Salomé Adroher Biosca

Intercultural Families – A Challenge for European Private International Law A Perspective from Spain

1. Introduction

Year 1970: A divorced Brazilian woman entered a civil marriage in Mexico with a Spanish man (originally an Austrian refugee). The Spanish Supreme court stated that the marriage is void even if the wife's own national law would permit her because a foreign regulation that permits divorce is deeply contradictory with the basic principles of Spanish family law. Marriage is seen as essentially indissoluble so foreign divorces are invalid in Spain (Spanish Supreme Court judgment of the 29/5/1970- Col leg. N° 303. Case Ozcariz vs. Bettencourt).

Year 1998: In Egypt, a Spanish woman married an Egyptian man, who had later repudiated her in Egypt. She returned to Spain and asked the Supreme Court to recognize the Egyptian sentence to be considered "divorced" in Spain. The Public Ministry opposed the demand stating that the repudiation is an unilateral, non judicial, marital and revocable way of ending a marriage which opposes the basic principles of Spanish family law. The Supreme Court nevertheless, finally gave the "exequatur" to the Egyptian judgment, sharing the public ministry criteria about opposition to some Islamic institutions with equality as a basic constitutional principle, but stating that a non recognition would be more harmful for the Spanish woman, obliging her to start a new divorce proceeding in Spain (Spanish Supreme Court judgment of the 21/4/1998, RJ 1998/3563).

Year 2005: A Spanish and an Indian man wanted to marry in Spain after the legal reform that permits homosexual marriage was enacted. The judge denied the possibility because Indian law, applicable to the Indian partner, does not allow same-sex marriage, and so the marriage would be void in India. The General Office of Registers and Notaries (*Dirección General de Registros y del Notariado*) allows it understanding that the right to marriage is fundamental, and in these cases Spanish law must be applicable to both members of the couple (Resolution DGRN 26/10/2005. JUR 2006/66658).

These three cases show three different moments of the tremendous evolution of cultural values and conceptions that Spanish family law has undergone since the political transition in the 1980s, coinciding with the consolidation of the immigration movements towards Spain and with the country's openness to international relations. Spanish family law has been challenged to redefine its identity and at the same time be open to intercultural family relationships. This is a challenge in all European societies. In this paper three issues will be discussed: 1) the philosophy that presides over the legal reforms in family law, 2) the way of facing intercultural family relationships with the backdrop of internal "revolutions", 3) the European attempts to approve common regulations in these matters so that the security and continuity of family relationships is guaranteed.

2. Social Changes and Family Law

Family law in all European countries has gone through profound and fast-moving reforms in

INTAMS review 14, 220-230. doi: 10.2143/INT.14.2.2034408

the last thirty years. This evolution is partly due to important social changes such as women entering the work force (among others), but it is also an expression of a deep change in values of the present postmodern culture and "way of life": the exaltation of individualism and relativism runs parallel to the demand for a public guarantee of some fundamental rights.

In some countries like Spain, these changes have been deeper and faster than in other European regions: twenty-five years ago, Spanish family law was characterised by a matrimonial system in which canonical, religious marriage was the norm (to accede to civil marriage both partners had to prove they were not Roman Catholics); divorce did not exist; a married woman needed her husband's permission for many public or daily situations (opening a bank account, for example) and children had different legal rights depending on whether they were legitimate or illegitimate. With the Spanish Constitution of 1978 and the new democratic regime, discrimination between man and woman and between the children disappeared. Divorce was introduced in 1981 and recently, since 2005, there is a new "divorce express" system. People can now choose between civil or canonical marriage and Protestant, Islamic and Jewish marriage are all civilly binding. Cohabitation has very similar effects as marriage, and since 2005 homosexual marriage is regulated and permitted.

Family law has been traditionally a part of private or civil law, and in its regulations the communitarian character of the family, as a "collective" institution, has prevailed over a conception centred on the individual and particular interests of the family members. Consequently family law rules have been traditionally considered as public order rules.

Nevertheless, "domestic" family law is subject nowadays in Spain and in other countries to two contradictory forces, one an expression of liberalism and the other of public interventionism. On the one hand the principle of freedom is boring its way into this branch of the law traditionally composed by imperative rules; on the other hand, the State simultaneously assumes competences traditionally reserved for the family in relation to some institutions (Adroher, 2005). The French Revolution ideals of freedom, equality and solidarity are the values that underline the deep reforms that are being adopted (Alberdi, 1999). We will now look at some examples.

2.1. Private Autonomy and Family Law

Private autonomy, as a manifestation of the freedom and equality principles, has been very important in contract law but has a limited effect in family law in general: people can voluntarily create a family but this relationship is then subject to the law and only in very concrete and specific matters (e.g. regarding the economic matrimonial regime) the private autonomy has a relevant paper. The recent tendency is to extend people's private autonomy into choosing how they want to create or manage their families. Some Spanish examples related to two moments in a family's biography (the creation and the dissolution of the family) can explain this first tendency.

In relation to the creation of the family, a progressive flexibility in the formal requirements and a conception of the child as "a right" can be appreciated in three senses. (1) The openness to religious multiculturalism has lead through to two legal reforms, one in 1981 and the other in 1992. In Spain, marriage can be celebrated either in a civil form or one of the four religious forms which have civil effects. This system, adopted by some Mediterranean countries, differs from the great majority of the state regulations in Europe in which the only valid way of contracting marriage is the civil one. This exclusiveness of the civil form has caused some problems in the past particularly with the emigration of Roman Catholic Spanish people or Greek Orthodox people to central Europe: their religious marriages were void in the state of emigration, so their children were illegitimate, problems could appear with regard to rights of succession etc. (2) Cohabitation has progressively developed a status similar

to marriage through different federal and regional state laws. The freedom to marry and the equality principle have recently lead to the regulation of homosexual marriages with exactly the same treatment as heterosexual marriage (Law 13/2005, of 1 July). (3) The Spanish law on assisted reproduction (Law 35/88 of 22 November) is one of the more permissive and "liberal" of Europe: it allows for the donation of genetic material, a single woman can follow a treatment, and it guarantees the anonymity of the biological progenitor. Forty percent of the women who are in treatment in Spanish hospitals for this matter are foreigners.

In relation to the second moment, the end of the relationship and the regulation of divorce, personal freedom has also had progressively more importance. Some expressions of this statement are: the ease of divorce (the recent Spanish reform is a good example) and parallel to this, the progressive "desjudicialisation" of family life with the advances in family mediation as a non-judicial way of solving family conflicts in which the protagonists take the decisions instead of the judge.

2.2. Public Intervention in Family (Private) Matters: The Solidarity Principle

Even if the solidarity principle has been one of the traditional pillars of family structure, the advances in the welfare state system have lead to a progressive demand for public intervention in situations traditionally outside of public competences. Two examples can illustrate this second movement.

(1) *Family violence*. Violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life" (Article 1 of the Declaration on the Elimination of All Forms of Violence Against Women) is a great social problem and particularly dramatic in some European countries like Spain: 111 women died in 2006.

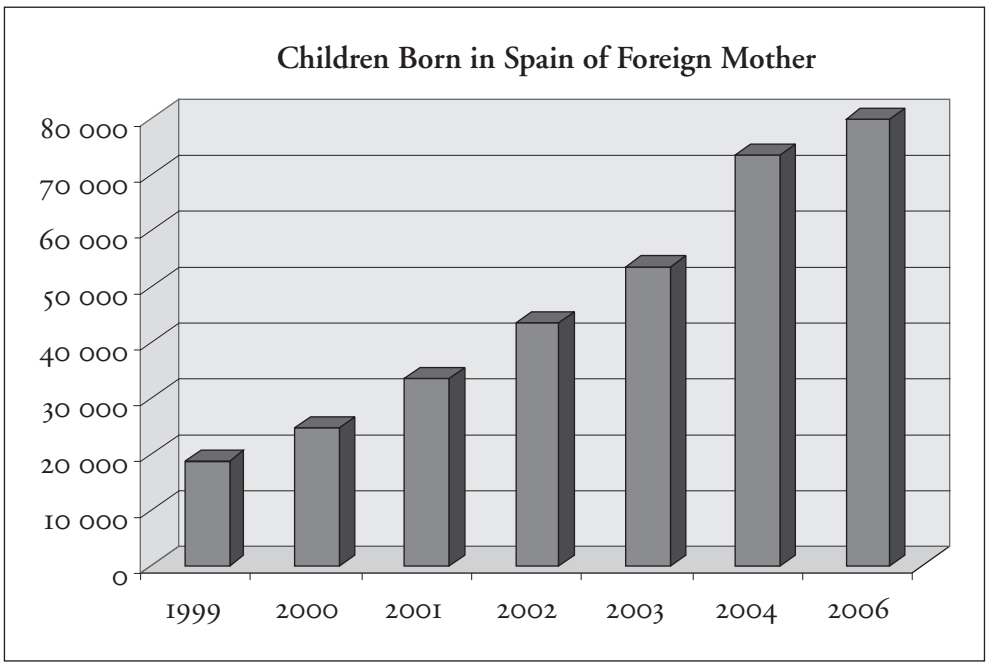
The struggle against family violence in general or gender violence in particular were not usually public responsibilities, except in relation to their criminal aspects. Nevertheless, in a good part of European countries the whole society feels burdened by this problem, so laws regulating the matter give the public administration much responsibility for the issue (as the Spanish Law 1/2004 of December 26th).

(2) *Child protection* in European countries is nowadays a public responsibility in contrast with other countries in the world in which some measures, such as adoption, can be a private matter (USA). A good expression of this progressiveness in the publification of child law is The Hague convention on the protection of children and co-operation in inter-country adoption (1993). This establishes a cooperation system between the public authorities of the origin and the receiving country which monitors the adoption, making sure it is in the best interest of the child. The process is child-centred and the subsidiarity principle is respected: "One of its basic premises is that adoption is not an individual affair, which can be left exclusively to the child's birthparents or legal guardians, or to the prospective adoptive parents or other intermediaries, but rather a social and legal measure for the protection of children. Consequently, procedures for inter-country adoption should ultimately be the responsibility of the States involved, which must guarantee that adoption corresponds to the child's best interests and respects his or her fundamental rights" (Innocenti Institute, 1998).

3. Intercultural Family Relationships

At the same time of this "inside" revolution in family law, some changes are coming from "outside" because of the growing internationalisation of family relationships due, among other factors, to migration movements, European Union integration, globalisation etc. Inter-country adoptions, marriages with foreigners, foreign children born abroad, foreign children in foster care etc.

are all increasing realities, especially in countries like Spain. In 2007, Spain became the most immigrated to country after the United States of America: one million immigrants in 2000, 4,1 million in 2006 (Izquerdo, 2007) and the most inter-country adoptive country also after the United States (Selman, 2005). Some examples of this new reality may illustrate this:



Which law applies to these mixed relationships? When are the Spanish courts competent to constitute an inter-country adoption or to grant a divorce to a foreign couple? How can a recognition of a foreign decision on family matters be obtained? The answers to these questions are regulated by private international law, a branch of the state law which is different in every state unless an international convention or communitarian law unifies some particular solutions. Some of its challenges will be analysed (Adroher, 2003).

3.1. Connecting Factors in International Private Family Law

Many European countries, which have followed nineteenth-century Mancini's "personalist" doctrine, have adopted the private international rule stating that the national law of a person must be applied to matters related to person, family and succession law. This is the system adopted by the French, Belgium, Italian, German or Spanish legislators and is based on an institutional and traditional conception of family law. Obviously, when these European countries become immigration destinations this system obliges judges to apply the personal laws of immigrants, which are sometimes culturally very different precisely in these sensitive matters. This system reflects a multicultural policy, and permits minorities to live according to their country's personal laws, as happened in the Middle Ages. In contrast, most Anglo-Saxon and Latin-American countries, who have followed the territorialism doctrines (curiously started in the sixteenth century by the French aristocrat D'Argentré), have adopted the "domicile" connecting factor: to all personal and family matters the domicile law must be applied. The domicile law is the closest to nationality and

permits the application of the law of the place where the person has his center of gravity and guarantees his/her integration or assimilation into the society in which he/she lives. These are the principal arguments defending this option, and some continental countries are proposing a change from nationality to domicile connecting factor.

Nevertheless some new and mixed postmodernist proposals arise in answer to the dichotomy between personalism/territorialism. On the one hand, some authors defend that private autonomy must be present in these matters allowing people to choose their way of integrating: multiculturalism vs. assimilation. Obviously this solution is not possible in all cases (in some bilateral relationships for example) and perhaps it is not convenient in some cases. On the other hand, in many European countries many personal matters are now being considered as procedure or public policy questions, and so the "*lex fori* criteria" can be applied to them.

We can see in these two movements or proposals a manifestation of the two tendencies already exposed: the influence in private international law of the principles of freedom and solidarity.

In some aspects, Spanish private international law has developed with the progressive consolidation of the country as an immigration destiny. Let us look at three examples of this evolution: (1) In 1981 a legal reform in the Civil Code included two new articles (49 and 50) regulating the marriage form in private international law and permitting the couple to chose between their national law or the local law to regulate the form of their marriage. So, an Islamic marriage contracted by two Moroccans in Spain (before 1992, the year in which the Spanish State signed a public agreement with the national committees of four confessions – Islamic, Protestant and Jewish) was valid because it was valid in their national law. (2) In 2003, article 107 of the Civil Code was reformed. Up till then, this article stated that national common law had to be applied to divorce and if the parties involved did not have the same nationality, common residence law could be applied. Moroccan women have registered a complaint with the Spanish Ombudsman because this rule obliged them to divorce in Spain under a law that discriminated against them. So the reform took place stating as a general rule the application of national common law to divorce but adopting as a particular rule, the application of Spanish law under some conditions. (3) After the 2005 reform of the Civil Code permitting homosexual marriages, and because of a great number of "international" homosexual couples wanting to marry in Spain, the General Office of Registers and Notaries stated that even if the national law applies to the capacity to marry, sex identity is not a category related to capacity, and the fundamental right to marry obliges Spanish law to apply this even if the couple is foreign and even if the marriage is void in their country.

3.2. Flexibility and Functionality in International Family Law

Spanish and European law practice shows to what extent private international law is a good way to test the intercultural sense of our law system: how are we managing between the defeat of the main values and principles of our societies and the respect due to the cultural identity of the foreigners who live with us? This equilibrium will be shown through the application of two classic techniques of private international law: qualification and public order clause.

(1) *The Progressive Flexibility and Functionality of Qualification*. Qualification is a complex task that every law practitioner must face when he must define the facts, the documents or the foreign institutions from either his own categories and values (qualification *lege fori*) or the categories of the foreign law (qualification *lege causae*). In Spain the Civil Code and judicial practice have traditionally faced this problem from the *lege fori* proposal but in recent times, with the "explosion" of inter-country relationships this has changed to a more pragmatic and flexible way of

resolving this task. An example of inter-country adoption can show this evolution.

As it has been said, Spain is nowadays second only to the United States of America in number of adoptions, and national adoption is insignificant in contrast to international: in 2004, there were 5.541 international adoptions vs. 828 national adoptions (CIIMU, 2006). This situation leads to a permanent exercise of understanding different adoption regulations in foreign law.

The Spanish legal system permits an adoption constituted in a foreign country to be recognised in Spain if the "effects" are similar to the effects of adoption in the Spanish legal system: breakdown of legal ties with the family of origin, equal rights of the adopted and biological children, and irrevocability. A rigid interpretation of these conditions in the early 1990s lead to a non-recognition of Asian adoptions, particularly of Chinese because in these countries adoption can be broken in some cases. It related to a particular family culture: for example in China adoption can be broken if the relationship between the adoptee major and the adoptive parents is not good. This particularity of Chinese law can be explained through the obligation of parents living together and children older than eighteen, an obligation that does not exist in countries like Spain. In 1997 the Spanish authorities started to qualify this Chinese condition in a Chinese context and so gave recognition even if the effects were not exactly the same as the Spanish ones. The Spanish authorities have stated that the "correspondence" between foreign and Spanish law must not be absolute but the effects must be "equivalent" to both laws. Today China is the first country of origin of adopted children with 1759 children adopted in 2006.

Similar flexibility has been observed in relation to some "simple adoptions" made in several Latin-American countries like Mexico and Venezuela and more recently in Ethiopia which is the fifth most common country of origin now. Ethiopian law states that "the adopted child shall retain his bonds with his family of origin", so in a case of a Spanish couple (that was Ethiopian in origin) who adopted three nephews, the adoption was not recognized in Spain. After this case, other Ethiopian adoptions were not recognized. Recently Spanish authorities have reconsidered this decision because this complication must not lead to the non-recognition of all adoptions of Ethiopian children: if they are orphans, the bonds with the origin family are broken. Even if there is a biological family but the child has been declared abandoned, the Ethiopian law states that "wherever a choice has to be made between the family of adoption and the family of origin, the family of adoption shall prevail".

(2) *The Functional Application of the Public Order Clause.* The second example has to do with the application of the public order clause in which the judge or authority who has to apply a foreign law or recognize a foreign decision can deny this application or recognition if it hurts the main principles of his domestic law.

This is particularly evident in relation to Islamic institutions such as polygamy, repudiation, marriage without consent, etc. If the reaction of the public order clause was traditionally dogmatic and definitive, now there is a growing European tendency to use this clause for a functional analysis in order to make the law concerning people's rights more flexible in concrete cases. This evolution can be seen in the sentence of the Spanish supreme court of 21 April 1998 which was referred to at the beginning of this paper: the protection of a Spanish woman repudiated in Egypt by her husband justifies the recognition of Islamic divorce in Spain; "maintaining the contrary would mean to situate the formalism of the equality principle first to the effective protection of a discriminated woman obliging her to go again to a Court in Spain with a great prejudice for her interests". This tendency can also be seen in cases of polygamy: when a polygamous man dies, all his wives ask to be recognized as widows to claim their state pension. Spanish authorities are recognizing their rights and even the bilateral treaty between Morocco and Spain refers particularly to this situation: so although a polygamous marriage cannot be initiated in

Spain and it is not possible to ask a family reunification visa for more than one wife, there are several polygamous families living in Spanish territory some of whose "vested rights" are recognized.

4. The Harmonisation of Private Family Law

> The European Union allows people in most of its Member States an unprecedented level of free mobility. As it has become virtually free to travel, work, and study within the Union, very often marriages and families are being formed between individuals from different Member States, or couples from the same state settle down in another Member State. The special circumstances of these people call for special EU wide attention to ensure clarity and coherence about the nature of family law regulations such as divorce agreements, child custody dealings, inheritance, etc.
>
> …A recent survey commissioned by the European Commission asked citizens of the European Union to voice their opinions on various questions related to international Family Law. … Overall, the majority of the population of the European Union expect the EU to play a role to facilitate legislation in another Member State in adoption of children from different Member States, recognition of civil status certificates, divorce, child custody dealings, and inheritance.
>
> Helping with the adoption of children and recognition of civil status certificates such as birth certificate and marriage certificate in another Member State top the list of what people expect from the EU the most.
>
> Seventy-six percent of the overall EU population expect the EU to facilitate legislation with regard to adopting children from different Member States and the same percentage expects the EU play a role to facilitate legislation for recognizing civil status certificates (birth certificate, marriage certificate) in another Member State.
>
> Two-thirds (67%) of the citizens of the European Union expect the EU to facilitate legislation in child custody dealings in another Member State and another 63% expect the EU to facilitate inheritance in another Member State.
>
> The majority of the citizens do expect the EU to play an active role on behalf of the EU to facilitate legislation in divorce in another Member State (60%). (Gallup Organization, 2006)

The conclusions of this recent Eurobarometer show private international law rules have not yet been fully harmonized in Europe. This is not just a "technical" problem; the public sees it as an urgent task for politicians if the free movement of persons is to be guaranteed. Free movement necessitates other rights. The process of economic integration implies also a progressive "comunitarisation" of social values, particularly family and personal values. What exactly is the state of the question?

Private international law, as has been said, is a branch of state law, so the solutions for international relationships are relative and non-homogeneous: a marriage, an adoption or a divorce valid in one state can be void in another. This situation is not satisfactory. Some international organisations have worked in international conventions to unify the choice of law, jurisdiction and enforcement of decision rules in such situations. In the field of family law, The The Hague Conference and the CIEC (International Commission on Civil Status) have been the main organizations.

What about the European Union? Traditionally, European Union regulations did not directly affect family law but some Council Regulations or Directives had to cope indirectly with family bonds, defining, for example the right to family reunification or the status of public workers in Europe. Nevertheless this situation has changed after the reforms of the EU Treaty made in Amsterdam in 1999 which recognized Council competences to adopt some measures on civil cooperation matters.

The necessity and the difficulty of adopting a common private international family law are symbolized in the reforms that have rapidly taken

place since then: a Council Regulation (EC) no. 1347/2000 (which coincided substantially with the text of a communitarian convention of 28 May 1998) amended three years later by the Council Regulation (EC) no. 2201/2003 "concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility" which was proposed to undergo a new reform in 2007. It is unusual to find Communitarian rules modified so many times in such a short period of time (1998-2000-2003-2007): it shows on the one hand, how difficult it is for member States to adopt common regulations concerning such culturally significant but different issues, such as family law, but on the other hand, this hasty reform symbolizes how essential it is to adopt common rules to facilitate the freedom of movement and the security in these relationships.

The Council Regulation now in force (2003) applies to civil proceedings relating to divorce, separation and marriage annulment, and to all aspects of parental responsibility (rights and obligations in relation to a child's person or property, including measures to protect the child, independently of any matrimonial proceedings) establishing a full system of rules on jurisdiction not only in matrimonial matters: it lays down rules also about child abduction (unlawful removal or retention of the child) to combat child abduction in the European Union. From this first perspective the Council Regulation establishes which is the competent national jurisdiction in all these matters. However, it provides for automatic recognition of all judgments adopted by a state jurisdiction in all the other states without any intermediary procedure being required and restricts the grounds on which recognition of judgments relating to matrimonial matters and matters of parental responsibility apply.

This regulation has harmonized some aspects of international private family law in Europe, but is not enough. In 2005 The European Commission published the Green Paper on the law and jurisdiction applicable in divorce matters. Its examples show that extent unifying rules on jurisdiction and enforcement of decisions without changing rules on the conflict of laws are not at all sufficient.

> A couple of Italian nationality live in Munich since twenty years and feel perfectly integrated in German society. When their children leave home, the couple decide to divorce by consent. They would like to divorce under German law, with which they feel the most closely connected, and which requires only one year of separation in cases of divorce by consent, compared to three years of separation required under Italian law. The new Brussels II Regulation allows the spouses to apply for divorce in either Germany or Italy. Nevertheless, since German as well as Italian conflict-of-law rules are based, in the first place, on the common nationality of the spouses, the courts of both countries would apply Italian divorce law. This example shows how the national conflict-of-law rules foresee in principle only one solution in a given situation, e.g. the application of the law of the spouses' nationality or the law of the forum ("*lex fori*"). This may in certain situations not be sufficiently flexible. It fails for example to take account of the fact that citizens may feel closely connected with a Member State although they are not nationals of that State. Introducing a certain degree of party autonomy allowing the parties to choose the applicable law could render the rules more flexible and enhance legal certainty and predictability for the spouses. (European Commission, 2005)

This is the reason why there is a new proposal for a Council Regulation of 17 July 2007 amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (European Commission, 2006). The diversity of national rules on applicable law and differences in substantive law, may lead to legal uncertainty in matrimonial proceedings of an international nature. This can make it very difficult for "international" couples to predict which law will be applied to their matrimonial proceedings. So the new proposal includes a choice of law rule which establishes that the spouses may agree to designate the

law applicable to divorce and legal separation between some laws closed to them. In the absence of choice by the parties, the applicable law is that of the common habitual residence with some nuances.

The speed in which changes occur in this matter makes it difficult to predict the future: again two different forces are present, two forces characteristic of this post-modern time: on the one hand the "globalisation" and "Europeanisation" of law, as the best guarantee of certainty and security for these relationships; on the other hand the particularism of each culture, country or region that wants to maintain their traditions or innovate in these fields through their family law rules.

Perhaps unification of private international law is a good way of equilibrating these two forces; national solutions remain (homosexual marriage is a particularity of some civil systems but cannot be imposed on all), but common and European choice of law and choice of jurisdiction rules can be adopted to give certainty and security to these relationships. In this context, the last reform proposal of the Council regulation on family matters also shows one of the tendencies explained at the beginning of this paper: the growth of private autonomy in family matters (the law applicable to divorce can be chosen by the spouses).

5. Final Remarks

The objective of this paper has been to show some of the tendencies of civil and private international law related to family questions. To conclude, the García Avello case, object of a judgment of the European Court of Justice in 2003, shows some of the tendencies already analysed very well.

Mr Garcia Avello, a Spanish national married Ms I. Weber, a Belgian national; they were resident in Belgium and had two children who have dual Belgian and Spanish nationality. In accordance with Belgian law, the Belgian Registrar of Births, Marriages and Deaths entered on the children's birth certificates the patronymic surname of their father, Garcia Avello, as their own surname. Both parents made a request to the Belgium Minister for Justice that their children's patronymic surname be changed to Garcia Weber (as they were registered in the consular section of the Spanish Embassy in Belgium) because in accordance to Spanish law, the surname of children of a married couple consists of the first surname of the father followed by that of the mother. They believed that having two different surnames (one in Belgium and another in Spain) would be inconvenient for them in many fields and was not compatible with the freedom to move and reside within the territory of the Member States. The request was denied and Mr García Avelló brought an application for annulment of that decision before the *Conseil d'État* who decided to stay the proceedings and refer the question to the European Court of Justice. In its judgment the Court considered that the decision of Belgian authorities was not compatible with communitarian law. Many of the questions already analysed in this paper are present in the Court affirmations: *internationalisation vs. national identities.* Family and personal law is a part of the law that represents the cultural values of a society. The progressive integration of the law of European Community member States must not necessarily affect these rules: each legal system can affirm its identity (for example in their name and surname legal system) but perhaps some common conflict of law, of jurisdiction and on enforcement of decisions rules is needed to avoid the uncertainty. However, the progressive adoption of common rules in these fields cannot be forced: it must be derived from the necessity shown and perceived in practice. This is the philosophy of the integration process from the beginning: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity." (Schuman Declaration May 9th, 1950)

Institutional vs. liberal regulation on family matters. The connecting factor of nationality in the private international rules of many member States, such as Belgium and Spain, relate to personal and family questions, like names and surnames and the consequences. This case shows some of the inconveniences of this criteria: the children have two different surnames according to Spanish and Belgian law because of their dual nationality. The judgment considers that the Belgian authorities must agree to the change of surname requested by the parents. The rule underlying this decision is the rule of autonomy in private international law: choosing the law – the national law – that they feel to be more convenient must be admitted:

> Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States … In contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems concerned … Such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals. The solution proposed by the administrative authorities of allowing children to take only the first surname of their father does not resolve the situation of divergent surnames which those here involved are seeking to avoid…
>
> It is common ground that, by reason in particular of the scale of migration within the Union, different national systems for the attribution of surnames coexist in the same Member State, with the result that parentage cannot necessarily be assessed within the social life of a Member State solely on the basis of the criterion of the system applicable to nationals of that latter State. In addition, far from creating confusion as to the parentage of the children, a system allowing elements of the surnames of the two parents to be handed down may, on the contrary, contribute to reinforcing recognition of that connection with the two parents. With regard to the objective of integration pursued by the practice in issue, suffice it to point out that, in view of the coexistence in the Member States of different systems for the attribution of surnames applicable to those there resident, a practice such as that in issue in the main proceedings is neither necessary nor even appropriate for promoting the integration within Belgium of the nationals of other Member States.
>
> THE COURT, in answer to the question referred to it by the Conseil d'État by judgment of 21 December 2001, hereby rules: Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State. (Judgment of the Court, 2 October 2003 num. 148/02)

References:

Adroher Biosca, S. (2005): "La privatización versus la publificación de las relaciones familiares de parentalidad y conyugalidad", in: G. Rossi (a cura di): *Interventi a favore della coniugalità e della genitorialitá: Atti del Secondo Seminario Internazionale del Redif, 29 ottobre 2004,* Milano: Vita e pensiero, 17-28.

Adroher Biosca, S. (2003): "Desafios del Derecho de familia en una sociedad intercultural", in: D. Borobio (ed.): *Familia e interculturalidad*, Salamanca: Universidad Pontificia Salamanca, 315-364.

Alberdi, I. (1999): *La nueva familia española*, Madrid: Taurus.

CIIMU (2006). *La infancia en cifras,* Madrid: Ministerio de Trabajo y Asuntos sociales.

European Commission (2005): *Green Paper on Applicable Law and Jurisdiction in Divorce Matters* (COM(2005) 82 final), available online from http://209.85.135.104/search?q=cache:k6IHVf7xeDwJ:eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0082en01.pdf+COM(2005)+82+final&hl=nl&ct=clnk&cd=1&gl=be; accessed 25 August 2008.

European Commission (2006): *Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters* (COM(2006) 399 final), available from http://209.85.135.104/search?q=cache:VHib-5Z59cQJ:ec.europa.eu/justice_home/doc_centre/civil/doc/com_2006_399_en.pdf+COM(2006)+399+final&hl=nl&ct=clnk&cd=1&gl=be&client=firefox-a; accessed 25 August 2008.

Gallup Organization (2006): *Family Law: Analytical Report* (Flash Eurobarometer; 188), available online from: http://ec.europa.eu/public_opinion/flash/fl188b_en.pdf; accessed 25 August 2008.

Innocenti Institute (1998): "Intercountry Adoption", in: *Innocenti Digest* 4 (1998), 1-24.

Izquerdo Escribano, A. (2007): *Demografía de los extranjeros: Incidencia en el crecimiento de la población*, Madrid: Fundación BBVA.

Selman, P. (2005): *"The 'Quiet Migration' in the New Millennium: Trends in Intercountry Adoption 1998-2003"*, Paper presented at the 8th global Conference Manila, 10-12 August 2005.

Salomé Adroher Biosca, Ph.D., is professor of private international law and vice-dean of international and institutional relations at the Faculty of Law of the *Universidad Pontificia Comillas* in Madrid. She is the author of *Forma del matrimonio y Derecho internacional privado*, Barcelona: Bosch, 1993, and published extensively in the field of international family law.

• Summary

Intercultural Families – A Challenge for European Private International Law

Family law, in some countries like Spain, is undergoing deep, recent and fast changes that can be partly explained by the present, postmodern culture and "way of life": the exaltation of individualism and relativism runs parallel to the demand for a public guarantee of some fundamental rights. Current "domestic" family law is subject to two contradictory forces: an important infiltration of the freedom principle into this branch of the law traditionally composed by imperative rules (e.g. the divorce "express", the admission of different religious celebrations of marriage with civil effects, homosexual marriage), but at the same time a progressive "publification" of some family institutions in which the state now assumes competences traditionally belonging to the family (e.g. the measures of child protection or the public responsibilities in family violence). While this "inside" revolution continues, some changes are coming from "outside" because of the growing internationalisation of family relationships due, among other factors, to migration movements, European Union integration, globalisation etc. Inter-country adoptions, marriages with foreigners, foreign children in foster care, just to name a few, are visible realities. Family law must work with unknown institutions such as *kafalah*, polygamy or private adoptions. The paper analyses how European private international law is facing this new situation moving, as Spanish domestic law does, into some questions with a growing flexibility towards cultural differences, especially in cases of homogeneous relationships, but in others reinforcing the state principles when a non-homogeneous relationship demands state protection.