.

2. RELIGIOUS DIVORCE PROCEEDINGS ABROAD AND RECOGNITION IN FRANCE

Scope of application of common private international law - If the divorce decision is issued by a third country¹¹ and no applicable bilateral convention applies (e.g., the Franco-Moroccan convention of October 5, 1957), French common private international law applies¹².

The determining factors are the international jurisdiction of the foreign authority and compliance with French public policy.

Broad recognition of forms of dissolution and religious divorces - Regarding the jurisdiction of foreign courts, French law generally recognizes the possibility of a divorce being validly pronounced abroad, even when it does not result from a judgment but from an administrative or private act¹³. It does not require that the authority pronouncing the divorce be necessarily a court: a religious divorce may, under certain conditions, be effective in France¹⁴.

Violation of public policy and equality of spouses - The most sensitive issue is that of a possible violation of public policy. In a ruling dated July 8, 2010¹⁵, the Court of Cassation specified that the refusal to recognize a foreign decision on the grounds of a breach of French international public policy presupposes that "it contains provisions that conflict with the essential principles of *French law*."

The scope of the absence of a violation of French international public policy was clarified by the rulings of the Court of Cassation of February 17, 2004¹⁶, in matters of repudiation.

¹⁰ Civ. 2^e, Dec. 4, 2013, no. 12-16.899.

¹¹ A particularly important rule, established in the *Zagha* ruling of June 15, 1982, no. 81-12.611: while foreign religious divorces may, in certain cases, be recognized in France, this is never the case for a religious divorce pronounced on French soil, in the absence of a civil court decision.

¹² Dalloz Action, Family Law, *op. cit.*, No. 525.140.

¹³ H. Gaudemet-Tallon, J. Cl. Dr. international, Fasc. 547-30: Divorce, nos. 1 to 3.

¹⁴ Family Law, Dalloz Action, 2023-2024, *op. cit.*, no. 525.181.

¹⁵ Civ. 1^{re}, July 8, 2010, no. 08-21.740.

¹⁶ Civ. 1^{re}, February 17, 2004, no. 02-11.618; Civ. 1^{re}, February 17, 2004, no. 01-11.549.

As a reminder, repudiation, in the sense of traditional Muslim law, is the unilateral dissolution of marriage by the husband, pronounced without substantial judicial intervention.

Certain national laws provide for forms of unilateral divorce or mechanisms such as *khol'â* (divorce initiated by the wife in exchange for financial compensation) (e.g., Art. 48¹⁷ and 54¹⁸ of the Algerian Family Code).

This arrangement raises a major objection under French law: the violation of the principle of equality between spouses upon dissolution of the marital bond. Article 5 of Protocol 7 to the European Convention of Human Rights, on equality between spouses provides that: "*Spouses shall have equal rights and responsibilities of a civil nature between themselves and in their relations with their children in respect of marriage, during marriage and at its dissolution. This article shall not prevent States from taking necessary measures in the interests of children.*"

Since the February 2004 rulings, the Court of Cassation has refused to recognize as judicial decisions having effect in France divorces by repudiation that undermine the fundamental values of the forum, in particular the equality of spouses, which is a requirement of international public policy.

More recently, in a ruling dated July 4, 2018¹⁹, the Court of Cassation ruled that a repudiation pronounced in Algeria was contrary to international public policy, since the spouses of Algerian nationality were domiciled in the territory of a contracting state (specify in the Franco-Algerian Convention of August 27, 1964²⁰), (add: even if they were separated) and refused to declare the divorce judgment enforceable in France.

In another ruling dated March 17, 2021²⁰, the Court ruled on the recognition of a divorce pronounced in Algeria under the *khol'â* procedure between a woman of French Algerian nationality and a man of Algerian nationality who had married in Algeria and then settled in France. It considered that the *khol'â* procedure and the repudiation procedure could not be equated: the former, initiated by the wife, is subject to the payment of a sum of money, while the latter is based solely on the will of the husband, who can only be required to pay compensation if the judge recognizes an abuse of rights. In this ruling, the Court of Cassation relativized the international public policy exception based on the status of the spouse requesting enforcement.

Relativization according to the applicant - Thus, an unequal divorce provided for by foreign law may be recognized in France if:

- (1) it is invoked by the spouse for whom the rules are least favorable;
- (2) it has not been tainted by fraud;
- (3) the other spouse has been able to assert their rights.

¹⁷ Article 48 of the Algerian Family Code states: "*Divorce is the dissolution of marriage [...]. It occurs at the will of the husband, by mutual consent of both spouses, or at the request of the wife within the limits of the cases provided for in Articles 53 and 54 of this law*".

¹⁸ Article 54 of the Algerian Family Code states: "*The wife may separate from her husband without his consent, provided she pays him a sum known as 'khol'â'. In the event of disagreement on the amount, the judge shall order the payment of a sum not exceeding the value of the 'sadaq el mithl' dowry assessed on the date of the judgment.*"

¹⁹ Civ. 1^{re}, July 4, 2018, no. 17-16.102.

²⁰ Civ. 1^{re}, March 17, 2021, no. 20-14.506.

Public policy of proximity and neutralization of the public policy exception - Furthermore, the public policy exception will also depend on the link of proximity with France: the refusal to recognize a situation contrary to public policy is not absolute. The Court, using the mechanism of "public policy of proximity," requires the characterization of a close connection (residence in France, French nationality) to invoke the international public policy exception²¹, which has been confirmed by legal doctrine²². Therefore, there is no reason to neutralize a divorce decision pronounced abroad that may violate public policy, such as repudiation, when the situation did not have close ties to France at the time the repudiation was pronounced. The rejection of the public policy exception and the subsequent recognition of the effects of repudiation, in the absence of a close connection with France, is amply confirmed by the wording used by the Court of Cassation, which emphasizes residence in France or French nationality²³.

Date of assessment of close ties - The Court of Cassation has not yet had to rule on the precise moment at which close ties with France must be assessed²⁴.

²¹ See, for example: Civ. 1^{re}, Feb. 17, 2004, no. 01-11549; Civ. 1^{re}, February 17, 2004, no. 02-11618; Civ. 1^{re}, July 4, 2018, no. 17-16.102.

²² P. Courbe, Le rejet des répudiations musulmanes, D. 2004. 815, no. 11; P. Mayer, V. Heuze, *Droit international privé*, LGDJ, 11thed., no. 617;²² H. Gaudemet-Tallon, *op. cit.*, no. 4; A. Devers, Manifestations of Public Policy, Dr. fam. no. 9, Sept. 2015, file 47; P. Hammje, Rép. dr. international Dalloz, v^o *Divorce and Legal Separation*, Nov. 2018, no. 278; T. Azzi, Conflits des lois et conflits de juridictions – Précisions sur l'ordre public de proximité, JCP Oct. 11, 2006, 10165; M. Farge, Consécration d'un ordre public européen de proximité et répudiation musulmane, Dr. fam. Nov. 2018, comm. 270.

²³ Dalloz action, Family Law *op. cit.*, no. 525.197; M.-L. Niboyet. A French perspective on the recognition of Muslim repudiations in France, *International Review of Comparative Law*. Vol. 58 no. 1, 2006. pp. 27-46; J. Lemontey, Voluntarism in case law: the example of Muslim repudiations before the Court of Cassation, *Private International Law: works of the French Committee on Private International Law*, 17th year, 2004-2006. 2008. p. 84.

²⁴ J. Lemontey, *op. cit.*, p. 84.