

# **The 2004 Moroccan Family Code: An innovation in progress Issues of private international law\***

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The new Moroccan “Family Code<sup>1</sup>, enacted on the 5<sup>th</sup> February of 2004, launched a new era in what European lawyers considered as “Muslim or Shari’a family law”<sup>2</sup>. Thirteen basic principles of traditional Muslim family law were changed resembling European law perceptions while the equality of the spouses before the law was substantially established<sup>3</sup>.

Nevertheless, the new Code still rests attached to some provisions of core traditional Muslim doctrine. For this reason, and as far as the new law is applicable to all Moroccan citizens, even those with a domicile or habitual residence in another country, Morocco’s new Family Code presents a great interest concerning matters of *private international law* because of the great number of economic refugees who have flowed into Europe from *Maghreb*.

The present essay aims at presenting the most important changes introduced by the new law and stressing the problems likely to arise out of

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<sup>1</sup> The whole text of the New Family Code is available at M.-C. Foblets, J.-Y. Carlier, *Le Code Marocain de la Famille*, Indices au regard du droit international privé en Europe, Brylant, Bruxelles 2005.

<sup>2</sup> For an analysis of principles of Muslim law see J. Schacht, *An introduction to Islamic Law*, Clarendon Press, Oxford, S.Vesey-Fitzgerald, *Muhammadan Law*, Scientia Verlag Aalen, 1979, K. Hodkinson, *Muslim Family Law*, Croom Helm, London & Canberra, 1984

<sup>3</sup> The other two axes on which the reform is established are: a) the greater intervention of the Judge in matters of family law and b) the protection of the child’s interests.

the recognition and enforcement of Moroccan Courts' decisions which are likely to be in direct opposition with "European public policy"<sup>4</sup>.

## I. Material scope of the Family Code

The new Code treats, firstly, matrimonial matters, such as essential and formal validity rules of marriage and divorce and secondly, matters arising from the relations between parents and children, such as the establishment and annulment of parenthood by law, establishment, exercise, delegation, restriction or termination of the "right of custody" (*hadana*) and "parental responsibility/authority" (guardianship). Concerning the latter terminology, we have to stress that there is no such institution in Muslim family law as the "parental responsibility" of European law. The content of the European legal term resembles to that of "parental authority" (guardianship) which exists in the family law of Islamic countries. On the other hand, the content of the "right of custody" in Muslim law does not coincide with the similar term in a European legal system. For these reasons, when using in the present text the term "parental authority" and "right of custody", we will refer to the definition they have in Morocco's domestic law. The differences between those terms and European family law will be presented in the paragraphs below.

In addition, provisions dealing with inheritance and the right of succession of the surviving spouse and children are treated by the new Code<sup>5</sup>. However, in the present essay reference will be made only to the Code's provisions that are conceived as "family law" in most European legal systems.

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<sup>4</sup> Because of the gradual "harmonization" of European private law, basic principles or "mandatory rules" of the domestic law of each State are likely to be common in every European country. For a further analysis of the term see : Karydis G., "L'ordre public dans l'ordre juridique communautaire : un concept à contenu variable", *RevTrimDrEur* 38/2002, 1-26, P. Lagarde, *Recherche sur l'ordre public en droit international privé*, 1959, etc.

<sup>5</sup> This latter inclusion of matters of succession into the material scope of the basic statute of Morocco's family law is totally unfamiliar to the European domestic law systems, in which family law and law of succession are two plainly separate branches.

## II. Personal Scope of application of the new Code

Article 2<sup>6</sup> of the new Code sets the personal scope of its application and has the form of a typical conflict of law rule; *“the present family code is applicable to: 1) all Moroccan citizens, even those of double nationality, 2) to all the refugees and apatrides that are recognized by the Geneva Convention of 1951, 3) to all kind of relations affected by this law between parties one of which has the Moroccan nationality, 4) to all kind of relations included in the material scope of the new law between Moroccan parties one of which is Muslim”*<sup>7</sup>.

Concerning Moroccan citizens of a double nationality, article 2 par. 1 provides for an unilateral conflict of laws rule<sup>8</sup>, aiming to apply Morocco’s domestic family law to them even when they reside outside its territory. However, the question of the appropriate applicable law still remains in case they have their domicile or habitual residence in a European country. If that country’s domestic law recognises as prevalent nationality between the two possessed, the nationality of the country of the habitual residence of the person, or of the country with which the person is most closely connected<sup>9</sup>, and if the connecting factor of that

<sup>6</sup> The translation of all the articles referred to in the text have been made by the author.

<sup>7</sup> The latter manifest intention of the legislature to set a rule of conflict of laws designating the applicability of Moroccan Family Law, puts an end to the ambiguity provoked by Moroccan jurisprudence which insisted on applying Muslim family law to all the above mentioned categories of persons, without discerning whether Muslim family law prevailed because it was considered as “directly applicable”, as a “rule of public policy” or as a result of the previous family law, which, however, did not include a direct conflict of laws rule, see S. Mernissi, in : *Le statut personnel de Musulmans, Droit Comparé et Droit International Privé, Travaux de la faculté de droit de l’ Université Catholique de Louvain (sous la direction de J.-Y. Carlier et M. Verwilghen)*, Brylant, Bruxelles 1992, 121. For a further analysis of the difference between norms of direct application and public policy see Ph. Francescakis, “Quelques précisions sur les lois d’application immédiate et leurs rapports avec les règles de conflit de lois”, *RevCritDrIntPr*, 1966, 1.

<sup>8</sup> M. Loukili, M.-C. Foblets, “Mariage et divorce dans le nouveau Code marocain de la famille : Quelles implications pour les Marocains en Europe ?”, *Rev.Crit.DIP*, 2006, 535.

<sup>9</sup> See, for example, art. 3 of the Code de Droit International Privé Belge, art. 5 par.1.1 of the EGBG, art. 23 of LDIP. This solution is also dictated by article 5 of the Hague Convention of 1930 about certain questions of conflicts of nationality laws, see Edwin Borchar, *Three Conventions of nationality*, *AJIL*, Vol.32, 126-128.

country's conflict of law rules which govern matrimonial matters is that of nationality, then Moroccan family law is likely not to be applied.

On the other hand, the connecting factor of religion (article 2 par. 4) is never used in European law as an element which is likely to connect sufficiently closely a person to a country, so that it could lead to the application of the latter's domestic law. After all, it is difficult to endorse such a connecting factor in a legal system which has excluded, as contrary to protected fundamental human rights, every kind of religious discrimination and based its social structure on no official religion and on the institution of *laïcité*<sup>10</sup>.

### III. The Marriage

In Muslim tradition the marriage is a contract between the parties involved<sup>11</sup>. Its stipulations, with some very few exceptions, are negotiable by the spouses and do not require any intervention of religious<sup>12</sup> or public authorities for being duly concluded. On the contrary, European tradition leads to most of the rules governing the essential and formal validity of a marriage being directly set by the State and requires a certain public intervention for its celebration, whether it is religious or not<sup>13</sup>.

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<sup>10</sup> This is because, the indicated applicable law insinuates, in a certain way, a hidden primacy of Islamic religion over any different religious belief of the other spouse, see Jean Duffar, "La liberté religieuse dans les textes internationaux", *Revue de Droit Canonique*, 1996, p 317-344. For an analysis about the incorporation of human rights into European legal order see C. Picheral, *L'ordre public européen: droit communautaire et droit européen des droit de l'homme*, CERIC (Centre d' Etudes et de Recherches Internationales et Communautaires), Université d'Aix-Marseille III, Documentation Française, 2001.

<sup>11</sup> See J. Schacht, *supra* note 2, 161 and K. Hodkinson, *supra* note 2, 89

<sup>12</sup> The marriage in Morocco can be celebrated either in front of a Muslim *adouls* (they have powers similar to those of a notary in civil law countries) or take place only between the partners, see A. Quinones-Escamez, "La réception du nouveau Code de la famille marocain (Moudawwana, 2000) en Europe", *Rivista di diritto internazionale privato e processuale*, 2004, 877-900.

<sup>13</sup> A. Quinones-Escamez, *supra* note 15, 879.

### i. Equality between the spouses

According to article 4 of the new Code, *“a marriage is a mutual consent between a man and a woman which consequently, creates a legal union between them, and has as a goal to establish a relation of mutual faith and purity and the foundation of a stable family under the guidance of both spouses”*.

The *“guidance of both spouses”* as well as their *“mutual consent”* in the marriage’s conclusion are aspects of the *“revolutionary”* effort of the Code to establish the equality between husband and wife. In traditional Muslim law the conclusion of a marriage was a responsibility of the *wali*<sup>14</sup>, whose consent was the only necessary in order to duly celebrate it<sup>15</sup>. Article 24 of the new Family Code, however, excludes the *wali* from the marriage’s conclusion and requires the future wife’s personal consent to it<sup>16</sup>. By the abolition of the institution of *wali* Morocco’s legislators show their intention to protect the right of the woman to choose her own husband.

In addition, the new Code establishes that the minimum age of marriage is 18 years for both of the spouses<sup>17</sup> and focuses on their *reciprocal* rights and duties. As a result, a marriage celebrated in Morocco does not necessarily, because of an inequality between the spouses, come in direct

<sup>14</sup> A male member of the wife’s family having the power to conclude the marriage on behalf of the bride.

<sup>15</sup> See J. Schacht, *supra* note 2, 162

<sup>16</sup> This changement is due to the school of law called Hanefite, following generally a more progressive interpretation of law’s provisions, (J. Schacht, *supra* note 2, 61). From now on, *“the wilaya (institution of matrimonial guardianship) is a right exclusively of the woman”*, N. Nair, *“La réforme du Code civil au Maroc : progrès pour les femmes”*, 20-11-2003, [http://sisyphe.org/imprimer.php3?id\\_article=786](http://sisyphe.org/imprimer.php3?id_article=786), who refers to N. Guesous Soumaya, *“Une page nouvelle dans l’histoire du Maroc, un espoir fou dans le coeur des femmes”*, 6 Maghreb Canada Express, Vol. I, 12. 2003, 6.

<sup>17</sup> Previous law stated that it was 18 years for men and 15 years for women. By the new reform only a judge can decide, on a case-by-case basis, if a marriage can be celebrated even in a lack of the marriageable age. However, after one year of application of the new Family Code, 96% of the demands of a permit to celebrate a marriage in lack of the marriageable age, have been accepted by the Courts, see *Rapport Annuel sur l’ application du Code Marocain*, available at [www.mediterraneas.org](http://www.mediterraneas.org).

opposition to the “*public policy*” of the European country in which its recognition is sought<sup>18</sup>.

However, despite the above mentioned amelioration of women’s status<sup>19</sup>, many provisions setting discriminations on the grounds of sex, remain intact by the reform. For example, a Muslim woman cannot marry a non-Muslim man while a similar impediment is not imposed on the latter<sup>20</sup>, and polygamy is solely a man’s right. The problems of recognition of a Moroccan judgment pronounced on these provisions will be treated in the following paragraphs.

## ii. Formal validity rules

The marriage contract is recommended to be in writing but, even in the absence of a written form, the judge can establish by any means of proof the validity of a union between two spouses (art.16)<sup>21</sup>. The mutual consent of the spouses should be given in person, orally, it is irrevocable and it should intend the creation of a legal union contracted for an indefinite period. By obliging the spouses to express manifestly their marriage’s grounds, the legislators aimed to avoid the phenomenon of marriages

<sup>18</sup> Marie-Claire Foblets, Jean-Yves Carlier, *supra* note 1, 11.

<sup>19</sup> For a detailed analysis of women’s status in Morocco see L.Weingartner, “Family Law & Reform in Morocco-The Mudawana: Modernist Islam and Women’s Rights in the Code of Personal Status”, *Univ Detroit Mercy Law Rev*, no4 Summ 2005, 687, and Sadiqi F. and Ennaji M., “The feminization of public space: women’s activism, the family law, and social change in Morocco”, *Journal of Middle East Women’s Studies* 2/2006, 86.

<sup>20</sup> This is a “traditional”, never abolished discrimination existing in Muslim Law, see L.Weingartner, *supra* note 25, p 712. As to men, they cannot marry a woman who does not have one of the Bible’s religions, a restriction which was not included in the previous law. For this reason, “discriminations on the grounds of sexes are diminished, but, on the other hand, they have increased on the grounds of religion”, see M.-C. Foblets, J.-Y. Carlier, *supra* note 1, 32.

<sup>21</sup> This provision has been inserted into the new Code after its long application by Morocco’s Courts, which accepted the validity of unions for which a written contract did not exist, see *Practical Guide of the Family Code*, article 16, 36, available at the electronic site: [www.justice.gov.ma/MOUDAWANA](http://www.justice.gov.ma/MOUDAWANA)

contracted for social or financial advantages<sup>22</sup> rather than “*the foundation of a stable family*”.

In addition, Moroccan family law provides that, in case of imperative reasons and exceptional conditions, a marriage can be concluded by delegation, too (art. 17). This provision is not to be found in the domestic law of most European countries<sup>23</sup> and is likely to be incompatible with their “*public policy*”, especially if its *ad hoc* application intends to distort their rules of migration policy<sup>24</sup>.

<sup>22</sup> For example, in France many Moroccan immigrants marry French nationals in order to obtain French nationality or a permanent residence permit, as well as some exemptions from taxation. By the provision of article 3 of Code Civil Francais (1804), which states that “Statutes relating to the status and capacity of persons govern French people, even those residing in foreign countries” we can deduct that Moroccan Family Law is the one to govern the personal statute of Moroccan nationals residing in France. If the marriage is concluded for economic reasons, then it should be treated as nule in Morocco. As a result, it is possible for common children of this union to have no rights of succession in Morocco because of the nullity of their parents’ marriage, and the lack of a provision establishing their of parenthood through an administrative action (similar to the institution of recognition of paternity existing in the European legal systems).

<sup>23</sup> Art. 102 par. 2 of the Loi Fédérale sur le Droit International Privé de Suisse (LDIP) states that the civil servant demands *separately* each one of the spouses to confirm their will to conclude the marriage, art. 1367 of the Greek Civil Code (1946) requires for the mutual consent to be given at the same time *personally*. “Sarkosi’s Law” of 26.11.2003 amended articles 63 and 170 of Code Civil Francais (1804), in order to outlaw all fake or concluded by force marriages. On the contrary, art 6 of par. 1 of the Polish Family Law (Kodeks Rodzinny I opiekcunczy, Law of 25<sup>th</sup> Februyry 1964), provides that “The Court may for grave reasons allow a declaration of entry into a marriage union to be made by proxy”, while art. 47 of the Code De Droit International Privé de Belgique (2004) sets that all the formal requirements of a marriage are governed by the rules of *lex regit actum*, as well as art. 50 of the Spanish Civil Code (1889). Consequently, if that law tolerates a marriage conclusion by delegation, this leads to an automatic recognition of the marital status of the person in Belgium or in Spain.

<sup>24</sup> During the discussion in the Parliament about the provisions of the new reform, this point was added in order to serve the rights of Moroccan immigrants who reside in a foreign country and it was intended to establish the possibility to celebrate a marriage by delegation in case of migrants spouses with no legal residence permit who cannot travel legally and get married in their country see M.-C. Foblets, J.-Y. Carlier, *supra* note 1, 23. For the incorporation of migration policy in the “*public policy*” of all European countries, see, for example the ECHR Case *E.A. et A.A. c. Pays-Bas*, appl.No. 14501/89, Judgement of 6.1.1992. A man resided in Holland with his second wife while the first one still had her habitual residence in Morocco. His son to the first wife requested for a residence

### iii. Substantive validity rules

According to the new Family Code a marriage is valid when four conditions are met: 1) the spouses should have the legal capacity to conclude the marriage, 2) the *wali* should be present when his consent is still required<sup>25</sup>, 3) the two *adouls* in front of which the nuptial procedure is held should confirm that the mutual consents meet all requirements set by law, 4) there is no legal impediment to the marriage and 5) the marriage contract should on no grounds embody any term which would abolish the nuptial present (*dot*, *sadaq*) given from the husband to his wife<sup>26</sup>.

The *dot*'s provision is likely to raise several questions concerning its conformity with "*public policy*" of European countries. First of all, we shall discern if, in a marriage of Moroccan citizens concluded in a European country, the *dot* will be considered as a formal or as an essential marriage requirement. This depends on the *legal characterization*<sup>27</sup> of the *forum's* judge. If the latter includes the *dot* in the requirements of form, then the *forum's* rules are most likely to be applied according to the domestic conflict of laws rule than if he includes it in the substantive validity provisions of a marriage. In some national laws, the *dot* will be characterized as

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permit on the grounds of family union. His application before the Court was dismissed on the grounds that "*there were insufficient elements concerning respect for family life which could outweigh the considerations relating to the proper enforcement of immigration controls. In this respect the Commission would emphasise the close connection between the policy of immigration and consideration of public order*".

<sup>25</sup> If the spouse does not meet the minimum age of marriage or if the marriage is concluded by a physically or mentally handicapped person.

<sup>26</sup> The institution of the *dot*, a traditionally established marriage precondition, does not have the same content as the analogous European term. In the European legal systems in which the *dot* was known, it consisted of the obligation of the wife's father to alienate his estate to his daughter in order to find a husband. On the contrary, the *dot* in Muslim law is an obligation of the husband and its fulfillment is a constitutive element for the conclusion of a marriage.

<sup>27</sup> For a better analysis of this term see Wengler, "Reflexions sur la technique de qualifications en droit international privé", *RevCrDrIntPr* 1954, 661 and L. Mistelis, "Charakterisierungen und Qualifikation im internationalen Privatrecht: Zur Lehre einer parteispezifischen Qualifikation im Kollisionsrecht der privaten Wirtschaft", Tubingen: Mohr Siebeck, 1999, 309.



a requirement of form and so the proper applicable law would be either the *lex loci celebrationis*<sup>28</sup>, the law governing the personal status of the parties<sup>29</sup>, or the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage<sup>30</sup>. By this solution it is possible that the law of the *forum* will tacitly exclude from the marriage's requirements of form the dot, as a provision which does not exist in its domestic law. And here we have the phenomenon of "limping marriages" again, because this marriage will be held void in Morocco.

The *Practical Guide*<sup>31</sup> of the new reform gives a practical solution to this problem is given by. The latter states that, even if the official contract of a marriage concluded in a foreign country does not expressly include a provision for the dot, the marriage celebrated can be recognized in Morocco<sup>32</sup>. The marriage contract can stay tacit regarding that provision, but not expressly exclude it from its stipulations.

<sup>28</sup> The Code Civil Français (1804) in its art. 170 states that a marriage between a French and a foreign national or between two French in a foreign country, is valid "when it meets the formal validity requests of the domestic law of that foreign country". We can deduct from the above mentioned article, that the marriage of two foreigners in France is governed as to its formal validity rules, by its domestic law. The Code De Droit International Privé de Belgique (2004) in art. 47 par. 1 sets that the formal validity rules of the marriage are "governed by the law of the country in which the marriage takes place", while art. 46 states that the essential validity rules are indicated by the law of the country whose nationality each of the spouses has. The Introductory Law of the German Civil Code (EGBG) in art. 11 and 13 III sets that the "conditions of form are governed by the domestic law of the country in which the marriage is concluded", art. 44 par.2 of the Lois Fédéral sur le Droit International Privé de Suisse (LDIP) states that "if the conditions set out by Suisse law are not met, the marriage between foreigners can take place as far as the conditions set out by the law of one of the parties are met" while art. 42 par.3 sets that the formal requirements of the conclusion of a marriage are governed by "the domestic law of the country in which the marriage is concluded", etc.

<sup>29</sup> The Spanish Civil Code (1889) in art. 50 establishes that the formal validity requirements of marriage are governed by domestic Spanish law or, in case they are not met by the spouses, "by the law of the country whose nationality has one of the spouses".

<sup>30</sup> This is a provision of common law rarely met in other European conflict of law rules. For this provision see Judgement *Brook v. Brook* of the House of Lords, 1861 in I.G.F.Karsten, "Capacity to Contract a Polygamous Marriage", *The Modern Law Review*, Vol. 36, 291-297.

<sup>31</sup> See *supra* note 27.

<sup>32</sup> See *supra* note 27, 41 in the art. 26.

#### iv. Polygamy

The new Code continues tolerating limited polygamy. Nevertheless, the strict conditions stated by the new Code make a polygamous marriage very difficult to be celebrated, at least theoretically.

According to articles 40-46 of the Code, a polygamous marriage can be concluded only under objectively exceptional circumstances which are confirmed by a judge<sup>33</sup>. It is supported that polygamy is permitted *"only at the discretion of the judge [... ] and the judges are required to apply draconian legal conditions in assessing whether an injustice will result from a polygamous marriage"*<sup>34</sup>. Polygamy is absolutely forbidden in three different cases: 1) when the spouse cannot guarantee an equal treatment of his two or more wives, 2) when he cannot prove that he has adequate resources in order to afford the maintenance of two households, 3) when a *"clause of monogamy"* has been included in the marriage contract with the first wife. This last provision helps wives to protect better their rights<sup>35</sup>, but does not come up to eliminate the already existent discrimination against them, as the very content of the institution of polygamy does not cope with the equality of sexes. There is not an analogous provision for women and the inclusion of the *"clause of monogamy"* in a marriage contract are not always a result of the woman's free choice, because the emancipation of women is far from having been fully realized and the

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<sup>33</sup> The necessary permit of the Judge in order to conclude a second marriage without the previous annulment of the first one was not provided for by the previous law. It is important that the judge has to hear both of the spouses but against his decision no appeal can be lodged, even in cases of a judgment by default against the wife. If the wife does not approve her husband's second marriage, the Judge allows both spouses to appeal for a divorce and condemns the husband to pay an idemnity to his first wife within a period of seven days. If he does not meet this obligation, it is considered to have tacitly renounced his right to take a second wife but only for this specific case. He can appeal before the Court again to ask for a new authorization in the future.

<sup>34</sup> L. Weingartner, *supra* note 23, 700.

<sup>35</sup> This provision also existed in the previous Family Code and is considered by some writers as an argument in favor of the recognition of the concluded second marriage in a European country, as long as it is concluded on the free will of the first wife and not because of her coercion by law (A. Quinones-Escamez, *supra* note 15, 884).

stipulations of a marriage contract are most of the times an expression of the husband's will.

We shall make clear that the conclusion by a Moroccan man of a second marriage in a European country is impossible at any case. Even countries bound by bilateral agreements to accept the conclusion in their territory of a marriage in the typical Muslim religious form, do not allow the conclusion of polygamous marriages. Polygamy cannot be endorsed in the European legal order<sup>36</sup> as both civil and common law follow the concept of monogamous marriage<sup>37</sup>. It is for this reason that, according to article 4 par. 4 of the Regulation 2003/86, "*in the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse*".

## v. Marriage of Moroccans in a foreign State

Article 14 introduces a revolutionary provision concerning the law governing the form of a marriage. For the first time<sup>38</sup>, the applicable law is

<sup>36</sup> Quinones-Escamez, *supra* note 15, 881, footnote 12.

<sup>37</sup> However, a judgment of annulment of the second marriage can be recognized in a European country, because the Court of recognition cannot examine the notion of the foreign "public policy" which tolerated polygamy in its domestic law and ended the polygamous marriage existing in its society. It is also possible to recognise a second marriage concluded in Morocco between two Moroccan nationals while the husband was still bound by a first marriage concluded in a European country, when the dispute is not closely connected to the country where the recognition is sought, see also J.- Marguenaud, "Quand la Cour de Cassation française n' hésite plus à s'ériger en championne de la protection des droits de la femme la question de la répudiation", *RevTrimDrCivil* 2004, 369, and F. Laroche-Gisserot, "Le nouveau Code marocain de la famille : innovation ou archaïsme?", *RevInterDrCom* 2005, 337.

<sup>38</sup> In the previous law, a marriage concluded in a foreign State could be recognised in Morocco only in case of a bilateral agreement signed between the states involved so that a mutual recognition of marriages concluded in the territory of any of them was imposed, see, for example, the Protocol signed in Brussels in 1979 between Morocco and Belgium, in A. Moulay Rchid, in : *Le statut personnel de Musulmans, Droit Comparé et Droit International Privé, Travaux de la faculté de droit de l' Université Catholique de Louvain (sous la direction de J.-Y. Carlier et M. Verwilghen)*, Brylant, Bruxelles 1992, 171.

that of the *lex loci celebrationis*, the form validity rules of a marriage are set by the domestic law of the country in which it is celebrated. The marriage is concluded before the authorities of that State in the presence of two Muslim witnesses.

The article also sets a rule of international procedural law regarding the recognition of a marriage concluded in a foreign country. In order to have such a marriage recognized, all provisions of Moroccan law concerning essential validity marriage rules should be followed by the future spouses. After the marriage's conclusion, a marital act is drawn before the Moroccan Consular of the foreign country in order to be registered in Morocco's official archives. The act should suffice in reporting that all the essential validity requirements of Moroccan law were met with no further control *au fond* of the act by the Consular<sup>39</sup>. In this way, the recognition of all marriages concluded in European States becomes easier.

#### IV. The Divorce

The Code's new provisions regarding marriage dissolution contribute, in their turn, to the establishment of equality between husband and wife in the domain of family relations. By accepting for the first time the divorce on mutual consent or the institution of *tamlik* as well as a type of divorce solely sought by the wife on the exclusively enumerated grounds stated by law, the new code undoubtedly is proved more revolutionary in comparison with the traditional provision of *Knol*<sup>40</sup>. Although according to article 70, "*the divorce is pronounced on exceptional occasions*", its exceptional nature derives more from Muslim religious tradition than from a legal rule. In consequence, the judge does not have any discretionary power to refuse to pronounce a divorce sought before him, but he has to certify that the rights of both spouses will be equally protected. After the enactment of the new Code and its provision that a divorce is necessarily

<sup>39</sup> These are the instructions given by the Act of 13-7-2004 distributed to all Morocco's Consulates, see M. Loukili, M.-C. Foblets, *supra* note 8, 546.

<sup>40</sup> As it is supported, "woman has no longer to buy her liberty as a slave", see N. Guessous Soumaya, *supra* note 18, 6.

bound to the former authorization of the judge, his control was fortified and exercised more effectively.

According to the new Code a marriage can be dissolved: 1) by death of the spouse, 2) by disappearance of the spouse, 3) by *talaq*<sup>41</sup> (repudiation) and *tamlik*<sup>42</sup>, if a provision for the second is included in the marriage contract, 4) by *Knol*<sup>43</sup>, 5) by the divorce requested by the woman on the grounds specially stated by law<sup>44</sup>, 6) by *chiqaq*<sup>45</sup>, 7) by divorce on mutual consent.

A judgment granting a divorce of the last three types will not encounter difficulties in being recognized in a European country. European judges are accustomed to apply domestic divorce provisions more or less with a similar content. Thus, Moroccan law does not oppose to the ‘pub-

<sup>41</sup> It is the unilateral dissolution of the marriage by the husband. The innovation of the code is that he is obliged to bring his request of the divorce before the judge in advance of the act of separation before two adouls. The Judge calculates the *mout'a*, a consolation gift or settlement due to his ex-wife, which should be deposited to the Secretariat of the Court within a fixed period. If the husband does not deposit the precised amount, he is considered to have resigned from his right to get a divorce by *talaq* this time, but he can bring another request before the Court in the future, see also L.Weingartner, *supra* note 23, 701.

<sup>42</sup> The inclusion of *tamlik* to the marriage contract is left to the discretion of the husband but becomes irrevocable once he accepts including it in its stipulations. It is the unilateral dissolution of the marriage from the part of the woman. Its pronouncement can depend on the grounds included in the marriage contract.

<sup>43</sup> It is considered as a type of divorce on mutual consent, see Sarehane F., “Le nouveau Code marocain de la famille”, *Gazette du Palais*, 4 Sept 2004, 15, because it is sought by the woman but after both of the spouses have précised the indemnity paid to the husband. The woman does not have to precise the reasons of divorce before the Judge.

<sup>44</sup> The provisions of the new Code remind a lot the divorce reasons stated in European domestic laws. The Code states that they are: 1) the conclusion of the marriage in lack of its essential validity rules, 2) the cause of a prejudice of one of the spouses by the other, 3) a consistent period of separation between husband and wife, 4) the existence of an incurable disease of one of the spouses, 5) the negligence of the obligation to support economically the household or the negligence of the obligation of alimony. The woman has to prove her prejudice in order to receive the authorisation of the Judge to divorce.

<sup>45</sup> Divorce for “strong and persistent disagreement which make the continuation of the marriage unbearable for one or both of the spouses” requested when a marriage is irretrievably broken, see *Practical Guide of the Family Code*, *supra* note 27, art. 99, 79.

lic policy” of the recognition State. On the contrary, European courts are very reluctant to recognize judgments pronouncing a divorce by *Knol'* or especially by repudiation (*talaq*), even when the recognition is sought by the woman. Divorce by repudiation is considered to infringe article 14 of ECHR which prohibits any discrimination on the grounds of sex and article 5 of the VII Additional Protocol to ECHR which establishes the equality between the spouses<sup>46</sup>. The recognition of such a judgement is likely only if the domicile of the party seeking it is outside the State of recognition. If this is the case, the legal impact of the recognition will not provoke a strong breach to the “public policy” of the recognition State, nor will it be in a close connection with its domestic legal order<sup>47</sup>.

On the other hand, the consent of the ex-wife to dissolve the marriage by *talaq*, and the inclusion of *tamlik* into the marriage contract, as well as the other types of divorce that the new Code provides for both husband and wife, are likely to equate, in concreto, the woman's position to that of her husband's. The recognition of a *talaq* divorce could, consequently, be tolerated, under certain circumstances, by the “public policy” of European countries<sup>48</sup>. The refusal of the European judge to recognise a *talaq* when the woman's rights are efficiently protected may deprive her of any possibility to conclude a new marriage in the country of recog-

<sup>46</sup> It is supported that the provision of *talaq*, see Marguenaud J-, supra note 39, 367.

<sup>47</sup> This opinion is contended by the French Judgment No 258, PrChCiv, Cour de Cassation, 17 Febrier 2004, [www.courdecassation.fr](http://www.courdecassation.fr), which connects the infringement of ECHR with the public policy of the State of recognition, see Laroche-Gisserot F, supra note 39, p 337, and declares that “in order to have an opposition to the public policy, the spouses, or at least one of them, should have their domicile in France”. The Code De Droit International Privé de Belgique (2004) is in alignment with the former judgment and does not, ab initio, exclude the recognition of a *talaq*, the conditions, though, it sets in article 57 are so strict that almost abolish their own provision: “an unilateral dissolution of a marriage can be recognized on condition that: 1) it was pronounced after the intervention of a judge, 2) it is not forbidden by the law of the State of nationality of the parties, 3) the parties do not reside in a State where the unilateral dissolution of a marriage is forbidden, 4) it has been granted after the wife's approval, 5) it is not the case of any reasons of non-recognition or non-enforcement of a foreign judgment set by Belgian domestic law”.

<sup>48</sup> Marie-Claire Foblets, Jean-Yves Carlier, supra note 1, p 62, and Quinones-Escamez A, supra note 15, 889.

dition as she would be considered still bound by her first marriage. As a consequence, what the judge of recognition should do is to examine whether the recognition of the judgment infringes the "public policy" of the State of recognition more gravely than the woman's rights. Finally, the *knol'* divorce may be recognized if the indemnity paid to the husband is not exorbitant and its amount is the result of a compromise between the ex spouses and not an unilateral decision of the husband.

The Code has no provision regarding the rules of international jurisdiction of Moroccan Courts. We can deduct them by interpreting the provisions regarding internal jurisdiction (art.79-80) and support that a couple can request before a Moroccan Court the authorization to separate before two *adouls* if the spouses have their common domicile in Morocco, if the wife has her domicile or her residence in Morocco or the marriage was concluded in Morocco. The articles do not indicate which should be the applicable law. However, we can presume that it will be that of the present Code, as the two *adouls* can apply only Muslim family law.

In addition, article 128 is a clear rule of international procedural law and governs the grounds of recognition of a foreign judgment which pronounces the dissolution of the marriage union. It sets primary that the Moroccan judge should examine the international jurisdiction of the judge of the *forum*, according to the rules of international jurisdiction of that State. Additionally, the recognition shall not be pronounced if the law applied by the foreign judgment is opposed to the "essential provisions" of Morocco's family law<sup>49</sup>. The last provision resembles what we conceptualize as "public policy" in European law and embodies only the most significant cultural, social and moral principles on which a society base its existence.

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<sup>49</sup> Practical Guide of the Family Code, *supra* note 27, art. 28 par. 2, 92. By using this wording the Practical Guide states that there is no possibility to reject the recognition of a judgment on the grounds of no application of Morocco's family law in totality.

## V. Establishment of affiliation (*Bounouwwa*)

This domain of family relations is the one which stayed less affected by the innovations of the new Code. As Muslim tradition dictates, the Code states that legal affiliation with the father can be established only on the grounds of a previous legal marriage<sup>50</sup> between him and the mother of the child, or by the institution of ‘*confession*’<sup>51</sup>. Legal affiliation is a necessary prerequisite for the child in order to become a legitimate heir of his father’s estate. As long as legal affiliation is established, the child is found automatically under the authority of his father and is bound by all marriage restrictions by reasons of consanguinity or affinity towards his father’s family<sup>52</sup>. In addition, he necessarily follows the religion of his father and receives his religious education from him.

The first important innovation of the new Code is the establishment of an additional ground of affiliation, when the conception of the child takes place during the period of *fatiha*<sup>53</sup>. In this case, affiliation should be confirmed and pronounced by a judgment of the Court after a petition by any of the spouses. The judge has to confirm only the existence of a legal period of *fatiha* while the paternity of the child is attributed directly by law to the future husband of the mother. The judge has the power to annul the affiliation established by law only if it is contested by any of the spouses.

The second innovation is that once affiliation is established on the grounds of law, it can be annulled only by a posterior judgment which

<sup>50</sup> Affiliation established on this ground can only be contested and annulled on the grounds of medical experts’ report. Nevertheless, determination of paternity based on medical evidence can be held only if this mean of proof is requested by the Judge in case the father’s objections to established paternity are possible to be true.

<sup>51</sup> It is a traditional institution similar to the administrative establishment of parenthood in European law. The confession of the father should be in written form and is irrevocable. Only the child can contest it after he becomes 18 years old.

<sup>52</sup> The consequences of affiliation with his mother are the same. Affiliation with the mother is established by birth.

<sup>53</sup> It is the period before the conclusion of the marriage during which the future spouses have exchanged mutual marriage promises and marital gifts.



should determine paternity by all means of proof<sup>54</sup>. Adoption (*attabani*) is still prohibited in the new Code<sup>55</sup>.

As to Moroccan citizens who reside in a foreign country, they have the right to establish affiliation with an “illegitimate” child through his judicial recognition, if this provision exists in domestic law. Most times, the conflict of law rule would indicate as applicable the law of nationality of both spouses<sup>56</sup>. Because of the lack of such a provision in Muslim law, the judge of the foreign State will apply his domestic law to protect the paramount interest of the child<sup>57</sup>. The problem which arises is that such a judgment would not be recognized in Morocco, so the child would be

<sup>54</sup> In traditional Muslim Law the affiliation can be annulled only through the institution of *anatheme* (the pronouncement of some religious oaths by the father after which the child do not belong anymore to the family of the former). The new Code does not abolish this provision, the absence of which was used by Moroccan Courts till 2003 in order to reject a petition for annulment of the paternity, even when there were contradictory medical experts’ reports. Nevertheless, the Code establishes the woman’s right to contest the pronounced *anatheme* by means of medical experts’ report, see M.-C. Foblets, J.-Y. Carlier, *supra* note 1, 81. *Anatheme* is used in the present Code only to contest affiliation established through a legal marriage between the parents (art. 153).

<sup>55</sup> An institution similar to the European “adoption” is that of *kafala*. By means of a contract a person is charged with the parental authority of a child who, however, does not become a member of his family, see S. Mernissi, *supra* note 6, 121. For the problems created by an adoption of a Muslim child in France see M.-C. Boursicot, “L’actualité de l’adoption”, *Rev.Dr.Civil*, 2006, n 25, available at [www.lamylinereflex.com](http://www.lamylinereflex.com). The Code permits the *Jaza*, institution with which a person becomes a legal heir of the adopting party, without bearing the consequences of legal affiliation (art. 149).\_

<sup>56</sup> See Code De Droit International Privé de Belgique (2004) in art. 67 par.1, Code Civil Français (1804) in art. 370-3 al. 1, Greek Civil Code (1946) in art. 23, Spanish Civil Code (1889) in art. 9 par.5 etc.

<sup>57</sup> The Code De Droit International Privé de Belgique (2004), in art. 67 par. 3 sets that “when the application of the foreign law provoke a manifest prejudice to the interests of the adopted party and the adopting parties are manifestly closely connected to Belgium, then Belgian law is to apply”. On the contrary, Code Civil Français (1804) in its art. 370-3 sets that “adoption however may not be ordered where it is prohibited by the national laws of both spouses. Adoption of a foreign minor may not be ordered where his personal law prohibits that institution, unless the minor was born and resides usually in France”, while the Loi Fédérale sur le Droit International Privé de Suisse (LDIP) in art. 77 sets that “when an adoption is not sure to be recognized in the State of nationality of the adopted child, then it is not pronounced by the Suisse Judge”.

excluded from his father inheritance or considered as a stateless person<sup>58</sup> there.

## VI. Child custody

The most crucial difference between “*custody*” and “*authority*” in Muslim law concerns the person vested with these rights. “*Parental authority*” is exercised only by the father and can never be removed from him. “*Custody*” is exercised by both spouses only during the marriage period. After the dissolution of the marriage custody is vested solely to the mother. “*Parental authority*” includes legal representation of the child, concluding a transaction on his behalf, the right to consent in the conclusion of his marriage and his religious education. In traditional Muslim law the latter provision is very important, for this reason it is confined only to the father. The child has to follow his father’s religion and a right to decide upon this matter is not granted to him<sup>59</sup>. “*Custody*” includes the responsibility to protect the child from anything which could harm him, mentally or physically, and take care about his education.

Although regarding the chapter of child custody the Code rests aligned to Muslim tradition, it has initiated some protective measures for the custodial mother<sup>60</sup>; it provides for the same age for both sons and

<sup>58</sup> M.-C. Foblets, J.-Y. Carlier, *supra* note 1, 84.

<sup>59</sup> Morocco has made a reservation to the 1989 UN’s Convention of the Rights of Children to art. 14 which protects the right of free development of religious conscience. This provision is found in total opposition with European “*public policy*”, which includes in its body the rights protected by ECHR, see C. Picheral, *supra* note 10. ECHR explicitly sets in article 9 that “*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief [...]*”.

<sup>60</sup> The mother can maintain the custody of her child even if : 1) she concludes a second marriage or 2) if she removes to a place distant to the previous place of spouses’ common residence in case : a) a child is under 7 years old, b) when the child suffers from an incurable disease which demands the care of his mother, etc. (art. 175). She can also regain the custody of her child once the reason of its removal has been treated. The mother can also be vested with authority powers on three exceptional occasions: 1) the father has declared incapability of the law, 2) if, in the absence of the father, the interests of the child are at stake and require immediate action in order to be protected, 3) when the child’s interests are in danger and the father is prevented from exercising his author-

daughters till which “*parental authority*” is exercised on them<sup>61</sup> and takes as *ratio* of all its provisions the interest of the child<sup>62</sup>. On the other hand, in case of a discrepancy in parenting styles, the father’s opinion is the one to prevail because he is the legal guardian of the child<sup>63</sup>.

In case mother loses her right of custody upon her children, the one to exercise it is the father or the mother of the father. In the previous family law the remarriage of the woman was enough to make custody conditional to her new husband’s will<sup>64</sup>. The present Code does not provide for an automatic restriction or termination of the right of custody for the woman who has concluded a second marriage. The first husband has to make a petition before the judge who does not pronounce the removal of the custody before examining the real interest of the child. What still remains unchanged is the prohibition against the woman to travel with her children abroad after a divorce. The father can request from the judge to make a journey depending on his previous authorization. If he is reluctant to give his permission, the woman can apply before the judge and get the authorization requested, on condition that the return of the child in Morocco is guaranteed (art. 179). Lastly, the change of the habitual residence of the mother can lead to a removal of her custody in case it sets difficulties to the supervision or the religious education of the child by his father<sup>65</sup>.

The former provisions set a difficulty in the recognition of a judgment pronounced on the application of European law in Morocco . First

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ity, see M.-C. Foblets, J.-Y. Carlier, supra note 1, 87.

<sup>61</sup> The previous law terminated “*parental authority*” at the age of 12 for the sons of the family and at the age of 15 for the daughters, while now it is terminated, irrespective of sex, when the age of 18 is reached (art. 166).

<sup>62</sup> Almost every article of this chapter bases its legal provision on this reason, see for example art. 169, 170, 177, 178, 186 and art. 166.

<sup>63</sup> The new Code tries to diminish the discrimination which the exclusive exercise of “*parental authority*” by the father establishes by providing that “*in case of disagreement, the judge decides on the grounds of child’s interest*” (art. 169).

<sup>64</sup> L.Weingartner, supra note 22, 687

<sup>65</sup> In case the woman has resided in a foreign country, the removal of custody is established automatically by the law (art. 178 provides for the discretionary power of the Judge only if the habitual residence is still inside Morocco’s territory).

of all, if “*parental authority*” (“parental responsibility” according to the European legal term), is vested to both of the spouses, it comes to a direct opposition to a core principle of Muslim family law. Secondly, a European judgment which removes “*parental authority*” from the father on the grounds of the applicable domestic law could not be recognized in Morocco<sup>66</sup>. In conclusion, if the applicable law according to the conflict of law rule of the *forum* is Morocco’s family law, the judge will exclude the provisions which lead to a removal of custody from the mother in case of a second marriage or of a change of habitual residence.

## Conclusion

Although it still includes several provisions that are contrary to law perceptions about human rights or religious freedom, as conceptualized in European countries, the new Family Code makes substantial and courageous steps towards a true equation between the rights of men and women in the domain of family relations. The innovations in matters of polygamy or divorce are some of the most representative ones. The new Code may have not arrived to set a revolution and completely detach legal provisions from traditional or religious ethics. For this reason, some of its principles are hardly bearable in a European legal system.

Nevertheless, this does not diminish at all its effort to protect effectively women’s and children’s rights as well as to approach more European law perceptions. Even if there are more steps to be made in this way, we shall bear in mind that radical societal changes always result from a strenuous, arduous and slow moving process which endorses, at the given moment, only the reforms that the society is ready to accept.

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<sup>66</sup> In our opinion, the only possibility for it to be recognized is if the “*parental authority*” is removed on the same grounds that lead to the exceptional exercise of “*parental authority*” by the mother in Moroccan law.