

MARRIAGE STORIES

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1 A Migrant's Story ¹

In the mid-1980s a Moroccan Muslim couple married and had a child. Soon after, they were divorced and the young child remained in the legal custody of the mother. The mother then remarried. The biological father made no claim to custody of the child and the new husband accepted responsibility for the child's support, placing its name in his own civil status (*état civil*) documents. In due course this marriage too ended in divorce, and not long after the mother went to study at a university in the United States, bringing the child with her. She then met and married an American, non-Muslim who formally adopted the child under American law. Problems, however, developed because of the mother's immigration situation, the status of the American marriage under Moroccan law, and the legal actions taken by the second husband back in Morocco.

Under United States law, individuals residing in the country on a student visa must, upon completion of their studies, return to their country of origin for a period of two years before being considered for re-admission to the United States. In the present case this provision would apply to the child as well as the mother since the former was born in Morocco and only later adopted by an American father. For mother and child to return to Morocco would, in this particular case, have posed more than ordinary difficulties. Both mother and child had developed serious illnesses for which they were receiving extensive medical care and for which they required careful, ongoing monitoring. For both to return to Morocco may

have had significant implications for their overall health. Even if an exception were granted allowing the child to remain in the United States with her adoptive American father the child would be separated for two years from her mother, the primary caretaker during the child's illness.

To compound matters, the mother's second husband had gone into the courts in Morocco and obtained two orders. First, he obtained an order declaring that he had no further responsibility for the support of the child. In addition, he got an order stating that, under the terms of a 1993 law, the child was actually an abandoned child.² This claim was based on the proposition that the mother's marriage to a non-Muslim is not valid under Moroccan law and that, since neither he nor the American husband qualify as legal father to the child, the child is indeed abandoned.³ Were mother and child to return to Morocco several consequences might follow: Having been declared abandoned the child might be taken from the mother and placed with strangers. (Although there is no formal adoption in Moroccan law - in the sense of full replacement of rights of inheritance and entitlement to use of an adoptive parent's family name - there is a form of agreement for support and upbringing (*kafāla*), and another couple could be granted such rights by a Moroccan court.)⁴ Alternatively the second husband could himself move to have the abandonment order vacated and claim custody of the child himself. His claim would be based on grounds that have implications both for the custody of the child and the status of the mother.

Since the marriage of the mother to a non-Muslim is null and void under the traditional form of Islamic law codified in contemporary Moroccan statutes, the mother has forsaken her right to custody of the child twice over - first, by re-marriage to any other man (which allows custody of an older child to revert to the "father"), and second, because her marriage is, in any event, invalid and thus a form of illegal sexual intercourse which would disqualify

her as a proper parent. Indeed, under Moroccan criminal law the mother could actually be prosecuted for fornication, inasmuch as she is clearly involved in a sexual relation with a man who, whatever his status as a lawful husband under American law is not a lawful husband in the eyes of Moroccan law.⁵ For the mother to return to Morocco could thus result not only in loss of her child but imprisonment.

Of course, there would be ways of contravening some of these dire implications. The American father could convert to Islam thus rendering the marriage to the mother perfectly valid under Moroccan law: Marriage by a woman to a non-Muslim is regarded as a "temporary" impediment which can be rectified by subsequent conversion.⁶ But such conversion is, under Islamic and Moroccan law, irreversible, and any attempt to reconvert after a convenient period would have serious implications were Moroccan jurisdiction ever to be enforceable. It might also be possible to appeal the Moroccan court's judgment declaring the child abandoned on the grounds that the statute was intended not to deprive biological parents for whom there is no demonstration of unfitness of the custody of their offspring. To the contrary, it could be argued, the purpose of the statute was exactly the opposite, namely, to find a legal way (in the absence of a tradition of adoption) for the state to gain control of children who effectively lack any parents and assign them to parties who are willing to be responsible for their upbringing.⁷ To return to Morocco to pursue the case would, however, expose the mother to the sanctions already discussed.

Here, then, we can see how certain aspects of Moroccan law, which - whatever the values of Westerners - have consequences that go far beyond the normal when placed in a transnational context. Unlike some European countries, which allow the law of the parties' country of origin to govern certain aspects of their personal status, United States practice clearly gives priority to its own statutes and will permit recognition of foreign judgments only if they do not

contravene the public policy of the state in which the parties are currently domiciled.⁸ Thus were they to remain in the United States mother and daughter would be in no legal danger. But because of Federal immigration laws, they must now convince an immigration official or court that due to their medical condition, their vulnerability to legal processes in Morocco, or the overall impact on the family of their forcible separation, the consequences would be so antithetical to the principles of American law as to warrant either modification of their visa requirements or a grant of personal asylum. As indicated, it is also a serious question whether the Moroccan law itself was meant to cover this admittedly unusual circumstance, but so long as the Moroccan court decision and the law on which it rests remain in force the risk to mother and child should they be required to return to Morocco is considerable.

A second set of problems relates to Moroccan use of the *état civil*. Moroccans themselves commonly, though mistakenly, believe that a woman cannot have an *état civil* document of her own - that she must be registered on that of some man, initially her father and later, in most instances, her husband. In fact, she can have her own document as well as being registered on that of a male. A child, however, is listed on its father's document and only on that of its mother if there is no legal father. Thus complicating matters is the need to get a child registered in such a way that whatever authority a woman has over her child is clearly and unambiguously indicated in the child's documentation. It might also be difficult, when a child has no legal father and the status of the mother is unclear, for the child to obtain a Moroccan passport even though he or she is regarded as a Moroccan citizen. Lack of clarity can result in lengthy and costly legal proceedings which tend to form the opportunity for additional tactical maneuvers.

Indeed, it is such maneuvers and their place in the larger realities of court proceedings in Morocco, that would be vital to a full understanding of a case like the present one. It is not, for

example, clear whether the former husband used the issue of abandonment in order to gain an advantage in his quest to be relieved of obligations of support under the earlier divorce decree. He is not the biological father of the child and there is nothing in the record to suggest that he has ever sought custody of the child. Thus we may be faced with the sort of situation that is very common in Morocco, in which a husband pressures his wife to forgive him some debt if he is forthcoming on the question of child custody.

This case also exemplifies some of the implications presented by such matters for various international and bi-national accords. The American approach to conflict of laws is largely assimilationist and statist: "Private international law" is a term and concept that is absent from the American common law tradition. Familial arrangements entered into abroad will be recognized unless they contravene the public policy of the state in which the parties are domiciled, there being no federal family law statute.⁹ Anyone present in the United States is subject to the law of the state of their domicile, itself a function of residence and other attachments to the state. The result is a relatively high degree of clarity about one's legal status and a correlatively low, but by no means non-existent, acceptance of non-mainstream familial arrangements. Proponents of jurisdictional absolutism may thus wish to weigh the implications of the present case against the solutions offered by European forms of private international law for the relative effects each produces both in their own legal regimes and in the process to which those residing in their midst may be subject if the laws of a foreign jurisdiction are to apply.

2 Power, Corruption, and the Realities of Legal Process

During his student years on the continent Ali married a European woman who returned with him to live in Morocco. After their children were grown they got divorced. Ali then married Tuda, a

rural woman of limited education, and took her with him when he went back to Europe to work for a year. When they took up residence again in Morocco, however, things began to go badly. Tuda wanted children of her own but did not become pregnant; when the children from Ali's first marriage visited there was considerable tension. Finally, Tuda moved out saying that Ali would have to deal with her father about their circumstances. Ali was reluctant to get divorced again, but finally agreed to a *ṭalāq khul'*, but rather than his wife giving up some financial claim in order to obtain the husband's divorce, Ali actually agreed to give her a sum of money.¹⁰ A final divorce was registered, but Ali was so eager to win his wife back that he offered Tuda, as a new bridewealth payment (*ṣadāq*), an apartment that she would own personally. She accepted and the couple were formally re-married.

Unfortunately, the same old problems recurred, and when Tuda fled to her father's house again she took many of the household items with her. The Code of Personal Status (Articles 115 and 35(1)) says that a man must support his wife, no consideration being given to any assets the wife may possess. It also says that there can be no theft as between spouses. Ali could simply have divorced Tuda again, but it would have cost him the apartment he gave her, the consolation gift (*mut'a*) required by the statute, and support (*nafaqa*) up to the time of divorce plus the waiting period of three months (*'idda*). He may have been willing to do so, but his resolve to fight was strengthened when Tuda's father and brother broke into the apartment and took several of Ali's personal belongings. Ali reported the theft to the police and together they lay in wait to see if the thieves would return for the items they left behind. When they did, Ali joined his own suit for civil damages to the criminal charges brought against his wife's kinsmen.

Suit followed counter-suit as the entire relationship devolved into a series of tangled proceedings running through several courts in different parts of the country. The tactic of Tuda and her family

had, from Ali's perspective, been one of delay from the outset, as they sought to run up the support bill that would be owed by a man they regarded as highly educated and highly paid. Ali's approach was based on his belief that the apartment he gave Tuda should be regarded not as a gift but as future compensation in the event of death or divorce, and that no further support - much less at the levels demanded by Tuda's father - should have to be paid. Pride and dependence, strategic maneuver and personal indignation at what each regarded as the other's legal advantage became indissolubly linked, particularly when both sides began, whether by compulsion or desire, to seek a more favorable stance in the courts by the offer of various "gifts" to relevant officials. These favors ranged from barely veiled solicitations from clerks and assistants for preferential listing on the court calendar to the production of true copies of documents that could otherwise have taken weeks to complete. Tuda and her father sought delays in order, as Ali's lawyer said, "to keep the meter running" on the level of support that would ultimately have to be paid, Ali pursued the criminal conviction and monetary award against Tuda's kinsmen in order to force a more favorable settlement. Tuda was kept hidden by her father, so she could not be served with vital papers and the clock would continue to run; Ali obtained court and police orders to seek her even though he knew that once found she would probably just hide somewhere else. A number of Moroccan women actually prefer to go to jail rather than be forced to return to their husbands. Commonly, in such instances, relatives and neighbors then pressure the husband to agree to a *khul'* divorce. In this case Tuda's desire for a divorce was either secondary to or submerged by her father's desire to gain a large support order against Ali and to retain the property given to Tuda. Ali even got court permission to take a second wife, and when that marriage proved unsatisfactory joked about taking a third or fourth wife so that no matter what happened Tuda and her father would get a diminishing share of his assets.¹¹

Notwithstanding its operative elements, several very important features of Moroccan social and legal procedure are highlighted by this case, features that affect the legal circumstances of far less complex and dramatic cases.

It is important, particularly in the context of transnational agreements, to understand what happens back in the home country where a case is actually adjudicated. The usual image of Muslim countries is that all of the legal power is in the hands of the men. This is far too simplistic. Though the range of variation across the Muslim world is considerable in this regard, the situation in Morocco is not altogether unusual. Delaying tactics may run up support charges, corruption can be used to tactical advantage, willful disappearance can be used to a woman's benefit, and a wife may even be willing to go to jail rather than obey an order to return to her husband thus drawing other relatives into the fray and restarting the support clock. These are tactics born to a considerable degree out of statutory inequality. But the question as to who has the greater power is not susceptible to a stereotypical Western answer. Women, for example, can demand a new place of residence away from the husband's relatives or call up at any time the remainder of the bridewealth payment that may have been outstanding from the inception of the marriage, both of them powers of no small import. More recently, the 1993 amendments to the Code of Personal Status allowing the woman to choose the jurisdiction where her case will be heard may have removed the advantage husbands had in forcing their wives to return from distant kinsmen, but now wives and their kinsmen use control over the forum to run up the expenses of husbands who must often bring lawyers with them, pay bribes to avoid delay, and encounter increased costs of support.

As people move around notice becomes a very significant problem, one that is compounded by the quest for advantage. A man who works abroad may have an order entered against him on the basis of his European salary, or have his Moroccan resources

attached without ever receiving notice, thus being unable to contest the Moroccan court order. Illiteracy exacerbates the problem, as does the absence of a common way in which Moroccans state their address. Where jurisdiction may lie in either the home country or a foreign court widely different results may occur simply on the basis of who wins the race to the courthouse door. Reciprocal enforcement laws are insufficient when the underlying jurisdictional and notice requirements lack adequate uniformity. And since the Moroccan solution to many difficulties tends to be imprisonment for either recalcitrant wives or penurious husbands the European image that deference to local law will actually lead to more legitimate and acceptable solutions to domestic relations problems often veils what actually occurs on the other side of the Mediterranean.

Ali and Tuda are locked in legal battle and their lives will only be rendered more complicated if and when Ali once again seeks to spend a period of work abroad. If power is not always exactly what or where it seems to be in Moroccan marital life, any more than it is in other domains of Moroccan social and political life, it should at least be clear that just changing the gender of certain issues does not change all of the underlying difficulties. Nor does shifting the venue always make the result less visible: The social problems that recur as people move across frontiers pose complications that classical conflict of laws theory can only address at the most formal level. In order to fashion laws and procedures that are responsive to the realities of law as a system of living relationships, it is imperative that all concerned move toward understandings that transcend borders.

3 Discussion

There are several rather important points that need to be underscored in the light of these examples.

It is necessary to look at the process by which legal decisions

unfold in a foreign jurisdiction and not simply concentrate on the statutes or treaty provisions. Neither the negotiation of international accords nor the decision of one's own courts should turn on uninformed or unrealistic views of the nature of proceedings in the foreign jurisdiction. This is not only a matter of comity or international politics: It is a matter of fundamental fairness.

Toward this end consideration should be given to the purposes that underlie the law of a foreign jurisdiction to which one is prepared to defer. Thus it would be desirable that each accord give voice to the purposes intended by the substantive laws that will be allowed to govern those living in one's ambit but who will now be governed by the laws of another forum. For example, if a European country is to defer to a North African jurisdiction on matters of child custody, the specific goal should be articulated that nothing will be enforceable that is found to be inconsistent with the best interests of the child.

A kind of legal limbo can exist as individuals, trapped in procedures that are unclear or internally contradictory, are left with no clear resolution to their problems. A woman who must choose between sustained contact with, much less legal custody of, her child or submission to the unequal powers of a husband - who may himself be supported in his position by transnational agreements - finds herself having to employ every tactic available to gain some leverage. A husband who faces jail for non-support when his wife's relatives are indeed trying to gouge him by their own tactics is drawn more easily into the petty corruption of daily life in North Africa for which he more often than not feels only contempt. In such circumstances both come to look at the law - European as well as domestic - as expressions of power far more than of protection, fairness, and legitimate authority. When those responsible for these laws and procedures fail to acknowledge the North Africans' concerns the latter can hardly be faulted for losing confidence in the host country.

It is important for Europeans to appreciate that Islamic law is not a form of civil law adjudication, but a variant of common law.¹² As a result, the role of case decisions is quite different, as is the relation of the law to the state. Failure to realize this most fundamental of differences may well lead to an overemphasis on statutes and insufficient attention to the course of legal cases.

In sum, the understanding of the impact of an international accord needs to be gauged against its context and its operation in the country to which one is prepared to defer. In stories of actual marital disputes one can see the implications of the transnational problems engendered by family migration; in the legal realities one can see the repercussions of accords to which both sides have agreed and with whose implications ordinary people must live out the decisions of those exercising power over their relationships. A high degree of realism and care for the consequences is thus indispensable to both the legitimacy of the institutions involved and the hope for legal understandings that are as mobile as the people affected.

NOTES

- 1 A number of features that bear on the identities of the parties described in this essay have been altered in order to preserve their privacy. These alterations do not, however, affect the overall description of the relevant legal and social issues.
- 2 Article of Royal Edict (Dahir) No. 1-93-165 of September 10, 1993 states that any child under eighteen may be declared abandoned if born of unknown parents and found deserted; orphaned and without support; lacking parents who, as a result of circumstances beyond their control, are unable to support the child, or whose divorced parents "do not assume their responsibility of protection and orientation in order to guide the child to the right path." Precisely how this applies in the

- present case was not indicated in the court opinion.
- 3 The record does not indicate it, but Moroccan attorneys with whom I have discussed the case suggest that the former husband would probably have had to ask for a court order requiring the mother to produce the child in Morocco, and - bearing in mind that he was not the child's biological father or (absent such a possibility in Moroccan law) the child's adoptive father - when the mother failed to do so the former husband could then have moved to set aside his support obligation under their divorce decree and seek an order of abandonment. It should also be noted that the American adoption of the child is not recognized by Moroccan law.
 - 4 See Zkik Saïd, *La repression de l'abandon de famille en droit marocain*, Rabat, 1994, pp. 78-79. A similar contract can be made by a supportive parent with the state for the upbringing of an abandoned child. The basis for the Islamic prohibition on full adoption is said to be the passage in the Quran (33:4-5): "God has not assigned to any man two hearts within his breast...neither has He made your adopted sons your sons in fact.... Call them after their true fathers; that is more equitable in the sight of God. If you know not who their fathers were, then they are your brothers in religion, and your clients."
 - 5 Article 490 of the Penal Code. As one commentator notes, this provision "poses a more delicate interpretation when the participants (*co-auteurs*) are adults and can be expected to be free to conduct themselves, notably when it is a question of foreigners whose own national legislation imposes no such restrictions." Adolf Ruolt, *Code Pénal Annoté*, Rabat, 1996, p. 509
 - 6 The marriage of a Muslim man to a non-Muslim woman is permitted under Moroccan law; the marriage of a Muslim woman to a non-Muslim man is forbidden, but regarded as a temporary impediment that may be overcome by conversion of the man. Moroccan Code of Personal Status (*Mudawwana*),

- Article 29 (4). See generally, A. Moulay R'chid, *La femme et la loi au Maroc*, Casablanca: Le Fennec, 1991, p. 54.
- 7 For example, in 1997 in the city of Casablanca 364 babies were found abandoned. Without the 1993 legislation, and absent any form of legal adoption, such children could not be given into the legal custody of parent-figures and would have had to remain in state-run orphanages. *Jeune Afrique*, February 9-15, 1997, p. 30 (reprinting an article from *The New York Times*). Saïd (1994: 81) cites data from Mme. Bennis Sabah, *L'Abandon: causes et conséquences* (thesis for the doctorate in medicine, Rabat, 1982, p. 35) showing the number of abandoned children in a center in Rabat as follows: 1974 (61), 1975 (95), 1976 (124), 1977 (173), 1978 (180), 1979 (193), 1980 (240).
 - 8 See Marie-Claire Foblets, "Femmes immigrées et conflits conjugaux: plaidoyer pour plus de protection juridique," *Droit et Cultures*, vol. 37, no. 1 (1999) pp. 255-76, which also cites a number of the European statutes and treaties affecting jurisdiction and private international law affecting trans-national Muslim marriages. For example, France has a specific accord allowing Moroccans residing in France to be governed by Moroccan personal status laws. See Jean Deprez, "Statut personnel et pratiques familiales des étrangers musulman en France. Aspects de droit international privé," in Marie-Claire Foblets (ed.), *Familles-Islam-Europe: Le droit confronté au changement*, Paris: Editions L'Harmattan 1996, pp. 57-124, at 63-64. By contrast, Belgium has three separate accords recognizing Moroccan custody and visitation orders. See Marie-Claire Foblets, "Un droit pour ou par ses destinataires? Les complexités du rattachement juridique de l'alliance matrimoniale entre partenaires immigrés," In *Id.*, pp. 125-51, at 135.
 - 9 A number of family law matters have nevertheless been accorded federal constitutional protection. Thus state laws

categorizing certain children as illegitimate or interracial marriages as impermissible miscegenation have been struck down for violation of the equal protection clause (whereas anti-polygamy laws have been sustained), while state laws banning the use of contraceptives have been found to violate the so-called "right to privacy," itself regarded by the Supreme Court as an unenumerated but implicit "penumbral" constitutional right

- 10 Normally a *khul'* divorce is a way in which a woman, unable to divorce the man herself and having no grounds for a judicial divorce, "buys" her freedom by forgiving the husband a debt, such as the unpaid portion of her bridewealth or legally required support payments. She may also be forced into such forgiveness of a debt as the price for the husband not contesting her claim to custody of a child who, under the statute, would otherwise go the husband or one of his kinswomen. Whether Ali misunderstood the nature of *khul'* because of his years abroad or was trying desperately to get his wife to return to him, his should be understood as an unusual case in regards to his involvement with the practice of *khul'*.
- 11 The 1993 revisions of the Code of Personal Status (Article 30) provide: "The first wife must be advised of the desire of her spouse to take a second wife in marriage." The statute does not, as even some educated Moroccan women mistakenly believe, require the consent of the first wife, only her notification. In Ali's case, notice was sent to Tuda four times, and when she failed to respond the court granted Ali permission to take a second wife.
- 12 See my essay "Islamic law as a Common Law System," in Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society*, Oxford: Oxford University Press (forthcoming).