Civil & Legal Sciences

Gloria Esteban, J Civil Legal Sci 2014, 3:2
http://dx.doi.org/10.4172/2169- 0170.1000116

Research Article Open Access

Implementation of the Moroccan Family Code by Spanish Authorities to Immigrant Women (Through the "Recognition Method")

Gloria Esteban de la Rosa*

Professor of Private International Law, University of Jaén, Spain

***Corresponding author:** Gloria Esteban de la Rosa, Professor of Private International Law, University of Jaén, Spain, Tel: 34 953 212 118; E-mail: gesteban@ujaen.es

Rec Date: Jan 20 2014; **Acc Date:** Mar 24 2014; **Pub Date:** Mar 26 2014

Abstract

The legal-family situation of female Moroccan immigrants in cannot be treated mechanically; rather, cultural aspects must also be taken into consideration. To this end the solutions offered under Private International Law linked to immigration must respect "cultural identity" and also "cultural diversity" common to these private relationships. Furthermore the Spanish system of Private International Law must promote the continuity of the family relations of people who migrate in their foreign place of origin. On the other hand, as part of the gradual formation of multicultural societies, the understanding of the role of public policy in relation with the legal-family situation of female Moroccan immigrants in is changing nowadays.

Keywords: Dowry; Mut'a, talaq and tatliq; Revocable and irrevocable dissolution; Hadana and wilaya; Recognition method; Public policy

Introduction

Studies carried out on the repercussions that the new Moroccan Family Code has had on Western countries can be appreciated in the bibliography which is not only growing in importance but also contains material written in Spain and Morocco as well as in Belgium, France, Italy and other Maghreb countries [1]. The commentary on the reforms put in place by the Family Code especially relating to the position of women within families and, consequently, in society, does not escape the attention of researchers not only in the field of sociology but also legal and cultural fields (anthropology, psychology, socio-pedagogical, etc.) and translation or philology among others.

The reforms in question are controversial to say the least. Whilst some authors believe that they constitute real progress which society, and especially women's organizations, have been demanding for decades, others are more skeptical and consider that these new provisions will have no real repercussions as long as the mentality of the people who have to apply them remains unchanged.

In any case, it is undoubtedly an innovative regulation, showing an advance in the recognition of greater freedom and independence for women within the family, and a move towards gender equality; a concept which cannot be understood along the same lines as in Western countries or legislations, on the one hand. And, on the other, regarding the daily life of the Moroccan population living in Spain and in the Autonomous Community of Andalusia at this time [2], these modifications are applicable insofar as the personal and family relationships of these women are governed by the Spanish system of Private International Law [3].

Thus, there are currently an increasing number of cases brought before Spanish authorities linking the current Spanish family law with the Moroccan Mudawwana [4]. These are "private international situations linked to immigration", where not only the socio-economic factor, characteristic of migrations, comes into play, but also the cultural factor, given that the cases involve people from a part of the world which, although geographically close to Spain, has a wholly different way of understanding life and personal and family relationships, from a deep-rooted Islamic judicial and cultural tradition.

Therefore, the main topic to be treated in this article is the legal-family situation of the female Moroccan immigrant in Spain and, in particular, institutions such as the dowry system, child support (or nafaqa) and dissolution of marriage, through the application of the current Mudawwana (as well as the old in some cases) in Spanish law. This allows not only an analysis of the legal status of personal and family relationships from the perspective of the Spanish system of Private International Law but also considerations relating to the recognition of such relationships in their country of origin. Here the "recognition method" can be applied (see below) [5].

The Moroccan family code of 2004: Main modifications

The Moroccan Family Code (FC) which came into play on 5th February 2004 repealed the Code of Personal Status and Inheritance (1957-58), better known as the old Moudawana (summary) [6]. The current Family Code is made up of 400 articles, which regulate in six Books: Marriage (Book 1), the dissolution of the bonds of matrimony and its effects (Book 2), Birth and its effects (Book 3), Legal capacity and representation (Book 4), Wills (Book 5), Inheritance (Book 6) [7]. Book 7 contains a collection of interim and final provisions [8].

The Family Code is based on tolerant Islam which honours man and preaches justice. As highlighted by the King of Morocco on the occasion of the opening of the autumn parliamentary session of 2003, the Family Code should be interpreted as a policy aimed at the entire family, which serves several purposes: to overcome the inequality that weighs upon women, to protect the rights of children and to preserve the rights of man. The Sovereign tried to reconcile in this way the development requirements of the country whilst ensuring family rights were upheld. This new legal instrument is both linked to the precepts of Islam and the rules of universally recognized Human Rights.

In this way the Family Code is based on the principles of Islam as an egalitarian and tolerant religion, given that, despite the views of other

more radical legal schools, Islam can be a source of modernity. There is, however, still debate over ijtihad, between those who consider the interpretation to be dangerous and those who are in favour of it [9].

This has gradually become a formal debate, given that the interpretation is considered to be not only necessary but, to all intents and purposes, indispensable, as, of the 80 verses contained in the Koran dealing with the rules of Law, many are not applicable in our times as the historical context for which they were written no longer exists.

For this reason, the Monarch of Morocco issued a Family Code, with the conviction that Islam gives women a number of rights, to be regulated and exercised by them. Thus, the Code advocates ijtihad, which, as seen above, is the interpretation of the Koran in the context of modern society and its demands, contrary to patriarchal hierarchy and designed to validate arguments present in sacred legal texts [10].

Like other Muslim countries, Morocco applies classical Muslim law, which led to the birth of various rites or schools (see below for more detail) [11]. On issues of personal status, Morocco followed the malikí doctrine up until the enactment of the Personal Status and Inheritance Code (previously Moudawana) [12]. This came about in response to the need for a norm to regulate family relations in accordance with the precepts of the Koran, above all to end "Urf" Law (on local customs and practices).

The Moudawana responded to this purpose, but furthermore it captured the situation of discrimination lived by women throughout the 1950s. Although there had been previous specific reforms (1993), family law underwent a significant change with the entry into force in February 2004 of the Family Code, which repealed the Moudawana [13].

The Family Court clarifies the concept of head of family, in that it considers the sharing of responsibility between the two spouses a necessary condition for the construction of a family, and underlines the importance of mutual comprehension and consent in managing all issues relating to the family (article 4 FC) [14]. It also annuls the wilaya, so that a woman can enter into matrimony without the consent of a legal representative [15]. A dowry must be presented (according to article 26 FC) [16]. Finally, the aspect of the regulation of marriage which causes greatest controversy in the eyes of Western legal systems is the requirement that a woman marries a Muslim.

Although polygamy is upheld, some limitations have been introduced, so that a man needs court approval to marry for a second or successive time [17]. A judge will not give authorization until he is certain that it is fair to the wives [18]. The woman can also introduce as a condition in the marriage contract that, if her spouse marries again, she has the right to file for divorce.

The Family Code has also simplified the procedure to be followed by Moroccan Muslims who wish to enter into marriage overseas. They can celebrate the marriage according to the local administrative procedures of their country of residence, provided that the conditions of consent (offer and acceptance), capacity and offering of the dowry are fulfilled, and the ceremony is held in the presence of at least two Muslim witnesses [19]. A copy of the marriage contract must be submitted within three months of its conclusion to the Moroccan consular section (articles 14-15 FC).

Regarding the dissolution of marriage, this can occur through tatliq or talaq, as well as through death of either spouse, (or the issuance of a judgement declaring him or her deceased when there is uncertainty surrounding the fact), through the existence of a defect (noted at the time of celebrating the marriage), or other causes stipulated in the Code (article 71). Finally, another relevant provision is article 128 of the Family Court, which allows recognition in Morocco of decisions rendered by foreign courts concerning divorce through tatliq or talaq, through mutual consent or annulment, as long they are issued by a court with jurisdiction over the matter and are based on grounds for terminating the marriage relationship that do not contradict those contained in this Moudawana.

In any case, the conditions and procedures laid out in articles 430-432 of the Code of Civil Procedure must be met [20]. This new regulation incorporates the jurisprudence of the Supreme Court of Morocco in the approval of decisions taken overseas.

The "Recognition Method"

As seen above, the personal and family situations of the female Moroccan immigrant must be dealt with by the Spanish system of Private International Law, given that a foreign element is present. It is worth pointing out that currently a methodological renovation of Private International Law is taking place, especially after the second half of the twentieth century, where a collapse in the leadership previously enjoyed by certain States in the world order took place on the one hand and, on the other, the world became divided into symbolic units (sometimes in preference to people) [21].

This renovation can also be linked to the current conformation of a micro-system within the legislation, the "social law of immigration", which effects Private International Law, obliging a reconsideration of its function and, above all, its traditional regulatory techniques, with the aim of verifying whether an adequate response to the needs of the people who migrate, in particular regarding their social integration, is offered [22].

This question can also be found in the framework of a concrete political theory and/or philosophy, given that the system of Private International Law is no stranger to either the social demands or to the principle constructions and reflections on these demands. For this reason the "Theory of Recognition" offered by Charles TAYLOR seems to be the one to follow. This author refers to "the overwhelmingly monological tendency of the mainstream of modern philosophy" before cultural communities who wish to survive and who demand "recognition", because they have realized that the identity of each person conforms to and is molded by, in part, their recognition or lack thereof (false recognition) [23].

So that the current system of Private International Law can respond to the social question of immigration it must be -above all- a law which supports the needs of the people who migrate [24]. Its aim is to promote the spatial continuity of a person's family relationships, both in the country of origin and of habitual residence overseas. Thus, the "recognition method" depends on there being a general clause, which allows interpretation in accordance with the principle of social integration, in the system in question [25].

The Spanish authorities ought to verify whether the relationship which they are to enter into the Forum would be recognized in the immigrant's country of origin and, if not, they must verify and consider the interests in play and the fairness of the result [26]. That is, the authorities must examine the interests of those involved in order to decide, through the elimination, as far as possible, of difficulties concerning the recognition and enforcement of foreign judgments (in accordance with Spanish law) whether the foreign law must be applied

to promote extraterritorial recognition of the (Spanish) decision in the immigrant's country of origin [27].

Note that the "recognition method" does not require a reform of Private International La, rather its interpretation in accordance with the principle of social integration when a private international situation related to immigration is submitted to the judicial authorities or other orders. Some cases in the Spanish case law can also be considered here, in which judicial authorities value the constitution of legal relations in the forum in response to the possibilities that have to be accredited in the immigrant's country of origin.

In this regard, the Sentence of the Appeal Court of Barcelona, no. 381/2006 (12th Section) of 8 June is noteworthy, as it considers the appeal filed and partially reverses the judgment at first instance, based on a different rationale law than that relied on by the appellant, in accordance with the Family Code [28]. The Appeal Court considers article 128 of the Family Court in order to assess whether the Spanish decision will be recognized in the country of origin of the former spouses, of Moroccan nationality [29]. If the Family Court of the dissolution of marriage is applied, the Spanish decision will be recognized in Morocco (art. 128 FC) [30].

Finally, the recognition method represents a limit to the performance of peremptory norms (that protect fundamental rights), given that social integration is measured by Private International Law in the spatial continuity of an immigrant's family and personal relationships, both in their country of origin and in their country of habitual residence overseas.

Difficulties in Applying the new Moudawana in Spain

The application of the FC by Spanish legal operators is not simple, to the extent that it is not only a question of knowing its contents, but also, behind each of its articles and, relating to the institutions contained in the Code, there is a specific understanding of the world and, more specifically, family relations [31]. Furthermore, the provisions present in the FC cannot be read disregarding the fact that Islam is the official State religion in Morocco, recognised as such under the constitution, on the one hand and, on the other, that the Code is the part of positive Moroccan Law most highly influenced by Islamic Law, given that following Independence many of the Codes adopted during foreign domination (French Protectorate) remained valid and have never been substituted or replaced with other texts.

For this reason, the FC is not exempt from religious influence in Morocco, but rather King Mohammed VI has emerged as the sole interpreter of the Code (in his capacity as Commander of the Faithful), despite approval being submitted to Parliament [32]. And, in so far as the King stands as supreme interpreter of its provisions, the authorities of the court order will have to follow his ijtihad.

The provisions of the Code are for personal application, of Moroccans (Muslims), regardless of whether or not they hold another nationality, whilst residing in Morocco but also overseas [33]. In the latter case, the extraterritorial application of its provisions means that the family relations of Moroccans are governed by the FC, even when they reside overseas, because all people who are believers or are faithful, are ruled by religious Law regardless of nationality. Nevertheless Moroccans of Jewish faith shall be governed by the provisions of the Hebraic Moroccan Family Law (article 2).

In the specific case of Morocco, regarding the interpretation of Islamic Law, the doctrine which prevails is that of the Maliki School which permeates at all times the sense of its provisions [34]. From this perspective, it is important to consider that the revelations of the Prophet constituted a major change in the understanding of social relations, which is not, however, considered sufficient in our time for the defence of actual equality for women (equal opportunities) within the family and society.

Marriage: The dowry

The celebration of marriage is a universal right (ius connubii) [35]. As is known, in Spain, the marriage system is unique, consisting of dual forms: civil and religious, and whose effects, regardless of the type of ceremony, will be the civil [36]. The celebration of a marriage is configured as a solemn act, in which consent has to conform to certain formalities, and at which an authority figure must be present, giving rise to the relationship between the authority and the form (lex magistratus).

In general, under Muslim Law, a man must hand over a dowry to his wife as a symbol of his desire to enter into marriage with her, as foreseen in the current Moroccan Family Code [38]. The dowry is fundamentally a requirement for a valid marriage celebration. Furthermore it plays an important role in cases of dissolution or if the husband dies, given that it is a debt to his wife [39].

If not delivered in full (if it is a sum of money), at the time of the celebration of marriage, it becomes a debt acquired by the man towards the woman which will eventually be inherited by his heirs. For this reason, the treatment of the dowry in such cases could be considered closer to the field of property law, and not family law, given that it is an actual debt which can be claimed in court.

The lack of correspondence at present of the dowry in Spanish legislation has led the courts, even those inclined to its recognition, to resolve inadequately those cases that have been raised by spouses united by marriage according to their personal law or in a mixed marriage, when one party holds either Moroccan nationality or that of another country where the dowry exists.

From the point of view of marriage in Spain, the requirements present could be considered a limitation inconsistent with the freedom to marry and contrary to the principle of equality and, therefore, a public policy issue. If a female Moroccan immigrant claims before the Spanish authorities the payment of her dowry, it would not make sense -as has happened previously- that her claim be dismissed simply because the dowry constitutes an institution which does not currently exist in Spanish legislation. This response is inconsistent with women's rights, given that she should be protected by a foreign legislation. In any case the relevant public policy must tread carefully [40].

This is what happened in the famous case resolved by Judgment n º 5/2004 of the Appeal Court of Castellón (Section 3), January 21st, 2004, where an appeal was made (by a woman) against the verdict offered by the court. The interested parties were married in the Islamic way in the Embassy of the Republic of Iran in Spain. During the celebration the man promised the woman a dowry of 3,000 euros.

Before the court's decision rejecting the claim for the payment of dowry, the appellant (an Iranian) was directed to the Appeal Court, who reiterated the arguments of the court: on the one hand, the marriage was not celebrated validly in Spain, nor was it registered in the Civil Registry. On the other, the dowry is considered an effect of marriage, regulated under article 9, 2º of the Spanish Civil Code (CC from now on) and therefore under Spanish law, which does not

recognise the dowry at present. And finally, proof of the Law of the Republic of Iran (a requirement of the Spanish Supreme Court) was not provided.

In any case, a claim petition for payment of the dowry would not be covered by article 9.2º of the Civil Code, as, according to the Moroccan Family Court, it shall not be considered an effect of marriage, but is rather a requirement for the valid celebration of the marriage, without which a marriage is invalid. On the other hand, if the dowry is considered through the application of article 9.3 of the Civil Code, that is as an aspect included in the property regime of the marriage, it would not correspond to its meaning in the Moroccan Law which states that its value is symbolic, and not economic or material.

For this reason it can be said that Private International Law does not yet hold the necessary instruments to respond to questions raised by the dowry, as regulated in the Family Code. From the perspective of the Spanish system of Private International Law the dowry should be considered a condition for the valid celebration of marriage, when celebrated on Spanish soil, in a legally recognized religious form, and, in particular, under Islamic faith [41]. And in cases where a delegated marriage has been celebrated (as stipulated in the Moroccan Family Code), and the woman claims her dowry before the Spanish authorities, a possible classification of the case under the system of Private International Law is that of debt (financial). The delegated marriage consists on the celebration of the marriage without the indication of the dowry (art. 27). In this type of marriages the dowry is clearly a debt (for the husband) and a credit for the wife.

Dissolution of marriage: Is this regulation incompatible with public policy?

The regulation of the dissolution of marriage, according to the Family Code, maintains –largely - the religious comprehension of family and social life. This is the main reason why such changes have not had a decisive impact on the understanding of the function of the dissolution of marriage in Moroccan law. Talaq consists of a unilateral dissolution presented by one of the spouses, usually the husband, given that if the request is presented by the woman she must first seek her husband's consent (arts. 78, 79 and 89 CF) [42], either because this right was handed over at the moment of celebration of the marriage (tamlik), in exchange for compensation (julc) or for the remainder of the dowry if it has not been paid in full [43]. Court authorization is required in any case [44].

The court will also determine an amount to be paid in compensation to the woman (mutca) for damages caused by the dissolution of the marriage, assessed based on the length of the marriage, and the degree to which the husband has abused this right, etc. (art. 84 CF) [45].

The wife may petition for divorce tatliq if one of the causes stipulated in article 98 of the Family Code occurs. These are: Non respect by the husband of one of the conditions in the marriage contract; harm; non-maintenance; absence; latent defect (ayb) or abstinence and abandonment [46]. Alongside these, the Family Court offers two new forms of dissolution of a marriage: by mutual consent (al-talaq b-l-ittifaq) as in article 114 of the Family Code, and for irreconcilable differences (tatliq li a-siqaq), under article 94. Both the woman and the man can ask for these two forms of divorce before a judge.

The question arises whether the fact that the Family Code regulates the forms of dissolution of marriage which a man or a woman can apply for differently is, in itself, incompatible with Spanish (international) public policy. Firstly it is necessary to delimit the essential content of fundamental law, as it is not possible to apply or take into account foreign law, because these aspects are regulated by rules of necessary application [47]. And consequently an assessment must be made of the point at which it is feasible to stop considering the essential content of fundamental law in order to give way to cultural diversity (legal), insofar as the norms of conflict require the application of a foreign law [48].

At present a new interpretation of public policy is called for, whose objective is to verify to what point fundamental law can be interpreted in accordance with the value of cultural diversity [49]. For this reason, the application of Moroccan Law cannot be omitted on the grounds that it is incompatible with Spanish public policy, as, if the essential content of the rights to equality are interpreted, and according to the (cultural) guidelines laid out in Islamic Law, it may be understood that the differences have been upheld (ounnir), and are present in the way dissolution of marriage is conceived [50].

So, public policy must act in a way which is not only attenuated but also limited, that is to say more as a clause than as an exception – as stated above [51]. The difference lies in the fact that a clause can be clarified, whilst the action of the exception takes place before circumstances which are assessed as public policy issues [52]. In any case, it is important to consider the notion of social integration as seen from the perspective of Private International Law, which requires that the connection which is established in the forum be recognised under the legislation of origin (recognition method).

The use of public policy as a safeguard clause allows consultation of the foreign Law and its application when this is not incompatible with the essential content of the fundamental law of the forum, as happens in this case, given that the current regulation foreseen in the FC relating to the dissolution of marriage is not incompatible with the right to equality [53]. The fact that new ways of dissolution of a marriage have been introduced, allowing both parties to terminate their relationship through the same procedure and alleging the existence of disagreements must also be taken into account (article 97 FC).

Thus public policy becomes a safeguard clause, that is, a limit on the possibility of the forum accepting the cultural peculiarities or specifications of the foreign law, as this is not permitted by the sense in which this fundamental law is regulated, not only in the forum's legislation but also in the international community [54]. Finally, and in any case, even when the foreign law is not to be applied, its specifications can be considered in order to, for example, promote recognition of the decision in the country of origin of the immigrant.

In this way intercultural communication between the legislations of the country of origin and of residence of the immigrant is favoured. Thus public policy acts more as a safeguard clause whose action is limited than as an exception and, in any case, it is subject to the "recognition method", as it is also important to verify – in order to make such a comparison -, whether the connection established in the forum will be recognised in the immigrant's home country.

The Appeal Court ruling of Murcia, number 166/2003 (section 1), 12th May, acts as an example of the action of public policy as an exception, where even the judicial authority went to the trouble of finding out the content of a foreign law (in this case the Moroccan law

relating to the causes for the dissolution of marriage), to prove that the public policy had acted in haste. However this procedure is justified only when public policy is seen as an exception which, insofar as the authority appreciates the incompatibility with the higher principles or values of the forum's legislation, cannot stop the exception being used to discard the application of a foreign law.

Nevertheless, public policy as a clause allows the content of a foreign law to enter, a comparison to be established with the regulation given by the forum's legislation, and an assessment made of its possible incompatibility with the higher principles or values. To do this, the content of the foreign law must be consulted, compared with the considered fundamental law, and if it is not compatible with the superior values of Spanish law, it may not be applied.

Legal separation of Moroccan women in Spain

Other cases of special interest are those presented at a specific time period in Spain, where female Moroccan immigrants filed for divorce from their husbands, of the same nationality. These requests led to a series of differing responses, cumulating in the reform of article 107 of the CC, and the birth of Organic Law 11/2003 of 29th September. This modification was related to the situations of helplessness in which Moroccan women, victims of abuse, found themselves when, in order to maintain the order of protection, they were obliged to file a civil action in the home within 30 days, according to article 544 of the Criminal Procedures Act (after modification by Law 27/2003, 31st July).

At that time, the fact that the possibility of filing for divorce without prior judicial separation was not referred to in Spanish law thwarted these claims, causing a patently unfair result for Moroccan women. The dissolution of marriage was governed by article 107 of the CC, according to which Moroccan law would be enforced, as both interested parties held that nationality.

Nowadays, these situations do not occur, because divorce has become independent of legal separation under present Spanish legislation, so the Moroccan immigrant woman can divorce in accordance with the indications of the Spanish law, as provided in the current Regulation 1259/2010, of the Council of 20th December 2010, for which enhanced cooperation in the field of the law applicable to divorce and legal separation is established (article 5). This regulation became effective on 21st June 2012.

Revocable and irrevocable characteristics of the dissolution of marriage

Another question which has caused suspicion to the Spanish authorities relates to the revocable nature of certain methods of marriage dissolution expressed in the FC. Specifically, there are both revocable and irrevocable methods of dissolution, but the revocable methods stated in the Code also become irrevocable over time. As a general rule, any divorce granted by the court is irrevocable, with the exception of cases of divorce on the grounds of abandonment and non-maintenance (article 122 FC).

Contrarily, any divorce pronounced by the husband (talaq) is revocable, with the exception of: a third repudiation (presented by the husband), divorce before the marriage is consummated, divorce petitioned by both spouses (tamlik and julc) and divorce by mutual consent (article 123 CF). If the husband wants to take back his wife after a revocable divorce, two adouls (public notaries) shall certify this and immediately inform the judge, and the wife's consent is also necessary (article 124 CF). The length of time for which the dissolution of the marriage is revocable corresponds to the cidda ((legal period of continence), which is three menstrual months.

When recognition by the Spanish authorities was called for of a Moroccan decision on the revocable dissolution of marriage, the **General Directorate for Registries and Public Notaries** considered that there is no uncertainty about the circumstances of the marital status of the person and therefore it is incompatible with public policy. Of particular relevance is the Resolution of 26th October 2006, which denied the registration of a marriage, given that there was no record that previous matrimonial ties had been broken, which goes against public policy.

The case referred to a marriage registration dossier in which an appeal was brought against a decision issued by the Clerk in charge of the central Registry Office, rejecting the registration of a marriage celebrated in Morocco on 10th September, 2000. The husband was born in Morocco in 1972 and held Spanish nationality, and his wife was born in Morocco in 1972, of Moroccan nationality. The husband was obliged to present the original marriage certificate and the marriage license, which states that he was divorced as of 7th October 1999, a divorce of revocable nature.

On 17th January 2005, the Clerk of the Registry Office passed sentence denying registration of the marriage, as previous matrimonial ties still existed. The divorce was not considered to be an authentic dissolution of marriage as its revocable nature meant that the ties had not been definitively broken. For its part, the **General Directorate for Registries and Public Notaries** considers the "application" of Moroccan law is incompatible with the public policy of the forum, because it does not provide assurance of the marital status of a person.

However, in this case public policy should not prevent the Moroccan decision of dissolution being recognised and, thus, registration of the new marriage should take place, paying attention to the regulation in the legislation of the revocable nature of the termination of matrimonial ties (see above). The position of the DGRN cannot be accepted for various reasons: firstly, for the fact that it contemplates recognition of a Moroccan decision on the dissolution of marriage and, more specifically, the issue of the termination of the personal bond of marriage.

It is not a question of recognising the possibility of a person, having terminated his marriage, resuming co-habitation with his first spouse, if he so desires, as they are, to all intents and purposes, still married. In this case, if both parties wished to resume said co-habitation, it would be necessary to celebrate a new marriage. Therefore, the issue presented before the General Directorate is not related to the application of Moroccan Law, rather to whether or not decisions made in Morocco on the dissolution of marriage are allowed to take effect before the forum.

Even if this issue had been raised from the perspective of the application of Moroccan law by the Spanish authority, it cannot be considered to be inconsistent with public policy, as the fact that the foreign law governs the termination of the personal bond of marriage can be accepted, without taking into consideration its revocable nature. That is, if reconciliation occurs, a couple will be required to remarry.

Consider, on the other hand, the similarities between the revocable nature of the dissolution of marriage and the status of legal separation.

These similarities mean that the Family Code cannot be considered incompatible with the international public policy of the forum. In short, if the public policy mentioned acts as a clause, the foreign law may be consulted, in the first instance. Secondly, it allows for a comparison with the regulation offered by Spanish legislation and, finally, there is room to assess its possible compatibility with the superior values of the forum.

Attributing hadana to female Moroccan immigrants

The search for an expression in Spanish which grasps the meaning of the notion of hadana is fruitless given that custody (care) as conceived by Spanish law has no similarities in Moroccan law. The main differences lie in the comprehension of parent-child relationships, given that according to Moroccan law it is the father who is sole holder of paternal rights (understood as paternal authority).

While the use of the expression "tutelage" is common, it does not allow for the understanding that there is actually a link with "patria potestad" (parental rights) conceived in Roman law as: exclusive and sovereign power of the pater familias over his offspring (RODRÍGUEZ ENNES). The term "wilaya" means "power" [68]. In fact during the pre-Islamic period, paternal authority – as in Roman law – gave the father ius vitae nescisque, or the power to make decisions about the lives of his son or daughter. However, Muhammad tried to introduce in this relationship the notion of protection, that is, tried to transform the power of control to a protective power of the daughter and son, an idea that customs have been slowly changing.

Both family systems (Roman and Arabic) respond to a symmetrized family model of patrilineal character, in other words they define symmetric roles for the brothers which imply an equitable distribution of property from which the sisters are often excluded (TODD). The power of control and protection (wilaya), over both the person and the property of the son and the daughter is related to succession and the rights to inheritance.

In this context the use of the expression "tutelage" to refer to the relationship established between the father and the son or daughter due to the fact of (legitimate) parentage is misleading. It must be said, therefore, that in current Moroccan family law there is no concept similar to that (known in Spain) as parental rights, which presupposes, in any event, equality between men and women in relation to their duties and rights towards their children.

According to Moroccan legislation, only the father holds parental rights over his son or daughter, and the mother holds the right to bring up the child (hadana), that is personal and material care (except alimentation) until the child comes of age. Hadana consists of the care and attention given by one person (usually the mother) to another and, more specifically, can be defined as the right/duty to bring up the child. Hadana is a right held by certain persons, according to an order of preferences established by the Family Code The Maliki School clearly states that hadana is the right of certain persons, although its practice must respond to the interests of the child.

An innovation in the new Family Code over the old is that now the interests of the child are specifically mentioned. Hadana is attributed, or specifically established (art. 179), whilst tutelage (wilaya) corresponds, by law, to the father of the child (art. 236). The court may resort to the assistance of a social worker to prepare a report on the home of the person who holds hadana and the extent to which it meets the material and moral needs of the child (art. 172 CF).

Hadana shall be awarded first to the mother, then to the father (art. 171 CF). However the mother may lose hadana in preference to the father if she is not Muslim or if she resides outside of Morocco, even when the marital home is in Spain, for example, and the father manages to prove before a Moroccan judge that the marital home is in Morocco. This comes about because the notion of marital home does not have the same meaning in Moroccan law as in Spanish law.

According to Moroccan law, it is up to the husband alone to decide where this home is to be found (baït azzaoujïa). Should changes occur in the status of the person who holds hadana that are likely to cause harm to the child, child custody shall be withdrawn and awarded to the next eligible person. The conditions which, according to article 173 of the Family Code, the person who holds hadana must meet are: the age of legal majority (if it corresponds to persons other than the parents); Moral rectitude and trustworthiness; The ability to raise the child, protect his or her health and ensure his or her moral and religious upbringing and schooling; and that women petitioners for custody may not marry except in the cases provided for in Articles 174 and 175. In general, hadana will be lost if the person does not meet any of the conditions.

In principle, the effects involved in the dissolution of marriage in Spain of the female Moroccan immigrant regarding her children are determined in accordance with Spanish law, that is, the judicial decision pronounced by the separation or divorce (or marriage annulment) determines the custody of children, visitation rights, if any, and the provision of alimentation which correspond to the minor or person who has come of age, and alimony, if applicable (see, among others, the Sentence of the Court of Appeal of Barcelona 582/2010, 14th October).

This means that the points on which the Spanish judicial authority has to rule are those provided by Spanish law without a foreign legislation being able to specify or clarify anything. This differs from the question of the legal status of aspects relating to the dissolution of marriage, since the Spanish system of Private International Law has conflicting rules which allow for a specific response to such questions.

These matters do not come under article 9.2 of the Spanish civil code either, as there is no specific reference to any of the effects of the dissolution of marriage, but only to the (personal and patrimonial) effects mentioned for the duration of the marriage and to the liquidation of the marital property system. However, case law does not always recognize the differences between the two questions (Sentence of the Appeal Court of La Rioja –Section 1-, no. 211/2005, 21st July).

The decision of the Provincial Court of Barcelona (Section 12), 17th November 2005, is a clear example of issues raised in a private international situation when one of the spouses, especially the wife, holds Moroccan citizenship in order to determine custody and visitation rights when a couple is in crisis or when there is a situation of gender violence.

This court considers that one of the causes for divorce given in art. 98 of the FC has been breached here, specifically "ignominious behaviour by the husband (...), as deduced from the initiation of a criminal case against the husband, for allegedly committing an offense of injury caused to his wife (...) having received a guilty verdict". The statements relating to the attribution to the mother of custody and guardianship of the minor daughter and of visitation rights to the father are also confirmed. However, the fact that the mother moved from Barcelona to Pamplona means that the Court considers that the father must visit his daughter at a Meeting Point situated in Pamplona.

Although this decision was taken before the Hague Convention of 19th October 1996 came into force, regarding competence, the applicable law, recognition and cooperation in parental responsibilities, and methods of protection of a child, the consequences are the same, given that the text allows for the competent authority to apply their own legislation (art. 15). That is to say, attribution of custody and visitation rights of children is determined under Spanish law. However there is the possibility to apply or consider (in exceptional cases) the law of another State where a strong link exists (art. 15, 2nd).

In any case, Spanish decisions giving the (Moroccan) father visitation rights in the new place of habitual residence of the children, after the dissolution of a marriage, would not be recognized in Morocco. Taking into account the role that men and women play within the family, marriage and relations with children according to the Moroccan system, only the father can be attributed the right to visit the children, but, as this is the person who holds parental authority, that right cannot be limited or impeded, except in cases of deprivation of parental rights (wilaya).

This Regulation may be considered incompatible with Spanish public order, given that parental authority over a child is not given to the mother for the simple fact that she is a woman (see below.) In such cases, Moroccan law ceases to be applied to regulate the personal effects of the dissolution of marriage relating to children, and in its absence Spanish law is to be applied, with the consequent limitations when recognition of the decision is requested in Morocco.

For all of these reasons, it would be possible to take into account the Moroccan law (as this is the nationality of most of the family members), and attribute visitation rights according to Moroccan legislation and, even, hadana. As seen above, article 171 of the Family Code states that hadana shall be awarded first to the mother, then to the father, then to the maternal grandmother of the child. If this is not possible, the court shall decide to award custody to the most qualified of the child's relatives in light of what would serve the interests of the child. Hadana is, therefore, a right attributed to the Moroccan woman (mother) by law from the moment a child is born, without necessity of any declarative or constitutive act.

While it is necessary that the person holding the right meets a series of conditions, these conditions are considered to have been met except when a specific case is brought before the courts to deprive the mother of her right. Thus the mother does not have parental rights over the child, just guardianship, and it is the father who is the child's tutor and legal representative until the child comes of age (at 18 according to the new Code). Therefore the father can prohibit the mother moving the child from their habitual place of residence (the residence of the child), if such a move would mean that the father loses the ability to control and supervise, as stipulated in the wilaya.

Regarding the allocation of the right to hadana, neither the man nor the woman is obliged to follow the Islamic religion according to the Maliki School, but there is a strict obligation on the part of the man (if he is awarded the right) to be assisted by a woman in the care of the child, in those tasks where he lacks experience, or for which he has no patience, especially if the child is very young. The situation stated above could only come about in cases, where custody corresponds to a man, who is not the mother's husband, as Moroccan women can only marry Muslim men.

Finally, child visitation comes under article 180 onwards of the Family Code, mainly through the ratification by the judge of the agreement reached by the child's parents. As seen, the FC foresees that the parents will be able to reach an agreement over visitation rights, likewise it is to be believed that they will agree on the right to hadana in those cases where the person who is first called upon to exercise this right (the mother) hands it over to the people recognized under the legislation as having access to this right, as could be the case of the father.

As seen above, if the regulation in question is believed to go against public order, the authorities will cease to apply Moroccan legislation in favor of Spanish law, with the disadvantages this will pose when approval of the Spanish decision is requested in Morocco. In these cases it is possible to apply the "recognition method", consisting in the consideration of both situations, relating to the fairness of the case: constitution, in the Forum, of the elimination of difficulties concerning the recognition and enforcement of foreign judgments or the application of foreign law, with the aim of recognizing the decision in the female Moroccan immigrant's country of origin.

The Spanish legal practitioner can consider the Family Code when assigning hadana in Spain, given that otherwise the decision would not be recognized in Morocco. The institution of "patria potestad" (parental rights) does not exist in Morocco and is therefore not recognized under Moroccan law. However, the regulation contained in the Family Code could be considered to go against the fundamental right of equality between a man and a woman within the family insofar as wilaya (specifically, legal representation over children) belongs to the father (and not the mother, except in exceptional cases), as are the rights to decide on habitual place of residence and the obligation to alimony.

The idea of protection, according to wilaya and hadana, is different than that considered under Spanish law. These cultural particularities must be taken into account when trying to establish a relationship of family law in the Forum, especially when trying to foster Spanish-Moroccan relationships. If the recognition method is applied to the attribution of custody and visitation rights of Moroccans who apply for the dissolution of their marriage in Spain, the unfair outcome which impedes spatial continuity of the individual's lives in their countries of origin could be avoided.

In this way the continuity of life of the people who migrate will not be broken, so that the hadana of the female Moroccan immigrant could be recognized when she travels to Morocco with her children. Finally, and in any case, article 154 of the Spanish Civil Code is to be applied as an imperative material norm and, as such, parental rights are to be shared between both parents (in Spain) unless there is cause to revoke it, which must be decided by the courts.

Conclusions

The Spanish system of Private International Law is to serve as a "communication channel" between legislations which are beginning to coincide due to the new private international situations taking place in , as a new foreign population begins to settle, in particular when it comes to female Moroccan immigrants. In these cases Moroccan family law may be applied or considered by the Spanish authorities, favouring thus the recognition of decisions taken in Morocco.

Finally, as part of the gradual formation of multicultural societies, the understanding of the role of public policy is changing, to the extent that it acts once the content of the foreign law is apparent (an action in advance of public policy cannot be considered), dismissing application

of the law if it is contrary to the higher values of the forum, and provided that it cannot be interpreted taking into account the foreign cultural specificity (legal).

References

1. AAVV (2005) Private Law in Arab countries: Codes of Personal Status. Granada: University of Granada and Euro-Arab Foundation for Higher Studies.
2. Adam Muñoz Mª D (2004) The amendment of article 107 of Civil Code and its impact in terms of the protection of the right to non-discrimination by reason of sex. Scopes. Journal of Social Sciences and Humanities Studies 11: 79-92
3. ADJJ (2005) Practical guide to the Family Code. Rabat: Ministry of Justice.
4. Aguilar Benítez de Lugo M (2005) The implementation problems of the conflict rule: an internationalist and functional perception. AAVV. Pacis Artes. Tribute piece to the Professor Julio D. González Campos, Madrid: EUROLEX. Vol. II: 1133-1150.
5. Borrás Rodríguez A (1998) Multicultural Europe. The case of Spain. Borrás, A. & Mernissi, S (eds.) Legal Islam and Europe. Law, Religion and Politics. Barcelona: Catalan Institute of the Mediterranean: 159-173.
6. Botiveau B (1993) The Islamic Law and the Right in Arab societies. Paris: Karthala
7. Cervilla Garzón Mª D, Zurita MI (2010) Moroccan Family Law. The Mudawana 2004 from the Spanish Law. Madrid: Difusión Jurídica.
8. De Lucas Martín J (1994) The challenge of the borders. Human rights and xenophobia against a pluralistic society. Madrid: Temas de hoy Pub.
9. Déprez J (1977) The reform of the judicial organization and the proceedings in Morocco and the Private International Law. Legal, political and economic journal of Morocco 3: 45-56.
10. Déprez J (1978) The reform of the judicial organization and the proceedings in Morocco and the private international law. Legal, political and economic journal of Morocco 4: 49-60.
11. Déprez J (1981) Review of twenty-five years of Private International Law in Morocco. Legal, political and economic journal of Morocco 10:125-151.
12. Diago Diago Mª P (2001) The Islamic dowry through the conflict of civilizations under the perspective of Spanish Private International Law. Annals of Law of Leuven 4: 407-420.
13. Esteban de la Rosa G (2009) Immigration and Private International Law. Madrid: Difusión Jurídica.
14. Esteban de la Rosa G (2009) The recognition method as proposal of regulation of the new private international situations that are connected with immigration. Journal of Legal Studies 9: 201-234.
15. Esteban de la Rosa G (2011) Social integration of immigrants from the perspective of the (Spanish) Private International Law system. In: Gavidia Sánchez J. (ed.). Immigration, Family and Law. Madrid: Marcial Pons, 155-179.
16. Esteban de la Rosa G (2009) The new Moroccan Mudawwana (between tradition and modernity). Translation of the Moroccan Family Code. Sevilla: Governing Council, Regional Government of Andalusia.
17. Fargues Ph (1950) The family demography in the Maghreb: a key for understanding the family. In: Roque Mª Á (ed.). The cultures of the Maghreb. Barcelona: Icaria, 137-149.
18. Esteban de la Rosa G & Ould Ali K & Saghir T (2008) Chapter XI. The custody right (hadana) of female Moroccan with regard to their sons and daughters in relation to the Spanish law. In: Rueda Valdivia, R & Ruiz Sutil, Mª C (coords). The female Moroccan immigrants in Spain. Seville: Andalusian Women's Institute, 269-302.
19. Feldstein de Cárdenas, S L (2003) The public international order: a perspective from the contemporary Private International Law". In: Calvo Caravaca, A L & Blanco-Morales Limones, P (dirs). Globalization and Law. Madrid: Colex, 266-275.
20. Esteban de la Rosa G, Ould Ali K, Saghir T (2007) Comment of the Sentence of the Provincial Court of Barcelona, no. 381/2006 (Section 12), 8th June. Spanish Journal of International Law I: 304-307.
21. Esteban de la Rosa G (2009) The hadana in Spanish-Moroccan relations (Spanish perspective on a Moroccan institution). In: VI Forum for Spanish-Moroccan Jurists. The Mediterranean as a space for coexistence and citizenship. Tangier, Mediterranean Capital of Law (19-20 November).
22. Foblets MC, Carlier JY (2005) The Moroccan Family Code. Incidents in regard to the Private International Law in Europe. Brussels: Bruylant.
23. Foblets MC, Loukili M (2006) Marriage and divorce in the new Moroccan Family Code: What are the implications for the Moroccans in Europe? Critical Journal of Private International Law, 521-543.
24. Gannagé l (2006) The relativism in human rights in the Mediterranean area. Looking to Middle East on the recognition of repudiations of Muslim Law in France. International Journal of Comparative Law 58: 101-1116.
25. Gaudemet-Tallon H (2005) General course. The pluralism in Private International Law: richness and weakness (the tightrope walker and the rainbow). Collected Courses 312: 275-315.
26. Gavidia Sánchez J (2012) Non-existence, annulment of marriage and marriage system. 1st ed. Barcelona: Bosch.
27. García Rodríguez I (1999) The celebration of non-Catholic religious marriages. Madrid: Tecnos.
28. González Campos J D (1995) Chapter VII. Marriage. In: AAVV, Private International Law, Special part, 5th ed revised. Madrid: Center of Higher Education Ramón Carande 413-450.
29. González Ferrera G, Díaz Sesé L (2011) Moroccan families on the other side of the Strait of Gibraltar. In: Gavidia Sánchez. J. Immigration, Family and Law. Madrid: Marcial Pons 520-546.
30. Gurvitch G (2005) The idea of Social Law. Granada: Comares.
31. Hammje P (1997) Fundamental rights and public order. Critical Journal of Private International Law 1-35
32. Kreuzer K (2008) International Instruments on Human Rights and Shariah Law. Towards new balances between legal orders. In honour to Hélème Gaudemet-Tallon, Dalloz Paris, 343-355.
33. Loukili M (2010) The recognition of decisions in Morocco in the sphere of Family Law. In: AAVV. Immigration and integration of immigrants from a Franco-Spanish perspective in the context of the current community policies on immigration. Granada: Comares, 285-304.
34. Mayer D (1977) Evolution of the family status in Private International Law. Journal of International Law, 453-465.
35. Miaja de la Muela A (1953). The Theory of Role Splitting in Private International Law. Spanish Journal of International Law, 145-163.
36. Mosconi F (1989-V) Exception to the operation of choice of law rules. Collected Courses 217: 143-200.
37. Muir WH (2000) Family patterns through the globalization (aspects of Private International Law). In: Calvo Caravaca A-L & Iriarte Ángel J L (eds). Globalization and Family. Madrid: Colex 11-24.
38. Ould Ali K (2011) Marriage regulations in Moroccan Law. In: Gavidia Sánchez J (ed.). Immigration, Family and Law. Madrid: Marcial Pons 289-314.
39. Ould Ali K (2012) The legal-family situation of female Moroccan immigrants in Spain (marriage, dissolution of marriage and custody of children). Esteban de la Rosa G (dir). University of Jaén. Private International Law Department.
40. Ouhida J (2009) From the Personal Status Code and successions to the current Moroccan Family Code from 2004. In: Esteban de la Rosa G. (dir.). Translation of Moroccan Family Code. Jaén: Imprenta Blanca, 17-42.
41. Ounnir A (2008) The recognition and enforcement of foreign judgments in Morocco. Studies and reports on foreign Immigration in the province of Jaén (2005-2006), Permanent Immigration Observatory, Comares, Granada, 451-462.

42. Ourkia A (2012) The sources of Maliki law and its influence on Moroccan Family Code. In: Esteban de la Rosa G & Menor Toribio J A (eds.). Studies and reports on foreign Immigration in the province of Jaén (2009-2011). Comares: Granada 340-352.
43. Pérez-Agote A (2005) In the global age: the breakdown of equations and dichotomies of the modernity. In: Ariño Villarroya A (ed.). The crossroads of the cultural diversity. Madrid: CIS 313-340.
44. Quiñones Escámez A (2004) Nationals from Islamic countries resident in Europe: What is the Family Law? In: Migration and citizenship. Proceedings of the International Colloquium organized by the Faculty of Legal, Economic and Social Sciences of Rabat-Agdal (25-26 April 2003), AMERM, Rabat, 158-170.
45. Quiñones Escámez A (1999) The Personal Status of Muslim immigrants in Europe: exclusion, alternation and coordination of systems. In: XVII Workshop of Professors of Private International Law and International Relations. Madrid: BOE, 181-193
46. Remy B (2008) The public policy exception and the mechanism of mandatory rules in Private International Law. Paris: Dalloz.
47. Rodríguez Benot A (2011) The Personal Status of foreigners from Muslim countries. In: AAVV. Islamic Law and Interculturality. Madrid: Iustel, 90-110.
48. Rousillon A (2004) The reform of the Moudawana: Status and conditions of Moroccans. Maghreb-Machrek 179: 79-99.
49. Saghir T (2013) Legal regime of recognition of marriages in Marocco celebrated abroad and the foreign judgments of dissolution of marriage. Esteban de la Rosa G (dir) Doctoral thesis. University of Jaén. Private International Law Department.
50. Salamé G (2006) The future of the family in Private International Law. Aix-Marseille: PUAM.
51. Schacht J (1983) Introduction to Muslim Law. Islam Past and Present. Paris: Maisonneuvre et Larose.
52. Taylor Ch (1993) Multiculturalism and "the recognition policy". Mexico: Fondo de Cultura Económica.
53. Vischer f (1976) The change in Family Law and Private International Law. In: AAVV. Family Law is changing. Dedicated to Hans Hinderling. Basel and Sttutgart: Helbing and Lichtenhahn Verlag, 320-354.
54. Zeghal M (2006) Islam and Islamism in Morocco. Barcelona: Bellaterra.