

## Getting a Divorce in Spain: A Moroccan Case of Legal Pluralism and Transnationalism

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### A. Overall aim

In this chapter I investigate Moroccan women migrants and family law in a transnational perspective. My approach includes a study of the ways in which Moroccan women in Madrid deal with and perceive of legal institutions in daily life, especially in connection with divorce. The relation between legal discourses (Moroccan and Spanish), social processes and local practices is central for my study. When comparing the different family law systems on an ideological and a practical level, the relationship between secularism and religion demands special attention. To what extent do Muslim family law and values and/or Spanish civil law and secular values influence or affect Moroccan women's identity in their contacts with legal institutions? Are not other factors of more relevance in the migration context, such as economic resources? How is women's agency involved in the application of the *Spanish* law reforms in order for women to gain legal, economic and social benefits? To what extent do the Moroccan women in Spain turn to the reformed *Moroccan* family code for their own benefit?

Concerning the concept of 'law' I treat it as any normative order which is observed by a population of persons, in accordance with Gordon R. Woodman's formulation. In connection with this formulation he defines the concept of 'legal pluralism' as "the condition in which a population observes more than one law".<sup>1</sup> The kind of legal pluralism that I am dealing with here can be characterized as 'deep' in the sense that the different laws observed within one population are distinct laws compared with the individual's own, and have different sources of authority.<sup>2</sup> In the actual study we are dealing with the Spanish state law, influenced to a certain extent by Christian values but in a secular shape, which most often is referred to as Human Rights, and the Moroccan state law, which is deeply permeated by Islamic law, Shari'a. The encounters - and clashes - between different law systems, constituting legal pluralism, is a consequence of large scale international migrations, which constitute one important aspect of modern globalization trends.<sup>3</sup>

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<sup>1</sup> Gordon.R. Woodman "The possibilities of Co-Existence of Religious Laws with Other Laws" in Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand, Gordon R. Woodman (Eds) *Law and Religion in Multicultural Societies* 1 Ed. (Köpenhamn: DJOF Publishing 2008) 23, 24, 26

<sup>2</sup> cf 2008:26; see note 1

<sup>3</sup> 2008:24; see note 1

To make things more clear, I will present a divorce case which I have followed for three years. It deals with one particular Moroccan couple living in Spain and their marriage and divorce story, such as it is told by the wife, her relative and her lawyer. I know little about the husband's reactions to the legal divorce procedures and his family members' opinions, as I have never met them. I got all my information through the wife, living in the Madrid suburb and indirectly from her brother in Morocco. I have been informed about the Spanish judge's handling of the legal acts through the wife's lawyer. My approach is anthropological in the sense that I am less interested in an analysis of the legal texts and more in the empirical data concerning the actors' thoughts and behaviour in the wife's strive for getting a divorce – or, in the husband's case, not to get it.<sup>4</sup> I have made anthropological fieldwork on Muslim women in Morocco (Qbila Anyera), Senegal (Mbacké and Dakar) and Spain (Ceuta, Tenerife and Madrid) for longer and shorter periods of time during the last thirty years.

Below I start with a few words on Human Rights (HR) and the Islamic law, Shari'a, as they constitute the two main sources of inspiration for Western respectively Moroccan family legislation. A short account follows of the old and the reformed Moroccan family law, and some characteristics of the old and the reformed Spanish Civil Code. A transnational perspective will be necessary to better understand how some Muslim women deal with the legal "multiple choice" situation in which they find themselves in Spain.

## B. Human Rights

In the Moroccan Constitutions of 1968 and 1972 The Declaration of Human Rights of 1948 has had a certain impact, especially what concerns equality for Moroccans (see article 5 I the Moroccan Constitution of 1972). However, in Morocco 95 percent of the inhabitants are Muslims and religious sources are often called upon in gender equality issues and references are made to the Quran concerning women's position in society. One conviction held by Moroccans is that Islam is not against equality between men and women because everybody is equal in front of God. However, Islam is against that men and women have identical rights in society. According to religion, women's subordination under men within the scope of the family is not to be negotiated by secular or religiously liberal forces. Put in other words: equality in Islamic legal tradition emphasizes two aspects. One is equality in the sense "of the same value". The other is sexually and religiously "the same" or "not the same". The latter

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<sup>4</sup> Anne M. O. Griffith: "Academic Narratives: Models and Methods in the Search for Meanings." In Sally Falk Moore (ed.) *Law and Anthropology*. (Oxford: Blackwell 2005)

aspect entails discrimination also for men, as those who are not Muslims are considered to be of lower or subordinated status.<sup>5</sup> How to cope with this double tendency in contemporary Moroccan society to both promote increased gender equality and to follow Islamic law and tradition?

In the revivalist Islamic Moroccan networks HR as formulated in the Declaration of HR have appeared to many Muslims as a product of the Western – read the North American – hemisphere. HR are not perceived as culturally or socially adapted to Muslim societies. Some Muslims go further in their critical attitude, considering HR to be ruthless and immoral tools for Western capitalism, intended to deviate the women of the Muslim world and to threaten the religious and national identity of the Moroccans. That is why Islamic equivalences have been created through other definitions of development, progress and equality, which have been loaded with moral and religious dimensions, particularly for application on women's position. When accounting for the Moroccan divorce legislation in the following I will show how gender, Islam and HR are interpreted and applied in varying contexts and cosmologies. The elasticity of concepts like HR in their Western respectively Islamic interpretation leaves space for cultural and regional variations as well as material needs and political influences and negotiations. The same is the case with the legislation, as we shall see.

### C. Shari'a, the Islamic law

It is obvious that family law is central everywhere to the reproduction of the social and cultural order: it arranges for the transfer of material resources from one generation to the other (succession), it organises care for the next generation (custody and guardianship) and it regulates sexual relations (marriage and divorce). All this involves gender relations and “the position of women”, a topic often discussed in terms of the desirability of Westernisation or secularisation versus cultural authenticity or religion.<sup>6</sup> Muslim family law puts special emphasis on men's responsibility for the women, who are supposed to be subordinated and obedient to the male family members, even if the reformed Moroccan family law explicitly says, as we shall see, that the spouses share responsibility and decision making in the family. European civil laws are comparatively more focused on the individual and on gender equality, as mentioned above.

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<sup>5</sup> Abdullahi An Na'im (ed.): *Islamic Law in a Changing World. A Global Resource Book*. (London: Zed Press. 2000); A.. Elizabeth Mayer: *Islam and Human Rights. Tradition and Politics*. (Boulder: Westview Press. 1991)

<sup>6</sup> Annelies Moors: “Introduction: Public Debates on Family Law Reform. Participants, Positions and Styles of Argumentation in the 1990s.” *Islamic Law and Society*, 10,1. (Leiden: Brill 2003)

On a “local” level in Morocco and also from Moroccans in Madrid I have learnt about Muslim women’s submission under their male family members paired with strategies for more independent livelihoods, less restricted by male-dominated family norms. From my data it seems as if Muslim men, whether migrants or not, try to “moralize” the public sphere for women by invocations of religion and Islamic family law, thereby limiting women’s access to the public sphere and to participation in the civil society. It is here that the “sacred” quality of law, of Shar’ia law, plays such an essential role for the maintenance of unequal gender relations in society. To explain the grip that legal norms based on Shari’a has on the Muslim mind, I will make a short account of the prevailing ideas about its origins and importance.

Islamic law is believed to emanate from God, from the divine will, revealed through the Prophet Mohammad in the Quran, and it is here to guide the religious community along the right path. The Islamic dogma says there is only one truth which embraces all other truths. Thus, Shari’a is not “rational”, because it is “revealed”; it is seen as a Godly recommendation or norms for men and women to live by. The juridical order is not the concrete formulation of a daily practice which slowly shapes its institutions, developing its legislative technique. The religious tradition constitutes the basis of the juridical structure and this provokes a permanent conflict with the daily reality, although it does not imply that Law remains immutable. Interpretation (Arabic: *ijhtihad*) becomes a crucial concept for people living under Shari’a. In theory, the Muslim jurist is forced to formulate and interpret law by creating a parallel with a situation already foreseen.<sup>7</sup> In the West, law appears as a kind of protection of the individual’s rights and is based on an idea about order as something that relies on the public force. In Islam, law is a guide for one’s behaviour, which defines human actions and their effects. Its authority rests above all in people’s conscience.<sup>8</sup>

So Shari’a is in the first place a guide for personal conduct without any territorial connection. The Muslim believer carries the law with him or her, even if the person does not live in an Islamic country. For the Moroccan migrants in Spain, it is only applicable within the field of personal status law. Crimes are always judged according to the Spanish Criminal Law. As the Muslim legal norm has a male bias it makes the position of women a sensitive issue, as we shall see, not least in a legal pluralistic perspective. If women’s legal submission

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<sup>7</sup> Pablo Mandirola Brioux: *Introducción al derecho islámico*. (1 Ed. Madrid: Marcial Pons. 1998) 72

<sup>8</sup> Ibid 1998:74; see note 6.

to men is God's will, how can this be ignored while living in Spain with reference of HR values and Spanish ideas about social equality? And how can then the Muslim family law ever be changed without serious identity breaches, emotional unease and fear of God's revenge?

#### D. Women and law

In an effort to modernize the Personal Status Code and to meet national and Western demands on legal reforms promoting gender equality, there exists an ongoing liberalisation of the Moroccan Family Law. In Spain, great changes in the Civil Code took place after General Franco's death in 1975. Until then, the family law was strongly influenced by a conservative Catholic ethic. The first legal reforms after Franco of the Civil Code were made in 1981 and the last ones, as mentioned, in 2005, representing a much more secularised legal ethic.

In Spain the Moroccan and the Spanish family law systems have existed side by side without being particularly questioned nor politically debated. First now, in relation to the increasing immigration of Moroccans to Spain – a number approaching 800 0000 persons has been mentioned - these issues have been brought to the fore by lawyers working with the immigrants' legal situation.<sup>9</sup> According to secular and religious traditions, ideas about family members' rights and obligations vary considerably. Occurrences of 'childmarriages' and 'honour-related' crimes and violence in Europe manifest that some norm systems do not focus on individuals with universal rights and obligations but rather on family members as parts of a group. This is also the case among most Moroccan migrants in Spain.

The Moroccan migrants in Madrid stress family and religious membership and family and religious loyalty before their identity as individuals with the same rights and status, regardless of sex and religious belonging, which constitutes the dominating Western perspective. In this context Susan Moller Okin's discussion about whether multiculturalism including legal pluralism is good or bad for women gets its meaning. She points at the contradictions or paradoxes in real life between the HR conventions, signed partially by Morocco and wholly by Spain, and all citizens' right to religious freedom and freedom of expressing his or her opinion. Okin asks us to be aware of the negative consequences for female Muslim immigrants that may follow from a too culturally relativistic attitude in Western countries

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<sup>9</sup> Saghir de la Rosa, G. Estéban and T. Ouald Ali: "Immigración y derecho internacional privado: una reflexión 'desde dos orillas': España y Marruecos." In *Actualidad Jurídica Aranzadi*. (Año XVI, 2006) 716

towards the Islamic norm system that the Muslim migrants take with them. Especially Muslim men wish to continue applying it with the support of most European countries' International Private Laws.<sup>10</sup>

The centrality of Islam in everyday lives of Muslim women has been debated, generating two positions: the first underlining that religion is the main factor affecting women's conditions in Muslim societies. The second position does recognise the importance of Islam but does not endorse the idea of Islam as being the sole factor defining the conditions of women in Islamic societies. According to Sandra Hale, Islam should not be seen as a "super structure monolith" and she criticises what she calls the "reductionists" (representatives of the first position) who overlook the strategies of resistance, adaptation, or accommodation that women everywhere employ in situations of oppression and subordination (Hale 1997).<sup>11</sup>

My reaction to both positions is the following: within the field of Muslim family law, Islam as applied and interpreted by most Islamic countries has a powerful limiting grip over women's possibilities to live as independent civil citizens. In other spheres of life, Muslim women may be masters of adaptation, accommodation and manoeuvres. But the borders set up for women's lives in a Muslim community with a legal norm system for family life inspired and directed by Shari'a is rigid and mostly resistant to changes towards equal rights for men and women even in contemporary daily life, with exception for Tunisia, Turkey and in an increasing extent also Morocco, in spite of the fact that economic and social duties are actually shared within the family. The Muslim believers' argument which supports the resistance to change is the law's sacred origin. That is why asserting the secular character of family law is so important – just because it is not sacred one can more easily change it or reform it.<sup>12</sup>

I think Hale's attitude is of great value as she pinpoints the importance of seeing Muslim women as "actors in their own story", instead of pitying them as victims in an Islamist male complot. Still, I prefer a more nuanced view which allows us to be aware of Muslim women's reactions and attitudes to Islam in their daily lives. The case I will present below shows how religion does not hinder Muslim women to engage in Spanish legal processes, in order to

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<sup>10</sup> Susan Moller Okin: "Is Multiculturalism Bad for Women?" In Joshua Cohen, Howard Matthew and Nussbaum, Martha (Eds) *Is Multiculturalism Bad for Women* (1 Ed. Princeton: Princeton University Press. 1999)

<sup>11</sup> S. Hale: *Islamism, Socialism and the State*. (Boulder: Westview Press 1997)

<sup>12</sup> Oral communication with the Senegalese sociologist Fatou Sow, Dakar, in January 2007.

gain economic benefits and to overcome bureaucratic obstacles, escaping male dominance and wife battering in Spain. At the same time the woman in question considers herself to be deeply religious. She resists with great emphasis all kinds of adaptation to Spanish social life. Other Moroccan women in similar situations may not be active Muslim believers. Their attitude to Morocco and its family law is often not at all positive after the bad experiences of the men's adherence to the Moroccan Family Code that they have had themselves or heard about from other women.

#### E. The Moroccan Family Code

The Family Code (Moudawana) of 1957 has been reformed twice – in 1993 and in 2004 - in accordance with the principles of Islam, expressed in the Quran and formulated based on the Malekite Law School. This Law School was founded by Imam Malik and is spread in North Africa. The new Family Code of February 3<sup>rd</sup> 2004 replaced the former Moudawana, which had since long been heavily criticized by many women's groups for being too traditional and gender conservative. The new Family Code improved significantly the juridical frame for women's rights. Before the rights and duties of each spouse were fixed in separate articles of the law. After the family law reform there is a statement in one and the same article about the reciprocal rights and duties of the spouses. However, both the Family Code and its predecessor have the same source, namely Islamic legal doctrine known as *fiqh* and in the Moroccan case the Malikite *fiqh*.<sup>13</sup> According to Marie-Claire Foblets, the difference between the two legal texts consists primarily in the form and in some more substantive rules, which do not change both legal texts' reliance on the fundamental principles of Islamic law in general. Thus, Foblets underlines that the present Moudawana does not break with the traditions of Muslim family law. She makes clear that the legislators call upon the judges “in case of silence or insufficient specification in the written law, to turn to Malikite rite and *ijtihad* (the conclusions of jurisprudence) to find a solution (Art. 400).”<sup>14</sup> This does not mean, however, that there are no improvements in the new Family Code what concerns women. The reform element distinguishes itself particularly in the Moroccan legislators' wish to be just towards women and, as she formulates it, “to place them on equal footing with men as regards both in marriage and its dissolution as well as in their relationships with their children. This is new.”

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<sup>13</sup> Marie-Claire Foblets: “Marriage and Divorce in the New Moroccan Family Code: Implications for Moroccans Residing in Europe”. In 2008:145 f. see note 1.

<sup>14</sup> In 2008: 147, see note 1.

According to Moroccan law, marriage is a civil contract, but it has a social and religious aim. This is the key for understanding the long lasting discrimination of the woman within the family, in spite of the equal political status of men and women declared in article 8 of the Spanish Constitutional text.<sup>15</sup> The minimum marriage age for girls was changed in 2004 from 15 to 18 years, the same age as for boys. Women were no longer forced to ask for a male tutor's (Arabic: *wali*) approval to get married nor to depend on a male tutor's opinion regarding their choice of husband. The mutual responsibility and the equal status of husband and wife in the administration of the home became legally recognized, even if in the reformed Moudawana only the husband/ father is still considered the legal tutor of the children. Previously the wife's duty was to obey her husband; this is eliminated in the reformed family law.

Several restrictions on men's right to have more than one wife (polygamy) have been introduced in the code. It is now left for the judge to decide whether a man who wants another woman within wedlock is capable of treating the wives equally in all aspects of marital life and/or if he can afford a polygamous family. The existing wife(ves) has(ve) the legal right to be informed about the husband's intentions before his marrying a new wife and a woman can stipulate in the marriage contract that she has the right to divorce in case of her husband's decision to marry a second (or third or fourth) woman. However, the wife cannot forbid it, but will get a divorce, if she has written into the marriage contract that she would never accept to share her husband with another wife. The husband can use the threat of a divorce against a woman who does not want a polygamous marriage but wants to stay with her husband – either she accepts another wife or he has the legal right to repudiate her (Art.45).<sup>16</sup>

Even if repudiation (Arabic: *talaq*), which means men's traditionally unilateral right to divorce still exists in the reformed Family Code, nowadays it has to be carried out and ratified in a law court. The wife has to be informed about her husband's intention and the husband has to explain to her why he wants to repudiate her. An effort to achieve reconciliation between the spouses is obligatory before the judge takes the final decision. Once he has got the divorce he must pay her and the children what he is due in terms of economic compensation, which is

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<sup>15</sup> Ana Quiñones Escámez: *Derecho e inmigración: el repudio islámico en Europa*. (Barcelona: Fundació Caixa. 2006)

<sup>16</sup> Foblets 2008:150, see note 1.



mostly a comparatively small sum of money, not a monthly maintenance. The application of the new law is yet not perfectly clear. Foblets writes about women's legal position in relation to men's right to repudiation and to divorce in general:

“A woman does not have a comparable right to end her marriage by her sole will, except in the cases of a *talaq* ‘by mutual consent’ (as it is called unofficially in English and translated into French officially as ‘*divorce par consentement mutuel*’), a *tamlik* (unofficial English translation: ‘divorce resulting from a right to choose assigned by a husband to his wife’) or a *khol* (official French translation: *divorce par khol*; unofficial English translation ‘divorce in exchange for compensation by the wife’, ‘*khol*’ being translated as ‘compensation’). But even in such cases, it is the will of the man that is taken into consideration in the first instance.<sup>17</sup>

So women who want to leave their husbands have to ask for a judicial divorce which they can get only if they have legally accepted reasons for it, which in the current law text can be no maintenance, absence, defect, abandoning the house (to be proved). Even if it has become easier for a wife to achieve a divorce than before, especially if she has good reasons for it, in real life money, education and the support of an influential family facilitate considerably the court's decision. The judges' opinions are of great significance for the sentences; their power is great and they are left with a considerable room of manoeuvre which can, as Foblets hints at in the citation above, be negative for the female part of the couple in divorce cases. No female judges are to be found in Morocco, even if they are much needed for the application of the reformed family law.

There also exists a new possibility for getting a divorce in case of ‘irretrievable breakdown’. The new code authorises a woman who wishes to end the marriage by filing a petition before court for divorce for *chiquaq* (official French translation: ‘*pour raison de discorde*’; unofficial English translation ‘for irreconcilable differences’). The court must then grant and pronounce the divorce within six months from the date of the petition. According to Foblets, it remains to be seen if this provision can become something equivalent to what repudiation is for men).<sup>18</sup>

Paralleling women's getting a divorce for *chiquaq*, the Family Code now introduces a new way of thinking about divorce: it could be based on mutual consent and it does not have to be based on negative reasons, falling back on accusations of bad behaviour. But the basic attitude of the family law was – and still is in practice – that men have the advantage over women of getting a divorce without difficulty. Divorce was and still mostly is regarded as a male

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<sup>17</sup> Foblets 2008:151, see note 1

<sup>18</sup> Ibid 2008:151, see note 1

privilege, due to the fact that men see themselves as family providers and main tutors of the children. Moreover, because of the bride wealth that the husbands have paid wholly or partly for their wives before marriage, they think they have a legal right to keep their wives and find the idea hard to accept that married women could decide themselves about divorce.

The time for processing a divorce case is long; it may last up to three years before the verdict is taken and in the meantime the woman/ wife cannot marry again. The man/husband can rapidly remarry, as polygamy is still legal. The wife in a divorce process has, however long time it may last, only the legal right of three months of maintenance by her husband and cannot remarry until the divorce process is completed. Little consideration is given to the economic conditions for the wife and the children during this period of time. However, if the man is found to have broken his legal obligations as husband and the wife is conceded divorce, the rest of the bride wealth should be paid to her, if the bridegroom has not already been given her the whole sum. Actually, in most cases part of the bride wealth is not paid to the bride and her family on marriage to prevent the husband to divorce without thinking twice about it.

In line with this way of arguing, in the reformed family law women continue obtaining just half of the inheritance compared with men within the same category according to the succession rules. This means that inheritance remains a burning issue for the women fighting for economic and social equality in Morocco. The argument used to motivate the conservation of the legal norms about succession has been the same in 1993 as in 2004, when the last reform took place. In the Koran it is explicitly stated that women should inherit half as much as men – again based on the idea that men provide for women. Nowadays, this has become an ideal rather than reality.

To understand this legal norm system, one should remember that the spirit of the International Private Law, of a confessional system of law like in Morocco and a non-confessional system of law like in Spain maintain different juridical logics, as mentioned above in connection with Shari'a. When dealing with secular family law and its application, legal rules and norms based on nationality and residence prevail. Within confessional legal systems, however, one gives priority not only to nationality but also to religion to guarantee the continuity of religious practice in the home country and also in the foreign territory where the believers live.

#### F. The Moudawana and the Moroccan woman in Spain

What impact has the latest version of the Moudawana/ had on the Moroccan migrant women's family lives in the diaspora? The Moroccans who live abroad can nowadays marry according to the local administrative procedures, under the condition that bride and bridegroom agree, that no legal obstacles exist and that the bride wealth is properly paid, in the presence of two Muslim witnesses and, in case it is needed, one tutor.<sup>14</sup> Here it is worth noticing that this law simplifies the marriage procedure for the Moroccans abroad and at the same time it permits, for the first time, a civil form of marriage and accepts rules according to the international private law (the submission of the juridical act to the law of the place where the marriage takes place).

Moroccan men and women residing in Europe – in my case in Spain – have now, with the reformed Moudawana, a possibility to decide, up to a certain point, which legal regime they want to apply to their family life. The example mentioned in my case to follow is divorce, in Foblet's article which I am amply referring to in this chapter she investigates Moroccan migrants' multiple legal choices in connection with marriage and divorce (Foblets 2008:168). This choice is something quite new in the history of the law of the European countries. Some Moroccans living in Europe have conserved their nationality of origin, others are combining it with the nationality of the country of habitual residence in Europe. Adhesion to the religion (Islam) and the traditions of the country of origin in some cases explain the attachment of the Moudawana, in some cases such an attachment is missing or exists without any deeper reflection, as a sign of Moroccan identity, whatever is meant by that. Below different attitudes to such an attachment will be illustrated in a case from a Moroccan-Spanish context. Factors such as geographical proximity and mobility rendered easier by obtaining the nationality of the country of residence and travelling without visa and with Spanish and/or Moroccan passports for people with Spanish residence cards have contributed to create a truly transnational community

One has to keep in mind that legal processes are extremely slow and even more complicated to manage at a distance. To make things work more smoothly, the Moroccans living abroad could have a divorce sentence pronounced at the Moroccan Consulate, at least in theory. However, my Moroccan female informants in Madrid say they have heard of no such assistance available at the Moroccan Consulate so far. Women's initiative, when it comes to

take a contact with Moroccan institutions such as a Consulate, may often be minute. Illiterate migrant women seldom dare to approach such places without male support. In divorce cases they would rather rely on different forms of Spanish assistance, as we shall see in the case below, and ask someone at home to consult of a Moroccan Family Court judge, mostly by the help of male family members.

Concerning divorce it is worth noticing that, as mentioned above, the article in the Moudawana about wives owing obedience to their husbands have disappeared. As a consequence wives nowadays should be able to decide themselves where to live without feeling an obligation to stay in the conjugal home under the control of their husbands. However, even today many migrant women do not dare to return to Morocco because they fear to be obliged to go back to live permanently with their husbands or ex-husbands, in case of having achieved a Spanish divorce, not yet ratified in Morocco.<sup>19</sup> According to the reformed Moudawana the family is put under the shared direction of the spouses. None the less only the father is the juridical tutor of the children under 18 years of age. The mother only becomes tutor in especially urgent cases when the father is absent or dead. But even in such cases, the father before he dies could name someone else to be the juridical tutor of the children. This makes life difficult for those Moroccan migrant women who are widows and want to raise their children in Spain.

As mentioned above, repudiation is an “only for men” way to divorce, which has not been abolished but is more restricted. The obligation to inform the wife is of great importance for the women migrants who before would often remain uninformed about their husbands’ divorce in Morocco or abroad. If she does not know that she is repudiated, she cannot raise her legal claim about the financial compensation from her ex-husband. Like the previous family law the current law says that the woman can ask a judge to grant her divorce but only on certain conditions or because of certain reasons.

Concerning material goods, the principle of the separation of property is not any longer salient in the Moroccan Family Law. The reformed law gives the spouses the possibility, in one separate document or passage in the wedding contract, to define a framework of how the property will be revised. In the case of disagreement or divorce, the judge dictates the

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<sup>19</sup> Nadia Naïr: “El código de la familia y la mujer emigrante.” In Revista *Mugak* (Bilbao: Número 27/040401, 2004)

contribution of each one of the spouses. Before the wife could only keep the property which was hers; which meant she had no right to anything of the property the spouses had accumulated during their marriage. Most times, Moroccan migrant women (just like other Moroccan wives) invest money in houses or cars in Morocco in their husband's name. If they divorce, they lose it all, unless something more favourable for the wife is inscribed in the marriage contract.

The consequences of divorce applying the national family code are not satisfying for the women, whether they live in Morocco or Spain. Moudawana governs beneficially family life for the Moroccan men in Spain. They see no advantage with the Spanish family code. According to the Moroccan family code the women have only the right to three months of maintenance, i.e. during the "waiting period", when the divorce is not yet a fact. Divorced Moroccan women in Spain are often left with the sole burden of provision for the children as the ex-husbands often do not fulfil the sentences about maintenance of divorced women and their children. Their relatives at home expect remittances from the women, who have little or no help with the expenses of child care and education in the diaspora. Even if many of these women who live and work in Spain as heads of households - divorced, widowed or married with absent husbands - would like to, they cannot visit Morocco with their children without risking to lose the custody of the children to the families of the husband who live permanently in Morocco. The great fear of these women is to have to return without their children to Spain. This fear will last as long as the Moroccan courts do not respect neither the shared *patria potestad* (right to custody of children) nor the woman's right to live and work wherever she likes quite independently.

However, one has to appreciate the changes made so far in the reformed Moroccan Family Law of 2004. Women divorced according to the Spanish Family Code will probably have a chance of validating it in Morocco within not too distant a future. The reformed Moudawana anticipates actually the recognition of foreign decisions, even if up to now the Moroccan jurisprudence has not contributed in any concrete case regarding/on this matter.<sup>20</sup>

In more general terms it can be stated that Moroccan men and women residing in Europe – in my case in Spain – have now, with the reformed Moudawana, a possibility to decide up to a

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<sup>20</sup> Saghir De la Rosa yAli Ouald 2006:716, see note 8

certain point which legal regime they want to apply to their family life. The example mentioned in my case to follow below is divorce and in Foblet's article which I am amply referring to in this chapter she investigates Moroccan migrants' multiple legal choices in connection with marriage and divorce.<sup>21</sup> This chance for the Moroccans in Europe is something quite new in the history of the law of the European countries. Some have conserved their nationality of origin, others are combining it with the nationality of the country of habitual residence in Europe. Adhesion to the religion (Islam) and to the traditions of the country of origin in some cases explain the attachment of the Moudawana, in other cases such an attachment is missing or exists without any deeper reflection, as a sign of Moroccan identity, even if what is meant by that is left unclear. Below different attitudes to such an attachment will be illustrated in my case in a Moroccan-Spanish context. Factors such as geographical proximity and mobility rendered easier by obtaining the nationality of the country of residence and travelling without visa, with Spanish and/or Moroccan passports for people with Spanish residence cards have contributed to create a truly transnational community.

#### G. The Spanish Civil Code including Family Law

It has since long been in the regulation of the matrimonial contract that the reproduction of a male dominated, not to say a patriarchal, ideology finds its legal outlet in the Family Code, at least in a historical perspective. According to the Spanish Civil Code of 1889, a woman's relations to her husband were, from the legal point of view, the following, as can be read in some selected articles:

-Article 57: the husband ought to protect his wife and she ought to obey her husband;

-Article 58: The wife should follow her husband wherever he decides to live;

-Article 60: The husband is the representative of his wife.

Women were discriminated against in the family law only because they were women.

Unmarried women and widows were suffering from special restrictions because they were regarded having an incapacity attached to their sex, not to their family status. Until 1958 women could be not the tutors of their children, while after 1958 they could become tutors with the permit of their husbands. The Civil Code of 1961 gave women political and social rights as well as rights to work outside the home, but only with the husbands' permission. The

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<sup>21</sup> Foblets 2008:168, see note 1.

men could at any moment change their minds and withdraw the permit.<sup>22</sup>

In the article 66 of the Spanish Civil Code of 1981, which is currently in use, it is stated that “the spouses have the same rights and duties” (Spanish: *los cónyuges son iguales en derechos y deberes*). Both parents are tutors of their children and all decisions within the family shall be taken by the spouses in mutual consent. Property owned by each spouse before marriage is considered to be the spouse’s private property and not divided in case of a divorce, while all assets and economic resources achieved during marriage is common property and shall be equally divided upon divorce. To have equal rights and obligations means that the spouses have the same rights and responsibilities as long as they are married. This is also the case after a divorce with regard to custody of children and the maintenance of the children. The one person of the ex-couple who suffers from the worst economic situation after the divorce – most of the times the ex-wife - has the right to receive maintenance from the ex-spouse in the form of a monthly sum, the size of which is stipulated in the verdict.

According to Article 86 of the actual version of the Civil Code, one spouse or both of them or one spouse with the consent of the other one has/ve the juridical right to ask for and to get a divorce by a verdict declared at a juridical court.<sup>23</sup> It has to be noted that before 2005 a divorce was always preceded by a separation phase for the couple. This is not the case any longer. The three most important changes were the following:

- (i) Separation or divorce can be asked for both when there exists a mutual agreement or in case of a demand from just one of the spouses after three months of marriage.
- (ii) If one of the spouses or their children is exposed to violence by the other spouse the postponing period of three months is not obligatory.
- (iii) The divorce demand can be presented and attended without having to allege any reason to legitimize the petition.

This means that no conditions for divorce are listed in the Spanish Family Code the way they are in Moudawana. No matter if it is the husband or the wife – or both – who want(s) a divorce – or for what reason they want it; divorce is every married person’s legal right. This is perhaps the most basic difference between the contemporary Moroccan and the Spanish family law systems, and reflects vital differences in the view of men and women as

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<sup>22</sup> María Luisa Balaguer: *Mujer y constitución. La construcción jurídica del género*. (Valencia: Ediciones Cátedra. 2005) 180 f

<sup>23</sup> This is according to Spanish Law 15/2005 of July 8th which modified the institutions of separation and divorce. *Código Civil*. (Sept. Madrid: Editorial Tecnos. 2006)

autonomous persons in the society of today. However, as mentioned above, not so long ago the Spanish Family Code gave expression of an attitude, similar to the Moroccan, in issues related to gender relationships and family law matters. Shared custody is the rule as long as the spouses/ parents agree and the juridical authority finds it best for the child/children of the couple. Even if the spouses do not agree about this, the judge can decide shared custody of the child/ children, under the condition that one of the spouses wants it and the judge's report is in favour of it.

The Spanish Civil Code states that foreign citizens living in Spain shall follow the family law of their countries of origin if it does not contradict the Spanish public order or is discriminatory. This means that if the foreign family law contradicts what is defined as fundamental rights in Spain, stated in the Spanish constitution and legislation, foreigners in Spain have the right to request the application of the Spanish family code concerning private family matters such as marriage, divorce, custody of children and succession.<sup>24</sup> As mentioned above, the application of the Spanish Civil Code may lead to contradictions and clashes between on the one hand the Spanish legal principles of equality, democracy and human rights and on the other hand Muslim family law Sanchez Martín 2003:2.<sup>25</sup> Consequently, lawyers from the "Colegios de abogados" (The Lawyers Associations) in Spain have started to study the Moroccan Family Law from a comparative legal perspective to be able to better deal with transnationalism and migrants living under Muslim Family Code in Spain.

#### H. The Mina case

Some cases of clashing legal systems in connection with migrants in Spain and divorce have already been reported in the Spanish press, involving Muslim women migrants living in Spain. As an example I will mention a Moroccan woman who turned to a Spanish civil court to get a divorce from her Moroccan husband in 2003. Her husband refused with reference to the Moudawana.<sup>26</sup> The Moroccan woman chose the possibility of getting a divorce according to the Spanish civil code by referring to article 107 and 9, 3 (discrimination). Her case was handled by a Spanish civil court. The woman won her case in January 2006 after a long legal

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<sup>24</sup> A. Motilla y P. Lorenzo: *Derecho de familia Islámica. Problemas de Adaptación al Derecho Español*. (Madrid: Ed. Colex 2002) 132, María José Sanchez Martín: "El código de la familia y su adaptación en España." Unpublished paper. (Madrid: TEIM, Universidad Autónoma, 2003) 2.

<sup>25</sup> Ibid 2003:2, see note 12

<sup>26</sup> *El País* 10.29, (Madrid 2003) 31



procedure.<sup>27</sup> This was only one month after the reform of the Spanish Civil Code was approved of, allowing separations and divorces according to Spanish legislation when the behaviour of one of spouses towards the other is discriminatory or against public order (both spouses being non-Spaniards). The woman explained that she had been forced into her marriage ten years earlier. In Spain she got the divorce against her husband's will, something which would probably had been impossible in Morocco even after the latest reforms of the Moudawana in November 2004. The Moroccan woman also got the custody of the daughter and the ex-husband was prohibited to take the daughter away from Spain without previous judicial authorisation.

In my extended case is about a Moroccan woman, whom I call Mina, the clashes are not between the different law systems but between the Moroccan wife and her husband, both living in Spain. This case is a good example of 'deep' legal pluralism as it shows the co-existence of two legal systems in its Spanish context and how this existence widens the Moroccan wife's scope of choice in her efforts to get a rapid divorce from he Moroccan husband.

I got to know Mina in a suburb of Madrid and what follows is my account of her own story, complemented by her aunt's comments and her lawyer's explanations to me. Mina was married in Casablanca in 2003 with a Moroccan man whom I call Mohammed. She did not particularly want him as her husband, but her parents thought he would be a suitable marriage partner, as he had a work permit in Spain. That meant their daughter had a chance of going to Spain to stay there working with her husband.

Mohammed's sister first saw Mina in a *hammam* (Arabic: sauna bath) in Casablanca and mentioned her to their father and mother as a possible fiancée and future wife for her brother. He lived in a village outside Barcelona, Spain, and reacted positively at to the family's proposition. After the wedding the newly married couple went to the village, where Mohammed rented part of a house not far from his brothers. Many West Africans and Moroccans lived there and worked in the surrounding vegetable cultivations.

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<sup>27</sup> *El País* 01.18 (Madrid 2006).

As the husband did not want to work himself, he asked Mina to start earning money as soon as possible. She remembered him saying that if she only could get enough money for paying food and shelter and two packages of cigarettes a day for him, he would be pleased because then he would not have to work at all. But Mina did not immediately get any job. In stead she spent the first time alone in this alien setting, without knowing any other people than the husband's brothers, with whom she had little contact. In Morocco Mina was not used to go outside the house alone. In Casablanca where she had lived before marriage, she was always at home with her family, leading a modest life, without talking with anyone but her parents, brothers and sisters.

Mohammed suffered from bad temper and soon began to shout at Mina and to beat her, When ever she did not behave or react the way he wanted. She got frightened and tried to avoid him, which only increased her husband's anger. Once, she said, he got so mad at her that he tried to kill her by putting the bed over her, intending to suffocate her with the mattress. Another time he banged her head against the wall so hard that she was taken to the doctor by his brothers. She had, as a consequence of the battering, got a terrible headache. Mina did not speak any Spanish and the brothers did not explain to the doctor the reasons for the headache. She got some medicine and went home, without a medical report about the damages she had suffered because of her husband's battering. This circumstance made it impossible for Mina on a later occasion to prove that she was qualifying for the measurements provided by the Spanish Integral Law of Gender Violence in the most urgent cases of gender violence.<sup>28</sup> Consequently she could not get the rapid kind of divorce according to the 207 c) article of the Spanish civil code (see note) which would have enabled her to get a work

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<sup>28</sup> The Spanish Integral Law of Gender Violence was ratified in December 2004 (*Ley Orgánica 1/2004, 28.12, de medidas de protección integral contra la violencia de género*). A number of courts with judges especially trained for the handling of cases of gender violence according to the new law have been established all over Spain. A woman exposed to gender violence (wife-battering or other forms of physical or psychological violence by husband, ex-husband, boyfriend and ex-boyfriend) shall denounce the crime as soon as possible at the nearest police station or a judicial court, bringing a medical certificate of the damage she has suffered (within 48 hours). The Gender Violence judge will have to treat the victim's case immediately, if considered an urgent case with fear for the woman's life, offering the victim shelter in a women's emergency centre and provide police protection. The woman should get juridical help free of charge and economic help to be able to move from the couple's home to a safer place for a certain period of time, mostly set to a fortnight. The perpetrator will be forbidden to approach the woman or the place where she lives. The women will get a rapid divorce (they do not have to wait the stipulated three months) and in the case of migrant women such as Mina, they will get a working permit in their own name as well as a residence card which shows that they are residents in their own right, not as wives of men, who have become their ex-husbands. The law has been heavily criticised, as the legal application is stricter for men than women: male perpetrators will get a more severe penalty than women for the same cases of gender violence. In practice, there are comparatively very few cases of female gender violence against men.

permit in her own name and the right to stay in Spain as an autonomous person instead of in the quality of being the wife of Mohammed.

In August 2005 the brothers decided to go Morocco for their holidays while Mohammed stayed in Spain. His brothers did not find it safe for Mina to be left alone with Mohammed while they were their absent, so she went with them back to Casablanca. As soon as she got home, she declared for her parents that she refused to return to her husband, who had beaten her several times, exposing her also to other forms of physical and psychological violence and once even tried to kill her. The parents did not force her to return to a husband like that, but wanted her all the same to go back to Spain to work. They said she had to exploit the possibility of going to Spain by using the permit that she had got as Mohammed's wife. Later they hoped she could change it into a work permit and get a card of residence in her own name, once she had got a divorce in Spain.

A Moroccan divorce was hardly realistic to achieve, according to the parents' considerations in 2005. The husband would never accept that his wife left him, they thought. In practical life the judges most of the times listened to the men's versions in divorce cases, in spite of the Moroccan family law reforms. Moreover, it could be costly to turn to a law court and the parents were poor and illiterate. For them, the main goal was to get some financial help through their daughter's jobs in Spain. One of Mina's sisters needed an expensive medicine, which they lacked the means to buy. They saw in Mina their hope for the future.

End of August 2005 Mina came to a suburb outside Madrid to stay with an aunt. She was brought there by a relative after Mohammed's brothers had left for going back to the village near Barcelona. They did not know where Mina was, but they thought she had remained in Morocco in the home of an uncle. Meanwhile, Mina stayed with her aunt in Spain. She slept in their living-room and helped with the daily house chores. Mina did not dare to go out for fright of meeting her husband, whom she feared might come to the place where she was staying to take her back. Opening the door and answering telephone calls were others things she abstained from for the first couple of months. Later she realized that Mohammed did not know where she lived and felt relieved when she was informed that her parents had refused to tell anything about Mina to the husband's family. They had declared that they did not want their daughter to return to Mohammed.

Mina began to feel relaxed, though she was still pale and thin, telling her aunt that she would never marry again. Every day she went to school with the children of the family and took them back home after school has finished. She was properly dressed in decent and covering clothes and well wrapped up in a scarf which did not show anything of her hair nor her forehead. The aunt asked Mina to leave the headscarf at home, which covered her front completely, indicating to everyone that she was a very pious Muslim girl. This may get her into trouble one day by Spanish racists, the aunt thought. But Mina refused, just as she refused to see any neighbours nor to make any friends nor go to the cinema or to the parks like other Moroccan girls in their spare time. She never went shopping alone or with other people than her woman host and she refused to take any classes in Spanish. She was hard working and earned money by cleaning houses and offices without any employment contracts or other formalities.

Mina was a devote Muslim, extremely shy and not used to expressing any opinions or participating in any discussions outside the small circle of her mother and sisters in Casablanca. In Spain Mina said she suffered from the Spaniards' gazes at her because she wears a head scarf deeply down over her forehead, a characteristic of a female Muslim believer. She also had problems with when, and where she could pray during the periods of time she worked outside the home of her aunt. Many times she saved a one or more of the daily five prayers until later at night. Mina's life in Spain also contained an element of physical fear of getting "contaminated" (my expression) by the Spaniards' bodily impurity they did not do any ablutions after having sex or going to the toilette like the Muslims and they ate pork. She was also critical their secularized life style. The uncertainty was always present: did the food she was eating – biscuits, sweets of different kinds, chocolate -contain any swine fat derivatives? Was the meat she was offered properly killed (Arabic: *helel*)? She said her only wish was to work in Spain in order to earn money for her family and herself. However, without a working permit she could only take badly paid cleaning jobs offered to her by her aunt's network of Spanish patrons/employers and Moroccan clients/employees. These jobs were hard to get and easy to lose.

The strategy the aunt had for her niece was clear right from her arrival to the outskirts of Madrid. Mina had better present herself at the police station of quarter where she lived, denouncing her husband for battering her, and asking for juridical help to get a rapid divorce according to the new Spanish law against gender violence. The aunt had heard about this in

the television and her Moroccan female neighbours at the marketplace had talked several times about this legal innovation. The new law could offer Mina a possibility to get a residence card in her own name and a working permit and all this not any longer as the wife of Mohammed but in her own name and person.

The aunt hoped that as Mina could be classified as a victim of gender violence she would not be denied such a working permit and she would get the divorce much faster than would be the case otherwise. Actually, Mina had two law suits against Mohammed: one penal (for gender violence), and one civil (applying for divorce against the husband's will). After some hesitation the judge decided that the law cases would be taken up at one of the Integrated Law of Gender Violence courts close to Madrid. However, the judge decided that as Mina could not present any medical certificate of her husband's physical mistreatment and as she had waited for more than three months before denouncing him to the police, and due to the fact that her husband had not during all this time tried to threaten her in any way, she did not qualify for any kind of police protection. Neither was Mina's case going to be treated as one which demanded an exceptionally rapid legal procedure. The judge consequently ordered that one should follow a prior judicial procedure in order to get the husband's version of what had happened before Mina left him.

In December 2006 Mina decided to sign the papers for divorce according to Spanish civil code procedure. She had not done it before, because she thought the trial in the penal court would take place first. But as her case was not considered to contain immediate danger for her physical wellbeing, it was postponed until later, after the divorce had been conceded – if Mina by then really wanted to continue her case in the penal court against Mohammed. The lawyer meant there was a very good chance for Mina of getting her divorce according to the Spanish Family Code, as hers was a clear case of gender discrimination. Moreover, the couple had no children and Mina did not want any property, no financial compensation nor maintenance from Mohammed. In January 2007 the lawyer told Mina that the divorce demand was received and the legal process had started. Mina most probably would have her divorce within six months. The main reasons for divorce were, as said, that Mina had been exposed to gender discrimination, and also the fact that she had not lived with her husband during the last three months.

In the meantime the husband had several times called Mina's family in Casablanca about Mina and also asked a friend living close to his family in Morocco to intermediate between Mohammed and Mina's family. That man told her brother that Mohammed was now working regularly (which probably meant not drinking liquor or smoking hashish any longer). The friend said that Mohammed earned good money and that he wanted Mina to come back to him. Her brother had repeatedly declared that Mina refused to return to Mohammed. Mina's aunt later reported that the friend in Casablanca himself had proposed to marry Mina, once she had gotten the divorce, as she did not want to live with Mohammed. Her brother had again said she was not thinking of marriage but of divorce only.

The Spanish legal divorce procedure advanced by sending Mohammed the obligatory information about the civil law suit against him and a plea to confirm the reception of the divorce papers by signing them and sending them back to the legal authorities. As there was no answer from him, the police searched for him both in the village indicated by Mina and in the neighbouring village where he was said to live ultimately – but in vain. During Spring 2008 new efforts were made from the Spanish court to reach Mina's husband without results. This fact delayed the accomplishment of the divorce, as the judge in Madrid refused to follow the routine of notifying him by edict, declaring the divorce between the couple valid after twenty days of official declaration in a public place. Such a proceeding was not unusual in similar cases.

Through Mohammed's parents he had been informed that Mina lived near Madrid, not somewhere in Morocco, as he had believed. His parents and sister-in-law in Casablanca had become really upset by this piece of news. Especially the wife of Mina's brother-in-law was furious, according to what her brother told Mina on a later occasion. That woman had complained that while she had to spend her all her time in the home of her parents-in law as a kind of unpaid servant, left with almost no money, as her husband sent home the monthly sum from Spain to his parents with no amount indicated only for her, Mina had the chance to earn money for herself living of her own. As Mina was still married to Mohammed, what she earned in Spain should not be only kept only by her but shared also with Mohammed and his family, they all thought.

In the beginning of 2008 Mina's brother finally got tired of waiting for the Spanish divorce to materialize. He thought the reformed Moudawana, which he knew was increasingly practiced

in the big Moroccan cities, would offer a more radical solution to Mina's problem and was worth trying. Besides, a judge had settled in the same quarter close to his family, to whom the brother felt he could turn to in the divorce matter. The fact that Mina had been maltreated by her husband and that they had no children he thought would make it possible for Mina to get a divorce in Morocco, the brother argued. She could then marry again with a Moroccan and live without problems in her country of origin if she wished, while a Spanish divorce was still not valid in Morocco. Moreover, the judge could find out about if Mina had a right to economic compensation from Mohammed and in that case with legal means make the ex-husband to pay, he opined. The brother turned first to Mohammed's family with the proposition of a divorce for Mina from Mohammed, but the answer was no. He then consulted the judge, and Mina was called upon to give her version of what had happened at the Family Court of his district of Casablanca.

While writing these lines in July 2008 any information about the definite outcome of this law case is not available. Mina's aunt has told me that Mina will have to make one more visit to the Family Court in Casablanca to sign some papers and that she will probably get her Moroccan divorce in October. Not until I have seen the marriage and divorce acts it will become perfectly clear what kind of divorce that Mina has got and on what conditions. Her husband in Spain has remained invisible and has avoided contacts with the Moroccan and the Spanish judicial authorities. Mohammed's parents keep asserting that they do not know where or if their son lives in Spain.

## I. Comments

Drawing on the text of the reformed Moroccan Family Code and interpreting the narratives of those people involved in the Mina case that I know, make it possible to discern some of the different actors' strategies. However, due to the current uncertainty about what is theory only and what has become practice in the application of both the Moroccan Family Code and the Spanish Law against Gender Violence I am left with many question marks concerning the development and end of this divorce case. New laws take time to gain effect and economic resources may be too scarce to carry the reforms through even if the intentions are good. The result will be seen in the long run.

To start with Mina's involvement, it remains clear that she wants to liberate herself from the madman she married and first of all by application of The Spanish Integral Law of Gender

Violence and the current Spanish Family Code. She has good reasons for it, as repeatedly told. However, getting a Spanish residence card and a work permit in Spain in her own name has nothing to do with her religious conviction. She is a very pious Muslim, who does not express any animosity caused the Moroccan legal and religious norm system. Neither does she blame Moudawana for offering more and better legal means for divorce to husbands than to wives. Mina strongly dislikes just one particular Moroccan man, Mohammed, who maltreated her and who wanted to take advantage of her in a ruthless way. The reasons that Mina wants to profit from the Spanish judicial system are, as we know, highly pragmatic. However, besides her Spanish divorce, she has always hoped to get divorced in the Moroccan way as well sooner or later, through the Family Court in Casablanca. If not there, she will try through the Moroccan Consulate in Madrid if needed, her aunt told me, as soon as Mina is divorced according to the Spanish Family Code. Her aunt then counts on the support of some Spanish and Moroccan contacts or patrons that she has got through her work in Spain. However, as for the moment it seems easier for Mina to get her divorce in Morocco, the most recent development of her case shows that the reformed Moudawana is able to act more rapidly than the Spanish legal institutions. It remains to be underlined that in this case of legal pluralism, one legal instance is not informed about the steps of the other and that it was the anthropologist's task to tell the Spanish lawyer about the efficient handling of Mina's case in the Casablanca Family Court – so far.

Mina's brother wants his sister not only to get a divorce according to the reformed Moudawana, but also to get an economic compensation from Mohammed for the suffering he has caused her, besides demanding her fair share of the couple's common property in Spain. Mina can also claim the rest of her bride wealth from Mohammed in case of a divorce, as one part of it was withheld when she married. This is usually done to prevent the husband to divorce his wife or rather to repudiate her too easily. Before the reform of the Moudawana the only solution for Mina to get a divorce would have been a *khol*, i.e. Mina's paying a sum of money to Mohammed for "repudiating" her, thereby getting his consent to letting her free. But currently there exists a new possibility, mentioned above, called 'divorce for *chicago*' in cases of what was called "irreconcilable differences". Mina's brother may think about testing the legal consequences of such a law suit.

Mohammed and his family are probably convinced of their legal right to get Mina back to him, as she has abandoned their home in Spain in spite of being married to him and



considering the part of the bride wealth he had already paid. Such a sum of money he does not want to lose by just letting her disappear. The fact that Mina, still his wife, is working and earning money in Spain out of reach for him or his family in Morocco, makes it even harder for Mohammed to accept that Mina has abandoned him. As wife battering is hard to prove and he does not admit any maltreatment of her, Mina would have been legally forced to go back to her husband according to the former Moudawana if she had lived in Morocco. Now Mohammed must feel uneasy, as legal pluralism makes his legal situation in Spain difficult. He knows that he risks to be punished according to Spanish criminal law for wife battering and that the Law against Gender Violence is tough against male perpetrators. Moreover, he does not want to facilitate for Mina to get a Spanish divorce with a residence card and a work permit of her own. Consequently he is hiding from the police and the judicial authorities and he probably distrusts the reformed Moudawana and its legal scope in cases of divorce, as it is not yet well established in practice and greatly depending on the attitude of the judges. So Mohammed is one of those men who does not accept the reformed Family Code and has probably asked his family to turn to a judge of the traditional kind to fight for his legal rights.

Mohammed's sister-in-law's negative reaction to Mina's living without a husband in Spain as a house cleaner and as such earning money for her own use is interesting. It reveals how oppression and gender discrimination can generate more oppression and serve as a hindrance for legal reforms from which also Mohammed's sister-in-law and other Moroccan women would have been able to benefit in the long run. Instead her envy and the anger she feels over her own situation stop all tendencies to influence Mohammed's parents and or brother in another, more liberal direction.

The Spanish judge's reason is not known for insisting on a prior juridical procedure instead of proceeding to a rapid verdict. She prolonged the legal procedure considerably when she, as a consequence of not having localized Mohammed, did not notify him by edict. This is usually the case when the person searched for after twenty days of delay has not contacted the legal authorities, counted from the day the official announcement is made in a public place. After that period the verdict is passed and the case can be settled. The judge's passivity when confronted with Mohammed's invisibility and silence has considerably retarded Mina's case. Perhaps the judge does not rely on Mina's version of what has happened during her marriage with Mohammed. Several cases of female manipulations of the Law against Gender Violence in Spain have been detected so far. However, from the perspective of legal pluralism it will be

of importance to investigate what lies behind the judge's way of acting. Once she will be back from her Summer holiday in September 2008 Mina's lawyer will find out about the judge's attitude in this matter.

### *J. Conclusions*

According to Franz von Benda-Beckmann, who is the most eminent social scientist to deal with the concept of "legal pluralism" in an anthropological way, too much time has been devoted to "conceptual, sometimes rather scholastic argumentation".<sup>29</sup> He thinks the discussions between those who gladly use and those who resist using the concept easily become sterile "unless they are rooted in the analysis of empirical situations and historical processes, and unless they are made parts of a more comprehensive social scientific understanding of the world of which law and legal pluralism, however defined, are only one aspect and part."<sup>30</sup> My intention with this chapter has been to follow the track marked by von Benda-Beckman and show how many factors actually contribute in shaping the social and juridical reality of people in multicultural and legally plural Spain. In the Mina case the fact that the Spanish Family Code has a mainly secular law spirit, based on Western ideas about gender equality with respect to marriage and divorce, does not prevent Mina to take advantage of the law system, without identifying with the secular ideals of the Spanish society. She has as her over all ambition to earn money in Spain without being dependent on of any man, her heart and mind being deeply attached to Casablanca. Spain is for her a locality without any notions of home, just work. Mina identifies with Islamic ideals and practice.<sup>31</sup> Still, the legal activities in Spain which she engages in such as denouncing her husband, resulting in one penal and one civil law case at secular Spanish courts form part of the necessary procedure to "get the papers" for work, to be able to earn a better salary and having more civil rights. This is all there is to it, she keeps telling me. It is her brother in Morocco who insists in arguing for that his sister should also have some economic compensation from her (ex-)husband.

Mina is unaware of - or avoids on purpose - any financial obligations in Spain, such as paying the monthly sum to Social Security to get an insurance in case of illness, which covers expenses for medical treatment, including hospital care. She lacks trust for the Spanish society

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<sup>29</sup> Franz von Benda-Beckman: "Who is afraid of legal pluralism?" Slightly revised paper presented at the XIIIth Congress of the Commission on Folk Law and Legal Pluralism, 7-10 April, 2002. In *Journal of Legal Pluralism* (nr.47, 2002) 37-83

<sup>30</sup> Ibid 2002:74, see note 29

<sup>31</sup> See above Foblets 2008:168, note 1.

and authority, just as she does for the Moroccan equivalencies. The best is to remain outside the Spanish welfare system, she thinks, in an effort to spare herself of any unnecessary troubles and expenses. The idea of sharing a common good with a group of unknown and unrelated people is unacceptable for her in the current phase of her life. However, once she has gotten her work permit and residence card, the things will change also for Mina both with respect to paying taxes and to contribute to Social Security. These will be obligatory demands on her.

The content of the reformed Moudawana is something Mina does not know much about. Her aunt, who has taken good such care of her during her three years in Spain, is the one who has informed Mina about women's legal rights. The aunt continuously exchange news about these important issues with other Moroccan women in the market places and on women's parties, as mentioned above. Mina is not alone being ignorant about the content of the Spanish or the Moroccan Family Codes and of the scope of one's legal rights as a resident or a national in Spain. Generally speaking, more attention paid to family law systems and to the existence of legal pluralism in Spain is needed among migrants as well as nationals. Among students of law and of social sciences more data about what is actually achieved within this field of investigation has also to be collected and analyzed.

One aspect to study in relation to legal pluralism and transnationalism is the gendering of laws between the states inside and outside Europe and its effects on men and women migrants in Europe – in this case in Spain. Advocates of group rights for minorities have not sufficiently or adequately addressed that such rights in many cases are antifeminist. An activist like Okin defines the concept of *feminist* as the belief that women should not be disadvantaged by their sex but be recognized as having human dignity equal to that of men and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can.<sup>32</sup> The reason why the legal situation of Muslim women migrants often can be qualified as precarious is twofold. First, Spain and other receiving countries in Europe tend to treat cultural minority groups as monoliths – the European countries pay more attention to differences between and among groups than within them.<sup>33</sup> Second, these groups are, just like the societies in which they exist, gendered with substantial differences in power and advantage between women and men. Moreover, advocates of group rights pay little or no attention to the private sphere. Yet, the

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<sup>32</sup> Okin 1999, see note 10

<sup>33</sup> Gerd Baumann: *The Multicultural Riddle*. (London: Routledge. 1999)

spheres of personal, sexual and reproductive life are dominant themes of most cultures and religious and cultural groups are often particularly concerned with “personal law”.

The Mina case shows that it is not satisfactory to boast over the secular family law systems based on HR while condemning the religiously based Family Code as it appears today in Morocco for being suppressive. In Mina’s case a liberal state like Spain with progressive and tolerant laws, promoting gender equality, is for varying reasons not capable of conceding her a divorce within a decent span of time. It seems as if in Morocco Mina’s divorce case will be treated in a for her meritorious way with more ease and speed by the application of the reformed Moudawana than in Spain, even if the scepticism among the former critics of the “old” Moudawana remain.

To sum up: legal pluralism and transnationalism belong to the same sphere of characteristics found in globalized societies inside and outside Europe. They constitute a huge field of investigation, in which both students of law and anthropology may have much to learn and communicate to others. My chapter is meant to draw attention from an anthropological perspective to the co-existence of different norms and spirits of law in contemporary Spain. My main objective has been to show how Moroccan women in Madrid and their families in Morocco strategize with and perceive of legal institutions in daily life, especially in connection with divorce. Mina’s endeavours in getting a divorce have served as just one example; many others remain to be investigated.