

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

**Extraordinary Ethics:
An Ethnographic Study of Marriage and Divorce
in Ben Ali's Tunisia.**

Sarah Grosso

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For Mum and Dad without whom
none of this would have been possible.

DECLARATION

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ABSTRACT

This thesis is about family law under the Ben Ali dictatorship where the women's rights embodied in these laws constituted a cornerstone of the state's legitimacy. In 1956, Tunisia became the first Muslim country to reform Islamic family law radically, abolishing polygamy and granting women and men equal rights in divorce. Whether these laws have supported gender equality or not has been hotly contested.

Based on fieldwork in a suburb of Greater Tunis and in a court (2007-2008), the thesis provides an ethnographic account of the practice of marriage and divorce. From these dual perspectives, it argues that ordinary ethics are an essential part of the practice of the law.

The thesis begins by exploring the uncertainties that surround marriage in a lower-middle class neighbourhood. It then analyses some of the mechanisms through which the law is intimately intertwined with ordinary ethics, notably through an examination of the documentary practices of divorce files.

This thesis argues that the connections between law and ethics generate radical uncertainties and anxieties.

First, there is uncertainty as to whether a litigant can access justice in divorce. To access rights in divorce a litigant must strive to display highly gendered forms of ethical personhood. Rather than supporting gender equality, the legal processes contribute to the homogenization of moral values at a national level, as particular gender roles are debated and reinforced via legal practice.

Second, there is uncertainty as to the state's moral legitimacy as it is exposed to the moral scrutiny of its citizens through the operation of the law. The thesis argues that the politically charged setting of the court is the scene for a kind of extraordinary ethics, as divorce cases are a site where the morality of marriage and the morality of the state are simultaneously at stake.

'L'égalité n'est pas un mirage, c'est un 'chantier' permanent.'

Lofti Chedly¹

¹ My translation: 'Equality is not a mirage, it is a continuous construction site.' Chedly 2007:593.

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INTRODUCTION

*'In summer, in the party hall
in winter, in the palace of justice.'*

Tunisian saying.

Besma² was a housewife living in an urban neighbourhood in greater Tunis.³ Her reaction was typical of the majority of Tunisians to whom I explained my intention to research divorce: 'Tunisia should be in the Guinness Book of Records for divorce,' she told me, before adding the Tunisian saying above that was becoming rapidly familiar to me. The proverb she and many others cited and the perception that the divorce rate was worryingly high, express wide-felt moral concerns about what was seen as the scourge of divorce; couples who move all too quickly from their summer wedding celebration to the divorce courts. The laws relating to divorce were a controversial part of Tunisia's Personal Status Code (PSC), a founding text of the newly independent state, promulgated in 1956 before even its first constitution (Chedly 2007:572). This revolutionary law sought to extend gender equality, notably by banning polygamy and extending equal rights in divorce to women.⁴ Tunisia remains the only Muslim country to have made these moves that continue to be perceived by some of its religious opponents (Amnesty International 2012) as contrary to Islamic law.⁵ Through these discussions and debates about women's rights – including a woman's right to divorce – morality in general and, more specifically, the morality of the state that ratified and enacted this law, was at stake.

Having been made a cornerstone of the Tunisian state's legitimacy at home and abroad, the PSC has been enveloped in controversy since its creation. Some analysts have celebrated Tunisia's progressive status on women's rights as embodied by the PSC, 'providing equality of the sexes in virtually all spheres' (Emma Murphy 1996: 138). Simultaneously, Ben Ali's regime was accused of using his image as a supporter of

² All names and other identifying details have been changed when deemed necessary to respect confidentiality to the extent that this is possible.

³ We shall meet Besma in chapter 1.

⁴ For a comparative perspective, a woman's unilateral right to divorce her husband was introduced in Egypt in 2000. See Sonneveld, 2010.

⁵ The Tunisian code has been used as inspiration for reforms elsewhere in the region including by the UN (cf Gafsa 2008) and has inspired the Moroccan and Algerian reforms (2004 and 2005 respectively; cf Chedly 2007:572). Polygamy remains legal (albeit with limitations) and a woman's right to divorce remains limited compared to her husband's in both those countries.

women's rights as a cover up for human rights abuses (Labidi 2010). In 2008, Human Rights Watch reported that opponents of the regime were subject to heavy surveillance, physical assaults, harassment of relatives and slander campaigns in the press, as well as torture and ill-treatment if interrogated by the police or imprisoned; both men and women have endured these human rights abuses. In addition, freedom of expression and of the press was strongly curtailed to rule out any criticism of the regime (Human Rights Watch 2008). This has led to seemingly paradoxical depictions of Tunisia as 'the most modernized and westernised country in the Maghrib' as 'women's participation in all aspects of public life is the most important in the Arab world,' (Layachi 2000: 32) whilst 'Tunisia has regressed to a level of political and police control unknown even in the worse times of the post-independence period' (ibid: 37).

In this oppressive context, when I arrived in Tunisia to study Arabic before beginning my PhD course (2004-5),⁶ I quickly ruled out the possibility of conducting research on any overtly political topic. It was unsafe to talk openly in a way that could be perceived as being critical of Ben Ali or his regime, let alone to a foreign researcher. I was told more than once that it was likely that I was being followed. Even close friends questioned me as to the difference between an anthropologist and a spy and rumours circulated about the American Research Centre I attended being a cover for activity by American Secret Services. Consequently, I strove to be as transparent as possible in all of my activities. I applied for a research visa⁷ and framed my research project in a way that allowed people to talk to me as comfortably as possible, even if our conversations were overheard.

What people did talk to me about, to an extent that surprised me at first, was their intimate lives. Although I never solicited information on the topic, a surprising number of people shared their views on sex and sexuality, notably in light of their concerns about the moral decadence of Tunisian society. These fears of increasing immorality were linked with the changing status of Tunisian women, and were made a political symbol by the creation of the PSC (Al Ali & Pratt 2009; Rabo 1996). In the apparently intimate space of marriage and divorce, as this facilitated conversations about peoples' personal lives, together with the legal framework that had sought to reorganise them, an avenue opened up through which the state could, however indirectly, be addressed or even criticised. In

⁶ The main period of fieldwork took place between May 2007 and December 2008.

⁷ This was eventually granted to me after 9 months of waiting and numerous visits in person to the Ministry of Education. I subsequently obtained permission from the Ministry of Justice to conduct fieldwork in the Court of First Instance in Ben Arous.

ways that will be explored below, the state of marriage was articulated with the state of the state.

Debates surrounding the morality of the PSC – and the state’s ability to uphold values associated with gender equality - have also marked Tunisian legal doctrine. Tunisian legal scholars have questioned which values are upheld by the PSC, both in the legal text and in legal practice (Yadh Ben Achour 1992; Sana Ben Achour 2004, 2005 & 2007; Chedly 2007; Meziou 1992; Chekir 1996; Ben Jemia 2006, Gafsia 2008). Chedly notes that, whilst the PSC was revolutionary in some areas (polygamy, divorce), ‘it was traditional and conservative in relation to the marital relationship’ (2007: 560). This has led renowned feminist legal scholar and women’s rights activist, Sana Ben Achour, to argue that ‘the PSC carried with it a tension between the spirit of tradition and the spirit of innovation’ (2005). Ethnographically very little is known about Tunisia in general and about how Tunisians have experienced these reforms in particular. Until now, the limited academic work has privileged either official discourses or public discourses of opposition, (Bessis 1999; Ferchiou 1985; Gilman 2000) and the voices of ordinary Tunisian women, and indeed men, have largely remained silent.⁸

Following actors both inside and outside the courthouse, this thesis explores peoples’ experiences of the revolutionary personal status laws and addresses the question of whether the laws live up to their claim to extend ‘women’s rights’ in practice. Does the PSC support ‘gender equality’? Or does it lead to a reinforcement of ‘patriarchal’ values?

Anthropological work on the law has explored extensively the complex articulations between the law and society, culture or ‘normative orders’ (Just 1992; Fuller 1994; Goodale 2005; Griffiths 2002; Mundy & Kelly 2002; WT Murphy 1997; Riles 2002). However, in order to explore these questions of women’s rights and the law, this thesis delves deeper into the articulations between law and ethics. I build on Goodale’s approach to the study of human rights through ‘the anthropology of ethical theory as social practice,’ as ‘part of a broader anthropological framework that bridges the legal and political,’ (2006: 34). What happens when ethical theory becomes legal practice in the divorce court? If, as Goodale argues in relation to human rights, women’s rights in Tunisia are never separate from the ‘swirl of other sources of normative inspiration’ (ibid: 34), what is

⁸ See Voorhoeve 2011 for a recent study of the practice of family law in Tunis that focuses on the judges rather than the litigants.

the nature of this connection? How is the law – via its specific dispositions and procedures – articulated with ordinary ethics?

By depicting the particular swirl of norms and ideals that surround women's rights in practice, as read through the ethnographic study of the processes relating to divorce law and those relating to the practice of marriage in an urban neighbourhood in the final years of Ben Ali's dictatorship, we shall see how ordinary ethics become what I shall call extraordinary ethics. In the process, this thesis contributes to an understanding of the moral landscape that shapes, and is shaped, by individuals' experiences of these laws that purport to extend women's rights and of the ways in which the laws may (or may not) support 'gender equality'.

THE ORIGINS OF THE PERSONAL STATUS CODE

The contours of the moral landscape I am to describe were shaped by the way in which the PSC emerged historically against a backdrop of ideological tension and civil war.

From the mid-19th century onwards, Tunisia experienced a wave of political and legal reforms. As other domains of law (civil and penal) were codified, brought under the control of the Bey⁹ and administered by non-religious courts,¹⁰ personal status law remained under the direct control of the religious courts until Tunisian independence in 1956 (Voorhoeve 2011: 55).

The PSC was one of the earliest reforms to be enacted after Tunisia gained independence, initiating a series of reforms in favour of women's rights. The religious courts were abolished and personal status cases were brought into the newly unified state court system.¹¹ In 1957, women over 20 were awarded the vote and literacy classes and health clinics were established to boost literacy and decrease fertility rates (Perkins 2004: 38). The Tunisian Constitution (1 June 1959) enshrined the equality of men and women stating that women are 'full citizens with complete legal equality and civic duties, with the

⁹ Tunisia was part of the Ottoman Empire but retained considerable autonomy; consequently, the Ottoman reforms of this period had little impact in Tunisia. Tunisia subsequently became a French protectorate in 1883. Voorhoeve 2011:52.

¹⁰ See Voorhoeve 2011, for a more detailed account of this history of legal reform.

¹¹ *Sharia* courts (*Maliki* or *Hanafi*) applied *fiqh*, Jewish courts administered Mosaic law, and French courts applied French family law in cases involving a French citizen.

full right to exercise their complete economic and social rights' (Emma Murphy 1996: 141).

Previous attempts had been made to reform and codify family law in Tunisia. Khair al-Din's¹² attempt to unify family law in the 1870s failed due to a lack of religious support, as the *ulama* felt their authority was being challenged. Tunisian religious scholar Tahar Haddad had proposed radical reforms to the position of women in Islamic law in the 1930s. Although arguing from a position of *ijtihad* (juristic innovation),¹³ his work was perceived as an attack against Islam. He lost his job at the Zaytouna¹⁴ where his colleagues considered his work blasphemous and it was subsequently banned by the government.

During the period between Haddad's rejection from the Zaytouna School and the ratification of the PSC, Tunisia experienced a struggle between Bourguiba and his rival Ben Youssef. Bourguiba and his reformist, nationalist Neo-Destour (constitution) Party, backed by those in urban areas and trade unionists, defeated Ben Youssef who represented more conservative forces supported by tribal areas and the religious establishment (Charrad 2001: 202). The bloody conflict that took place was as much between these two groups as against the French who, realising they faced defeat, intervened in favour of the French-educated jurist, Bourguiba,¹⁵ rather than the pan-Arab and pan-Islamist Ben Youssef. The crushing of this internal, ideological opposition opened the door to the reform of personal status law that was to follow.

Bourguiba's revolutionary reforms went hand in hand with the rearticulation of the state and religion, enabling him to dismantle or avoid criticism from the religious elites who had scuppered previous attempts at reform. Bourguiba appointed a liberal *shaykh* at the head of the Zaytouna mosque, the most important religious figure in the country, to help the code's smooth introduction (Voorhoeve 2011: 74). Ben Youssef could only articulate his objections to this law, that it had 'prohibited what God had authorized and authorized what God had forbidden' from his exile in Egypt (Perkins 2004: 137); by banning polygamy (seen by many as legitimate in Islam), the PSC allegedly encourages adultery (if a man cannot take a second wife to fulfil his needs, I was told, he is more likely to resort to adultery). I rapidly became familiar with this phrase cited to me by many of

¹² Prime Minister and reformer.

¹³ For an explanation of *ijtihad*: a process of interpretation of religious law in order to apply to new situations in an exercise of reason see Hourani 1991: 68.

¹⁴ A traditional seat of religious knowledge.

¹⁵ Bourguiba studied law, political science and French literature in France. He married a Frenchwoman and his first son was born in France (Micaud 1964: 41).

my informants as they expressed their own moral-religious concern about the absence of polygamy.

Although Bourguiba was careful not to introduce his reform of family law by 'force', in the sense of Asad's definition of force as 'the dislocation of the moral world people inhabit,' (Asad 2003: 185) some historical data suggest the extent to which the values incorporated in the PSC represented a departure from the situation prior to independence.¹⁶

First, the PSC could be seen to entail a break with classical Islamic law, the Maliki or Hanafi schools of which were applied by the *sharia* courts who ruled on the personal status issues of Tunisian Muslims prior to independence.¹⁷

The significance of family law lies in both the important role that family law plays in society as a whole, constituting or reproducing, 'a normative model of individual, family and society and the relationship between them' (Charrad 2001: 5), but also as several of the few direct commandments contained in the Koran relate to family law, and in particular to marriage. The *sharia* model of the family, in particular in the Sunni legal schools, strengthens the patrilineage and leaves the conjugal bond fragile, as links with natal kin continue to hold the most significance for an individual after marriage. This is reflected in patterns of inheritance and by the facility with which a man can repudiate his wife, whilst a woman may only appeal to a *qadi* (religious judge) for a divorce in specific circumstances such as abuse or neglect. Polygamy, of up to four wives, is permitted. A male guardian has the power to choose a marriage partner for a woman and there is no legal age for marriage, although marriage may not be consummated prior to the girl's puberty (Anderson 1976: 103).

¹⁶ This attempt by Bourguiba to present these reforms of marriage and divorce as being an innovative interpretation of Islam, and hence promote their acceptance with Tunisia's predominantly Muslim population could be read as an instance of vernacularization or hybridization, as defined by Engle Merry, 'a process that merges imported institutions and symbols with local ones, sometimes uneasily.' (Engle Merry, 2006: 44) Although at least in part the produce of *ijtihad*, given that Bourguiba studied law, lived and married in France, his ideas had the potential to be perceived as imported and, as going against Tunisia's Islamic tradition. This was also a reaction to observation of the situation in Turkey, where Attaturk had broken with Islamic law, introducing a personal status code based on Swiss law, that had been poorly received by the population. (Hafsia, 2005: 79)

¹⁷ Tunisian Jews went to Mosaic courts, whilst the family law issues of Christians or any case involving a foreign citizen (such as mixed marriages between French and Tunisians) were dealt with in the French civil courts of the protectorate. Cf Ben Achour 2008 for historical information on cases involving mixed marriages. Consequently, the situation of Tunisian Jews changed radically post-independence as they became subjected to a codified version of Islamic family law. Political tensions lead many of Tunisia's Jews to leave the country in the late 1960s. None of my informants were Jewish; in this thesis, I write about the Muslim majority and do not discuss the implications of this change for religious minorities.

The PSC departed from this definition by outlawing polygamy¹⁸ and repudiation, setting a minimum age for marriage¹⁹, and founding marriage on the consent of both spouses.²⁰ In this respect, the PSC departs from Maliki *fiqh* that requires a guardian's consent for a woman's marriage. Whilst the PSC requires the payment of a bride gift (*mahr*, article 3), the amount was limited to the symbolic sum of 1 dinar.²¹ Marriage registration was made compulsory: an unregistered marriage ('customary marriage') is considered null and void and sanctioned by three months imprisonment.²² The logic of this reform (the registration of marriage not being required in the Maliki *fiqh*) was to prevent people entering into prohibited polygamous marriages.

By banning polygamy, the PSC in fact did not change marriage practice significantly. Historical work on Tunisia shows that polygamy was rare both in urban and rural settings (Blili 1999; Hafsia 2005; Micaud 1964).²³ Tunisian historian Blili found that only 8% of marriages she studied were polygamous and in the majority of cases this was due to infertility.²⁴ The practice of writing a clause in the marriage contract allowing the wife a divorce if the husband took a second wife (known as the 'contrat Kairouani') was used in the cities of Tunis, Kairouan and Beja, in effect discouraging polygamy (Hafsia 2005: 55). Although the PSC's detractors viewed the banning of polygamy as a departure from a clear Koranic precept, the PSC was coherent with the practice of the majority of the population who did not enter polygamous marriages.

The PSC did, however, entail a break compared with the historical practice of divorce. Before independence, 'it was the man who divorced' (Blilli 1999: 187). A man could repudiate his wife without any justification or recourse to a court; the wife may not even have been informed of the divorce beforehand. Her only entitlement was to maintenance (*nafaqa*) during the three-month waiting period (*'idda*) after the divorce. A

¹⁸ PSC, Article 18.

¹⁹ The legal marriage age was set at 20 for men and 17 for women. Under this age, the marriage must be passed by a judge (PSC, Article 5). In 2007, the marriage age was unified at 18 years for men and women.

²⁰ Article 3. In the case of the marriage of a minor, the consent of both the legal guardian (usually the father) and the mother is required (article 6).

²¹ The limitation of *mahr* is significant, as these marriage payments traditionally served as insurance for a wife in the event of a divorce. The limitation to one dinar was subsequently removed from the PSC. However, no one I spoke to – including the graduate student of law who did not believe me when I told him – was aware that the value of *mahr* was no longer limited by law.

²² Article 31. Summarised from Voorhoeve 2011:56-57. See Voorhoeve for more detail about how the content of the PSC pertaining to marriage and divorce contrasts with Maliki *fiqh*.

²³ According to Micaud, 'true' polygamy (as opposed to what he termed 'successive' polygamy) was prevalent only among the Bedhouins where it brought an economic advantage. Micaud 1964:145.

²⁴ Either infertility of the wife, or of the husband when he did not suspect he was to blame, or as the husband had only daughters and wanted a son. Blili 1999:101. Hafsia found infrequent bigamy linked with sterility or lack of daughters. Hafsia 2005:13 & 58.

wife was more constrained if she wished to end her marriage; in no circumstances could she pronounce a divorce herself. She could either appeal to a (male, religious) judge or could seek a divorce by mutual agreement (*khul'*) that contained the notion of 'harm' and required her to pay her husband compensation. She would also lose all rights to maintenance payments (*nafaqa*) and her remaining *mahr* (Hafsia, 2005: 66). If she filed for a divorce for 'harm' in front of a judge, the judge carried out an investigation and called upon witnesses. If successful, the wife would be paid the remainder of her *mahr* (Hafsia 2005: 66-70). Tunisian historian Largueche points to the difficulties for women who wished to file for a divorce. Merely for daring to ask for a divorce, a wife would be sent to a place she calls the 'prison for crimes of the heart', where she would be observed by moral guardians, who acted as witnesses and were to assess the causes of the marital breakdown. Historically,²⁵ these *dar joued* (reform homes for recalcitrant wives) had been seen as something of a sanctuary for women where a wife could prove her husband's violence towards her; couples would be sent there together to be observed by individuals of good moral standing who were wont to report to the judge about the reasons for the divorce. Subsequently, the place became a kind of prison, where women lived in abject conditions and were placed under scrutiny alone. Many women renounced their desire to divorce to avoid this ordeal (Largueche 1992: 95).

The PSC made divorce available to both men and women on an equal basis requiring both spouses to file for a divorce in court (article 31). The husband loses his right to extrajudicial repudiation and must also be accountable in front of a judge (who is now a state official and may be male or female). Either spouse can file for divorce for harm or for a divorce without grounds; alternatively, both spouses may file for a divorce by mutual consent. In the first two cases, the injured party receives compensation payments. Previously, as we saw, a wife could bargain using her *mahr* if she wanted a divorce and could keep this money if her husband decided to divorce her; the amount of *mahr* would have been negotiated between the two families prior to the marriage. The PSC ended this practice by limiting the *mahr* to one dinar. In the new system, compensation payments are decided upon by the Family Judge, based on an appreciation of who has suffered the most 'harm' due to the divorce. The changes in the financial structure of divorce lead to a focus on the legal concept of 'harm', the (lack of a) definition of which we shall return to below.

Given the low prevalence of polygamy in Tunisia, divorce – and, specifically, the ability of women to file for a divorce unilaterally without justification and without the

²⁵ The institution of *dar joued* existed from the 16th century onwards.

possibility of the judge refusing their request²⁶ – emerges as the more ‘forceful’ reform. All of these changes have significant implications for the practice of divorce explored ethnographically in this thesis and its relationship with ethics.

REFORMING THE MORAL

Echoing the moral framing of public debates and discussions in Tunisian legal scholarship about the PSC, the ethnographic material presented in this thesis emphasizes the connections between the law and ethics. To a limited extent, therefore, I follow Latour by viewing the ‘moral’, as opposed to an a priori category, as that which is in the process of being reassembled via these circulating legal and ethical references²⁷; rather than being the explanation, the moral is what needs to be explained (Latour 2005).

As I avidly read the divorce files to understand how a controversial reference to ‘custom’ in the PSC (that we shall learn about in detail further below) was interpreted – hoping to read more details that could elucidate something about its meaning in practice – I quickly found that any such detail was missing. I realised that the meaning did not need to be made explicit; the intended audience and interpreter of the files (the judge) was assumed to understand the implicit reference to, as one judge put it, ‘things everybody knows’. The boundaries between ethics, understood as modes of life, and morality, read as explicit normative rules, did not seem so clear.²⁸ Consequently, I draw inspiration from Lambek’s approach to studying ordinary ethics as being inherent in all domains of life and follow him in using these terms interchangeably (Lambek 2010: 9). It is by attending to the details of the legal code and its procedures²⁹ - like the creation of divorce files and the judgement process mentioned above - that I show some of the precise means and mechanisms through which the law is intimately intertwined with ordinary ethics³⁰ in the extraordinary setting of the court (Lambek 2010; Caton 2010).

²⁶ The judge may refuse the divorce on procedural grounds. Of course, in this case the litigant may start proceedings again to be granted a divorce.

²⁷ Paraphrasing Goodale (2005: 506), citing Latour, who follows Mundy and Pottage (2004) in emphasizing the constitutive nature of the law.

²⁸ See, for instance, Laidlaw 2002.

²⁹ See Riles on the importance of bringing the technical dimension of law into view, in particular given the role these tools play in the production of knowledge (2005:986).

³⁰ Within the anthropology of ethics or morality, anthropologists are divided between those who seek to define a specific domain of morality that is apt for ethnographic study (Zigon 2007, 2009; Robbins 2007) and those who view

As WT Murphy found, albeit in a very different historical and legal setting, an ethical space opens up in the law that is de-contextualized, cut off from the scene of action, but that nonetheless constitutes ‘an institutionalized systemic form for debating what are by definition largely matters of public morality’ (1997:199) and potentially becoming the ‘conscience of society’ (ibid: 209). Part of the premise of this particular ethical space that is opened up in Murphy’s analysis, is the critical potential and possibility for scrutinizing prejudices that emerge as the law is detached from politics and ethically engaged lawyers and judges are responsible only to the law itself (ibid: 206-210).

In the Tunisian family court, at the heart of the state’s attempts to reinforce a particular version of gendered, public morality, and operating in the midst of Ben Ali’s dictatorship, the illusion of detachment is very finely veiled at best; the law is seen as the conscience of the state and is key to its moral legitimacy. It is precisely the distancing or dislocation of the court from the scene of action that requires the judge to engage in a process of *re-contextualisation*;³¹ as the law requires him to interpret what happens in marital disputes in this dislocated setting, the judge must use his moral judgment.³² This is a central way in which ordinary ethics is part of – and is essential to – the practice of the law as, in Asad’s words, the state intervenes in this private domain (2001: 8).

REFORMING THE FAMILY

As Bowen found elsewhere, debates over family law point to broader issues of social and moral order.³³ The connections between the law and ethics (Kelly 2011) and, specifically, family law and ethics, have been well documented, in particular in relation to personal status laws in Muslim contexts (Asad 2001; Joseph 1997, 2000; Bowen 1998, 2001; Dupret 2006). Asad has argued, in relation to personal status laws in Egypt, that ‘when *sharia* comes to be equated with justiciable rules, the consequence is not simply abridgement but a re-articulation of the concepts of law and morality’ (2001: 13). He highlights the transformations that take place when the *sharia* is transformed and confined to defining

ethics as ‘basic to the human condition’³⁰ (Lambek 2010; Caton 2010). (Robbins argued that the anthropology of morality has been stunted by ‘treating all of culture as morally charged.’) To Zigon, this would make the practice of family law in Tunisia an ideal case study for what he calls an anthropology of morals. Drawing on Heidegger, Zigon argues that anthropologists should focus on key moments of moral breakdown, which require actors to engage in the conscious work of ethics that he distinguishes from non-conscious morality (2009:263). He suggests that this focus is a way in which we might distinguish the anthropology of morality from that of religion or law (2007:146). However, I provide an ethnographic account of the connections, in my case the connections that link law and ethics, rather than seeing these as separate domains, or constraining ethics to particular moments.

³¹ Building on WT Murphy (1997) on ‘de-contextualisation’.

³² Cf Goodale (2005) and Mundy & Saumarez Smith (2007: 4-6) on the centrality of interpretation in legal practice.

³³ Paraphrasing Bowen 2001:2.

personal status law, placing an emphasis on the modern state's intervention in this private domain (ibid: 7).

As the family emerges as both a legal and a moral category, kinship provides a perspective through which to consider the operation of the law and its interconnections with ethics as part of broader political processes. Anthropological work has stressed the embeddedness of the house as the first level of political control (Mundy 1995, 2003; Singerman 1995): 'government does not begin at the higher-level boundaries between groups, but at home; it is the family that contains the seeds of everyday legal domination' (Mundy 1995: 53). Furthermore, given the question as to whether the PSC promotes gender inequality, feminist scholarship³⁴ has stressed the implications of the 'direct linkages between the enclosed, private world of the family, and the outside world of the state's legislative apparatus and the project of nation-making' in terms of gender (Carsten 2004: 6).

How has anthropological work on the family in the Middle East and North Africa region explored the links between kinship and the law and kinship and ethics?

Work that focuses on the links between kinship and the economy – examining the household as an economic unit – also frequently draws in the moral, either implicitly or explicitly, in the form of attitudes towards working wives and changes in gender roles in the household (Moore 1988). In terms of the regional literature, this is often articulated in the form of discourses on 'honour', underpinned by female sexual propriety and the control of female sexuality. Whilst connections are traced between kinship, economy and morality, often the law is only given a token presence as part of the political setting in these ethnographies based in the household or village. I seek to unite these approaches by tracing how ordinary ethics permeates both the practice of kinship and the practice of the law. How marriages are formed and how gender roles are changing in the household³⁵ (chapters 1 & 2) forms an essential backdrop required to understand the arguments presented in the divorce court (chapters 3-7); it is in the neighbourhood that we learn about the shared assumptions (Bowen 1998) that underpin the practice of the law.

³⁴ For instance, see Carsten charting the links between gender and the house and the links between houses and 'the wider polities of which they are part.' (2004:61) Also Stoler on sexual control and marriage as a political issue linked with the authority and legitimacy of colonial rule (2010).

³⁵ cf Moore on the impact that household composition - as well as extra-household relations - has on women's lives. (1988:55-59).

The question of which form of family is advanced by the PSC in practice and which reform of the family it entailed remains hotly disputed.

After he came to power in a 'constitutional coup' replacing Bourguiba as President in 1987, Ben Ali was quick to confirm that he would not threaten the advances made in the PSC.³⁶ Following in Bourguiba's footsteps, Ben Ali undertook the most significant series of reforms to the PSC (1993) whilst pursuing the project of reforming the family to be more focussed on the conjugal couple.³⁷ Bourguiba was explicit in his desire to intervene in family relations, striving to dismantle the patriarchal family in order to emancipate women from male domination, whilst enhancing citizens' dependence on the state rather than the kin group in order to build a homogenous, national identity (Platt 1987: 287; Zussman 1992: 1; Abu Zahra 1992: 41). As Bourguiba argued, 'how can we leave the family unit, which are states in miniature ruled by autonomous chieftains, to fend for themselves? The state, which sees beyond the individual, must intervene for the sake of national solidarity.'³⁸

The 1993 reforms touched the heart of the marital relationship, amending article 23 of the PSC that, albeit ambiguously, provides the law's only definition of marital duties. Previously, this article had maintained the wife's duty of obedience to her husband in respect of his role as head of the household. Whilst the husband remained head of the household, the wife's duty of obedience was removed and replaced with reference to the reciprocal duty of both spouses to respect their 'marital duties according to custom and habit'. As we shall see, the way that this subjective reference to 'custom and habit' is interpreted in legal practice is a central question posed in this thesis. In addition, the financial relationship between spouses was reformed, diluting the male duty to maintain his wife by stating that the wife must also contribute to the household and introducing the option of a shared property regime.³⁹

³⁶ In the National Pact (November 1988), Ben Ali reaffirmed the importance of working towards the full emancipation of women and echoed the constitution in underlining 'equality among citizens, without discrimination between men and women. Cited in Emma Murphy 1996 :143.

³⁷ In this spirit, in 1992 Ben Ali created a Minister of Women's and Family Affairs and in 1993 he undertook the most substantial series of reforms to the PSC since it was created. Among other reforms, domestic violence was made punishable and mothers were given the right to veto the marriage of daughters still considered as minors. A fund was established to provide alimony for divorced women and their children. Equally, the reforms enabled women to pass nationality on to their children if married to non-nationals. A 1998 reform extended rights to children born out of wedlock, enabling them to bear their father's name and to be entitled to maintenance payments from their father. In 2007, the minimum marriage age was aligned to 18 for both men and women. A 2008 law enabled a mother who has custody of the children to stay in the marital home after a divorce.

³⁸ Bourguiba 1961 cited in Zussman 1992 :11.

³⁹ Reform of 1998.

The PSC and its 1993 reforms entail a significant change in the legal definition of the family and of marital roles within it when compared with the standard definition of the martial relationship as understood in the Maliki and Hanifi schools of Islamic jurisprudence that had prevailed before independence (Mir Hosseini 1993: ix). The legal patriarchal family was, prior to the PSC, a system based on the 'absolute authority of the father,' that allowed him to arrange a daughter's marriage, after which she was 'at the mercy of her husband' who could 'repudiate her for no other reason than his desire to marry a more attractive woman and his inability to support two wives' (Micaud 1964: 145) The PSC encouraged 'the modern idea that marriage was more a relationship between a man and a woman than between two families,' (ibid: 51) by making the consent of both spouses the first condition of marriage.⁴⁰ Bourguiba condemned arranged marriage saying 'it is incomprehensible that a young girl should be forced to found a family with a man she does not love. Money alone is not enough to base a marriage on.'⁴¹

The data available on Tunisia suggest that the forms of relatedness have undergone radical change since the country gained independence. The limited ethnographic work on Tunisia (Abu Zahra 1982; Holmes-Eber 2003; Ferchiou 1985; Zussman 1992) follows work elsewhere in the Arab world (Maher 1974; Mundy 1995; Kapchan 1996) in showing a range of co-existent marriage patterns, as opposed to the culturally dominant ideal of FBD marriage (Tapper and Tapper 1992/3: 10). Recalling Goody's argument about the relationship between production and reproduction (1976),⁴² anthropologists have discussed the relationship between female education (Holmes-Eber 2003; Abu Zahra 1992) and employment (Singerman 1995; Inhorn 1996) and changing marriage practice, especially in urban areas.⁴³ Since these studies were completed, Tunisian population statistics⁴⁴ indicate that there has been a significant change in the place of women in economic life.⁴⁵ In addition, female literacy and school attendance rates are high in Tunisia⁴⁶; in 2001, 97% of girls aged six or over were enrolled in school (Harris

⁴⁰ This contrasts with 'the fact that the classical doctrine of all schools of Islamic law allows a marriage guardian to contract his minor ward in compulsory marriage and that Malikis, Shafi'is and Hanbalis also insist that the marriage of even an adult woman can be contracted only by her guardian' (Anderson 1976:102).

⁴¹ Bourguiba cited in Marshall & Stokes 1981:637.

⁴² Ethnographic work on Tunisia (mostly in rural settings in the 1960 -1980s) suggests that changes both in the mode of economic production and in the types of property being transferred via inheritance are articulated with changing marriage strategies (Ferchiou 1985; Larson 1983; Zussman 1992; Abu Zahra 1982).

⁴³ See also Moore 1998.

⁴⁴ In 1999, 24.6% of the economically active population (over age 15) was female, compared to only 6% in 1966 (UNDP: 74).

⁴⁵ cf Goody 1976 on the impact of the gendered division of labour in a different context.

⁴⁶ Educating girls also formed part of Bourguiba's reforms to emancipate women. 'At independence in 1956, less than 5 percent of children were enrolled in primary school; by 2003 this share had increased to 98 percent, with essentially no gender differences in participation.' (Lockheed & Mete 2007: 207) 'In 1991 a second education reform

& Koser 2004: 61). Other anthropologists (Singerman 1995; Inhorn 1996; Holmes-Eber 2003; Rugh 1984) have pointed to the implications of working wives and the tensions this may lead to in the conjugal couple.

Singerman, in her ethnographic study of urban Cairo where she traces families and informal networks, analyzes the family as a site of power with its own form of morality. She goes so far as to suggest that the debates on morality surrounding the family, what she calls the 'familial ethos', constitute a form of legal pluralism (2006:14). In this way, she traces a link between law and morality. She also suggests that this familial ethos, an alternative way of 'ordering or determining truth and justice' may be used by the state (ibid: 16). Whilst tracing the connections between the economic difficulties in forming marriages in contemporary Egypt and the politicisation of the family that ensues (1995: 15), she does not address how the familial ethos or economic tensions surrounding marriage and the family inform, or are informed by, legal practice. These economic tensions are central to the practice of divorce as studied in Morocco (Mir Hosseini 1993: 121) and Yemen (Wuerth 1998: 178), where the legal obligation and ideal role of the husband as sole material provider clash with the economic reality in which women's employment is vital to the household's survival, particularly amongst the poor. How, then, do these tensions appear in the Tunisian divorce court given the attempt of the PSC to redefine marital duties and the ambiguous phrasing of the legal code?

Equally, literature on the family in the Middle East frequently discusses the issue in terms of a 'gap' between an ideal moral discourse of kinship and the economic reality in which this ideal has become impossible. Gilman, for instance, attributes the 'gap' that persists in Tunisia between law and practice concerning women's rights to 'a family structure that continues to view women as inferior and unequal' (2000: 95) The terms of this argument, however, ignore the connectedness between 'law' and 'society', as if the law played no role in shaping social relations or as if the operation of the law occurred in isolation from contemporary forms of sociality and kinship.⁴⁷

My approach differs slightly. Lambek's reading of Arendt reminds us that if kinship is an ethical realm, it is also due to the feminist concept of 'care', 'looking after or looking out for the wellbeing of others' (2010: 15) Whilst in Singerman's work, the familial ethos

made basic education compulsory for both boys and girls 6–16, with parental penalties for noncompliance.' (Lockheed & Mete 2007:210).

⁴⁷ See Griffiths on how a consideration of the dynamic interaction between semi-autonomous fields can contribute to an understanding of the gendered nature of the law (2002: 304).

appears to designate a form of moral discourse, to be distinguished from - and that often enters into conflict with - every day ethical practice, Lambek suggests how ordinary ethics are inherent in the everyday practice of kinship and the duties carried out by each spouse within the family. By reading these practices, we can understand ordinary ethics, as well as the discourses on marriage, as integral to the formation of legal ethics.

SPACE, RESIDENCE

Whilst the above analyses have explored marriage strategies in terms of economic change, viewing the household as an economic unit, ethnographic work on cities that have experienced rapid urbanisation⁴⁸ - such as has been the case in Tunis - have stressed the impact of changing residence patterns on marriage and gender roles. In their ethnographic work on Tunisia, Larson (1983) and Holmes-Eber (2003) both follow networks to highlight the relationships that are of significance to their informants, stressing the lived practice of kinship in contrast to the dominant model of patrilineage. Holmes-Eber, in the most recent ethnographic study in an urban setting (1980s) discussed the significance of non-kin networks as a mechanism for coping with life in a setting marked by rapid urbanization. She found that marriage practices varied and that due to patterns of neo-local residence, 'the extended household of old has been replaced by the extended street' (2003: 70).

Whilst Holmes-Eber pays attention to residence patterns, she does not pay explicit attention to the changing structure of the city and of the house that lead to her following a network based research methodology. In contrast, I follow Carsten in looking at patterns of relatedness from and through the vantage point of the house. This entails paying attention to the structure and materiality of the house itself.

Anthropological literature on the MENA region has traced connections between the house and ethics through debates about the gendered use of space. Public and private spaces become metaphors for gendered ideologies concerning the appropriate roles of men and women in society and are articulated with essential qualities attributed to men and women, notably in discourses of 'honour' (Kapchan 1996; Jansen 1987; Bourdieu 1990). The house is a site in which it is possible to trace economic relationships, in particular that between husband and wife, and a site in which ordinary ethics are enacted. As Lynch & Bogen have argued in relation to the law, the house 'shapes but does not

⁴⁸ See Hoodfar 1997; Inhorn 1996; Singerman 1995; Jenny White 1994 and also Vatuk 1972 (on a comparable situation in India).

determine' (1996: 121) what happens within its walls. What can the house tell us about contemporary patterns of sociality in the newly constructed neighbourhood? (Chapter 1) In an approach that examines how ordinary ethics permeate the work of the law, I strive to treat the house and courthouse in comparable terms to bring out their inherent similarities and differences. Indeed, what happens when we look at the courthouse like a house (chapter 3)? Can this help us understand how ordinary ethics enters the practice of the law? In this way, by following ordinary ethics in the house and court house, I show both the continuities between these two sites and the peculiarities that distinguish them; similarly, I will argue that in the court, as a site imbued with the power of the oppressive state, ordinary ethics become extraordinary ethics.

In order to study the contemporary Tunisian family ethnographically, I spent time living with,⁴⁹ and later visiting, a family in a place called Morouj⁵⁰ in the outer urban suburbs of Greater Tunis to the South and East of the capital in the district of Ben Arous. The growth of the Morouj is part of the strong phenomenon of urban migration⁵¹ of the Tunisian population. In the 1930s, only a third of the population lived in urban settings, compared with nearly two thirds by 1989 (Ben Jafaar 1992). According to the 2004 census, 444 000 people migrated within Tunisia⁵² between 1999-2004, most frequently due to work or to join family (INS 2013). Greater Tunis is the most popular destination for this migration. The Morouj form part of Ben Arous – a district of Greater Tunis – and of the jurisdiction of the Court of First Instance of Ben Arous where I read and observed divorce cases.

Best characterized by their mixity, being the fruit of internal migration,⁵³ the Morouj – meaning 'fields' in Arabic – were literally just that before the land was sold off and people began to build homes there in the mid-1980s. Fields could be seen in the distance from the main road, stretching away from these neighbourhoods that were still very much under construction. How can ethics be understood, in spatial terms, in this new neighbourhood that is a radically different kind of place to the rural villages (Abu Zahra 1982; Zussman, 1992) from where the residents of Morouj mostly originate? (Chapter 1)

⁴⁹ I spent 3 months living in Morouj in 2007 and a further 3 months in 2008. In the mean time I lived in Tunisia with my husband in one of the more affluent suburbs to the North of the city, yet I returned to Morouj frequently to visit my host family and her neighbours and to conduct interviews.

⁵⁰ The Morouj are known and identified by number. I have excluded references to numbers here to protect the confidentiality of my informants.

⁵¹ Tunisia's urban population grew from 40% in 1966 to 61% in 1994 (UNDP: 35).

⁵² To put this in perspective, the Tunisian population was 9.9M at the time of the most recent census (2004).

⁵³ Often whole families moved from one region to another (UNDP: 35).

Kinship has been understood from a spatial perspective in terms of residence patterns and changing relationships between a married couple and their natal and affinal kin (Vatuk 1972; Singerman 1995; Inhorn 1996; Hoodfar 1997; Jansen 1987; Jenny White 1994). Ethnographic work on Cairo suggests that changes in residence pattern may be related to a shift in the way marriages are formed. As Inhorn writes of the politics of marriage following 'the increasing nuclearization and separation of marital partners from their extended families', 'under one roof, young Egyptian couples ... have come to see their marital relationship as primary' (1996: 148) She suggests that this has strengthened conjugal connectivity at the expense of patriarchy (ibid: 149). In Istanbul, Jenny White's study on rural peasants who migrated to Istanbul, found that extended family retained significance, even when people lived in nuclear households (1984: 43). Singerman (1995) and Inhorn's (1996) approach to studying an urban centre in rapid expansion raises important questions about how the family and informal networks may be evolving in urban Tunis.

Anthropological work on Tunisia in past decades hints at the significance of migration to marriage patterns (Abu Zahra 1970; Zussman 1992). Abu Zahra described how traditional Tunisian kinship 'is expressed in terms of space' and 'the greatest humiliation that could befall a person [is] that he should leave his place of origin to live elsewhere' (1970: 1096). If, as Abu Zahra suggests, place of origin is significant to people, how does this affect the webs of sociality in the new neighbourhoods of Morouj, where people are necessarily distanced from their roots? What are the implications of changing residence patterns and forms of relatedness on the way marriages are formed and the way they break down? What are the moral implications of place and space and of the changing relationships between people and places as they are distanced from their places of origin?

Residence patterns have also been implicated in facilitating or constraining access to divorce. In her study on divorce in Yemen, Wuerth found that a woman wanting to take her husband to court is unlikely to do so whilst living with him, particularly if he is not paying maintenance; therefore, only a woman with family to support her can proceed to make a legal claim (1998: 163). Divorce is often discussed in ethnographic work based in the household or neighbourhood in terms of the stigma associated with divorce that may deter women, in particular, from divorcing (Inhorn 1996; Abu Lughod 1986). This could be seen as one way in which anthropologists writing on divorce in Arab or Muslim societies have traced the link between the law and ethics ethnographically, as objections

to divorce and the refusal of some to access their legal rights are couched in moral terms (frequently in terms of a 'discourse of honour' (Tapper & Tapper 1992/3: 11-13)).

If I decided to study divorce in the neighbourhood alongside the courthouse, it was also to gain insight into those who do not divorce. I did not want to be limited to meeting only those who made it as far as the divorce court.

How, then, does the structure of the new neighbourhood and the forms of relationship built within it, encourage or limit peoples' access to legal rights in marriage? Who are those who, for various reasons, are unable to instigate a divorce or who decline to access their legal rights?

FAMILY AND ETHICS

Literature on kinship and marriage traces relationships between morality and economic change (in particular the changing role of women) and the (often related) changing use of space and morality. My approach seeks to combine these perspectives and to link them with the law through a detailed ethnographic study of marriage and legal practice (Mundy 1988).

Joseph connects moral discourses on kinship and patterns of relatedness with the practice of the law in terms of the ability of citizens to access their rights. Writing on Lebanon, she demonstrates that rights are relational and experienced through what she calls 'patriarchal connectivity' (1997). As suggested in the ethnographic work on divorce cited above, citizenship rights, in particular those pertaining to personal status laws, are mediated by the webs of relationships in which an individual is suspended and through which he or she is connected with the wider polity (Mundy 1995; Strathern 2004). Consequently, an understanding of the PSC and its reform of marriage and divorce, and how this laws translates into practice, requires an exploration of the 'small everyday processes of relatedness (that over time) have a larger scale political importance' (Carsten 2004: 4). Do these factors structure the ability of Tunisian citizens to access their rights in divorce?

Tracing the connections between law and ethics will make it possible to comprehend peoples' experiences of the law and to gain a sense of the extent to which the law may, or may not, promote a changed status for women or for men. By extension, the

operation of the law cannot be understood apart from these webs of sociality and patterns of relatedness in which its operation is suspended.

REFORMING THE LAW

Family law most frequently enters ethnographic work on the family in the Middle East implicitly as part of the political context that shapes the practice of kinship and marriage (Singerman 1995; Inhorn 1996; Hoodfar 1997; Jenny White 1994, Hoodfar 1994). From the vantage point of the house, the operation of the law is scarcely addressed. In contrast, court-based ethnographies focus predominantly on the law in practice (Osanloo 2009; Mir Hosseini 1993). Following work on gender and citizenship in the Middle East and centred on questions about women's rights in practice, these works often focus on women's experiences of personal status laws (Osanloo 2009⁵⁴; Hill 1979). Accounts that, at least to some extent, combine legal and social perspectives (Wuerth 1998; Bowen 1998; Mundy 1995; Bear 2007a) are less common but more telling. I aim to make explicit the embeddedness of the court and its work in broader social processes. At issue is how the law is involved in the continual process of reassembling the moral, or to borrow Sana Ben Achour's image, how both the court and the neighbourhood are sites in which the moral is in continual construction (2004).

In the case of Tunisian personal status law, this construction occurs through the categories and procedures (Riles 2005) that make the practice of ordinary ethics integral to the operation of the law. The situation differs from that described by Dahlgren, for instance, who, in her work on *mahr*⁵⁵ in Yemen, discusses conflicting representations of gender roles and rights by examining conflicts between customary practices and the prevailing legislation (2005). In Tunisia, moral conflicts are present *within* the law itself.

Voorhoeve points out that innovation of the PSC lies as much in the fact that it was codified as in its content (2012). The codification of personal status law has been said to lead to greater fixity in areas where the *sharia* was more flexible and adaptable to local

⁵⁴ Osanloo also describes women's koranic classes but does not specifically address the house or neighbourhood ethnographically.

⁵⁵ Payments made to the bride by her husband as part of the marriage agreement.

circumstances.⁵⁶ As we shall see, however, the strongest controversies surrounding Tunisia's PSC, stem from areas of the code that leave space for ambiguity. We shall see that the PSC leaves flexibility and space for interpretation in some areas regarding the way marital duties are understood in legal practice, whilst remaining more rigid in others.

OPEN NORMS, INTERPRETATIVE SPACES

The PSC made three types of divorce (divorce for harm, divorce without grounds, divorce by mutual consent) available to both men and women. In the first two cases, whenever the divorce is contentious, the family judge must rule on who has suffered the most 'harm' due to the marital breakdown, either to validate a divorce for harm or to establish the level of compensation payments due in a divorce without grounds. ⁵⁷ 'Harm' is established according to whether each litigant has fulfilled, or failed to fulfil, their 'marital duties.' The judge must also rule on the custody of any children according to the 'best interest of the child'.⁵⁸ In this way, the legal categories 'marital duties' and 'harm' play a central role in shaping the divorce settlement.

The PSC, however, fails to define these essential legal categories. As Voorhoeve states, based on her research on judicial decision making in personal status cases in the court of Tunis, 'the law does not define the term 'harm' (*darar*) in any way. Its meaning is left vague and judges are free to interpret this term' (2012: 204). Equally, 'marital duties' were redefined in the 1993 reform of article 23 of the PSC, yet this only served to make their definition more ambiguous (Chedly 2007); since this time, each spouse must fulfil their 'marital duties according to custom and habit.' This leads, 'to a law that is illegible, difficult to interpret and strongly incoherent' (ibid: 559). Sana Ben Achour emphasises the difficult position of the family judge as interpreter, caught 'in a permanent tension between conservatism and innovation' (2005).

How do judges interpret these ambiguous legal terms in divorce cases? Which version of marital duties and which form or forms of family are reinforced via the practice of the law?

WT Murphy has argued that if the law is an ethical space, it is because: 'the legal subject as a surface on which variations will be effected brings into play an array of

⁵⁶ The codification of Islamic family law lead to a loss of flexibility and a reduction of the judge's discretion (cf Osanloo (2009 :203); Tucker (1998) read in Sonneveld (2010:109)).

⁵⁷ See chapter 6.

⁵⁸ See chapter 7.

predisposition and prejudices on the part of judges and juries, preprogrammed interpretative schemes for interiorizing the driving forces of human behaviour, forces which are not visible and require interpretation' (1997: 95). Consequently, it is through this practice of judgement, that is simultaneously legal and moral, that legal practice is intertwined with ordinary ethics.⁵⁹

Anthropologists (Al Ali & Pratt 2009;⁶⁰ Messick 1993; Starr 1978; Wuerth 2003) have written of the authority vested in those whose work it is to interpret the written laws; the realisation of women's rights lies in the hands of the interpreters of personal status laws as much (or more than) in the law itself. Equally, a litigant's experience of accessing rights is shaped by the extent to which legal outcomes depend on judicial discretion.⁶¹ Wuerth, in her study on divorce in Yemen, found that much hangs on the character of the judge (1998: 6).⁶² I will argue that the fluidity of the law and its ambiguities generate considerable uncertainty and anxiety, not only for feminist activists who are concerned about the morality of the law, but for litigants who experience it first hand and for the judges who interpret the law. What is the nature of this uncertainty? What happens in these interpretative spaces? What are the implications of these ambiguities of the legal system for the state's perceived legitimacy and understandings of justice?

Feminist legal scholars in Tunisia have expressed their fears and concerns about how the PSC may be interpreted in ways that go against 'women's rights'.⁶³ Sana Ben Achour feared that the PSC's ambiguities weaken its emancipatory potential: 'Exploiting the silences, contradictions and ambiguities of the (legal) text, the judge reintroduces Islamic law' (2004: 9).⁶⁴

⁵⁹ This analysis of the law resonates with Lambek's argument (2010) that places (moral) judgment at the fulcrum of ordinary ethics.

⁶⁰ Writing on the drafting of the Iraqi constitution (2005) and fears that the arbitrary interpretation of the laws, rather than Islamic law per se, would lead to a loss of women's rights (Al Ali & Pratt 2009: 112).

⁶¹ See Engle Merry on the ways in which experiences with the legal system are necessary to confirm an individual's rights-bearing subjectivity (2003).

⁶² Elsewhere, Caroline White (2012), discussing immigration law in the UK, found the experience of litigants fraught with uncertainty as the outcome of their case hinged on whether they fell upon the right judge on the right day.

⁶³ Hafsia discusses the influence of cultural values and social class in guiding a judge's decision historically in Tunis (2005: 13). See also Charrad (cited in Gilman 2000: 91); Bessis underlining the conservatism of the judiciary (1999: 4); and Chekir (1996).

⁶⁴ My translation from French.

The opposition women's organisation⁶⁵ denounced this ambiguity, together with the utilisation of the religion and a generalised reverence for patriarchal norms as contributing to the continuation of the 'patriarchal oppression of women' (Bessis 1999). Voorhoeve notes that the law does not guide judges as to how to interpret the lacunae in the PSC.⁶⁶ Unlike Moroccan or Algerian law, Tunisia's PSC does not make reference to Islamic law in case of lacunae; consequently, Tunisian jurisprudence sometimes interprets the silences of the legal code otherwise (Chedly 2007: 555). Recalling that judges and their judgements may also become subject to judgment by their peers in the Courts of Appeal and Cassation, Sana Ben Achour noted that the ambivalent attitude of the government causes judges to be insecure about how they should apply the law. The role of *sharia* is unclear. Should they refer to *sharia*? Should they refer to the state's expressed desire to support women's rights? In addition, the state has declared the *sharia* to be a source of women's rights, or is this a contradiction in terms?⁶⁷ Voorhoeve points out (2012: 209) that judges have no training in *sharia* (Islamic law being taught neither in law school nor in the school for judges and could, therefore, not apply it even if they wanted to. In these circumstances, what would it mean to say that judges are 'applying *sharia*'? What does this suggest about the relationship between the state and Islam?

Based on an ethnomethodological study of judicial decision making in the Court of First Instance of Tunis,⁶⁸ Voorhoeve considers the factors that curtail freedom in judicial interpretation in light of the judge's own accounts of this activity (2012: 201). Voorhoeve lists the factors which lead both to uniformity and to diversity in judicial decision in personal status cases. 'Custom and habit', 'good morals' and '*sharia*' are all factors that lead to uniformity'. 'Custom and habit' is referred to as justification for the wife's duty to cohabit with her husband, a marital duty that is not specified in the PSC.

Tunisian jurist Chedly has echoed Sana Ben Achour in describing 'equality ... as a continual construction site.' These perspectives point to the continual labour of defining what the PSC means via the practice of the law. Like Voorhoeve (2011), rather than asking whether '*sharia*' is being applied or not, I explore ethnographically what happens in these interpretative spaces. How are these ambiguous legal terms interpreted in divorce cases?

⁶⁵ ATFD (Association Tunisienne des Femmes Démocrates). Sana Ben Achour was a leading member of this association, together with Hafidha Chekir, another renowned feminist legal scholar.

⁶⁶ Meziou (1992) cited in Voorhoeve (2011:76).

⁶⁷ Ben Achour (2007) cited in Voorhoeve (2011: 86).

⁶⁸ Fieldwork was carried out in 2008 at the same time as research for this thesis.

How can we understand the judgement process involved in divorce cases in which these categories play a central part?

Anthropologists discussing the law have pointed to the problematic relationship between legal and social categories (Riles 2002). Pottage has argued that legal categories are 'resources from which persons and things are fabricated' (2004: 25) and as such produced entities that are more than artefacts of the legal procedure. WT Murphy pursues the problematic and dynamic relationship that exists between legal and social categories and finds a 'special affinity' that exists between law and society as 'legal categories were social categories' and there is 'no problem of translation' (1997: 187).

This point resonates with Lambek's argument surrounding the place of criteria in ordinary ethics. He writes that 'criteria for practical judgement are established and acknowledged in performative acts, whilst acts emerge from the stream of practice. Performance draws on previously established criteria.' (2010: 39) According to Lambek, then, 'we may find wellsprings of ethical insight deeply embedded in the categories and functions or language and ways of speaking, in the commonsense ways we distinguish among various kinds of actors or characters ... Thus in the shared criteria we use to make ourselves intelligible to one another' (ibid: 3).

It is through these shared criteria, or assumptions, that Bowen suggests norms enter the work of the law (1998).⁶⁹ This insight raises questions about the moral criteria that are brought into play as marriages are formed and break down in Tunisia. Which criteria are set up by the act of marrying in Tunisia? How are these criteria transposed into the work of the law as people divorce? What are the implications of these criteria being brought into legal practice?

Bowen's insight that much can be learned from paying attention to the assumptions that underlie the arguments used in court judgements also highlights the role played by lawyers and litigants in interpreting the law via the performances and narratives they present in court. Legal practice can be examined from the differing perspectives of the judges, litigants and lawyers who are involved in creating and interpreting the arguments used in divorce cases that are shaped but not determined by

⁶⁹ Fuller made a similar point: 'the authoritative legal discourse of the professionals is ... a complex and counter-intuitive transformation of everyday relational or moral understandings.' (1994: 11).

the legal code (Lynch & Bogen 1996).⁷⁰ Which arguments are put forward in the interpretative spaces allowed by the law's failure to clearly define marital duties? Or, more simply, how do litigants and their lawyers try to persuade the judge? (chapters 4, 5 & 6)

JUDGE AND COMMUNITY

Inspired by Rosen's work on judicial reasoning in the context of Islamic law,⁷¹ the judge as interpreter has been discussed in relation to the nature of his connection with the community served by the court (Wuerth 1998; Sonneveld 2010; Rosen 2000). Sonneveld, writing on personal status law in Egypt, notes a key difference between the judges of the Ottoman era and the contemporary judges, 'the former having roots in the community where they practiced, possessed a profound knowledge of the region and its people' (2010: 106-9). Tunisia (like Egypt as described by Sonneveld) now follows a system of rotating judges every four years. Equally, 'judges working in major urban centres, such as Cairo ... are very unlikely to form any connection to the communities where their litigants are coming from.' She argues that this can lead to a rupture between judge's perceptions and litigants' experiences of social reality (ibid: 109).

Unlike the other contexts studied in the literature on Muslim family law, Tunisian judges may be either male or female. Since independence and the closure of religious courts, all the judges are state officials⁷² who, as mentioned above, are trained in secular law rather than the *sharia*. Required to rotate every four years, Tunisian judges do not specialise in one area of law. When I began fieldwork in 2007, the chamber of the Court of First Instance of Ben Arous, dedicated to personal status issues and where I studied, was presided over by a female judge. She was replaced by a male judge in 2008 who had never before worked on personal status issues. Consequently, fieldwork took place under both a female and a male family judge. In addition, I spent time with the male cantonal judge of Ben Arous who was responsible for the maintenance cases brought by wives against their husbands and that are frequently cited in divorce cases.

Messick's analysis of the relations of interpretation and the conceptual contrast between *muftis* and judges, whilst without parallels in the Tunisian context, raises some fundamental questions about the interpretative role of the Tunisian family judge. In

⁷⁰ Also see Engle Merry who highlights the role of 'intermediaries' (in her case NGO participants and community leaders) in 'translating ideas' (in her case transnational human rights approaches) to 'make them meaningful in local settings' (2006: 38).

⁷¹ See Mundy (1991) for a critique of Rosen's approach.

⁷² cf Gobe (2010) on the relationship between lawyers and the Tunisian government.

Yemen, muftis acted as arbiters and delivered opinions (*fatwas*), commonly connected with marital disputes (1993: 136-8). Their purview was 'locally generated questions ... related to locally interpreted jurisprudence,' making muftis, 'the creative mediators of the ideal and the real of the *sharia*' (ibid: 151). In addition, 'as jurists and moral beings, *muftis* traditionally distanced themselves from the considerable ambivalence surrounding the judgeship itself, and the court, which many considered an arena of corruption, coercion and error' (ibid: 142) The form of interpretation in which each engages is related to the context in which each practices judgement: 'the judge's *mahkama*, or court, is ... the quintessential public forum, a locus for the coercive exercise of state power' (ibid: 144).

In Tunisia, we shall see how these functions become merged in complex ways. As well as reaching judgement on the divorce case (based on the divorce file) the family judge must also try to reconcile the couple in person (article 32).⁷³ What are the implications of these intimate disputes being drawn into the institutionalised space of the court? On which basis or bases does the family judge reach his judgement?

WT Murphy, in a very different context, speaks of the distancing that occurs between the judge and litigants as the 'law is a decontextualised space in the sense that it is cut off from the contexts of application or implementation' (1997: 206). In this light, the Yemini court is a very different kind of 'ethical space' (ibid: 195), if we take the relationship between the judge and mufti and the communities in which they work as well as the politicised nature of the *mahkama*, into account. How is the Tunisian family judge connected with the community served by the court? What are the implications of this for the way in which the law is enacted?

THE SUBJECT OF JUDGEMENT: PERSONHOOD⁷⁴

Although, theoretically, the divorce judgement is based on the written divorce file alone,⁷⁵ the PSC requires the couple to encounter the judge at least once before they may divorce for a reconciliation session (article 32). Although, due to the heavy workload, these

⁷³ Traditionally, the families of both couples would be involved in trying to reconcile the couple in the event of marital dispute. Comparatively, in Iran (as seen in Longinotto & Mir Hosseini's film, *Divorce Iranian Style (1998)*), reconciliation takes place outside the court by mediators appointed (often within the families) who subsequently report back to the judge.

⁷⁴ Concepts of personhood have been central in work on the anthropology of the law (Pottage & Mundy 2004; Douglas 1995), in the anthropology of ethics or morality (Mahmood 2005; Zigon 2007 & 2009; Heintz & Rasanayagam, 2005)⁷⁴ and in anthropological work on gender (Moore 1988; Butler 2004; Busby 2000). This discussion will focus on the intersection of legal practice with ethical personhood that is most relevant to the ethnographic material that follows.

⁷⁵ We shall talk about these files in detail below, and in chapters 5-7.

sessions could be divided between the judge's colleagues, the male family judge decided to hold them all himself. He felt a strong sense of responsibility for his work and did not want to 'divorce' a couple he had never met. 'It is not the same as just seeing the papers,' he told me. 'It is *personal* status law. You need to see the *person*.' Consequently, as we shall see, a first moment of judgment occurs when couples meet the judge in these reconciliation sessions (chapter 4).

In her work on women's human rights, Engle Merry has argued that such 'experiences with the legal system,' are integral in enabling individuals to generate particular forms of subjectivity and to adopt a 'rights consciousness (2003: 342).' Her work emphasises the important role of institutions and their agents in supporting litigants as they generate this form of subjectivity by taking 'these rights seriously when being claimed by individuals (ibid: 379).'⁷⁶ Women's rights, or more specifically, the ability of victims to take on a 'rights consciousness', therefore, are generated through legal practice as individual litigants and legal personae⁷⁷ interact in the institutional setting of the court.

Literature on family law in the Middle East often centres on women's rights and experiences and discusses the operation of the law in terms of women's empowerment, sometimes suggesting that women have found empowerment in unlikely places (Mir-Hosseini 1993; Osanloo 2009). Whilst Wuerth holds the law responsible for validating gender inequality (1998: 254), according to Osanloo, it is precisely this inequality of rights that has lead women to engage more actively with the law in Iran (2009: 195). Mir-Hosseini argues how women felt empowered by the 'embedded contradictions' (1998: xiv) which result from the 'clash between the ideal and the possible' (1993: 121), actively manipulating official discourse to show the husband's failure to fulfil his juridico-religious obligations (ibid: 106).⁷⁸

Their interpretations reflect a structure of the law that requires women and not men to file for a judicial divorce. But in Tunisia both men and women must file for

⁷⁶ Also see Engle Merry 2006.

⁷⁷ Following Mundy & Saumarez Smith (quoting Thomas 1998): 'the term 'personae' is used for legal institutional agents notably of government. These personae are central to the social relations of property and are not reducible to the sentient human persons who may act as legal personae.' (2007: 257).

⁷⁸ Also see Osanloo 2009:192.

divorce.⁷⁹ Since losing their right to unilaterally repudiate their wives outside court, the majority of litigants filing for divorce in court are men.⁸⁰

How do men experience these laws that aspired to promote women's rights? If empowerment and 'agency' have provided anthropologists (and others) with an analytical vocabulary through which to understand women's experiences of women's rights, how can we apply these categories to men's experiences? (Engle Merry 2003: 2)

Building on critiques of feminist theory, in particular its treatment of freedom or individual autonomy, Mahmood elaborated her theory of agency by attending to the practice of ethics and ethical personhood (2005:2). This allowed her to unveil diverse modalities of agency that better help to comprehend the situation of women living in a patriarchal system based on gender inequality. Whilst she traces the ways in which 'ethical practices of self-formation take on a new, distinctly political relevance,' (ibid: 34) she does not discuss the implications of the law being one set of 'procedures, techniques and discourses through which highly specific ethical-moral subjects come to be formed' (ibid: 28). Which modalities of agency emerge when we pay attention to the nexus between law and ethics? How do the ethical dimensions of legal practice shape the ways in which litigants and legal agents experience the law as promoting (or failing to promote) women's rights?

Writing within the anthropology of ethics, Laidlaw developed his critique and alternative conception of agency by attending to the role played by responsibility. He consequently defines agency as: 'the ways in which responsibility or accountability for actions and their effects are attributed to persons and things' (2010: 148). In his reading, ethical practice, in the form of moral judgement, shapes modalities of agency. Although he does not explicitly link his analysis with the law, how does legal practice, in the form of

⁷⁹ The PSC also changed the basis upon which the divorce judgement is made. Historically, the Muslim family judge had a significant interpretative role. According to Tunisian historian Hafsia, he (at the time it was always a male judge) 'rules on the husband's behaviour ... according to social status and the custom of the place,' (Hafsia 2005: 58) leading her to argue that family law was in fact a kind of 'customary law'. She also suggests that that this system worked in the wife's favour as the judge aimed to make a harmonious marriage and tended to accept the wife's assertions about the husband's bad conduct without asking her for proof. (Hafsia 2005: 58) This contrasts strongly with the picture painted by Lagueche above, in which women were effectively punished and imprisoned for asking for a divorce. In both cases, however, the divorce judgement is reached by careful witnessing by witnesses who are known to be honourable and who report directly to the judge. In both cases, women are required to justify their actions and are placed under a form of scrutiny that men are not subject to in order to obtain a divorce.

⁸⁰ 70% of divorce cases in Tunisia between 1987 and 2000 were brought by men (CREDIF 2001). In the sample of 196 divorce files I examined, 63% were initiated by men. Notably, a majority (68%) of the cases of divorce without grounds were initiated by men rather than women. Prior to the reforms, Lagueche found that of the 120 divorce cases she studied between 1878-1940, 55% represented divorce by repudiation (1983).

legal judgement – that I argue is intimately intertwined with moral judgement - shape modalities of agency? What can be learned about agency when seen in the light of the practice of divorce law, read as one such mechanism for attributing responsibility to persons? How can this enhance our understanding of the experiences of both male and female litigants as they strive to access their rights in the divorce court?

THE SUBJECT OF JUDGMENT: DOCUMENTS

Documents play a central role in Tunisian divorce law in determining the responsibility of persons in divorce cases. During the time I spent in the Court of First Instance of Ben Arous in the chamber dealing with personal status issues,⁸¹ alongside observing daily life in the office and the reconciliation session, my main activity was to copy the content of divorce files by hand. As I wrote, I became intimately acquainted with the nature of the documents and the kinds of arguments found within them.

Laidlaw's alternative conception of agency (discussed above) is of additional interest as it encompasses the role played by non-human actors, to use Latour's terms that partially inspired his approach, in the attribution of responsibility. Viewing documents as such, what role do they play in making husbands and wives accountable in the divorce court? I will argue that ordinary ethics is intertwined with legal practice as litigants (and the judge) attempt to establish truth in court. How is truth established in court? What are the consequences of Tunisia being a documentary based legal regime (chapters 5 & 6)?

My approach to these documents is not dissimilar to my approach to the house. Whilst taking their materiality seriously, I read documents as a nexus through which relationships can be traced. In this way, I draw inspiration from Riles (2006) whose focus on documentary practices allows for a deeper understanding of the dynamic relationships that exist between the judge's interpretative power, the 'agency' of litigants (both male and female) and lawyers who are involved in creating those documents, along with the authority of the documents present in the divorce file.

The emphasis on documents departs from the traditional use of witnessing as the main form of evidence in divorce cases. Hafsia writes that the judge in Tunisian divorce cases prior to independence could conduct an investigation or appeal to eyewitnesses if required (2005 :60). Witnessing remains a key form of evidence in contexts with Islamic

⁸¹ I attended the court regularly between May 2007 and December 2008.

family law (Wuerth 1998; Rosen 2000; Mir-Hosseini 1993⁸²). Wuerth, in Yemen, found that the community is literally present in the divorce court, as its members must be relied on as witnesses. The nature of evidence, notably the use of written rather than oral forms of evidence, can, therefore, be seen to influence the mechanisms via which 'society' enters the 'law'. Wuerth discusses patterns of sociality, addressing the ability of litigants to produce witnesses in personal status cases and the relations of dependency that this creates between people. She also refers to the judge's relationship with those in the court's jurisdiction; in Yemen, her judge lived in the community and may have known the litigants personally. Apparently some of them came to visit him in his house, and it was not unknown for them to bribe him.

Elsewhere, anthropologists have explored the anxieties of those who need to interpret official documents, given the distance between the documents and the people they represent (Kelly 2006; Bear 2007b). The potential constraints on the judge's scope for interpretation are not fully contextualized in literature discussing the role of the judge in family law (as discussed above), in particular the role of documentary evidence and the judge's attitudes to that evidence. Voorhoeve found that the case file and the presence of particular documents was one factor leading to uniformity in judicial decisions on divorce (2012: 213). However, she also found diversity in the assessment of evidence; the same evidence could lead to different interpretations and outcomes when evaluated by different judges (ibid: 217).

This raises questions about the position of the Tunisian family judge, someone who, as we shall see, experiences his own share of anxiety about the documents upon which he must base his judgement. How is he related to the community he serves given that the jurisdiction of his court is around 500,000 people? In this context, how does he ascertain whom, or which pieces of evidence, to trust?

METHODOLOGY

The literature explored above on personal status law in the Muslim world can be crudely divided into two categories according to the methodological approach taken and the focus of the study. Primarily court-based studies focussed on the law in practice (Mir-Hosseini

⁸² Although this appears more the case in Iran than in Morocco.

1993; Osanloo 2009; Voorhoeve 2011) contrast with neighbourhood or household based studies focussed on kinship, household economics and the social practice of marriage and divorce (Inhorn 1996; Singerman 1995; Hoodfar 1997; Abu Zahra 1982; Holmes-Eber 2003). This is not to say that the former studies do not touch upon the social dynamics of divorce, or that the latter do not acknowledge the impact of the legal framework on the practice of marriage and divorce, to varying extents.

My research project began with a methodological commitment to bridge between these approaches in order to see marriage and its breakdown from both perspectives. I wanted to get a sense of those who do not divorce in spite of marital difficulties and who never enter the legal system, as well as what happens in successful marriages as a backdrop against which to understand marital breakdown in the court. Most significantly, I wanted to show the interconnectedness of law and ethics by tracing these connections ethnographically.

Having carried out undergraduate studies in French and German and married a Frenchman, I spoke fluent French before starting fieldwork. I found that people frequently assumed that I was French and, by extension, that I was Christian or Catholic. I did, however, need to learn Arabic, both modern standard (the language of the court files and the legal code)⁸³ and Tunisian (the language spoken by Tunisians of all social classes). Consequently, the research material was gathered in a mixture of all these languages. I had not wanted to use a translator to collect data on such an intimate domain of life. I found that my sometimes shaky grasp of Tunisian Arabic acted as a great ice-breaker, yet was sufficient to conduct all the interviews myself.

As research took place between 2004 and 2008, it was necessary to grapple with the difficulties of conducting research in Ben Ali's dictatorship and the general air of mistrust and unease that prevailed during this time. I was conscious of wanting to put my informants at ease and, still more importantly, to avoid putting anyone in a compromising situation with the state.

As I wanted to conduct participant observation in a family home, to observe the dynamics of married life, I had to search for a family who were willing for me to live with them. This was not an easy task. My ethical concerns lead me to delay my stay with my

⁸³ I studied Modern Standard Arabic at the Bourguiba Institute for Modern Languages for two academic years and for two summers. In addition, I took classes in Tunisian Arabic at the Bourguiba Institute and with the Soeurs Blanches, as well as a number of private classes in Arabic.

host family until I had gone through the lengthy process of obtaining official research permission from the Ministry of Education.

My choice of host family could not have been more fortuitous as they rapidly introduced me to one of the clerks, Karima, who worked in the court of first instance of Ben Arous, and who in turn introduced me to the wonderful female Family Judge. With support from this judge, it was much easier to obtain permission from the Ministry of Justice to study in the court. I spent many days at court in the period between May 2007 and December 2008. Meeting Karima was crucial to my fieldwork as I got to know her well and literally followed her between the court and the neighbourhood.⁸⁴

This dual perspective allowed me to gather data from diverse sources.

In Morouj, I spent 6 months living with Besma and her family (3 months in 2007 and 3 months in 2008). Between these times, I visited the family regularly, conducting interviews, joining Besma on visits to her extended family and neighbours and attending wedding celebrations. I also drew the family trees of four households I knew well, tracing marriage and later education, employment and place of residence to the extent that my informants' patience and generosity allowed me to do this. The air of mistrust and my desire to be respectful of my hosts strongly constrained my movements, restricting me to only working with those families known to Besma and her family. By good fortune, a friend I had met via my husband, who worked in Tunisia as a diplomat during my fieldwork, also lived close by and provided a further, acceptable contact in the neighbourhood.

In the court, other than my general observations of daily life in the office, I attended a number of public hearings related to divorce. Although 'public', these sessions were not open to the general public, but limited to those whose divorce cases were being heard during that session (as I discovered when, much to the amusement of the clerks who knew me, a police officer asked me to leave the first session I attended).

I was fortunate to have the opportunity to carry out research under two family judges. The first, female judge, a wife and mother in her forties, was rotated to a new

⁸⁴ See chapter 3.

position⁸⁵ in the summer of 2008 and I completed my fieldwork under her replacement, a male judge, also married and a father, in his forties who had never worked on family law before. I also got to know the Cantonal Judge responsible for cases related to *nafaqa* (maintenance allowance). The male Family Judge gave me the opportunity to observe the reconciliation sessions that are compulsory before a divorce is granted and which take place in the privacy of the judge's office. I was also permitted to observe a couple of confidential sessions between the Family Judge and the person in court responsible for protecting children in danger. I interviewed two judges who did not work at the Court of Ben Arous (one female judge who worked at the Court of Tunis on Personal Status matters and one senior judge, who had had a varied career and taught law at a university).

In addition to this, I had the opportunity to interview Hafidha Chekir, the Tunisian feminist legal scholar mentioned further above and to meet Souhayama Ben Achour,⁸⁶ who generously provided a wealth of documentation on the Tunisian doctrine relating to the PSC. To help me understand the legal Arabic and terminology I found in the files, I worked with a graduate law student, who himself aspired to become a judge, who furthered my understanding of the PSC and provided insight into the way he had been taught this subject.

One of my key sources of data in court was the divorce files that filled every imaginable space in the court office. For reasons of confidentiality, I was unable (and never asked) to photocopy the files. Conscious of the trust invested in me by the court, I spent considerable time copying out the various documents by hand in Arabic, rendering my notes anonymous by omitting personal data. I made it a rule never to examine the file of someone I knew or had interviewed. It would have seemed unfair to have not left my informants in control of the information they gave me, once they were no longer anonymous to me.

To my surprise, I came to know as many lawyers as litigants. I was able to talk at length with both male and female lawyers working on divorce cases about their experiences of the law in practice. One of the key difficulties of my research was finding people willing to talk to me about their divorce. I found that my status as a young, female foreigner helped in this to some extent (although this created its own problems as far as talking to divorcing men was concerned). Those who did generously share these intimate

⁸⁵ Judges in Tunisia are not specialized in a particular area of law and rotate between different courts every few years.

⁸⁶ Professor of law and niece of famous feminist Sana Ben Achour (cited further above).

details of their lives with me often commented that they felt able to do so as I was an outsider and sensed that I would not judge them. I instantly dropped any illusions of talking to the litigants coming into the office to deal with paperwork or for their reconciliation sessions. Mariam, a lawyer who became a friend, offered to help me approach litigants who were waiting in the corridors. We rapidly concurred that it simply did not feel appropriate to solicit people who were often anxious about their divorce and ill at ease at having to come into contact with state officials. Of those I did speak to, some I found were relieved to find a sympathetic ear and someone willing to listen to them. Some, like Saida, who lived in the neighbourhood or Leila, whose sister happened to be a lawyer, I came to know well. Others, I met only once or twice, like ships passing in the night, sometimes through a mutual acquaintance or by chance in the court office on a quiet day. Others still were close personal friends who were divorcing or divorced and whose wishes not to be mentioned in this thesis I respect, much as their experiences nonetheless informed my understanding of divorce.

My status as an engaged and then married woman played a role in how I was perceived by my informants and also in opening up different social circles to me. It also provided a degree of amusement to the many people in court who asked me if I was there to get a divorce, when I replied that I was about to get married. Through my husband and his colleagues, I was able to meet Tunisians belonging to higher social classes, including the Tunisian elite, living in different areas of Tunis and who expressed a diverse array of political opinions, some of them belonging to the political opposition. My own activities – notably joining a gym in the city centre – also opened up different social spaces and allowed me to meet the two people who became my closest friends. One of these people was in the process of divorcing as I left the field and his experiences too implicitly inform this work.

Overall, I was able to observe marriage and divorce in a variety of settings and gather data from a range of sources. It is these multiple perspectives that opened questions about how the morality and the law are connected in multitudinous and complex ways.

OVERVIEW

Chapter 1 introduces the neighbourhood in Morouj and its recent formation. Reading relationships via the house (Carsten 2004; Carsten & Hugh-Jones 1995), I trace the relationships that are important to my informants (whether kinship or friendship) and the way these relationships are formed in relation to changes in the structure of the house. The issue of how to know whom to trust, or, in other words, how people judge the ethical personhood of others, and the sense of uncertainty and anxiety that results from this moral dilemma allows one to explore the concepts of ethical personhood, moral criteria and dislocation that will prove central in this dissertation.

Chapter 2 continues to pursue these themes whilst exploring how marriages are made. Ordinary ethics and moral judgement are pivotal to 'consent' in marriage, the selection of a spouse and the decision to terminate a marriage. Marriage is a context where the gendered criteria for ethical personhood are central: what constitutes an ideal husband or ideal wife? How are 'marital duties' – the key legal category used in divorce cases – understood in practice in the neighbourhood? Tensions surrounding the practice of marriage intersect with moral questions surrounding sexuality (female sexuality in particular) and practical difficulties and economic realities that oblige many women to leave the house for study or for work.

Chapter 3 traces the ways in which the court both appears 'separate' from and is connected with society, in respect of the moralities of the neighbourhood. The legal processes involved in initiating a divorce case, the interactions between staff and litigants and daily life in the office all reveal the court as an ethical space (WT Murphy 1997). After a first moment of decontextualisation (*ibid*), the law demands a further moment of *recontextualisation*: legal professionals create a bridge between the neighbourhood and the practice of the law. The morality of the law – as perceived through the interactions between state officials and its citizens in the court office - is necessarily bound up with the legitimacy of the state.

Chapter 4 focuses on the reconciliation sessions and the role of the judge as legal interpreter who engages in the labour of *recontextualisation*. Through a description of the reconciliation sessions, looking at both the judges and litigants strategies, this chapter raises questions about how the legal categories of 'harm' and 'marital duties' are interpreted and used in legal practice. The moral criteria that define an ideal husband and

wife are given legitimacy in legal practice and are strongly gendered. As litigants are judged by the family judge, the state is simultaneously under trial itself, as litigants judge the state's legitimacy in terms of its ability to uphold moral ideals.

Following a documentary practice approach, chapters 5 and 6 discuss the implications of the PSC as a document based legal regime. Documents become the basis for both legal and moral judgement and this, I shall argue, entails a further form of dislocation or distancing.

Chapter 5 examines divorce files relating to divorce for harm in light of the documentary evidence used to prove the harm done. We shall see how some forms of evidence are more authoritative than others and how this leads to the gendering of divorce for harm. Inequalities in the law that could be seen to reinforce male power are highlighted by specific dispositions in the legal code that lead to the gendering of legally authoritative evidence in support of divorce for harm. In practice this seems to make divorce for harm easier for women than for men, leading to a sense of the divorce law unjustly favouring women.

Chapter 6 focuses on a different kind of document in the files: petitions, in particular those submitted in cases of divorce without grounds, and on lawyers as the authors of these narratives. Taking the decision to file for divorce, places the litigant's ethical personhood on trial; a 'good' husband or wife would not file for divorce without reason. Lawyers try to persuade the judge to trust their client and their client's judgment, with arguments 'customised' to appeal to the judge. At stake is the cost of divorce – the divorce settlement – perceived both in financial terms and in terms of the social stigma attached to divorce, felt more heavily by women than by men. Within the intimate and confidential pages of these files, broader political and moral debates are played out about the kind of values that the state is expected to uphold.

Chapter 7 looks at how custody is allocated in divorce cases according to 'the best interests of the child' – another open norm that requires the judge to act as interpreter. In which cases is the child taken from its mother? Which moral criteria come into play? Public fears about the immorality of divorce are linked with the inevitable break up of families on divorce, as it is feared that broken families produce broken children with broken morals. Once again, there are implications for state legitimacy in the decisions the judge makes in regard to custody.

The concluding chapter draws together the themes of ethics and law linking these with the state and returns to the question of whether the law in practice can be seen to support gender equality.

CHAPTER 1 -

DISLOCATED LIVES: MAKING MOROUJ

Besma (1)

A safety pin appeared on my bedside table. I had to smile. Besma, the mother of my host family, had clearly put it there following a conversation we had had the previous day. She had been to the hammam where she had seen many of the neighbours and friends I knew. They had told her many nice things about me. Her worried tone indicated the implicit threat underlying these seemingly pleasant compliments. If these women were jealous of me, there was the risk that they could put the evil eye on me and bring me bad luck. (Black magic was something most people I knew took seriously; its being against Islam was proof that black magic existed, as it was mentioned in the Koran). As protection, Besma suggested that I wear a safety pin hidden in my clothes, as she did herself.

INTRODUCTION

The implication that I should not trust those people I knew best and should be suspicious of their intentions underlines the atmosphere of mistrust and uncertainty that marked life in the neighbourhood.

The ethical practices described in this chapter are overshadowed by the radical uncertainty generated by living in a dictatorship intolerant of any form of opposition and well known for its repression of free speech and human rights violations.⁸⁷ This threat formed part of the fabric of daily life and was made tangible to me on a number of occasions. Waiting for a bus on the main road leading from the airport to Carthage, I was by then unsurprised to note that the road had been closed to all traffic. Some time passed

⁸⁷ See the introduction.

before a luxurious black car drove past accompanied by a cavalcade of police cars who I guessed were escorting the French president, due to arrive that day, to the presidential palace. Some more time passed before a single unmarked bus appeared and stopped in front of me and the dozen or so others waiting at the bus stop. Around 10 men boarded the bus leaving me standing alone with a woman and her child. As we exchanged bemused glances, I understood that we had both drawn the same conclusion, that these men had been plain-clothes police ensuring Sarkozy's safe passage. On another occasion, I was interviewing a litigant in a café when a man came to sit down close behind us, apparently listening to our conversation. With a glance, my companion indicated that we should change topic and also change table. This was not an isolated event. Moments like these reinforced the impression of being under continual surveillance and did little to help the prevailing sentiment that will be discussed from a different angle below, that appearances cannot be trusted.

The focus of this chapter, however, is on everyday practices of kinship and relatedness and their intersection with the ethical as people struggled to build relationships and ascertain whom to trust.⁸⁸ Equally, whilst the sense of chronic uncertainty stemming from the oppressive nature of the regime was widely shared across classes, this chapter predominantly explores the ethical practice of building and exercising trust in the lower-middle class neighbourhood where I spent time living with my host family.

Following Lambek (2010), this chapter provides a study of ordinary ethics⁸⁹ from the perspective of the neighbourhood. Ordinary ethics entails two key moments that stand in intimate and dynamic relationship to each other: performance and judgment. As Lambek writes: 'if performance establishes the criteria by which subsequent practice is engaged and evaluated, so too practical judgement generates new performances, that is, relatively formal acts and utterances that recalibrate the criteria and shift the ethical context (2010: 56).'

If judgment is the fulcrum of ethics, everyday life requires people to continually exercise judicious practice (wisdom, practical judgement) as they engage and interact with others and decide whom to trust (Lambek 2010: 20). In particular, we need to understand the basis on which this judgement is made. How do the inhabitants of this new

⁸⁸ This is not to say that the political disappears from the analysis. (See, for instance, Mahmood 2005: 32-34).

⁸⁹ In broadly following the anthropological studies of ethics inspired by Aristotle via Foucault, I also draw inspiration from Mahmood 2005.

neighbourhood go about evaluating the ethics of those they encounter? Which criteria are being established? Or, in other words, how can they tell who is 'good' and who is 'bad'? This question was of key concern to residents of Morouj and was made significant by the structure of the house that changed the way women in particular related to each other. Given that the neighbourhood was made up of strangers, people lacked the intimate knowledge they would have had of each other and their families when they lived in village settings.⁹⁰

Ethnographic work on Tunisia has not paid attention to the ways in which the structure of the city and of the house itself are changing (Holmes-Eber 2003). This chapter understands ordinary ethics in spatial terms. On the one hand, I describe the sociality of the neighbourhood from the perspective of the house. The house provides a privileged vantage point from which to read the relationships that are central to peoples' lives and the 'interrelations between buildings, people and ideas' (Carsten & Hugh-Jones 1995: 1). Significant changes have occurred in the structure of the house since Besma's parents' generation; this change reveals broader shifts in relatedness, not the least how marriages are made and unmade.⁹¹

The house forms both a nexus through which it is possible to understand relatedness (Carsten 2004) and as the stage on which ordinary ethics are played out. The house can be seen as a mediating entity in Laidlaw's sense.⁹² In a sense, we may read houses as we read documents as shaping but not determining practice (Carsten and Hugh-Jones 1995: 15 & 17). If we approach the house as a document, we can explore the responses and emotions that people express in relation to their homes. This allows one to give priority to the 'emotional ties formed in particular households rather than some abstract moral duty of care to particular categories of relatives' (Bear 2007a: 196). It is these daily acts of care, that are inherently ethical,⁹³ which constitute the daily practices of kinship and that characterise patterns of relatedness in the neighbourhood. The structure of the house itself can be seen to make the continued dilemma of whom to trust central to

⁹⁰ Cf Abu Zahra 1982; Zussman 1992 for detail on patterns of relatedness in Tunisian rural settings in the 1960-70s. If I am comparing kinship and patterns of sociality with past anthropological work on rural settings, it is first because there is very little ethnographic work on urban Tunisia and second because the people under study who live in Morouj are mostly migrants who originate from these rural settings.

⁹¹ cf Busby (2000) who pointed to the interrelationship between performance and materiality. Whilst her argument relates specifically to the performance of gender, I extend this to relate to the performance of ethical personhood that is to some extent structured by the architecture of the house and the neighbourhood.

⁹² Agency, he writes, is 'a matter of relations that reach both into and beyond the individual by means of mediating entities, be they body parts, property, artworks, tools, statistical effect ...' (Laidlaw 2010 :163).

⁹³ Arendt read via Lambek.

social life. How, then, is the architecture of personhood connected with the architecture of the house and of the neighbourhood?

If historically Tunisian kinship is expressed in terms of space and as Abu Zahra suggested, it is the 'greatest humiliation that could befall a person that he should leave his place of origin,' (1970: 1069) how do people live in a context defined by migration in which all the inhabitants have left their region of origin? The new neighbourhood represents a strikingly different kind of place from the villages depicted in anthropological work on Tunisia, where local identity is of central importance in structuring social relations and marriage practice (Abu Zahra 1982; Zussman 1992; Platt 1987). Both Zussman and Abu Zahra describe rural villages in which political power is held by traditionally landholding tribal groups of noble descent and in which subtle variations in marriage strategy are observed in different groups.⁹⁴ Ferchiou, in her anthropological study of rural Tunisia in the 1980s, makes the links between space and identity more explicit. She states how peasants remain attached to the land not only as a source of production but as a source of identity, as it continues to define them as a group (1985: 18). What happens when identity becomes dislocated from places due to the increased population movements within Tunisia?

At stake, then, is how ethical personhood is formed and perceived in this urban, heterogenous setting. Mahmood, in her work on piety in Cairo draws our attention to the architecture of personhood of the participants in the women's mosque movement, notably the relationship between interiority and exteriority (2005: 166). Drawing on Butler's insight that 'norms are not simply a social imposition on the subject but constitute the very substance of (an individual's) intimate, valorized interiority,' (ibid: 23) she explores the architecture of ethical personhood, in particular, 'the kind of relationship established between the subject and the norm, between performative behaviour and the inward disposition' (ibid: 157).

Equally, Mahmood suggests how personhood is related to judicious practice. She indicates how perceptions of ethical personhood and differences between interiority and exteriority may be evaluated in different ways. Whereas to one of her female informants acting shy was an essential part of the process of cultivating shyness in the self, Mahmood

⁹⁴ Both acknowledge how the basis of political power was changing as Bourguiba had abolished the practice of *habous* (a form of passing on land) that had the additional consequence of eroding the traditional basis of power of some of these families. Noble families traditionally were considered to descend from Saints (typically the founding saint of the village), another form of power that Bourguiba sought to erode. Tribal groups were defined by blood, being traced back to a common ancestor (Camilleri 1967).

feared that the performance of shyness could be perceived as hypocrisy. Here, she points concretely to ways in which performance and judgment are intimately linked, both in terms of an individual's evaluation of their own morality and in the ways in which their performance may be judged by others. As we shall see, the architecture of personhood appears to have changed along with the architecture of the city and of the house; I argue that the way this change is *perceived* reveals the inherent instability of ethical personhood and contributes to the atmosphere of distrust that permeates life in the neighbourhood.

Firstly, this chapter will describe the nature of Morouj as a place that is marked by different kinds of dislocation: both in the sense that those who live there have been uprooted from their place of origin and because the kinds of homes they have built create a sense of isolation between households. Secondly, based on an extended case study of the family I lived with, I will explore how people went about building relationships in this context. How did people try to ascertain whom to trust? Which relationships take on significance in this new neighbourhood where most people live neolocally? Finally, I will argue that in this setting ethical personhood has become dislocated itself; the bases on which ethical personhood is judged have shifted, leading to the sense of uncertainty and anxiety that marked social relationships and life in the neighbourhood and that, as we shall see in later chapters, is directly relevant to the operation of divorce law.

DISLOCATED LIVES

Besma (2)

Besma's family was one of the first to move to Morouj in 1982, attracted by the sale of cheap land. Previously, the area had been nothing but fields, which stretched into the distance. From the main road, flocks of sheep could be seen grazing on land that awaited the next wave of expansion.

Hearing Jamila, Besma's daughter (now 21) talk about their move to Morouj was a reminder of how recent the neighbourhood is and its ongoing process of construction. Jamila remembers the lack of infrastructure, fences and sparcity of neighbours

surrounding their new house when they first moved to Morouj when she was 10. Apart from one other house next door, everything was trees and soil. Other children complained to their parents that they did not want to stay in this desolate place.

Morouj is located in Ben Arous, one of the four administrative districts of Greater Tunis and part of the capital's sprawling suburbs, which have grown over the last few decades to meet the demands of internal migration towards the capital city. It is a site of the 'rural exodus', as Besma would say, that was at its peak from the mid 1970s until the mid 1980s. Ben Arous is an industrial heartland, home to one of the country's main commercial ports. Bordered by the capital city to the north, the Mediterranean to the east and agricultural land to the south and west, Ben Arous is home to people who live very different lives, although they may only live a few kilometres apart.

Convenience is a good way of summing up the reasons why people come to live in Morouj: cheap land and a good location, not far from the city and their place of work. Where Besma lives is, in particular, home mainly to white collar workers, employees in private companies or civil servants, who were able to afford a loan to buy land there in the 1980s and who have subsequently built a house for themselves. With a monthly household income ranging from 400-800 dinars, considerably more than the minimum wage of 200 dinars, most families would consider themselves fortunate, although rises in living costs mean that their financial situation is often tight.

The Morouj have not yet acquired the status of a 'houma' which are neighbourhoods having their own sense of identity and belonging, such as the old neighbourhoods surrounding the Medina in central Tunis. Morouj is not somewhere you can 'come from'. One of the first things I learned about Besma was that she was 'Kerkennia', a woman from the small island of Kerkenna, her 'bled', attached to Southern Tunisia. I once heard Besma telling someone that she 'came from' Kram (in the Northern suburbs of Tunis), where she grew up, as Morouj is not yet a possible answer. Besma explained that even a man of 60, born in Tunis and living there all his life, would say that he is 'from' Sfax or Gabes or wherever. She said that Tunisians only identify themselves as 'Tunisian' when they are abroad; internally, it is the region of origin, or 'bled' (literally 'country'), that counts.

The significance of Morouj being a new area born of internal migration and inhabited by a mixture of people of different regional origins becomes clear in light of previous ethnographic work on Tunisia cited above. Ancestry is one of the criteria that Hopkins identified in his study of a small Tunisian town in the 1970s that people used in their evaluation of others, alongside social wealth (wealth as defined by local standards) and behaviour in public (1977: 468). As we shall see, to Besma and others, ancestry or, in slightly different terms, place of origin appears as an essence and as a marker of ethical personhood; this marker is becoming increasingly illegible as more and more people live elsewhere.

Besma (3)

Besma quickly taught me the importance of Kerkenna in her life, as well as that of the small village of Sidi Bou Said, where she was born and of Kram (her 'houma' - a suburb of Tunis), where her natal family and close friends continued to live. A shared connection with Kerkenna was also the groundstone of Besma's marriage (her husband was also Kerkenni) and of the closest friendships she had made in Morouj.

Besma's family aptly demonstrates how place of origin no longer correlates with place of residence. Saying that most people in Besma's family 'come from Kerkenna' conceals the spread of their current places of residence, which may range from Kerkenna to Germany or Saudi Arabia. Very few people appear to remain on the island of Kerkenna itself, although some return for their retirement. Certain branches of the family tree moved to Sfax, the closest large city and portal to Kerkenna, most likely due to improved employment opportunities, whilst others live in the capital.

This pattern became familiar to me. Another resident of Morouj, Nabil, a man in his mid 40s, spoke of how his natal village near the Algerian border had become increasingly empty and desolate. When I asked him whether anyone continues to live in the village now, he told me that it is a 'village of migrants.'⁹⁵ At first, like his wife's father (who came from the same village and was also his paternal uncle), just the breadwinner would leave

⁹⁵ cf Latreille (2007) on the impact of migration in these rural settings in Northern Tunisia.

to work in France, then the whole family would move to join them. Tunisia's high urbanisation rate⁹⁶ has been responsible for reweaving the social fabric of new neighbourhoods and making it difficult to know whom to trust.

DISLOCATED PLACE

Besma (4)

Besma described being from Kerkenna as a quality that was 'innate', synonymous with being a 'good' person who can be trusted. People from Northern Tunisia were considered 'bad' compared to those in the South who were 'good' – although this was always said with the frequently used polite disclaimer that there are always exceptions as 'one can find good and bad everywhere'. Given that these people were frequently second or third generation migrants, born and raised in the capital, their identity was tied up in an essence as, like religion and the surname, identity is passed on from father to child.⁹⁷ Although Besma's mother was also Kerkennia, she inherited her regional identity from her father.

Living in this dislocated place where such essence or origin was, or could be, invisible, was something that unsettled Besma, the judge and numerous other friends. Origin could be hidden, if a person so desires. One aspect of regional identity that could be less readily concealed was regional accent, a person's voice revealing their origin to those with the appropriate knowledge. Besma carefully schooled her daughter in the art of recognising different accents and Jamila was proud of her ability to detect which accent came from where.

⁹⁶ Tunisia's urban population grew from 40% in 1966 to 61% in 1994.

⁹⁷ The reason that it is '*haram*' (religiously forbidden) for a Muslim woman to marry a non-Muslim man (but not vice-versa) is because her children will not be Muslims, as they automatically follow their father's religion.

If regional identity retains some significance as a marker of ethical personhood – and is still perceived as an essence - how is this expressed now that people rarely live where they ‘come from’? How does Besma go about judging someone’s regional identity?

Some people did choose to express their regional identity. Besma wore hers proudly, not the least since she was known as ‘the Kerkennia’ both in Kram and Morouj. Dislocated from the places of their origin, Besma and her friends breathed life into their regional origins in daily life and shared memories of visits to the place that was so important to them:

Besma (5)

Besma’s mother came over to help her make a supply of ‘bchicha’ (small pellets made of chickpea flour cooked in soup). She also made a pile of ‘hlalam’ (small dumplings), telling me that she was making the coarser Kerkenni version to accompany fish dishes, and not the finer ‘Tunsi’ hlalam used with meat. When she was little, the women used to get together to make annual supplies of yarn and cloth, taking the wool to wash in the sea in Kerkenna and then brushing and spinning it. People do not do this anymore. Together with a group of neighbours, she used to make annual supplies of essential foods (such as dried peppers, tomatoes, spices, couscous) for both her daughters when they were working. One day they would prepare the couscous for her daughter and cook in her house and the next day they would go to her neighbour’s to do the same for hers. She seemed to accept that the next generation of women such as her granddaughter, currently studying at university, was unlikely to carry on this tradition of preparing supplies of food, just as her generation no longer made their own cloth.

Different ways of preparing foods are a hot topic of conversation between women when they meet, whether in Morouj or, as we shall see in the office at the court (chapter 3). Regional difference can be expressed in the different spices used to flavour traditional Tunisian dishes. This is why a traditional meat dish cooked the morning after *Aïd el-Kebir* is red in Kerkenna, using ground red pepper, and yellow in Djerba where cumin is used.

Being Kerkennia, therefore, supposes various forms of acquired knowledge, which help to unite those women who share them. This knowledge of ways of cooking, marrying and living is coupled with local knowledge, memories of people and places, familiarity with a place and memories of childhood visits to the island, which helps to create a bond between Besma and her Kerkenni friends. As such aspects of material culture are lost, what will being 'Kerkennia' mean in a few generations time?

Besma (6)

Apart from frequent references to 'our Kerkenna' and mentions and tales of Kerkenna in everyday speech, the island came alive to me in the family photos of holidays and weddings there. Of Besma sitting on the beach, her hair tied back in the traditional red Kerkenni headscarf, gutting squid caught fresh from the sea. Or of video footage of traditional Kerkenni wedding music taken on her son's new mobile phone.

Besma only went to Kerkenna twice as a child. Her parents did not have the financial means to fund annual trips for the whole family. When she was 11, she and her brothers and sister went for the summer holidays there during the harvest season. They spent long days in a tent on the beach, guarding the newly harvested produce, listening to their grandmother tell them stories, washing in the sea and drinking water from a well. Besma insisted on spending the money she received in presents for passing her Baccalaureat on a trip to the island, which led to her marrying her future husband.

Her husband has a more immediate relationship with Kerkenna as he grew up there. 'You can breathe better in Kerkenna', he told me, evoking his nostalgia for the clean sea air. He cannot sleep well anywhere the air is less pure.

Shared memories hinting at shared connections to a place that is trusted are of value in this place where people are unsure who to trust.

Carsten has explored the broader, political significance of memories connected with places that hold great significance for people. These ghosts of memories help people understand continuity with the past in contexts where this seems complicated, such as where the past may have been disrupted by processes such as migration (2007:1). It is perhaps not surprising then that Besma and her friends make frequent references to 'our Kerkenna' and enjoy sharing stories about places and people they know there, as well as recipes.

The ghosts of memory are a reminder of the omnipresent risk of forgetting and loss of identity. The next generation raised in Morouj or elsewhere in the capital will necessarily have a different relationship with their regional identity. Social relationships will have to be grounded differently as the moral is reassembled in this corner of a foreign field. Whilst proud of her Kerkenni heritage and keen to learn about the recipes and the traditions they would follow for her wedding, Besma's daughter would probably have felt a little silly wearing the traditional red Kerkeni headscarf around the neighbourhood.

It is perhaps because being Kerkennia,⁹⁸ maintaining a visible regional identity, involves a process that is lived, that it simultaneously suffered from the threat of being lost or consciously concealed, something, which Besma frowned upon. Although recipes and other traditions are passed on from mother to daughter, the threat of loss was never far away; Besma's mother knew that her granddaughter's life (Jamila was at university studying to become a doctor) would be very different to her own.

DISLOCATED SELVES

As Hopkins (1997) found in his study of a small town in rural Tunisia the increasing invisibility of ancestry leads to an emphasis on behaviour – that I refer to as performance. Even regional identity – perceived as an essence and a reliable marker of ethical personhood – is performed, if individuals choose to make this part of their identity visible to others. For those that did not enact regional identity, which other criteria did they perform? Which bases of assumed shared identity came to the fore in the absence of traditional markers of ethical personhood?

⁹⁸ This discussion necessarily focuses on the female process of becoming Kerkennia, which I was granted access to and excludes the male equivalent, a world from which I was largely excluded.

In the absence of shared regional identity, as friendships are shaped by circumstance and shared experience, shared religious identity takes on increased significance as a marker of ethical personhood. (We shall see how Karima builds her ethical personhood by enacting piety in chapter 3).

Besma's daughter's ethical personhood was enacted in ways that were different to her mother, explicitly linked with her identity as a Muslim, rather than referencing her regional identity (of which she was nonetheless proud). Jamila displayed many of the virtues associated with being a good, ethical woman, or, as my informants would have put it, 'the daughter of a family', a reputable girl, who would make any man a decent wife. Beautiful and intelligent, as well as trustworthy and modest, Besma did not worry in the least about her living away from home to study at university. She trusted her daughter's judgement and knew that she would not become involved with boys or make friends with the wrong kind of people.

Whilst proud of her Kerkenni heritage, Jamila aspired to appear as a modern Muslim woman. She would have liked to wear the *hijab*, as some young women were increasingly doing. This differs from the 'traditional' Tunisian ways of veiling. A few older women, like Habiba, still wore the *sifsaree*, a long, white cloth draped over the head and fastened by holding the corners of the fabric in one hand or between the teeth. More frequently, like Besma, women veiled Tunisian style, with a headscarf thrown around the head and usually knotted under the chin, often worn with a long, loose *djebba* covering her down to her ankles. Jamila's father had forbidden her to wear the *hijab* due to his concerns for her education and safety. Veiled women - perceived to be making a thinly veiled criticism of the regime - could encounter difficulties entering state institutions like the university, attracting unwanted attention from the ubiquitous plain clothes police. Instead, Jamila, who sought to project modesty and piety rather than make a political statement, was always carefully dressed, ensuring that her knees, shoulders, cleavage and neck were covered at all times.

These discussions about the appropriate dress for women provide an explicit example of the way in which ethical personhood was seen to be increasingly based on appearances, appearances which could be deceptive. For instance, an immoral girl (who had engaged in sexual relations outside marriage) may strive to appear decent by dressing carefully. In contrast, Rachida, whom I met in the city centre and who defined herself as modest and pious, dressed in shorts and vest tops. Whilst these revealing clothes were less

shocking in the centre of Tunis than they would have been in the more conservative setting of Morouj, by dressing this way, she nonetheless projected an image of immodesty that was far removed from her interior disposition. Firm in her love of her religion, she simply ignored the unwanted male attention she received.

Through performance, it is possible for someone to project an image of ethical personhood that does not correspond to his or her inner self. In Mahmood's terms, external appearances may not correspond to interior dispositions (2005). Whereas in Mahmood's case, to the participant in the women's mosque movement, enacting modesty was a way to cultivate this virtue in the self, in Tunisia a growing awareness of the performative nature of ethical personhood leads people to be suspicious. What I will refer to as dislocated personhood – the perception that performance and exteriority may be a mask concealing an individual's true self – contributed to a sense of uncertainty and anxiety in the neighbourhood and elsewhere in the city. It is not easy to exercise moral judgement when the basis for this – the projection of ethical personhood via performance – is unstable itself.

DISLOCATED HOMES

Besma (7)

Besma's home in Mourouj is one white-painted house among many in a maze of streets around the main boulevard, not far from the local mosque, bus stop, hammam and shops.

Built in the style of a 'villa'⁹⁹, the house itself is only partially visible from the street, hidden behind a high, white wall penetrated via an opaque metal gate. Besma regularly treats each corner of the property with 'bkhor' (fragrant granules, similar to incense burned in a fire) in order to protect the family from the evil eye.

A large, tiled terrace lies in front of the house and forms part of a garden, which

⁹⁹ This term is used in Tunisian Arabic.

surrounds the property. Another terrace, better concealed from the prying eyes of neighbours, is used as an extension of the kitchen. This is where sheep are sacrificed and the meat is prepared for celebrations. Besma cooks there all year round, weather permitting, sitting on a sheepskin shielded by vines. Behind the house, there are two pens (a covered stable for winter and an outside pen for summer), in which the Aïd sheep are kept, awaiting their sacrifice for Aïd el-Kebir.

The house itself is composed of two independent stories, which is a typical pattern in the neighbourhood. Besma's family live on the ground floor and rent out the first floor to generate income. The current tenants are from the 'riif' (countryside). Besma has limited contact with them except for their 3-year-old son, who runs around her house. Their relationship is neighbourly rather than friendly. Knowing they are poor, Besma gives the children clothes.

Besma's relationship with her current house and the friendships that surround it differ from those she associates with her childhood home, a home that symbolizes a way of life that is fading. She grew up in a large traditional Arab house that housed five families, each family living in a set of rooms giving onto a communal, internal courtyard. This house, home to some of her most treasured memories created a universe whose boundaries were permeable. Although Besma and her sister would not have been allowed to go 'out', within the house, she was able to circulate with ease, deciding to run across the courtyard and eat some of the delicious coastal specialities prepared by the 'Sahlia' (woman from the coast) if she did not like what her mother had cooked that evening. Given the lack of space in her family home, Besma's sister often went to share a bedroom with the neighbour's daughter. This would be quite unthinkable today; this neighbour also had sons and her sister's reputation and that of the family would be at stake; at the time, there was no such impropriety, as the boys were considered as her brothers.

Besma depicts this house as a safe environment where the families lived together. In the courtyard, the women were never alone whilst carrying out their daily chores. In the afternoon, someone would make tea. In the evening, they would chop vegetables together to prepare a large couscous to be shared between all the families. Although Besma's mother stayed 'at home', as a good wife should, she was always in good company. Life, Besma told me nostalgically, was less stressful then.

These families, who were once linked by sharing a courtyard, mostly continue to live close by in Kram today. Even Ines, a woman of Besma's generation, who moved to Libya, remains a virtual part of the circle; she and Besma continue to visit each other. The 'Sahlia' has recently moved to another suburb of Tunis, but she returns to Kram frequently to visit, as her children live close by.

In contrast to the isolation that Besma sometimes feels in Morouj, visits to her father's house are full of warm embraces from people she has known for decades and copious amounts of tea, food, chatter, catching up, laughter and occasionally tears. As her parent's first-born child and the eldest sibling, she retains an active role in her natal household, participating in the cooking and preparations for special events, such as her brother's wedding. Only 15 years younger than her mother, she described their relationship as being closer to that of sisters or friends, rather than mother and daughter.

Besma describes her father's current house in Kram as being 'like it used to be,' in that two of her married brothers have set up their homes in identical apartments built on the roof. All four of Besma's siblings are married and have remained close to their father's house. Whilst two brothers live on the parental roof, a third brother lives in a near-by street, not far from his wife's parents. Her sister also lives within walking distance, next door to her husband's parents.

Her father's house, or 'villa', is built in the same format as Besma's home in Morouj. Entering from the street via a large, metal gate in the high, white wall, you immediately arrive in the garden and terrace, which circumnavigate the property. Her parents live in the main rooms on the ground floor. Separate staircases provide independent entrances for each son. Up until her brother's wedding, he had continued to live in the main house with his parents and the apartment on the roof had been rented out, a useful source of income. Climbing a further floor, there is a large roof terrace, where his wedding party was held.

Her father refused to allow their third son to build a further apartment on their roof. He felt that he could not sustain living with a third daughter-in-law. His son's mother-in-law had offered the couple the opportunity to build on the roof of her house, an option that was strongly condemned by his parents and siblings. What if he died? Their family would be left with the fruits of our brother's labour. Or what if his

wife died? He could hardly remarry and live with his new wife above his deceased wife's parents. This issue was resolved by Besma's father, who ruled that his son should build on the land he had bought in new Morouj. The couple have both had to renounce their desire to remain close to their families and will have to confront the isolation of neolocal residence that marks Besma's experience of living in the Morouj.

The relationships that were forged in the communal courtyard in the first house in Kram – made possible by the structure of that house and expressed through the everyday activities of care and exchange – are those that hold the greatest significance, as well as love and affection, for Besma. In contrast, the new design of houses, with their steep external walls and space which is turned to the inside, creates a barrier to the world, often resulting in isolation and loneliness in women, who are supposed to remain within the sanctity of their home. It is difficult for a woman to assert her status as a 'good' wife, whilst making frequent outings to visit friends. The closeness of these friendships and relationships with her mother and sister are clearly lacking in Morouj, divided by the walls of the house that make it harder for women to visit each other in the first place in order to forge this kind of lasting friendship. Of course, it is possible – and Besma has made (carefully chosen) friends. But the need to trespass boundaries to do so makes the process morally charged in a way that it did not appear to be for her mother during a similar phase of her life.

DISLOCATED PEOPLE

Unlike the relatively permeable boundaries in Besma's childhood home, the high, white walls surrounding each individual house were a tangible reminder of separation and increased isolation. I arrived wanting to get to know other people in the neighbourhood and it was immediately apparent to me that this was going to be even harder than I had imagined. As an outsider, I would not make it through the door without Besma to introduce me. The setting was claustrophobic. I was warned not to talk to people on the bus or in the streets and most definitely not to give my phone number to anyone, male or female; again, I was warned, people were looking out for their own 'interest' and would try

to profit from me.¹⁰⁰ Therefore, most of the interviews and conversations with women took place in their own homes, Besma having introduced me as a friend of the family, which had the benefit of giving me an insight into these private spaces.

If Besma is faced with the dilemma of who to trust and associate herself with, it is in part because she is obliged to go out of the house to find company. 'Going out' is something that good wives are not really supposed to do (or at least be seen to do). The universe of a good wife is supposed to be (or at least *appear* to be) limited to her own home, with permitted outings to do shopping or to do chores related to the children, such as taking them to school or visiting the doctor. Going to her place of work is also a valid activity. The question of visiting friends and neighbours is more complicated, as a wife who frequently goes out to visit is not seen in a good light, due to the dual implication that she is neglecting her duties at home and that she may be keeping bad company or come into ill repute. Whilst it seems that all women visit others to some extent as a matter of personal sanity, no-one would admit in public that they like visiting a lot and it is far from a compliment to say of a woman that she 'goes out a lot' or that she 'is always visiting.' Irkam (50, a housewife) prefers to stay at home to avoid problems with the television and her daughters for company.

Although the mosque had a separate entrance and prayer area for women, I did not know any women who went there to pray. Even the most pious woman I knew, prayed at home, explaining that women needed to stay at home, for the children or if they were cooking a meal. The *hammam* is another acceptable location for a public outing and a place where women meet and socialise, although as more women have hot running water and can bathe in their own homes, a trip to the *hammam* is more an occasional treat or used for special occasions.

The *hammam* and mosque are places where men meet frequently, but the ultimate male meeting place is the café. Besma's husband would sometimes go to pray with his neighbours at the mosque, and this would be followed by a trip to the café together afterwards. Whilst there are a number of mixed-sex 'tea rooms',¹⁰¹ to which I occasionally went, even walking past an all-male café made me feel like a trespasser, inviting unwanted comments and stares. On the whole, there are few acceptable meeting places for women

¹⁰⁰ Notably, people thought that I might be able to help them procure a visa to go to France or the UK. Some were looking for a marriage partner for a family member, marriage to a foreigner also being a way out of Tunisia with its political and economic difficulties.

¹⁰¹ In central Tunis and some of the other suburbs of the capital the situation differed slightly and it was more acceptable for a group of young women to go out together to cafés or tearooms.

outside the home, other than the spaces in which they may be found engaging in their daily business.

For Besma, who is sociable by nature and who had previously worked in an office, this isolation can take a psychological toll. It can also lead to marital disputes, as lonely wives insist upon visiting their friends to the disdain of their husbands, to whom this is not acceptable behaviour for a 'good wife'. How did Besma go about forging new friendships in Morouj? On which criteria did she base her judgment of which people could be trusted?

Besma (8)

Besma's closest friends in Morouj, like Habiba and her daughter, were mostly Kerkennia.

Habiba, a formidable old lady in her 80s, met Besma on a bus journey about 10 years ago, during which they realised that they both came from Kerkenna. Besma affectionately and respectfully referred to her as 'khalti' (literally my maternal aunt, a frequently used way of addressing a woman of your grandmother's generation), or even 'my mother', stressing even closer proximity and affection. Habiba had been divorced three times and was living in the upper floor of a house she rented from her daughter, Yasmine, who lived on the first floor with her husband and children. To Besma, Habiba is also an outlet for fulfilling her religious duties of charity; as Besma's mother once told me, Besma uses her to win favour with God. Living alone, and with little income, Habiba has for many years been the chosen recipient of Besma's alms-giving, a duty to be carried out just after Ramadan. Besma treats her kindly, buying her vegetables and helping dye her hair with henna.

It was helpful in maintaining their friendship that Habiba was an older Kerkennia. I felt that Besma's husband increasingly tried to control her outings in the time I knew her. It was difficult, however, for him to object to Besma visiting a kind, old lady, from his 'bled'. (Besma's husband came from and grew up in Kerkenna and Habiba reminded him of his mother). As a result, he tolerated Besma's friendship with Habiba far better than he did her relationship with various other women. The

expression of regional identity, being Kerkennia, equated to a form of 'good' ethical personhood, someone who was in some way familiar in an unfamiliar environment.

For Besma and her husband at least, regional origin retained its significance as a marker of ethical personhood. Having met Habiba out of the blue on the bus, their shared regional identity made it acceptable and possible for them to get to know each other further and to build a friendship.

In a context where it is difficult to know whom to trust, Besma, like those around her, nonetheless cultivated a network of relationships. In particular where firm foundations of friendship were missing (like shared regional identity), trust was slowly and continuously constructed via the labour of daily life, via intrinsically ethical 'continuous or repetitive life-reproducing activities.'¹⁰² More specifically, these relationships were built via the reciprocal labour of caring for one another, 'looking out for or looking after the well being of others' (Lambek 2010: 15). Seeing care as central to ethical activity reminds us both of the ways in which individuals are inextricably connected and of the responsibilities that define personhood alongside the webs of relatedness in which an individual is embedded (see chapter 2).

Friendships take on added meaning as those I met in Morouj are living far from their 'homes'. Besma told me that 'you only leave your father's house when you marry or when you die.' '*Darna*' (our house, meaning a person's father's house) was a frequently used phrase making the house synonymous with a person's natal family that never loses its significance. 'Our house' is also a place of refuge. Even Habiba talked of returning to the sanctity of her father's house in Kerkenna, now inhabited by her grandchildren. Tellingly, Irkam, aged 50, told me that she lived 'alone'; she meant that she lived with her husband and children, rather than with her extended family or husband's family. Divorcing women (and men) would systematically take refuge in their father's house. (Rather than asking a divorcing woman where she lived, the judge would simply ask her, 'in your father's house?' assuming the response in his question).¹⁰³ A daughter's ability to take refuge there, however, is contingent on her father's acceptance of their desire to divorce,

¹⁰² Arendt read via Lambek 2010:15.

¹⁰³ These exchanges occurred in the reconciliation sessions. cf chapter 4.

something not to be taken for granted.¹⁰⁴ The talk of 'our house', along with Besma's frequent visits to her own father's house, points to the continued significance of kinship as a support network. It is not that extended family has lost its importance or has been replaced by the 'extended street' (Holmes-Eber 2003); the nature of kin relations has also changed as the family is now extended geographically.

The idiom of kinship¹⁰⁵ is recruited to add meaning to new forms of relatedness, whether permanent friendships or fleeting encounters. Besma introduced me to Tata¹⁰⁶ Meriam, another of her close friends who shared the innate goodness and proximity due to shared Kerkenni identity, describing her as a 'relative'. She was not literally related, but Besma said that if someone comes from your '*bled*' (place of origin), then you can say they are a relative. Meriam, a woman a little older than Besma, is also from Kerkenna. By telling me to call her '*Tata*' Besma was indicating to me that Meriam was her close friend whom I could trust and treat as I would Besma, a woman of my mother's generation. Besma herself calls her friend 'Meriouma', using the diminutive. Kinship terms were not used only to refer to those who shared a regional origin. Whilst she would not have described her as a relative in these terms, Nour (who we shall meet below) was also known to Jamila and me as '*Tata*'. Equally, kinship terms were frequently used to show respect and build trust when meeting complete strangers, not the least when soliciting help (as we shall see in the court office in chapter 3).

More and more people, however, lived far from their 'house'. As Besma told me, her 'house' was in Northern Tunisia and her immediate neighbour, Nejia's, 'house' was in central Tunisia. She and Nejia lent each other money and their sons lived together like brothers, borrowing each other's clothes. She considered Nejia's little girl like another daughter. Besma also provided essential support for Nejia each time she had a dispute with her husband, something that, unfortunately, happened all too frequently. Equally, for Saida, who had moved to Morouj for its cheap rent after she was forced out of the marital home due to domestic violence, some of the neighbouring women provided a vital support network. They offered her odd jobs to earn money, help with babysitting, legal advice in view of her pending divorce (one of the ladies had studied law) and, perhaps most importantly, company so that she did not have to spend all day alone in the small room she

¹⁰⁴ cf chapter 2.

¹⁰⁵ cf Singerman (2006) for her discussion of the familial ethos in Cairo, a moral ideal that often contrasts with the practice of kinship and relatedness in the city.

¹⁰⁶ *Tata*, the French for aunty, is used as a term of endearment or respect for women of approximately your mother's generation.

was able to rent with her 3-year-old son. In this way, solidarity between neighbours may grow out of necessity, even where genuine affection such as that which existed between Nabiba and Nejia has yet to flourish.

Consequently, the seeds of many friendships were sown as people went about daily life. Jamila had her own network of friends that started in school and remained in her neighbourhood in Morouj. These merged with her mother's as they frequently spent time together with Nour and her daughters who were mutual friends. Years of friendship began as the girls borrowed each other's schoolbooks and helped each other with homework. Aunty (Tata) Rhadia is a notable exception among Besma's friends, as she does not come from Kerkenna. (Although I suspected that Besma's husband approved less of this friendship than he did of some of the others).

The duty of mutual care between neighbours was, according to Besma, also a religious duty. Besma stressed the importance that the religion places on helping your close neighbours, a statement that was far more than just words to her, as she frequently went out of her way to help those living close by. As well as these women whom Besma considered friends, by enacting what she believed was required of a good Muslim and neighbour, she also became closer to her immediate neighbours in the time that I knew her. The relationships between these neighbouring families seemed to tighten as they exchanged visits and support during difficult moments in their lives. As she helped her neighbours, they were slowly becoming friends.

This was most notable during Ramadan, when people traditionally tend to visit each other more frequently and the immediate neighbours came a few times to break the fast with us. Just before I left Tunisia, the death of one of the neighbours, Amm Ahmed¹⁰⁷ also accentuated these ties. Ahmed lived close to Besma's house and his health had been deteriorating for some months. During this time, Besma and her husband visited him regularly in hospital, together with Salah, who lived next door and was also friends with Besma's husband. When he suddenly died the day after *Aïd el-Kebir*, Besma sprang into action, helping the new widow prepare food for the funeral and for guests who came to pay their respects. Her husband, son, Salah and another neighbour helped out by slaughtering the sheep needed to make the couscous and preparing the meat in Besma's garden, to ease the strain on the bereaved family.

¹⁰⁷ *Amm*: Literally 'paternal uncle', a term of endearment or respect for men of your father's generation or older.

Besma and her husband acted as surrogate parents to Salah, who comes from the countryside in the interior of Tunisia, and his young wife, Nejwa, who had left her native soil for the first time to join her husband in Morouj. Unfamiliar with city life and far from her family, Nejwa, who was only 17 when she married, has become increasingly close to Besma. I do not think that Besma would describe Nejwa as a friend and she expresses reservations about her, given that she comes from the countryside, 'the interior' and not from the South, but she nonetheless sees it as her human duty to be kind to this girl, who is so far away from her mother. She is doing a favour for Nejwa's mother, Gamara, of whom she is fond; if Jamila were ever far from home and need of help, she would hope that another woman would be so kind to her daughter. It has even been known for Besma to intervene to defend Nejwa in marital disputes with her much older husband; it would be inappropriate for Besma's husband to intervene, to preserve the couple's intimacy, but Besma's intervention as an older woman and mother-figure is deemed appropriate and Nejwa's husband is bound to respect her (at least overtly). In this way, in this neolocal setting where people live far from close kin, neighbours and friends take on the role of caring for one another and, in the process, create new webs of relatedness.

The ability to weave a web of relationships is, however, limited by the material constraints that increasingly weighed on these families struggling to bring up their children in a difficult economic climate. Economic difficulties make households more atomised, as people are less willing or able to share resources that are scarce and hard to come by. Those I knew in Morouj in their 40s and 50s often reminisced to me about the golden days of childhood, when, as Besma's neighbour Zeineb (aged 48) put it: 'Life was better in all respects ... We had good food and everything was better and plentiful.' Maintaining friendships has a financial cost as visitors must be offered something to eat and drink. Besma regretfully told me that, financially, she could not allow herself to share food with close friends or neighbours, as was common practice in the past. Material impoverishment is felt alongside the loss of the close relationships in the house that would once have been supportive when times were hard.

The economic climate contributes to the sense of dislocation and lack of trust in a further respect. In spite of the genuine affection that exists between many of these women, Besma, like many others, feared that these friendships may really be based on 'interest', the potential for gain - material or otherwise. In addition, people tended to hide any success or riches they did have for fear of attracting the jealousy of others that put them at risk of being subject to the evil eye. (This was another reason for the safety pin that had

appeared on my bedside table). Even those Besma is closest to, mostly come to see her when they want something. Whilst necessity, proximity and human kindness draw this group together, these newer friendships are bitter sweet; even these women cannot supplant the virtually life-long friendships she has in Kram.

CONCLUSION

As ethical personhood has become dislocated, it is difficult to evaluate the intentions of others who may have an ulterior motive for befriending you or whose kind words may conceal a threat in disguise. (Hence, the appearance of the safety pin on my bedside table, with which I began this chapter). As traditional markers of ethical personhood, like a person's regional identity or family origin, have become illegible in the setting of the neighbourhood, it is increasingly difficult to locate others socially. Judicious practice is wrought with uncertainty, as the basis on which it is made cannot be trusted. In this setting, itself dislocated – as in the court (chapter 4) – moral judgement must be based on performance and appearances may not be all that they seem. These doubts about who to trust lead to a sense of uncertainty and anxiety.

This chronic uncertainty is deepened by the implicit political implications of the way in which a person's performance of ethical personhood may be judged. Jamila's father did not want her to veil because he feared that this would be read as a political statement with undesirable consequences.¹⁰⁸ The potential for judgement by her father and by agents of the state who may wrongly interpret her intentions shapes the way in which she expresses her modesty and piety.

It is in this context, where trust is hard to build and where the fear of repression coupled with the processes of dislocation I have described creates radical uncertainty, that marriages are formed and break down. In the next chapters, we shall see how this process of dislocation and the resulting uncertainties permeate the practice of marriage and of divorce, not the least as the uncertainties of moral judgement intertwine with those surrounding legal judgement in cases of divorce. Equally, if rights are relational as Joseph (1997) has suggested, we shall see how this is so in Tunisia, where relationships with neighbours and friends have taken on importance alongside those with kin and where

¹⁰⁸ See McBrien (2009) for a comparable analysis of the practice of veiling in Kyrgyzstan.

webs of relatedness are marked with uncertainty and anxiety in the heterogeneous setting of the city suburbs.

EPILOGUE. MAKING MOROUJ: NO RETURN

Besma (9)

Besma's family's visits to Kerkenna continue. Having their own car and better financial circumstances than during her childhood allows them to make annual visits, to see her husband's mother and to harvest the olives from their trees. Each time the car comes back full of Kerkenni delights: olives from their trees, fresh fish and octopus.

However, life in Kerkenna can be harder than the fond memories suggest lacking in some of the material comforts that are prevalent in the city. Following a dispute with her daughter, Habiba threatened to move back to Kerkenna to her father's house where her grandchildren now live. Besma said that her children would never allow this. The winter in Kerkenna is hard for an old lady.

Besma tells me that there is a whole neighbourhood in Kerkenna full of older, single men. These men, having finished bringing up their families in Tunis, move back to their grandfather's house in Kerkenna upon retirement. Their wives refuse to go, preferring to stay close to their children and grandchildren, and the couples divorce.

Besma can imagine that Morouj will become a 'houma' like Kram is to her mother in the future. She cannot imagine going back to live in Kerkenna, even after she retires. Although she has blood connections with many people there, these are distant relatives; her close family are in Kram. If she imagines staying in Morouj, however, it is because of her house and most of all her children, whom she hopes will stay there to bring up her grandchildren. She wants to play an active role in their lives. Her sons, she hopes will live upstairs, following the patrilocal tradition. Her daughter's place of residence is less certain and will depend on her future husband.

One dream would be for her daughter to marry a neighbour, meaning that she could keep her close by and help look after the grandchildren and clean her home, whilst she goes out to work. Recently, one friend had evoked the possibility of leaving Morouj; her marriage was breaking down and she did not wish to remain in Morouj with the stigma attached to being a divorced woman. Besma immediately reproached her, asking how could she consider leaving all her friends? Besma would undoubtedly miss this woman she is fond of, who forms part of her support network. These people, and the webs of relationships between them, are in the process of making Morouj into more than a formerly empty field. Especially those relationships between parents and children, which are the most solid of all.

CHAPTER 2 –

MARRIAGE IS LIKE A WATERMELON

Besma (1)

We went to Besma's parent's house in Kram to join in preparations for her brother's wedding. Outside, the women of the family and various female friends busied themselves preparing food for the first of the wedding parties to be held that night on the roof of the house. 'Marriage,' they told me, 'is like a watermelon. You don't know whether it is sweet or bitter until you cut it open.'

The apparently unwilling groom lay on his bed, visible through the door that opened onto the courtyard, grappling with the uncertainties of his pending marriage to his second cousin. Would his watermelon be sweet or bitter? His mother had decided that it was high time that he married and a suitable match was found in the family. I was pleased to discover that their marriage was sweet. Subsequent visits found the couple happily settled into their marital home above the parental roof. A high level of mutual respect and compromise meant that the groom retained some of his freedom and could continue to visit his friends, whilst his wife went about her duties and enjoyed their Saturday tradition of going out for a meal together, giving her one day off from cooking every week.

INTRODUCTION

Marriage, like life in the neighbourhood as seen in the last chapter, was ripe with uncertainties. This chapter examines how the processes of dislocation described in the previous chapter shape the practice of marriage. In particular, it explores marriage among the predominantly lower-middle class inhabitants of Morouj and Besma's network in relation to changing patterns of consumption that shape the material relationship between the spouses.

In this context, I focus on two related aspects of marriage: how marriages are formed and how marital duties are understood and carried out. Through this discussion we can explore why divorce is taboo and why some people remain stuck in unhappy or abusive marriages rather than file for divorce.

'CONSENT'

Through the PSC, that made the consent of both spouses the first condition of marriage,¹⁰⁹ Bourguiba explicitly wanted to change the basis on which marriages are made. As part of his nation-building project, he wanted to weaken an individual's reliance on kin in favour of an emphasis on national solidarity and citizenship. As Abdulahmid, our Arabic teacher at the Bourguiba Institute for Modern Languages taught us during the part of the course that covered the PSC, marriage should be based on the 'freedom of choice' of the spouses:

'Before, the father chose a husband for his daughter. Her suitors spoke to him directly and, if he agreed, the daughter had no right to refuse. The PSC cancelled this. It is now a condition of marriage that both consent. The person officiating asks the bride if she accepts the marriage, and she signs to show her agreement. In the past there was forced marriage, now this is no longer the case. As God said: there is no compulsion in religion.'

In this way, our teacher stressed how the notion of each spouse consenting to the marriage was not a foreign one; rather it was felt to be part of the religion. This view was echoed in Morouj. Samia, Besma's neighbour, explained to me a proverb of the Prophet Mohammed, who said that when a man comes to marry your daughter, the mother and father should check if she agrees and if not, should not force her to marry. Aziz, aged 79, also underlined this point: 'even before the PSC, in *sharia* law, you must ask if the girl agrees to the marriage. Forced marriage is forbidden. Sometimes the brother tries to force his sister, and tells her to marry her cousin (paternal uncle's son) instead of someone else, but this is 'forbidden in the religion.' In this way, the PSC was legitimated as being compatible with Islam, as opposed to practices like forced marriage that had been maligned and were considered antiquated. Nonetheless, in a rare direct ethnographic reference to the PSC, Abu Zahra noted that in her village, 'people regret very much that today¹¹⁰ girls have a say in their marriage and are given the power to challenge the authority of their fathers' (1982: 128). Alternatively, however, according to Hafsia in her historical account of marriage in Tunisia, women have always given their consent to

¹⁰⁹ PSC, Article 3.

¹¹⁰ Her study was carried out in the 1970s.

marriage before two witnesses, although a male guardian was delegated to sign the marriage contract on their behalf (2005: 38-9).

Anthropological work on Tunisian kinship discusses how marriages were formed in terms of the relationship between two groups and how marriage strategies have evolved in light of economic changes. Goody has emphasized that 'a change in productive system [that] will have an important affect on social organization' will subsequently influence interpersonal relations and marriage strategy. Land being replaced by other forms of cultural capital, such as education (Goody 1998: 104) – as has occurred for the inhabitants of Morouj – emerges alongside the rise of women's employment in the labour market as key factors which influence the mode of social stratification and marital strategies.¹¹¹ There is little information, however, on how marriages are formed in urban settings, although Holmes-Eber's 1980's urban ethnography of Tunis (2003: 55) supports Abu Zahra's conclusion¹¹² that education privileges marriage outside the group, which is most likely to occur in families where 'all daughters go to school [and] some may even qualify for jobs/professions' (1992: 51).

The notion of what might have been meant by 'consent' historically in Tunisia, when a male guardian signature was also required for marriage, contrasts with the PSC's understanding of consent as freedom of choice as portrayed by our teacher. Furthermore, these accounts appear to emphasize structure rather than agency or choice in the making of marriages. How might consent be understood according to more nuanced accounts of agency that move beyond this dichotomy?

Laidlaw, following Williams, identifies three kinds of terms that must be reconciled for an understanding of agency: 'determinism, choice/intention, ethical terms such as blame and responsibility' (2010: 154). He proceeds to locate agency in the third of these terms, in responsibility:

'Speaking of how much 'agency' the acting subject may or may not have is roughly speaking meaningless. This is not an increase in their general capacity to get what they

¹¹¹ Abu Zahra's 1960's ethnography examines the impact of the post-colonial economic and political reforms on marriage practice in the Tunisian village of Sidi Ameur. The abolition of *habous* lands, which had previously assured the dominance of the founding, prestigious Zawiya group, combine with the introduction of compulsory education and a political system no longer based on descent to allow upward social mobility to the Ramada, previously the lower social strata in the village. Marriage became a battleground where the ancient antagonisms between the two groups could continue to be expressed in the new economic climate, as the Ramada aimed to use their new cultural capital to inter-marry with Zawiya women, whilst the Zawiya sought to maintain their policy of in-group marriage as 'the marriage of Zawiya women is more controllable than the ownership of land and olive trees.' (1982:161).

¹¹² cf. Goody citing education among factors which influence how we chose a mate (1998:104).

want done. It comes instead as *responsibility* for particular happenings or states of affairs and this may include states of affairs *that they have rather limited capacity to influence.*' (ibid, my emphasis)

However, by focussing on how an individual may be held accountable for things beyond their control, it is not clear what place Laidlaw gives to intentionality. In which cases is it relevant to take an individual's intention into account when evaluating whether they are responsible for their actions? (I will return to this question in detail later on). I will argue that attending to the place of intention in 'agency' contributes to an understanding of the gendered nature of ethical personhood and of the gender inequalities that emerge in the operation of the law.¹¹³

If intentionality is, or is not, taken into account it is because, as I will argue, moral judgement lies at the heart of 'agency' and consequently emerges as a more pertinent concept through which to understand how marriages are formed and ended. Laidlaw suggests this implicitly as he also defines agency via '*the ways in which responsibility or accountability for actions and their effects are attributed to persons and things.*' (ibid, my emphasis) Consequently, agency – read as judicious practice based on a form of ethical personhood that is relational and defined by responsibilities – provides a framework through which to understand the practice of marriage and the practice of divorce, given that the attribution of responsibility for marital breakdown is at the core of the work of the family judge.¹¹⁴

'MARITAL DUTIES'

In later chapters we shall return to how responsibility is attributed in the divorce courts and how intentionality is relevant to the legal judgment process. Behind this lies an understanding about what husbands and wives are perceived to be accountable for: their responsibilities or, as the PSC puts it, their 'marital duties.' Due to the ambiguity and silences of the law, this moral category takes on significance in the divorce court. Bowen highlighted the importance of exploring how the social norms relevant to the law are evoked in other contexts and by ordinary people. He concludes from this that, if ordinary people are influenced by these norms, then they would also shape decisions taken by judges (1998: 395). In the Tunisian case, the legal code makes the relationship between

¹¹³ See ch4-7.

¹¹⁴ In ch4-7, I will trace the relationship between judicious practice (as described in chapters 1 and 2) and judicial practice as the judge reaches decisions in divorce cases.

law and norms explicit. It is in the neighbourhood, that I was immersed in the 'custom and habit' that informed the work of the court, (not the least as some of the judges I knew lived not far away), and where 'morality' was lived and breathed as my informants went about their lives. In this way, through my interactions and observations, the legal terms 'marital duties' and 'custom and habit' were brought to life for me, informing my own understanding of the divorce files and cases. I was also to learn about the challenges that people face as it becomes increasingly difficult to live up to ideal marital roles in the contemporary social and economic climate.

Lambek describes how specific rituals bring particular ethical criteria into play (2010: 18). Marriage is one such ritual act, a form of promise initiated by the signing of the marriage contract and the celebration of the marriage (ibid: 17). As such, marriage initiates a new state of 'ethical personhood' (ibid: 42-44); married couples are expected to act as 'good' husbands and wives and may be judged (by others and themselves, and potentially the court) as a result. How, then, are marital duties defined in the neighbourhood? How are they enacted in practice?

The female Family Judge pointed to a key way in which the marital relationship is changing; a second reason for the increase in divorce, she told me, was that women work. She suggested that this made women less tolerant of marital discord and more likely to file for divorce even for minor reasons. Available statistics¹¹⁵ confirm a considerable rise in female wage labour¹¹⁶ in Tunisia over recent decades, encouraged by the post-colonial state in its aim to redefine gender roles. The limited ethnographic work tells us little, however, about how, or if, this change has contributed to modifying the conjugal relationship and the gendered division of labour within the household. Holmes-Eber highlights the low proportion of women who continued to work after marriage due to social pressures that kept women at home, sometimes in spite of financial need (2003: 86). It was a question of 'family honour' to keep women at home and, as such, 'women's work and seclusion are generally related to class' (ibid: 23), although she suggests that economic factors were making this increasingly difficult for middle-class men. Rugh, discussing the lower classes of urban Egypt, where similar beliefs surrounding women's work prevailed until the 1980s, found that attitudes became more accepting of female employment as a result of economic difficulties, 'rising expectations about what the basic needs of the household were' and the role model set by middle-class women who worked

¹¹⁵ In 1999, 24.6% of the economically active population (over age 15) was female, compared to only 6% in 1966 (UNDP 2001: 74).

¹¹⁶ cf. Goody (1976) for impact of the gendered division of labour in a quite different context.

in more 'prestigious' jobs without a loss of status (1984: 284). Education played a crucial role in opening the door to such higher status jobs for women, and parents began to encourage their daughters into education as 'preparation for marriage,' as more and more parents grew to believe that 'young men are beginning to seek wives who work' (ibid: 285 & 287). Once again, attitudes to women's work are described taking into account the gendered use of space and moral concerns surrounding female movements outside the house. How has the conjugal relationship changed in light of increased female employment?

Predominantly based on my time spent in the neighbourhood and interviews with people there,¹¹⁷ this chapter will continue to build on the extended case study of Besma and her family to explore how marriages are formed. How has marriage changed as a practice in urban Tunis under the influence of the new state morality of marriage of the PSC and the processes of dislocation that mark life in these urban neighbourhoods?

MAKING LOVE

Besma (2)

Besma's brother's marriage to a relative from Kerkenna was not unusual. Whilst discussing Besma's family tree and that of her husband, I soon realised that it was quicker to ask who did not come from Kerkenna, rather than who did. In addition, most come not only from Kerkenna but from the same village. In her opinion, 90-95% of people in the family marry people who are 'from Kerkenna.' She does not think that this 'regionalism' in her family tree is unique and that 90% of family trees would display a similar level of bias towards people coming from the same region. Besma and her four siblings all married people from Kerkenna. Her three brothers had what she would call 'traditional' marriages, meaning from within the family. Her sister's marriage resulted from a chance encounter between their mothers on the beach. Besma's parents were reassured, as her father had worked with the brother of the

¹¹⁷ I also draw on interviews and time spent elsewhere in Central Tunis and the Northern suburbs and conversations with friends there.

potential son-in-law. Having established that the man had a sound financial situation, owning his own house, the marriage between them was quickly arranged.

One of the few marriages in the family that involved someone not from Kerkenna was the cause of some scandal, especially because the male relative who chose to marry 'out' was well off. The groom's close family were happy that he had found a love match, a girl he studied with at university. However, other relatives were resentful that he had squandered his wealth on an outsider.

The marriages that took place in Besma's family highlight the co-existence of different types of marriage. On the one hand, there are what my informants called 'traditional' marriages that are like unopened watermelons and are most often arranged by the couple's mothers. Love is expected to grow after the marriage. On the other hand, there are 'love marriages' that presuppose some contact between the spouses before marriage, arranged by the couple themselves. Here, romantic love precedes the marriage between two individuals who are, most often, unrelated.

The family trees I collected in the neighbourhood revealed striking changes in the way marriages were formed, especially in the most recent generations. Besma's experience provides a good example of this, especially when contrasted with that of her mother and their joint aspirations concerning her own daughter's future spouse.

Besma's Mother

Besma's parents had recently celebrated their 47th wedding anniversary. Both grew up in the same neighbourhood in Kerkenna. In the 1950s, her father, Hichem, had been offered work in the village of Sidi Bou Said near the capital, where his elder sister was already living, and moved there to live with her and her husband. When he was in his early 20s, his family decided it was time for him to marry and his mother started looking for a wife for him in Kerkenna.

Mabrouka, Besma's mother, explained that she came to marry Hichem, as he was her sister's neighbour. Her sister had a daughter of a similar age to Mabrouka and wanted her daughter to marry Hichem. He refused, as he had grown up with the girl and considered her a sister. Mabrouka's sister was fond of Hichem and said that it was the same to her whether he married her daughter or Mabrouka. One day, Mabrouka and her mother were talking about Hichem and Mabrouka decided to visit her sister next door to discuss him. Much to their surprise - as Hichem was already working away in Sidi Bou Said - he was outside in the street, having come home to visit Kerkenna for the summer. She had previously been proposed marriage by a rich Moroccan, but her father had refused the match as, in the days before telephones and travel, he did not want his daughter living so far away.

As she was only 14, 10 years younger than her husband, Mabrouka and Hichem were not allowed to sign their marriage contract in Kerkenna. After an appointment with a doctor to confirm that she was apt for marriage (that she had reached puberty), Mabrouka travelled to Sfax with her father to obtain permission from the court. The judge insisted on speaking to her alone to ask her how she knew the man she was going to marry. She explained that he was her sister's neighbour. The judge asked if she wanted to marry this man. She said that whatever her father wanted was 'blessed' (mabrouk) and that she gave her consent. Armed with a certificate from the judge, they were able to proceed to the notary's office to sign the marriage contract before two witnesses. The couple did not see each other before the wedding night.

Newly married, Mabrouka came to live with her husband in his sister's house in Sidi Bou Said. Consequently, she learned the essential tasks of a wife, such as cooking and washing, from her sister-in-law, rather than from her mother. Mabrouka fell pregnant almost immediately and gave birth to Besma, their first child, 11 months after her marriage.

Besma's mother's marriage demonstrates the crucial role played by the female kin of both families in making the match, even though her father gave the final stamp of approval. Mabrouka officially consented, as the law requires, although the terms in which she related this to me imply that she never would have contradicted her father. She also expressed her consent to the judge in terms of following her father's wishes. The marriage

was a reassuring one due to the proximity of both families who were known to each other, even if the spouses themselves had not met. By stressing how she met her husband on their wedding night, Mabrouka expresses her own modesty, a marker of her ethical personhood as a good daughter to a good father.

What is striking in these accounts is the increase in marriage age, in particular for girls, across recent generations. Although the PSC set a minimum marriage age for girls¹¹⁸ and boys, my informants cited education as the reason behind the increase in girls' marriage age. Rajah (in her 80s) was unsure how old her mother would have been when she married. 'Girls married when they were still running around playing with other children,' she told me, 'so they would cry when they had to get married. Now girls get married later as they want to study.'

Besma's own marriage is both very similar and very different to her mother's. Reflective of this general pattern that I also noted in the family trees I had collected, Besma was older than her mother when she married, having already started university studies.

Although Besma was older and an adult, the match was nonetheless agreed by her father on her behalf (even though she was consulted as a matter of courtesy) and she barely knew her husband prior to their engagement. Unlike her mother, however, she did have the opportunity to see a little of her fiancé before the wedding night:

Besma (3)

Besma's face lights up, when I ask her how she came to marry Ali. It started at a wedding in Kerkenna. Her husband was working in Tunis, but wanted to marry a girl from Kerkenna, so, as often happens at such events, his mother was keeping her eyes open for an eligible young girl to marry her son. His mother spotted Besma, asked people whose daughter she was and was pleased with what she heard. Following this, Ali came to Tunis, accompanied by Besma's cousin, to have a look at her. The two men were standing in the street in central Tunis and her cousin was describing her to him. 'So she looks a bit like that girl over there?' Ali concluded. It was Besma. Her

¹¹⁸ Minors, like Besma's mother, could be married with permission from a court.

cousin came to speak to her and pointed out Ali, who had a big grin on his face, in the distance. That night, her cousin went to speak to Besma's father about a friend, who was interested in asking for Besma's hand. Her father inquired about the family he was from, what job he did and how much he earned and then, satisfied with the answers, asked when the young man was going to come to see him.

Ali came to her father's house the next day, bearing a gift of fruit. Shy by nature, he was red-faced with embarrassment. Besma listened secretly through a window, whilst her father asked him some questions. Her father then instructed him not to bother his daughter on the street and to bring his family - parents, siblings and spouses - from Kerkenna for the official proposal. Besma's mother discussed the match with her. Besma replied that she would do whatever her parents thought best. She was 20 at the time and had just repeated her first year studying law at university. Her mother told her that she was getting old and that it would be best for her to stop her studies after the engagement to work and save money for her wedding trousseau. Her family was not so well off that they could provide a trousseau for her and at the time it was possible to find work with a diploma and university studies were deemed less necessary.

The proposal party travelled up from the island and they were engaged a month later. Ali gave her a watch, which she still wears when she dresses up for special occasions. Besma's mother tells me that they were pleased when Ali came to the house to ask for Besma's hand in marriage, as they knew his parents and family. 'We took him for his family,' she says.

Besma was 21 when she married the next year. They were married in Kerkenna. There are photos of her husband following the local tradition of walking slowly back from the Saint's tomb accompanied by male friends and musicians before going to collect his bride, photographed nervously waiting at her father's house. A further photograph depicts her anxiously holding her husband's hand, sitting on a bed, awaiting their wedding night.

Again, the groom's mother played a central role in instigating this marriage. The role played by the couple's parents in arranging the marriage is reflective of the taboos

relating to contact between unrelated men and women outside marriage. It is representative of Besma's good ethical personhood that she did not meet her husband herself. Besma's husband's behaviour in approaching her family with his intentions signalled his own good ethical personhood and this, together with his family background as a son of a family known to them in Kerkenna and his position as a good future breadwinner, confirmed him as a good match for their daughter. As with Mabrouka's marriage, the family were reassured both by the regional and family origins of the groom; both of these forms of identity made him known and trusted and were seen as guarantees that he would make a good husband.

There is also a subtle subtext in the way that Besma recounts her own marriage as well as that of her mother. Both these tales (and many others recounted to me by Besma) involved coincidences: Hichem just happened to be standing outside the door as they were talking about him; Ali just happened to see Besma in the city centre. These coincidences point to the workings of a higher power implying that the marriages were shaped by divine will, what my informants called '*maktoub*' (written by God) as well as the human actors involved. *Maktoub* implies that neither Besma and her mother, nor their families, were fully in control of their own destinies and that she trusts her fate to God. As we shall see in later chapters discussing divorce, talking about '*maktoub*' may be a way of expressing thanks for something fortuitous or a way in which someone draws on their faith in God in order to find the strength to cope with a difficult hand that they may have been dealt.

Strong taboos continued to surround the mixing of the sexes for women of Besma's generation, despite having been exposed to men of their own age through education (Besma also attended university). Consequently, when interviewing women of Besma's generation (in their 40s and 50s), it is unsurprising that my question 'how did you meet your husband?' was most frequently met with the reply, 'I didn't!' This response displays a particular form of ethical personhood in underlining the appropriate absence of contact with the opposite sex, the presumed presence of virginity and her diffidence to the natal family, especially the father. As a 46-year-old wife and mother, it would never occur to Besma or her brothers to contradict their father, even now.

In Besma's mother's generation, it was not uncommon to learn that the couple literally saw each other for the first time as they entered the bedroom for the wedding night. The norm 'before' was that the couple did not know each other before the wedding.

In some cases, photos were exchanged so they could see if they liked each other. 'The woman met her husband on the wedding night!' Souha, another 53 year-old wife explained. Irkam (aged 50) was a notable exception to this rule as she and her husband spent a lot of time together before they married, 'more than fiancés do', in her words, as they had been volunteers together at the Red Crescent.

Halti Zohra, aged 52, was more typical of this generation. She told me that she had 'met' her husband at a wedding, although she did not know it at the time. They did not speak. 'It was not like now,' she told me. Her husband saw her at the wedding and arranged the marriage with her brother (in the absence of her father who had died when she was only 6).

Interviewing other women of Besma's generation in the neighbourhood confirmed the central role played by female kin in arranging marriages under the auspices of the father's ultimate authority. Tata Faza told me that her mother married when she was 11. Her father was 23. When they put on her the traditional gold bracelets worn by women at marriage in Kerkenna, she took them off and threw them into the sea. 'In those days', Faza explained to me, 'the father had the last word.' So she did not dare say anything to her father. She was afraid of her husband who went out drinking with his friends. Her mother-in-law tried to reassure her that she would not be harmed.

Hedia, aged 55, met her husband via her sister, who knew her husband's sister. His family approached theirs and agreed on the marriage. Hedia said that her father was the 'boss' and she would do whatever he said. In any case, a good father would not send his daughter to a bad place. Consequently, validating the choice of spouse for his child reflects a father's ability to exercise his own moral judgement; his own ethical personhood and ability to appear as a good father is at stake.

Faza herself (of Besma's generation) also proved something of an exception in a different way, marrying late for a woman of her generation, aged 30. Her brother had refused previous offers of marriage on her behalf, as it was useful having her to help around the house after her mother died at a young age. She eventually married a relative (her husband and mother are first cousins). Her mother, mother-in-law and aunt are sisters-in-law as they married three brothers. Her mother-in-law arranged the match. Faza had been in love with another man (who was forced by his mother to marry his niece), so she married for practical reasons, to have a husband rather than for a love match. As her

husband had been previously divorced he did not want a second failed marriage. This gave Faza a lot of power to negotiate things. She is grateful that he is faithful and calm and does not drink and for the most part they get on very well.

Some fathers, however, may have less choice and, sadly, deviate from the ideal model of the protective, caring father. Neila was desperate to divorce her abusive husband, whom she had been forced to marry when she was 15 (relatively young for a woman of her generation; she was 37 when we met). Although she did not agree to the marriage (she met him during their 6 month engagement and did not like him), still she did not dare contradict her father. Her father had seven daughters and was extremely poor and so agreed to give them to the first man who came to ask.

Whilst I did not speak to so many men, those I did speak to suggested a similar experience to Besma's husband and father regarding how they came to choose their spouse. The emphasis was more on the union of two families, rather than two individuals coming together to form a conjugal couple. This sentiment echoes the residence patterns prevalent in rural areas (where a majority of these people came from), where couples frequently lived patrilocally after marriage, and where there was a gendered division of labour that would see women spending considerable time together.

For instance, Moncef, aged 56, who owned a grocer's shop in Morouj, echoed the women I interviewed in telling me that he did not meet his wife before their marriage. His mother arranged the match as they lived in the same neighbourhood. For him, this was logical as, given he was working in the capital away from his native Siliana, his mother would have to live with his wife and not him. Moncef thought this system made sense and should be used more often. He lamented that people these days married 'strangers', people outside their family and region. This created tensions, he thought, as each family has their own way of living. Also, families would be diluted and disappear. However, when I asked him about the kind of man he hoped his daughter would marry, he merely replied that it was down to 'destiny' (*maktoub*), hinting at the rapid shifts in the social landscape.

Although the traditional ideal of marriage between first paternal cousins fulfils the requirement of marrying someone who is known to both families, it is an ideal that is losing favour:

Zohra and Nabil (1)

Zohra (aged 46), and her sister, Saida, gave me greater insight into 'cousin marriages', considered the 'traditional' kind. These two sisters married two brothers who were their cousins. In both cases, these were first and foremost love marriages. A love story grew between Saida and her cousin Chorki when he visited his uncle during summer holidays when they were both teenagers. As the families lived far apart, Zohra did not meet Nabil, Chorki's brother, until she was 14 at an event in the family village. Her face glowed as she told me that it was love at first sight. He was then able to visit her under the pretext of visiting his uncle, even though the constant presence of a chaperone made it difficult to do more than exchange furtive glances. The rest of the year, they exchanged love letters in secret – sent to a neighbour's address to prevent her father intercepting them. They married when she was only 17. Only later did Zohra learn that her grandfather had always wished for her to marry her cousin. In addition, she had always got on well with her mother-in-law who was, of course, also her aunt. There was no chance of her marriage breaking down, she told me, as their relatives would intervene immediately to help them solve any problems (and it did not matter that they had always lived neolocally away from the rest of the family).

Concerning her sons' future marriages, Zohra is adamant that they should not marry in the family. Given how many marriages within the family there have been in the past (hers was the third generation of intermarriage), they are lucky not to have suffered any genetic abnormalities. Her sons need to marry 'out' to introduce a fresh pool of genes and to avoid potential health problems in their children. She also notes how her brother married his French wife (who divorced him) too fast; it is a mistake to marry quickly without getting to know the other person first.

As Moncef suggested, in Besma's daughter's generation, there is a generational shift towards marriage with a partner who is initially unknown and unfamiliar by traditional standards. As we heard above, one of Besma's relatives married a love match he had met at university, rather than someone from within their family, and his parents supported him in this. Mixed education and mixing of the sexes in places of work leads to increased opportunities for men and women to meet in acceptable contexts, away from

the watchful eyes of parents and neighbours, as well as in less acceptable circumstances such as out in the street or in cafés.

Salima

Salima, 22, had recently married her husband, aged 34. She met him walking with her cousin in the souk when asking for directions in a baker's shop. It was 'love at first sight'. They agreed to marry a week later and the wedding took place the following year. As we spoke she had just fallen pregnant. She was happy that her marital home was a short distance from her mother's house, so that she could visit her mother and sister easily whilst her husband was at work.

Only among the youngest generation – women like Salima in their 20s – did I hear tales of couples who met independently from their families, such as in a café or shop. (Irkam above is a rare exception).

SEX AND THE CITY

The possibility of love coming before marriage is connected with the fear that sex may also precede marriage. Marriage, as a ritual, plays a key role in initiating a woman's legitimate sexual relationship. It is significant that, whilst a couple are legally considered married once they have signed the wedding contract, they are not socially considered married until the wedding party has been held.¹¹⁹ Only then, once the religious obligation of 'publicising' the marriage has been fulfilled are they free to consummate the marriage and begin a sexual relationship. As Besma explained, this is to ensure the paternity of any children born from that relationship. These concerns about paternity are in turn related to the

¹¹⁹ The consummation of the marriage also holds legal significance. In practice, a man's duty to pay his wife maintenance begins only once the marriage has been consummated and not after the contract has been signed. The marriage is assumed to have been consummated if the husband and wife have been witnessed entering a bedroom together. If a husband refuses to consummate the marriage, the wife can *legally* 'consummate' the marriage in order to force his eligibility to pay her *nafaqa*. As such, the beginning of their sexual relationship also marks the start of their responsibility to carry out their marital duties.

incest taboo; if born outside marriage, a child may not know who his father is and could, therefore, unknowingly marry his or her own sibling. In this way, the need to control female sexuality is linked with broader religious, moral concerns and becomes a key ethical criterion that, as we shall see, is applied unequally to women rather than men.

Wassim, a male lawyer in his early 30s, explained to me rather ominously (when we were alone together in his office), that whenever a man and a woman are alone together, there is always a third party present: the devil, representing the threat of temptation. These fears about illicit sex that is increasingly a possibility as men and women mix in public spaces lead to tensions about whom to trust, given continued expectations of virginity and the control of female sexuality.

An intact hymen on marriage, as proof of virginity, remained a marker of ethical personhood and suitability as a wife, even if the conventions surrounding this had changed. Traditionally, a white cloth stained with blood from the freshly broken hymen would be displayed after a couple's wedding night as evidence that everything had gone well. The performance of a successful wedding night was crucial and could also create a sense of complicity between the couple. A woman now in her 70s told me how her husband brought a small bird and a knife with him on their wedding night. This allowed them to produce the blood stained cloth required of them, whilst the actual events of that night remained between the husband and his young, terrified bride. As Besma would tell me, this tradition is now seen as antiquated and has been replaced by inquisitive phone calls from the groom's mother and sisters the next day. Here too, the complicity of husband and wife can protect the couple's intimacy, whatever may have happened on the wedding night. Indeed, many women of Besma's generation spoke of their fear on their wedding night, as they were necessarily inexperienced and sometimes totally unaware of what would happen, together with their gratitude for their husband's understanding.

In previous generations when girls married much younger, including before they reached puberty, these issues related to virginity would have been less relevant. Virginity is a purely feminine concept, as I was to learn when, much to his amusement, I told one of the male lawyers that some devout Christian men in the UK choose to remain virgins until marriage. Once he had stopped laughing, he explained to me that men could not have virginity; they literally have nothing to lose. Also, as a young man himself, a believing Muslim, the idea of another young man voluntarily avoiding sex was highly amusing to him. Were these men ugly or exceptionally shy, he asked me? He did concede that some

Muslim men, who he characterized as religious extremists, may abstain from sex before marriage. Some mothers I knew who had sons expected them to have sex prior to marriage and the idea did not seem to bother them. They were, however, not expected to marry these immoral girls.

For the young women I knew, the situation was difficult. Najet, a young woman in Morouj, was especially worried for girls who had recently moved to the capital from the countryside. Coming from a 'very closed society', these girls were more naive and more likely to do 'ugly things', whereas city girls had more 'open mentalities', they studied and watched satellite television. Just because a city girl has a boyfriend, it does not mean that she is going to do 'ugly things.'

Mothers most certainly did not expect their daughters to engage in sex before marriage and policed their daughters for any signs that this might be happening. One young woman told me she hid her contraceptive pills at work to prevent her mother from finding them. Another told me she was frustrated that she could not wax her legs, as her mother would want to know why. Besma, like many mothers, had advised her daughter to avoid various (non-sexual) activities, such as gymnastics, that could inadvertently result in the hymen breaking and the girl 'losing her virginity'. I told her about a girl I knew whose hymen had broken whilst horse riding when she was 11 years old. Besma's response was simply, 'did her mother cry?'

Some young women were patient and practiced restraint, whilst others did not want to wait until they were married before having sex. One young woman explained how she evaded the problem of keeping her virginity by engaging only in sexual practices that would not result in breaking the hymen. Another young woman, who had lost her virginity was devastated when her mother discovered this fact, tearing at her own face and shouting that her daughter had given away the most precious thing that she had. She was seriously considering having her hymen – and with it her family's honour – restored before marriage. She could not imagine marrying a Tunisian man who would be understanding about her sexual activity before marriage, even if he had been sexually active himself. Even a decision as intimate as whether to start a sexual relationship requires the careful exercise of judicious practice and is best characterised by a notion of 'agency' that takes a girl's wider relationships and responsibilities into account.

The female body itself becomes the basis for moral judgement, specifically the hymen, the integrity of which represents a woman's modesty and virginity prior to marriage. Even the physical marker of this virtue in the female body could no longer be trusted due to the frequent rumours and alleged prevalence of hymen reconstruction surgery. As a result, even the female body is able to 'perform' virginity. This possibility of the hymen being reconstructed caused a great deal of anxiety among young men. How could they be sure if their future bride was a virgin? The male lawyer mentioned above feared marrying a girl who had had this operation; he hoped that his sexual experience would allow him to ascertain whether his future wife was really a virgin or not. Consequently, the issue of virginity – a moral criterion applied to women and not men – or fear of the lack of it, created an atmosphere of mistrust between young men and women.

Another young man told me that he slept with his long-term girlfriend in order to check this fact. She seemed far too used to having sex and he could not believe that this was her first time; he consequently never contacted her again. I heard several accounts of girls who slept with their boyfriends after much soul searching, only to be dumped so that the boyfriend could marry a virgin.

Once again, as with dislocated selves, appearances cannot be trusted. Najet repeated a view I heard many times that 'it has returned to how it was before.' As men do not trust women, they turn to their mothers when it comes to choosing their wives, since women know women better than men do, especially given the operation that exists to restore the hymen. Najet believed that only 2-3 % of men would accept to marry a woman who was not a virgin – even if the woman had lost her virginity to the man himself! On the other hand, there was a general sentiment that it was impossible for a man to remain a virgin before he married, in spite of recommendations in the religion for men to practice constraint by praying, fasting and doing sport. One mother of three young men hinted at a reason for this acceptance, suggesting that at least one spouse should know what to do on the wedding night. A successful wedding night is, therefore, just as much an affirmation of masculinity, a man's ability to perform sexually, as it is of femininity, a woman's virginity as proof of her prior constraint.

A WOMAN'S WORK

As we saw in the first chapter, these concerns about female sexuality and moral decadence are heightened by the increasing movements of women outside the house.

Female education and the difficulties in paying for the high costs of a wedding have lead many young women to work prior to their marriages.¹²⁰ I met various women in their early 20s who were working, as Besma had done, to save up for her wedding 'trousseau'. In many cases, such as Samia's daughter who was working in a factory, the implication was that she would stop working when she married. The new economic climate made it difficult for women to embody the ideals expected of them as a good daughter or wife. The following story of Zohra and her daughter demonstrates how being outside the home – in particular to engage in less 'prestigious' forms of work – can lead to fears of immorality, reflected not only in the daughter but also in the mother.

Zohra and her Daughter

Cracks began to appear in Zohra's marriage. Last year, the couple had argued over their son's circumcision party. He was being stingy and wanted to scrimp on the food and sweets. Zohra was far from pleased.

However, the main source of tension between Zohra and her husband was their eldest daughter. Someone had asked her father to whom she was engaged, as she had been seen in a café with a man from her work. Needless to say, she was not engaged. Her parents argued about whether she should continue working. He wanted her to give up work, whilst Zohra disagreed and found herself stuck between her daughter's and her husband's wishes. It was finally the daughter who decided to leave. Zohra said she would choose to support her daughter's desire to work in any case. She saw the practical economic argument for her daughter to continue working.

With tensions rising, Zohra and her daughter went out to the rural part of Ben Arous to see someone who practices black magic who gave them something to put in her husband's food. After her husband had (unknowingly) eaten this, the problems

¹²⁰ On marriage, a wife and her family must provide certain things for the future marital home, known as the wedding 'trousseau' or 'jihaz'. These may include: soft furnishings (curtains, cushions, carpets, quilts), bed linen and towels, crockery, kitchen ware, decorative items like ornaments, as well as a supply of clothes for herself. A husband should provide larger items like the bed, cupboards, sofa, large electrical items like the television and white goods, including the fridge. These exchanges replace in some way the *mahr* (dower) that was essentially abolished by Bourguiba and in practice was a symbolic 10 or 20 dinars (around £3). Husbands would also contribute to the cost of the wedding party, buying food. Other significant costs include the wedding dress – even hiring an elaborate dress could cost over 500 dinars - , the costs of preparing the bride (hairdressing, hamam), renting the party venue and buying the food for the various wedding parties).

resolved themselves. This respite lasted until another of Zohra's daughters told her father what had happened.

This father's fears about his daughter underline how in order to be perceived as a good father and for one's daughter to be thought of as a good potential wife, the performance of ethical personhood is paramount. For women in particular, this is tied up with appropriate sexual behaviour, or rather the absence of overt sexual contact before marriage (or any behaviour that could lead people to cast aspersions about a woman's sexual modesty and restraint).

THE STIGMA OF DIVORCE

These fears surrounding female sexuality contributed to the bad reputation given to divorced women who, no longer virgins, having been initiated into sexuality activity when they married, were 'free' to engage in sexual relations, as they no longer had anything to lose.¹²¹ Awatef, aged 33, who had been married for 9 years told me, 'in the Arab world, being a divorced woman is horrible. A divorced man can take (marry) a girl (virgin), and it is OK. A divorced woman has a bad reputation, even if she was wronged against, even if she is good. Like someone who has been in prison.' This is why, after her husband walked out following a dispute, Zohra was plagued by rumours in the neighbourhood, in spite of struggling to retain an appearance as a good wife and was desperate to repair her unhappy marriage.

The stigma of divorce and the related fears of sexual freedom of divorced women have become a greater issue now that remarriage is more difficult. I was initially surprised when several women noted that divorce was not such an issue in the past. Nadia, herself suffering from the stigma of being a young divorced woman, noted how divorce was not 'dramatic' in the past. Both her grandmother and her grandfather were divorced three times. As her grandmother was the only daughter and had seven brothers and she was pretty and her father rich, she had no trouble remarrying. (Although she adds that her grandmother first married at 14, divorcing at 17. Her third and final marriage was the only one to produce children). These days, Nadia, an attractive woman in her 30s, is seen as a sexual predator.

¹²¹ cf Hill (1979) on the significance of social representations of divorced women.

I was also struck by the history of divorce in Besma's family tree. Knowing her strong opposition to divorce in current times, I asked her why she was not shocked by a grandmother in the family who had divorced 7 times. She explained how in the past remarriage was easier for divorced women. There were many men without wives, as the mortality rate of women was higher. Equally, polygamy was possible. These days, a divorced woman has fewer chances to remarry. If she does not remarry, it is assumed that she sleeps around:

'Even her parents look down on her and say that she is dirty. The divorced daughter is a source of dishonour. The grandmother divorced many times, but remarried many times. She could have become a second or third wife and this was not a problem. Now, a divorced woman has nothing to hold her back sexually.¹²² Her honour is under threat and she is morally bad. Men are always men.'

This last comment sums up the way in which divorced women are subject to far greater stigmatization than men, as it is deemed 'normal' for a man to engage in sexual relations, whether married or not. Besma's commentary also stresses the relational nature of ethical personhood as a bad daughter reflects badly on the honour of her natal family. Consequently, these gendered attitudes to sexuality inform how divorced men and women are perceived and contribute to an individual's willingness to file for divorce.

AN IDEAL HUSBAND

Because a good potential husband is less bound by his sexual behaviour before marriage, a man who makes a good husband is one who has the potential to make a decent living in order to support his family. His perceived morality, however, remains under scrutiny, if in slightly different ways. The women I spoke to were looking for husbands who were kind, patient and generous and who, often first and foremost, were good Muslims. (Not the least because it is strictly forbidden for a Muslim woman to marry a non-Muslim).¹²³

Even for Besma, Kerkenni identity was not the first criteria she was looking for in her daughter's future husband. The only possible suitor within the family had decided to marry a fellow student he had fallen in love with, supported by his parents. Therefore, Besma had started keeping her eyes open closer to home.

¹²² She means this literally, as a married woman is no longer a virgin and has no hymen.

¹²³ The opposite is not true. A Muslim man may marry a Christian or Jewish woman. As children follow their father's religion, his children would become Muslim. If a Muslim woman married outside her religion, her children would not be Muslims and this is perceived as a rejection of her faith.

Besma (4)

Besma asked me if there were any young men working with my husband who would potentially suit her daughter as a husband. By then, it was clear to me that a 'suitable' man would have to be Arab and Muslim. I suggested a Moroccan colleague – a practising Muslim, well-educated with a sound financial situation, who travels abroad (and who had asked me to help him find a wife) ... 'No way,' she said. The man must be 'Tunisian'. There was a Tunisian colleague, who I had met once, also well educated with a good job and in his early 30s. This was much more what she was looking for. 'Where is he from?' she asked, interest tangibly growing on her face. The Sahel, I replied, the coastal region, known for being prosperous and having some affinities with her native Kerkenna. The response pleased her.

One of the neighbours (not Kerkenni) seemed a good option, not the least as Manel had taken a shine to him and he to her. He was buying his own home and ran his own small business. As their neighbour, he was a known entity; he went to the mosque with her husband. In addition, if she married a neighbour, Besma would be able to help her daughter, expected to have a professional career after her medical studies, to clean her house, make the dinner and take care of future grandchildren whilst she was at work. Besma did not underestimate the importance of this support, as she herself had had three children whilst working. Regional identity suddenly seemed less significant than other factors in providing a presumed guarantee of the good ethical personhood required of a suitable marriage prospect.

UNMAKING MARRIAGE

The caveat when parents make marriages is the possibility that the parents are at fault if the marriage is unhappy or breaks down. If the chosen spouse turns out to be bad, this suggests that the parents (in particular the father who has the final word) have not exercised their moral judgement judiciously. If it is a matter of parental honour to make a

good choice of spouse for a child, the public failure of a marriage is a matter of shame which must be hidden, even, it seems, if this means that the child remain in a miserable marriage.

Nour, who did not divorce

Nour, a woman in her 40s, was very unhappily married with two children. Her mother once confided in me that they had made a mistake. They thought they knew their future son-in-law as he worked with the bride's father and as he came from the same region of origin. He seemed a good match and owned his own home. Once they had married, Nour quickly discovered that he had lied. He did not own the house, rather his sister did. Also, he drank and was violent. She returned to her father's house only to be abruptly told to return to her husband; her father was adamant that no daughter of his would divorce. She repeated this a year later, only to be sent back once again. Not long after, she fell pregnant and abandoned any thoughts of divorce for the sake of her child. When we met, her first child was nearly 15 years old. Nour worked and provided for the children herself. She complained that her husband had never even bought them milk. She had fled the marital bed and was being wrongly accused of cheating on her husband by her sisters-in-law. She resigned herself to staying in the marriage, saving face for her natal family, and effectively raising her two children alone. As with Besma, there was no question of her going against her father's word.

Even those traditional indicators of good ethical personhood – regional and family origin – can be deceptive. Although Nour's husband appeared a good match, he turned out to be a liar and a cheat. In this case, her family did not have intimate knowledge of his family as they lived in the dislocated setting of the neighbourhood. Could they otherwise have avoided this mistake? Nour had little choice but to stay put and cope in her difficult marriage in order to avoid revealing her parents' error of judgement that may cast aspersions on their, and subsequently her, own ethical personhood.

Aziz shared the view that marriage and marital problems should remain in the family:

Aziz

Aziz, aged 79, was born in a small village in the agricultural heartlands near the Algerian border. Since his father's death, as the eldest son, he had ruled over the whole family, including his nieces and nephews. He could tell them all what to do. Even those living abroad phoned him to ask his advice or permission, including permission to marry, and to settle marital disputes. They asked 'not the judge or anyone else, but him.' In his family 'divorce is forbidden (haram).' Should marital disputes arise, they had to be solved. After his brother divorced, his father did not let him marry anyone else, sending all potential wives away. After three years, his brother remarried his first wife.

Aziz's wife agreed, 'there is no divorce.' The couple 'should always find a solution for their problems.' Although 'not all families are like this. Going to the police or the court is 'forbidden (haram)' for both men and women in his family. These problems are 'a family matter.' Aziz concurred. He did not like the legal system: 'the judge (should) never interfere ... Now you have to get divorced with a judge and the court must attempt reconciliation ... If there are two good fathers in the family, it won't end up in court. If there is no-one (to help reconcile the couple), they will go to court.'

Here, the intervention of the state was directly juxtaposed with the weakness of the family. A child divorcing can be a damning commentary on the ethical personhood of their natal family, especially of their father. The burden of protecting the honour or wishes of their family weighed on both men and women, or to put it into other terms, shaped their 'agency' with regard to accessing their legal rights to divorce.¹²⁴ Again, there is a caveat to this situation. One of the divorcing women I interviewed told me that her father had been staunchly against divorce prior to the failure of her marriage to an abusive husband. Her

¹²⁴ Cf Joseph (1997) for comparative sense of women's ability to access their rights and how this relates to kinship in Lebanon.

father came to see that divorce would enable his daughter to escape from her suffering and to seek amends; consequently, he became an advocate for a woman's right to divorce.

Other women declined to divorce to protect the moral reputation of their daughters and their daughters' marriage prospects, rather than the moral reputation of their father:

Nejia

Nejia wears the foulard. She is 42 and tells me that she thinks the foulard makes her look older. She was born and grew up in Siliana in the North. She moved to the suburbs of Tunis, where her husband worked, when she married, although he is originally from Siliana too. They have 3 boys aged 23, 21 and 20 and 2 daughters aged 19 and 14. She is 'at home' (a housewife). She expected marriage to be 'heaven', restful, but in fact it is 'tiring', because of the children. She and her husband argue and he hits her. She does not want to divorce due to her children. She says it is hard for a daughter to find a husband if her parents are divorced. 'Women', she explains, 'are patient and good as they have children and refrain from asking for divorce.'

Being married itself – and remaining married - is a criterion of ethical personhood, in particular for a woman. Sacrificing herself for her children and showing 'patience' in light of marital problems, even tolerating domestic violence, Nejia displays the moral criteria required of a good wife.

MAKING HUSBANDS AND WIVES

Marriage entails a ritual transformation bringing to bear new criteria that define a person's ethical personhood. These expectations for people to embody – or at least to perform – the ideals associated with being a good husband or wife were strikingly homogenous across social classes and regions. Given the changes in sociality and

economic struggles, however, these ideals were increasingly difficult for both men and women to live out in the lower-middle classes observed. Marriage too has become dislocated, contingent on the ability of each spouse to perform their ideal role, whilst struggling with the reality of married life behind closed doors. As we have seen, both the forms of house and kinship and friendship have changed. But perceptions of what ideal marital roles *should* be do not seem to have changed significantly – in spite of the changing economic reality. Thus it is increasingly difficult (sometimes impossible) to live up to the idealised expectations associated with being a good husband or wife and fulfilling all of one's marital duties. This next section will set out some of these highly gendered religious and moral ideals that people are expected to fulfil as husbands and wives and also some of the difficulties in realising these ideals in these times.

MAKING IDEAL WIVES

'I am everything at home. He is not responsible for anything.' (Neila, housewife aged 42, mother of 5.)

When I asked one of the divorced men I interviewed what he would like to change in the law if he were President for a day, his immediate response was that he would stop women going out. A wife should always be at home. What about taking the children to school or buying food at the souq? He conceded that these activities should be allowed, but that any other outings should be prohibited.

Equally, when I asked Zeineb, Besma's neighbour, when divorce was justified, she replied that a wife (like a husband) must refrain from doing things that are forbidden (*haram*) in the religion, like 'going out into the streets' or 'letting just anyone into the house'. A husband, she told me, does not like this behaviour, as he has to protect his home and their children. The notion of a wife being at home also hints at the legal language surrounding marriage in the PSC. Marriage is centred on the 'cohabitation'¹²⁵ of the spouses. One of the grounds upon which a husband may file for a divorce,¹²⁶ is when a wife fails to cohabit with her husband and abandons the marital home.

A wife's duties are both legally and socially tied to the house. Legally speaking, she has a duty of 'cohabitation' that begins once the marriage has been consummated and that

¹²⁵ Article 23 refers to the reciprocal duty of husband and wife to cohabit peacefully.

¹²⁶ cf ch5.

is the counterpart of her right to be provided for by her husband. Whilst the failure of a wife to cohabit with her husband takes centre stage in the divorce files (in later chapters), in the neighbourhood I found that 'cohabitation', the physical presence of a wife in the marital home, became a metaphor for the wife fulfilling all of her duties.

When asked what she does, a housewife (*rabbat bayt*) will simply reply, '(I am) at home' (*fid-dar*). Women repeatedly told me that they do everything in the house and that the man does nothing. By this is meant, as Saida, a 46-year old housewife explained, 'to clean the home, make food' and also carry out any duties related to the children. This is why Besma's mother used to leave Morouj early to return home, saying that her son needed her, her son at the time being 43 years old. This did not seem to shock anyone but me. Zohra (Nabil's wife) often laments that her husband and three sons simply do not eat if she is not there, even if she has left food on the table for them.

MAKING IDEAL HUSBANDS

'The duties of the husband are outside. He is in the street and she is in the home.' (Ahlam, 42 year-old housewife and mother)

In contrast, whilst a wife's duties are traditionally seen as being founded in the home, a husband's duties necessarily entail his being outside the home in order to make a living and to provide for his family. He should 'work and bring in the money,' as one wife put it. Zeineb, a housewife aged 48, stressed how the husband's responsibilities are financial, 'he cannot leave his wife and spend as he likes. Equally, a wife must carry out her responsibilities,' she added.

A husband's responsibility to provide for his family is particularly onerous in times of high male unemployment and yet remained central to the meaning of marriage for men in Tunisia. Moncef (a shopkeeper) summed up the situation for me in these terms:

'What is marriage? Marriage is an insurance policy. Why? As the dreams of single men and single women are different. The man studies. Why does he study? To work. And why does he work? To build a house. And why does he build a house? To fill it with a family. The man was free and then imprisoned. He hurries home from work, does the shopping and then comes to see his children, wife, to relax. Marriage – there are many risks, like the new diseases, like AIDS. So it is better to get married. Otherwise you are like a bee, each time in a different flower.'

(And, as we shall see, failing to maintain his family may quite literally lead to a man losing his freedom in the form of a prison sentence).

Financial pressures, in particular the difficulty of providing a marital home, weighed upon many men, forcing them to wait longer and longer to get married once they had managed to find the financial resources necessary. These constraints accumulated to form the worrying social phenomenon of 'delayed marriage (*'azouf 'an*)' that concerned many of my informants greatly. (The later people married, the greater the risk of sex outside wedlock).

Where possible, parents, like Besma and her husband, were trying to help their sons, by building storeys on top of their homes to be used as future marital homes.

Besma (5)

The upper floor of Besma's house was reserved for their eldest son, then at university abroad, for when he married. Given the increasing price of rent and buying property, being able to provide a marital home for your son was a distinct advantage. After all, why 'waste' money on rent, if the couple can be provided with somewhere to live by the family? If her son earns good money abroad, Besma hoped they could even build a second storey on top, a wish that later became true after the revolution, when the authorities were less concerned with planning regulations. Her house is, therefore, broadly similar in format to her parents' house, with its outside living space surrounding the house and extra accommodation on the roof.

Besma explained this to me as a return to traditional, patrilocal residence patterns and a move away from the neolocal conjugal couple. Perhaps this is also a sign that Morouj is slowly becoming a '*houma*' as families start to lay down roots there.

Zohra and Nabil (2)

Nabil (Zohra's husband) wanted, like Besma, to provide for his sons' futures. He asked me why, in Europe, people like small children and babies a lot, but are not so fond of adolescents and older children; when they are 18, children become independent and move out of home into their own place with their own car and boy or girlfriend. In Tunisia, they like to keep hold of them, until they are much older and leave of their own accord. 'Why do you think I built this big house? It is not for myself, but for my sons,' he told me. They are unlikely to have the means that he has now, so he plans ahead to provide a place for all three.

Nabil feared for his sons' futures, although they were all bright students at university. A good education was no guarantee of finding and keeping a good job. Finding employment most often involved having the right contacts and could be a heavily political matter, especially if the pay was lucrative. Unfortunately, this solution comes up against expectations of neolocal residence associated with urban living that can create tensions between the parents and their future daughter-in-law. Alternatively, given increasing female employment, it was not unusual for a wife to own the marital home, a fact that could also be the source of tensions within the marriage.

Zohra and Nabil (3)

Nabil's attitude towards marriage can be understood from a story he once told me about a nephew who married, divorced and then remarried the same woman. 'They' found this nephew a wife and 'we' (himself and other family members) went to her father's house to ask for her hand in marriage. This father was 'traditional' and agreed on condition that the couple would not see each other before the marriage.

The nephew's parents built a flat for the couple on top of their house. Due to the way the house was constructed, they were obliged to build this new storey with a shared entrance. After they were married, the wife complained that her husband spent all his time with his parents laughing and talking, whilst she was upstairs in their house

alone. After she left, many family members went over to see the wife to try to persuade her to come back. The wife finally agreed, on the condition that they would have their own home or at least their own entrance; both of these options proved impossible financially or technically and they divorced. By this time, the wife was pregnant with a baby boy. The husband went to the clinic and paid all her medical bills and suggested they try again; he did not want his son to grow up with another man and, apart from her loneliness, there were no real problems between them. They remarried and returned to live above his parent's house. They both worked as teachers. They have bought a plot of land with his salary and they live off her salary.

Rather than the ideal of a sole male provider, we find complex webs of relationships between husband and wife and between the conjugal couple and their respective families on whom they may be materially dependent to varying extents. A man's ability to appear as a good husband is contingent on the web of relationships that surround him, on the responsibilities that weigh heavily upon him and on factors, like unemployment, that may lie beyond his control.

MAKING FAMILIES

Anas

As we are drawing his family tree, I ask Anas (Habiba's son) why people used to have so many children. He tells me that people did not know about family planning before the 1960s, and they would keep going until they had a son. He points out one family on the family tree who had 6 daughters and then a son. His daughter, sitting with us, who is 12, says that people used to kill baby girls as they wanted boys. He adds that 'God gives and God takes away. Many children used to die from illnesses that we suffered from in the past.' He also adds that men used not to work much. I am led to understand from this that they used to fill their days pestering their wives for sexual

activity. He tells me of a neighbour in Sfax who is very poor and has 14 children. 'He keeps calling for his wife,' Anas concludes.

Besma explains how only 'natural' methods of contraception are permitted in the religion (the withdrawal method, 'counting the days' and avoiding sex on fertile days). In practice, men resist using condoms and consequently many younger women take the pill, whilst older women use coils. In the Koran, it says that a man should look for a wife who gives birth a lot and love her; this is how Besma understands that contraception is forbidden. It (family planning) is all down to Bourguiba, she explains. He was 'secular. He liked women and wanted all Tunisian women to be like French women. He once ripped a sifsaree off a woman in the street and wanted women to stop wearing the veil, as he said it is not in our traditions. This is why he wanted to introduce family planning. He only gave child support for the first three children. Zine (Ben Ali) increased this to four to encourage people to have children. Bourguiba did it to discourage people from having children. They would say, he only gives me money for three, so after this I will have an abortion to remove the baby.' I discover many women I know who have had abortions, either for health reasons or because they had too many children. Habiba explained that abortion is accepted in the religion up to 40 days when 'the baby becomes a soul'. She regrets the abortion she had after this limit that is 'haram' and fears that she will not be forgiven for this sin.

As Moncef explained further above, if people marry and build a home, it is because they want to fill it with a family. Radical changes in family size have occurred in the context of state politics designed to promote family planning. In this context, changes in the structure of the house also document changes in the structure of the family and this sets the scene in which men and women strive to play out their roles as ideal husbands and wives.

The family trees I collected reflected the striking change in the number of children born in each generation and the impact of family planning that made a reduction in family size possible, whilst economic changes made having fewer children desirable. Habiba told

me how people used to have a lot of children, maybe 15-16.¹²⁷ Her 23 year-old granddaughter ascribed the reduced family size to economic changes. She told me how people used to have 12 children, whereas now they just have 2. Before they could live on little money. Now life is expensive.

MAKING A LIVING

Changes in the economy and an increased dependence on, and desire for, consumer goods have made life expensive and restricted the size of family that couples seek to build.¹²⁸ As people migrated away from the countryside, they also migrated out of a particular type of economy, frequently based on agricultural production and owning land.

Zohra and Nabil (4)

Nabil spoke about his childhood in the agricultural heartland of El Kef, where his parents were farmers, with a nostalgia that betrayed his regrets about today's increasingly consumer society. His sons' expectations for these consumer goods made an increased household income necessary.

He contrasts the life his sons expect with his childhood when he helped work on the farm during school holidays:

'We were almost in the stone age. We used to make everything ourselves.' 'Tabouna' (a traditional bread) was baked in a clay oven over a wood fire. The whole family shared a room sleeping together under one blanket on a large grass mat. He often wonders how his parents managed to have 11 children! (Sadly, two of his siblings died). He adds that in the past 'people did all these things with pleasure. This was their life.'

¹²⁷ cf Goody 1976. This shift reflects Goody's argument relating changes in the type economy (here, away from an economy based on agricultural production at a time when many of these people frequently lived in the countryside prior to the rural exodus towards wage labour) to changes in family size.

¹²⁸ cf Goody 1976.

Like many others who talk about the past, he keeps mentioning how life was 'before.' I ask him, what he means by this. Before what exactly? Things changed for them, when his father bought machines for the farm. His father then became a mechanic, as he could only afford to buy second-hand machines that constantly broke down! Then the children studied and no one took over the farm from his father. They let someone run it for them, in return for the profits, but he did not take good care of it as it did not belong to him. Many of the animals died. Only the walls of the old house are left. If they had stayed there, he could have started growing a more profitable type of crop like olives, instead of wheat, but this would have required a lot of work. Now, his family have only a small house in the village, inhabited by his elderly mother.

Zohra says that her sons complain that they have to share a room (there are two bedrooms for three sons) and have become materially very demanding under the influence of marketing and consumerism, wanting designer clothes and other consumer goods like mobile phones. Fortunately, relatives can bring some coveted items from France. When she was a child, she took it for granted that she had to share a room with her sisters. She did not expect to receive a present, just because someone else did, trusting that it would be her turn next time.

Nabil is fortunate that he has a good job and that his generous salary, combined with the rent from the roof apartment, enables them to have a good standard of living. Nonetheless, when Zohra fell pregnant a fourth time, her husband persuaded her that it made sense to have an abortion to avoid overstretching them financially.

However, the pressure to consume and reliance on material goods that are purchased rather than produced by wives in the home makes it increasingly necessary for a household to have two incomes. As Besma's mother pointed out, women now earn money outside the house to buy products in the supermarket, rather than making supplies of these foods, like Besma and her mother still do; wives increasingly produce wages rather than *hlalam*.¹²⁹ The increased demand for consumer goods weighs heavily on parents, who must provide for their children. As Zeineb put it, 'before, you had children and just let them live and eat from your plate. Now there are nappies and things and it is very expensive.'

¹²⁹ cf Ch1 on women making annual supplies of essential foods.

I often heard these husbands and wives in the neighbourhood reminisce about their childhoods, perceived as a time when people lived simply, with few material needs and when they themselves were free from responsibility. Besma also took refuge in her memories of a time when life was easier. She had also made a significant financial contribution to the household through her work before she was made redundant.

Besma (6)

Besma and her husband did not remain living at her parents' house for long after their marriage. Besma had spotted a block of flats near the city centre in Hai Al Hadhra, which she dreamed about living in. Not long after, by coincidence, her husband's employer offered him the opportunity to buy one of these very same flats. No doubt, Besma's income helped with this purchase as she continued working after her marriage. The children were cared for by a childminder whilst she worked. She saved every penny she earned to give to her family; she saved the restaurant vouchers given to her by her employer, to treat the children with cakes. Every month, she and her husband placed their money together on a shelf and this fund was used communally for the family expenses. On top of her full time job, Besma bore the burden of all of the housework, although she tells me that her husband would help occasionally. When I lived with them, after she was made redundant, she was 'at home'. I rarely, if ever, saw her husband help with the domestic chores.

Their three children were born in their new home. As the children started growing up, the flat began to feel cramped. Her husband noticed an advertisement for land for sale in Morouj. Besma had mixed feelings; Morouj was far away, but the children were fast outgrowing the apartment and the price of the land was too good to refuse. They still own the flat, kept in safekeeping for their eldest son and rented out to provide some useful income.

Whilst ideal notions of what makes a good husband or wife remain constant – and surprisingly homogenous across social classes – it is increasingly difficult to live up to these ideals of a sole male breadwinner married to a wife who remains at home. Firstly, as

we saw above, wives must leave the house to socialise, if for no other reason. Secondly, educated wives are driven to, or may want to, go out to work. Tensions appear between ideal notions of marital duties – and the forms of ethical personhood associated with being a ‘good’ wife or husband who fulfils these duties – and the reality in which these roles are constantly changing.

Zohra’s dispute with her husband over their daughter’s work (cited above) indicates how in some households, it is either not possible or perceived as undesirable for a woman to work. This is frequently for reasons related to the suspicions and taboos surrounding female presence outside the home. Salima, in her early 20s, had not completed her studies. Before meeting her husband she had worked in a print shop, but her husband wanted her to stop. She also preferred not to work so that she could concentrate on her responsibilities at home (not the least because she was pregnant). Irkam, aged 50 (and educated to secondary school level), did have a civil service job but stopped working when she had children. Her daughter told me that her father had not wanted her mother to work. Some women did not have the same opportunities. Another woman of Irkam’s age was illiterate. Her daughter suggested that her father preferred her mother being dependent and forced to remain at home. As we met, this lady was learning to read. She told me that she wanted to read the Koran; this provided a reason for leaving the home and becoming literate that her husband would find difficult to object to.

If the wife does not work, however, the pressure on the male breadwinner is immense. As Zeineb, herself a housewife, told me regretfully, her husband worked night and day. If he had only worked in the day, there would have been a thousand things missing.

Consequently, the ability of a wife to work in a respectable profession takes on increased value in the marriage market.¹³⁰ Jamila’s good education that will lead to a respectable career as a doctor in the future will enable her to ‘help’ her husband provide for their household. Fathi, a young man working in the court, was pleased to be engaged to a secondary school teacher who not only had a steady income as a civil servant, but whose work would be easy to combine with her future role as mother. The idiom in which this is expressed, as working wives ‘helping’ their husbands, underlines the tensions that prevail as ‘traditional’ gender roles are increasingly difficult to live up to for both men and women. This is a shift compared to the logic of Besma’s parents, who told her to stop her

¹³⁰ Cf Ch3 on how Faza juggles her roles as working wife and mother.

university studies when she became engaged in order to work and save up money for the wedding, or Zohra's (aged 46) parents, who similarly told her to stop her education as she was getting married. A sign of the changing times, in retrospect, Besma's mother now regrets that she did not encourage Besma to finish her studies. The implication here was that these women would work temporarily to help provide their 'trousseau' and then stop once married. During the time I knew her, Zohra later briefly found a job at a call centre, but gave it up within a few months as she found it impossible to combine with her responsibilities as wife and mother. The breaking point was the month of Ramadan, when her manager would not let her change her working hours to be home in time to cook for her family ready for the breaking of the fast.

Often, women are required to work to meet the basic costs of living, rather than to pay for consumer goods and luxuries. Male unemployment has made this a greater imperative. Others, like Nejia, begin work because of marital breakdown, when their husbands are unwilling rather than unable to provide for the family. A female lawyer living in Morouj, who frequently works with women who are victims of violence, commented to me on the amazing resourcefulness of women, who may be poorly educated, and their ability to find the money they need to escape from a marriage that has become intolerable. Nejia's father had married her off to the first person who asked for her hand when she was only 15, finding himself extremely poor with 7 daughters to care for. Poverty also meant that Nejia could not take refuge in her father's house. Educated to secondary school level, Nejia managed to obtain a loan to start a small shop selling women's clothes after struggling for years and selling most of the furniture to feed her children, whilst her husband – who was employed – did not provide for his family. The gas and electricity had been cut off and she kept food in her neighbour's fridge. She was hopeful that her new independent income would enable her to pay for a divorce. 'Should the mother provide for the children?' she lamented. 'No! The father should maintain them.' She described her husband as something 'extra' in her life, something she did not need and could live better without.

If women are increasingly required to work, it is less practical for women to remain in the home, the traditional site of their marital duties. The breakdown of 'traditional' marital roles, led to an inherent contradiction between a nostalgia for a past when things seemed easier as material needs were more easily met and the sense that women are better placed in society today as they are educated and 'free' in different ways. Having also told me that things were better 'before', Zeineb went on to tell me in the same

conversation that, in some respects as far as the situation of women is concerned, things are better now that women are 'cultured' and able to read. It is also better that men are now more engaged in family life and take on more responsibilities with the children, 'instead of just going to sleep.' Souad (aged 35, born and bred in the North) told me that things used to be better as women were 'afraid of men'. The man was 'the ruler'. In this contradiction, there are undertones of a fear of moral breakdown, that things are no longer the way they should be and that these changes may be responsible for the social problems that trouble people- such as a 'high' divorce rate, juvenile delinquency and young women engaging in sexually loose behaviour.

Zohra felt that, whether or not a wife has a high level of education and works, 'the husband has the upper hand at home'. This is the natural order of things to her, according to the religion. As she explained, there should be respect between husband and wife, but especially from the wife to her husband, as 'a man is a man and a woman is a woman.' She repeats the same sentiment to me when we discuss how she imagines her sons' married life in the future. 'A man should help his wife (with the housework), but it should not be his responsibility. He should still be able to come home and find food on the table. The man's responsibilities include first and foremost 'to provide for the family, to work.' She tells me that I should respect my husband, because 'a man is still a man' and 'we should always respect a man more than a woman. Even if the woman is a Minister and the man is a farmer, we should still respect the man more.' Indeed, the female Family Judge told me that, although she was a judge at work, she remained a wife at home carrying out her marital duties as other women do.

CONCLUSION

Reading agency as a network encompassing relationships and responsibilities (Laidlaw 2010; Strathern 2004) provides a more pertinent model for understanding the agents who make and end marriages. These individuals appear to be related and responsible rather than docile or empowered. Consequently, morality does not reside in the individual, but in the web of relationships; a father's ethical personhood is at stake when his daughter divorces or loses her virginity (however this occurred) because his own judgement is at stake.

Moreover, 'agency' appears as a less fitting way to read and understand these decisions than does judicious practice. Viewing consent in marriage or the decision to file for divorce in terms of the continuous exercise of moral judgement accounts for the subtleties of the different relationships that must be weighed up and also the responsibilities that are held by, and that help shape, the ethical personhood of those concerned.

Husbands and wives emerge as particular kinds of ethical persons, new criteria having been instantiated by the ritual act of marriage itself, opening each spouse up to judgement in light of the marital duties expected of them. As we have seen, these duties are highly gendered and remain so even in the difficult economic climate that, along with the growing norm of neolocality, places greater emphasis on the conjugal couple who struggle together to raise their children and make ends meet.

What emerges is a further form of dislocation: between the ideal and the real (or the possible) as far as enacting marital duties is concerned. The public act of a happy marriage is a further form of performance, keeping up the appearance of how people continue to believe marriage should be, even as subtle changes in the conjugal relationship are occurring behind closed doors. In this way, even once opened, marriage continues to be like a watermelon, ripe with new kinds of uncertainty that may make it bitter or sweet.

These ambiguities related to marital roles echo changes in the PSC. Firstly, the addition of a phrase in article 23 indicated that 'the wife shall contribute to the maintenance of the family, if she has property.' (Although, the wife's contribution is clearly conditional and the lawyers I interviewed were unclear about whether a salary would be considered 'property' or how 'property' should be defined). Secondly, the change in legal vocabulary in the PSC¹³¹ appeared to move towards a legal model of the marital relationship founded on reciprocity rather than the dominance of the husband.

Whilst marriage has become dislocated, kinship retains a central role in people's lives, albeit in subtly different ways. Once based on residence in the same place and intimate involvement in each other's daily lives, neolocal residence has shifted the way couples relate with their kin, rather than eroding these relationships entirely. In these difficult economic times, kinship may be taking on renewed importance as there is a shift back towards living patrilocally, as concerned parents like Besma and Nabil build future

¹³¹ See Introduction.

marital homes for their sons. It remains to be seen whether their sons will take up these offers of material support, like Besma's brothers have done, and decide to live above their father's house.

Besma (7)

Besma's husband once discussed hypothetically what he would do if polygamy were reintroduced. He would not take another wife, he concluded. He owed her far too much. It was she who had struggled with him and 'worn herself out' as they raised their children together. In the days when Besma had worked, they pooled their resources to provide for the family. These days, Besma took care to save them money, using their resources wisely. A glowing smile lit up Besma's face. His response pleased her greatly.

CHAPTER 3 -

FROM BOTH SIDES: ABOUT THE COURT HOUSE

Saida and Karima

When I met Saida in Morouj, she was in the midst of an acrimonious divorce. Having been thrown out of her home by her husband and, far from her native Algeria, she lived alone with her 3-year-old son in precarious conditions. I offer her a lift to the court to spare her the expense and time of travelling and to provide moral support in the intimidating space of the court.

I am conscious that her contact with me will automatically win her better treatment from the clerks. Souad, a clerk in her mid-40s, herself a wife and mother, takes time to listen to Saida. She then offers advice on the law and its procedures: she must file her request to travel to Algeria with her son for Aid at the Court of Tunis (where her husband resides, rather than in Ben Arous); her right to a rent allowance officially ceased when her husband told the judge he had decided to reconcile with his wife, thereby ending a previous divorce case he had filed against her. 'As long as he says that he will return to his wife in front of the judge and the court, we suppose this happens', she explains. Saida asks if – in her present divorce case – she should ask for a lump sum or monthly payments in compensation. Souad replies that a monthly pension can be 'light' (very low). She adds that she does not see why she cannot travel to Algeria with her son unless her husband has taken legal measures to prevent her travelling. She advises Saida to move back to Algeria after her divorce: 'there is nothing left for you here.' Yet, I know that Saida is afraid of losing custody of her son if she tries to move away.¹³²

A few weeks later, as I drive Karima, another clerk, back to the neighbourhood where we both live, she explains how she has previously helped Saida. However, she is afraid that Saida has not listened and asks me to repeat her advice. I am touched by her genuine concern. Like Souad, Karima is afraid that Saida's case would be thrown out

¹³² She would be required to respect the father's visiting rights. Evidently, it would be impractical and undesirable for him to travel to Algeria every weekend to visit his son.

of court, as she is not filing it in the jurisdiction where her husband currently lives.¹³³ In addition, she thinks that Saida does not have enough evidence to prove the harm done to her by her husband.¹³⁴ Although Saida has proof that she used to live in a hostel for children in danger, this is not sufficient as she had only lived there because she is Algerian and had nowhere else to go. 'People', Karima explains, 'do not want to take in women running from their husbands, in case the police get involved and they end up in trouble themselves.' Saida's husband is likely to triumph as he is following the law to the letter; her lawyer is only using her for money and surely knows that her case will be rejected for being filed in the wrong jurisdiction. 'He will say later that it was not his fault and that it was the judge's decision', Karima adds. She has also taken Saida to see the family judge to ask whether she could travel to Algeria with her son for the religious festival. Regretfully, he could not agree to this as he could not guarantee that she would not run off with her son.

INTRODUCTION

Moving between the neighbourhood and the court – literally in this vignette – highlighted the numerous links that existed between these supposedly separate sites.¹³⁵ From these perspectives, to borrow Latour's metaphor, the court office took on a 'star-like shape with a centre surrounded by many radiating lines with all sorts of tiny conduits leading to and fro' (2005: 117). This chapter focuses on the actors who enter the court office, as the legal code requires both men and women to divorce judicially and for litigants to come to the office for various bureaucratic purposes.

WT Murphy found – in a different context – that the 'rule of law' requires 'a barrier between the inside and outside of the courtroom', a 'means for determining the difference between what is relevant and what is irrelevant to the discourse that unfolds inside' (1997: 197). He talks about an adjudication system that provides an 'ethical space in which everything can be subjected to a particular kind of often 'uninformed' or decontextualized critical scrutiny' (ibid: 209). Such a separation would appear necessary for law to have its own morality.

¹³³ This requirement is established in jurisprudence, rather than the legal code.

¹³⁴ cf chapter 5 for a discussion of evidence.

¹³⁵ Cf Mitchell's approach to 'the question of the state and its relationship to society' (2006:184).

The PSC, however, in defining marital duties according to 'custom and habit', explicitly demands a degree of continuity between the courthouse and the community. To pass judgement, the court must try to see into the intimate domain of the household, the stage where marital disputes are played out, a space that is frustratingly kept out of view. In order to try to comprehend the litigants and their marital disputes, after a first moment of decontextualization, I argue that the practice of the law requires a process of *re-contextualisation* that takes place as those individuals who work in the law create human bridges with the household and neighbourhood and the moral values and ideals that are dominant there.

This chapter seeks to outline the kind of ethical space that constitutes the Tunisian family court that is both apart from, and a part of, the context in which the law is applied. Interrogating this space and peoples' experiences in it reveals ways in which the court is part of the broader process of reassembling the moral.

In tracing these connections, I follow Goodale and his approach to studying human rights by reading them as 'ethical theory as social practice' which he has defined as 'the development of normative ideas through the dynamic interaction between the many different sources reflected in these complicated arrangements' (2006: 29). As a result, he finds that human rights are never separate from the 'swirl of other sources of normative inspiration, which include unwritten community rules of behaviour, Bolivian state law ... standards associated with evangelical Christianity' (ibid: 29). Similarly, we will find that personal status law concerning divorce is never separate from the 'swirl' of related kinds of 'normative inspiration', a moral storm in an office shaped teacup.

In turn, the legitimacy of the Tunisian state is at stake, as the state, via its court and legal code may, or may not, be seen to uphold those dominant values associated with an Islamic version of morality, as expected of it by the majority of its citizens.

In this context, this chapter sketches the swirling forces that are visible from the vantage point of the court office and seeks to portray what happens within its four walls. As in the previous chapters focusing on the house, the courthouse shapes and documents the relationships that are formed between people, between litigants and the agents of the law who work there. We observe these from two sides: from the perspective of the court staff and that of the litigants. First, we will look at the court from the outside in: the elements that make the court appear unwelcoming and separate and the legal procedures

that compel litigants to enter this strange institutional world. Secondly, we will view the court office from the inside out. Karima – my own entry point into the court, whom I first met at her home in Morouj – provides a case study, enabling us to consider one of the key actors of the court office from both sides of the apparent divide in her professional and home environments. We will also meet the rest of the court staff and observe the office life of these individuals marked as much by community spirit as by professional activity. Finally, we will find out what happens when both sides collide and explore the nature of the interactions between staff and litigants and how these interactions inform litigants' perceptions of the morality of the law.

OUTSIDE IN

The English term 'courthouse' could be misleading in making the court sound unobtrusively familiar and house-like. The most frequently used Arabic terms speak more of the way the court was perceived by my litigants, being referred to most often as *mahkama* (literally 'place of judgement) or *qasr al-'adala* (palace of justice), terms which create a sense of distance and estrangement and hint at the litigants' aspirations of what might be found there: a favourable judgement or justice for harm suffered in marriage.

This sense of separation was heightened by the physical distance between the Court of First Instance of Ben Arous and anywhere where litigants might visit on a daily basis. Coming to the court required a special effort, often travelling on public transport for potentially an hour or more given the large area of the court's jurisdiction.

The imposing building is distinguishable as a state institution by the red Tunisian flag flying from the roof. Several storeys high, it is reached by a broad flight of marble steps leading to a heavy wooden door. A small cubicle houses the uniformed police who patrol the entrance. Immediately opposite this door are three large rooms used for public hearings. To each side, corridors and steps lead up and down to a maze of small offices, home to the different sections of the court and their clerks. The basement houses the archives and clerks from whom litigants buy fiscal stamps to validate their documents. The public prosecutor's spacious office is right at the top of the building, only accessible via his secretary's office.

The Personal Status Office, responsible for divorce cases and other personal status issues, and where I spent time observing and consulting divorce files, is the closest office to the main hall. Staff were constantly interrupted by lost citizens looking for completely different services amidst poorly sign-posted corridors. These people added to the numbers of litigants and lawyers already present in the entrance of the small office, waiting to consult documents or registers related to their case. The unmarked door next to this office is the office of the Family Judge.

To hold back this flood of people, who could number up to fifteen, a wooden rostrum was placed in front of the door, which also served to house the record books for easy consultation. One book listed all the divorce cases by number, mentioning start and end dates and the type of divorce at the outset and at judgement (changes to the nature of the divorce being relatively common). A second book listed cases under judgement date; all cases considered at each Friday hearing are registered with the outcome of the judgement, indicating the next steps to be taken. A further book listed cases being taken to appeal, specifying whether it was the grounds of the divorce or the details of the divorce settlement (compensation payments, child maintenance or custody) that were being disputed.

Inside the office a long series of cupboards stored the files currently in process or recently completed. Paperwork dominated the office with files stacked on any available surface. One desk boasted a computer, which arrived a few months after I started fieldwork and was one of relatively few in the court. This machine was rarely used – except for playing solitaire – until I was ending my fieldwork when a new clerk started entering divorce cases into the Ministry of Justice database for statistical purposes. Accurately and conscientiously copying out documents and keeping records up to date by hand was the key activity of most of the clerks who worked there. A portrait of Ben Ali looked down on them as they worked.

One morning I arrived at the courthouse to find a woman sitting nervously on the steps, fearful of what she may find inside. Trying to reassure her that the judges were good men, I learned that she had come because her husband no longer provided for her and she could carry on no longer without support. Like this woman and Saida, most litigants seemed to enter the court with a degree of apprehension. The physical symbols that marked the court out as a separate, institutional sphere echoed the psychological barriers that prevented others from entering this taboo space at all. (Zohra, in the previous

chapter, avoided the court to prevent making the breakdown of her marriage irretrievable). Another litigant had come to the court because her husband had filed for divorce. She told me that she had contemplated committing suicide and killing her children to escape her abusive marriage; the idea of coming to a court and asking for a divorce herself had never even occurred to her.

A FILE IS BORN

A case cannot exist without a file, its written embodiment. It is because of the documentary basis of the law and the various legal procedures to produce these documents, that litigants were compelled to come to the court and expose themselves to public scrutiny as they interacted with the staff who worked there. In this way, the law literally requires the neighbourhood to enter the court through its inhabitants.

The presence of files all over the court office was viewed as a reminder of the worrying prevalence of divorce. The obligation to carry out certain legal procedures relating to their cases compelled litigants to make the long journey to court. Although some divisions are drawn along socioeconomic lines, as those who can afford a lawyer can avoid regular visits to deal with the mundane paperwork, all litigants must come to the court at least once for their compulsory reconciliation sessions. Some expressed frustration at being made to wait since they had been forced to take time off work to come to the court.

In order to initiate a divorce case, the petitioner (or their lawyer) must come to the court office with various documents. First is the 'summons' written from one spouse to the other summoning them to the court for the first reconciliation session. It may be written by a petition writer or a lawyer, or occasionally by the litigant if they are confident and aware of the legal form the document must take. This document includes a 'subject' which outlines the reasons why the litigant is asking for divorce. It is always stamped and requires a 'fiscal stamp' costing 5 dinars (increased to 12 dinars in September 2008), as fees paid to the court. The marriage certificate and birth certificates of both litigants and any children must also be presented. Once the correct documents are present, a new case can be born, slipped into its own distinctive yellow cardboard jacket and attributed a case number that is registered in the 'general record book'. The litigant will be given a date for their first reconciliation session with the judge, which he or she must communicate to the spouse via legal means, by taking the document to a notary who will summon the spouse

to the court on the allotted date. As cases are continually born, and the clerks are their midwives, this paperwork formed an important part of their job.

When a case is finalised, a clerk must fill out a standard sheet, including details such as names and date of birth of the litigants, date and place of marriage, mother's maiden name and date of divorce. The form always begins with the man, in contrast with the yellow cardboard sleeves, which begin with the litigant asking for divorce regardless of gender. These sheets made at the end of each case are handwritten by a clerk and then sent to the typists. Once typed, they are stamped and signed by the judge, and the litigant has to pay fees to the court (with a minimum payment of 30 dinars or 2% of the financial settlement, Karima called this a 'divorce tax'). Once cases are completed the couple must return to collect a sheet stating that they have divorced. This must then be taken to the town hall so that their birth certificates (which also register marital history) can be amended.

INSIDE OUT: DAILY LIFE IN THE OFFICE

Whilst later chapters focus on the files themselves, here we will focus on the files' guardians and gatekeepers, the litigants and court staff brought together in this small, non-descript room, measuring no more than 20 square metres. We will see how the staff experience and interact with the space of the court office and each other, before turning to how the 'outsiders', the litigants, experience this space. It was these people who formed human bridges via the moral values and prejudices they carried with them from their respective houses, linking the world of the court with that of the neighbourhood.

Even for those who worked there, the office was not always exactly hospitable. It was often boiling hot in the summer heat with only a fan to cool it down (that tended to blow the papers around the office) or, in early winter, cold enough to warrant keeping on a coat, especially when the winter chill came early before the heating was turned on after December 15th. The window was often open so that Fathi, the gopher, could smoke.

Only Karima, who had worked there for about 15 years, remained during the whole period of my fieldwork. Others came and went. Three permanent clerks worked in the office at any one time. As well as managing the files, recording details in the various

record books and preparing the files for court, Karima took notes during the weekly public divorce sessions. I was initially surprised to see that Karima veiled at work, wearing the Tunisian *foulard*. In the public hearings, she wore a bonnet, instead of the scarf, to cover all but the 'moon' of her face alongside her court uniform, veiling being forbidden in state institutions.

Souad, carried out the same job in the public session dealing with children in danger and custody. During my fieldwork, Souad and Karima changed places, as Karima had had enough of divorce after over 10 years! The third clerk was responsible for recording statistics among other things. It is difficult to say exactly what this clerk's responsibilities were as the position was filled by people who appeared to do very little indeed. All clerks assisted the litigants.

Whilst Karima, Souad and Sanaa were all married with children, Amira (who replaced Sanaa) was only around 30 year's old and had been widowed at a young age. She was engaged to be married in a 'love marriage'; her new husband accepted her son as she was widowed.

In 2008, Fathi joined the team. A man in his late twenties, he worked as an assistant, helping carry piles of files between different offices and managing the flow of litigants for the reconciliation sessions. He was not classed as a permanent employee (unlike the others who had the status of civil servants) and earned significantly less. He hoped that one day his position would be made permanent. I was told rather cynically that this aspiration might explain his conscientious attitude. Always polite, he helped the clerks manage the stream of litigants who came to the office.

Another familiar face was the Mauritanian intern, who Karima said must have been sent to Tunisia because Tunisia is famous for family law. He seemed shocked by the amount of divorce in Tunisia and declared that what he saw happening in Tunisia was 'not freedom', as he understood it. At least one of the clerks was inclined to agree with him.

A few other people sometimes came and sat on the spare chair in the office, chatting to the staff. These included the cleaning lady, the IT support technician and a man who worked in the office responsible for children in danger. Another regular visitor was a waiter from the café across the street, who came to collect the cups used that day. To my

surprise, the office was also visited by a travelling saleswoman selling a selection of clothes, perfume and makeup.

I came to know two family judges during my fieldwork. The first, Judge Samia, gave me permission to carry out fieldwork. She was replaced by Judge Ali in September 2008. Much to my relief, he accepted my presence. Both Family Judges were married with children and in their mid-40s. I also got to know the Cantonal Judge (who deals with maintenance payment cases), a gentleman in his mid-30s who was also married with children and dealt with the *nafaqa* cases so often linked with divorce files.

FROM BOTH SIDES NOW

There can be no stronger embodiment of the movement between the court office and the neighbourhood than Karima, the well-respected clerk who first introduced me to the court. I knew Karima both in her home and workplace, allowing me to observe the moral values that she carried with her between these two sites, whether talking about how she experienced life as a working mother or discussing divorce cases with her colleagues and the litigants. Her own expectations and experience of marriage necessarily informed her work (and vice-versa). Simultaneously, in contrast to Besma, she demonstrated alternative ways of navigating the uncertainties of Morouj, that did not rely on an increasingly invisible regional identity. Karima, then, reveals the ways in which moral webs are woven between the court and the neighbourhood by the human actors who work there; consequently, it is worth spending some time in her company and learning about her life inside and outside the court.

THE STORY OF KARIMA

When Besma introduced me to Karima, I was intrigued that, although she had an encyclopaedic knowledge of most people in the neighbourhood, she did not know where Karima or her husband, Hakim, 'came from'. Rather, as an indication of her high moral standing and character, she stressed their strong religiosity, telling me that I should trust Karima and Hakim and should act in front of them with additional caution. Both had completed the pilgrimage to Mecca and were widely respected. Karima literally wore her religious identity in the form of the Tunisian '*foulard*' (head scarf), the use of the French term denoting that she tied her scarf in the 'traditional' Tunisian way (a knot tied under

her chin) and not in the politically connotated manner of the '*hijab*'. In the court, she was known as 'the religious one', as few women wore the veil at work. She was conscious of being a symbol of Islam and took this role seriously; she knew that she would be judged on her moral behaviour more strictly than other women who did not veil. The pertinence of the epithet was brought home to me when another (less well-respected) clerk decided to start veiling in an attempt to improve her reputation. The general consensus was that this was ridiculous; the experiment was very short-lived. It went to show that the person makes the veil, rather than the veil the person.

Karima shared Besma's nostalgia¹³⁶ at the loss of a more communal way of life centred on the Arab house she shared with uncles and cousins during her childhood. However, for both Karima and her husband, religion and education appeared to be the most important elements of their life stories and identities. Karima studied for two years after her Baccalaureat, but now held a position that equated to someone with a Master's degree, having passed various competitive exams that qualified her for promotion. As I left Tunisia, she was being promoted once again to head clerk. Hakim, who was visibly proud of her professional achievements, was educated to doctoral level and had a career that reflected this. In their mid-40s, they had two children in their teens, both of whom excelled in their studies.

On Marriage

Karima's attitudes to both marriage and divorce, as well as her own experiences as a working wife and mother, informed her work in the court.

Karima

Given that our first meeting takes place when Besma deliberately takes me to see Karima to talk about divorce, the conversation naturally turns to marriage and marital duties. We are not the only people to visit Karima to talk about divorce; as her professional activity is well known in the neighbourhood, various people go to her for legal advice. Besma is typically chatty and curious and asks her questions about the people getting divorced in the court. She asks how long they have been

¹³⁶ See chapter 1.

married. Karima replies that many couples have been married for less than a year. Both women sigh disapprovingly. One couple though, Karima adds, have been married for more than 40 years. Besma wants to know why they would want to get divorced after such a long time. She replies that in these cases, it can be because the wife no longer wants to have sex with her husband and so the husband asks for a divorce. They discuss whether this is right or not.

Besma is sympathetic to the wife. She must be an older woman, who has already had all her children and she must pray. (As people have to cleanse themselves thoroughly before praying after sexual activity, sexual relations can be seen as a nuisance necessitating lots of extra bathing). All women have moments, when they are not desirous of their husbands, after a hard day completing all the household chores, and their husbands should be patient. Karima seems to take the side of the husband. She is adamant that it is 'one of his rights' to have sex with his wife and this is even mentioned in the Koran. Besma asks whether the reverse is true, if there are any wives who divorce their husbands, as they do not want to have sex with them. Karima says this does not happen, although there are some rapid divorces straight after the marriage, if the husband has hidden his impotence.¹³⁷ She adds that there is a lot of infidelity in Tunisia. Both women say 'hamdullah' (thank God, I am OK) and then laugh nervously.

Karima continues talking about marital strife. The problem in Tunisia today is that people think that women and men are 'kif kif' ('the same, identical'), whereas they are complementary, as is mentioned in the Koran. A perfect example of this is the sexual one. She shows this complementarity by placing her two hands together with their palms and fingers matching. 'Two become one.' Problems arise when the man and woman become confused and the woman does not fulfil her role. For instance, sometimes a wife is tired when she comes home from work and tells her husband to fetch a pizza. 'This is not normal.' She adds, in a sentiment I was to hear repeated many times, that these days, 'men do not have any rights,' whereas 'women have all the rights.' She feels that Tunisia is moving away from Islam and away from sharia and this is not a good thing. For instance, in Tunisia women can divorce without grounds and have more rights than in some European countries. They begin to

¹³⁷ There are divorces requested by wives, as their husband does not want to have sex with them, although as for financial issues, one problem can be intricately intertwined with another. I saw at least one file like this and there was one case in reconciliation, in which the judge provided advice on this topic.

compare Tunisia to Libya, where polygamy is still allowed. But, Karima asks, is it Libya which is too closed or Tunisia which is too open?

On a separate occasion, I ask Karima whether her husband ever helps with the cooking. (I later realise that my question may have implied that she was neglecting her wifely duties, something I would not wish to suggest). Never, she simply replies. It is not so much that he does not want to help, but that he does not know how to cook. And he is often away on business trips all over Tunisia. When I joined her on bus rides home from work, she was always straining to get back quickly so that she could start cooking the dinner.

During Ramadan, she sometimes does chores until 2 am. She makes an effort to bake sweet things for her children, when she gets home from work, whilst they are studying for their exams. 'They deserve something sweet,' she says.

Karima neatly sums up the wife's martial duties: 'children and house.' The husband 'provides for the family.' Hakim 'is not the kind to ask for my salary,' she says. 'I want to buy things for my children.' In the end, 'at work or at home, we both have duties to do.'

Much to the surprise of our mutual friend, who had warned me not to shake hands with Karima's husband (as someone who has done the Hajj, he should not touch a foreign woman and she also believed I should cover my head in front of him), Hakim was not the least shocked by my bare head when he arrived home unexpectedly during one of my visits. On the contrary, he greeted me warmly with an outstretched hand and spontaneously offered help with my study. Ironically, he became one of the men I knew best in the neighbourhood and treated me to many interesting discussions, against a backdrop of Karima ironing or getting on with some other household chore and his children helping each other with their homework. Unusually, he was not averse to serving drinks and food himself; usually, husbands would instruct their wives to provide such hospitality.

Consequently, I was able to have a similar discussion about marriage with Hakim. He was aware that changes in life were having an impact on marital life in a number of ways. He stressed how for the husband the main duty is to 'provide for the family'; even in the religion, the 'costs of living' are to be paid by the man. His views evoked

the tensions between the ideals and the realities of married life,¹³⁸ in particular concerns about how gender roles are changing in connection with the rising cost of living.

“Before’, he began, ‘it was the wife alone who cared for the children. Now, if the wife works, they should help each other. But’, he added, ‘Karima does nearly everything. Women do more than men. Men don’t really care. They go to the café. They come home to find the meal ready. Men must help their wives, even at home. It is not enough to only do the shopping and to leave the wife carrying the rest of the burden. It is hard for women in Tunisia. She does everything in the home, in the street, at work. Karima wears herself out. Normally, they should share. Life is hard. If people have [their children’s] grandparents, who can help out [with childcare], they can relax a bit. Those with origins outside the capital have no grandparents to help out. These people have to use a crèche. At least a wife who is ‘at home’ is a bit relaxed. Most women work, as one salary is no longer enough to maintain a decent standard of living. All children study. Girls study and want to work. They do not study to stay at home.

Some men do not want their wives to work. Not because they are stubborn, but if their wives have not achieved much in their studies and would not earn much, they prefer them to stay at home with the children, if they are well-off enough. Most women work because they really need to, not just because they want to. The cost of living is very high. It is difficult. Even if both [parents] work, they can barely ‘cover the heads’ of the children. So now people have 2 or 3 children instead of 5. My grandmother had 14 children! [Only 9 of them survived]. And her husband had been married before and already had children too!’

Friendship

Working life means that both Hakim and Karima have different strategies and criteria for making friends, compared to Besma, although they share the fear of friendships being founded on ‘interest’ rather than genuine affection.

¹³⁸ See chapter 2.

Asking Hakim and Karima about their friendships revealed an aspect of court life that I had underestimated. Hakim talks to me about his circle of friends. His friends are his neighbours, although now it is rare, as life is 'difficult', so now he only makes friends at work. It is not like it used to be. He now sees his neighbours more frequently than his natal family, 'more often than my brother and my mother.'

The notion of life has changed a lot, he ponders. People have two or three friends. Mostly it is a question of 'mentality', who you make friends with. He says that his wife knows the neighbours, but only frequents a few women who are close neighbours. It is a question of 'proximity' and sharing 'the same mentality.' The essential thing is that someone is not making friends with you for a specific purpose; they just want friendship. They are not looking to profit from you.

Karima, who is doing the ironing, adds that she would not make friends with people who do not have the same level of education or people who 'act in a way she finds bizarre.' Her husband concurs. It is about 'loyalty, sincerity.' After all, you cannot be friends with everyone, apart from your childhood friends. Previously, 'people you know' were considered better than 'people you do not know', this being the logic behind cousin marriage in the past. Now, he adds, 'we do not marry our children. It is they who choose.'

'NEIGHBOURHOOD' SPIRIT

It is not just Hakim who befriends his work colleagues. Karima is also close to her colleagues. She spends a substantial amount of time at work and is not at home during the day to visit neighbours. The court staff go on annual holidays together, accompanied by their spouses and children, which Karima always enjoys. She told me after the last trip, that they had had a wonderful time and that there was a 'family atmosphere' between them. Souad, another clerk whose husband also works in the court and whose children frequently come to the office after school, doing their homework on the edge of a desk, also looked forward to these trips.

A tragic event at the end of my fieldwork made me realise how close the bonds were between the ladies who work together in the court and how attached I had become to the people there. Arriving to visit Karima and Hakim, they told me that they did not

have much time, as Souad's mother had died suddenly. It took me a moment to realise that they were referring to Souad the clerk who worked closely with Karima in the court office. Souad had phoned her that morning with the sad news. It struck me that Souad turned to Karima, apparently as one of her first ports of call, in this time of need. Another colleague (who lived in the same area) joined us. Together, we went to Souad's brother's house, where their mother's body had been laid out under a green cloth next to a copy of the Koran, to give the family our condolences.

The staff also pulled together for happier occasions. Karima and Souad organized a collection for Fathi's wedding to give him a helping hand with the onerous costs of the wedding celebrations and all the things needed to begin married life. Many of the lawyers who frequently came to the office also gladly contributed.

As in the neighbourhood, where similar events brought Besma and her neighbours closer together, these relationships were constructed gradually by the daily exchanges that took place in the court office: exchanges of ideas, assistance, advice, affection, recipes and food. I was known to all as 'Saroura' ('little Sarah') and the majority of staff who knew each other well similarly addressed each other affectionately in the diminutive. As elsewhere, rules of hospitality and sharing applied; it was inconceivable not to share a sandwich bought in the 'fast food' across the road if people were working over lunch. Homemade biscuits were brought in and tasted with delight, just as Besma shared the results of her baking with her neighbourhood friends. It was not lost on me that all of these working mothers still found the time to bake the sometimes complicated and time-consuming recipes for special occasions.

These people brought the 'neighbourhood' spirit across the visible boundaries that demarcated the court as a state institution with its high, whitewashed walls and red flag. The 'neighbourhood-like' nature of life in court (for like any work place, it is far more than a place of work) suggests that it would be better to speak of 'community' spirit (or another, less place-specific name), as it is no more tied uniquely to the neighbourhood than it is to the court, especially to those who have a long history of collaboration and friendship. Ironically, one of the key differences in the way spaces structure sociality differently, is that the court office is in some ways similar to the Arab house remembered so fondly by both Karima and Besma. Free from the taboos of crossing between the private space of the home and the public space of the street, it is easier to circulate freely inside

the space of the court. From this perspective, as actors circulate, the illusion of separation between neighbourhood and court is broken down.

ATTITUDES TO DIVORCE

The morality of the neighbourhood entered the court in the form of the staff's attitudes to divorce and to those who divorce. The female staff appeared to choose to wear publicly their private roles as wives and mothers, as if they needed to show that, although working, they were not neglecting their marital duties. Presenting a correct image, as a good wife and good ethical person, appeared to be the basis of their legitimacy, when interacting with litigants or when putting forward sometimes cynical opinions, especially on some of the juicier divorce cases that came into the office.

Karima did not find it easy working on divorce. She was genuinely concerned for the children of divorcing couples: all too often children paid the price for their parent's mistake or their mother's unwillingness to 'sacrifice herself' for her children. This was perhaps one of the most frequently alluded to problems with divorce, providing the link in the chain to social breakdown, the increasingly familiar (to me) argument that the children of divorce lacked a proper upbringing and would become 'thieves' (the boys) and 'prostitutes' (the girls – meaning women with loose sexual behaviour, rather than to be taken literally).¹³⁹

The cases that were considered worthy of discussion or comment in the office, could be read as a kind of moral barometer. Some were evoked merely because of their shock value – the discussion appearing to be a kind of coping mechanism, allaying the strong feelings these cases could evoke among staff who were confronted more often than general citizens with sometimes horrific facts. Gruesome photographs of the consequences of domestic violence would be shared, glances exchanged between saddened eyes. (A woman who tried to poison herself and her three daughters, resulting in the death of the youngest child, being a case in point; she was sent to prison for murder and her husband divorced her).

Cases, which were considered shocking and evoked comment among the staff, included speedy cases of divorce, such as one 60-year old man, who was divorcing his wife after only two weeks of marriage. It was concluded that his wife must not have been a

¹³⁹ See chapter 7.

virgin, although this was never mentioned in the case (the law forbids using this as a grounds for divorce); they were divorcing by consent and the file quoted 'differences of character' as the grounds for divorce.¹⁴⁰ By contrast, divorce of couples who had been married for decades and grown old together – was also deemed saddening, if not shocking. One example of this was a couple who were cousins and had been married for 55 years and were divorcing due to their '*cuisine interne*' (a French expression used in Tunisian Arabic meaning 'things that go on behind closed doors'). One clerk reacted by tutting solemnly and saying, '*haram, haram.*' (forbidden, in the religious sense; with repetition for emphasis). One clerk asked the other where this couple were from. They were from Gafsa, in Southern Tunisia, considered to be more 'traditional.' 'Difficult, difficult,' the other replied.

The kinds of things the clerks (vocally and strongly) disapprove of will become apparent in their interactions with litigants below:

WHERE BOTH SIDES MEET

Malika

I met Malika in the office where she practiced as a child psychologist. Articulate and well presented, she looked much younger than her 45 years. Her divorce was over when we met and she was able to reflect on her ordeal. She only went to the court when she had to, for the compulsory sessions related to the children, for instance which she said was very 'stressful, anxiety-producing'. 'They are not going to side with you,' she lamented. 'I never left the court with the impression that justice would be done'. The 'intervention of other people' was needed to ensure success, something she had learned via bitter experience in earlier sessions of litigation with her estranged husband. Her success in these – recovering custody of her children who had been 'kidnapped' by their father after school and who then denied her access to them – she attributed to having known 'the right people' who could intervene on her behalf, although, in her words 'It was my right. I should not have needed this'.

¹⁴⁰ My opinion is that they had been forced into marrying by the family and, having fulfilled their duty, were freeing themselves. I have heard of men who are divorced or widowed being pushed into marriage by their families as they 'need' a woman in their lives (not the least to cook and clean for them in their old age, although obviously more is implied).

I enquired how she was received by the court staff. 'If you are lucky,' she replied, 'you fall on a gem'. Yet, like many litigants she did not feel welcome, even when asking for information.

She was disappointed that 'the judge is inaccessible unless you know someone' and said it was 'better to use lawyers who have easy access, as they are colleagues'.

Ironically, her experience differed from this. I asked her to tell me about any positive aspects of her experience with the divorce law and proceedings. The only thing, she told me, was 'having had the intelligence to find a compromise and to cut off the haemorrhage.' The person who helped them find this compromise was the Family Judge. Both she and her husband filed for divorce for harm a few days apart. Making the connection between both cases, the judge advised the couple to divorce by consent and to agree to a divorce that favoured their children. With this encouragement, they were able to divorce more quickly and less painfully. Nonetheless, Malika's memories of divorce were haunted by a lingering sense of injustice. It was a humane, personal intervention – and not a legal, institutionalised procedure – that had saved her. In her words: 'I would be in the shit, if it were not for Samia (the Family Judge).'

LEGAL MORALITY; STATE LEGITIMACY

If the court is a morally ambiguous space, it is because the question of whether it is appropriate for the state to intervene in the intimate domains of private life that remains open to (moral) questioning. On my first morning in court, I struck up a conversation with one of the many men staring at me as I stood waiting outside the office failing to recognise Karima's frantic signalling for me to come inside. He told me that his divorce had been finalised that day ending three months of marriage to a woman much older than him. Putting his hand over his heart, he told me that she had no 'get up and go, like a car you have difficulty starting.' 'The trouble is,' he continued, 'when the state gets involved in things that it shouldn't get involved in ... You have to get married in the town hall and divorced in the court and this causes chaos.' He continued intertwining his critique of the state with that of women's materialism: women are 'only interested in maintenance payments and get to keep the house. The court tells you how much you have to pay her

each month and it is a problem.’ As he spoke, I noted that he used ‘the state’ and ‘the law’ almost interchangeably.

The court is a space where the state’s moral legitimacy is on trial; litigants also engage in judicious practice as they are given a sense of whether the state supports good husbands and wives, whilst chastising bad ones, thereby upholding a sense of justice that litigants like Malika (whom we met above) were looking for.¹⁴¹

The court is also a liminal space, where the risk of trespassing moral boundaries and stepping into the territory of ‘*haram*’ (that which is religiously, morally forbidden) is ever present (if this boundary has not already been surpassed by entering the court itself). It is through contact between the state’s officials and its citizens in this ethical and legal space that people came to experience the state as morally upstanding or morally bankrupt.

Like Saida, however, many litigants did not only come to fulfil their bureaucratic obligations, but to seek sympathy and advice, perhaps believing that this could influence their divorce case for the better. In doing so, they opened themselves up to being morally judged by the court staff who, as pawns of the state’s justice system, find themselves in a position of power over litigants. In the process, particular versions of morality are performed and reproduced in the court office.

Malika’s experience underlines the importance of the personal interactions which occur in court, that informed her attitude to her divorce and to the justice system. The relatively positive outcome in her case was down to luck and interpersonal contact, rather than systematically, institutionally guaranteed rights. She was grateful to Family Judge Samia rather than to the law (not the least as her husband escaped any retribution for his underhand tactics that preceded their divorce case).

Nervous, anxious litigants enter the unfamiliar space of the court as strangers and are forced to interact with those who are at home there. In this way, the sense that there are two sides – that the court is a separate, threatening institutional space, an instrument of state justice – influences the interactions that take place within its office. Not unlike the neighbourhood, where familiarity and ‘who you know’ are invaluable resources, a power dynamic is created between those inside and those outside. Unlike the neighbourhood,

¹⁴¹ See chapter 6.

those familiar with the court are the gatekeepers to a state-backed justice system that can have a legally enforceable impact on the lives of the litigants.

How, then, do litigants and clerks navigate their interactions, where both are in the same space but in very different kinds of territory and in which the state's perceived morality is simultaneously at stake?

NAVIGATING LEGAL TERRITORIES

I was not in the least surprised that Malika felt that her experience in the office depended on luck. Not only did different clerks treat litigants differently but the same clerk could treat litigants in strikingly different ways depending on their mood, health or workload and the business of the office. The same clerk who went out of her way to help particular litigants would be best avoided on days when she had a headache. I knew this, but the litigants often did not.

As I was frequently in the office, taking notes and sitting at a desk or the corner of a desk, litigants often assumed that I worked in the court. This could be quite frustrating, as I had to explain that I was unable to help them. On one occasion, I had to talk myself out of an argument with a pushy woman, who was convinced that I was merely unwilling to help her; she simply did not believe that I did not work there. She became increasingly fawning trying to win my help and then irate as I was unable to help.

It fascinated me to see with whom staff sympathised and the tactics litigants used to win their favour. There was no service mentality, no idea that the staff were there to serve the litigants. More frequently I had the impression that the bustle of litigants in the doorway impeded the staff from getting on with their paperwork. Instead, it was up to the individual litigant's interpersonal skills, notably their ability to perform good ethical personhood, to win the clerk's favour, whether they got what they needed or not. As mentioned above, they came to register new cases, obtain dates for reconciliation session, to check the record books to find out the outcome of the judgements or to make copies of the sheet from the reconciliation sessions in order to activate the judge's rulings on maintenance payments, rent allowance and custody.

Mounira described how she efficiently presented herself in a favourable manner in the office, whilst directly making a link between the perceived morality of the state and her experience in the court. When I asked her how she felt about the justice system, she replied based on her treatment during her divorce case:

Mounira

There were 'ups and downs'. She had noticed that when she put on makeup, did her hair, dressed nicely and spoke French, 'they roll out the red carpet for me' and it was better than when she spoke in Arabic. One of the secretaries in the court helped her when she discovered she could not speak Arabic. Men in particular were very kind to her when she spoke French. They offered her their phone numbers, 'just in case you need me.' She took them and then threw them away. Women were also kind to her. One secretary took pity on her, when she discovered she was divorcing, and gave her the papers she needed immediately, instead of having to wait for six weeks.

Whilst clothes and sexuality can say a lot in the court office, the language used to solicit help is religiously charged, as it would be in other contexts, such as when haggling for a good price at the market or asking a neighbour for a favour. One of the most frequent expressions used, both to solicit help and to show gratitude, is '[may God] bless your parents' (*rahm walidaik*). Kinship terms are also frequently used, as they are throughout Tunisia, to forge solidarity: 'thank you, my sister/ my brother'. The terms 'my maternal aunt/ paternal uncle', which are used when speaking to someone of your parent's generation, were not required in court given the age of the staff. Older litigants may refer to them as 'my daughter, my son'. Karima, in her religious garb, could be referred to respectfully as '*Hajja*', a compelling way to call for her help. In this way, bonds of social solidarity were actively brought into the mostly anonymous context of the court office, replete with the moral obligations inherent in this language.

Some were less appropriate than others, making the court a particularly hostile environment. One clerk in particular created a lot of animosity, as she was prone to stress and easily overwhelmed by the heavy traffic of people in the office. One man dared to

approach her, coming out from behind the rostrum and leaning on her desk, asking calmly but firmly for help. She shouted at him sharply and repeatedly, in the name of the Prophet, to get away from her; fortunately Fathi appeared and calmed down the situation. This was not an isolated incident. Everyone was relieved when this clerk moved to another post requiring less contact with the public. Whilst this clerk was particularly turbulent, I saw all of the staff argue with or shout at litigants at one time or another, although the latter was fortunately less common.

On the other hand, as seen in the opening vignette, staff occasionally went out of their way to help litigants who had won their sympathy, especially if, like Mounira, the litigant appeared to be innocent and was suffering at the hands of his or her spouse. In these cases, the clerks would offer advice, provide documents rapidly and even take the litigant to see the Family Judge. I never saw Karima receive anything at all in return for her services; she saw it as a moral duty to help people. The turbulent clerk mentioned above did once receive a box of Tunisian pastries as a thank you from a litigant, although this was partly an apology for him having reduced her to tears with his overbearing nature on a previous visit.

Not all contact in the court was anonymous. As Malika found, having a contact (whether direct or via a mutual acquaintance) was deemed valuable; there was an implication that if you knew someone, you would be guaranteed pleasant and efficient service. This too is not unique to this court setting. At the extreme end of this scale was a relatively widespread fear of corruption. Various litigants expressed their anxiety that their spouse may know someone in the court who could be bribed and that corruption would win them the case. Saida, who we shall meet below, was concerned about documents 'disappearing' from her file, presumably not under their own volition. I should note that I did not observe any sign of this corrupt behaviour in the office where I spent my time.

Such tactics do not always work. A stranger once arrived in the office asking for Karima, saying that they had come on behalf of a mutual friend; she had never heard of the person in her life. She told the person that they could find 'Karima' in an office that does not exist on the other side of the court, although she is the only person of that name in the building.

Dominant expectations of ideal marital duties formed the basis for moral judgements about the ethical personhood of litigants. These judgements were sometimes made explicit to the litigants and concerned the clerk's perception of who was to blame. Their reading of the litigant's intentions was also paramount. It would be unfair to say that the female staff sympathised more with the wives than the husbands. In one case, the staff took the side of the husband, who was divorcing his wife without grounds, as he did not have enough proof to divorce her for harm. His wife was described as 'dirty' and unfit to look after the children. His wife would not agree to divorce by consent, as her husband was a businessman and she hoped to get a lot of money. Their concern was what would happen to the children; his elderly mother would be unable to look after the children of a young age, making it difficult for him to gain custody rather than his wife. The wife came across as ill intentioned, concerned with money rather than her children. Sana's conversation with another litigant in the office points to the presumption that women seek material gain in divorce cases, casting aspersions as to the morality of their intentions. This man, a civil servant, explained that he wanted to divorce without grounds. Sana asked how much he earned; his salary was 'OK'. She advised him that he would have to tell the court this and that his wife would take some of his money.

One form of moral judgement present (levelled against the state as much as any of the individuals concerned) was the kind of divorce that may have been avoidable if polygamy were still possible. One couple came into the court to divorce as they were unable to have children.¹⁴² Karima sighed and commented that the problem is that there is no polygamy; if there were, this man could take a second wife to have children, if his first wife agreed to remain married.¹⁴³ (This is assumed to be a favourable outcome for the first wife, who would avoid the undesirable status of a divorced woman with little chance of remarriage, whilst retaining the protection and support of her husband). She quotes the Koran and *Ijtihad* to back up the religious legitimacy of this option.

Concern for the children and the obligation to fulfil marital duties (legal, religious and moral) were other frequent themes. For instance, Farid, a recently divorced man came to the office as he was considering appealing the level of maintenance payments (100 dinars) and rent allowance (150 dinars) ruled in his divorce judgement, given that his wife also works. The clerk, as well as responding to his questions about the procedures

¹⁴² Although Tunisia was one of the first Muslim countries to make adoption legal in 1958, it is still considered 'haram' by many, due to the perceived risk of incest, with children not knowing who their biological parents and siblings are.

¹⁴³ This follows the common assumption that the wife is to blame for infertility.

involved in taking a case to appeal, advised him to drop the idea as she considered the payments low and reasonable given his salary (800 dinars). 'Who can rent a house for 150 dinars anyway?' she told him. 'You should take responsibility for your children.' To back this up, she quoted from the Koran: '*al-rijal qawwamun 'ala al-nisa*'.¹⁴⁴ He was not swayed and promised to return with the necessary paperwork. (His female lawyer agreed with the clerk's opinion, although she could do little about her client's determination to appeal). I suggested to the clerk that he might be reluctant to pay her, as he felt that his wife was the one in the wrong in their divorce case. She merely replied that I should not believe what he tells me, adding nebulously that his wife has a strong character and 'women rule at home.'

Contrary to what Mounira believed, but in line with what she actually experienced, the Family Judge is far from inaccessible. Although staff in the office would say the contrary, lawyers tell me that anyone is entitled to speak to the judge. People can and do knock on her door for help. She is also driven by a sense of moral duty and unhesitatingly goes beyond her job description when necessary. She thinks this is partly because the position of Family Judge is relatively new and the jurisdiction of her work is not clear. On one of my first meetings with her, a lady who was visibly extremely poor, came into the office asking for the judge's help. She was brandishing small bandages covered in fresh blood. She asked the judge to help her take her children somewhere safe, so that their father could not beat them, and burst into tears. Although this was not her role, she intervened to put this woman in touch with the Representative of Children in Danger, who deals with children at risk. On another occasion, one of the judges intervened in a much more personal context. He had carried out a private sitting with a divorced woman who could no longer afford to keep her children. She appealed to the court to take them from her until she could afford to care for them herself. (Her husband was failing to pay her *nafaqa*). As well as doing all that was legally necessary, the judge summoned the woman back to the court at a time when it was usually closed. He withdrew some cash to give her and arranged for his sister to give her some of her children's old clothes. He carried out these kind acts discretely; I came to know of this by chance. Again, he was driven by a simple human desire to help someone who was clearly suffering so much.

¹⁴⁴ This was a popular quote (verse 33, 4th surat in the Book of Women) frequently cited in relation to women's rights. One of my informants pointed me to Dr Yusuf Ali's 'translation' of this phrase (adding that the Koran cannot be translated directly, only its 'meaning' can be translated): 'men are the protectors and maintainers of women'. The meaning of the word *qawwamun* is especially controversial. Several feminists with whom I discussed this term understood this to mean that men were (wrongly) entitled to dominate women according to the religion. Others stressed the male duty to take care of his wife embodied in this phrase, rather than the wife's subordination. The latter comment was made during a discussion about how working wives increasingly contribute to maintaining their families.

An undercurrent of moral obligation flows through many of these interactions.

The judges and clerks help out those they take pity on because they cannot leave a child in danger or ignore someone's evident suffering. This suggests that the staff have a human proclivity to 'side with' those who are able to present themselves as morally upstanding people, whose intentions are beyond reproach as, free from blame, they have been forced to enter the morally dubious space of the court for reasons beyond their control.

The exercise of judicious practice by state officials has an impact on the litigants' experience as they go about pursuing their legal right to divorce. In turn, this experience may influence how they perceive the law and its morality and consequently the legitimacy of the state that created the divorce laws and the morals that it is seen to embody.

PUBLIC DIVORCE HEARINGS

Sabr

Sabr, a mild-mannered, modest man in his 40s, attended himself the Friday morning public court hearing; his wife had sent her lawyer. When they called his name, he had to go to the front of the room and stand before the judge 'with all those people looking at me.' The judge asked him if he wanted to divorce and he assented. He said that 'this was the hardest moment of my life. Everyone was watching me.' He was relieved that his wife was not there, as otherwise he would have had to explain why he wanted to divorce and he would have been ashamed to tell his story in front of all those people.¹⁴⁵

¹⁴⁵ The sheer number of cases means that the judge would not have time to ask all the litigants to explain their problems, even if this were deemed desirable. Any discussion of an intimate nature required during these public sessions is deferred to the end of the sitting, once everyone else had been asked to leave the room.

Other than to do the necessary paperwork or to attend a reconciliation session, a third reason why litigants may be required to come to the court is to attend the public hearings during which divorce cases are judged. These take place every Friday morning. To Sabr, it seems that this deeply unpleasant experience opened him up to the moral judgement of his fellow divorcing citizens, in addition to that of the court; he links the public gaze to his shame. Leila¹⁴⁶ found her divorce case overwhelming. She felt as if she was carrying all the consequences of divorce alone: material, psychological and moral. 'I feel like he has defeated me,' she sighed; she had started taking anti-depressants. She stayed at home and sent her lawyer to the public hearing in her place.

Attendance at the public divorce hearing is not compulsory and litigants who can afford it may be represented by a lawyer. Nevertheless, the large hall is bursting with divorcing citizens every Friday.¹⁴⁷

In the space of the public hearings, people particularly feel themselves to be under scrutiny, the subject of moral judgement under the weight of negative attitudes to divorce.¹⁴⁸

On Friday mornings the public courtroom is crowded and stuffy with around 150 - 200 cases going through each week. The last session before the court closes in July is particularly busy and can see more than 200 cases. (Besma wrongly saw this figure as evidence of the shocking prevalence of divorce. This is not the number of couples who divorce each week; only a relatively low percentage of these cases are finalized each week, others being referred for further action). The whole process lasts around three hours. A sheet of A3 paper displays the list of case numbers and the names of litigants for that week's hearings. A partial door shields the room from nosey onlookers, who are prevented from seeing the 'stage' at the far end, where the judge and his assistants sit on large wooden chairs; the judge enters this space directly through the back door. The clerk has her own desk to the side and a male assistant (*coursier*) in civilian clothes stands between them, passing files from the judge to the clerk and handing the clerk the litigants' ID cards to verify their identity. He also plays some role in security; on occasion the judge nods at him to silence someone trying to use a mobile phone. It is in this area, in front of the judge's desk, where litigants or representing lawyers stand when their case is being examined. On the back wall in full view of everyone hangs the emblem of Tunisia, which is

¹⁴⁶ Cf Chapter 6.

¹⁴⁷ Litigants also come to the court to attend the reconciliation session with the judge. See chapter 4.

¹⁴⁸ Cf Chapter 2.

also displayed on policemen's badges. This depicts scales¹⁴⁹ (to represent justice), a lion (strength) and a ship (freedom). A few ceiling fans circulate the warm air around the room and are powerless to alleviate the heat as summer approaches.

Rows of wooden benches reminiscent of church pews are lined up facing this stage area. The first two rows of wooden benches are reserved for lawyers and their secretaries, wielding armfuls of blue files. The lawyers are dressed in the court uniforms they must wear to be able to speak to the judge. Legal professionals are visibly distinguished from the litigants. Judges, lawyers and clerks wear the same uniform of a broad-sleeved, loose black gown with a three-pronged white tie to the front and a two thin black scarves hanging down the back, each with a white bobble on the end. A long wooden rostrum forms a barrier between the judge's area and the public area. The rest of the room is packed with litigants. Uniformed police patrol the room, trying to prevent people from leaning on the white-painted walls; the grey stains on the walls suggest this is not always successful. As far as I could tell, husbands and wives did not choose to sit together. Some litigants came with people I assumed were family for moral support. Some women sat weeping silently.

There is a third door to the side through which police officers escort litigants who have been permitted to leave prison for their divorce cases. On one occasion I sat next to a lady in tears, who told me that one of these men, handcuffed and flanked by two policemen, was her son.

Typically, those present will be the presiding Family judge and their two assistant judges, the clerk, the assistant, around 10-20 lawyers, some legal secretaries and in the region of 200 litigants. The session is not open to members of the public who do not have an audience with the judge. Therefore, for each case, one or both of the spouses may attend or one or two lawyers; in some cases no-one attends at all.

Observing those present in the room reveals that there is a mix of people in attendance in all aspects apart from social class; people who look wealthy are notably absent, presumably using their right to be represented by a lawyer. The litigants span all ages from those in their early twenties to pensioners and display different styles of dress

¹⁴⁹ Many lawyers had a decorative model of some scales on their desk.

from ladies in veils, old men in *schechias*,¹⁵⁰ young men in tight-fitting t-shirts and sunglasses, or young women in trousers with fashionable highlights in their hair.

A bell rings marking the start of the session. Everyone falls silent and stands for the entrance of the judge. She then indicates for everyone to be seated. The judge takes each file in turn calling out the case number and names of the litigants. If there, they indicate they are present and make their way to the front of the room. The judge briefly leafs through the file. This is also to check whether all the legally required documents are present; on one occasion she asked the couple to bring in their marriage contract, which was missing.

If both of the couple are present, the judge asks them if they agree to divorce.

On one occasion, she interrogated a man, as to why he had failed to attend the reconciliation session. In general, however, the poor acoustics in the room make it difficult to hear what is being said, which affords the couple under scrutiny some privacy. The judge deliberately lowers her voice, speaking in a whisper audible only to the assistant judges.

Given the quantity of files to process, only a minute or so is spent on each one, which does not allow time to enter into detail. Previously, the written files will have been examined by the judge with her colleagues in a private deliberation session. The vast majority of arguing takes place in the documents. It is rare for lawyers to present arguments orally in court or for the judge to question the litigants. In these cases, lawyers tend to speak in classical Arabic, echoing the level of language used in written petitions. Lawyers may hand the judge additional documents for the file during the session.

One of the longer discussions between a lawyer and the judge that I heard, involved a case where the husband was asking for divorce without grounds. This was his third divorce case, the previous two having been for harm. The husband was working abroad in Saudi Arabia; his wife had abandoned him, refusing to return there. They married in 2005 and had spent only a few months of their marriage living together and had no children. He was suggesting that she agreed to divorce, but was insisting he divorce without grounds, as he was rich and she hoped to receive a high level of compensation

¹⁵⁰ Traditional Tunisian rimless hat of red felt worn by men. Nowadays, only older men wear them on a regular basis.

payments. A figure of 100,000 dinars¹⁵¹ was mentioned. The outcome was for the judge to order another reconciliation session.

The judge talks to the litigants in Tunisian Arabic. Arabic is the language of the courtroom; in cases involving mixed couples, translation must be used, even if the spouse is French and the judge is in fact fluent in French.

The clerk writes furiously, recording the judge's decision on sheets of court notepaper which she has previously prepared with the case number and names of the litigants. The most frequent decision seems to be to give a date for a future hearing. (The judge later told me that this is a deliberate policy to give the couple more time to think, in the hope that they will reconcile).

One case is dismissed by the judge, who simply tells the lawyer that it is wrong; Karima screws up the sheet in a ball and throws it on the floor.

As people become agitated, as they inevitably do, spending several hours on a hard, wooden bench, the judge taps her pen on the table to restore silence.

The case of a couple who appeared to be in their seventies was called up. A commotion occurred as the wife struggled to leave her seat, leaning awkwardly on a walking stick. The judge motioned to her to remain seated, as everyone in the room looked round to see what was happening, exchanging sad or amused glances. Karima later told me that he was divorcing her as she was ill and could not work. If she was lucky, she would live with her daughter, who would look after her; this was more likely than her going to live with a son and his wife. She partly saw this as normal; he needs a woman and it is better for him to divorce and remarry, rather than doing things which are '*haram*' (notably committing adultery). It would be better for him to be patient and tolerant, but if he knows he cannot, he should divorce.

Any litigants present who tried to use their time in the court to complete paperwork in the office would often be disappointed, finding the door to the office locked, due to the overwhelming number of people trying to get in and the absence of one of the

¹⁵¹ Approximately £50,000, an extremely high and unheard of amount. The clerk said that she is more likely to receive 3-4000 dinars. See chapter 6.

clerks to work in the public hearing. Isolated and sometimes ashamed, litigants could literally find themselves shut out.

CONCLUSION

The court as an ethical space is far from separate; ordinary ethics shape and are shaped by the operation of divorce law. Ethical theory intertwines with legal practice as the legal code and its procedures set the stage for the different interactions between litigants and court staff that require all parties to engage in judicious practice. In the process, particular moral criteria are enacted and reinforced. As we have seen, these criteria are often gendered. In particular, the court staff's reading of the litigant's intentions in the divorce case is central to how they perceive ethical personhood and this too is gendered. Unscrupulous husbands try to escape their duty to provide for their family. Unscrupulous wives try to profit financially from a divorce at the expense of their children's wellbeing.

Simultaneously, the litigants are making their own judgements about the law that reach beyond their experience of the processes and encounters with its agents. Malika's positive experience with the kindly family judge did not counteract her impression – shared by many - that the legal system had failed to deliver justice. In this way, the legal 'processes create the effect' of the law as 'a distinct dimension of structure, framework, codification, expertise' (Mitchell 2006: 185) and also, as we shall see, of morality as the law seems to countenance particular moral criteria that are most readily reproduced via its procedures.

Consequently, in this peculiar, institutional context, ordinary ethics become extraordinary ethics as they are drawn into the operation of the law via this practice of reciprocal moral judgement. In the process, as we shall see again in the next chapter, both the morality of litigants and the legitimacy of the state is at stake.

CHAPTER 4 -

RECONCILIATION AS THEATRE: TRACING THE SPIDER'S WEB

Judge Karim (1)

It is 9.30am on a cold December morning. I sit by the desk in the Family Judge's office to observe the reconciliation sessions. Judge Karim usually presides over commercial affairs. Today he is in charge of the reconciliation sessions, a task he takes seriously, both as a judge and a human being, seeing it as his moral duty to help prevent the breakdown of a family. The reconciliation session provides a forum where couples discuss their problems for perhaps the first time and may, in rare cases, be susceptible to the advice of the judge. Many, however, appear to have no intention of reconciling; by the time they reach the court and initiate divorce proceedings it is too late. Instead, they battle to convince the judge of their own outstanding conduct as a husband or wife and their spouse's deficiencies in order to obtain a more favourable divorce settlement. The ways in which they act out the 'ideal' husband and wife are revealing of the gender dynamics both in the legal code and in moral ideals related to marriage. Behind these closed doors several tensions are at play: between the judge's role as judge with the power to take decisions which will impact the lives of litigants and the game of cat and mouse which is played out as the judge attempts to discover their 'real problems' and save their marriages. As the judge navigates between widely shared norms regarding ideal marital roles and the realities in which these are increasingly less possible, reconciliation is a site, therefore, where the moral is reassembled.

INTRODUCTION

If the court is a factory for reassembling the moral, this takes place in its specific procedures such as the reconciliation sessions examined in this chapter. More often than

not, these sessions are a legal formality that litigants have to endure before they are legally entitled to divorce, rather than having much to do with reconciliation as their name suggests. Reconciliation sessions often become a forum in which litigants strive to perform as the ideal husband or wife, whilst demonstrating their spouse's failings in front of the judge. They become a site in which the morality, alongside the legality, of their actions is enacted, interpreted and contested.

The PSC requires at least one reconciliation session,¹⁵² forcing litigants into this intimate encounter with the judge; divorce may only be pronounced once attempts at reconciliation have been carried out and shown to be fruitless (article 32). Whilst litigants may be represented by their lawyers to carry out all the other procedures, each litigant must attend the reconciliation sessions in person.

As citizens enter the court and interact with its officials, legal procedures orchestrate encounters between actors who call upon categories that are at once legal and moral in order to negotiate their divorce case. The reconciliation sessions provide a privileged vantage point from which to observe what the categories of 'marital duties' and 'harm' mean in the practice of the law and the role of the judge, who is obliged to interpret the performances that litigants put on for his benefit.

The reconciliation sessions remained an enigma to me until the very end of my fieldwork. I had heard about them from litigants, judges, clerks and lawyers, but they had always been veiled in a cloak of secrecy. My burning curiosity to discover what happened behind the closed doors was satisfied thanks to the new male Family Judge. Although I only had the opportunity to observe one judge in action, all the judges I interviewed had carried out these sessions and I am also able to draw on their accounts of reconciliation sessions. Equally, I will draw on my interview material with litigants and lawyers.

If the law frames, but does not determine, how actors perform in this setting,¹⁵³ we need to consider the legal framework. Thereafter, we will enter the intimate space of the judge's office and look at the reconciliation sessions from both sides, examining the

¹⁵² In order to underline the role of these reconciliation sessions in protecting the family, a 1981 reform increased their number to three, each spaced out by one month, for couples who have minor children. The spacing is designed to factor in time for reflection in the hope that the couple will reconcile outside court. A further waiting period of two months is required once the attempt at reconciliation is over, before the final judgement can be pronounced. The apparent intention of the legislator to prevent divorce when children are involved echoes attitudes met in the neighbourhood where divorce was more heavily frowned upon if a couple has children.

¹⁵³ Paraphrasing Lynch & Bogen 1996.

litigants' and the judge's experiences and the role of the judge from both his own perspective and that of the litigants.

RECONCILIATION SESSIONS: THE LEGAL FRAMEWORK

Intended to encourage the couple not to divorce, the reconciliation sessions play a significant role in the divorce procedure and are the responsibility of the Family Judge, a new position created in the 1993 reforms. In practice, however, they may be carried out by any judge in the court, as the workload is considered too great for one judge alone.

During reconciliation sessions, the judge takes crucial and immediately executable decisions on child custody, visiting rights, maintenance payments and living arrangements, producing a document that enters the divorce file and can be used as evidence. The judge (or a clerk) records what has been said (in the case observed the judge wrote himself) and the summary is signed by both litigants, giving it legal status as evidence.¹⁵⁴

In addition, the reconciliation session provides an opportunity to confirm consent to divorce, hence giving up a chance of material or moral compensation. A malicious husband filing for a divorce without grounds would have much to gain were he able to bring along a woman posing as his wife, who consented to the divorce and to forego all her rights to financial compensation, the marital home and child custody. To avoid such subterfuge, and an indication of how much is at stake, the judge checks the litigants' ID cards and that an absent spouse has been duly notified by legal means.¹⁵⁵

At stake in the reconciliation session is the divorce settlement, in particular the level of moral or material compensation payments. Litigants' arguments may be recorded by the judge and entered into the divorce file as documentary evidence, playing a role in the judgement. Therefore, it is relevant to explore the types of argument used in relation to the legal categories of 'harm' and 'marital duties'.

¹⁵⁴ Voorhoeve underlines the judge's influence on the composition of evidence that enters the divorce file, notably as the judge decides what is recorded in reconciliation sessions (2012:213).

¹⁵⁵ A penal sanction of one year was introduced in 1993 (PSC, Article 32bis) to punish a spouse who uses fraudulent means to prevent the other party from knowing about the reconciliation session. These precautions hint at what is at stake in the reconciliation sessions.

'HARM'

The silence of the PSC as to a definition of 'harm' and the related category of 'marital duties' has the effect of opening up and foreclosing the judge's space for interpretation in different ways.¹⁵⁶

Although 'harm' is a flexible legal category, dispositions elsewhere in the legal code constrain how it can be interpreted in practice.¹⁵⁷ Article 23 forms a bridge, making these dispositions relevant to the divorce case. For instance, a violent husband may be prosecuted under the penal code,¹⁵⁸ but his wife is entitled to divorce him *because* he has thereby been proven to fail in his 'marital duties' according to article 23 that states that he must not cause her 'harm'. Either spouse may file for divorce if their spouse has been violent to them or to a member of their family, as backed up by the penal code. Equally, both spouses may divorce for adultery, another form of 'harm' that finds backing in the penal code.¹⁵⁹

Two key forms of 'harm' are, however, gender specific. A wife is allowed to divorce her husband if he fails to provide for her. The husband's duty to provide maintenance (*nafaqa*) is backed up both in article 23 (PSC) that maintains him as the head of the household and in chapter 4 of the PSC (articles 37-53bis) dedicated to this duty.

The female counterpart of the male duty to pay maintenance is now considered to be a wife's 'cohabitation' with her husband,¹⁶⁰ the pre-condition for her fulfilling the duties expected of a wife in social norms, such as cooking, cleaning and caring for the children. A husband may file for divorce due to the 'harm' caused to him by his wife's failure to

¹⁵⁶ Jurisprudence states that the interpretation of 'harm' is left to the judge's discretion (Voorhoeve 2012:224).

¹⁵⁷ Notably, these dispositions entail their own procedures and allow litigants to prosecute their spouses and produce legally permissible evidence of the harm done in the form of final judgements. The importance of this evidence will be explored in detail in chapter 5.

¹⁵⁸ The penal code (article 218) was amended to instate a stronger sentence in cases of violence perpetrated by the victim's spouse.

¹⁵⁹ Both adultery and domestic violence law share the feature that the perpetrator's spouse may drop the charges at any time and the state will not continue the prosecution, implying a desire to encourage the couple to reconcile and the 'continuity of the family', as one lawyer put it to me. The same lawyer explained that these are seen as crimes of the 'couple' rather than as a matter of 'public order', in which the state and its police must intervene regardless of the desires of the immediate victim, as would be the case in the event of a burglary.

¹⁶⁰ A reform of the PSC in 1993 removed the wife's duty to be obedient to her husband. The text of article 23 replaced the wife's obedience with the reciprocal duty of both spouses to 'cohabit with kindness.' of the introduction.

cohabit. Her abandoning the marital home without justification¹⁶¹ is referred to as '*nushuz*' and is a purely feminine concept. There is no separate legal disposition to reinforce the wife's duty to cohabit. Rather, '*nushuz*' is lent its legal backing by jurisprudence that has established this standardized interpretation of article 23.¹⁶²

Where clarifying legal dispositions and frequently used jurisprudence are absent, the definition of 'harm' is left to the failure to fulfil 'marital duties according to custom and habit' (article 23). In practice this means that it is left to the judge and his discretion.¹⁶³ Consequently, if the law is a 'spider's web', as Latour has suggested (2010: 277), much can be learned about its nature by tracing the activities of 'spiders', the judges who interact with litigants and ultimately interpret the law.

Several law professionals suggested that the legislator had intentionally phrased the law to allow for flexibility and different interpretations. The cantonal judge supported this interpretation saying, 'the customs and habits are not the same now as they were before. They are rules which progress and which are relative.' Seen in this light, the law expects judges to be flexible and to play an active role in interpreting the constantly changing institution of marriage, drawing on their knowledge of marriage outside the court as much as on their knowledge of the law.

It is not only litigants who have something at stake in the reconciliation sessions. In these sessions, litigants come into direct contact with the state embodied in the official persona of the judge. Judge Bechir, whilst explaining the philosophy of the PSC, pointed to the complex relationship between religion, law and morality. The state as legislator appears as the guardian of the 'correct' interpretation of Islam. He told me:

'The philosophy of the PSC was to distance us from false ideas of the religion. As Islam is a modern religion; as (there are) many false ideas about the religion. Islam was the first religion to give rights to women (as in the sourat of women in the Koran). When you read it (this sourat), you feel as if it is for women today. But many people made mistakes in

¹⁶¹ A decision of the Court of Cassation (no. 20425, 7/12/88) shows that the court must examine the reasons, which led the wife to leave the marital home. In the case described, the couple had been married for five years and had one child. The Court of Appeal had granted the husband a divorce for harm based on his wife abandoning the marital home. In fact, the husband had moved to a remote place, leaving the city where they married and their child had grown up and where his wife had a job. The Court of Cassation ruled that the Court of Appeal should have looked beyond the simple fact of the wife's absence from the marital home and should have taken these circumstances and the husband's ill will into account when evaluating the 'harm'.

¹⁶² A decision of the Court of Cassation (no. 2422, 4/2/98) ruled that, if a wife remains away from home and refuses to return, she is said to be failing to respect article 23, which says that she must not cause harm to her spouse.

¹⁶³ See Voorhoeve (2012) for a detailed discussion of factors curtailing and opening up these interpretative spaces.

practicing and applying the religion ... Each law has a philosophy. The philosophy of the PSC is this – to distance us from the customs of the older generations, who understood Islam wrongly.'

The judge, as the state official on the front line enacting this law in practice, becomes the public face of this version of 'modern' Islam upon which the state seeks to build its legitimacy. In the reconciliation sessions, we might find clues as to the ideal moral criteria that define marital duties, as they are being challenged and redefined and in which, as we shall see, the legitimacy of the state is simultaneously at stake.

RECONCILIATION OBSERVED: BEHIND THE SCENE

Judge Karim (2)

Sitting next to the desk in the Family Judge's office, I can see the litigants begin to gather outside. One of the clerks has told me with sympathy for the poor judge that we are due to see 60 cases this morning; only 25 of these cases appear. The couples are all summoned at the same time, meaning that many have to wait for up to 5 hours. This long wait cannot help those who arrive daunted and nervous at the prospect of the reconciliation session. Some come with relatives for moral support, even though they must enter the judge's office alone.

Reconciliation can be seen as something of a social leveller, as it is the one time that all litigants must attend the court in person. A glimpse into the waiting room reveals the mix of people present, who range from their 20s to their 70s, although the majority appear to be in their 30s and 40s. An old woman walks along the corridor in her slippers, wrapped in a sifsaree holding the ends between her teeth; other younger litigants of both sexes wear jeans and the big, flashy sunglasses, which are in fashion at the moment. Although it is sunny in December, some are clearly trying to conceal their tear-stained eyes.

In some cases, only one litigant is present. Therefore, over the three days on which I was allowed to attend, I observed 44 cases where both litigants were present, 8 where the husband was alone and 9 where the wife came alone. In addition, the type of divorce was not always evoked and was impossible to deduce by listening to the litigants who were hurling accusations in every direction; as a result, I have not been able to record the type of divorce for each case.

The basic data I was able to note down enables me to paint a brief portrait of the kind of people who came to the court to divorce.¹⁶⁴ The vast majority of couples had one or more minor children.¹⁶⁵ For most, this was their first experience of divorce. Only four of the 27 men for whom I have this data had previously divorced, as had four out of 30 women. In two cases, the couples had previously divorced each other, subsequently remarried and were coming to divorce for a second time.¹⁶⁶ Only one man was previously widowed.

Most couples (21 out of 33 couples) had only been married for 5 years or less, with two having been married for only 5 months. In contrast, 11 couples had been married over 15 years. The brief data I have on education levels and income provides some socio-economic context, showing a broad spread; around half of the litigants had only primary level education, whilst others were educated to Baccalaureat level and beyond (8 out of 21 women and 3 out of 24 men had been to university).

The professional situation of the litigants also varied widely. Out of 34 women for whom I had data, 18 were not working. Of these, 5 described themselves as 'unemployed' or 'redundant', 7 as 'not working' and 6 as 'at home'¹⁶⁷. Those women who did work had a range of jobs. At the lower paid end of the scale were those who did sewing or worked in factories; slightly higher paid would be those who worked in schools, teaching, as secretaries or in companies.

¹⁶⁴ Litigants attending their first session were asked their age and profile. However, those attending subsequent sessions were no longer asked these questions. Consequently, I was forced to make my own estimates or deductions in absence of precise data.

¹⁶⁵ Of the 40 cases for which I have this data, 7 couples had no children. 21 couples had only one child, and the majority of these were of a young age, under 10 years old. 10 couples had two or more children. In two cases the couple lived with the husband's children from his first marriage: tellingly in both cases the failure of the wife and these children to get on appeared to be a key reason for the divorce.

¹⁶⁶ In Tunisian law (following the Islamic principle of triple *talaq*) a couple may divorce and remarry up to three times. In order to marry a fourth time, the wife must first be married to someone else and that marriage terminated.

¹⁶⁷ See chapter 2. This phrase referred to housewives; a man would never be 'at home'.

Of the 32 men for whom I had data, four were unemployed or redundant. The rest worked in a variety of professions as taxi drivers, civil servants, in commerce or private companies. Another was a teacher, one was a nurse and one man ran his own sports club. The highest paid worked as a pilot, an engineer or as a waiter in France.

Judge Karim, a man in his mid-thirties smartly dressed in a black suit and tie, but without the ceremonial long, black robes worn for public hearings, is himself married with a baby son. He, like all of the heads of the chamber, was called upon to carry out reconciliation sessions to share this burden with the Family Judge. Senior judges are usually older and more experienced, and are more likely to be married and to have children, criteria that Family Judge Samia felt made these judges more able to sympathise with litigants. Her opinion underlines how reconciliation judges require knowledge and experience that reach beyond the law into their personal lives in order to play the role that the law demands of them.

Judge Karim echoed other judges I spoke to in his personal commitment to these sessions, working through his lunchtime into the afternoon to spend the time that was needed with each couple. The family and cantonal judges both told me that they would sometimes spend several hours trying to work out the problems of one couple, especially if the couple had children and there was a family to be saved.

Judge Karim insisted that the litigants sat facing each other on the two leather armchairs placed symmetrically at either side of his large desk. This was the first of the strategies that he used as he tackled the difficult task of ascertaining whether the couple could be reconciled.

Any illusion of couples entering these reconciliation sessions with the hope of reconciling was rapidly shattered when I spoke with litigants and their lawyers. Nor did I expect the litigants to evoke the 'real reasons' for the divorce. The Family Judge pointed out that they were more likely to talk to me about the real problems than to him.

Most people entered the room with the intention of exploiting the legal format and its elasticity in order to pursue their own interest in their divorce case. Imed, a lawyer, explained, 'people do not speak freely, they express themselves in order to achieve a legal result.' As one female litigant put it, defending herself against her husband's accusations of

immoral behaviour during one of the sessions, 'any man who wants a divorce will say that there is something wrong with his wife!'

Many litigants seemed to have been either coached by their lawyers or given advice by friends or relatives about how they should behave in front of the judge. Indeed, the wife of one litigant refused to answer any of the judge's questions directly for fear of saying something that would compromise her position and deferred any answers until the next session so that she could seek advice.

One of the most common pieces of advice, especially relevant in cases for divorce without grounds, was for the other party never to admit that they agreed to the divorce. Giving consent would lose them any entitlement to compensation. This led to the seemingly paradoxical situations often observed, where a wife, whose husband was divorcing her without grounds, presented an atrocious image of her neglectful, abusive husband, whilst insisting she wanted to remain in the marriage.

The notion that men and women are using strategies and acting out a role supposes an implicit understanding of which arguments are going to be compelling to the judge. Returning to the judge's office, I will explore some of the main arguments used, showing how these are inherently gendered.¹⁶⁸ Which moral criteria come into play as litigants strive to portray themselves as ideal husbands and wives whilst showing their spouse's deficiencies? Which of these ethical criteria does the judge appear to validate in his response to the litigants?

¹⁶⁸ Ethnographies of divorce in the Muslim world (Hill 1979; Wuerth 1998) found that the grounds for divorce vary according to the social class of the litigants. It would be desirable to reproduce such an argument here, but the discussion is necessarily limited by the available data and as I share the judge's frustrations in locating the litigants socially.

Walid and Safia.

Dispute over violence.

Husband wants divorce for harm and, if not, without grounds.

Walid and Safia are a young couple in their late 20s. Safia enters the room in tears. The atmosphere is charged with bitterness. Walid seems almost unnaturally calm and collected throughout, whilst she is nervous and distressed. The judge asks her gently why she is crying. Does she not want to divorce? She replies in the negative through her tears.

Walid, who studied to PhD level and earns a good living as a pilot, begins to talk, but is silenced by his wife: 'Don't lie! Enough! For months, I have been living in our house (her parent's house), without my belongings.' She has a young baby. She and her child share a bed with her divorced mother. All she wants, she says, is 'stability.'

The judge, being authoritative, speaks: 'In this world, a woman is always weaker than a man. He who fears God... If you want to, go back to her. If not, divorce her and give her her rights.'¹⁶⁹

Walid tries to speak, but is again interrupted. Safia mentions their baby, who is just three months old. She is breast-feeding. She adds, 'for 6 months he has not given me my shariq rights. He beats me. I have been to hospital twice. He takes my salary. His whole family judges me...' (Walid tries to defend himself).

Walid produces a letter he has written (by hand). He wants to reduce the nafaqa he pays her and his son to 300 dinars due to his 'conditions.' Safia asks for a rent allowance and presents a typed letter to the judge.

The judge makes an unrelated phone call. Once he has finished, he asks whether there is any chance of reconciliation. Safia explains that some of their friends had intervened. His father and aunt also tried to reconcile them at her request.

¹⁶⁹ This is a sentiment present in the religion, which many people quoted to me. Either they should remain married in peace or, if they cannot, they should divorce in peace. They should divorce by consent just as they married by consent.

Walid mentions for the first time that he went to court to pursue a case against his wife. He wants to divorce for the harm done to him by his wife and, if not, he will file for divorce without grounds. He had to take two weeks off work due to the scars on his face, which he says are due to his wife.

Safia interrupts: 'I went to hospital twice. I swear to God!'

Walid says that he would stop the divorce, but he knows that she will continue being violent. He dropped the court case against her. (Presumably because he lacked evidence).

The judge, who seems quite angry, interrogates the husband: 'what proof do you have? You have no proof. Why do you think like this?'

He does not reply. Safia says that his aunt had said that his father told him to divorce and to throw her out of home; he has been against the marriage from the start as she is several years older than him.¹⁷⁰

The judge gives them a date for the public hearing.

Walid asks him: 'Tell me, your honour, how can you live with someone who beats you?'

He responds: 'Can I give you some advice? Either succeed in marriage or succeed in divorce.'

If Safia and Walid are in court, it is because attempts to reconcile them by family and friends have failed. On the contrary, his father would appear to be exacerbating any problems between them. The cantonal judge spoke at length of his fear that 'the reconciliation phase is handicapped as the couple come to the court as a last resort, when it is too late. People are afraid of the court. It would be better to attempt reconciliation outside the court, (for instance) with a representative of the family and then only come to court when the breakdown became definitive. Reconciliation would be better if it were

¹⁷⁰ It is a social taboo for a wife to be older than her husband.

'extra-judicial, in the family.' He concludes 'the status of judge and the function of reconciliation are incompatible.' For similar reasons, the cantonal judge felt very uncomfortable judging those who did share their intimate feelings with him. A lawyer, Manel, however, felt that reconciliation might be more likely using a mediator within the family. On the other hand, the problems between one couple she knew were caused by interference from the husband's family, with whom the couple lived. They were able to resolve their differences in the neutral setting of the court.

The essential factor, which determines the utility of these sessions, seems to be the person of the judge. The judges I spoke to felt morally implicated when taking on this role in the divorce process. The cantonal judge felt guilty, especially if the couple have children, as, in his words, 'it is not easy to rule on the breakdown of a family.'

He suggested to me that a judge should be able to treat the cases with 'sang froid' (indifference), although, he believed it better for a woman to take these reconciliation sessions and divorce cases, as she is more sensitive and people are more likely to open up to her: 'the couple will be shy and will be more likely to talk to a woman about their intimate life.' The cantonal judge is an extremely sensitive person, who easily gets caught up in the tragic stories he hears regularly in the court, to the extent that he would be kept awake at night unable to stop thinking about people he knows are suffering. Judges do not receive any specific training to carry out reconciliation sessions and the cantonal judge feared that they have an impact on the personal life of the judge. He suggests that the female Family Judge has to 'sacrifice her health and her family life' in order to carry out her job. Finally, he asked for special permission to stop taking reconciliation sessions, as he started to hate marriage and had begun ruling out the possibility for himself. (He has since married and had children). The competence of the reconciliation judge is related to their personal and social knowledge, their ability to read situations and litigants and empathize with them, rather than their legal knowledge.

When Judge Karim started making an apparently personal phone call during Safia and Walid's reconciliation session, I wrongly thought he was being indifferent and rude. After they left, he looked at me and asked if I had noticed what he had been doing. The phone call was part of his strategy to encourage the litigants to forget his presence and talk more openly, perhaps even mentioning the 'real' reasons for their dispute. He was only too aware of the theatrics that litigants often engaged in when trying to win his sympathy:

'Each one tries to dominate the other, so that the judge gives him (or her) his rights. They try to show the other's bad side in front of the judge. He says that she drinks, smokes, has 'a boyfriend', does not cater for his needs or those of the children; she wants to live beyond my salary, she wants to have expensive clothes, she is against my parents/brothers/sisters. She says, he does not give me money, we are hungry, he spends money on his friends and wine. It is a 'war without weapons.'

After these initial formalities, the judge opened the conversation by asking the petitioner why he or she wanted to divorce. Alternatively, if the couple were returning for a second or third session, he would simply ask, 'have you reconciled?' This was almost unanimously met with a response of 'no'; in the total of 61 cases I observed, only one had come to tell the judge he and his wife had reconciled. From this moment on, the judge switched states, trying to minimise his presence, in the hope that the litigants would talk more freely. On other occasions he also consulted his mobile phone, sending text messages or answering calls. Otherwise he sat silently, arms folded, listening. This is a strategy and part of the difficult balancing act he has to perform of juggling his role as judge with that of arbiter. He told me:

'Why do I let them talk? As when they start arguing, they will lose control and talk impulsively about the real reason. At that time I am not a judge. At first I listen and [they] will say what they want to tell me, which I write down. Then they argue and I notice the real reasons, which they may not even realise. In the second session, I can work on the problem they mentioned. I write down these reasons. For example [in a case we saw of a wife whose husband has a second wife in Libya], I was pretending not to listen to relax him and get him to speak. I must make them feel I am not judging them. But, I must also show power, especially if he is not doing his duty towards the children.'

As he sees it, echoing the intention of the legislator and the Koranic imperative to assign arbiters to the disputing couple, his role in the reconciliation session, unlike the public hearing, is 'not to judge them, but to make them get on.' The first step towards this aim consists of penetrating their 'camouflage' and finding the 'real reason.' If the problem is about their 'intimate life' it may be changed and become something about money or children.

Like Judge Karim, the cantonal judge shared a strong frustration that people tried to conceal as much as possible. If judicious practice is contingent on context,¹⁷¹ the

¹⁷¹ cf Lambek 2010.

reconciliation sessions, held in the anonymous setting of the court office, are frustratingly de-contextualised. In a way, this echoes Besma's frustrations as she navigates the newly constructed neighbourhood; judges are faced with the task of re-contextualising litigants,¹⁷² a task that they themselves deem crucial if they are to succeed in their task of reconciliation. Women try to portray themselves as victims. He added, 'it is not easy to distinguish between the true and the false.' This is especially the case due to the 'mixing' between regions, which has happened in recent decades. He adds, 'you cannot trust appearances. The majority of people in Greater Tunis and Ben Arous come from all over Tunisia.' He tries to get an impression of who the couple are by looking at their profession and age, but after five minutes talking to them he finds that, 'they have no character. They run away. They do not want to give away any information about themselves that I could use to reconcile them.' As a result, it becomes difficult to connect with the litigants and to know how to communicate with them.

Although I did not have the opportunity to observe the female Family Judge in action, she told me that she does her best to build rapport with each couple, sharing personal stories to build their trust. A lot may depend simply on whether the litigants like her or not. She may give an example from her own life, such as 'I have a son of that age and I would never treat him like that.' She uses 'any possible argument' to try to dissuade them: 'your children are going to be unbalanced. They will not be good people in society and will not succeed in their lives.' In practice, the examples she gives are moral arguments about the ills of divorce and how the litigants and their families will be perceived in the neighbourhood after the divorce.

These judges' accounts stress the personal and psychological elements of the role of reconciliation judge. Emotions play a central role, too. The litigants, therefore, in their strategies, appeal to the judge both legally and personally. Safia's tears did not leave the judge indifferent. As they left, he turned to me and said, 'They made me nervous.'

Even if, as we have seen, the judge's experience of reconciliation is marked by his doubts as to whom to trust, he may appear to be swayed one way or the other. Fears about how the reconciliation sessions could be manipulated by the different actors generated a high level of uncertainty and malaise among all those concerned.

Many litigants feared how their spouse would behave during the reconciliation

¹⁷² See chapter 3.

session and the detrimental impact this might have on the divorce settlement. One litigant told me bitterly that his wife had cried on purpose and dressed up in torn clothes to show the judge how much he was neglecting her.¹⁷³ His wife told the judge that he did not buy her food and clothes, but he insisted that this was not true and that she was repeating what her mother had told her to say. Another male litigant, divorcing his wife without grounds, was extremely pleased when his wife exclaimed out of pride that she too wanted a divorce, hence losing any entitlement to compensation payments.

Many people do not need to exaggerate or invent stories to convince the judge of their genuine suffering. Malika, for instance, had been badly treated and abandoned by her husband and beaten by her mother-in-law. When I spoke to her, large bruises were still healing on her arms. In spite of all this, she still loved her husband and did not want a divorce. She told me that she began crying in the reconciliation session. The judge saw instantly that she was sincere and tried to help her. In addition, her husband had told the court that they were divorcing by consent, when this was not the case; rapidly proving him to be a liar. The judge strongly defended her and shouted at the husband for mocking the court and the justice system and condemned him for not taking better care of his children. The judge held her back after the session. He told her to have patience and to ask for her rights. In this gesture, the judge seemed to be making a commentary on the respectively good and bad ethical personhood of both litigants. He went out of his way – beyond the scope of his role as judge – to support what he thought was right.

DECONSTRUCTING THE IDEAL HUSBAND

Safia and Walid draw on the two marital duties that constitute the clearest legal definitions of 'harm': the husband's duty to pay *nafaqa* and their reciprocal duty not to be violent. Violence, one of the key sources of 'harm' in marriage, is backed up by the penal code and constitutes one of the main justifications for divorce that was considered valid by people I interviewed in the neighbourhood.¹⁷⁴

Violence was the problem most frequently invoked by women in the reconciliation sessions, 26 claiming to have suffered at the hands of their husband or one of his relatives,

¹⁷³ Cf Bear on the duplicity of bodies and how this relates to the uncertainty of officials and may bring out their prejudices (2007a: 208).

¹⁷⁴ See chapter 5.

most often his mother. In one case, a wife claimed her husband had threatened their daughter with a knife. Seven men mentioned violence. Two of these claimed that their wife had hit them and two that she hit his mother. In several cases, both parties accused the other of violence, in some instances supported by penal cases in both directions.

Like Safia, not all of these women who said they had suffered violence were asking for a divorce or even claimed they wanted to divorce; tolerating violence was used as an indication of their patience and their determination to save their marriage. This forms part of their performance as the 'ideal' wife who is willing to make sacrifices for her family and who does not want to divorce, thereby retaining her entitlement to compensation payments.

Leila, a wife in her early 30s with a baby son, was beaten by her husband who had mental health problems. Knowing the difficulties of proving domestic violence, instead of asking for a divorce herself, she pushed her husband to ask for divorce without grounds. Now she attends the reconciliation sessions and tells the judge that she wants to stay in the marriage, in order to receive compensation from her husband. Her performance in the reconciliation session takes on greater significance where documentary evidence is lacking.¹⁷⁵

Safia was one of 26 women to evoke her husband's failure to pay *nafaqa* (or enough *nafaqa*) during the sessions; 18 of these specifically mentioned *nafaqa* as the main problem. Like many men, Walid cannot play the ideal husband as her salary is also needed to support the family. If she can hold this against him with some conviction, it is because his duty to be the sole provider is backed up by dispositions elsewhere in the law.¹⁷⁶ Like Safia, wives often accused their husbands of not maintaining them by detailing their own contribution to the household, filling in for their deficient husbands. Several wives had brought bills with them to show that they had paid them and that their husband had not. In a couple of cases, wives mentioned that the husband's father was paying, which appeared to lead to further tension concerning parental interference in their marital life. Husbands mentioned either their unwillingness or inability to pay *nafaqa* or argued over their wife's use of her salary. A couple of cases revealed tensions with their respective families, in a struggle over the spouse's resources. The husbands commonly complained

¹⁷⁵ See chapter 5 on the role of documentary evidence.

¹⁷⁶ See chapter 5.

that their wives were too demanding materially, for instance, having been used to a higher standard of living before marriage or making demands beyond their husband's means.

As a legally, morally and religiously valid principle, *nafaqa* enters the reconciliation session in different ways and may be made to substitute for other things that are hidden from the court. Disputes over *nafaqa* do not happen only when the husband is devoid of resources. Sometimes it appears that other disputes – which may remain a mystery to the court – have lead him to stop paying *nafaqa*, out of revenge, because he believes she is not fulfilling her duties which are the counterpart of *nafaqa*, or as an indication that he has lost interest in the marriage. When Zohra disputed with her husband, as we saw in chapter 2, and he left home, he also stopped paying her *nafaqa*; she secretly took a job washing dishes in a café to make ends meet until he returned.

Several women made comments during the reconciliation sessions which appeared to wound their husband's masculinity by pointing out his failure to fulfil his role as breadwinner. One wife, who had taken out a court case for her husband's failure to pay *nafaqa*, exclaimed: 'you did not buy the milk (for their baby daughter) or anything! It is the last thing that you thought about! I do not want your mother to pay. I want you to take your responsibility.' Her husband's telling humiliated response to this was simply, 'I am a man in front of you.'

However, the judge's attitude and failure to follow up on this point (he makes no comment to Safia or Walid about his duty to pay *nafaqa*) suggests that he is aware of the reality in which two salaries are required to sustain a household. Rather, he offers Walid another possibility to appear powerful and play the ideal husband. The judge appeals to their shared Muslim identity, using words that echo those of the prophet Mohammed, to re-establish the husband's masculinity in a domain that does remain within his control; as a God-fearing citizen he should treat his wife well and give her her rights if he pursues his divorce. In the present economic circumstances, this represents a more achievable way of playing the ideal husband than being a sole male breadwinner.

The judge's suggestion that Walid should be willing to give her her rights if he wants to divorce relates to his annoyance that Walid is trying to pursue a divorce for harm without the necessary, legally permissible evidence. Without suitable documentary evidence,¹⁷⁷ Walid's performance in the reconciliation session (like Samia's above) takes

¹⁷⁷ See chapter 5.

on greater significance. Perhaps his wife will admit to her failings and enable him to divorce for harm if this is recorded by the judge? His willingness to change the type of divorce he is filing for suggests that he is aware that he lacks evidence. (If he divorces without grounds he wife will receive compensation). In this case, it seems that the ruse has failed and he has mostly succeeded in annoying the judge.

The judge was not the only one to bring religion into the room as a source of moral authority. Safia was one of many litigants to swear to God, to the prophet or on the Koran in an (often unsuccessful) attempt to assert that she was telling the truth. Allusions to religion are used to gain authority and legitimacy for what the litigant is saying. A couple of women added to this, 'give me a Koran and I will swear on it! ¹⁷⁸On one memorable occasion, a wife had actually brought a copy of the Koran with her, whipped it out of her handbag and started swearing on it; her husband, not wanting to be outdone grabbed the book from her and swore that he had been telling the truth. Given that their arguments had been entirely opposed, one of them must have been lying. The judge did not seem impressed by this event.

In the sessions I observed, wives used a wider range and greater number of arguments in their attempt to convince the judge, compared with husbands. As well as failing to pay *nafaqa* and violence (both physical and 'verbal' violence), husbands were accused of drinking and gambling, indicators of 'bad' ethical personhood and of a husband not to be trusted. If wives were active in painting a portrait of their deficient husbands, which moral criteria come into play as husbands try to depict the failings of their wives?

¹⁷⁸ A *sharai'c* means of collecting legally valid evidence, which remains in Tunisian law, is an oath sworn on the Koran. This would normally take place in a mosque in front of an Imam.

DECONSTRUCTING THE IDEAL WIFE

Mehdi and Saida.

Conflict with his family. He asks for divorce without grounds.

Mehdi and Saida are in their early 30s. Both are wearing jeans and an anorak and look moderately well off. He passed his Baccalauréat, works as a car salesman earning 550 dinars per month and lives in a pleasant, seaside suburb. This is his first marriage. They live in a flat, which he owns, above his parents' house. They have been married for two years and have a baby daughter. Saida studied to Master's degree level and works as an accountant earning 500 dinars. She is living with her brother in central Tunis.

The judge asks Mehdi why they are disputing. He explains that the problems started when they left the flat they were renting and moved into the flat above his elderly parent's house. She did not want to live there and left, taking their baby with her, whom he has not seen for 6 weeks. The Judge looks at his mobile phone, before finally making a phone call as Saida starts telling her side of the story. They had agreed to live away from his 'dar' (literally house, but here referring to his family), but he had made her move into the small flat above his parents when she was heavily pregnant. The judge tells her that she is wrong: 'you cannot reject his family'. She reassures him that she does not reject them; she goes to them for Aïd. But she cannot live there as they restrict her freedom.

After she gave birth, her family managed to reconcile them and she returned to live with her husband on the promise that his father would allow her independence and freedom. In spite of this, his mother interfered. 'His mum asked, 'are his clothes washed?' explains Saida. 'Who is responsible for my husband? Me or his mum.'

The judge tries to calm her, 'If my mother asked my wife that, she would just say yes. She knows how to treat her.' Saida insists that she tried to love her mother-in-law, but she interferes in their relationship, coming up to visit them at 5am.

Mehdi retaliates claiming she neglects her duties: 'She goes out all day and leaves the baby with my mother. From 8am- 6pm. She wants me to erase my mum and dad from my life. My mother cooks us dinner. She thinks ... My mother dominates me. My wife left the baby in Bizerte with her parents.'

The judge asks the husband again if he wants to divorce. Saida speaks over his reply saying that their daughter is ill and that she was thrown out. The judge asks her if she agrees to divorce. Saida replies, 'I don't want to divorce. If I did, I would have asked for divorce. Do you men take (meaning marry) women for their salaries?'

She adds: 'He tastes my food and says his mother cooks better. He is not diplomatic. I don't care about money. I have paid maintenance since I married and don't keep accounts.'

They argue between themselves. The judge makes another phone call. Mehdi says that the real problem lies with his parents. Saida says that he has no 'character'. He retorts that he has a 'moral obligation' as they are his parents.

The judge addresses Mehdi:

'Women are women. You must stop your mum, if she crosses her boundaries. It is not for the court to do this. I will give you advice about women. Sometimes a mother does not know her boundaries. ... you must tell her, when she goes too far. Can you get your wife and mother to agree?'

Mehdi: 'She thinks that everything my mother does is a mistake.'

Judge to Mehdi: 'This is all down to you. This is your duty and you failed! As I see it, there is no problem between you as a couple.'

Mehdi: 'It is a problem between my parents and my wife. But I feel that she does not respect me.'

Saida: 'Your parents dominate you and you just watch.'

Mehdi (who has tears in his eyes): 'For 18 months, we have had problems. Her family kept coming...'

Saida: 'Ahhhh! You have a problem with MY family?!'

Judge to Mehdi: 'Don't try to convince yourself that these are not real reasons. I will give you another reconciliation session. Think how you imagine your life. What differentiates between men? There is no success, unless you can resolve problems. People management. Especially for men, more than for women; marriage, parents, colleagues, etc. Each man has power.'

Saida: 'I respect him.'

Mehdi: 'She does not respect me!'

Saida: 'Each month I pay the rent alone and provide for our family alone. Our daughter cries and asks for her dad. I want to bring her (back from Bizerte). Where can I put her?'

Mehdi says that he wants to see his daughter but fears that her family will block his visit. The judge advises him to go to see her in Bizerte and that he can use the police if necessary, if he cannot manage alone. He sets a date for the second reconciliation session.

This case illustrates some of the main arguments used by husbands to demonstrate the failings of their wives and the ways in which the morality of wives is founded in the house. Other than accusations of violence, moral criteria pertaining to a bad wife revolve around the house; wives are accused of going out of the house too much, neglecting their housework and children or abandoning the marital home completely (*nushuz*). Six husbands used explicitly moral arguments complaining that their wife's behaviour was 'bad' or shameful (going out until late at night, dressing in an inappropriate way). One man, responding to his wife's accusation that he did not pay *nafaqa*, replied that he was ashamed of the clothes his wife wore and that her mother encouraged this behaviour, asking him why he does not allow his wife to wear '*décolleté*' (tops which reveal her cleavage).

Mehdi accuses Saida of neglecting her duties as she goes out of the marital home.

Presumably, this is due to her work as an accountant that enables her to earn almost as much money as her husband. As a woman who works, there are tensions with her mother-in-law as she is unable to play the ideal wife and be the kind of mother that her husband's mother was able to be. Her salary is essential to the running of the household (and she may well want to work given her level of education). In turn, she is able to accuse her husband of being weak and failing to be the ideal husband because she makes this financial contribution. In this sense, Mehdi's accusations end up underlining his own failings as a husband, rather than her failings as a wife.

Mehdi was not the only husband to accuse his wife of going out a lot. As we saw in chapter 1, in the neighbourhood it is frowned upon for women to go out. The responses of the wives to this argument points to the necessity of going out of the house in the contemporary neighbourhood, something the judge appeared to understand. Nebil, for instance, stated simply of his wife that 'she goes out,' her immorality implicit in this phrase. In her defence, she retorted: 'I only go to see my neighbour and friend. Is this 'haram to me'?' Another wife explained that she went out to the grocer's shop, a short distance away. In both cases, the judge did not respond to this particular point, focusing his efforts on other aspects of the marital dispute where he thought a difference could be made.

Although Mehdi is speaking to the legal expectation established in jurisprudence for wives to cohabit with their husbands, jurisprudence states that the wife is only at fault if her absence is unjustified. There are many legitimate reasons why she may be absent from the marital home. In the sessions I observed, the judge sought the reasons for the wife's absence. Nebil, the husband whom we met earlier, was filing for divorce for harm due to his wife abandoning the marital home. His wife told the judge herself that she had spent the last 6 months in her father's house, after 10 years of marriage. She claimed that her husband had spoken to her with 'words of the street' and hit her for no reason, providing the judge with a justification for her absence before he had even asked for one. Nebil claimed that she went to her father's house for any 'small' reason. The judge declared: 'one only leaves home for the biggest reason.' Saida continued her justification, 'a wife who is beaten, sworn at ... I cannot change him.' The judge appeared to lose patience with Nebil, telling him: 'you made a mistake.'

Rather than showing any sympathy for her absence from the marital home, the judge identifies the essence of Mehdi and Saida's marital tensions as lying between her

and her parents-in-law, rather than between her and her husband.

Family problems, including interference from either family, tensions as they live with his family, disputes with children from a former marriage, the negative influence of a family member, or opposition by the family to the marriage, were common themes in the reconciliation sessions I observed. Saida demonstrates the tensions that exist between expectations (and, in her case, prior experience) of neolocal living and material circumstances that necessitate a return to patrilocal residence.¹⁷⁹ The judge seemed aware of these constraints. One wife explicitly stated that she argued with her husband's family because she lived with them. The judge simply replied 'this is not a problem' and encouraged the couple to reconcile for the sake of their son. In another case, the judge pointed out that the wife's father-in-law was elderly, encouraging her to be patient, implying that she would gain the independence she craved after his death.

Mehdi and Saida's case was one of 8 out of the 61 that I observed where the judge appeared to see a glimmer of hope and actively sought to reconcile the couple. In a couple of these cases, he merely encouraged the couple to keep thinking about their problems before the next session. In the other cases, he was more active, not only giving advice, but instructing them on how to proceed in the form of commands. In three of these cases, the problems seemed to be tied to difficulties between the wife and her husband's family more than between the couple themselves.

In persuading them to reunite, he treated men and women differently, placing the emphasis on the husband, who should play an active role in reconciling the marriage by making the first move towards his wife. The wife, however, must also actively play her seemingly passive role if they are to reconcile. She must display the patience and intelligence expected of an ideal wife and be tolerant of what is often a tricky material situation that they do not have the means to change. As with Walid above, the judge also seemed to offer Mehdi an alternative way of reasserting his power as a man in a situation in which he is otherwise powerless. He placed the onus on Mehdi to manage the relationships within the family more harmoniously, especially that between his mother and his wife. Again, Mehdi is offered an alternative way of playing the ideal husband.

Not all couples spoke in front of the judge. A couple may jointly decide to present a

¹⁷⁹ The reader will recall Besma and Nabil in chapter 2 building extra floors onto their houses to provide future marital homes for their sons.

wall of silence, in particular if they have already agreed to divorce by mutual consent and if there is nothing to be gained or lost in terms of compensation or child custody. In a couple of cases, the only response given to the judge's question as to why they wanted to divorce was '*maktoub*' (literally 'written' by God), lending religious legitimacy to their silence. There is little the judge can do if they refuse to speak. The judges I interviewed were divided on how much they would push couples who remained silent, depending on the time available and whether the couple have children. In their silence, a couple may escape legal judgement.

In stark contrast to this, much to my surprise, some couples discussed intimate problems with the judge, including lack of sexual relationship, adultery, infertility and the refusal to have children or more children. One wife complained that she was still a virgin some time after their marriage. Two wives said that their husband had taken a second wife;¹⁸⁰ one of these had married for the second time in Libya. Six other women mentioned that their husband had 'another woman'. One complained that her husband refused to have any children, as he already had four children from a previous marriage. One did not like her husband looking at pornography. Far fewer men seemed willing to talk about this topic, although two also hinted at sexual problems. In one of these cases, the husband did not feel able to talk about it and indicated that the judge should read a letter included in the file; his wife was ill and unable to have sex. One husband accused his wife of prostitution; she had a lot of money and he claimed that this came from 'all the men who come to the house.' One couple suffered from fertility problems and had agreed to divorce; it was not stated which party was infertile.

Two women mentioned their husband's neglect of them in bed as their main reason for wanting a divorce. Judge Karim responded to these problems pragmatically, placing the emphasis on the husband to approach his wife and to restore their sexual relationship. Ahlam complained that her husband had abandoned her sexually. The judge advised her husband, 'the most important thing is the '*vie de couple*'¹⁸¹. Especially for the man. This is the most important thing, above everything else. If you succeed in your 'life in bed'. A man who is clever and successful gets this right.' Once again, Judge Karim appears to be offering the husband an alternative way of restoring his masculinity and playing the ideal husband.

¹⁸⁰ Recalling that polygamy is illegal in Tunisia.

¹⁸¹ He says this in French, although they are speaking Arabic. Literally 'life as a couple', he is referring to their sex life.

CONCLUSION

The moral criteria which define what makes an ideal husband or wife (that are already familiar to us from the neighbourhood) are given legitimacy by the law and its lacunae, in the spaces opened up by its failure to clearly define those key legal categories of 'harm' and 'marital duties'. The initially gender-neutral wording of the law in practice rapidly becomes gendered. Firstly, in the legal code's own dispositions that help define 'marital duties' and secondly as ordinary ethics enter the practice of the law through the person of the judge.

Lynch & Bogen analysed the Iran-Contra trials as being an inversion of Foucault's spectacle of the scaffold; what was once hidden was made public (1996: 93). In their words, 'this ceremony provided a forum for enacting a civic ritual through which public representatives would pass judgement on the legal and moral status of actions taken' (ibid: 89). The reconciliation sessions may also be read as a ceremony in which what was once kept in the family is exposed in front of the state,¹⁸² whose officials will pass judgement on the legal and moral status of actions and the ethical personhood of each spouse. Although the meetings take place behind the closed doors of the Judge's office, public standards of normality and morality are heavily present.

Equally, Lynch & Bogen have stressed how, 'formal orders are incapable of *determining* the actual course and outcomes of social activities and that they are nonetheless *practically* relevant to their conduct' (ibid: 120). The guilty may still refuse to confess; litigants can bend the rules of the format to their own ends. The performances litigants choose to put on for the judge enable them to retain some control over the extent to which the state can intervene in their intimate lives. They may also choose to remain silent.

The fluidity of the legal categories the litigants are performing within ('marital duties', 'custom and habit', 'harm') partially stems from the ambiguities of married life in the neighbourhood.¹⁸³ The strategies and performances of litigants and the judge during these reconciliation sessions demonstrate how marital duties are simultaneously being

¹⁸² cf chapter 2 on the taboos of entering the divorce court.

¹⁸³ cf chapter 2.

redefined through legal practice, as the law lends legitimacy to moral norms as they enter the court. The judge, frustrated as he seeks to reconcile couples he cannot locate, could theoretically ask questions about regional origin. However, he never did so in my presence. His understanding of the litigants' marital disputes is dependent on his ability to re-contextualise, to read the situations he is presented with against the grid of his own understanding of marital ideals and his own experience and observations of married life.

Given that the couples observed varied broadly in terms of socio-economic class, the arguments used by husband and by wives appeared surprisingly consistent. Litigants shared a common sense of the kinds of arguments that would appeal to the judge and the moral criteria that are expected of ideal husbands and wives that form the basis of these arguments. If region is less visible and reliable as a marker of ethical personhood and identity, it appears that there is a shift towards a homogenisation of moral values on a national level. Other factors enter into play as the judge interacts with litigants, not the least their shared religiosity and faith in Islam that, as we began to see in the neighbourhood, are beginning to displace other criteria as indicators of ethical personhood.

Whilst the cases I observed suggested broad agreement as to the ethical criteria that define ideal husbands and wives, the judge displayed his awareness of the tensions between these ideals and the realities of marriage. Due to the nature of the reconciliation sessions and the silences in the legal code, the judge's personal knowledge of society and its morality are explicitly invited into, and are required by, the practice of the law. In a different Muslim context, Bowen studied how judges crafted their decisions to make them convincing to litigants and concluded that, 'we might therefore expect to find clues as to the norms supporting their decision in the narrative structure of the judgement' (1998: 90). The arguments Judge Karim used to appeal to litigants, in particular those used to persuade them to reconcile, implicitly suggest his understanding that it is increasingly difficult to play the ideal husband or the ideal wife. He knows that a husband can no longer be sole breadwinner and that a wife cannot remain at home. Rather he suggests alternative avenues for playing the ideal husband that are more realistic in the difficult economic climate.

As a great deal hinges on the person of the judge, in this peculiar legal setting the moral may be reassembled in very different ways. Whilst this judge acknowledged

contemporary realities, another judge may have underlined old prejudices.¹⁸⁴ Reconciliation sessions are an unpredictable encounter with an unknown entity; uncertainty and anxiety mark both the judge's and litigants' experience of the reconciliation sessions and may lead to morality being redefined in potentially unpredictable ways.

It is possible to add a further layer of inversion to this secret spectacle of reconciliation. As they try to persuade the judge to take their side, litigants make their own judgements as to the morality and legitimacy of the state. Through the reconciliation sessions, therefore, the moral fabric of society is being rewoven as judicious and judicial practice combine. Simultaneously, the litigants' ability to play the ideal husband or wife and the legitimacy of the law itself are placed under scrutiny.

¹⁸⁴ In a very different setting (UK immigration law) in which the legal outcome and destiny of litigants relied upon judicial discretion, White found the verdicts of her litigants depended on whether they came across 'a nice judge on a good day' (Caroline White 2012: 6).

CHAPTER 5 -

'MAKTOUB' (1): DOCUMENTING DIVORCE

- THE ROLE OF DOCUMENTARY EVIDENCE IN CASES OF DIVORCE FOR HARM

'In Tunisia, the judge rules with what is written (*al maktoub*). Only with what is written.'
(Saida, during her divorce)

Saida (1)

When I first met Saida, a woman in her mid-30s, in the single room she shared with her 3-year old son, she was in the middle of not one but two divorce cases; both she and her husband had filed for divorce on different grounds in different courts. In the small apartment where she lived with her 3-year old son, she took a thick divorce file from the cupboard. In it rested her hopes of bringing over two years of painful divorce litigation to an end, of being released from an unhappy marriage and granted her rights. In her recent reconciliation session her husband spoke to the judge but she held her tongue. She hoped her documents would speak for themselves.

By the time I met Saida, I had developed my own relationship with divorce files during my research. I had read too many cases which had been forced to change track or had been rejected due to the difficulties of providing proof relating to such an intimate domain of life. Her anxiety was mixed with hope, based on her confidence that her evidence would hold up in court. I was not so sure.

INTRODUCTION

Documents have been described as 'the most boring of ethnographic artefacts' (Latour 2010: 26). For lawyers, expert weavers of legal texts, they are far from boring as both their livelihood and ability to gain justice for their client are at stake. For the judge, the documents map out the possible judgements. For litigants like Saida, her 'fate', lies in these

assembled pages. In her words, the '*maktoub*' (that which is written by God, predestined, fate) may literally lie in the '*maktoub*' (that which is written, proof).

This chapter aims to respond to pleas made by scholars to take documents seriously by exploring a particular kind of legal document: the evidence provided in cases of divorce for harm (Latour 2010; Riles 2006). Whilst documents in general can be read in many ways (Riles 2006), in law, documents are frequently read for what they can prove (Kelly 2006, 2012; Messick 1989). In the Tunisian PSC, not only does evidence structure the kind of divorce available to a litigant, but it also serves as the basis for the divorce settlement, including any compensation payments awarded.

There are particular conditions to the documentary basis of Tunisia's personal status law. Voorhoeve cites the restriction on the kind of evidence that is accepted in practice as being one factor that constrains judicial discretion and leads to the harmonisation of judgements in personal status law (2012). Legal documents enter into the process of reassembling the moral, but which forms of 'harm' are easier to prove than others?

In the case files, as well as my interviews with judges, litigants and lawyers, 'documents anticipate and enable certain actions by others' (Riles 2006: 21). We should ask then 'how diverse types of agency are produced,¹⁸⁵ stretched or abbreviated through the *medium* of the documents' (ibid: 21). Documents shape both the judge's scope for interpretation as he makes his judgement and the strategies that can be deployed by litigants and their lawyers as they seek a favourable divorce settlement.

Seeing documents as mediums highlights their inherent uncertainty. Documents appear as liminal spaces; they are 'mediations, their writers mediators between the ... text of (the) law and the particular events of the world' (Messick 1989: 27); in short they are 'fallible' (ibid: 36). Kelly, writing on the use of fallible identity documents in an entirely different context (the second Palestinian intifada), found them to be 'an unpredictable and unstable technique of governance, producing considerable anxiety for all those concerned' (2006: 90). Drawing our attention to the processes by which documents are created and the ways in which they are used and interpreted, he found that:

¹⁸⁵ This use of agency is to be distinguished from my use of it in this thesis, understood via Laidlaw.

'It is in the spaces created by the gaps in the law, rather than the law itself, that distinctions between Israelis and Palestinians are produced in everyday life [and that] suspicions therefore fill the gap between legal documents and their application' (ibid).

If these identity documents fail to provide certainty, it is also because they are being read in conjunction with bodies and appearances that are replete with their own duplicity.¹⁸⁶ In the process, certain prejudices are brought to bear and are reproduced with consequences for the individual endeavouring to access their rights.

As far as the final divorce judgement is concerned, the family judge must rule based on the case file alone, deprived of even the limited contextualisation provided when the litigants appeared in court in person for their reconciliation sessions (that may have been held by one of his colleagues). The judge is required to engage in the process I have called re-contextualisation (chapter 4) at a distance as he is confronted with 'the world represented in the file' or, in Pottage's words, the file as a 'map of the world' (2004: 21). This situation premised on the physical absence of litigants at the moment of judgement stands in stark contrast to the Moroccan system described by Rosen. Here, the *qadi's* perceptions of 'how people of the sort *in front of him* are expected by him to comport themselves' (2000: 13)¹⁸⁷ are paramount to the judgement process in general and, more specifically, to his evaluation of the veracity of the documentary evidence that most frequently takes the form of witness statements. In this way, regimes of evidence are intimately connected with forms of sociality and perceptions of ethical personhood as the judge weighs up whom and whose evidence should be most trusted. Expressed in Lambek's (2010) terms, the *qadi* combines judicial with judicious practice, exercising ordinary ethics in an extraordinary context.

Further detached from the contextualisation upon which moral judgement is contingent (Lambek 2010), the Tunisian Family judge is, in the scope given to him for judicial discretion in the evaluation of harm and in the evaluation of evidence in divorce cases, nonetheless expected to combine judicious and judicial practice.¹⁸⁸

¹⁸⁶ cf Bear on the duplicity of bodies and the uncertainties generated by the failure of documents to provide any definitive proof of identity (2007a: 208).

¹⁸⁷ My emphasis.

¹⁸⁸ Tunisian jurisprudence holds that the evaluation of evidence in divorce cases is left to judicial discretion (cf Voorhoeve 2012).

What happens, then, when these fallible documents become the basis for both the judicial and the judicious practice that the judge must engage in as he rules on divorce cases?

'Facts', as Latour has suggested, and as Saida was slowly learning, 'do not speak for themselves' (Latour 2004: 82). Only particular facts lend themselves to being woven into the 'map' of the divorce file: those, which trigger the production of convincing, legally permissible evidence. This chapter looks at the types of evidence that are most convincing and that consequently constrain judicial discretion the most.

In the Tunisian context, rife with uncertainties, where Besma struggled to know whom to trust in the neighbourhood (chapter 1) and where the judge shares similar concerns and suspicions even when the litigants are present in front of him in the reconciliation session (chapter 4), which forms of evidence are most trusted? If some forms of evidence are more trusted than others, which moral criteria relating to good husbands and wives are reinforced by the most convincing forms of evidence in the practice of the law?

MAKING EVIDENCE: LEGAL REQUIREMENTS

Evidence plays a central role in determining the type of divorce for which a litigant may file, notably to support claims that a litigant has suffered 'harm'. In the case of divorce for harm, it must be proven in order for the divorce to be granted. 'Harm' is also the basis for compensation payments both in cases of divorce for harm and divorce without grounds (that will be examined in more detail in chapter 6). Crucially, these compensation payments do not always flow in the same direction; evidence is the weir that directs this flow.

A litigant requesting divorce for 'harm' must prove the 'harm' caused and can ask the husband or wife for compensation for this if successful; the settlement will be in his or her favour. A litigant requesting divorce without grounds is not required to provide any justification or evidence for their request. The litigant is, however, expected to pay compensation to their spouse, on whom they are effectively forcing an unwanted divorce; the financial settlement will be in their spouse's favour. In practice, if a litigant is unable to

prove the harm suffered with legal evidence, he or she may be forced to ask for divorce without grounds. In this case, it is in the interest of the litigant to attempt to persuade the court that his or her demand is really based on harm, in the hope of reducing the compensation, which must be paid to the other party. Therefore, both spouses frequently attempt to provide evidence to show that he or she has suffered the greatest harm due to the divorce in the hope of gaining a more favourable settlement; this is central in structuring the acrimonious game of ping-pong that is played out between litigants in the files.

As I selected them from the shelf, the files themselves provided a visual clue, signalling things to me about the case inside. War-torn, bulging files, thick with pages of contradicting evidence and correspondence, fast becoming tattered and bursting out of their yellow jackets, reliably announced the months or years of pain and heartache depicted inside. A thick file was generally a long and complicated one and was typically for harm, or potentially divorce without grounds; in contrast, files for mutual consent contained but the few essential sheets of documentation required and generally looked neat and new, having spent less time circulating between various court offices.

Saida (2)

Saida had already been through two failed divorce cases, both initiated by her husband. His first case, for harm, in which he accused her of being violent to his mother, was rejected by the court due to lack of evidence. In the second case, he filed for a divorce without grounds. This case was littered with accusations against her, including adultery, as she had allegedly declared in public that he was not the father of their son. She refuted this and began claiming substantial material and moral damage payments, based on his generous income as the owner of his own business. Unwilling to pay her any money, he dropped the case, telling the court that he wanted to stay with his wife and son. In reality, neither spouse wished to remain in the marriage. The main impact of this second reconciliation was for Saida to lose the rent allowance that the court had allocated her during the divorce proceedings; the 'reconciled' couple were assumed to have resumed married life under the same roof. The rent allowance had been essential since her family lived far from Tunis, and it was not an option for her to live with them, as divorcing women typically do. As they

*did not resume marital life, she was left living in highly precarious circumstances with no fixed income to support herself. She was compelled to file a case to force him to pay her maintenance.*¹⁸⁹

Let us now focus on divorce for harm,¹⁹⁰ in which the entire case hangs upon the presence of legal evidence. We shall examine the form that this evidence can take and the procedures required to produce evidence that is legally valid and acts as a constraint on the judge's discretion.

SOME KINDS OF EVIDENCE ARE MORE TRUSTWORTHY THAN OTHERS

'What the wife said contains no truth. The husband does carry out his marital duties according to custom and habit. Whoever alleges harm, must provide evidence for it. The current file is devoid of any proof of harm such as a penal case or final judgement.' (A husband's lawyer writing in defence of his client in a divorce file after his wife filed for divorce for harm)

Tunisian law is strongly focussed on the '*maktoub*', the documents, as opposed to oral forms of evidence, the divorce judgement being based exclusively on the written divorce file. It was these files that I was able to examine in the court office. It is the written file that will be passed on to the Court of Appeal and assessed by the judge's colleagues, should either spouse appeal his decision.

This lawyer¹⁹¹ sums up the key problems facing a litigant trying to file for divorce for harm; although all forms of legal evidence are theoretically permitted in divorce cases, jurisprudence holds that only final judgments can justify divorce for harm. These are, therefore, the ones that speak loudest to the judge and may restrict his judicial discretion more than others. Nonetheless, other forms of evidence, although less authoritative, find their way into divorce files and are worth brief consideration.

If the validity of evidence is connected with webs of sociality, it follows that given the increased illegibility of ethical personhood (chapter 1), the use of witnessing (Wuerth

¹⁸⁹ This procedure is examined in more detail below.

¹⁹⁰ Chapter 6 discusses cases of divorce without grounds.

¹⁹¹ It is not compulsory to use a lawyer in divorce cases. However, given the difficulties of evidence, lawyers were frequently used, in particular for the more complex cases based on documentary evidence.

1998; Mir-Hosseini 1993; Osanloo 2009), including notarised witness statements of the kind that were so prevalent in Rosen's Moroccan context (2000), were almost entirely absent in my Tunisian case files. Two or more witnesses may prepare a written statement in the court or in front of a notary. The Judge was aware of the difficulty of finding witnesses in personal status cases. Contemporary forms of sociality in the urban setting of Ben Arous do not lend themselves to witnesses being present during marital disputes. Furthermore, in Ben Ali's dictatorship, although neighbours sometimes intervened to help resolve marital disputes, people were reluctant to become involved with a court case or issues involving the police. Consequently, witnesses were rarely forthcoming and it was unusual to find such evidence in divorce files.

Rather than appealing to the judge's perceptions of ethical personhood and who is likely to tell the truth, the most authoritative evidence rests on the authority of the state itself. It is possible to echo Messick in noting that alongside changes in the nature of the Tunisian polity, 'the weight of authority shifted from the notary to the state' (1989: 34).

When I asked the Family Judge about 'harm' and the acceptable means of proof, he echoed jurisprudence, telling me that there must always be something 'final': a final judgement which was no longer subject to appeal and which was not delivered in the absence of the defendant (implying a longer appeal period). The evidence he trusts most is that which bears the seal of approval of a state court and the guarantee that a fellow judge will have followed the appropriate procedures to validate that judgement. In practice, then, authority lies both in the author and in the procedures.

The Family Judge continued to explain that harm may be proven by 'all means of proof', all of which must be backed up in some way by the authority of the state. Declarations made in front of the judge and recorded (for instance, during the reconciliation sessions) are considered binding, although a majority of litigants appeared aware enough of this fact to avoid making incriminating statements in his presence.

A far more widespread form of evidence, prolific in the divorce files, was that authored by notaries. The trust placed in notaries (*'udul*, 'just men') as expert witnesses, long present in the Maliki school of jurisprudence prevalent in North Africa,¹⁹² is now predicated on the authority of the state; notaries are public officials, whose honesty must

¹⁹² See Messick 1989 for fuller discussion of the use of notaries and written versus oral evidence in Islamic legal traditions.

not be doubted.¹⁹³ This evidence nonetheless has considerable limitations, as it is only able to say certain things; it can speak of specific facts (the furniture in the room was broken), but not of the all-important authors or their intentions (the husband or wife broke the furniture in a fit of rage).

Finally, medical certificates, another frequent inclusion in the divorce files, suffer from similar weaknesses to those of statements by notaries. They can attest to the physical damage suffered, but do not identify the author of the violence. In addition, greater trust is placed in certificates issued by public doctors, as opposed to private doctors who are paid by their clients. Medical certificates are not without suspicion, thanks to the 'creative' use of such evidence by some litigants. A lawyer told me about a woman who had suffered considerable injuries in a car accident. She acquired a medical certificate listing the bones broken and stitches needed and hid it in a drawer. Some months later, she had a serious dispute with her husband and used this medical certificate to try to file for a divorce for harm. In this case, her subterfuge was quickly unveiled but abusive acts such as this do not help the judge trust this kind of evidence. Also, as we will see below, it is the role of the penal judge, and not the family judge, to assess the evidence and rule on cases of domestic violence, thereby producing a penal judgement that could be used in a case of divorce for harm.¹⁹⁴

Saida (3)

Saida's husband's first divorce case for harm was rejected. The only evidence he had against her was a judgement for violence that was not final since it had been ruled in her absence. She had been sentenced to one month in prison for hitting his mother, who had a medical certificate stating that she needed 45 days rest as a result of her injuries. Saida vehemently denies this.

Saida received considerable moral and material support from various neighbours who had become friends. As they provided tea, sympathy, a break from caring for her boisterous toddler alone and the chance to earn some money doing odd jobs, they

¹⁹³ See Charfi for a detailed discussion of the use of evidence in civil law cases (1997: 252-256).

¹⁹⁴ In her study of Court of First Instance in Tunis (2008-2009), Voorhoeve similarly found that judges were cautious when considering evidence of domestic violence in cases of divorce for harm due to their suspicions about various kinds of fraud (2012:205).

witnessed her suffering and poor living conditions. It was never suggested, however, that any of these people could be witnesses in her divorce case. To support her current divorce case for harm, she had obtained a judgement against her husband for domestic violence. He used to beat her, she told me. As she held her baby in her arms to protect herself, he beat her around the head causing her headaches that continue to this day. She believed that this was a final judgement. Her husband had been sentenced to prison for six months, yet he never went to prison; the sentence was commuted to a fine. Was this a 'final judgement' as required by the judge? By the time I left the field, the status of this evidence was still not clear, even though Saida questioned multiple lawyers about it, sometimes in my presence. She appeared convinced that her evidence would speak to the judge and she would find her rights.

As opposed to the theoretical legal rule that 'all means of proof' are accepted, a hierarchy of types of evidence emerges, which speak more or less persuasively to the judge, the most authoritative being those produced by the state.

DOCUMENTING HARM

It follows from these uncertainties surrounding evidence that judges did not like cases of divorce for harm, which all too often end in rejection by the court due to a failure to provide convincing evidence. Of the 51 divorce files for harm that I examined, only 16 were accepted by the court, whereas 20 were rejected.¹⁹⁵ By comparison, of the 81 cases of divorce without grounds, only 4 were rejected (on procedural grounds). This section will explore which grounds underlie the successful and unsuccessful cases; in particular, it will highlight how these differ along gendered lines. Which grounds for divorce leave litigants in a stronger position with greater certainty as to the outcome of their divorce case? Which forms of harm can be backed up by the most authoritative final judgements? In other words, how is 'harm' defined in law when we take the need to produce evidence into account?

¹⁹⁵ Of the remainder, 6 couples agreed to divorce by consent, 6 litigants changed the type of their divorce to divorce without grounds and 3 couples reconciled. My sense is that these couples most likely reconciled as the litigant, like Saida's husband, was unwilling to change his demand to one for divorce without grounds (at the risk of paying compensation) and as the couple were unable to agree to divorce by mutual consent. It would not be surprising if, like Saida and her husband, these couples returned to the divorce court in the future.

Article 23's subjectivity does not lend itself to the production of legally valid evidence. It is not surprising, then, that the key marital duties that tend to lead to divorce for harm are backed up by specific laws and procedures elsewhere in the legal code¹⁹⁶ that allow for the production of evidence. The authority attributed to the evidence produced in each case, the degree to which the judge is inclined to view that evidence with suspicion, is a consequence of the procedures used to generate it.

The two main reciprocal duties viewed in this light are fidelity and the absence of violence, both of which are the subject of legislation in the penal code. However, Narjes, a lawyer who frequently worked on divorce cases, lamented that, other than catching the couple in *flagrante delicto*, adultery is particularly difficult to prove. The female body may end up providing this evidence in the form of pregnancy or childbirth; new DNA testing used to prove paternity also opens men up to being exposed as adulterers by the birth of a child.

Although both violence and adultery have the potential to produce authoritative forms of evidence, it remains to be seen whether litigants are able or willing to go through the procedures necessary to produce them. Equally, although these could be seen as the most definitive forms of harm, even when a final judgement has been produced, spaces for litigants to exercise different strategies are nonetheless opened up and may not lead to the results expected.

In considering the authority of evidence and how it shapes the strategies of litigants, there is a further dimension worthy of exploration, that of emotion. Bear's work on railway archives in India signals a further dimension of documentary practices, highlighting the longings, desires and needs of her informants in relation to the feeling of uncertainty and anxiety produced by their fallible documents (2007a). Emotions of the litigants, of court staff and of the judge, often disappear in court-based ethnographies, although work based outside the court has revealed these veiled sentiments and the strong emotions surrounding marriage and divorce (Abu Lughod 1986: 224-227).

Strong emotions were at the heart of Ramzi's story as told to me by a court clerk.

¹⁹⁶ cf chapter 4 for a detailed discussion of the legal dispositions which play a role in defining 'marital duties' and 'harm' in divorce cases.

Ramzi

Ramzi had been married for 20 years and had three sons, when he discovered that he suffered from a chronic illness. His doctor told him that this illness meant that he had always been infertile. Surprised, he told the doctor that this was impossible as he had several children. The doctor regretfully informed him that he could not be their father. A DNA test confirmed the bad news and could have provided evidence to prove his wife's infidelity and to justify a divorce for harm. Court staff witnessed an emotional, tear-stained scene in which the children told him that they loved him as the only father that they had ever known. The court clerks were impressed with Ramzi's capacity for forgiveness, since he decided to reconcile with his wife for the sake of his family.

Emotions play their part in a litigant's reasoning and in determining whether they are able and willing to pursue a particular course of action, even with documentary evidence. Considering emotion in this way, in juxtaposition to evidence that frames but does not constrain actions, helps draw out the creativity of the human actors involved alongside the authority of the documents.

Litigants may use this creativity differently as their strategies are necessarily gendered. Their strategies are framed, if not determined, by the legal code that provides the most clarity and the clearest procedures for the production of legally permissible evidence to show a husband's, rather than a wife's, failure to perform his marital duties.

DOCUMENTING BAD HUSBANDS: A HUSBAND'S DUTY TO PROVIDE MAINTENANCE

As discussed above,¹⁹⁷ a husband's main marital duty is to provide for his wife and children (*nafaqa*). Various procedures are in place to ensure that a wife who is denied this vital living allowance can make a claim rapidly to the court to force her husband to pay. These cases take between 2 weeks and 3 months to reach a judgement.

¹⁹⁷ See chapter 4.

Nafaqa cases are heard in the cantonal court, selected due to its accessibility to litigants; as a local court, the procedures are deemed easier, their cost is low and no lawyer is required. A case may be launched by the wife making a simple verbal complaint to the cantonal judge that she is lacking maintenance and showing her marriage contract to prove that she is married.

How does the court ascertain whether a husband is failing to provide maintenance? The court begins with the presumption that if a wife comes to ask for maintenance, then he is not providing for her. Her words are backed up by two procedures, although the burden of proof rests on the husband to demonstrate that he does pay. First, the cantonal judge can ask a social worker to visit the marital home and to provide what the judge called 'real information'. Second, the husband will be summoned to a meeting with the judge, where he may also bring his pay slips or any other evidence of his financial resources such as tax returns, a second home or a pension. Some of these documents may prove elusive; for instance, many men are self-employed and would not receive an official payslip. An absence of official documentation to prove the husband's income is a frequent difficulty for these men and for the judge, who must take a decision about the appropriate level of maintenance payments that the husband will be required to pay. One judge explained:

'The woman has all the rights. There is a presumption that he is guilty and he must prove the contrary. As for the wife, it is something negative – how could she prove he does not do something? She cannot prove that he does not pay. So a *nafaqa* case is easy for a woman. There is a 90% guaranteed result.'

Many of the women who initiate these cases are in genuine need. However, an awareness of the ease of such a claim and that such a judgement can be used as evidence in divorce cases, leads some women to take out these cases and store the judgements 'just in case', to use as a weapon to pressurise their husband or to file for divorce in the future. Conversely, some women in genuine need refrain from taking their impoverished husbands to court.

What if the husband does not pay the amount awarded by the judge as maintenance?

Once a wife has a *nafaqa* judgement in hand, there are various procedures available to enforce the sentence. The one relevant here, evidence of which is used in

divorce cases, is the penal sanction which men are subject to if they fail to pay maintenance for more than one month.¹⁹⁸ Repaying the debt to his wife releases a husband from his prison sentence, which may range from 3 months to 1 year. Crucial to the current argument, once a husband is in prison for failing in what could be seen as the ultimate male duty, various documents (judgement for *nafaqa*, judgement for failure to pay *nafaqa*) will have been produced that, stamped with the seal of the court and his colleague's approval and prior investigation, speak very loudly indeed to the divorce judge.

IN THE FILES: DIVORCE FOR HARM INITIATED BY THE WIFE

Failure to pay *nafaqa* could be seen as directly, or indirectly, related to all the cases of divorce for harm in my sample.

It is no coincidence that all of the 13 successful cases of divorce for harm initiated by women included evidence of at least one other court case. Nine of these fulfilled the ideal of including a final judgement. In five cases the husband was in prison at the time of the divorce. A sixth husband would have been in prison for not paying *nafaqa* had he not been living in the US. Three husbands were in prison for crimes related to their wives (adultery, violence and failure to pay *nafaqa*). Four were in prison for crimes unrelated to their wives (sexual abuse of a minor, drugs-related offences, bank-robbery). The last husband attempted to defend himself by claiming that the bank had been harmed and not his wife, but the court was apparently unconvinced. In any case, an imprisoned husband is necessarily failing in his duty to provide *nafaqa*, itself grounds for divorce.

The remaining three successful cases included other court cases still in process. Strikingly all these cases involved domestic violence. In one instance, the husband, who a medical certificate stated was mentally ill, had allegedly attacked his wife with a knife. Although it is the purview of the penal judge, rather than the family judge, to rule on matters of domestic violence, in allowing the divorce in the absence of a final judgement, it seems that the judge acted to remove these wives from immediate danger.

In all 8 unsuccessful cases for harm initiated by wives, final judgements, or evidence of any other court judgement, were absent. Several used medical certificates as

¹⁹⁸ PSC, Article 53bis.

evidence of domestic violence; sadly, it is simply not the role of the divorce judge to rule on what would be a matter for the penal court.

This picture of which pieces of evidence speak convincingly of a bad husband is in harmony with that painted by Souad, a female lawyer, experienced in defending battered wives. Although legal procedures are available to prove domestic violence, they are not always accessible or desirable. She was often forced to ask clients whether they preferred a long period of uncertainty with a violent husband or whether they would prefer to file for divorce quickly without grounds, at the risk of having to pay their husbands damages. Divorce without grounds is often the default divorce option in the absence of evidence. As taking the husband to court for violence could take between 3 and 9 months, many wives opted for the quicker choice. Souad explained that the procedures could be drawn out even longer if the husband was tried in his absence, entitling him to five years in which to appeal. Only after this could she use the judgement as evidence. Whilst we have seen in the above cases related to domestic violence where no final judgement was present that the court can be sympathetic, we do not know whether those decisions were later reversed in the Court of Appeal.

Saida (4)

As part of her arsenal of evidence against her husband, Saida has a judgement against him for failure to pay nafaqa. However, she talks about this more in terms of her relief that he is now forced to pay her, rather than the role this may play in her divorce case.

About the same time as she filed for divorce for harm, her husband had initiated a case for divorce without grounds. Since dropping his previous case for divorce without grounds, he had found another woman and wanted to be free to pursue this relationship. In addition, he had 'sold' his business, which enabled him to claim that he was now an employee earning a modest salary with fewer financial resources that Saida could make claims on in the nafaqa or divorce cases.

Saida was advised to drop her case for harm due to the uncertainties surrounding evidence and the likelihood of it being rejected by the court. In any case, if he divorces

her without grounds she will be entitled to moral and material damages, just as she would if she divorced him for harm.

Saida resisted resorting to this strategy of divorce without grounds, even where evidence seemed to be present. She was anxious, having been hurt by her previous experience; her husband had already dropped one case for divorce without grounds to avoid paying her damages and could easily do it again. The most certain path appeared to be to pursue her own divorce case on the strength of evidence which would surely speak in her favour.

Even when the strongest form of evidence was present, however, outcomes appeared uncertain and failed to satisfy the litigant:

Naziha

Naziha, was also in the midst of a divorce when I met her. Herself a lawyer, she was highly aware of the problems related to divorce for harm and, although she had gained a judgement against her husband for domestic violence, she did everything possible to push him to divorce her without grounds. This released her from the burden of proof. It merely required her to attend court and claim she wanted to remain in her miserable, violent marriage for the sake of their baby daughter; if she had shown her desire to divorce, the couple would have divorced by mutual consent and she would lose her rights. Her plan apparently worked in her favour. However, as I was leaving, she was taking the divorce settlement to appeal; the damages awarded to her could not compensate for all she had suffered during her marriage. Although she was relieved to be free, justice remained elusive.

DOCUMENTING BAD WIVES: A WIFE'S DUTY TO 'COHABIT'

'The counterpart of maintenance is the wife's cohabitation.' (A judge)

Marriage is premised on the reciprocity of rights and duties. Although the legal code refers to the consummation of the marriage as the condition for the wife to receive *nafaqa*,¹⁹⁹ current legal practice is represented by the above judge, who sees cohabitation as its counterpart.²⁰⁰ As we saw, jurisprudence underlines that the wife can only be accused of abandoning the marital home if she has left with no justification and that the court must examine the reasons why she left.²⁰¹ The Family Judge told me that he would always look at the 'reasons' why she left; the absence must be *proven* and 'without justification'. Only then is a wife deemed guilty of *nushuz*.²⁰²

It is this latter point – the absence of justification – that makes the difficult procedures of proving *nushuz* close to impossible. There are, nonetheless, some legal means available to a husband whose wife has abandoned the marital home.

If a wife has left the marital home, a husband may make an official demand for her to return via a notary. The wife is informed that if she fails to return she will be guilty of *nushuz* and her husband will be entitled to divorce for harm. A notary may also be brought to the marital home to certify the wife's absence. As one judge told me, however, he would only accept a divorce case based on *nushuz* if the wife told him herself that she had left home for no reason, even if a notary's report had witnessed her absence. This is due to the potential for abuse in the production of this kind of evidence. An unscrupulous husband may deliberately arrange for the notary to visit during a justified absence, when she is out shopping or working. Crucially, the notary cannot attest to the reasons for her absence. Wives may have been thrown out of the marital home by their husbands or compelled to leave due to violence or lack of maintenance. In nearly all the cases I observed, the wife did not appear to be required to back up her justification with evidence; the benefit of the doubt seemed to rest with the wife.

Although many documents are produced via these procedures (a notarized request to return to the marital home, the wife's notarized response to this request), they fail to speak of the all-important lack of justification for the wife's absence and

¹⁹⁹ PSC, Article 38. Interestingly, it is the consummation of the marriage and not the legal act of marriage (signing the marriage contract) that counts.

²⁰⁰ See chapter 4.

²⁰¹ Decision no. 20425, 7/12/88.

²⁰² By comparison in Iran, as described by Osanloo, the burden of proof rests on the wife to demonstrate that she is not at fault (2009: 139).

consequently, at best, whisper softly in the ear of the divorce judge. In the words of a former litigant, whose ex-wife had sent him to prison for failing to pay *nafaqa*:

‘There should be a law to send wives to prison if they do not do their duty ... The law seems to believe the words of women more than the words of men.’

IN THE FILES: DIVORCE FOR HARM INITIATED BY THE HUSBAND

Testimony to these ambiguities and potential for manipulation is the fact that there were only three successful cases of divorce for harm initiated by husbands. In contrast, nine cases for harm initiated by men were rejected by the court; six of these were based on *nushuz*.

All three successful cases were also based on the wife having abandoned the marital home. In two of these cases the wives were entirely absent and did not communicate with the court at all during the case. In one case, the husband claimed that not even her parents knew where she was. In the other, she had allegedly left home only 10 days after the marriage was consummated.

The judgement of the third successful case surprised me, in that its evidence and arguments echoed those found in those, which had been rejected. The next section will explore this case in more detail in order to elucidate how different litigants may formulate different strategies based on the same evidence, with very different outcomes.

TWO CONTRASTING CASES BASED ON 'NUSHUZ'

Mohammed and Ahlam:

Divorce for harm initiated by the husband

Mohammed had filed for divorce for harm and argued, via his lawyer, that his wife, Ahlam, was failing in her duty to cohabit with him, citing article 23. As evidence, he provided a report prepared by two notaries who went to see Ahlam in her father's house and delivered his request for her to return to the marital home. Their report recorded Ahlam's claim: she left as she was sworn at and beaten by her husband. Two such 'demands to return to the marital home' were included in the file.

Ahlam's lawyer asked the court to reject his request for divorce. Her husband had suffered no harm. Ahlam abandoned the marital home under duress and not of her own accord. As evidence, the lawyer drew on a statement Ahlam had made to the judge to that effect during the reconciliation session and which was recorded by the judge. Rather, it was Ahlam who had suffered harm, as evidenced by two cases filed against her husband for violence, but which she had subsequently dropped. She claimed that she had decided to tolerate this treatment to protect their young family. In spite of the doubt over the wife's motives for leaving the marital home, the court decided to approve the divorce. That Mohammed had claimed only a symbolic millime in compensation from his wife may have helped to convince the court to allow the divorce in this case.

Adel and Ahlem:

Divorce without grounds initiated by the husband

Adel, likewise, backed up his divorce case using two 'demands to return to the marital home'; however, unlike Mohammed, he had decided to file for divorce without grounds. The judge cannot refuse this kind of divorce; what is at stake here is how much compensation Adel will have to pay his wife. His case is unusual in making explicit the suspicions and manipulations that implicitly underlie so many cases,

adding to the general atmosphere of anxiety surrounding divorce cases. His strategy aimed to minimise the compensation payments and to weave his somewhat shaky evidence into an eloquent narrative in order to convince the judge.

Adel's lawyer made it clear to the court that he was asking for a divorce without grounds in the best interests of his children and 'in respect of family relations' and not because he was lacking the evidence he would need to ask for divorce for harm. As evidence, he also referred to statements made by his wife during their reconciliation sessions and to the cantonal judge during a case she had brought against him for nafaqa, but later dropped. In these, she had allegedly confessed to leaving the marital home of her own accord.

In addition, he levelled a further accusation against her, which has legal consequences. She violated his right to visit his children by taking them away from their usual address on the day of Aid el-Kebir (a Muslim celebration). He provided a notary's report witnessing their absence from her father's address, which, in the words of the lawyer, 'shows the wife's intention to punish the husband and prevent him from seeing his children by misleading him that they were at the house they were usually staying in.'

Ahlem's lawyer shed a different light on this evidence. She described how Ahlem's hopes for a happy marriage had been dashed as her husband humiliated her and subjected her to continued aggression. First, her alleged confession that she had left the marital home was made under pressure from her husband and from her desire to continue married life (for social and financial reasons); she dropped her nafaqa case because he promised to drop his divorce case. This left her in a precarious position, living in her parent's house with her three children and no income of her own, supported only by her father's pension.

Her lawyer concluded that, as the husband's request for a divorce was not justified, there was no nushuz and Ahlem should be entitled to generous compensation. She then replied to the allegation regarding the children:

'The wife contacted her husband by phone to inform him that they would be spending the holiday in her father's house in Tozeur²⁰³ taking the children with her. He gave

²⁰³ A town in Southern Tunisia 7 hours' drive from the capital.

his permission for this, as he could then weaken her by filing a complaint against her later on. He is the one who really humiliated his wife. It should be clear to the judge that not only did the husband not really want to reconcile with his wife, but he also wanted to send her to prison so that custody of the children would be taken away from her. All this means that our above demands should be granted to my client.'

It is of note that it would be in her husband's best interest to gain custody of the children. This would allow him to break any remaining financial ties with his wife, as he would no longer have to provide her with their nafaqa or housing. In this case, as he had moved away from the capital, the incentive seemed stronger still.

The court granted quite generous compensation to the wife, who was awarded 5000 dinars in moral damages - 10 times her husband's monthly salary - and a monthly pension of 100 dinars following the divorce.

Ahlem and her lawyer succeeded in casting doubt on her husband's ethical personhood by making Adel come across as being dishonest. From that point onwards, his evidence was silenced; this was possible because his evidence was of a kind that did not require the judge to listen and that did not tie him to a particular decision. She seemed the 'good' wife and he the 'bad' husband, and the court ruled in her favour.

CONCLUSION

A focus on documentary practice, how people respond to documents and use and interpret them, suggests how the legal and the ethical coalesce in the practice of the law. If the court is a factory for reassembling the moral, it is via these documentary practices that the legal and the moral are articulated. It is left to the judge to re-contextualise the peculiar ethical space of the file, haunted by his own suspicions.

'Facts do not speak for themselves' (Latour 2004: 82); some translate better than others via the procedures available and in light of the ruses demonstrated above, not all documents are able to speak with the same conviction. Only limited kinds of evidence, final judgements, are accepted in practice in cases of divorce for harm. Final judgements

shout loudly and clearly to the judge. Demands to return to the marital home whisper softly at best and may be treated with a great deal of suspicion.

This preference for evidence that has already been validated by the state via its courts appears to be a response to the de-contextualisation of the court as an ethical space. Distanced from the litigants and clues as to whom to trust, the judge places his trust in the veracity of judgements previously issued and countenanced by the state. Consequently, judicial discretion is limited and documentary evidence plays a leading role in determining whether the divorce for harm will be granted.

The construction of evidence, like these personal narratives, is woven around the legal expectations of husbands and wives which are, in practice, found to be gendered; particular masculine and feminine forms of ethical personhood are called into play in the court as litigants strive to turn their spouse into a 'bad' husband or wife in the eyes of the judge. A husband's failure to pay *nafaqa* leads more readily to legally authoritative evidence than does *nushuz*, making opportunities to divorce for harm more available to wives than to husbands. Whilst the case material suggests this is also true in practice as well as in theory, the canvas against which these family sagas play out cannot be forgotten. As has been seen, various social and material constraints play their own role in a litigant's ability to follow the necessary procedures in order to produce certain pieces of evidence. On this level too, litigants' experiences of divorce bifurcate along gendered lines. In these spaces created by silences in the law, not only is a great deal of uncertainty produced, categories of 'good' and 'bad' husbands and wives are also deployed, with the implications this can have for the divorce settlement.

Whilst this superficially may seem to benefit wives who have (relatively) easier access to divorce for harm, 'traditional' marital roles are simultaneously reproduced as these wives are required to project a particular image of themselves and of their husbands in order to increase their chances of being granted a divorce.

These precise legal dispositions and procedures, backed up by the evidence they allow litigants to produce, resonate with the widely shared moral ideals surrounding marriage and appear to be mutually reinforcing; this movement of mutual reinforcement is backed up again by the legal code's reference to custom and habit. This *connection* that ties the law to ordinary ethics, as expressed by the need to practice the law in the context of these moral ideals, leads to a first move of homogenisation of these norms at a national

level. The use of documentary evidence in cases of divorce for harm underlines these gendered ideals as the place where there is most certainty and agreement as law and morality work side by side.

Subsequent forms of evidence are shrouded by a sense of uncertainty. Partly because of the de-contextualisation and distancing of the paper file, different judges may assess the same evidence differently, as in the cases of Mohammed and Adel, whilst remaining within the bounds of the law. Each litigant (and their spouse) chose a different strategy – with more or less success – yet in each case this was shaped by the presence and quality of the documentary evidence available.

Just as the judge finds it difficult to tell whom to trust, it is not easy for litigants like Saida to know whether their evidence will be trusted. The morality and legitimacy of the state is at stake as it seemed that, in her eyes, the state via its legal institution could not be trusted to deliver the justice she sought:

Saida (5)

Although the gendered structure of divorce would seem to play in her favour, my concerns for her grew with our friendship. The strength of the evidence ('maktoub'), on which her desire to divorce for harm was pinned, was unclear. Nonetheless she clung to her documents, sometimes literally, carrying the copies she obsessively made with her each time she went to court. I left before her judgement and do not know whether she found the justice she was seeking. At our last meeting, I found her anxious and tense and sensed that her hopes of finding justice through the legal system were fading. 'In any case', she sighed, comforting herself that her fate lay in the hands of a greater, benevolent power, 'it is all 'maktoub' (pre-destined, written by God).'

CHAPTER 6 -

'MAKTOUB' (2): DOCUMENTED DIVORCE

- CUSTOMIZED ARGUMENTS AND THE COST OF DIVORCE

Leila (1)

'It was maktoub,' Leila tells me, describing how she could not find the courage to back out of her marriage to a man she had already realized was incompatible with her. His father had encouraged (or perhaps set up) their marriage, proud that his son would marry a well-educated doctor like himself. At just under 30 years of age, she had felt the clock ticking. He came from a professional family, working as a bank manager. Perhaps his father could even help her in her career.

I met Leila in court after nearly five years of marriage, the birth of their son and a year of divorce proceedings. A petite woman, her elegant dress and carefully applied make-up and highlights reflected her professional standing. She had done everything to avoid divorce. She had tried to reconcile with him even after arguments turned to violence and she had felt compelled to return to the safety of her parent's home with her son. The thought of her husband, who weighed over twice as much as her, hitting her was intolerable to me. The time she did not try to make peace, he asked for a divorce.

They both realized that the marriage was not working. Both wanted it to end. Both also had privileged access to legal knowledge; her sister and his brother were lawyers. He wanted to divorce by mutual consent. She firmly refused this option, disbelieving his claim that this was purely in the best interest of their child. She could not accept him walking away without paying her damages. She felt insulted and that her husband and his family wanted to 'deny her her rights.' 'I am not materialistic,' she was quick to add. But 'the law is in my favour, so why not use it?' Although she had a case in process against her husband for violence, she did not want to file for divorce for harm; this would mean waiting until her husband's lawyer brother had taken the case through the Court of Appeal. The option that remained, therefore, was to ensure that her husband asked for divorce without grounds. As both of them knew,

'it is not always the one who starts the case for divorce, who is in the position of power.'

INTRODUCTION

Leila was fortunate that her sister was a lawyer. She was immediately disabused of a misconception shared by many a litigant meeting their lawyer for the first time: that he or she had been harmed and would be able to file for a divorce for harm. My interviews with lawyers revealed that litigants were often unaware of the kinds of evidence required for divorce for harm and were disappointed that this kind of divorce appeared as elusive as the proof they were unable to provide. Rather, like Leila, they were advised of different strategies that could be followed in the absence of such evidence. Asma, a lawyer who worked frequently on divorce cases summed up the options. The litigant could either file for a divorce for harm that was likely to be refused, or file for divorce without grounds that is likely to be quicker. She knew that as litigants like Leila strive to obtain their 'rights', compensation and some form of justice (she could not let her husband get off 'scot free'), seemingly unlikely strategies could be the most powerful.

This chapter explores cases structured around the absence of legally convincing evidence,²⁰⁴ cases of divorce without grounds in which the narratives and arguments put forward by lawyers take centre stage. It draws on a reading of case files relating to divorce without grounds, in particular the petitions that fill their pages set in the context of interviews carried out with lawyers, litigants and judges. We will see how the structure of the law leads to the projection of particular forms of gendered, ethical personhood conducive to achieving the desired legal end, a favourable divorce settlement. The texts presented in this chapter are my translations of petitions I copied by hand from the divorce files, the originals being written in Modern Standard Arabic.

Whilst the use of a lawyer is not compulsory in personal status cases, one or both parties did employ a lawyer in the majority of cases. An equivalent of the petition writers seen in the film *Divorce Iranian Style*²⁰⁵ did exist, although not many litigants seemed to use their services. Nora, the petition writer located in a small photocopy shop opposite the

²⁰⁴ See chapter 5.

²⁰⁵ Longinotto & Mir-Hosseini 1998.

court, told me that anyone who could afford to do so would use a lawyer; the modest fee of 10 dinars that she charged to word process the summons used to initiate a divorce case paled into insignificance compared with lawyers' fees that could range between 400 and 1000 dinars.²⁰⁶ She described those who came to her as being mostly women (many of whom, she noted, looked very poor, even if their husband earned a good salary) and of a 'low social level.' She did not have any legal training, although she was familiar with the appropriate format and language to use in order to present petitions to the court and knew how to word process a document. (Not all litigants had access to a computer). Lawyers, nonetheless, were the authors of the bulk of the petitions found in the divorce files and are one of the main protagonists in this chapter.

The previous chapter examined how the documentary basis of the Tunisian legal regime contributes to the way in which the moral is reassembled by considering the difficulties involved in evaluating evidence at a distance. Isolated from the context in which evidence is produced, the judge has difficulties in exercising his judicious practice and knowing whom to trust; this leads to a focus on specific kinds of legally convincing evidence.

Judicious and judicial practices are merged once again as petitions are created and interpreted and form the foundation of the divorce judgement. The subject being judged, morally and legally, however, is the act of filing for divorce itself and, consequently, the ethical personhood of the litigant filing for divorce. As my informants frequently told me, divorce is the most hated by God of all permitted things and should not be undertaken lightly. Is the divorce really 'without grounds'? Is the divorce justified? Was the litigant a good husband or wife who was compelled to file for divorce for reasons beyond their control?

First, this chapter will consider the dynamic between the authors of these documents, the lawyers, and their intended audience: the judge who, in these cases of divorce without grounds, has even greater scope in which to exercise his judicial discretion. Second, the chapter will discuss what is at stake in these cases of divorce without grounds: the cost of divorce, that it is impossible to measure in purely financial terms.

²⁰⁶ Lawyers' fees were charged per case rather than on an hourly basis.

POETIC JUSTICE, CUSTOMIZED ARGUMENTS

‘The wife aims with this (argument) to appear as an innocent, powerless victim in front of the judge to influence the judge and to gain the court’s pity.’ (A husband’s lawyer defends his client in a case for divorce without grounds)

Leila (2)

After the reconciliation phase is over, Leila explained, the lawyers present their arguments in writing in the divorce file. Her sister based her demand on the financial situation of her husband, a bank manager with a generous income. Then, he would claim that he is poor and she would say that he is lying and has other sources of income. In her case, she asks for a rent allowance (as custodian of their child) and a lump sum in material damages; as she earns a good income as a doctor, she is not entitled to receive monthly payments for material damages. She also asks for moral damages and for the return of her ‘trousseau’. ‘He is a thief’, she told me. Her mother started buying things for her ‘trousseau’ when she was 6 years’ old; as receipts were not kept, there is no means of proving what she owns. Instead, she made her husband swear an oath that this property was his, the last resort, once all other modes of evidence have been exhausted. This was extremely important to her. ‘He is a Muslim. Even those who are not practising believe in God. He will have to swear in a mosque on the Koran.’ He would get her possessions, but for this he would have to lie in front of God. ‘I know atheists who say that bad things happen to those who lie in front of God.’ For her it is a matter of principle; she would rather not see her belongings again as they harbour bad memories.

Her husband also failed to pay the nafaqa that was due to her son. She did take him to court for ‘failure to pay nafaqa’ and he was sentenced to one year in prison. (The judgement is not final as he could still appeal this case completed in his absence). In any case, the interest of this law is to get him to pay, rather than to send him to prison. ‘If he is in prison, he will not work and then how will he pay for my son?’ she stresses. She adds that, ‘he will pay for this later’, alluding to the divine retribution that her husband will face for failing to take proper care of his son.

Having established her decision not to divorce for harm (although she nonetheless pursued her husband in court for violence and non-payment of *nafaqa*), at the centre of Leila's case is a desire to establish her husband as a poor husband and father, as an untrustworthy individual of bad moral character and herself as the innocent victim of his actions; there is great power in appearing powerless. He is a liar and a thief, whilst she has patiently sought to sustain a violent and abusive marriage for the sake of her child. That there can be great power in holding the space of the victim is suggested in the many cases that follow a similar dynamic using almost poetic language to depict the sacrifices of one spouse against the failings of the other. 'Good' husbands and wives are constructed on behalf of litigants in the accounts crafted for them by their legal experts, weaving into them a sense of morality that is nonetheless framed and structured by the dispositions of the legal code.

If documents are fallible and 'harbouring within a separation and a threat of falsehood' (Messick 1993: 213), this threat is all the greater in the files for divorce without grounds, given the absence of legally convincing evidence. The documents filling these files may include some of the weaker forms of evidence, but are reliant on the fantastic sagas²⁰⁷ written by lawyers. As a writer, the lawyer 'mediates both the reproduction of the law and the incorporation of the world ... He must be both a specialist in this area of *sharia* drafting (*in this case modern Tunisian law*) and intimately conversant with the affairs of society' (ibid: 227). To understand the categories of 'good' and 'bad' spouses that are revealed in these files demands, therefore, that lawyers and the judge step out of the pages of the file into the moral, social world.

These accounts are only comprehensible when situated within a wider frame of reference, a hegemonic and authoritative version of morality – replete with normative ideals of gendered roles – that is reinforced and reproduced in the court.²⁰⁸ In this way, 'custom', having been explicitly evoked in the legal code,²⁰⁹ permeates the files and enters the court via the locus of the lawyers and the judge. In the work of the court, as ethical criteria that may ordinarily be implicit must be made increasingly explicit, categories are given meaning and ethical personhood is subject to judgement. Consequently, divorce cases provide a window through which judgement, understood as both moral and legal, can be observed.

²⁰⁷ I do want to suggest the fictional and creative nature of these documents.

²⁰⁸ of the process of *re-contextualisation* described in chapter 4.

²⁰⁹ PSC, Article 23.

In the pages of these divorce files, in which the morality of the litigants is placed under scrutiny, the morality of the state is simultaneously at stake.

As WT Murphy found elsewhere, an ethical space opens up in the law that is de-contextualized, cut off from the scene of action, but that nonetheless constitutes ‘an institutionalized systemic form for debating what are by definition largely matters of public morality’ (1997: 202), potentially becoming the ‘conscience of society’ (ibid: 209). One premise of such an ethical space is the critical potential and possibility for scrutinizing prejudices as ethically engaged lawyers and judges are responsible only to the law itself (ibid: 206-210). In the Tunisian Family Court, at the heart of the state’s attempts to reinforce a particular version of gendered, public morality, and operating in the midst of Ben Ali’s dictatorship, the illusion of detachment is very finely veiled at best. If the law is seen as the conscience of the state, the precise way in which this law operates as an ethical space and contributes to a broader process of moral reassembly is key to the state’s moral legitimacy.

That the ability to comprehend the files rests on specific forms of social knowledge was suggested to me by the Family Judge himself when he defined ‘custom and habit’ as ‘things that everybody knows’, adding that he ‘needs to know the psychological and social situation of the people.’ As we have seen,²¹⁰ this need to know the people is frustratingly elusive to the judge in the files. He would undoubtedly have empathized with Latour’s hypothetical scientific researcher’s frustrations surrounding the use of legal documents:

‘Let’s put the file to one side and go and see what’s happening for ourselves, let’s do some fieldwork, question the witnesses, forget the pathetic arguments of the lawyer, and escape from the straight-jacket of this paper world, which is unable to capture reality’ (2004: 101).

My Family Judge’s sense that the files were unable to capture reality was confounded by his awareness of the ruses that are not seldom referred to in their pages. Operating within this interpretative space, mired by these uncertainties, his freedom of decision is also a burden. Underlining his own moral implication with his work, the Family Judge expressed the desire to meet all the litigants in person. In this way, he hoped to see what was happening for himself, although the idea of doing his own fieldwork and calling witnesses himself remained a practical impossibility due to overstretched resources.

²¹⁰ cf chapters 4 and 5.

Although it is hard for the judge to tell whom to trust even when the litigants are present in front of him,²¹¹ he had decided to start doing this, via the reconciliation sessions, just as my fieldwork was coming to a close. In the meantime, as in the legal code, the divorce judgement was ostensibly made on the basis of the paper file alone.

A second constraint shapes the judge's freedom in making decisions; the disembodied court in the above quote whose pity litigants are trying to win is a reality as the file may be reviewed in the Court of Appeal. His judgements must hold up to scrutiny and, therefore, be comprehensible from within both the legal framework and the commonly shared moral framework that tends towards consensus at the national level, as shifting patterns of sociality reshape the morality of the city. The 'everybody' in 'things everybody knows' could be presumed to be Tunisian, rather than Kerkenni or Beji, traces of these regional identities being difficult to locate in the divorce files. Local knowledge is of limited use if it is not possible to locate the litigants.

The documentary basis of divorce judgements and the high level of judicial discretion created uncertainty and anxiety for judges and also for lawyers. When talking about the secrets of success in cases of divorce without grounds, Asma and Ahlam, two lawyers working on divorce cases, concluded, 'it depends on whether the judge is convinced.' Specifically, it depends on whether the judge is convinced that the petitioner is justified in filing for divorce, or whether the divorce really is 'without grounds.' It is the lawyers who create the paper world of the divorce file as they translate whatever their clients may have told them (and that they may or may not have believed) into arguments that are presumed to be legally and morally appealing to the judge. If the law is a de-contextualised ethical space (WT Murphy 1997: 206), it is the lawyers who provide the limited context that is available and this serves as the basis of the judge's decision and his assessment as to the good or bad ethical personhood of the litigants. Consequently, lawyers play a vital role in reinforcing particular forms of ethical personhood that are constructed in these files.

What form, then, does this straightjacket take? Which kinds of arguments and descriptions are deployed to raise the judge's pity, as they evoke a shared framework of morality?

²¹¹ Chapter 4.

Fadel and Fatima had been married for nearly 15 years. They had no children and the divorce case took only around 4 months. Fatima, aged 37, was 11 years younger than her husband. She had no profession, was officially unemployed (as proven by a certificate provided in the file) and claimed to have no future prospect of work. Fadel apparently had a respectable income, although I could find no clear evidence of this in the file. Several pieces of medical evidence related to the couple's lack of children with dates ranging from 1996 to 2000: an ultrasound scan of her uterus, blood test results, two prescriptions for a sperm analysis, scans of the husband's testicles and sperm analysis results; on one of these the words 'low sperm count' had been underlined by hand in red pen.

These apparently contentious issues surrounding infertility are buried in the initial summons. Fadel's lawyer explains why he is asking for divorce:

'Marital life deteriorated between the two parties due to the wife's irresponsible actions. She neglected him and her duties in the home and does not fulfil her marital duties towards him. *(Here I understand their sexual relationship)*. My client has been strongly harmed by her actions. He asks for divorce without grounds.'

Typical of petitions in these cases, the lawyer attempts to establish harm from the outset, arguing that the litigant is not really divorcing 'without grounds.' Asma, a lawyer, explained that she would begin petitions on behalf of a husband divorcing without grounds by establishing the 'conditions' of the marriage and showing that he was not at fault. 'Was the guy a good husband? Was he a responsible husband? What did she do? For instance, was he ill with diabetes and she was always insulting him. So he is really getting divorced 'by obligation', out of respect for the children, to avoid problems. He has to ask for divorce, as it is impossible to continue the marriage.' In essence, she would establish her client as the good husband and his wife as a bad wife.

Asma explained how lawyers defend their clients from having to pay moral damages in cases of divorce without grounds. She would argue that the wife had no right to moral damages, as she was the one who pushed her husband to divorce. Underlining the important role of judicial discretion, Asma explained how in these cases: 'It depends on whether the judge is convinced that the woman *deserves* financial compensation or not,' (my emphasis). If unsure, she would ask the judge to take the husband's financial situation into account. Again, whether the wife 'deserves' compensation depends on

whether she is seen to suffer harm or to have caused harm; this is contingent on her ethical personhood, whether she is established as a good wife or, as Fadel's lawyer suggests, an 'irresponsible' wife who has 'neglected her duties.' The construction of ethical personhood is linguistically linked with the legal code as the lawyer refers to 'harm' and 'marital duties' even though article 23 (where both these terms are mentioned) is not referred to explicitly. The language selected by the lawyer creates a linguistic bridge between the law and morality, creating arguments that are at once moral and legal.

As the case progressed, Fatima's lawyer responded with a lengthy letter in which she sought to establish that Fatima had suffered the most 'harm' in their marriage as the basis for her elevated claim for compensation.²¹² As she did not work, they were entitled to argue for her to receive material compensation in the form of a monthly allowance:

'The husband's act of filing for divorce without grounds is an abusive use of his right and as such causes strong harm to the defendant, who is accustomed to marital life and its material and moral advantages, and [she will consequently be harmed] by the [divorce].

In addition to this, the wife's understanding of the institution of marriage is that it is not simply a game, in which an individual fulfils his own desires whilst showing no interest in the values of intimacy, self sacrifice and denial ... She is the one who was troubled by life with him under one roof. She was deprived of the pleasures of motherhood whereas his only desire ... is to satisfy his animal desires throwing her into the condition of a divorced woman without her being the guilty party.

When the legislator gave each spouse the right to end the marital relationship unilaterally (divorce without grounds) it is clear that this path was legislated to maintain the right to choose to continue in married life amicably or to be free. However, much of what happens is contrary to this when it is used abusively to serve a hidden agenda – such as in the case of the husband – and perhaps what encourages all this is ... the symbolic nature of the compensation, which is awarded on occasions of divorce.'

Both the content and the nature of the language used in this account are designed to draw in the judge and win his pity. The arguments have been 'customized', in the sense that they are targeted at an imagined (or perhaps known) judge, who will uphold the moral order and in the sense that they rest on his understanding of custom, the morality of

²¹² These cases have been abridged for the purpose of this thesis.

the city which forms his jurisdiction.²¹³ As one lawyer put it, 'it is enough to make allusions.' What, then, do the lawyers allude to in their petitions?

As regional identity is becoming less visible, the judge is appealed to as Tunisian. He is expected to understand how difficult life will be for Fatima and what she has sacrificed for her marriage. Implicit in the text is a particular understanding of marriage and of divorce and how this will affect a woman more negatively than a man. Fatima is portrayed as a victim, who has sacrificed much, including the possibility of becoming a mother (literally underlined in the text), one of the main purposes of marriage for a woman.

Fatima's lawyer begins by stating that the husband's act of filing for divorce is not only unjustified but also 'abusive.' Asma explained that the relatively frequent references to the 'abuse' of the right to divorce (recalling that the judge cannot prevent a litigant from divorcing without grounds) relate to a disposition in the COC (Code des Obligations et des Contrats) that states that a person who exercises his right should not cause 'harm' to another party. This is a disposition that is used to argue for increased compensation payments in cases of divorce without grounds.

Whilst this legal reference provides additional weight to the argument, at the heart of this petition lies a debate surrounding the morality of marriage and the morality of the state. The lawyer evokes some of the higher values such as self-sacrifice and the desire to create a family that her client, the 'good wife', associates with the institution of marriage. Her 'bad husband' is depicted as selfish and interested only in his own carnal pleasure.

The lawyer highlights how it is unfair that the wife will gain the undesirable status of a divorced woman through no fault of her own. This indicates a 'cost' of divorce that is paid unequally by women, as divorced men do not suffer from negative stereotypes related to their status to the same extent.²¹⁴ In several other case files, this same point was framed as a 'cultural' argument, such as by one lawyer (arguing for a wife's right to receive compensation payments in a case of divorce without grounds) who wrote that, 'we are living in an Arab society with the mentalities of Arab men.' When I asked Wassim, a male lawyer who worked on divorce cases, about this he explained that 'Arab mentalities' shun

²¹³ The lawyers who frequently work at this court may well get to know the judge and the way he reacts to different arguments. They are, therefore, writing to him as a depersonified office (as the case may be handed up to Appeal to unknown judges) and to him (or her) personally.

²¹⁴ The reader will recall the negative image of divorced women as discussed in chapter 2.

divorced women, who would be in a more difficult situation than their ex-husbands after the divorce. He contrasted this situation to Europe, where, in his view, 'people are open (minded) in regards to divorce and it is easier for a divorced woman to re-marry.' The divorce files, therefore, become a space in which these mentalities and their related 'cultural' identity are reinforced and defined, as they form the basis of arguments that are expected to appeal to the judge.

These arguments can also be read as a debate on the kind of values that the state is expected to uphold. In contrast to the public judicial decisions analysed by Bowen (1998) that provided a format in which judges strove to legitimise the reformed personal status laws, this is a debate with public implications taking place in relative secrecy in these confidential divorce files. In theory, only the lawyers, litigants and judges concerned (in the Court of First Instance and potentially the Court of Appeal or Cassation) would read the file. Nonetheless, morality is present and reassembled in the sheets of the divorce files. In this particular file, the lawyer explicitly refers to the presumed intention of the legislator that is depicted as being coherent with the Islamic injunction to choose to remain in married life with kindness or to be free.²¹⁵ She incites the judge to ensure that law is practised in harmony with this specifically Islamic version of morality and with an Islamic vision of ethical personhood in which husbands and wives act in accordance with the Prophet's advice. The judge is clearly being appealed to as a Muslim and as guardian of the state's legitimacy in that, through his decision, the state may be seen to uphold a particular Islamic, 'Arab' moral conception of marital values. Specifically, the legal device at the judge's disposal that he police the 'abuse' of divorce law by bad husbands or wives - if he is convinced - through the compensation payment payable to the defendant, the evaluation of which is left to his discretion. Fatima's lawyer continues explicitly implicating the judge with a reference to judicial discretion:

'Compensation for material damages.

Jurisprudence has remained constant that the value of compensation awarded is left to the judge's discretion.²¹⁶ This is the evaluation of the harm caused by the breakdown of the marriage by one of the spouses. The elements of the valuation consist of the standard of living to which she was accustomed in marital life – given the particular conditions of each party such as the age and length of marriage, their having had children and also the

²¹⁵ The reader may recall that the judge also referred to this injunction during a reconciliation session (chapter 4).

²¹⁶ PSC, Article 31.

material situation of the spouses, including the husband's income and the wife's employment and the standard of living she is accustomed to.²¹⁷

These elements give hope. The situation of the two litigants entitles the wife to ask for a monthly pension of 300 dinars considering the respectable income of the husband and, in addition, that he does not need to take care of family expenses as he is infertile ... The wife is unemployed, as is made clear by the attached certificate. Her level of studies is low and her chances of remarriage remain unlikely, unless God is merciful. Divorce will have the effect of leaving her without income and without work to assure her needs and without a level of studies. She has been unemployed throughout her marriage thanks to her husband's respectable income and considering the duration of the marriage we ask the judge to rule a monthly pension of 300 dinars in material damages.

Compensation for moral damages.

It is enough to make allusion to the fact that the wife has given up the flower of her youth working for this husband for a period of nearly 14 years. She has sacrificed what is most dear to every woman in the marital relationship and that is motherhood, especially as she is able to have children as made clear by the attached medical ultrasounds and certificates. And with this proof that the husband is unable to have children, after having satisfied himself, he spat her out like a pip.

There is no doubt that divorce will leave her with feelings of deep sadness, loss of social status and psychological damage, considering that ... society looks down on divorced women and is unforgiving ... in spite of their sacrifice and victimhood and their having destroyed their lives in the service of others and the ensuing psychological affects.

On this basis, she asks the court to grant her fair compensation to help overcome this failure in her family life and to help her forget her pain of no less than 30,000 dinars in moral damages.'

Fatima's lawyer finally mentions the pieces of medical evidence in the file relating to the couple's inability to have children. Infertility is in itself a socially acceptable ground for divorce given that most people marry in order to start a family. In this case, however, the issue is raised to show the availability of Fadel's salary and to demonstrate Fatima's patience as a good wife who tolerated this situation and abandoned her own dreams of

²¹⁷ Underlining in the original.

motherhood. At the same time, this argument reinforces the value and purpose of marriage as the foundation for a family.

Although the lawyer has literally underlined the factors that jurisprudence suggests are to be used when evaluating compensation payments, her arguments are oriented to the emotional and psychological impact of divorce as much as the material situation of each spouse. Again, she reinforces a particular conception of ethical personhood, the good wife as patient and suffering in silence. In this emotional appeal to the judge, we are told that the wife is a 'victim' and will suffer sadness and pain. She is subjected to a change in status that has implications beyond her control and that will persist long after the divorce. Her religiosity is also suggested as (according to her lawyer) she places her destiny in the hands of a higher power who may be merciful to her; in other words (to reuse my pun from the previous chapter) her future and fate are '*maktoub*' (written by God) rather than '*maktoub*' (determined by the documents of the divorce file).

The good wife depicted in many of these files finds power in her apparent powerlessness. Her predicament (as depicted by her lawyer and understood via my ethnographic work in the neighbourhood) speaks to a notion of agency as defined by Laidlaw (2010). Her agency is defined at once by her relatedness (to her husband, kin and those in her neighbourhood where she may be subject to stigmatisation as a divorced woman) and by her responsibilities (she may be believed to be accountable for the divorce and/ or for her childlessness whether the situation is of her own making or not).

The response of the husband's lawyer, although not without its own poetic flourish, is far shorter:

'The wife remarked that she gave up the flower of her youth working for her husband although she did not have children and that her recompense for this was a civil case. Contrary to what she stated, my client maintains that it was because of their inability to have children that marital life became impossible. She pushed my client to ask for divorce without grounds in order to be able to claim compensation.

In reality, the husband's material conditions are average and are not what the wife claims. The demands presented by her are excessive and we ask for the monthly allowance to be 50 dinars and the moral damages to be 1,000 dinars.'

Fadel's lawyer cannot offer to pay no compensation; the law states that

compensation is payable.²¹⁸ Therefore, he is obliged to reply by making his own proposition about a more modest sum to be ruled. Whilst highlighting his client's material inability to pay, the thrust of the argument is to cast a shadow of doubt on the wife's good intentions. Intentionality, or the perception of someone's intentionality, becomes a key criterion through which their ethical personhood is assessed.

Their marriage was brought to a close, whilst maintaining financial links between them in the form of a monthly pension of 70 dinars. In addition, he must pay her 4000 dinars in moral compensation and 200 dinars in legal costs. (The table further below²¹⁹ will help to put this settlement into perspective). It would be impossible for anyone to survive on 70 dinars per month, let alone living independently. (It would cost about this much to rent very basic accommodation indeed). The relatively generous moral compensation will contribute to the wife's material survival in times to come.

Did Fatima 'win' this case? It is possible to assume that she was not satisfied with the outcome as both spouses were taking the case to the Court of Appeal to dispute the financial settlement.

Was the judge persuaded by the pieces of medical evidence? Was he won over by the emotional pleas and depictions of her suffering? This information also lies frustratingly out of my reach. What is clear, is that Fatima's lawyer believed that the best way to place his client in a position of power was to make her seem as powerless as possible, as the good wife who is patient and a victim. The opposing lawyer's pleas that she has bad intentions reinforce the impression that there are advantages in divorce cases for those who are able to correspond to particular ethical types.

THE COST OF DIVORCE

'Any compensation is symbolic and it is impossible to compensate for moral and social suffering.' (Lawyer in correspondence to the court, 19432)

²¹⁸ There were cases of divorce without grounds initiated by women, where no compensation was ruled in cases where the wife had no employment or other source of income.

²¹⁹ Page 209

Leila (3)

Leila looked increasingly fragile and tired and had started taking anti-depressants. 'If I had been happy, I would never have divorced,' Leila confided. 'For men it is easier. He may divorce her, even if he loves her. The man takes no responsibility for the children. The only impact for him is a financial one. It is much harder for the wife to rebuild her life after the divorce, especially if she has children.' (Although she adds that Tunisia is 'advanced' in these matters compared to other Arab countries, which are 'nearly archaic'). 'It is very hard for women,' she continues 'as men equate good morals with virginity. 'She is not a virgin. She will sleep with anyone.' The divorced woman has nothing to lose.' She feels that she bears all the consequences of divorce: material, moral and psychological. Her husband was rebuilding himself (quite literally with cosmetic surgery to end his battle with obesity). He had also found another woman, posting romantic pictures of himself with her on the Internet although they were still officially married. (He did not know that Leila could use the Internet). Leila at least wanted some financial compensation for all she had been through. 'I feel as if he has defeated me,' she sighs.

Leila's story at once expresses the hope that financial compensation can make up for her suffering and a sense of futility that any amount of money could make her feel better. Like Fatima's lawyer, who spoke of sadness and social stigmatisation as much as the loss of material support following divorce, she shows us the fallacy of considering the 'cost' of divorce in purely financial terms.

Above, I suggested that compensation payments play a role in creating a sense of legitimacy for the state, as the judge, via his ruling, reinforces particular notions of ethical personhood associated with being a good husband or wife. Consequently, as Leila's situation suggests, the compensation payments need to be considered from within a broader context in terms of what is being compensated for and which values are being reinforced in the process. Strathern, in a different setting, has highlighted the role that compensation payments can play in the 'management of emotions' questioning the 'capacity of wealth to make people's feelings 'good':

'So-called reparation for loss suffered is also a registration, a measurement of loss inflicted. It does not necessarily cancel out the loss; it inevitably draws attention to it' (1985: 125).

Such payment can inflame as well as soothe, she continues, 'precisely because of its symbolic qualities, as standing for persons and the relations between them' (ibid: 125). Litigants look to these payments, to their divorce settlement, for a sense of justice, for recognition of the suffering they have experienced as a result of their divorce, reaffirmation of themselves as good husbands or wives and confirmation of their spouse's failings. In the Tunisian case, as the arguments of Fatima's lawyer suggest, these payments also say something about the relationship between persons and the state. Compensation payments, therefore, play an indirect role in legitimising the state to the extent that they concurrently create, or fail to create, a sense of justice from the litigants' perspective.

Strathern's analysis points to the bitterness of the struggles underlying the detailed arguments, which fill the divorce files. Just as flows of property are related to differently by men and women outside the court, so too are they in divorce cases.

These gendered differences are written into the legal code. In requiring men to pay material damages, in light of their continued legal role as head of the family (Article 23, PSC), the law allows for men and women to 'pay for' divorce in different ways. The compensation structure reflects a gendered division of labour, written into the PSC,²²⁰ in which husbands are providers and wives are entitled to maintenance. In divorcing without grounds, a wife is effectively 'paying a price' in releasing her husband from the material burden of maintaining her and losing her source of sustenance. A further implication is that a wife is deemed less likely to hold a salary from which a judge could award such compensation payments.

With this in mind, it is interesting to look at a summary of moral and material compensation payments²²¹ awarded in cases of divorce without grounds in my sample of files:

²²⁰ Notably, articles 23 and 38 (on *nafaqa*, maintenance).

²²¹ These payments may be subject to revision if taken to the Court of Appeal. My analysis is restricted to decisions taken at the Court of First Instance.

Divorce Without Grounds		Initiated by the Wife	Initiated by the Husband
	<i>Total number of cases</i>	23	52
Moral Damages	<i>Number of cases where damages awarded</i>	11	39
	<i>Average awarded²²²</i>	1,809	6,872
	<i>Range</i>	500-10,000	1,000-30,000
	<i>Average as multiplication of monthly salary (n=11)</i>	x 4	x 12
Material Damages as Lump Sum (n=20)	<i>Average awarded</i>	n/a	6,450
	<i>Range</i>		1,000-20,000
	<i>Average as multiplication of monthly salary</i>		x 8
Material Damages as Monthly Allowance (n=14)	<i>Average awarded</i>	n/a	100
	<i>Range</i>		70-150
	<i>Average as proportion of monthly salary (n=11)</i>		20%

²²² All amounts in dinars. 1 Tunisian Dinar = approx £0.44 in 2008

Men frequently pay a greater financial cost for divorce, both in absolute terms and when their relatively higher incomes are taken into account, an impression that is exacerbated if we recall that women need only pay their husbands moral compensation. However, this reading obscures the invisible, emotional, psychological and social costs of divorce, the burden of which is often most strongly felt by women, as noted above. That divorce is harder for women is an accepted social fact often evoked in the divorce files and understood by the judge. (Although, this is not to say that men experience no psychological or social consequences when they divorce, such as the distance from their children discussed in chapter 7).

In this light, how is compensation assessed? What is being compensated for? The legal code (article 31) provides a guideline only for the material damages owed to women, to be evaluated and jurisprudence has contributed further criteria to this (length of marriage, material situation of the spouses, wife's employment), as Fatima's lawyer explained above.

Whilst the benchmarks that are set for the evaluation of material damages may appear more measurable, how are these weighed up in light of the respective financial situations of the litigants? How is this set against the 'moral' 'harm' suffered? Whilst the judgement sessions in which judges convened to decide on these matters remained elusive to me, insight into the strategies of litigants and lawyers – and the kind of argument believed to be persuasive to the judge – can be gleaned from the pages of the files; these customized arguments are enlisted in a battle over material resources that is also a battle for justice.

[SELMA AND OMAR'S FILE: DIVORCE WITHOUT GROUNDS INITIATED BY THE HUSBAND](#)

Selma and Omar are both 49 years old. They have been married for 14 years and have one son. Omar was previously married and had three children by his first wife. He has a good job, earning 500 dinars as a civil servant, whilst Selma does not work.

Two pieces of evidence are provided. One is a copy of a letter written by the wife to the cantonal court requesting an increase in the *nafaqa* he must pay her and her son due to the rising cost of living; this refers to an original *nafaqa* case from 2002. The second is a copy of a letter from his ex-wife to the cantonal court requesting *nafaqa* for their three children. These documents imply that Omar has been less than a good husband and father and that he has failed to provide for his children of his own volition.

The document summarizing the first reconciliation session reveals that the couple separated long ago. Both reside in Ben Arous; she in the seaside resort where she was born and he in a rural village where she refuses to live. She also claims that he has a mistress with whom he has had two children. The husband stated merely that he wants a divorce. The initial summons paints the reasons for divorce in strong, but vague, terms:

'The marital relationship deteriorated ... in view of the wife's intentional failure to cohabit (*musakina*) with her husband leaving him in a state of neglect. She rejected everything sacred in marital life and ... the importance of trust in marriage and that constitutes cohabitation (*mu'ashara*).

The husband was harmed by the actions of his wife and asks for divorce without grounds.'

It is noteworthy that the first reference to cohabitation implies that he is accusing his wife of *nushuz*, whilst the second reference to cohabitation hints at the couple's sexual relationship. (As *nushuz* involves the unjustified refusal to cohabit, the word 'intentional' is key in building this argument). The case follows the familiar pattern of claiming that the divorce is really based on harm caused by the wife's actions rather than being truly without grounds. In the following correspondence, Selma's lawyer tries to discredit the moral standing of the husband, revealing his manipulative use of the law to play games with his wife:

'In the letter opening this case, the husband pleads that his demand for divorce without grounds ... is based on the wife's actions.

Before looking at the foundations of this claim, we draw the judge's attention to the husband's ruse of manipulating his wife through his desire to abusively make use of his right to ask for divorce. This is supported by his case for divorce for harm presented to this court as case no. x which ended in reconciliation at his request on 16/6/06, influenced by his certainty as to the failure of the case for divorce for harm and lack of evidence of harm. All of this pushed the wife to initiate a case for divorce for harm ... presented to this court. The husband changed his case to one for divorce without grounds, which encouraged the wife to drop her case, due to her husband's desire to divorce without grounds. Then the husband changed his case of divorce without grounds to divorce for harm done by the wife and with this we return to the starting point.

It is clear ... that the husband's ruse intended to torment his wife leaves her in limbo, as if she were neither married nor divorced ... We draw the judge's attention to my client's desire to continue her married life with the husband.

If the husband persists in his demand, she is entitled to compensation.

As a result of the divorce, she will be materially affected, especially as she does not work and is advancing in age and has been accustomed to a good standard of living throughout marital life with the prospering of the husband's career, as he is an employee in the civil service. These conditions lead to compensation for material damages of 300 dinars per month.

Ruling divorce without grounds will cause serious harm to the wife including sadness and psychological pain, given the length of the marriage, close to 14 years, her advancing age and reduced chances of remarriage. This results in compensation for moral damages of no less than 30,000 dinars.'

That divorce files may be riddled with ruses underlines the fallible nature of the documents on the basis of which the judge must assess the litigant's act of filing for divorce. The litigant's ethical personhood is central to the construction of intention and the assessment of who is being caused the most harm by the divorce and, consequently, who merits compensation.

Selma's lawyer echoes Fatima's lawyer in establishing that Omar's divorce case is dishonest and manipulative in an attempt to establish him immediately as an untrustworthy person in front of the judge. The presence of various cases for *nafaqa*, as well as for adultery, suggest that he is a bad husband and father who has failed to take on his responsibilities to his family of his own accord. Selma's lawyer is also following the familiar strategy of making exaggerated demands that are clearly unrealistic (as will become clear below); this is done in the spirit of 'it is worth a try'. In addition, if the case goes to appeal, the appeal court can never award more than the amount of compensation requested in the initial file. Therefore, the lawyer is setting a maximum cap rather than stating the amount of damages he or she actually believes the client may receive.

The reader less accustomed to perusing these files may wonder how credible the wife's claims are that she wishes to remain in the marriage given her past divorce case against her husband, the fact that she refuses to live with him and her court case against

him for adultery.²²³ The structure of the divorce case, however, requires her to make this claim if she is to gain access to her rights. (Agreeing would mean that they would divorce by mutual consent with no compensation payments). Her tolerance of his wrongdoing is an element of her performance as the 'good' wife, who is patient and rejects divorce for the sake of the family.

This fact, however, pales into insignificance in face of the surprising way that the Omar's lawyer seeks to defend him:

'My client has asked for divorce without grounds and his wife has registered her demand for moral and material damages ... The husband is the only one who has suffered harm ... His wife refused to reside with him in (name of village), after they were obliged to live with his aged parents. The husband lived alone for many years, which forced him to form an adulterous relationship with another woman.

Therefore, my client filed for divorce for harm, but this was rejected due to the inability of the husband to prove this harm. He decided to put an end to this marital relationship by asking for divorce without grounds.

The first person harmed is the husband, who faces two problems due to the actions of the wife, which are contrary to *sharia* and custom.

The first ... is the excessive amount demanded. The other element we bring to attention is the material situation of the husband.

The wife stated that her husband's material capacity is affluent and allows him to pay the amount of money demanded. This payment is completely unrealistic as he earns 500 dinars per month and has compulsory, monthly expenses, notably:

-Paying *nafaqa* of 150 dinars to the children of his divorced, first wife.

-Paying *nafaqa* of 145 dinars to his wife and children.

-Costs of his medication for heart disease.

The amount demanded is excessive and something the husband is unable to pay.'

²²³ Cf Chapter 4 on litigants' strategies during reconciliation sessions.

Initially, it may appear surprising, to say the least, that the husband confesses to the penal offence of adultery in his lawyer's correspondence and this in the same paragraph in which it is claimed that he was the only one to suffer. The wife's failings are not outlined in detail. In this sense, the lawyer's argument is 'customized'. Custom performs its role, being supportive of, if not identical to, *sharia*. There is no need to specify what the charges are against the wife. Custom does this work for him; the wrongdoing is meant to be understood implicitly. We are supposed to fill in the gaps and make our own links with her failure to cohabit (both literally and sexually).

The husband's complaint that his marriage is lacking sex is implicit in the references to an absence of 'cohabitation' in the initial summons. This argument also reflects attitudes to sex in the city that the judge is assumed to understand and be sympathetic to; marriage is the appropriate setting for sex and one of the core marital duties is for each party to satisfy the other. It is his wife who has failed in her marital duty to satisfy her husband, rather than the husband who has failed in his duty to be faithful to her.

This attitude to the sexual dynamics of marriage resonated with opinions I heard in Morouj. In practice, however, women were expected to be more patient than men if the sexual relationship were lacking. Besma, for instance, regretted that polygamy had been banned as men with wives who had lost interest in sex were 'forced' to divorce in order to take a second, younger wife to satisfy their needs. (She did concede that it was preferable for men too to be patient). This argument nonetheless speaks to sexual dilemmas now that taking a second wife is not an option whilst marriage remains the only acceptable context for sex.

Whilst ruling on this divorce case, the judge is being asked to take a stance in this controversy that speaks to broader issues concerning sexuality and the morality of the PSC that banned polygamy and creates the framework for this debate.²²⁴ Whilst the judge's opinion remains opaque in the final judgment (although he seems to side with Selma), the practice of the law nonetheless requires him to think about these issues and draws his own opinions on the matter into his judicial practice.

²²⁴ cf Introduction.

Omar's material situation is the more predictable part of this argument. His unlikely confession combined with the drawn out litigation involving several divorce cases may have been instrumental in determining the relatively generous settlement. He must pay her 6000 dinars in moral compensation, along with 80 dinars per month in material compensation, 145 dinars nafaqa for their son and 100 dinars in rent allowance. Whilst 80 dinars does not seem a lot, Omar will not be left with very much of his salary after all his obligations to his ex-wives and children are taken care of. Again, it can be presumed that neither litigant found their satisfaction in the settlement; both parties were taking the case to appeal.

CONCLUSION

Earlier in the thesis (chapter 3), I discussed how rather than being a separate, de-contextualised ethical space of the kind described by WT Murphy (1997), the PSC demands a second moment of *re*-contextualisation. The individuals who work in the court provide human bridges articulating legal practice with the neighbourhood and the moral ideals dominant there. By making judicial discretion central to the practice of divorce law in the interpretation of key legal categories (harm, marital duties) and the evaluation of documentary evidence (chapter 5), the judge is required to engage in this labour of re-contextualisation, uniting judicious and judicial practice in order to carry out his work.

This chapter has discussed how this process of re-contextualisation operates in regard to compensation payments. These divorce petitions show how lawyers play a role in defining what legal categories, such as 'harm', come to mean in practice. They engage in their own form of judicious practice as they write petitions presenting information that they believe will appeal both legally and morally to the judge.

Lawyers were unanimous about the 'massive, discretionary power' held by judges in divorce, especially in cases for divorce without grounds, where the interpretative spaces are at their greatest. As one lawyer told me, 'the judge must respect and base their decision on what is in the documents and not be carried away by sentiments, for instance if he sees a woman crying ... they must balance the human side and the documents.' This lawyer seems to forget the human side that is necessarily present *in* the documents. In allowing the judge space for interpretation, his sentiments – or morals – are inextricably

called into the judgement process, as the nexus between the court files and the complex moral and material world that lies beyond. Without this process of re-contextualisation, no understanding of the files would be possible.

In these cases, something more appears to be at stake than the settlement of individual divorces, important as this is to the litigants. They seem to entail a broader enforcement of morality, a shared moral code that appears to be increasingly homogenized on a national level premised on an Islamic version of morality that takes precedence as signs of regional identity are increasingly elusive. At the distance of the paper file, the anonymous litigants and the anonymous judge are assumed to share a Tunisian, Muslim identity.

For the state, divorce also has a 'cost' of an intangible kind as its own self-conscious Muslim identity and morality is placed under scrutiny. These cases provide an opportunity for the state – via its legal officers and procedures – to police a particular, authoritative version of morality, reinforcing it in the process. Compensation payments play a symbolic role in this process, as a subjective measuring stick that hints at which values and virtues are being upheld by the state. As we have seen, this process is inherently gendered as different virtues are applied in the assessment of what constitutes a 'bad' husband or a 'bad' wife. It is the legitimacy of the state that is at stake as litigants like Leila struggle to find justice in their divorce settlement.

Different forms of uncertainty emerge from the silences in the legal code, in particular its failure to define 'marital duties' and 'harm': the uncertainty of the judge pursuing his work on the basis of fallible documents. The uncertainty of litigants, whose divorce settlement is contingent on winning the pity of the judge, being depicted successfully in the files as a good ethical person, a good husband or wife. And finally, the uncertainty as to whether the strong emotions associated with divorce (and physical and material suffering) – explicitly referred to in the files – can be assuaged with any amount of moral compensation. Will justice be felt to have been done in rewarding the litigant who appeared to best uphold that which is expected of them by the shared sense of morality?

Leila (4)

Although she had done everything to put herself in a position of power, I found Leila increasingly disillusioned. She was, 'disappointed, worried. I do not really believe in justice, even the justice of God. It is inadmissible to ruin someone's life and then live happily in love in a new relationship.' The main things she gained in divorce were 'freedom' and she 'saves her child.' I asked about her hopes for the future. She would consider remarriage one day, but insisted she would remain financially independent. She would look for a man who accepts her son, 'a man in the truest sense of the word ... who is a son of a good family, with origins, well-brought up, polite, who you can count on, who does not lie, understands responsibility, is ambitious and who values his wife at home.' She divorced shortly after I left the field and told me that she was appealing the amount of damages. (She did not tell me how much this was). Although she insisted that the Tunisian legal system is good - 'Tunisian women have more rights in some ways than French women' - the problem lies in 'practice'. 'There is no justice.'

CHAPTER 7 –

DISLOCATED FAMILIES: THE REAL COST OF DIVORCE

Neji, The Representative of Children in Danger, Court of First Instance in Ben Arous.

Working closely with the Family Judge, Neji intervenes to protect children who have been abandoned by their parents or who find themselves in precarious circumstances. He divides these broadly into two groups: children of divorce and children of 'single mothers' (born out of wedlock). The repercussions of divorce on children, he tells me, are as follows. First there are 'psychological and behavioural' problems. Children fail at school, being more likely to repeat years since they are 'psychologically absent' as a result of neglect. Second, they are likely to become 'delinquents'. For girls, this implies immoral sexual conduct. Boys may turn to drink or organized crime.

He reminds me of a case we witnessed together, when I observed one of the weekly sessions with the Family Judge where the court endeavours to find solutions for these children in danger. The case is easy to recall. A shabbily dressed boy of 17 was brought in with his mother, a lady in her forties. The family judge had unusually (as we will see below) given custody to the child's father as neither the mother nor grandmother wanted it.

The mother claims that she has nowhere to live and spends her time moving between the homes of two of her uncles. Now her son is a 'young man' he is not welcome.²²⁵ Instead he sleeps in a garage. His circumstances have recently improved as he is now able to sleep in a car, as opposed to stretching out across two chairs. The court clerk interjects that his father must take his responsibility. Is the father paying nafaqa, the judge inquires? The son responds that he has no money and that the garage belongs to a neighbour. The clerk comments that they had previously tried to force the father to help, but that the house belonged to his father's mother and she refused to give her

²²⁵ Presumably his uncles have daughters. It is inappropriate for the boy to live with his female cousins who are permitted to him in marriage.

grandson a room in the house.²²⁶ The judge appeals to the mother: 'Why don't you take your son and we will force his father to pay a rent allowance?' She is insistent that he would fail to pay, in spite of the judge's promise that he would risk going to prison. 'How do you see the solution,' he asks. 'You don't want to sacrifice yourself. Each wants to live his own life.' The mother insists on her ex-husband's failure to pay her rent. The judge turns to the boy:

'I will give you advice. You have to live by yourself now. We are going to help you. Neither your mum nor your dad want to sacrifice themselves. Next time we will discuss with your dad how he can give you nafaqa and a rent allowance. If he does not pay he will go to prison. But this is not enough. If you want to succeed in life... I hope God will help you. This is within your power.'

He instructs the mother, who is trying to talk, to be silent and orders Neji to find a safe place for the boy to live and to arrange for him to be paid nafaqa and rent allowances. After the litigants leave, he sadly concludes that 'each wants to live their own life. The son is old enough to make problems for his mother.' His moving performance, he confides to me later on, was aimed at the mother, rather than the boy. It was his attempt to pull on the maternal heartstrings to ensure a better future for the boy accompanied by at least one of his parents.

INTRODUCTION

Although Neji had more exposure than most to children in danger, his concerns about the consequences of divorce were broadly shared by my informants in and out of court and were the subject of concerned public debates on the topic. Many would have shared Karima, the court clerk's, sentiment that 'children are the victims' when parents divorce. No matter how bad the circumstances, she could not imagine a situation in which divorce could be a preferable solution. Not only did divorce lead to the moral decadence of the family but also, by producing potentially immoral children, it was feared that divorce would lead to the moral decay of society.

²²⁶ The clerk comments on these earlier developments to aid the judge, a temporary substitute for the Family Judge who is unfamiliar with the details.

These concerns reflect a shift in state discourse from women's rights towards a focus on children's rights. Tunisia's National Office of the Family and Population had compiled a detailed bibliography on 'The Children of Divorce: An Adolescent and a Single Parent' in 2004, including a selection of press articles with alarming titles such as 'Divorce in Tunis ... Dangerous for Children,' (*Essabah*, 31/12/2000) or 'Children of Divorce: Risks for their School Life' (*Science Plus*, October 2002). The same office held a conference in May 2008 entitled 'Breaking Up without Breaking Everything'²²⁷, where the impact of divorce on children was the dominant theme. Indeed, one judge told me that he had asked to be taken off divorce cases. He used to find himself lying awake at night thinking about the cases he had seen; he did not want to take decisions, in his words, to 'break up a family.'

At the same conference, a female lawyer highlighted a statistic in a previous presentation that 32% of fathers abandoned their children after divorce²²⁸, and commented 'divorce is first pronounced between the father and his children.' This reflects the norm in Tunisia for custody to be awarded to the child's mother in the vast majority of cases. In Mir-Hosseini's comparative study of Iran and Morocco, custody appears as a key feature that distinguishes between these two divorce regimes. In Iran, custody is typically awarded to the father, in contrast with Morocco where mothers usually gain custody, leading to differences in family organization post-divorce and in a woman's willingness to file for divorce – in particular in Iran where this mostly entails the loss of her children (1993: 160). Tunisia broadly follows the Moroccan pattern and public, moral concerns about divorce are related to the fact that children remain with their mothers. This fact means that strengthening children's rights leads to an improvement in the rights of the divorced mother. It also leads to a moral paradox whereby a divorced woman is necessarily viewed as being immoral,²²⁹ yet as a mother, she remains the best person to raise her child. Decisions and discourses surrounding custody become a process through which the moral is being reassembled as couples battle over and judges rule on this essential issue. It is a legal battleground in which, as we shall see, highly gendered moral criteria are used as weapons.

Once again, what is at stake in these custody battles has implications both for the couple and family concerned and for the state as it strives to reinforce its moral legitimacy in and through this contentious domain of law.

²²⁷ Translation from French, '*Rompre sans tout Casser*'. Curiously most of this was held in French rather than Arabic.

²²⁸ 2000 study by Moncef Chebbi based on national survey of 500 divorces.

²²⁹ See chapter 2.

In addition to holding conferences, the state has also been active in reinforcing its legislation in favour of children (and consequently in favour of their mothers). During fieldwork, in March 2008, a new law was introduced to guarantee housing for a child and his or her custodian. This reform prevents a father selling the house he owns, if designated for his child and the child's custodian. Equally, a penal sanction was applied in the event of non-payment of the rent allowance owed to the custodian (similar to the penal sanction that applies to the non-payment of *nafaqa*). This move responded to attempts by unscrupulous husbands to abuse loopholes in the law and was warmly welcomed by the female Family Judge as 'security for the children'. 'There are people, who sell their houses!' she remarked.

There were indications that the reformed legal framework appeared to be shaping custody disputes which occurred during the divorce cases. The impact of these reforms and the legal structure of custody (outlined below) appear to strengthen the material connections which bind a child's father to the person with custody, most often his ex-wife. Hardly a desirable state of affairs, they appear to create an increased incentive for the father to fight for custody in an attempt to sever these links. Custody disputes, although rare in the files, can be broadly grouped into three categories: those where the father seeks custody in order to cut off links with his ex-wife; those where the mother is deemed morally unsuitable to have custody; and those where the mother lives abroad and the battle aims to keep the children close to their father on national soil. In the process, performances of ethical personhood, documentary evidence and judicial discretion again come into play as the court decides on this most significant consequence of divorce.

The discussion below is constrained by the nature of my data; other than one opportunity to observe a private session on 'children in danger', all my data comes from divorce cases, interviews and participant observation. I did not follow the custody disputes that took place separately in the Personal Status Office under the jurisdiction of the same Family Judge, as this was beyond the scope of my permitted research (to focus exclusively on divorce). The court file material here, therefore, is limited to custody disputes taking place within the divorce files. A few examples of custody cases that took place before or after divorce were provided via interviews with litigants and lawyers. Nevertheless, given the central importance of custody in divorce settlements, let us see what emerges from this limited material.

First, this chapter explores the appreciation of the ‘best interest’ of the child that the judge plays an active role in defining, or, in other words, when custody is not awarded to a ‘bad’ mother. Again, the judge must engage in his work of re-contextualisation, uniting judicious and judicial practice. Once again, the structure of documentary evidence plays its role in this legal construction of ‘bad’ mothers. Next, custody, or the loss of custody, and the financial arrangements surrounding custody will be seen to be a further ‘cost’ of divorce experienced differently by men and women. Lastly, the chapter closes with cases of marriages with an international dimension and in which morality intertwines with national and religious identity. These cases suggest a further way in which the practice of the law is bound up with broader processes of reassembling the moral on a national scale.

GENDERING PARENTAL DUTIES: THE LEGAL FRAMEWORK

Custody (*hadana*²³⁰) is defined in the PSC as ‘bringing up the child and ensuring its protection in its abode’.²³¹ Since 1966, custody has been left to the discretion of the judge according to the ‘best interest of the child.’²³² This is another open norm that, like ‘custom and habit’, leaves the judge considerable scope for interpretation. However, just as specific legal dispositions lead to the gendering of marital duties, dispositions of the legal code constrain the judge in his decision-making, since the code includes detailed – if in some instances highly subjective – requirements that the person with custody must satisfy. A legal article is dedicated entirely to this topic stating that:

“The person awarded custody must be over the age of majority, of sound mind, honest, capable of satisfying the child’s needs and free from any contagious disease. If a man, he must have at his disposal a woman who can carry out the duties related to custody ... If a woman, she must be unmarried, unless the judge considers that this is against the best interest of the child...”²³³ (my emphasis)

²³⁰ Mir-Hosseini defines *hadana* in the Maliki Moroccan context as ‘nurturing, nursing or raising, (and this) determines who looks after the children and where they reside.’ In contrast, guardianship (*wilaya*) ‘literally means power, authority and supervision over the child’s upbringing and education, making sure that the child is brought up as a Muslim; and at the same time providing maintenance for the child. It has a distinctly patriarchal character: it is the father’s right and duty.’ (1993:146).

²³¹ PSC, Article 54.

²³² PSC, Article 67. It is of note that if one parent dies, custody is automatically awarded to the surviving parent.

²³³ PSC, Article 58 (my translation).

In spite of opening with gender-neutral language ('the person'), article 58 is explicit that the task of caring for a child is an essentially feminine one, echoing dominant social understandings of parenthood. The legal code also explicitly draws the evaluation of a woman's ethical personhood into the practice of the law; a woman worthy of holding custody must be 'honest'. If custody is contested, her ethical personhood may be brought under scrutiny. The legal code requires the judge to engage in the work of re-contextualisation as he is faced once again with the difficult question of knowing whom to trust at the double distance of the courthouse and the case file.

MAKING 'BAD' MOTHERS: ABSENT MOTHERS

Whilst we shall see below that the male prerogative of 'control' (guardianship) is shifting in the contemporary legal code, a statistical view of custody in my sample of files corroborates the notion that children belong with their mother. When I spoke to the male Family Judge about how he evaluated the best interest of the child, he told me that he considered that young children are best off with their mother, as 'mothers are always more attentive'. The figures from my sample confirm that he and his predecessor consistently ruled in this way.

Custody Awarded to:	Number of Cases
<i>Wife</i>	83
<i>Husband</i>	5
<i>Wife Has Daughter, Husband Has Son</i>	2
<i>Wife Has Son, Husband Has Daughter</i>	1
Total	91 ²³⁴

²³⁴ My total sample of cases was much larger; only cases involving minor children required a decision on custody.

Whilst statistically insignificant, the cases where the dominant norm was broken and children were taken from their mother, assume their own significance due to their exceptional nature. In which cases does the judge feel obliged to break with the social ideal and remove children from their mother? Which mothers are so 'bad' that they lose custody of their children? Which criteria are assumed to resonate with the judge as lawyers and litigants try to persuade him to go against the norm and attribute custody to the father?

Although the following case resulted in custody being awarded to the father due to the mother's work abroad, the arguments used appeal to shared values concerning the importance of the mother's role in bringing up her children and the qualities that she alone can bring:

CASE FILE: MERIEM AND MUNIR. FATHER WINS CUSTODY AS THE MOTHER WORKS ABROAD

Meriem had filed for divorce without grounds. As I left the court her case was being sent to the Court of Appeal. In her submission, Meriem explained that after a relatively long period of marriage, they had agreed that she would go to work in Qatar as a nurse with the aim of improving the material conditions for their family. From this point onwards, her husband caused her problems. She attempted to reconcile with her husband 'to protect family relations and in the presence of small children', but this proved impossible in light of her husband's behaviour towards her.

Their reconciliation sessions revealed various disputes between the couple and his family. She accused her mother-in-law (with whom her husband lived) of trying to requisition the house they built using her wages (one floor of a villa above the mother-in-law's house), although her husband denied this. (The file includes details of the bank loan taken out in her name). She accused his family of poisoning her children against her, as they refused to speak to her on the phone and she only saw them once during her last visit home. She claimed that her husband consented to her travelling abroad to work; since Qatar is an 'Arab country' – as the court clerk explained to me – she would need official permission from her husband to work there.

Meriem's lawyer made a detailed plea for custody to be returned to her in the best interest of the children, showing her to be an excellent wife who had gone beyond the call of duty as a concerned mother:

'The marital relationship lasted for a relatively long time during which my client was an exemplary wife. She carried out her duties according to custom and habit and collaborated in managing the affairs of the family ... especially maintenance (*nafaqa*) ... which was placed on her shoulders, the good upbringing of the children²³⁵ and the expenses for their needs.

[In spite of the husband's ruses and those of his mother who tried to confiscate the marital home that she paid for]²³⁶ she made a personal effort to maintain family relations for the sake of the children

[Seven years ago she accepted to work in Qatar to improve the material situation of the family and to fund the building of a home. Her husband did not contradict her in this decision, although he later claimed that she went without his agreement.]

[When she went to Qatar] she reassured herself that the children would be in his care and that of his mother. [Although she made every effort to maintain contact with her children, she was alarmed that her children started avoiding her phone calls. Later it became impossible for her to speak to them, leaving her in a difficult psychological position]. Concerned for their welfare, she asked her family to visit the children, but her husband and his family forbade them from doing so ... She returned to national soil for the holidays hoping to see her children, but they were under the [influence of] her husband's bad words about her. Considering their young age and the ease of influencing them this prevented her from seeing them. He had claimed that she left them and travelled and they did not want to see her or speak to her or speak to anyone in her family. The husband is the one who made the wife suffer the consequences of these words throughout her holiday in Tunisia.

In spite of the husband's bad behaviour, my client continued in her efforts to protect ... the children ... to spare (them) from the breakdown of the family. My client became convinced that it was pointless to continue marital life in light of all the disputes created by the husband and his continuing to forbid her to see her young children. Therefore, she decided to divorce by unilateral desire (without grounds) and started a civil case hoping for justice giving her custody of her children. If the judge cannot decide this, given that she works outside Tunisia, then she asks that he please award custody to her mother who lives in

²³⁵ The language used here echoes that of article 23 relating to marital duties.

²³⁶ Bracketed sections of text are my abridgement, retaining key points only.

Tunis, especially as the Court of Cassation in their decision no. 8603 3/7/1973 decided that 'the court has the right to award custody to the grandmother, if it is in the best interest of the children and the father cannot refuse this decision unless he has evidence concerning her health'.

The husband filed a demand to the Family Judge for custody to be awarded to him, given the wife's work and travel outside Tunisia and his claim that she neglected to see them.

The wife, who cohabited with the husband for a relatively long time, notes that his social and material situation and the psychological climate was [bad for] the children. Her husband was not an exemplary father, protecting the best interest of his children; notably he failed to care for them and left this burden on his wife all the time that she was in Tunisia ...

Custody, according to article 57, PSC, is intended to protect the children ... from harm and [assure] their moral and physical upbringing.

The factor expressed in awarding custody is the interest of the children and not the interest of the adult having custody, as has remained constant in jurisprudence.

The criteria for the person who has custody are: their ability to carry out the duties for the children, their being in good moral shape and in good health.²³⁷

The mother is entitled to custody and cannot be refused it as she knows about the upbringing of children and has the virtue of patience in a way that a man does not and she has time and affection ... which no-one else can offer among the relatives of the children.

Her mother ... fulfils the conditions stated in article 58, PSC for awarding custody of the children. In addition, awarding custody to the maternal grandmother would provide a healthy climate for their upbringing and the wife, their mother, would take continued responsibility for their care and duties, when she is not absent abroad.

Her husband left the children in his mother's care (neglecting his) responsibility. In addition, they were left in relatively bad material conditions, demonstrating the lack of moral character required of the person who has custody. [Her husband was thrown out of his job due to a crime related to money. We note that the wife also suffered [theft from him] as he appropriated all of the sums of money sent by my client's mother when my

²³⁷ This echoes the PSC verbatim.

client was living in his parent's house]. He forbade the children to see their mother. The father ... failed to provide a healthy climate suited to a good, balanced upbringing.

My client asks the judge ... to rule for a social investigation to stop the children being placed in psychological conditions, such as those with the paternal grandmother. In addition, this makes it clear that the situation of the wife allows her to do the best for the children with their maternal grandmother and would give them the best and most balanced upbringing. Awarding custody to the wife is an expression of **the best interests of the children.**' (emphasis in the original)

This petition is almost entirely constructed around the moral criteria required of a person worthy of being awarded custody. Frequent references to the 'best interests of the children' build a linguistic bridge with the legal code, coupled with direct references to the legal code and jurisprudence.

Meriem is portrayed as a patient wife who has been tolerant of the bad treatment she has suffered from her husband and his family and who has made sacrifices in order to protect her children. Her husband is depicted as someone who is dishonest and a bad father who neglects his children. The material struggles and the fact that Meriem has been working to provide for the family also point to her husband's failure to fulfil his male role.

Various devices are employed to show the immoral character of the children's father, whether his mistreatment of them in preventing them from seeing their mother or the accusation of theft; he is portrayed as being dishonest ('honesty' being a requirement for the person who is awarded custody according to the legal code). The accusation of theft is supported by a witness statement from Meriem's mother, who claims that Munir has stolen money from her on several occasions. The outcome of the case implies that this document – that apparently never lead to a criminal prosecution – only held limited authority. In the absence of legally permissible evidence, the onus lies on the narrative to convince the judge.

Equally, the moral standing of the children's paternal grandmother, who would be taking care of them, is made to appear dubious. Neither their father nor paternal grandmother is suited to the crucial role of custodian according to the moral criteria set out by the law itself. Meriem's lawyer is able to position her as following the spirit of the law that intends to protect children and to ensure that they are raised 'in good moral shape.' The lawyer also draws upon the essential qualities of a mother that make her the

person best suited to care for her children; the assumption is that this attitude towards motherhood will be one that is a received social norm shared by a majority of people, including the judge.

Although he rests his claim on the inescapable fact that Meriem is absent, working abroad, Munir's lawyer nonetheless seeks to discredit Meriem morally, as both a bad wife and a bad mother:

'The marital relationship deteriorated between the two parties due to the actions of the wife: her neglect of her marital duties and her absence from the national soil to work in Qatar until the present time without her husband's permission and leaving the children in his custody. He has been the one who has looked after ... them and has supported their studies for the last five years ...

His wife filed for divorce without grounds. My client refuses divorce. He wishes to continue marital life and try to overcome their problems considering the best interest of their children so that they can live in a stable and balanced family. In her demand for divorce without grounds, she has caused harm to the husband, who has the right to compensation for moral harm done. (He asks for 40 000 dinars in moral damages).

Concerning the custody of the children, my client wishes this to be ruled as in the temporary decision which awarded custody to him, especially as the wife lives outside national soil and will continue to stay there.'

Perhaps Meriem's willingness to work abroad, leaving her children behind, makes her de facto a bad mother. Munir was awarded custody and also 2000 dinars in moral damages. This amount appears reasonable given that Meriem earns 1300 dinars per month in her work in Qatar, compared to Munir's modest salary of 400 dinars.

Although the wife's lawyer's extensive narrative failed to achieve its ends, it nonetheless displays the values assumed to be shared by litigant, lawyer and judge. In the event, coupled with the fact that the children appear accustomed to living with their father, it seems that the mother's physical absence was insurmountable. In taking on the masculine role of providing for her family, she has inadvertently foregone the feminine role of caring for her children.

The nature of the arguments used in these petitions points to the way in which custody disputes are drawn into broader processes of reassembling the moral by the text

of the law that makes moral criteria relevant to judicial decision-making. Moral criteria, the essential nature of mothers and, hence, the gendered nature of parental duties are being contested and reinforced within the pages of these files. Material tensions encountered in Morouj, where we saw that ideal marital roles are increasingly difficult to fulfil are being played out here: Can Meriem be a 'good' mother whilst absent in order to fulfil the essentially male role of main breadwinner?

MAKING 'BAD' MOTHERS: UNFIT MOTHERS

Whilst the previous case is understandable in light of the mother's physical absence, the question remains as to when the judge actively goes against the norm and removes children from a mother who is present. In these cases, documentary evidence plays a role in making 'bad' mothers and determining which mothers are able to keep custody of their children.

One tragic case serves to illustrate some of the extreme circumstances in which children are removed from the custody of their mother. After a period of tension in their marriage, the wife had snapped and ominously threatened that she would avenge her husband's control over her behaviour. The next day the husband received a frightened phone call from his 10-year-old daughter. She, her 4-year old sister and mother were vomiting blood and losing consciousness. They had ingested strong bleach used to clean toilets fed to them by their mother mixed up with some yoghurt. By the time the husband arrived and rushed his family to hospital it was too late to save the little girl. The mother survived her own attempted suicide and was sent to prison for murdering her youngest daughter. (The murder case would have produced documentary evidence of the wife's conviction and presence in prison that would have been very convincing to the judge).

This is perhaps an extreme example of the male Family Judge's criteria for allocating custody: 'If there is something *proven* against the mother, something *moral* like adultery (*zina*), then I give custody to the father *automatically*' (my emphasis). Documents take on a further important role testifying to the moral capacity of the wife to be a good mother and shape the judge's decision concerning custody. In addition, in these cases, the Family Judge would not always demand that the father has a woman with him to take care of the children.

The lone case file cited in the chart earlier, which saw custody divided between the parents, with the son remaining with his mother and the daughter with her father, was based on the mother's proven adultery. This case can be read in light of popular fears that daughters of divorce will fall into immoral sexual behaviour. Although the father had asked for custody of both children, the couple and judge had reached this agreement. One of the five cases in which the father alone won custody was also based on the wife's adultery:

[CASE FILE OF ZEINEB AND FERID: FATHER WINS CUSTODY DUE TO WIFE'S ADULTERY²³⁸](#)

As I began reading this case, one of the clerks mentioned that this was not the first time that Zeineb and Ferid had appeared in the divorce court; he had previously filed a case for divorce for harm that had been rejected at appeal. On this occasion, Zeineb had filed for divorce for harm, but later changed her request to divorce without grounds. Given the improbability of being awarded divorce for harm on these grounds (a situation her lawyer must have been aware of), the summons which launched the present case can be read retrospectively as a justification of the adultery of which she is later found guilty:

'Summons.

The marital relationship deteriorated between the two parties as a result of the husband's bad treatment of his wife, his neglect of her and his violence towards her. The most important of these ... is his refusal of marital cohabitation²³⁹ ...

This refusal continued for a period of years and she was patient ... with the goal of protecting her family and children, but this caused her serious physical, material and moral damage. She started suffering from nervous illness and heart disease and is in treatment for this. There is no doubt that the clearest of the marital duties are cohabitation and sexual relationships. The Tunisian legislator did not recognise the marriage contract without considering the natural obligations, which are the sexual relationships. These are compulsory and not carrying out this relationship for a period of many years causes the marital relationship to be unstable and represents a proven form of harm and is something, which the wife is entitled to.

The Court of Cassation has made it clear, in many decisions concerning this matter, ... that this is the wife's right and entitles her to ask for divorce for harm.

²³⁸ This file has been abridged.

²³⁹ *Mu'ashara zawjia* clearly denotes their (lack of) sexual relationship. When a husband accuses his wife of not cohabiting *mu'ashara* and *musakina* are both used.

Among the decisions of the Court of Appeal published in this respect is the civil appeal judgement published by the Court of Appeal in Sousse (decision 2876, 30/4/77 published by Court of Cassation in 1999 page 168), which specified the following:

'The husband's continual refusal of **marital cohabitation** for many months and the neglect of her need for cohabitation and the absence of his desire to have sexual relations with her in the natural way ... causes harm to the wife and entitles the wife to ask for divorce for harm ... He abstained from intercourse with her without a valid pretext.'

There is no doubt that what the wife has suffered for years in terms of the lack of **cohabitation** constitutes proven harm ... This matter has caused her chronic illness, heart disease, in spite of her young age as a result of her suffering from the neglect of her husband and especially due to what has been mentioned above. The harm is proven and consequently she requests compensation for moral and material harm.

My client is asking for divorce for harm for the first time after consummation and compensation for moral and material harm. She wants custody of the children and maintenance for herself of 500 dinars per month. She wants to stay in the marital home as the person who has custody.' (emphasis in the original)

Zeineb's lawyer builds on this argument, and a temporary decision concerning custody made by the judge in their first reconciliation session, to present a demand for a decision to be made concerning *nafaqa* for the children and their living arrangements. Again making reference to the wife's weak health and heart problems, the lawyer claims that Ferid '***threw her out of the house and kept the children from her in the absence of any legal procedures forbidding him from doing this.***' (emphasis in the original). Zeineb, therefore, makes a claim for 200 dinars in *nafaqa* for each of their two children, based on her husband's salary of 1000 dinars. She also wants to remain in the marital home on the basis of her having been awarded custody in the reconciliation session. Ferid's lawyer's belligerent response hints at the extent of their marital breakdown:

'2. Demand for the repeal of the temporary decisions:

The Family Judge made a decision concerning custody. My client has been maintaining his family. In spite of this, the wife exploited this judgement to ask for *nafaqa* for her and the children of 300 dinars in the Cantonal Court of Hammam Lif.

The wife manages to retain custody although she is not healthy for the children due to her

neglect of them and her perpetually attacking them. She does this to punish her husband, in spite of him providing for the costs of the family and the many loans relating to the marital home.'

At all three reconciliation sessions Zeineb repeated her demand for divorce based on his failure to sleep with her and the heart problems she suffers as a result. He repeated that she is lying and that he wants to remain in the marriage. (The reader will note that he previously filed for divorce for harm himself and is accusing her of adultery; this is a necessary statement to justify his claim for moral compensation and to avoid the case being changed to divorce by consent).²⁴⁰ In support of his charges of adultery, various pieces of evidence are included. First, the husband filed a case against her for adultery. The report relating to this case reads as follows:

'(Her husband) claims that she has a relationship with another man, who is also married, as proven by the telephone bills with calls to his number. She has a dubious relationship with this man who has a Mercedes. The husband said he saw him waiting for her outside the house. Their son said, 'there is Uncle x's car'. Sometimes the husband follows them and when they see him they change direction. The moral police brigade saw her go to his house.'

A second investigative report pertaining to the adultery of the wife is also attached, along with pages of the detailed telephone bills mentioned above. All of this lead to the court awarding the father custody of the children and the most generous payout of moral damages (10,000 dinars – based on his wife's high salary of 700 dinars in addition to the subjective evaluation of the harm suffered) of all the husbands in my sample.

In this case, the authority of documentary evidence produced and countenanced by the state played a leading role in achieving a divorce settlement that is highly favourable to the cheated husband. The clarity of the penal code that sanctions adultery sets the scene for the judge to be convinced of the accusation. The legal procedures produced documents relating to this crime that hold enough authority to justify the judge's decision. The presence of legally permissible evidence, as in the cases of divorce for 'harm', does not in itself relieve the judge of his need to engage in a process of interpretation. The judge serves as a moral 'bridge' between these legal facts and the particular circumstances of the individual case concluding that it is in the 'best interest' of the children for them to be raised away from their adulterous mother.

²⁴⁰ See litigant's strategies as discussed in chapter 4.

(THE LOSS OF) CUSTODY AS A COST OF DIVORCE

Saida

*Saida (whom we met in chapters 3 and 5) had been subject to various attempts by her husband to cheat her out of her rights. Her greatest fear of all would have been to lose custody of her son; this thought alone brings tears to her eyes. She had already renounced moving closer to her family who live 8 hours drive away from the capital where her husband lives for fear of losing custody due to failing to respect his visiting rights. She does not dare to travel to visit her parents alone and leave her son with her husband. She refers back to the case, which her husband filed against her, accusing her of violence against his mother. 'The law was with me,' she notes, as his case for divorce for harm was rejected for lack of evidence. Her husband's aim in bringing this case, she insists, was to try to get custody of their child so that he would no longer have to pay her nafaqa and a rent allowance. Saida told me about the new amendment to the law passed in March 2008. Her husband had sold the marital home **whilst** she was in the process of filing a case for housing for herself and her son. 'If a man has a house', she explains, 'it must be placed at the disposition of the person who has custody of his children.' If the judgement had been passed, his selling the house from under her feet would have entailed a prison sentence.*

As in Saida's case, the child necessarily creates a lasting bond between its parents, frequently constraining them to live close together even after they have separated. In all cases, the parent who does not have custody is automatically²⁴¹ awarded visiting rights, with or without the right to take the child out of their home, at fixed times (usually Sundays and national/religious holidays from 9am to 6pm). The legal code states that a mother or father with visiting rights cannot be prevented from exercising this right.²⁴² As for Mehdi's wife (below), this article has additional implications for the residence of the

²⁴¹ For obvious reasons, the main exception to this is if the parent is in prison.

²⁴² PSC, Article 66.

person with custody; moving away from the parent with visiting rights can open them up to legal action and the risk of losing custody of the child.

The material implications of being granted custody also serve to create a lasting bond between the divorced couple, assuming that the mother has been awarded custody. The father must provide accommodation for the child and the person holding custody of the child, if they do not have accommodation of their own. This is reinforced with a penal sanction in the event of non-payment. He must also provide for the child, if the child does not have property of his own.²⁴³ In addition, the law provides for the person with custody to receive a 'salary'²⁴⁴ for 'doing the washing, the preparation of foods and other services according to habit (*'urf*)'.²⁴⁵ As a result, the legal structure of custody means that a wife retaining custody of the children after a divorce maintains considerable material links with her ex-husband, at least until the children have reached the age of majority. As the opening vignette to this chapter suggests, this situation may prove disadvantageous to all parties concerned. Several cases echo Saida's, indicating a growing awareness of the new law and its implications.

Malika

Malika's divorce began with a bang; a shock that she believes was a direct result of the new law leaving the house to the wife who has custody. Returning from a short business trip to France, she discovered that her husband had taken a cheap house in a poor neighbourhood not far from where they had lived and had relocated all her belongings there. She filed a demand at the court and went with a notary to recover some belongings for herself and her daughters. As they jointly owned the floor of the pleasant villa which constituted the usual marital home, he was, in her view, afraid of losing this if they divorced. He was attempting, therefore, to relocate the marital home to the cheaper, unpleasant residence she had been surprised to find him in on her return from abroad.

'I resisted,' she tells me. She remained in the former marital home, even though it was empty, refusing to move to the other house. However, their floor of the villa was

²⁴³ PSC, Article 56.

²⁴⁴ *ujra*, salaire, PSC, Article 65.

²⁴⁵ PSC, Article 65.

directly above his mother-in-law, who cut off the gas and water supplies to try to force her to leave. Malika bought some candles and a small heater that used gas bottles. They had to go without television. It was the end of winter and still cold. 'They made us live in precarious conditions,' she laments. As she persisted in the marital home, her husband's family soldered closed the gate that lead from the garden into the street. She had to call the emergency services to be able to take the children to school. Finally, her husband's family 'kidnapped' the children as they left school. She had to carry out legal procedures to get them back. 'It is my right. I should not need to do this,' she says.

The Family judge intervened and helped them reach an agreement to divorce by mutual consent.²⁴⁶ Her husband, a well-off senior manager, would contribute 300 dinars in rent allowance and 350 dinars in nafaqa for the children and would have visiting rights, whilst she maintained custody. Malika had mixed feelings about the justice system. The only positive aspect of the divorce process for her was to 'have had the intelligence to find a compromise and stop the haemorrhage.'

It is of note that the serious problems and manipulation Malika suffered in the run up to her divorce would have been entirely invisible in her divorce file; as they finally divorced by mutual consent there would have been no need to refer to any of these events (although the judge was aware of what had happened).

Khaled

Not all husbands are prepared to stoop to these levels in order to sever the material ties with their ex-wives, even if conscious of the possibility of doing so. Khaled, in his mid 30s with one young son, divorcing his wife without grounds, provides some insight into why so few men seem to fight for custody. He perceived it as natural for his son to go with his mother. He could, he explained, have found a 'dishonest' way of gaining custody, by getting fake papers claiming his wife was a 'prostitute' (likely meaning she had committed adultery), but he did not want to level this kind of

²⁴⁶ As we saw in chapter 3.

accusation against his son's mother. In our final meeting, Khaled told me that he was trying to insist that his wife remain living in 'the marital home', a house owned by him adjoining his parent's house, with whom she had had substantial disputes. This was a thinly veiled act of revenge as he knew that his wife wanted to move back to her home town, a few hours' drive away, to be close to her family and friends; a legal commitment to live in his house would prevent her from moving away under the threat of contravening her husband's visiting rights and losing custody.

Just as convincing the judge that your spouse is a 'bad' husband or wife can lead to a financially favourable divorce settlement, the material flows surrounding custody disputes are articulated with performances of good or bad ethical personhood. A husband may 'lose' the marital home and remain indebted to the custodian of his children. A wife may lose her children, if she is deemed unfit or unable to care for them as a mother should, or remain dependent on a man with whom she is no longer married. These 'costs' of divorce are experienced and felt differently by men and by women as both marital and parental duties are strongly gendered.

INTEREST OF THE CHILD

In a few cases, the judgement appeared to be based simply on the preference of the child or children. Occasionally, the judge would draw on the opinion of experts (social workers) who see what the children want and what kind of conditions they live in and whether the father has a woman who agrees to look after them.

CASE FILE: IN WHICH THE JUDGE FOLLOWS THE CHILD'S WISHES

One of the cases where the son was in the custody of his father was decided according to the son's wishes. He had fabricated fabulous tales of abuse at the hands of his maternal grandmother and uncle, who, in his words, 'imprisoned him and tied him up with a belt to a chair' in the garage and laughed at him for being afraid of the mice and beetles. 'Why don't you kill them, you are a strong man?' his grandmother would taunt him. He answered that 'he was barefooted and had no shoes to kill them with' and replied, 'should

I lick them with my tongue?’ As proof of his love for his father, he told the social worker that he wanted to become a pilot so that he could take him on the Hajj to Mecca.

The social worker remarked to the judge that ‘the boy has a very strong imagination’; the allegations did not hold up to verification. Nonetheless, the boy’s words bore witness to his desire to stay with his father. In addition, the social worker confirmed that the father’s unmarried younger sister, who was used to caring for the children, was willing to maintain this role and dedicate her life to them. The boy successfully persuaded the court to rule in accordance with his wishes. His sister stayed with their mother.

A second case similar to this, in which custody was divided, served to formalise an existing arrangement whereby the son had been living with his father and the daughter with her mother after their separation.

Unable to see into the home himself, the judge appears to place his trust in an expert who has had the opportunity to witness the intimate space of the family home. The boy’s performance to persuade the court nonetheless has moral undertones. He was placed in the hands of someone portrayed as a loving, caring young woman willing to sacrifice herself for the boy as opposed to being left with family members he described as being cruel and violent. Even where the state does intervene in such an intimate domain of life, emotions and preference retain a place and may play a crucial role in the judgement process.

INTERNATIONAL CASES: POLITICS OF IDENTITY AND THE PATRILINE

‘Why doesn’t she just forget her son and go back to her country?’ (Besma, commenting on an Algerian woman with a baby son being divorced by her husband)

Besma’s comment hints at the moral stakes in what I will refer to as international cases that involve one spouse coming from, or residing outside, Tunisia and the complex relationship between religion, (national) identity and morality. Like Kerkenni identity, all forms of identity, an essence derived from belonging to a place,²⁴⁷ are inherited via the

²⁴⁷ See chapter 1.

patriline, pointing to the patrilineal foundation of the nation (even if by law Tunisian mothers may also pass their nationality on to their children).

Several other legal articles are critical in order to understand custody in relation to religion and place of residence. The first upholds the commonly held belief that identity, including religious identity (or regional identity) is passed down to the child via the patriline. Besma's seemingly cruel comment highlights the importance of this connection between father and child, as well the negative views of divorced women. It did not matter to Besma that Tunisia and Algeria share the same religion and that the Algerian woman is a Muslim. Nor did it matter that she and her son had suffered violence during her marriage or that her husband was divorcing her.

According to the legal code, if the person with custody is of a different religion to the father of the child, they may only exercise the right of custody until the child is 5 years old or unless there is no reason to fear that the child will be brought up in a religion that is not that of his father; this article does not apply, however, if custody is held by the child's mother.²⁴⁸ It is reasonable to assume that this exclusion became necessary due to the existence of mixed marriages between Tunisian men and non-Tunisian women. For the latter, article 61 is likely to be more problematic; custody is lost if the person with custody *changes*²⁴⁹ their residence to a distance which renders the child's guardian unable to fulfil his duties to his ward. Crucially, however, the law remains flexible, the best interest of the child remaining key. If deemed necessary to avoid causing harm to the child, the judge may award certain rights of guardianship to a mother who has custody, if the guardian is unable, or neglects, to fulfil his duty, is absent or impossible to locate. Leila (who we met in chapter 6) explained that she was able to take decisions on schooling for her son and his circumcision; his father remained 'guardian' (*wali*) and as such responsible for managing the child's property, although these decisions must be agreed upon by the judge, who will rule in the best interest of the child. Consequently, it is of note that a father who loses custody may also find himself losing elements of the male prerogative to hold guardianship over his child.

Sometimes fathers can go to great lengths to reclaim their children who have moved abroad. Although Sabr did not gain custody via the courts, the legal system did

²⁴⁸ PSC, Article 59.

²⁴⁹ This word is significant: the situation is different if the mother's place of residence is established as being abroad when custody is ruled.

validate his claim once he had obtained custody via his own means, notably so that his children, as Tunisians, would remain and grow up in Tunisia:

Sabr

Sabr, a businessman in his late 40s, had married his childhood sweetheart. 'Love makes you blind,' he lamented, referring to the differences in 'custom' between their two families, that he believes eventually lead to their divorce. She had been partly raised in France and came from an 'open' family, who 'live like the French.' His 'Tunisian, Muslim family' was more modest. Their marital problems escalated after her father died and there was no one left who could 'bring her back to the straight and narrow.' He proved unable to control his wife. She began to visit a woman he describes as a 'whore', 'who everybody knew smoked cannabis' and who was leading her astray. Under her bad influence, his wife accused him of attempted murder. When the police came to arrest him at his father's house, they recognized him and could not believe that such a reputable citizen was the person they were supposed to arrest.

The public humiliation caused by her inappropriate behaviour led him to file for divorce. They agreed to divorce by consent, although she drew out the case for as long as possible. They finally divorced on 15/6/2000. He reels off the date as if it is engraved in his memory.

After the divorce, his wife enrolled the children in school in Paris and sent them to live with her sister. He missed them terribly and cried after speaking to them on the phone. He devised a plan. He moved to Paris and then brought the children back to Tunisia with him 'for the holidays.' He then petitioned the court to forbid his children from leaving the country. He added that he believed that his wife wanted rid of them; children need their father more than their mother. He realized later that he should have immediately informed the court that the children were with him to prevent his wife from filing a case against him for unpaid nafaqa. Fortunately, she did not do this.

Back in Tunisia, he moved to a new neighbourhood for a fresh start. 'I dedicated myself to my children,' he said. 'I was the father and the mother at the same time.' His

recompense was his children's love. He allowed himself few other pleasures, merely occasional fishing trips. He renounced remarriage for fear that his children would feel neglected, although he added that it was not easy for a man to stay alone; his 'needs' remained unfulfilled.

People are constantly surprised that he cares for his children alone. 'Maybe I am the only case!' he exclaimed. It was hard for him to adapt and learn chores he was unused to doing. He even cooks and has learned to plait his daughter's hair. It was not easy to accompany his daughter through the onset of puberty. Now, he is her confidant for matters of the heart and she is extremely proud of her father who 'sacrificed himself' for them. Sabr remains his own confidant too, releasing the painful feelings he still harbours in letters that he does not send.

Perhaps there are two morals that can be drawn from Sabr's story. The first is that divorce marks both an ending and a beginning. As this new phase unfolds, the situation continues to evolve. That which has been gained may be lost; that which has been lost, regained. Forms of anxiety and uncertainty are produced which endure once the divorce case is officially over. In this case, although Sabr's wife had custody, he could use his position as guardian and find support in the legal system to bring his children back to their country of origin. The second moral is that Sabr weaves his narrative about his divorce and plot to regain custody of his children around his and his wife's respective ethical personhood. The image he presents of himself as a devoted father, a good, morally sound citizen, contrasts entirely with the image he presents of his wife as an unfit mother.

Sabr was not the only father I heard about who had repatriated his children from abroad. Another such case had required the intervention of the foreign (Western, non-Muslim) wife's embassy. Her ex-husband had brought the children to Tunisia to spend the summer with their grandparents. She then travelled to Tunisia to take them back to her home country, where they had been resident. She found herself blocked at the airport, unable to leave Tunisian soil. In spite of a Tunisian court order allowing her to travel with the children, the police officer at the airport told her that the children were Tunisian and should remain in Tunisia. She spent some time living in her embassy with the children before the situation was resolved via diplomatic channels.

The moral, as well as identity (which carries its own sense of morality, as it can serve as an indicator of good ethical personhood, such as in being 'Kerkenni' or 'Muslim') is being reassembled in yet another way as decisions are taken concerning in which country, and with which parent, children should be raised. This returns us to the concerns with which this chapter began, expressed by Neji but shared by many, that the moral fabric of society is being eroded as divorce means that children are, with increasing frequency, being brought up in broken families.

CONCLUSION

Custody disputes are bound up in multiple ways with the process of reassembling the moral.

Firstly, custody highlights some of the moral issues surrounding debates that fuel public concerns surrounding divorce. When a couple divorce, the (nuclear) family, perceived as the building block on which society and its moral equilibrium is founded – and the nature of which is experiencing change in the urbanised setting of the neighbourhood²⁵⁰ - is inevitably broken. The judge has no choice but to break up a family as he rules a divorce. As seen in the first case in this chapter, this damage may be irreversible. Both parents lacked the moral courage (and the material resources) to 'sacrifice themselves' for their son and his fate is left to Neji, the Family Judge and the legal system.

Secondly, the text of the law – the use of the open norm 'best interest of the child' and the requirement for the person awarded custody to be 'honest' – turns the case files into a forum where the moral criteria relating to good mothers and fathers are debated and reinforced. The judge is again asked to engage in the onerous task of re-contextualisation that is required to make the individual cases comprehensible and to make a judgement possible. The case files become a forum where both marital and parental duties, and the gendered forms of ethical personhood they imply, are debated and contested.

²⁵⁰ See chapter 1.

A litigant's potential to use (or abuse) the law is largely contingent on their ability to project the appropriate ethical personhood and to provide convincing documentary evidence of the spouse's immorality. Rather than explaining the dramas and sagas of the courthouse by referring to a 'moral' explanation to be implicitly understood, morality – what it is that makes someone a good mother or father, a good husband or wife – is constantly being renegotiated and reconfigured within the courtroom, an institution that itself is located in the complex social networks that spiral outwards engulfing increasingly difficult material realities.

Thirdly, custody (or more precisely the loss of custody and the financial arrangements surrounding custody) as the 'cost' of divorce appears to be a double-edged sword experienced differently by men and by women. For both men and women, any 'agency' they may have within these disputes can be best understood by seeing them as related and responsible, to echo Laidlaw's terms (2010), rather than docile or empowered. Unlike the situation for Iranian women,²⁵¹ Tunisian women face barriers other than the potential loss of their children that may deter them from divorcing.²⁵² Even as the marriage in its legally accepted form is broken, material ties remain. As Chekir, a Tunisian feminist professor of law, has argued the improved rights of children and of the person awarded custody mean that ex-wives (as those most frequently awarded custody) may remain materially dependent on someone to whom they are no longer married (1996). Their freedom to remarry is also curtailed by the fear of potentially losing custody, contingent on whether their ex-husband decides to file a complaint and what the judge will rule in light of the 'best interests of their children.'

In this sense, we could find a parallel situation to that found by Mir-Hosseini (in very different legal circumstances) in Iran, where 'women's motherly duties are also in the domain of male control' even after their marriage has ended (1993: 147). Yet, this would seem to ignore the role of the state and its laws and representatives. The husbands mentioned above who sought custody to avoid being indebted to their ex-wives or to avoid 'losing' the marital home, in particular following the recent legal reforms that hold them more strongly accountable, shed a new light on the dynamics of this post-marital relationship. The state may intervene on either side; Sabr realized that his ex-wife could have prosecuted him for the non-payment of *nafaqa*. The nature of 'male control' and its (lack of) power appears to be reconfigured when subject to policing by the state.

²⁵¹ Read via the work of Mir-Hosseini and Hoodfar.

²⁵² Chapters 1 and 2.

Finally, custody disputes also provide a forum for debates surrounding the most appropriate context in which children should be brought up. In the international cases, the norm of children remaining with their mother could be overridden by the stronger imperative for children to be raised where they belong, in their (father's) country of origin, where they will be raised according to their (father's) religion.

As divorce cases and custody disputes cannot be resolved whilst keeping the marital family intact, the moral fabric of society is seen to be increasingly eroded as children are raised in broken families; fears abound about children being raised outside the appropriate setting of the nuclear family - complete with a mother and a father - that appears as the necessary condition for the reproduction of good forms of ethical personhood in the next generation.

CONCLUSION -

(EXTRA)ORDINARY ETHICS: ETHICAL THEORY AS LEGAL PRACTICE

May 2007, Ministry of Statistics

Thanks to a mutual acquaintance, I found myself in the Tunisian Ministry of Statistics where I was told I would be furnished with data that could be useful for my study. The kind civil servant who received me there seemed rather more sceptical about whether I should trust the statistics being produced. He showed me a pyramid that depicted the population by age according to gender. 'Doesn't it look rather too symmetrical?' he asked me rhetorically. Rumours had been spreading about there being too many young women of marriageable age compared with young men, a topic that was the subject of some moral concern. How could these women find husbands, in particular given the illegality of polygamy? If these women could not find husbands, would it lead to sexually loose behaviour and children born out of wedlock? The implication was that any troubling gender asymmetry that had the potential to cause problems for the state had been ironed out of the statistics before they were released to the public. I left with some population statistics and the sense that the official divorce rate was more likely to represent the political stakes underlying family law, rather than giving me any notion of the prevalence of divorce in Tunisia.

It is not surprising that statistics may have been less than accurate in a dictatorship such as Ben Ali's. It is, however, revealing that such care was taken to monitor the public acceptability of statistics pertaining to family law in this oppressive regime.²⁵³ Family law – in particular the state's 'advanced' position on women's rights reflected in that law – had become the cornerstone legitimising Ben Ali's corrupt regime at home and abroad. Bourguiba and then Ben Ali had self-consciously made women's rights into a foundational issue of the nation-state and a source of the state's identity promoting an enlightened, Islamic version of personal status laws (Bourguiba 1956). Ben Ali continued to use

²⁵³ Voorhoeve also discusses the state censorship of allegedly high divorce statistics (2011:99-101).

women's rights as a symbol of his continuity with Bourguiba to lend legitimacy to his rule following the bloodless coup that enabled him to come to power. This use of state discourse surrounding women's rights to gain legitimacy raised the political stakes surrounding family law and turned divorce statistics into a political weapon.²⁵⁴

These statistics were in a sense the public face of the regime's own performance as far as family law was concerned; the ability of the state to police marital and kin relations and to guarantee the upkeep of morality – both public and private- in a way perceived to be coherent with its self-identification as Islamic. Rumours about the (perceived) high divorce rate²⁵⁵ (see introduction) expressed fears that changes in the family due to changes in women's rights (due to divorce) would lead to broken families, broken morals and social decadence. Like smoke and mirrors, by manipulating statistics, the state could maintain the illusion of its own legitimacy in the eyes of its citizens. The many comments I heard about peoples' concerns about divorce and the impression that Tunisia had an extremely high divorce rate ('Guinness book!' as Besma told me) confirmed that the state's legitimacy was but an illusion. Nonetheless it was one that had to be preciously maintained for the regime to continue.

INTRODUCTION

The brief vignette above hints at the extraordinary circumstances in which ethical life unfolded both in and outside the divorce court. As I went about my research, the smiling face of Ben Ali looked down at me, right hand placed deferentially over his heart, in the familiar omnipresent portrait that was hung on the wall of the office in the court, as it was in most of the other public places I visited. His presence was a constant reminder of the paradox that a regime broadly perceived to be morally corrupt advanced itself as a moral and religious guardian.²⁵⁶

²⁵⁴ Cf Introduction.

²⁵⁵ See introduction.

²⁵⁶ The illegal activities of those close to the President, notably his wife and her relations, were well known at the time of fieldwork. At the same time that members of her family were essentially accused of stealing from Tunisian banks (for instance by taking loans that would never be repaid) and were increasingly flaunting their wealth (most of my Tunisian friends were aware that Leila's son owned a Hummer – a car not commercially available in Tunisia-painted in the flashy colours of his football team). My informants of all social classes complained about the increased costs of living and difficulties in making ends meet.

This thesis began as an attempt to explore peoples' experiences of the personal status laws that lie at the heart of the political project that claimed to extend 'equal' rights in divorce to both women and men. Would the law support 'gender equality' in practice or would it uphold claims by secular feminists such as Hafidha Chekir (1996) that the PSC perpetuates gender inequality and patriarchal values? More specifically, I wanted to explore how key legal concepts - notably 'marital duties' and 'harm' - were interpreted in legal practice. What happened in these interpretative spaces? Which values were being reinforced?

In answering these questions we have examined the specific processes and means through which the law is articulated with ethics. In this sense, it is a study of how ethical theory (Goodale 2006) operates in both the ordinary circumstances of the neighbourhood and in the extraordinary circumstances of a court in an oppressive state. Rather than perceiving 'morality' as an a priori category and object of analysis, I have sought to follow Latour (2005) by approaching 'morality' as that which is being reassembled via legal and social practices.

Like Lambek, I have found judgement to be 'more appropriate than either freedom or convention as the fulcrum of everyday ethics' (2010: 26). If judgement is central to both ordinary and extraordinary ethics, it is because judicious practice is both a marker of, and is premised on, ethical personhood. It is also the culmination of judicious practice and judicial practice in the person of the judge that makes ethics - in particular conceptions of ethical personhood and the moral criteria or virtues that constitute 'good' (or 'bad') husbands or wives - central to the practice of divorce law. The legal code requires the judge to exercise discretion and makes these criteria central to the practice of the law, in particular, as the inclusion of open norms ('harm', 'marital duties' and 'the best interest of the children') allows him further scope for interpretation. The centrality of judgement to ethics, and of ethics to the law, can then be seen to be written into the law itself.

In conclusion, I will build on the ethnographic descriptions of extraordinary ethics in the previous chapters in order to delve deeper into the process that I describe as dislocation that characterises life in Morouj, as well as the practice of the divorce law. Here, I aim to draw out the broader consequences of this process of dislocation in light of the state's 'feminist' project that reformed family law in order to 'advance' women's rights as one of the pillars of its legitimacy. In the process, I will speak to a central issue that is inherent in the paradox of a corrupt state striving to present itself as a moral guardian:

fears surrounding a mismatch between interiority and exteriority – that appearances may not be all that they seem.

RELATIONAL RIGHTS

Joseph's elaboration of 'patriarchal connectivity' in Lebanon provides one example of how personhood is defined via relatedness and how citizenship is defined via the family (1997). She links this concept with a 'relational' understanding of rights where 'you have rights as you are invested in relationships' (ibid: 85). In her Lebanese case, Joseph finds that 'one comes to have rights by having relationships with people who have access to the desired resources and privileges' (ibid: 86).

In Tunis, it can also be said that connections of a personal nature are always helpful; personal knowledge comes with the assurance of ethical personhood and a person can more readily be accepted as trustworthy, when they can be judged on their 'essence' or origin. Relationships formed in the neighbourhood can play this role, as well as kin relations, whether patriarchal or otherwise. The webs of relationships that play an important role in the lives of those like Besma would be ill-defined as patriarchal and encompass new friendships as well as old (chapter one). My good fortune in being introduced to Karima in the neighbourhood, who helped me to gain access to the court, is a case in point.

Rights in Tunisia are 'relational' in a different sense to the one meant by Joseph. Responsibilities flow from these relationships as well as rights. Access to rights is facilitated for those who are seen to carry out their responsibilities and who are consequently seen as taking those relationships into account. Taking marriage as one such relationship, divorce law brings these responsibilities sharply into focus; in the context of legal practice, marital duties – or the failure to fulfil them - must be talked about explicitly. In order to receive one's rights in marriage or in divorce, a spouse must be seen to fulfil their responsibilities. Thus ethical personhood in Tunisia has been seen to be relational and responsible.

In court, most relationships - not the least the one between the judge and the litigants – were constructed on the basis of performance, as the size of the court's

jurisdiction meant that the citizens entered the court mostly as unknown entities. Rights are also 'relational' in the sense of being based on an individual's ability to build a relationship rapidly with someone who is unknown and inspire their trust via their performance. Judicious practice is central to this process, as individuals must judge how to shape their performance appropriately in anticipation of how it will be judged. In Lambek's words, 'how, when and whether people act is a product of their exercise of judgement to fit the circumstances, an exercise that is in turn related to character, acquired dispositions and accumulated wisdom' (2010: 55). In this way, ordinary ethics (ibid: 53) entered the practice of the law as it shaped the relationships formed in the court office (chapter 3), just as it shaped life in the neighbourhood (chapter 1).

Rights are 'relational' in a further sense in that accessing rights in court is contingent on the litigant's embeddedness in relationships – kinship and friendship – outside the court that may have supported them and enabled them to take the difficult step into the courthouse to initiate a divorce case. As we saw, for instance, Saida (chapter 5) was materially supported by her brother (although he lived far away) and received more immediate help from her friends and neighbours in Morouj, whether in terms of moral support, advice, or help with childcare. In contrast, Nour did not file for divorce, in spite of her desire to escape her violent husband and despite her earning her own living, in order to save face for her family, who had played a role in arranging the marriage.

The relationship between citizenship and kinship plays out differently, therefore, when compared with Joseph's study of Lebanon, where 'citizenship law codified kin control and disenfranchised women' (2000: 109). In Morouj, kin networks remained a key source of support in times of trouble, although as we saw residence patterns may overcome a preference for patriline (chapters 1 and 2) and patrilocal residence is not always possible or desirable. Consequently, people only turn to the state once other avenues have been exhausted (to petition for *nafaqa*, for instance, or to file for divorce). This may entail the state enforcing the kind of kin contract of care and control described by Joseph, for instance, by making husbands pay *nafaqa* (or punishing them when they fail to do so). Rather than reinforcing patriarchal power, for those who enter the legal system, male control becomes subject to policing by the state and is open to being either sanctioned or punished by state power.

At the same time, changes in the legal code emphasised male duties whilst apparently eroding areas in which men (as husbands or fathers) traditionally exercised

power.²⁵⁷ In the divorce court, therefore, men as 'bad' husbands are being disciplined as part of the state's oppression. Anas, a well-educated man in his 30s studying for a doctoral degree in literature (and who was unmarried due to the difficulties he had in making a living that made him doubt he could support a family), was conscious of the state's hold over men and quoted Foucault to me: 'power is everywhere,' he told me. 'If men are in trouble at home, they will not make trouble elsewhere.' As we have seen, a man may become a 'bad' husband for (usually financial) reasons beyond his control and be subject to discipline by the state. Family law appears – and was sometimes perceived – as a disciplinary technique of an oppressive regime.

ENGENDERING RIGHTS

If both men and women experience policing by the state in personal status matters, it is because of the requirement that both men and women file for divorce in court. This is one of the key ways in which Tunisian divorce law differs from that in other Muslim countries. Osanloo, writing on divorce in Iran, describes how the litigants' experiences of divorce are gendered; women must convince the judge of their husband's failings, whilst men only appear as respondents and 'require little knowledge of procedures and the law' (2009: 194). As we have seen, in Tunis both men and women may file for divorce and both men and women may appear in court as the respondent. The gendering of divorce in Tunis occurs along different lines as both the positions of petitioner or respondent lead litigants to enact the 'ideal' husband or wife.

Osanloo wrote of the 'multiple subjectivities' of the women who attended the Iranian family court she studied and argued that her informant's 'subjectivities as autonomous rights bearer and Muslim woman' were 'simultaneously sanctioned' by Iran's family court system (2009: 193). In a sense, Tunisia's personal status code also provides for the coexistence in the family court of what could be termed 'multiple subjectivities' (that I have preferred to discuss in terms of ethical personhood). Both men and women can exercise their right to file for divorce unilaterally, whilst – in practice – the law requires them to embody ideal notions of Islamic, ethical personhood in order to claim the rights that result from a divorce, whether compensation payments or custody of the

²⁵⁷ For instance, woman's right to file for divorce independently. The 1993 reforms removed the reference to the wife's duty of obedience from article 23.

children. I argue that this uneasy attempt at the cohabitation of conflicting notions of ethical personhood leads to tensions in the practice of the law and contributes to a sense that the state's moral legitimacy should be questioned. These contradictions are brought into view by attending to the assumptions that lie behind the legal terms as they are interpreted in practice (Strathern 2004; Mahmood 2005).

At first, the act of filing for divorce - in particular filing for divorce unilaterally - could appear to be an independent gesture of an autonomous citizen. However, far from being an autonomous act, an individual's decision to file for divorce is dependent on their relationships and responsibilities (chapter 2). It is in itself a marker of the litigant's ethical personhood as filing for divorce is an act that demonstrates moral judgement; a wife may be judged to be lacking in 'patience' or as 'failing to sacrifice herself' for the family if she files for divorce. As we saw, the situation may not be easier for men in some circumstances.

The key difference between men and women being underlined here is the capacity for moral judgment. Whereas it may be appropriate for a man to file for divorce (and in the religion it was a male prerogative to terminate a marriage unilaterally), in the social imaginary, a good wife does not file for divorce. A woman's presence in court as petitioner appears almost as a contradiction in terms. Consequently, men and women inhabit the contradictory notions of ethical personhood implied in the law in different ways, contributing to a sense that the law does not conform to the Islamic, moral standards that many of my informants would like it to.

The ethical personhood of the litigant appearing in the divorce court is, therefore, marked by a double contradiction. In order to file for divorce, an individual must step outside those relationships and responsibilities to some extent. A litigant appears in court as an 'autonomous rights bearer' (Osanloo 2009: 193). And yet, he or she must *perform* precisely those relationships and responsibilities to attain a favourable divorce settlement once the case has reached court. Through litigants' performances during the reconciliation sessions or through the narratives woven by lawyers, a surprising level of consistency emerged in the moral criteria that people sought to put forward to establish themselves as the ideal husband or wife.

Divorce law appears to recognise the tension between the idea of an atomised rights-bearing citizen and a related, responsible ethical person by attributing

compensation payments to the respondent in a unilateral divorce. Accessing this legal right to compensation is, in turn, contingent on persuading the court that he or she has done no 'harm' and has fulfilled his or her 'marital duties'. The focus remains on reciprocal obligations even as the marriage is being legally broken apart (Strathern, 1985).

These performances of ideal marital roles, whether presented by persons (chapters 3 & 4) or petitions (chapters 5, 6 & 7), frequently stood in contradiction with the realities of marriage (chapters 1 & 2). In this sense the court served as a magnifying glass for the marital tensions found in the neighbourhood, where working wives, whose incomes were indispensable, were described as 'helping' their husbands (chapter 2). Performances, like smoke and mirrors, strove to keep up the appearance of an ideal marriage in circumstances that were often far from ideal.

Tensions between the real and the ideal lead to a second contradiction. This is a contradiction between interior dispositions and external appearances that is inherent in the way ethical personhood has come to be read as performance by its interpreters; it is a form of personhood that I will describe as 'dis-located' and that was a source of uncertainty and anxiety in the neighbourhood and court alike.

DISLOCATED LIVES: ETHICAL PERSONHOOD

The family judge shared the frustrations of the reconciliation judge who found it difficult to locate the litigants.²⁵⁸ He told me that 'people wear masks,' and that it is difficult to tell *who people are* these days. Performances (like bodies) may be duplicitous (Kelly 2006; Bear 2007a) and, consequently, it is has become harder to know whom to trust. Exercising judgement, moral or legal, is treacherous when the only basis available from which to reach that judgement is fluid and cannot be trusted.²⁵⁹

The family court, in highlighting the way in which the performance of ethical personhood leads to uncertainty, serves as a microcosm for shifts that were encountered in the neighbourhood where relationships were equally tainted with ambiguity and distrust. One of the reasons why the inhabitants of Morouj found it difficult to navigate

²⁵⁸ Chapter 4.

²⁵⁹ Cf Kelly on fears of dissimulation that mark the British asylum process, in particular suspicions as to the intentions of the claimants (2012).

this new neighbourhood was because the traditional indicators of ethical personhood – a person’s origin or essence – were either unknown, difficult to read or could be hidden (chapter 1). The instability of performance has been well recognised in the anthropology of gender. According to Morris, performance ‘derives its compulsive force from the fact that people mistake the acts for the essence and ... come to believe they are mandatory’ (1995: 573). On the contrary, my informants were highly conscious that the acts were not the essence and that this generated a high level of uncertainty and anxiety for those in the neighbourhood, just as it did for the Family Judge. Performance, then, creates the possibility of falsity, as the couple in their reconciliation session demonstrated.

In Egypt, Mahmood explored how the relationship between interiority and exteriority works to shape the ethical personhood of women in the Muslim mosque movement (2005: 157). In her words, ‘the mosque participants do not understand the body as a sign of the self’s interiority but as a means of developing the self’s potentiality’ (ibid: 166); by acting shy, her informant felt that she would *become* shy. Performance begins with the intention to train the self by enacting virtues physically.

Rather than the transformation of the self, in Tunis, performance appears to be oriented towards cultivating social relationships and towards maintaining the impression of morality in an atmosphere marked by the fear of moral breakdown. And in the case of divorce law, performances are oriented towards achieving a legal result. The intention may be to dissimulate, to project the appearance of modesty or piety, rather than to necessarily cultivate these virtues in the self. Just as people have literally been dislocated from their places of origin as new neighbourhoods like Morouj are formed, ethical personhood has become dislocated; the exterior is no longer *perceived to be* a ‘true’ reflection of the inward disposition, of whether someone is believed to be a ‘good’ or ‘bad’ person. Unlike the claims of Mahmood’s informants, who shaped their performance with the goal of shaping their interior in order to cultivate religious virtues such as shyness, in Tunis the performance of ethical personhood appeared often as an protective mask, used sometimes pragmatically, to facilitate social relations. This dislocation of the self contributed towards generating the strong sense of uncertainty and anxiety felt by many of my informants.

Mahmood’s work is also of interest for the insight it provides into the place of intention in the shaping of ethical personhood. She also attends to the ‘ends towards which (an action) was aimed and the terms of being, affectivity and responsibility that

constituted the grammar of (her informant's) actions' (ibid: 182). Attending to 'ends' or goals of actions draws attention to the place of intentionality in ethical practice, seemingly providing a contrast with Laidlaw's definition of agency that highlights responsibility for actions that may be beyond the control of the individual in question.

Thinking about the place of intentionality in moral accountability contributes to an understanding of the gendering of Tunisian divorce law. In legal practice, the law applies different accounts of human action to men and to women as the judge assesses who has caused the most 'harm'. A 'bad' husband is one who is unable to maintain his family whatever his intention and even if this inability is due to circumstances beyond his control such as unemployment. It is relatively easy to provide legal proof of this failure to pay (chapter 5) and the judge can rule on the basis of a legal document that can be trusted. By contrast, a wife is only guilty of failing to cohabit (*'nushuz'*), if she *intentionally* (without justification) leaves the marital home. Jurisprudence states that the judge must take her intention into account in reaching judgement. Notably, it is close to impossible to prove an intention by legal means and the judgement is likely to be overshadowed by doubt (chapter 5). In the practice of the law, in relation to these key marital duties, the ethical personhood of men is judged on a different basis to that of women, implying a different model of human action; this differentiation is, in part, a product of the legal code, whose precise dispositions lead to the gendering of evidence. A wife is not held accountable for things beyond her control (domestic violence, other factors that could have compelled her to leave the marital home), whereas a man may be held accountable for things beyond his own volition (the harsh economic climate, difficult economic circumstances). In turn this leads to the sense that divorce law 'favours' women's rights, as it appears to police 'bad' husbands more vehemently and effectively than 'bad' wives.

In this way, ethical personhood is linked with perceptions of justice: access to justice – to a favourable divorce settlement – is contingent on the ability to display appropriate forms of ethical personhood that, as we have seen, are highly gendered. Legal ambiguities – silences in the law leaving decisions to judicial discretion, the limitations of what can be proven with legally acceptable evidence – combine with ethical ambiguities – the shifting basis of ethical personhood, the difficulties of being a good husband or wife in the contemporary social and economic climate – to generate a sense of uncertainty that dominates the practice of divorce law. Central to this uncertainty is the question of if or when justice can be done.

THE COURT AS ETHICAL SPACE

The state's legitimacy in relation to personal status law was frequently debated in terms of gender equality and women's rights. The tension found in the law between the different notions of personhood can be further analysed along gender lines and reveals peoples' concerns about the right of women to divorce unilaterally. The fear was that the right to divorce unilaterally discouraged women from being 'patient' and tended towards breaking up families. My husband told me about a conversation he had with a young, female Tunisian colleague about my research. He explained to her how Tunisian law was seen to be avant-garde in its protection of women by allowing them to file for divorce in order to escape from violent marriages. His colleague had never seen Tunisian law in terms of protecting women; she thought of the law in terms of women abusing their right to divorce in order to pressurise or blackmail their husbands, or in an attempt to gain materially in a divorce settlement.

Writing on Lebanon, where family law is left in the domain of religious courts, Joseph found that the 'state has created non-homogenous legal conditions for its citizens, making for a direct conflict with the constitutional codes asserting equality among citizens' (1997: 82). She added that this 'throws matters into the domain of non-negotiable sacred religion and into the hands of patriarchal religious clerks' (ibid: 82). As a unified, codified personal status code, Tunisian family law differs strongly from the Lebanese situation. Although the experience of Tunisian divorce law is highly gendered in practice, and although the reference to 'custom and habit' defining the legal category of 'marital duties' has the potential to reinforce 'patriarchal' values as secular feminists have feared, this category also wrote some fluidity into legal practice. The interpreters were not 'patriarchal religious clerics', but secular, state judges – both male and female.²⁶⁰ The ability of the law to uphold the constitutional promise of 'equality'²⁶¹ lies in the process I have referred to as re-contextualisation, characterised both by fluidity and unpredictability, which, as we saw, generated a high level of uncertainty and anxiety for litigants and legal practitioners alike.

²⁶⁰ See Voorhoeve (2012) on casuistry in judicial decision-making. For instance, a young, male judge who cited international conventions to justify decisions in favour of children born out of wedlock – another subject of moral debate in Tunisia.

²⁶¹ This reference to gender 'equality' in the constitution has been the subject of much public debate since the revolution, including an attempt to replace this mention of equality with 'complementarity' between men and women.

This need for *recontextualisation* stems from the provision in the law that requires the family judge to act as interpreter. It also stems from the various processes of dislocation I have described: that of the court from the neighbourhood due to the size of the court's jurisdiction; the dislocated criteria for ethical personhood; and the additional layer of distancing created by the documentary basis of the legal regime. All of these bases for judicial practice are, as Messick has written of documents, fallible and require the judge to engage in judicious practice. It is through these means (documents, performances) and processes (*recontextualisation*) that categories such as 'harm' are ascribed meaning. Consequently, the law is contingent on ordinary ethics and legal practice is affected by the mixity, fears of immorality and the dis-location of the social fabric observed in the neighbourhood.

In the courthouse, ordinary ethics becomes extraordinary ethics, as the court is imbued with the power of an oppressive state, one that is not readily trusted and that is known to be corrupt. The court appears to some extent to be a 'conscience of society' (WT Murphy 1997: 199) a decontextualised ethical space in which issues of public morality are nonetheless debated and particular moral criteria are reinforced or redefined. However, in contrast to the kind of court described in Murphy's work, characterised by its decontextualisation and detachment from politics, the Tunisian court as an ethical space is defined by its connections: via the work of *recontextualisation* that must be carried out in order for the law to function (chapters 4 and 6) and by the intimate connections between the law and the state of which it is an instrument (chapter 4).

Kelly (2006), Bear (2007a) and WT Murphy (1997) have explored (from different angles) how prejudices are reproduced by the work of interpretation within the law. In Kelly's Palestinian context, for instance, prejudices were reproduced as Israeli soldiers exercised their judgement based on the duplicitous Palestinians under scrutiny. The generation of prejudice appears to be connected with the exercise of judicious practice on a basis that cannot be trusted. In the Tunisian case, I argue that the way people experienced and imagined ethical personhood provided the shaky foundation for both judicious and judicial practice; it is on this basis that prejudices were reproduced within the practice of divorce law.

In the case of Tunisian divorce law, inequalities were most pronounced where the legal code provided some clarity. In contrast, judicial discretion could lead to more flexibility as the judge responded to the challenges of contemporary marriage. The

relationship between legal and social categories was generally characterised by fluidity, rather than fixity, allowing for legal practice to reflect the ambiguities found in the neighbourhood. Furthermore, the judge's scope for being forgiving in the light of these tensions was curtailed by the clarity of legal dispositions that were incontrovertible concerning specific marital duties. This fluidity was most apparent in the reconciliation sessions, which became a forum where – in this strangely public yet confidential setting – moral criteria were debated, contested and reinforced (chapter 4).

What are the implications of such extraordinary ethics for the state-citizen relationship? Do citizens feel that the state provides justice? Does the state appear to uphold the values that its citizens expect it to uphold?

Studying divorce law in Tunisia from the dual perspectives of the court and the neighbourhood reveals how legal practice is intertwined with morality and made part of the law by the wording of the legal code (its reference to 'custom and habit'). The potential for casuistry that stems from the open norms contained in the personal status code is ripe with uncertainty (Voorhoeve 2011). Citizens felt they could not trust the law to provide justice. For those who did feel well serviced by the legal system, this sentiment stemmed from their personal contact with the judge or court staff (chapter 3). Like Caroline White's informants (in a UK immigration court), Malika's positive experience²⁶² rested on finding 'a good judge on a good day' (2012). Even those litigants who felt they had convincing documentary evidence were unclear about whether they would find justice (chapter 5). As their violent, abusive marriages were drawing to a close, Saida and Leila (chapter 5) ultimately left the question of justice to a higher power. Leila had forced her husband to lie under oath about possessions that he claimed to be his and that she knew were hers. An all-knowing God, able to see who is telling the truth, would deliver divine justice. Faith was placed in '*maktoub*' (fate, that which is written by God), rather than '*maktoub*' (documents, documentary evidence), leaving to a higher power the consequences of things beyond an individual's control. '*Maktoub*' in the former sense, appeared as a key coping mechanism that helped individuals deal with the uncertainties and anxieties surrounding their divorce cases and judgements.

²⁶² Cf chapter 6.

CONCLUSION: SMOKE AND MIRRORS

The family law court becomes an ethical space through which public morality is debated and in which the state too is under trial. Its legitimacy as self-proclaimed guardian of Islamic and moral values is being judged by its citizens (chapter 4), as the state in its officials judges the citizens (in)ability to perform as the ideal husband or wife. If this legitimacy is shaky it is because of the double contradictions inherent in this form of ethical personhood: the paradox that the state seems to provide legal rights to rights-bearing citizens, whilst simultaneously demanding that citizens display a notion of ethical personhood that has a very different kind of architecture in order to access these rights. The state's legitimacy is also formed of smoke and mirrors in that, ironically, it is the mirror of the performances enacted by the citizens themselves. As they judge the state, they are simultaneously judging their own (in)ability to live up to the responsible and relational form of ethical personhood required of them in the divorce court (chapter 4) and expected of them outside it (chapter 1).

In the divorce courts, ethical personhood and moral criteria are subject to continuous judgement. The permanent, essential nature of these religious-moral values is at stake as they must be questioned and interrogated – for their relevance and validity in light of contemporary social and economic changes – as the judge reaches a verdict on a divorce case. In the corridors of the court, in the office, behind the closed doors of the judge's office, in the confidential pages of the divorce files – through the performances and narratives constructed by litigants and lawyers (and in the judge's responses to these), in these intimate, yet politically charged spaces within the domain of the state and overseen by the state's officials – the moral is reassembled.

The answer to the question of whether the divorce law tends to reinforce 'gender equality' or 'patriarchal values' is inherently unstable and fluid, subject to the dynamic performances and processes through which the moral fabric is continually rewoven through the practice of the law.

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