

***"The judicial practice of the court of cassation in the Moroccan Family law issues»
Research study***

Summary

This study, conducted by ADFM, aims to **analyze judgments rendered by the Court of Cassation** concerning the application of the Family law, in order to interpret them and to demonstrate their consistence with the constitutional provisions (Equality and non-discrimination) as well as the spirit of the Family law (The preamble to the family law of 2004 sets the broad policy objective of providing justice to women).

Why analyzing the judgments of the Court of Cassation?

The interest in analyzing the judgments of the Court of Cassation, the highest court in Morocco, lies in the fact that these judgments represent jurisprudence. Jurisprudence involves the interpretation of legal texts having a general and abstract scope and their adaptation to specific cases. That interpretation must be consistent with the spirit of those texts and the objectives for which they were adopted. This is one of the fundamental functions of this highest judicial body (the Court of Cassation).

Consequently, jurisprudence, which embodies this kind of harmonious complementarity between the application and the interpretation of the law, makes the Court of Cassation one of the sources of legislation and normative references.

Findings of the study (summary):

The judicial decisions analyzed in this study, which reflect the dominant tendency of the Court of Cassation, reveal that the provisions of the Family law, in general, are not "applied in a fair, modern and effective manner" or interpreted according to the spirit of the Family law nor are they in harmony with the modern objectives announced in its preamble as strategic perspectives for its application.

In fact, the interpretation and application is aimed more at restricting the content of the texts, preferring a narrow interpretation of the texts and the use in this interpretation of conservative references, despite the clarity of the law sometimes, which makes them a retrograde interpretation.

- It also is interesting to note that the strong provisions on human rights, equality and non-discrimination contained in the 2011 Constitution, despite their importance, do not find any echo in the judgments and grounds of the Court of Cassation.

- The application and the interpretations of the law reveal another aspect, in particular when comparing the jurisprudence of the Court of Cassation to that of the other courts (courts of first instance and Courts of Appeal): the existence of a sort of cleavage between two generations of magistrates. The first is the one who's majority, because of its age and long experience in family law and its reference system; belongs to a traditional and conservative school (universities of Islamic studies give access to the judiciary in the judicial domain of the family). The second is a generation of young magistrates who tend more towards the renewal and a more or less positive interpretation of the laws, and the openness to the international instruments relating to human rights and to the human rights of women.

- Finally, these retrograde and subjective applications and interpretations reveal above all the limits, gaps and failures of the Code as well as the ambiguities that affect its wording. It is these shortcomings that allow for misapplication or misinterpretation and open the door to unfair application of the Family law.

In summary, the Family Code, with its legal shortcomings, the lack of harmony between a number of its provisions, the ambiguity of some of its provisions inducing a misinterpretation, carries in itself the causes of its misapplication. It requires a comprehensive and coherent review that takes into account all the negative aspects that reveal its application and interpretation.

If these findings reveal the urgent need to review the text of the Family law as a whole in order to remedy the deficiencies and dispel the ambiguity of some texts, they confirm the need to open to the young magistrates the way to the Court of Cassation in order to establish a new spirit in the treatment of family issues which guarantee human right and are in harmony with the evolution of society and with Morocco's international commitments on human and women's rights.

Recommendations

Based on the above-mentioned conclusions, several recommendations were formulated by the ADFM and appear at the end of the study. It should be noted that these recommendations are, as far as possible, practical, precise, direct and achievable as long as they carefully identify the key actors and parties concerned according to their nature and the missions assigned to them. Therefore, recommendations have been classified as follows:

1. Recommendations addressed to the legislative institution
2. Recommendations addressed to the Ministry of Justice
3. Recommendations to the Supreme Council of the Judiciary
4. Recommendations to the Court of Cassation
5. Recommendations addressed to the President of the Public Prosecutor office
6. Recommendations to the Bars and Bar Association of Morocco
7. Recommendations to the Higher Institute of the Judiciary