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Moroccan Women in Europe: Bargaining for Autonomy

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Abstract

This Article explores the path of possibilities offered in the case of Moroccans—in particular women—residing in (continental) Europe to determine, up to a point, the legal regime that will apply to their family life. The vast majority of Moroccans currently living in Europe have retained their original nationality, often combining it with that of the country of habitual residence. Adhesion to Islam often explains the attachment to the family law, which is a religious law, of the country of origin. Family reunifications in many cases mean enduring "rootedness" in the normative system of the country

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of origin. With mobility rendered easier by obtaining the nationality of the country of residence (which removes the obligation to obtain visas), an image of a complete and truly transnational community develops, and one which, although deriving part of its identity from European society, often remains very attached to its original culture and legal system.

The years spent in Europe do not alter this need to identify in family relations with the culture of origin. The situation is clearly not identical in all cases, and some feel no need to retain roots in the family law of the home country, but prefer instead to apply the law of the land of their habitual residence (in Europe). The situation, in legal terms, is all the more interesting in the case of those who express a desire to remain, in regard to their family life, in alignment with the law of their country of origin. The techniques offered by private international law make it possible, in a number of countries in continental Europe, to fulfill this desire.

Without claiming to be exhaustive, this Article explores several possibilities permitting Moroccan men and women residing in continental Europe to marry, as harmoniously as possible, the application of the provisions of Moroccan family law with the demands made by the norms and methods of private international law in the country of their habitual residence. I explore three issues in particular: celebration of marriage, the modelization of the effects of marriage, and the dissolution of marriage.

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I. Introduction

The analysis that follows is subdivided into two parts: Part II summarizes, as succinctly as possible, the main lines of the new Moroccan Family Code,¹ while at the same time expressing some reservations about its claim to be innovative. Part III discusses the impact—real or potential—of the new Moudawana on the lives of families where one or more members reside abroad. I seek to bring the most constructive analysis possible of the various options available to Moroccans residing abroad (MRA), either in applying Moroccan domestic law or by the techniques of private international law, in order to, at best, balance the rights and obligations of each household member while bearing in mind the concrete circumstances and individual needs in each situation.

II. The New Moroccan Family Code: A Reform That Is Faithful to Islamic Tradition

In comparison to the former Moudawana,² the new Code is characterized by its clearer style, at least in the Arabic version, and by the

1. FAMILY CODE (Morocco), translated in Global Rights, *The Moroccan Family Code (Moudawana) of February 5, 2004* (2005), http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf (last visited Jan. 29, 2008) [hereinafter *Moroccan Family Code*] (on file with the Washington and Lee Law Review).

2. Law No. 1-57-343 of Nov. 22, 1957, Bulletin Officiel [Official Bulletin], May 23,

abundance of rules, grouped into four hundred articles.³ On the whole, however, the new Code is arguably in continuity with the former one, as both draw inspiration from the same sources.⁴ The new Code is also clearly in line with the Islamic tradition governing family law. It may even be said that the rules of the new Code elevate the principles of Islam in this field into mandatory rules for the following issues, treated in sequence: marriage, the dissolution of marriage, filiation, legal capacity, and wills and succession, since the Code mandates the intervention of the Public Prosecutor's Office in all of these matters.⁵

This observation may be seen as too severe. Yet, there is no lack of evidence to this effect. By virtue of Article 400, the last provision of the Code, judges must follow the lead of the Malikite rite⁶ absent an available, incomplete, or imprecise written rule of law.⁷ Article 400 of the new

1958 (Morocco), amended by Law No. 1-93-347 of Sept. 10, 1993, Bulletin Officiel [Official Bulletin], Dec. 1, 1993 (Morocco). For a French translation, see FRANCOIS-PAUL BLANC & RABHA ZEIDGUY, MOUDAWANA: CODE DE STATUT PERSONNEL ET DES SUCCESSIONS [CODE OF PERSONAL STATUS AND SUCCESSIONS] (1994).

3. FAMILY CODE, translated in *Moroccan Family Code*, supra note 1.

4. Marie-Claire Foblets & Mohamed Loukili, *Mariage et Divorce dans le Nouveau Code Marocain de la Famille: Quelles Implications pour les Marocains en Europe?* [Marriage and Divorce in the New Moroccan Family Code: Which Implications for Moroccans Residing in Europe?], 3 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [CRITICAL REV. OF PRIVATE INT'L LAW] 521, 524 (2006).

5. See FAMILY CODE art. 3, translated in *Moroccan Family Code*, supra note 1, at 8 ("The Public Prosecutor's Office is an essential party to all legal actions related to the implementation of the provisions of this Moudawana."); id. art. 53, translated in *Moroccan Family Code*, supra note 1, at 18 ("When either spouse evicts the other from the marital home without justification, the Public Prosecutor shall intervene to return the evicted person to the house immediately and shall take all necessary measures to guarantee his or her safety and protection."); id. art. 54, translated in *Moroccan Family Code*, supra note 1, at 18 (stating that the Public Prosecutor is responsible for monitoring the care of children when it pertains, among other things, to breastfeeding, religious guidance, and education). Moreover, the Code considerably increases the judge's power of oversight in a number of areas. The Article addresses this subject in the conclusion. This increased authority of Moroccan judges may pose a problem for implementing the new Moudawana, notably with regard to the situation of MRAs.

6. "The Malakite rite is one of the four orthodox rites of Sunni Islam and is the common rite in North Africa." Middle E. Media Research Inst., *King of Morocco Calls for Fundamental Reform in Family Law*, Nov. 7, 2003, at n.2, <http://www.memri.org/bin/articles.cgi?page=archives&Area=Sd&ID=SP60403> (last visited Jan. 28, 2008) (on file with the Washington and Lee Law Review).

7. FAMILY CODE art. 400 (2004) (Morocco), translated in *Moroccan Family Code*, supra note 1, at 59. The Arabic text refers to Islamic law "of the Malikite rite" and to *ijtihad* (the efforts of jurisprudence), Law No. 1-04-22 of Feb. 3, 2004, Bulletin Officiel [Official Bulletin], Feb. 3, 2004 (Morocco), whereas the French formulation could be taken to mean that the judge has a choice between "the Malikite rite and/or *ijtihad* (the efforts of jurisprudence)," Law No. 1-04-22 of Feb. 3, 2004, Bulletin Officiel [Official Bulletin], Oct. 6, 2005 (Morocco)."

Moudawana confirms, in a sense, the prohibition against Moroccan judges relying on sources other than Islamic ones in the area of family relations. Classical Islamic law, however, has its own distinctive concept of the status of women and children within the family that is not the same as the one that currently prevails in a growing number of so-called modern legal systems around the world: In the former, the husband is the sole head of the family,⁸ and he alone has the privilege of dissolving or preserving the marriage bond.⁹ The wife is not the legal guardian of her children, even if she has custody—which in certain cases can be taken away from her.¹⁰ Similarly, a child born out of wedlock does not enjoy any legal protection,¹¹ and the notion of filiation to the father exists only within the framework of marriage.¹²

As a result, the following question arises: Did the Moroccan legislators who drafted the new Moudawana follow a different path from the one delineated by classical Islam? To appreciate the importance of the reform, this Article first must review the changes concerning the status of women and of children.

8. See AN INTERPRETATION OF THE QU'RAN: ENGLISH TRANSLATION OF THE MEANINGS 4:34 (Majid Fakhry trans., 2002) ("Men are in charge of woman, because Allah has made the one of them excel the other, and because they spend some of their wealth.").

9. See *id.* at 2:28–34 (outlining the procedures for a husband to dissolve the marriage without listing procedures for a wife to dissolve the marriage).

10. See Bolaji Owasanoye, *The Regulation of Child Custody and Access in Nigeria*, 39 FAM. L.Q. 405, 422 (2005) ("[T]he father is the legal guardian of the children and is responsible for their protection during and after the specified age of custody. [He] supervises the moral, educational, and religious upbringing of his children, and his executor takes over as the legal guardian in the event of his death.").

11. Moussa Abou Ramadan, *The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992–2001)*, 26 FORDHAM INT'L L.J. 595, 619 (2003) (citing an Israeli Supreme Court decision that interpreted Islamic law "to declare that a child born out of wedlock has no right to child support from his father") Maurits S. Berger, *Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor*, 50 AM. J. COMP. L. 555, 578 (2002) (citing an Egyptian court opinion stating that parentage "will be recognized in Egypt under certain circumstances, one of them being that 'it should not violate Egyptian public policy, bearing in mind that Islamic law considers the illegitimate child excluded from inheritance and parentage'" (internal citation omitted)).

12. See generally Mohamed Akdid, *Alisilhaaq fil Fiqh Walqanoun [The Recognition of a Child in Fiqh and in the Law]*, 2004 ALAYAAM ADIRASIYA 32 (2004); Mohamed Akdid, *Hijiyat Alifrach Qoowatoehoe Alithatiya [The Value of the Proof of Filiation within the Marriage]*, 2004 ALAYAAM ADIRASIYA 55 (2004).

A. Reforms Concerning the Status of Women

The principal subjects of the new provisions in Moroccan law concerning women are marriage and its dissolution. The traditional rules regarding inheritance have not undergone any substantial change. Therefore, I will not discuss them here.

1. Marriage

The new Moudawana puts women and men on an equal footing in regards to the age of nubility. It requires that both sexes have reached the minimum age of eighteen.¹³ It authorizes women who have reached the age of majority to marry without the intermediary of a marital tutor.¹⁴ By contrast, it retains the prohibition against a Muslim woman marrying a non-Muslim man.¹⁵ Similarly, a Moroccan woman may not marry a foreigner, even if he is Muslim, without prior authorization by the Crown Attorney at the Court of Appeal.¹⁶ The new Moudawana does not abolish polygamy,¹⁷ instead, polygamy is subject to prior court authorization¹⁸ to safeguard the rights of the first wife and her children,¹⁹ if any, and the Moudawana permits a wife who does not accept bigamy to petition for divorce.²⁰ The court can, if necessary, order her to divorce her husband if she is unwilling to be the spouse of a polygamous man but does not petition for divorce.²¹ As to the matrimonial regime, the new Moudawana

13. FAMILY CODE art. 19 (2004) (Morocco), translated in *Moroccan Family Code*, supra note 1, at 11.

14. *Id.* art. 24, translated in *Moroccan Family Code*, supra note 1, at 12.

15. *Id.* art. 39(4), translated in *Moroccan Family Code*, supra note 1, at 15. Moroccan Muslim men can marry a non-Muslim woman only if she is Christian or Jewish. *Id.*

16. *Id.* art. 65(5), translated in *Moroccan Family Code*, supra note 1, at 21.

17. See *id.* pmb. para. 4, translated in *Moroccan Family Code*, supra note 1, at 5 ("[P]olygamy shall be allowed only in the following circumstances and according to the following legal conditions . . .").

18. See *id.* art. 42, translated in *Moroccan Family Code*, supra note 1, at 15 ("In the absence of a stipulation by the wife in the marriage contract precluding polygamy, the husband wishing to resort to it must petition the court for authorization.")

19. See *id.* pmb. para. 4, translated in *Moroccan Family Code*, supra note 1, at 5 ("The judge shall not authorize polygamy unless he has verified the husband's ability to guarantee equality with the first wife and her children in all areas of life . . .").

20. See *id.* art. 45, translated in *Moroccan Family Code*, supra note 1, at 16 (stating that if a wife persists in a request for divorce after an application for polygamous marriage, the court will grant the divorce if the husband can pay a determined sum of money).

21. *Id.*

perpetuates the principle of separate estates, while allowing spouses to agree on joint management of assets acquired during the marriage.²² In case of a conflict between spouses over property, the judge decides on the division of property between them, "consider[ing] the work of each spouse, the efforts made as well as the responsibilities assumed in the development of the family assets."²³ This provision presupposes that the judge will play a more active role in the area of proof—a condition that, so far, has rarely been applied in practice in Moroccan family law.²⁴

By and large, the provisions of the new Moudawana concerning marriage imply that both spouses will henceforth head the Moroccan family²⁵ and will work together in making decisions concerning the management of family affairs.²⁶ Nevertheless, the husband remains the legal guardian of the children during the marriage,²⁷ as was the case under the former Family Code,²⁸ while the wife becomes their legal guardian only if her husband dies.²⁹

2. The Dissolution of Marriage

There are several ways to dissolve a marriage under Moroccan domestic law. The new Moudawana adds a few further options previously unavailable under the former Code. The most controversial form of dissolving a marriage is undoubtedly the *talaq* (repudiation, translated into French as "*divorce sous contrôle judiciaire*" ("divorce by court authority")).³⁰ It allows the husband to

22. *Id.* art. 49, translated in *Moroccan Family Code*, supra note 1, at 17.

23. *Id.*

24. Under the legal regime of the former Code, numerous judgments rejected women's petitions on the grounds that they had not proved their participation in acquiring the assets. Supreme Court Civil Chamber, Dossier No. 2276/97, Judgment No. 1520 (Mar. 5, 1998) (Morocco) (unpublished); Court of Appeals Agadir, Dossier No. 534/03, Judgment No. 806 (Sept. 14, 2004) (Morocco) (unpublished); Court of First Instance Agadir, Dossier No. 564/04 (Nov. 25, 2004) (Morocco) (unpublished).

25. See FAMILY CODE art. 4 (2004) (Morocco), translated in *Moroccan Family Code*, supra note 1, at 8 ("Marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life . . . under the supervision of both spouses according to the provisions of this *Moudawana*.").

26. *Id.* art. 51(3), translated in *Moroccan Family Code*, supra note 1, at 17.

27. *Id.* art. 231(1), translated in *Moroccan Family Code*, supra note 1, at 49.

28. FAMILY CODE (1993) (Morocco).

29. See FAMILY CODE art. 231(2) (2004) (Morocco), translated in *Moroccan Family Code*, supra note 1, at 29 (stating that legal authority by the mother can only be exercised "in the absence of the father or when the father is deprived of his capacity").

30. See Louise Halper, *Law, Authority, and Gender in Post-Revolutionary Iran*, 54 BUFF. L. REV. 1137, 1179 (2007).

end a marriage unilaterally. The Moroccan legislators retained this mode of dissolving a marriage,³¹ but specified clearly that the exercise of this right is dependent on obtaining a court authorization³² to allow the wife to be heard and to guarantee her rights as well as those of the couple's children.³³ The court will give authorization to draw up a *talaq* only if the husband has submitted to the court clerk's office a fixed sum of money, in an amount determined by the court, covering the rights of the spouse.³⁴ In the case of a revocable *talaq*, the husband may take back his wife only with her express consent.³⁵ A woman does not have a comparable right to end a marriage by her sole will, except in cases of a *talaq* by mutual consent³⁶ (translated into French officially as "*divorce par consentement mutuel*," and into English unofficially as "divorce by mutual consent"), a *tamlík*³⁷ (unofficial English translation: "one resulting from a right to choose assigned by a husband to his wife") or a *khol*³⁸ (official French translation: "*Divorce par khol*"; unofficial English translation:

31. See FAMILY CODE arts. 35–46 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 14–16 (outlining the requirements for repudiation of marriage).

32. *Id.* art. 79, translated in *Moroccan Family Code*, *supra* note 1, at 24.

33. See *id.* pmbl. para. 6, translated in *Moroccan Family Code*, *supra* note 1, at 5 ("[B]efore repudiation may be authorized it must be ascertained that the repudiated woman has received all of her vested rights . . . and the repudiation can not be registered until all vested rights owed to the wife and children have been paid in full by the husband.")

34. *Id.* art. 83, translated in *Moroccan Family Code*, *supra* note 1, at 25. The rights of the wife are specified in Article 84: balance of the *sadaq* or dowry, if any; maintenance owing for the legal waiting period; and a "Consolation Gift." *Id.* art. 84, translated in *Moroccan Family Code*, *supra* note 1, at 25. Article 85 provides that the husband must also give an amount to cover child support payments. *Id.* art. 85, translated in *Moroccan Family Code*, *supra* note 1, at 25.

35. *Id.* art. 124, translated in *Moroccan Family Code*, *supra* note 1, at 32. This is contrary to the situation under the former Family Code.

36. *Id.* art. 114, translated in *Moroccan Family Code*, *supra* note 1, at 30 ("The spouses may mutually agree on the principle of ending their conjugal relationship with or without conditions, provided that the conditions do not contradict the provisions of this *Moudawana*, and do not harm the children's interests.")

37. *Id.* art. 89, translated in *Moroccan Family Code*, *supra* note 1, at 26 ("If the husband has assigned his right of repudiation to his wife, she can exercise this right by petitioning the court according to the [repudiation] provisions . . ."). Repudiation is granted to the wife by a clause inserted in the marriage contract, or possibly by the consent of the husband after the dispute has begun. MINISTÈRE DE LA JUSTICE, GUIDE PRATIQUE DU CODE DE LA FAMILLE [PRACTICAL GUIDE TO THE FAMILY CODE] 68 (2005), <http://www.justice.gov.ma/MOUDAWANA/Guide%20pratique%20du%20code%20de%20la%20famille.pdf> (last visited Nov. 20, 2007).

38. FAMILY CODE art. 115 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 30 ("The spouses may agree on divorce in exchange for compensation according to the provisions of [the divorce by mutual consent]."). Repudiation is made by the husband at the wife's request and in return for compensation. MINISTÈRE DE LA JUSTICE, *supra* note 37, at 81.

"Divorce in exchange for compensation by the wife"; *khol*' may be translated as "compensation"). But even in such cases, it is the will of the man that is taken into consideration in the first instance.³⁹

The situation regarding divorce referred to as irrevocable breakdown is different in the new *Moudawana*. The new Code authorizes a woman who wishes to end the marriage to file a petition before the court for divorce for *chiqaq*⁴⁰ (official French translation: "*pour raison de discorde*"; unofficial English translation: "for irreconcilable differences"). The court is obliged, in such cases, to grant and pronounce the divorce within a maximum of six months of the date of the petition, "taking into account each spouse's responsibility for the cause of the separation when considering measures it will order the responsible party to take in favour of the other spouse."⁴¹ Could this new provision be regarded as being, for women, what repudiation is for men? The answer to this question will have to come from practice. Some judges consider this form of divorce to be a variant of divorce for fault,⁴² in which case the courts have a discretionary power to evaluate the admissibility of the petition and to set an amount owing as compensation for the damages suffered by the husband because the wife is responsible for the break-up of the marriage.⁴³ Such an interpretation clearly makes divorce more difficult for women. If it turns out that in practice this interpretation prevails, one would be obliged to conclude that the *shiqaq* does not constitute an equivalent of the *talaq*. In that case, this new form of divorce would be closer to a legal separation with compensation—a concept that nevertheless does not exist in the Code—whenever the wife fails to convince the court of the sincerity of her request.

B. Reforms Concerning the Status of the Child

The new Code considers the protection of children, something that the previous code ignored. The new *Moudawana* mentions the rights of children and the obligations of parents.⁴⁴ However, on certain matters relating to

39. See generally MALIKA BENRADI ET AL., LE CODE DE LA FAMILLE. PERCEPTIONS ET PRATIQUE JUDICIAIRE [THE FAMILY CODE. PERCEPTIONS AND JUDICIAL PRACTICE] (2007).

40. See FAMILY CODE art. 94, translated in *Moroccan Family Code*, *supra* note 1, at 26 (implying that a wife has the right to petition the court for a divorce based on irreconcilable differences).

41. *Id.* art. 97, translated in *Moroccan Family Code*, *supra* note 1, at 27.

42. See generally BENRADI ET AL., *supra* note 39.

43. See generally *id.*

44. See FAMILY CODE pmbl. para. 8 (2004) (Morocco), translated in *Moroccan Family*

children, the new Code retains the same vision as the previous text.⁴⁵ This Article briefly will consider the status of the child under Moroccan law, simply by way of illustration of the fidelity shown by the Moroccan legislators to Islamic tradition. The status of children under Moroccan law is not, however, the central topic of this analysis and is a subject that deserves more detailed study.⁴⁶

1. Filiation

The new Code, faithful in this regard to traditional Islamic law, recognizes only legitimate filiation; in other words, the child must be conceived within marriage. Establishing natural (out of wedlock) paternal filiation remains prohibited.⁴⁷ The same is true for adoptive filiation.⁴⁸ However, the new text of the Moudawana allows for a broad understanding of marriage when it comes to determining the legitimacy of filiation. This enlarged notion allows the inclusion—in addition to valid marriage⁴⁹—of certain categories of nullified marriage, vitiated marriage, and betrothal when the conditions established by the Code have been fulfilled.⁵⁰ The Code goes so far as to admit illegitimate

Code, supra note 1, at 6 (setting out, as one of the Code's goals, the protection of children's rights).

45. LEILA JORDENS-COTRAN, *NIEUW MAROKKAANS FAMILIERECHT EN NEDERLANDS IPR [THE NEW MOROCCAN FAMILY LAW AND DUTCH PRIVATE INTERNATIONAL LAW]* 475–523 (2007). In particular, see chapter 4 on filiation issues in Moroccan family law.

46. For a study of certain aspects related, in terms of private international law, to the status of the child in Moroccan law since the entry into force of the new Code, see France Blanmailland & Céline Verbrouck, *La Garde des Enfants dans le Nouveau Code de la Famille Marocain [The Custody of Children in the New Moroccan Family Code]*, 130 *REVUE DU DROIT DES ÉTRANGERS* 559 (2004).

47. See FAMILY CODE art. 148 (2004) (Morocco), translated in *Moroccan Family Code, supra* note 1, at 35 ("Illegitimate filiation to the father does not produce any of the effects of legitimate filiation.").

48. *Id.* art. 149, translated in *Moroccan Family Code, supra* note 1, at 35.

49. See *id.* art. 154, translated in *Moroccan Family Code, supra* note 1, at 36 (stating that the paternity of a child is proven if the child is born within six months after the marriage contract concluded and the opportunity for sexual intercourse existed, or if the child is born within a year following the separation date).

50. See *id.* art. 156, translated in *Moroccan Family Code, supra* note 1, at 37 (providing three necessary conditions before a court will recognize a child's filiation to its father when a marriage contract was not officially concluded prior to conception). In particular, Article 156 states:

If an engagement takes place by an offer and acceptance but for reasons of *force majeure* the marriage contract was not officially concluded, and during the engagement period the engaged woman shows signs of pregnancy, the child is

relationships, albeit on a temporary basis only, provided, however, that they are subsequently legitimated by a judgment recognizing the marriage.⁵¹ The legal action must be launched within five years of the entry into force of the Code.⁵² The Code likewise allows for cases of sexual relations said to have been entered into in error,⁵³ provides for the benefit of the doubt (*shubha*),⁵⁴ and, finally, permits the recognition of paternity (*istilhak*).⁵⁵

In Moroccan law, traditionally, the legitimate filiation of a child could not be challenged except on the basis of an oath of anathema (*liâne*).⁵⁶ The new Moudawana allows for paternity henceforth to be challenged also by means of expert witnesses commissioned by the court.⁵⁷ This innovation in a code that draws inspiration from Islamic law may be surprising: The testimony of experts commissioned by the court can in fact prove to be contrary to the interests of a child, insofar as it makes it possible to challenge, at any time, the legitimacy of a child; whereas in classical Islamic law, the challenge to paternal filiation by an oath of anathema is very difficult.⁵⁸ It is all the more strange that this new form of proof (ordered by the court) should have been accepted when in no instance—except for the *shubha* (doubt) in the case of betrothal—does

affiliated to the engaged man on the grounds of sexual relations by error when the following conditions are met:

- (a) If the two engaged person's families are aware of the engagement, and if the woman's legal tutor, if required, has approved the engagement;
- (b) If it appears that the engaged woman became pregnant during the engagement period;
- (c) If the two engaged persons mutually acknowledge that they are responsible for the pregnancy.

Id.

51. See *id.* art. 16, translated in *Moroccan Family Code, supra* note 1, at 10 (stating that a couple can petition a court for recognition of their marriage "[i]f for reasons of *force majeure* the marriage contract was not officially registered in due time . . .").

52. *Id.*

53. *Id.* art. 147, translated in *Moroccan Family Code, supra* note 1, at 35 ("Maternal filiation is deemed legitimate in cases of . . . sexual relations by error . . ."); *id.* art. 152, translated in *Moroccan Family Code, supra* note 1, at 36 ("Paternity is established by . . . sexual relations by error.").

54. See *id.* art. 143, translated in *Moroccan Family Code, supra* note 1, at 35 ("Filiation to the father and mother is considered legitimate until proven to the contrary.").

55. See *id.* art. 160, translated in *Moroccan Family Code, supra* note 1, at 37–38 (laying out four requirements, in addition to a father's acknowledgment, to prove paternity).

56. See generally JORDENS-COTRAN, *supra* note 45.

57. See FAMILY CODE art. 153 (2004) (Morocco), translated in *Moroccan Family Code, supra* note 1, at 36 (allowing a husband to challenge his paternity through a sworn allegation of adultery or irrefutable expertise).

58. See generally JORDENS-COTRAN, *supra* note 45.

untried, and will be the subject of the next part of this analysis. Another way of devising solutions suited to the lives of MRA is to use contractual clauses, familiar to both Moroccan law and to the family law of European countries. On certain points, these too make it possible to overcome incompatibilities between the Moroccan and European family law systems. Part III.B will address these situations.

III. Marriage and Its Dissolution in Moroccan Law: What Are the Implications for Moroccans Residing in Europe?

This third Part focuses more particularly on the question of the impact—real or potential—of the new Moudawana on MRA. I concentrate here on the question of the implications for MRA in Europe of the provisions of the Code dealing with marriage, some of its effects, and where applicable, its dissolution.⁷⁰ The analysis is divided into two subparts. The first subpart examines specifically the provisions of the new Moudawana that relate to MRA, while also identifying some of the difficulties that may arise with regard to their application. The second subpart examines more closely the possibilities offered by the new Moudawana, in combination with the domestic and the private international law of European countries, to MRA residing in Europe. Particularly, the subpart analyzes the new Moudawana's attempt to devise solutions in terms of family law that are recognized within the legal order of the different countries involved, and thus permitting them—and this is the intention—to reach international harmony in family life between individual lived identity, the reality of migration, and the requirements of daily life.

A. The New Moudawana: A Code Concerned About the Family Life of Moroccan Nationals Residing Abroad

The provisions examined in this subpart may be read as embodying, after their own fashion, the will of the Moroccan legislators to ensure that with the passage of time the bond of allegiance linking Moroccans residing abroad to their country of origin does not weaken. I will review, in turn, the provisions on recognition of civil marriages contracted abroad⁷¹ and on the conditions

70. For a more complete analysis, see MARIE-CLAIRE FOBLETS & JEAN-YVES CARLIER, *LE CODE MAROCAIN DE LA FAMILLE: INCIDENCES AU REGARD DU DROIT INTERNATIONAL PRIVÉ EN EUROPE* [THE MOROCCAN FAMILY CODE: IMPLICATIONS IN THE LIGHT OF PRIVATE INTERNATIONAL LAW IN EUROPE] (2005).

71. FAMILY CODE arts. 14, 15 (2004) (Morocco), translated in *Moroccan Family Code*,

governing the form of marriage,⁷² the new regulations on establishing a marriage dossier with the judicial authorities (Articles 65 through 69), and finally, the principle of recognition of divorces issued abroad (Article 128). I, however, remain cautious in my remarks. The new Moroccan Code was not conceived primarily with MRA in mind.⁷³ True, it does address, on certain points, the question concerning their particular situation, but it does so, as it were, incidentally. The Code does not contain a complete set of answers that would suggest a complete and coherent organization of a MRA's family life outside the home country.⁷⁴ It would be wrong to try to give the Code a role it does not assume for itself. Moreover, this analysis is valid only for Europe—I do not seek to make any prognostications for other legal systems in the world.

1. (Civil) Marriage of Moroccan Nationals Residing Abroad (Articles 14 and 15)

In theory, Article 14 seems to figure among the practically "revolutionary" provisions introduced by the new Code. Civil marriage by Moroccan nationals contracted abroad in accordance with local administrative procedures will henceforth be recognized in Morocco, provided that the conditions of consent, capacity, and the presence of the marital tutor (*wali*), where applicable, are met, and there are no legal impediments.⁷⁵ Until now, Morocco required its nationals marrying abroad to follow the form prescribed in the old version of the Code.⁷⁶ Moroccan

supra note 1, at 10.

72. *Id.* arts. 16, 17, translated in *Moroccan Family Code*, *supra* note 1, at 10–11.

73. See generally FÉMININ-MASCULIN: LA MARCHÉ VERS L'ÉGALITÉ AU MAROC 1993–2003 [FEMININE-MASCULINE: THE MARCH TO EQUALITY IN MOROCCO 1993–2003] (Houria Alami M'Chichi et al. eds., 2005), available at <http://www.fes.de/fes6/pdf/femininmasculin.pdf> (last visited Nov. 20, 2007).

74. See generally Foblets & Loukili, *supra* note 4.

75. See FAMILY CODE art. 14, translated in *Moroccan Family Code*, *supra* note 1, at 10 (requiring consent, capacity, the presence of two Muslim witnesses, a marital tutor if necessary, and compliance with the provisions of Article 21 of the Moroccan Family Code).

76. Abderrazak Moulay R'chid, *Le Droit International Privé du Maroc Indépendant en Matière de Statut Personnel* [Private International Law of Independent Morocco in the Realm of Personal Status], in *LE STATUT PERSONNEL DES MUSULMANS: DROIT COMPARÉ ET DROIT INTERNATIONAL PRIVÉ* [THE PERSONAL STATUS OF MUSLIMS: COMPARATIVE LAW AND PRIVATE INTERNATIONAL LAW] 143, 143–177 (J.Y. Carlier & M. Verwilghen eds., 1992). Respect for the forms of Muslim marriage is also required of mixed marriages between a Moroccan national and a foreigner, and to marriages between foreigners where one partner is Muslim. See generally H. KOTWUR, *KOLLISIONSRECHTLICHE PROBLEME CHRISTLICH-ISLAMISCHER EHEN* [CONFLICT OF LAW

courts did not recognize civil marriages celebrated abroad by Moroccan nationals.⁷⁷

From the point of view of Moroccan legislators, the new provision of Article 14 facilitates, as far as possible, the formalities required in marriage for MRA, providing them with the possibility of using administrative procedures in force in the country of habitual residence.⁷⁸ The preparatory work makes reference to the Qur'an and the words of the Prophet Muhammad concerning marriage: "[F]acilitate and do not complicate."⁷⁹ Henceforth, MRA will be allowed to contract civil marriage, albeit under conditions that guarantee the authorization of their marriage under Islamic law: capacity and the presence, where required, of a *wali*,⁸⁰ the absence of legal impediments, the mention of the dowry (or more precisely, the absence of a clause that would annul the dowry) and, finally, the presence of two Muslim male witnesses.⁸¹

A problem in connection with this new provision arises from the fact that marriages contracted in Europe do not contain all the elements listed in Articles 14, 65,⁸² and 67⁸³ of the new Code. It is therefore to be expected that civil registrars who have the competence under local law to officiate at marriages will omit certain conditions imposed by the Moroccan Code—in particular with respect to religion and sex—given that these conditions (*inter alia*, the presence of two Muslim witnesses) are unknown in domestic law or even contrary to public order (notably, certain temporary impediments, as well as the necessity that the witnesses be male).⁸⁴ In practice, the competent authorities with respect to marriage in the country of residence (in Europe) of

PROBLEMS CHRISTIAN-MUSLIM MARRIAGE] 77 (1998).

77. Morocco has already signed bilateral conventions with a few countries (including France and Egypt) making it possible for Moroccans to contract marriage in the form provided for by the domestic law of the country of residence. The new Code seeks to make this principle generally applicable to all MRA.

78. See MINISTÈRE DE LA JUSTICE, *supra* note 37, at 24–25.

79. *Id.* at 12.

80. This condition is still in force for underage women and for any women who wishes it.

81. See generally FAMILY CODE (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1 (specifying when a marriage contract is annulled, notably in cases of failure to observe the conditions outlined in Article 14, and more particularly with regard to consent, legal impediments, and annulment of the dowry).

82. See *id.* art. 65, translated in *Moroccan Family Code*, *supra* note 1, at 20–21 (listing the documents that the dossier associated with the marriage certificate must contain).

83. See *id.* art. 67, translated in *Moroccan Family Code*, *supra* note 1, at 21–22 (specifying the requisite information for a marriage contract).

84. See Foblets & Loukili, *supra* note 4, at 546–47.

MRA therefore ignore these conditions, thereby officiating at limping marriages from the point of view of private international law.

In practice, it would nevertheless seem that the obstacle should not be over-estimated. Verification of the conditions for the validity of a marriage under Moroccan law takes place at the time when the marriage is recorded in the consular registers.⁸⁵ The Moroccan consular authorities in the country of the parties' residence draw up an additional certificate in cases of difficulty concerning the condition that requires two male Muslim witnesses, and this certificate will mention the identity of the two Muslim witnesses (who may be different from the witnesses who were present at the civil marriage).⁸⁶

Article 15, in a sense, complements the provisions of Article 14. It lays down the conditions for recognition by the Moroccan authorities of the civil certificate delivered abroad.⁸⁷ MRA who have recourse to the new Article 14 and try to benefit from it under Moroccan law, that is to say, who wish to have their union recognized under domestic Moroccan law, must submit within three months of contracting their civil marriage a copy of the certificate to the Moroccan consular authorities in the place where their marriage was contracted. However, if there is no consulate in the country where the couple resides, they must submit it within the same three-month period to the civil registrar and the family law division of the place of birth of the two spouses.⁸⁸ The former text of the Code contained

85. This is in accordance with the circular of April 13, 2004 from the Moroccan Ministry of Justice. This circular goes so far as to give retroactive effect to the provision in Article 14 allowing for the validation of civil marriages between MRA contracted prior to the entry into force of the new Moudawana.

86. In practice, the consular authorities, via their consulate, verify the person's religious adherence by means of a simple presumption: Anyone whose father is Muslim or whose country of origin is one where the principal religion is Islam is presumed to be Muslim. The indicators used for this presumption are generally the patronymic, national origin, or both. For converts, the consulates require a certificate of conversion issued by a mosque or an Islamic institution. SYLVIE SAROLÉA, GUIDE PRATIQUE DE DROIT FAMILIAL ÉTRANGER: LE NOUVEAU CODE MAROCAIN DE LA FAMILLE EN QUESTIONS APERÇU DES DROITS TURC ET ALGÉRIEN [PRACTICAL GUIDE TO FOREIGN FAMILY LAW: THE NEW MOROCCAN FAMILY CODE, WITH AN OVERVIEW OF TURKISH AND ALGERIAN LAW] 37 (2005).

87. See FAMILY CODE art. 15 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 10 (requiring a submission of a copy of the marriage contract to the Moroccan consular within three months of its conclusion, or in the absence of a Moroccan consulate, submission to the appropriate department at the Ministry of Foreign Affairs within the same timeline).

88. See *id.* (requiring that if both or one of the spouses were not born in Morocco, a copy of the marriage contract must be sent to the Family Court and the Attorney General's Office at the Court of First Instance in Rabat). "Dahir" stands for "law" or "decree."

no provision in this regard. Rather, it was the *Dahir* No. 1.0.20-60 of March 4, 1960 that governed questions of marriage between Moroccans and foreign nationals.⁸⁹

2. Conditions Regarding the Form of Marriage (Articles 16 and 17)⁹⁰

Article 16 deals with actions for recognizing the marriage.⁹¹ The former Code provided, in Article 5, paragraph 4, that in exceptional cases a judge could hear any action for the recognition of marriage and could admit to this end any legal means of proof.⁹² Jurisprudence provides a few cases of the application of this provision to permit MRA couples to regularize their marital situation in the eyes of Moroccan law.⁹³ This will continue to be possible in the future. The new provision in Article 16 is nevertheless more precise. The following are considered to constitute legal proof: expert testimony (i.e., medical evidence, such as DNA) and witness testimony.⁹⁴ The pregnancy of the wife and, of course, the presence of

89. The registration of the marriage certificate is henceforth regulated by Law No. 37-99 on the civil registry, promulgated by *Dahir* No. 1-02-239 of Oct. 3, 2002, Bulletin Officiel [Official Bulletin], Nov. 7, 2002 (Morocco), and Implementing Decree No. 2-99-665 of Oct. 9, 2002, Bulletin Officiel [Official Bulletin], Nov. 7, 2002 (Morocco). The *Dahir* of March 4, 1960 continues to apply to domestic situations.

90. The subtitle of this part of the analysis is not entirely accurate. Since the conditions regarding the form of marriage were not treated systematically in a separate provision of the Code, I grouped them under Articles 16 and 17. It is true that Article 16, paragraph 1 touches on the form, establishing as it does the principle of the written form of marriage. See FAMILY CODE art. 16, translated in *Moroccan Family Code*, *supra* note 1, at 10-11 ("A marriage contract is accepted legal proof of marriage."). But the rest of the provision, as well as Article 17, is limited to regulating specific situations. See *id.* arts. 16-17, translated in *Moroccan Family Code*, *supra* note 1, at 10-11 (regulating situations where the marriage contract was not officially registered in due time for reasons of *force majeure* and when a proxy may conclude the marriage contract in the absence of one of the parties). Article 17 deals with proxies, which is an exception to the condition requiring the presence of both spouses. For a detailed discussion of Article 17, see *infra* notes 103-05 and accompanying text.

91. See FAMILY CODE art. 16, translated in *Moroccan Family Code*, *supra* note 1, at 10-11 (stating that, if for reasons of *force majeure* the marriage contract was not officially registered in due time, a court may consider legal evidence and expertise such as the existence of children or pregnancy from the conjugal relationship and whether the petition was brought during the couple's lifetimes).

92. See generally BLANC & ZEIDGUY, *supra* note 2.

93. See generally Associations Prologues, *La Réforme du Droit de la Famille Cinquante Années de Débats [The Reform of the Family Law: Fifty Years of Debates]*, in 3 PROLOGUES EXCERPTS (2002).

94. See generally MINISTÈRE DE LA JUSTICE, *supra* note 37.

children,⁹⁵ will also be taken into consideration in actions for the recognition of marriage.⁹⁶

However, what is new and somewhat surprising is the restrictive provision contained in the last paragraph of Article 16, which limits the admissibility of actions for the recognition of marriage to a transitional period no longer than five years (starting from the entry into force of the new Code).⁹⁷ How is the meaning of this restriction to be understood? The *Guide Pratique* encourages "[a]ny person wishing to establish his marriage in this way" to "submit a request to the competent court, even in cases where the consent of the parties and testimonies are present, in cases where this procedure does not constitute a marriage contract."⁹⁸ The Moroccan legislators seem to have been willing to clear up suspended cases, but what will happen after the five-year deadline has passed?⁹⁹

Article 17 deals with the forms of celebrating marriage in cases where one of the parties is unable to be present at the wedding and therefore gives a mandate to a third party to contract it in his or her name.¹⁰⁰ The mandate is not new to Moroccan marriage law. Article 10 of the former Code already authorized such a mandate.¹⁰¹ The text of Article 17 of the new Code is more detailed on this point.¹⁰²

95. In this case, it is specified in the commentary on Article 16 provided in the *Guide Pratique*—referring to certain decisions by the Moroccan Supreme Court—that the court is bound to demonstrate the exceptional nature (of the recognition of the marriage): "such as the existence of children in the conjugal home, their dates of birth, baptism, age, school certificates where applicable, the duration of their common life, etc." *Id.* at 26.

96. See *supra* note 91 and accompanying text. The Code specifies that the fact that an action was initiated during the lifetime of the two spouses should also, where necessary, be taken into consideration by the judge.

97. See FAMILY CODE art. 16 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 10-11 ("Petitions for recognition of a marriage are admissible within an interim period not to exceed five years from the date this law goes into effect.")

98. MINISTÈRE DE LA JUSTICE, *supra* note 37, at 26.

99. During the parliamentary debate, the group known as "Justice et développement" had proposed that this time limit be removed on grounds that it would be difficult to apply. The proposed amendment was not accepted. See generally Nouvelles et principales dispositions de la Loi 03-70 portant Code de la Famille, http://www.cesnur.org/2004/moudawana_fr.pdf (last visited Jan. 29, 2008) (on file with the Washington and Lee Law Review).

100. See FAMILY CODE art. 17, translated in *Moroccan Family Code*, *supra* note 1, at 11 (providing the conditions in which a marriage contract may be concluded in the absence of one of the parties).

101. See Foblets & Loukili, *supra* note 4, at 524.

102. *Infra* notes 103-05 and accompanying text.

In theory, a marriage between Moroccan spouses "is concluded in the presence of the parties."¹⁰³ The Code nevertheless provides that a proxy may be given a mandate to this effect, with the authorization of the judge, provided certain conditions are fulfilled: (1) special circumstances exist that prevent the delegating party from being personally present to conclude the marriage contract; (2) the mandate must be drawn up in the form of an authentic legal document, or by private contract, with the notarized signature of the delegating party; (3) the proxy must have reached the age of majority, enjoy full civil capacity, and fulfill the conditions of tutelage if designated by the *wali*; (4) the delegating party must indicate in the mandate the name of the other spouse, his or her personal information, and all information that the delegating party judges useful to include; (5) the mandate must include the amount of the dowry (*sadaq*) payable in advance or at a later time;¹⁰⁴ the delegating party must also specify the conditions that she or he wishes to stipulate in the marriage contract and the conditions he or she is willing to accept from the other party; and lastly, (6) the mandate must be certified and approved by a judge to ensure that it meets all the required conditions.¹⁰⁵

There is yet another series of provisions that illustrate the desire on the part of the Moroccan codifiers not to lose control over the family lives of MRA. These are the provisions found in Articles 65 through 69 of the new Code, regulating the administrative formalities and procedures that must be fulfilled prior to marriage.

3. Administrative Formalities and Procedures Prior to Marriage (Articles 65 and 69)

The new Moroccan Family Code requires that a dossier be created for every marriage contracted by Moroccan nationals.¹⁰⁶ The creation of a marriage dossier seems to reflect the Moroccan legislators' concern for precision in establishing the marriage record and for keeping the relevant

103. FAMILY CODE art. 17 (2004) (Morocco), translated in *Moroccan Family Code*, supra note 1, at 11 ("A marriage contract is concluded in the presence of the parties.")

104. This condition might seem surprising, in view of my analysis of Article 14 with regard to the marriage gift. Why should the amount of the latter have to appear on the mandate given that it can, independently of the mandate, be the subject of a separate agreement between the parties?

105. FAMILY CODE art. 17, translated in *Moroccan Family Code*, supra note 1, at 11.

106. See *id.* art. 65, translated in *Moroccan Family Code*, supra note 1, at 20-21 (requiring a birth certificate, administrative certificate, medical certificate, marriage authorization under special circumstances, and a certificate of capacity to marry for the creation of a marriage contract record).

documents under judicial control.¹⁰⁷ Set forth in Article 65, the creation of a marriage dossier must be seen by the judge *before* giving authorization to record the act.¹⁰⁸ The marriage dossiers shall be kept at the court clerk's office at the family court of the place where the marriage was celebrated.¹⁰⁹ Each dossier will then be filed under its assigned number and must contain the documents listed in Article 65: two birth certificates; a medical certificate for each of the future spouses; an authorization to marry in cases of marriage under the age of nubility, of polygamy, or of marriages by converts to Islam or by foreigners; and a certificate of capacity in the case of foreigners.¹¹⁰ It is up to the family judge, who is also competent to authorize the *adouls* (notarial witnesses), to record the marriage to verify beforehand the documents that will constitute the dossier.¹¹¹

The administrative formalities prior to marriage that are now obligatory for all couples may appear burdensome. The aim seems clear: It should be difficult for a Moroccan national to commit fraud with regard to marital status. The purpose of registering marriage certificates (and the dissolution of marriages) is namely to allow the competent administrative and legal bodies in Morocco to know with certainty the civil status of a person.¹¹² At least, that is the ambition. This ambition will be fulfilled only if the civil registry services operate throughout the territory of Morocco and truly are accessible.

Another form of monitoring is the obligation placed on the *adouls* to mention in the marriage contract the declaration of both spouses as to whether or not they had previously been married.¹¹³ In cases of a previous marriage, the declaration must be accompanied by documents in "proof of the legality of the marriage to be concluded."¹¹⁴ Lastly, the Code provides for fraud to be punished severely; the injured spouse has the right to claim the dissolution of the marriage, with a compensation for the damages suffered.¹¹⁵

107. See MINISTÈRE DE LA JUSTICE, supra note 37, at 52-55.

108. See FAMILY CODE art. 65, translated in *Moroccan Family Code*, supra note 1, at 20-21 ("The Family Affairs Judge in charge of marriage records officially certifies the record . . . and files it at the Court Clerk's office under its assigned number.")

109. *Id.*

110. *Id.*

111. *Id.*

112. MINISTÈRE DE LA JUSTICE, supra note 37, at 52-55.

113. See FAMILY CODE art. 65 (2004) (Morocco), translated in *Moroccan Family Code*, supra note 1, at 21 ("The two *adouls* note in the marriage contract the declaration by both spouses specifying whether or not they have been married previously.")

114. See *id.* supra note 1, at 21 ("In case of a previous marriage, the declaration must be accompanied by proof of the legality of the marriage to be concluded.")

115. See *id.* art. 66, translated in *Moroccan Family Code*, supra note 1, at 21 ("If a person

Article 67 specifies what annotations are required to appear on the marriage certificate. The original is to be given to the wife and a copy to the husband.¹¹⁶ On this point, the Code renews the former Article 43.¹¹⁷

These provisions, intended to reinforce the monitoring of marriage formalities, will have positive effects in private international law since they will facilitate the recognition of marriage certificates. However, it remains to be seen how the new provisions on administrative formalities prior to marriage will be applied in cases of marriage or remarriage involving MRA. There is no doubt that in the medium term, this strengthened administrative monitoring in Morocco will facilitate, in Europe as well in the case of civil marriages by MRA, a thorough examination of the status of both fiancés before giving them permission to marry. This is equally true in the case of MRA who must obtain their birth certificate from Morocco, or, where applicable, proof of the registration of a previous divorce.

But it is not certain that things will automatically become easier for MRA who wish to marry in Morocco. In application of Article 22 of the *Dahir* of October 3, 2002 promulgating Law No. 37-99 on the civil registry,¹¹⁸ certificates of marriage and of divorce will be recorded in the margins of the birth certificate. The Rabat court is specifically competent to receive copies of a MRA's marriage certificates.¹¹⁹ Here is one concrete example of the difficulty that might arise: Article 65 lists the documents to be provided by (and for) the spouses who wish to marry in Morocco.¹²⁰ Domestic laws in Europe differ among each other, however, particularly with regard to divorce proceedings: In some cases, only the judicial authorities are competent to dissolve a marriage and, in other cases, registration at the civil

employs fraud to obtain the authorization or the certificate of capacity . . . [t]he injured party has the right to ask for the annulment of the marriage with compensation."

116. See *id.* art. 67, translated in *Moroccan Family Code*, *supra* note 1, at 21-22 (listing various annotations for a marriage contract such as a mention of the judge's authorization, the names of both spouses and the marital tutor, the amount of dowry, the conditions agreed upon, the signatures of both spouses and tutor, and the judge's authentication).

117. See Foblets & Loukili, *supra* note 4, at 524.

118. The registration of the marriage certificate is henceforth regulated by Law no. 37-99 on the civil registry, promulgated by *Dahir* No. 1-02-239 of Oct. 3, 2002, Bulletin Officiel [Official Bulletin], Nov. 7, 2002 (Morocco), and Implementing Decree No. 2-99-665 of Oct. 9, 2002, Bulletin Officiel [Official Bulletin], Nov. 7, 2002 (Morocco). The *Dahir* of March 4, 1960 continues to apply to domestic situations.

119. See FAMILY CODE art. 15 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 10 ("If one or both of the spouses was not born in Morocco, the copy will be transmitted to the Family Court in Rabat and to the Attorney General's Office at the Court of First Instance in Rabat.")

120. See *supra* notes 113-14 and accompanying text.

registry office is sufficient.¹²¹ It is not certain that these differences will be taken into account.

The last illustration of the new Moudawana provision that relates explicitly to the specific situation of MRA is Article 128, which recognizes decisions rendered by foreign courts concerning divorce.

4. Recognition of Divorce Decrees Issued by Foreign Jurisdictions (Article 128)

Article 128 contains a rule of private international law concerning the recognition in domestic Moroccan law of divorce decrees—or repudiations—issued by foreign jurisdictions.¹²² Recognition is not an automatic right, but must be granted by means of an *exequatur*.¹²³ In theory, the *exequatur* will be granted if the judge or the foreign authority was competent and if the grounds for the decision to dissolve the marriage comply with the Moroccan Family Code—that is to say, are recognized in domestic Moroccan law.¹²⁴ The verification of the grounds for the foreign divorce for which recognition is being requested will take place therefore under the purview of Moroccan law, and not under the foreign law applied *a quo* by the judge. In actual fact, it does not seem that this verification regarding the grounds for divorce goes so far as to demand that reference be made to the provisions of Moroccan law.¹²⁵ The examination is limited to making sure there is nothing contrary to the grounds for dissolution of marriage according to Moroccan law or public order. As an example of a contravention of public order, the *Guide Pratique* cites the absence of the right to defense.¹²⁶

The provisions of Article 128 may considerably facilitate the recognition in Morocco of judgments issued by European courts in cases involving MRA. Before the adoption of the new Code, MRA often had to undergo a double

121. K. Boele-Woelki, *Divorce in Europe: Unification of Private International Law and Harmonisation of Substantive Law*, in MET RECHT VERKREGEN: BUNDEL OPSTELLEN AANGEBODEN AAN MR. INGRID S. JOPPE [DULY OBTAINED: VOLUME IN HONOUR OF MR. INGRID S. JOPPE] 17-28 (H.F.G. Lemaire & P. Vlas eds., 2002).

122. See FAMILY CODE art. 128, translated in *Moroccan Family Code*, *supra* note 1, at 32 (stating that divorce or annulment decisions rendered by foreign courts shall be admissible when issued by a court with jurisdiction over the matter and if the decision does not conflict with the Code).

123. *Id.*

124. *Id.*

125. See generally MINISTÈRE DE LA JUSTICE, *supra* note 37.

126. See *id.* at 85-86.

divorce, one within the legal system of their country of habitual residence and one within the Moroccan legal system.¹²⁷ However, the current concrete illustrations cannot yet predict with certainty what grounds for divorce will in the end resist the examination provided for in Article 128. What about a divorce on grounds of *de facto* separation, for instance, a form of divorce unknown in domestic Moroccan law but widespread in Europe? Or further, what about foreign decisions issued before the entry into force of the new Moudawana—will they likewise be taken into consideration? These are all questions that await the development of Moroccan jurisprudence regarding Article 128.¹²⁸

In sum, everything points to the expectation that the 2004 amendments to the Moroccan Family Code relating to MRA, no matter how revolutionary they may be, will be of value only in their concrete application. This observation is true for the entire Code. For cases involving MRA, the situation has its own particularities: The analysis of the reforms does not allow one to predict the future regarding the question of whether Morocco will keep—as the Moroccan codifiers seem to have wished to do—a firm hold on the family life of their nationals living abroad. From an examination of the provisions that seek explicitly to produce this effect, it appears that, seen from Europe at any rate, the application of certain reforms likely will not produce the effects desired by Morocco.

127. F. Sarehane & N. Lahlou-Rachdi, *Réflexions sur Quelques Règles de Conflit de lois à l'épreuve de la Pratique* [Reflections on a Number of Conflicts Rules with a View to the Practice], 1 *CAHIERS DE DROITS MAGHRÉBINS* 81, 81–108 (1995).

128. I remain prudent on this matter. Certain decisions given after the entry into force of the Code refused to observe, based on the provisions of the former Moudawana, international conventions relating to legal cooperation, judging that with regard to judgments in the area of family law that might be carried out in Morocco, the foreign judge who rendered the decision is not competent if he or she is not Muslim. See generally Casablanca Court of Appeal, Dossier No. 3401/03 (Apr. 8, 2004) (Morocco) (unpublished); Casablanca Court of Appeal, Dossier No. 2877/03 (Apr. 29, 2004) (Morocco) (unpublished); Casablanca Court of Appeal, Dossier No. 1619/04 (Feb. 5, 2005) (Morocco) (unpublished). On the other hand, the Moroccan Supreme Court recently admitted the possibility of applying the provisions of the new Code even for foreign decisions issued before its entry into force, without concern for the religion of the foreign decisions issued before its entry into force, without concern for the religion of the magistrates called upon to intervene in a divorce case involving Moroccans of Muslim faith. As a result, it allowed the *exequatur* in Morocco of judgments issued by foreign non-Muslim judges in the matter of divorce, as long as the two following conditions were respected: (1) the decision regarding dissolution of the marriage bond must be rendered at the request of the husband or with his consent; and (2) the foreign court must respect the formal and substantive rules concerning divorce contained in the new Code. Supreme Court, Chamber of Personal Status & Succession, Judgment No. 188, *Revue Jurisprudence de la Cour Suprême*, No. 63, 12–115 (Mar. 30, 2005) (Morocco); Supreme Court, Chamber of Personal Status & Succession, Judgment No. 333, *Revue Jurisprudence de la Cour Suprême*, No. 63, 126–28 (June 15, 2005) (Morocco).

This is not to say that MRA are helpless in the face of this situation. The new Moudawana does indeed offer several possibilities in the area of family law, not only to Moroccan nationals living in Morocco but also to MRA, allowing them to arrange according to their greatest convenience—within the limits allowed, of course—their family relations and especially the commitments spouses make to each other. These various options, tailored to the individual and adapted to family life, are illustrations of the "emancipatory potential" of the new Moudawana. Certain possibilities are not in fact new, but were already available under the former law. It seems, therefore, all the more important to devote particular attention to the new provisions, bearing in mind questions of private international law that they may raise.

B. The Emancipatory Potential of the New Moudawana: Combining Moroccan Domestic Law and Private International Law

This next subpart explores the path of possibilities offered since the entry into force of the new Moroccan Family Code—with a particular interest here in the case of the MRA—which allow them to determine, up to a point, the legal regime that will apply to their family life. Without claiming to be exhaustive in what follows, several possibilities exist that permit MRA, since the entry into force of the new Code, to combine the application of the provisions of the latter with the requirements made by the norms and methods of private international law techniques in Europe.

1. The Double Celebration of Marriage

Article 14, which authorizes MRA to contract their marriages according to local administrative procedures in their country of residence, will certainly facilitate the recognition of civil marriages involving MRA under Moroccan law.¹²⁹ At this point, it is advisable, for the reasons already mentioned, to proceed via a double celebration—a civil one and one before the Moroccan authorities. This would ensure that the marriage is recognized in both countries. In sum, it all depends on what the couple wants, for certainly not all couples attach the same importance to the double celebration intended to secure

129. See FAMILY CODE art. 14 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 10 (requiring consent, capacity, the presence of two Muslim witnesses, a marital tutor if necessary, and compliance with the provisions of Article 21 of the Moroccan Family Code).

the recognition of the marriage in both legal orders.¹³⁰ The double celebration offers more legal protection, given that Moroccan law provides spouses with possibilities that civil marriage does not, and these possibilities may prove to be particularly helpful later, especially for the wife. The Moroccan codifiers offer, for example, the option of excluding polygamy in the marriage contract; it also provides the spouses with the option of recognizing, in their marriage contract, the right of the woman to end the marriage. In particular, couples who intend to keep their ties with Morocco would do well not to contract only a civil marriage, but to arrange for a marriage contract to be issued in compliance with Moroccan law, which would protect the wife against the risks of polygamy and of repudiation. In the case of mixed couples where one of the partners is not Moroccan, the consulate in the country of habitual residence is not qualified to recognize the marriage.¹³¹ The couple could, if necessary, envisage returning to Morocco and marrying there for a second time in order to contract a marriage that affords as much protection as possible to the rights of the wife within Moroccan domestic law.¹³²

It goes without saying that a double celebration is out of the question in the case of marriages that are forbidden under Moroccan law, notably on grounds of religious impediment.¹³³ MRA who may worry about the constraint of a double celebration could simply obtain a document drawn up by the local Moroccan consular officials, registering the presence of the Muslim witnesses in addition to obtaining a civil marriage certificate.¹³⁴

2. The Modelization of the Effects of Marriage and Its Dissolution

MRA can take advantage of the possibility offered to them in Article 47 of the new Moroccan law for various matters related to conjugal life. Article 47 states that the marriage contract in Moroccan law may include all conventional clauses "except for those contrary to the terms and objectives of marriage."¹³⁵

130. Some couples do not marry civilly but only in a religious ceremony, but in that case, the effects of such a marriage are ignored by the law, and for this reason are to be discouraged.

131. Since the consulate is not competent to handle issues that involve non-nationals.

132. See *infra* Part III.B.2 (discussing the modelization of the effects of marriage and of its dissolution).

133. See FAMILY CODE art. 39, translated in *Moroccan Family Code*, *supra* note 1, at 15 (listing "temporary impediments to marriage").

134. Cf. *supra* note 86 and accompanying text (describing the practice employed by the consular authorities to verify one's religious adherence).

135. FAMILY CODE art. 47 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 16.

Modelization may refer to various questions, linked sometimes to personal status¹³⁶ and sometimes to property.¹³⁷ The clauses, once they have been inserted into the marriage contract (or, where applicable, into an agreement concluded afterwards),¹³⁸ are binding on both spouses.¹³⁹

There are various motives that might lead MRA to take recourse in modelization, by means of a contract, of their marital commitment. These motives are linked to the concern that couples can be assured that their conjugal union is treated in equal manner within the Moroccan domestic legal order and in the European country of their habitual residence. Inasmuch as the Moroccan law authorizes the personalization of commitments between spouses, it opens up the possibility for MRA to regulate their marital relationships in alignment with Moroccan domestic law while at the same time ensuring that they fulfill the commitments they have undertaken in accordance with the legal order of their country of habitual residence. This, in turn, is a way to avoid limping situations at the level of private international law.

The monogamy clause,¹⁴⁰ which is not new in Moroccan law but that continues to be relevant given that the new Moudawana has not completely prohibited polygamy, provides a woman with a specific guarantee of additional legal protection.¹⁴¹ It assures a wife that as long as she does not grant her consent to a modification of the clause,¹⁴² the couple will remain monogamous or the marriage may be dissolved.¹⁴³ In this regard, it would be useful for the

136. See *id.* art. 67, § 8, translated in *Moroccan Family Code*, *supra* note 1, at 22 (stating that the marriage contract should include "conditions agreed upon by both parties").

137. See *id.* art. 49, translated in *Moroccan Family Code*, *supra* note 1, at 17 (stating that the spouses can agree on the "investment and distribution" of their property).

138. This will usually be the case of agreements based on Article 49 of the Moroccan Family Code.

139. See FAMILY CODE art. 48, translated in *Moroccan Family Code*, *supra* note 1, at 17 ("Conditions that confer a legitimate benefit on the person who drew them up are valid and binding on the spouse who agreed to them.").

140. See *id.* arts. 40, 42, translated in *Moroccan Family Code*, *supra* note 1, at 15 (placing restrictions on polygamy).

141. See *id.* (stating when polygamy is prohibited).

142. See *id.* art. 48, translated in *Moroccan Family Code*, *supra* note 1, at 17 (stating when conditions in a marital contract may be waived or modified).

143. See *id.* art. 40, translated in *Moroccan Family Code*, *supra* note 1, at 15 ("[Polygamy] is . . . forbidden when the wife stipulates in the marriage contract that her husband will not take another wife."). It should be noted, however, that the ban on celebrating polygamous marriage does not prevent the possibility that some of the effects of a polygamous marriage contracted in a country that allows it, such as Morocco, might be recognized in Europe. There are two reservations regarding such recognition. First, all of the conditions laid down by Moroccan law must have been fulfilled. Secondly, only those effects will be recognized that will be considered not to infringe upon public order: the legitimacy of children, the matrimonial regime,

Moroccan Ministry of Justice to issue a circular informing future spouses, especially MRA, of their rights and obligations, including the possibility of inserting a monogamy clause into their marriage contract. It may also be prudent to require that Moroccan consular authorities abroad provide this information to MRA.¹⁴⁴ To go even further, the consular authorities might also consider providing future spouses with model marriage contracts that include an optional clause excluding polygamy and other clauses dealing with personal status, in particular clauses concerning the dissolution of marriage and providing for the assignment by the husband of the right of repudiation.

The assignment of the right of repudiation by the husband to his wife, known as *tamlik*, thus offers a second illustration of a clause relating to personal status available under Moroccan law.¹⁴⁵ The advantage of this second clause has to do with the fact that it grants a woman the possibility of ending the marriage unilaterally in a discretionary manner.¹⁴⁶ The husband cannot revoke his wife's right to divorce ("repudiation") once he has assigned it to her.¹⁴⁷ In Europe, within private international law, the recognition of repudiation often presents problems on the grounds that the wife does not have an equal right.¹⁴⁸ The fact that the husband has assigned his right of

succession (such as a widow's pension that is to be shared between two wives), and maintenance obligations. Other effects will not be recognized. Thus, as a rule, a residence permit will be granted to one wife only. With regard to France, see B. BOURDELOIS, MARIAGE POLYGAMIQUE ET DROIT POSITIF FRANÇAIS [POLYGAMOUS MARRIAGE AND FRENCH POSITIVE LAW], 439, 444 (1993). With regard to other countries, see S. Aldeeb Abu Sahlied, *La Suisse face à l'inégalité entre homme et femme en droit musulman* [Switzerland Facing Gender Inequality in Islamic Law], in RAPPORTS SUISSES PRÉSENTÉS AU XV^{ÈME} CONGRÈS INTERNATIONAL DE DROIT COMPARÉ [SWISS REPORTS PRESENTED AT THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW] 9 (Int'l Cong. of Comparative Law ed., 1998); FEMMES MAROCAINES ET CONFLITS FAMILIAUX EN IMMIGRATION: QUELLES SOLUTIONS JURIDIQUES APPROPRIÉES? [MOROCCAN WOMEN AND FAMILY DISPUTES IN THE CONTEXT OF MIGRATION: WHAT ARE APPROPRIATE LEGAL SOLUTIONS?] 117 (Marie-Claire Foblets ed., 1998); L. JORDENS-COTRAN, HET MAROKKAANSE FAMILIERECHT EN DE NEDERLANDSE RECHTSPRAKTIJK [MOROCCAN FAMILY LAW AND LEGAL PRACTICE IN THE NETHERLANDS] 132-36 (2000).

144. See *infra* note 152 and accompanying text (providing information on the model of the obligation of information for the *adouls* provided for in Article 49 of the Moroccan Family Code).

145. See FAMILY CODE art. 89 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 26 (stating procedures that should be followed "if the husband has assigned his right of repudiation to his wife").

146. See *id.*, translated in *Moroccan Family Code*, *supra* note 1, at 26 ("The husband cannot prevent his wife from exercising the right of repudiation that he has previously assigned to her.").

147. *Id.*

148. H. Fulchiron, *Ne Répudiez Point: Pour Une Interprétation Raisonnée des Arrêts du 17 Février 2004* [Do Not Repudiate: Play for a Rational Interpretation of the Court Decisions

repudiation to his wife may eliminate this obstacle.¹⁴⁹ In line with the proposal regarding the monogamy clause in the marriage contract, it would also be prudent on the part of the Moroccan authorities to issue a circular or other official explanatory document to their consular representatives abroad reminding them of this option available to future spouses. Such information is all the more important where MRA are concerned. In sum, the private international law of most European countries would find both of the aforementioned clauses regarding the status of persons acceptable to the degree that they simply confirm the rejection of institutions deemed to be manifestly contrary to public order: polygamy and repudiation.¹⁵⁰

As to the conditions relating to property, Article 49 of the new Moudawana authorizes spouses, with respect to the administration of property that is acquired during the marriage, to agree on the way these will be managed and divided.¹⁵¹ This agreement must be recorded in a document that is separate from the marriage contract.¹⁵² This innovation, introduced in 2004, will facilitate the recognition of such contracts under the various legal orders concerned. The marriage contract covering the matrimonial property arrangements is a feature of all European legal systems today, and it is now possible under Moroccan law as well. In the private international law of most European countries, the matrimonial regime is subject principally to the law of

of 17 February 2004), 58 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [CRITICAL REV. OF PRIVATE INT'L LAW] 7, 7-25 (2006).

149. Another way of eliminating the obstacle may, in coming years, prove to be the introduction into the new Moudawana of divorce for irreconcilable differences referred to above, which could be interpreted as a right similar to unilateral breakdown of the marital bond, which is granted equally to women. It is still too soon, however, to conclude that this is indeed a similar right; it will depend to a large extent on the attitude that Moroccan jurisprudence will take in the future with regard to this new form of unilateral divorce that is open to both spouses.

150. Under the private international law of some countries, it will be necessary for spouses to confirm their commitment when the lawsuit is initiated. This is the case, notably, in Belgium. The Belgian Code of Private International Law recognizes the autonomy of the will in the area of divorce, thereby allowing spouses to have their divorce proceedings governed by the law of their foreign nationality. See CODE OF PRIVATE INTERNATIONAL LAW [BELGIAN PIL CODE] art. 55, § 2, translated in YEARBOOK OF PRIVATE INTERNATIONAL LAW 319 (Petar Sarcevic et al. eds., 2005) (stating that a couple may choose between the law of their foreign nationality or Belgian law when deciding what law will govern their divorce proceedings).

151. FAMILY CODE art. 49 (2004) (Morocco), translated in *Moroccan Family Code*, *supra* note 1, at 17 ("[T]he two spouses may, under the framework of the management of assets to be acquired during the marriage, agree on their investment and distribution.").

152. See *id.* (stating that an agreement regarding the distribution of property acquired during the marriage must be in "a written document separate from the marriage contract"). To ensure that all parties are aware of these provisions, the *adouls* must advise both parties at the time the marriage is contracted of the possibility open to them under Article 49. *Id.*

the primary conjugal residence.¹⁵³ Nevertheless, conflict rules also permit the choice between the law of habitual residence and the law of one's nationality.¹⁵⁴ MRA have a particular interest in making use of the possibility Article 49 offers them in the following situation. Two MRA, having contracted a civil marriage in accordance with Article 14 of the new Moudawana, will most likely be subject entirely to the matrimonial regime (i.e., relating to property) of the law under which they were married.¹⁵⁵ There is a good chance that in Europe this will be the regime of community property acquired during the marriage. It is not certain, however, that this system will be recognized in Morocco, because the latter has maintained the system of separation of conjugal property.¹⁵⁶ Such recognition could, however, be facilitated if a contract drawn up by the spouses, in compliance with the provisions of Article 49, specifies the status of the property to be acquired during the marriage and the way it is to be managed and divided.

IV. Conclusion

The new Moroccan Family Code is an important piece of legislation. MRA can take advantage, on various matters related to conjugal life, of the possibility offered to them to include in their marriage contract all conventional clauses "except for those contrary to the terms and objectives of marriage."¹⁵⁷ One could speak of modelization. Modelization may refer to various questions, linked both to personal status issues and to property matters. The clauses, once they have been inserted into the marriage contract (or, where applicable, into an agreement concluded afterward), are binding on both spouses.¹⁵⁸

153. See, e.g., BELGIAN PIL CODE art. 51, translated in YEARBOOK OF PRIVATE INTERNATIONAL LAW, *supra* note 150, at 319 (linking the matrimonial regime to the law of the first habitual common residence and only in the absence thereof, to the common nationality).

154. See *id.* art. 49, translated in YEARBOOK OF PRIVATE INTERNATIONAL LAW, *supra* note 150, at 309 (permitting couples to choose whether their matrimonial property regime is governed by the law of their first habitual residence, the law of one spouse's habitual residence, or the law of one spouse's nationality).

155. See FAMILY CODE art. 14, translated in Moroccan Family Code, *supra* note 1, at 10 (stating that Moroccans living abroad may conduct their marriage according to the laws of their country of residence, including presumably the matrimonial regime related to property).

156. See *id.* art. 49, translated in Moroccan Family Code, *supra* note 1, at 17.

157. See *id.* art. 47, translated in Moroccan Family Code, *supra* note 1, at 16.

158. See *id.* art. 48, translated in Moroccan Family Code, *supra* note 1, at 17 ("Conditions that confer a legitimate benefit on the person who drew them up are valid and binding on the spouse who agreed to them.").

The aim of this Article was to stress that such clauses allow MRA to endow their marriage commitment with greater legal certainty, insofar as the clauses provide a framework of rights and obligations for marriage that will later reduce the likelihood of difficulties for the spouses, which sadly are still all too frequent, caused by the nonrecognition of marriage, of several of its effects within the different legal systems involved, or both. The position of MRA in relation to their family lives remains vulnerable in legal terms because, notwithstanding the reforms to the Moroccan Family Code of 2004 there are still a number of discrepancies between the Muslim and the Western conceptions of the place of women and children within the household. Certain clauses may counteract this vulnerability, at least in part, and this is the reason I suggest speaking of the "emancipatory potential" of the new Moudawana.