



NARRATIVES OF **TRUTH** IN **ISLAMIC LAW**

Edited by Baudouin Dupret,
Barbara Drieskens, Annelies Moors

LB.TAURIS

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INTRODUCTION

Baudouin Dupret
Barbara Drieskens

This book addresses the issue of legal truth. Such an issue is two folded. On the one hand, there is the legal truth as it is told, produced, transformed and made relevant for legal purposes, from within the legal system and its actual functioning. The ways in which these stories about ‘what happened’ are told largely depend on and are oriented to, the relevancies and technicalities of the specific context of law practice. On the other hand, legal truth is also what is told ‘about the law,’ from outside the legal body. These are stories of what people think and say about legal happenings, and they are told in the performance of some other activity than the law, for different practical purposes. In a broader sense, therefore, this book addresses the production of narratives ‘in the law’ and ‘about the law.’

A Single Reality: One Truth?

In legal contexts, parties are striving to impose their own version of events according to their personal intentions and concerns, while the judge is deemed to look for the ‘truth’ and for the ‘correct version.’ The pressing question of ‘what happened’ must be answered in order to ground the decision. From the alternative versions of the same event emerges an authoritative one, produced in the course of the proceedings. Specific to legal contexts, it is the only version of reality lifted to the level of ‘truth.’ This narrative of truth of any particular case has, moreover, to be presented in such a way that general rules can be applied to it. This is what is commonly called the legal characterization of facts.

From a commonsense point of view, there is only one single reality and discrepant versions of the same event that must be explained by the intervention of some additional factor that made it impossible for one of the parties to correctly account for what happened. In this sense, the legal conception of truth, with its one-dimensional representation of what happened, duplicates the commonsensical one. As a whole, people acknowledge the

claims of objectivity of events (cf. Pollner, 1975, 1979, 1987), according to what Searle (1995) would call the existence of an external reality. Indeed, for members, events may have been a variety of things, “but all bore down upon them with an overwhelming objectivity.” (Eglin and Hester, 2003: 86)

In a relativistic sense, however, which is the one adopted by post-modern scholars, multiple versions of the same event refer to the plural nature of the world and its perception. Some of them are related to the intentions and personal concerns of witnesses and the different parties, but there seems to be also an intrinsic plurality in any event. As such, this relativistic conception of truth and reality runs against common, legal and scientific senses. In other words, it is not because words are fallible and account partially that reality does not exist and that there can be no truth claim about the world. However, this relativistic conception of truth gains some credibility when, instead of originating from some kind of scholarly overhanging and ironic standpoint, it proceeds from the people’s conviction that truth, whatever it can be and wherever it stands, is beyond reach for average humankind. Thus, it means that what is needed is a solution to the puzzling and conflicting versions that look acceptable to a majority and can be provisionally taken as truthful (cf. Pollner’s critique (1974 and 1987) of Becker’s version (1963) of the labelling theory).

Legal adjudication is primarily concerned with fact presentation, since its production according to legal and procedural relevancies closely determines the outcome of the whole process. However, the final version of ‘what happened’ is not necessarily a truthful account of facts; neither does it necessarily aim at the production of such truthful account. Legal narratives of ‘what happened’ may constitute either a version that is accepted by conflicting parties or a version that satisfies the legal requirements despite factual gaps. For instance, the judge’s intimate conviction can be deemed enough in case of doubt or parties to a conciliation process can agree upon some account that allocates responsibility without being much preoccupied by the exactitude of facts. Thus, mutual agreement or plausibility can prevail over the strict correspondence between facts and story. In any case, on the basis of facts as processed and presented in the course of the legal process, there will be one authoritative truth according to which a ruling will be issued.

In other words, legal processes are goal oriented and the many parties to any judicial proceeding get oriented to those practical goals such as incriminating properties, moral schemes of interpretation, and backgrounds of normality. Without the law, ordinary actions and judgments are also morally predicated, by which we mean that they assess every event, every story

against some background understanding of normality. All members rely on a presumptive background of recurrent events, standard routines, commonplace motives and characterology, which are constantly instantiated, specified, defeated, and challenged (Lynch and Bogen, 1996). This can be called the morality of cognition (Heritage, 1984). As well, from within the law, legal 'translations' of events into legal texts and commonsense assessments of legal events are achieved through moral (both normative and evaluative) work. Indeed, beside formal legal definitions, law professionals act with regard to categories which are constituted as the normal background of their routine activities. According to Sudnow (1987), the legal characterization of facts functions according to categories whose definition proceeds from the attuning of legal provisions to common situations encountered in daily practice. Henceforth, it can be said that characterization is related to normality. Normality informs every step of legal procedures, every action, person, fact or rule being assessed according to its conformity to background schemes of normality and its possible incongruities vis-à-vis this background (cf. Dupret, this volume).

The authoritative version of the event forms the basis for the judge to evaluate the behaviour of the concerned parties either as legal, according to the norms, or as illegal, transgressing the rules of social order or law. The narrative of a particular case has to be presented in such a way that general rules can be applied to it (cf. Peters, this volume). This construction of 'objective facts' is already anticipated by witnesses, attorneys and other legal actors, who are trying to fit the details in a one-dimensional representation of 'what happened' in favour or against someone. Witnesses are inevitably conscious about the possible implications of their stories.

More than veracity, it might be credibility that is at stake in witnesses' accounts. The comparison between witnesses' utterances, statements, testimonies, expertise, on the one hand, and, on the other, background schemes of interpretation, which refer to the normal understanding of similar situations, closely determines the value attributed to these witnesses' statements. Many studies on witnessing show that credibility works as a substitute to truth, which also means that witnesses' interrogation is open to the many parties' practical work of deconstruction. Story telling, in general, is also intertwined with methods for establishing moral entitlements and justifications. For instance, by describing the past, it implicates a range of claimable, assertable, and disclaimable rights and responsibilities associated with being a singular person (*ibid.*: 192; cf. Moors, this volume).

Story telling, in the shape of witnessing, remembering, accounting or entertaining, is thoroughly moral, but at the same time, story telling is

bound by the practical task at hand. That is, it closely depends on the context in which it takes place, such as legal proceedings, friendly conversation, historiography, etc. Stories told in conversation, for example, are not composed in advance of their telling, but unfold interactionally, intertextually, and dialogically. As Sacks (1989, 1995) puts it, conversational stories make use of narrative conventions that “bind together” characters, setting, events, and the narrator’s experience. Audiences make judgments about the plausibility of what is told on the basis of what perceivedly happens normally in situations of this type, while storytellers anticipate and count on these audiences’ orientation and continuously design and re-design their stories accordingly. This is why and how stories, when they unfold on many years, usually transform and adapt to the changing relations between the parties who were involved and to the environment of their telling (cf. Zomeño, this volume). Sometimes, stories can even develop and transform into important causes of general interest (cf. Schulz, this volume).

Law as a Topic of Inquiry or as a Source for Social History?

Given the particular character of ‘legal truth,’ we must draw a sharp distinction between the law as a topic of inquiry in its own right and legal texts and stories as a resource for social history. When we consider law in its own right, we need to make another distinction between, on the one hand, law as a tool for all further legal practical purposes, that is legal codes, precedent, jurisprudence as they are used by law practitioners in order to perform their activities (e.g. using some precedent as a ground for introducing a petition), and, on the other hand, the description of these legal practices in their manifold dimensions, that is the rendering of the many activities that led to the production of the law (cf. Ghazzal, this volume). Only the description of such practices allows us to better know how truth is practically produced in legal settings.

Legal narratives and case-reports in particular, constitute a one-dimensional version of reality and are to a large extent shaped by the particular context in which they are produced. There are theoretical and methodological issues concerning the role of ethnographers and historians as tellers of stories and the extent to which legal documents can be used as sources for social history (cf. Messick, this volume, and Zomeño, this volume). What is often lost when we take legal texts as a resource is the phenomenon, which should nevertheless stand at the core of any inquiry into law: law in context and in action. In other words, there is a gap in socio-legal literature because of its neglect of the practical dimension of law. Only by considering these sources in their particular contexts and finalities can we understand the various meanings which people give them.

Legal Stories in Their Contexts

Once it is said that the context of legal stories must be given central attention, we have to remain cautious with the mere notion of context. How can we know about the context and what is relevant to it? Must context be taken in its narrow or its large understanding? Or, in other words, what is contextual and what is not? Without going into much detail, we should emphasize the importance of limiting the context to what can be empirically described as relevant to the people participating into an action and the enfolded of such action. The context is not what can be observed by scholars occupying some kind of overhanging position, such as what Drew and Heritage (1992) call the “bucket theory of context,” but what is displayed and oriented to in a very indirect or implicit way, by the many people engaged within a course of action (Zimmerman, 1998). According to Schegloff (1991: 51; cf. also 1997), it is about “showing from the details of the talk or other conduct in the materials that we are analyzing that those aspects of the scene are what the parties are oriented to.” In that sense, any legal context is made of the many cultural, institutional, substantive and procedural practicalities, relevancies and technicalities that concurred to constraining the specific course of action.

When looking at legal texts, it is precisely the context of their own production that is missing. Legal documents are written for legal purposes and, therefore, they tend to hide the conditions of their own constitution. In other words, legal documents are polished versions that occult the performance that led to their achievement. From an action to an account of that action, from a verbal exchange to a written narrative, from a record to a report and from a report to a ruling, there is a huge transformation which is achieved. This transformation creates a gap between what happened, what is recorded, and what is made into law (cf. Buskens, this volume). Facts of history intertwine with the methods of historiography. Factual information is collected and assembled with an eye to its inclusion or exclusion within a narrative (Lynch and Bogen, 1996: 76; cf. Messick, this volume). It remains, therefore, possible to partly retrieve the steps that led to the formalized and polished account by closely looking at texts as practical achievements whose grammars, patterns, structures and embodied relevancies are immediately accessible. To put it differently, texts display different cultural narratologies, which tell us a lot about the practical conditions of their writing, their retrospective and prospective dimensions, their dialogical constitution, their contested nature and the ways in which some of these narratives pragmatically became dominant.

Putting legal texts back in context, it appears that they are both contextualizing and contextualized. By contextualizing, it means that any dealing

with them is necessarily to be put within the constraining frame of their legal, procedural and institutional relevance. By contextualized, it means that each specific legal text is in itself part of a broader textual legal network within which it looks both backward and forward. It looks backward, for instance, to the provisions of the law to which it makes reference or to some previous police or forensic report that provides it with some prejudicial presentation of the facts and the law. It looks forward, for example, to its prospective uses by some appellate judge (cf. Wuerth, this volume). Such a prospective and retrospective feature of legal texts, which is primarily evidenced by their intertextual construction, displays their embedment within a dialogical network of documents responding to, and anticipating, each other.

Beside this dialogical dimension of legal documents, it must also be stressed that they directly reflect the many orientations of the parties to the activity in which they are engaged. With regard to law professionals, texts and documents often manifest the routine nature of their work and the practice through which they perform it; with regard to lay people, the same documents reflect how they negotiate the most beneficial or less detrimental solution for their own personal interests, as well as the blame-implicative nature of legal proceedings, at both a moral and a legal level. Such orientations of the parties are manifested through the use of descriptions and categorizations, the backgrounding and foregrounding of elements of information, or the many left-outs appearing against the background of proper legal and contextual knowledge. Through the close inspection of the many ways in which parties display their orientations and attitudes toward facts, law and legal characterization, one can get access to the sense of law's practical grammar, that is, the law as it is practically produced, lived and experienced by the many people within some process of law.

To put it in a nutshell, events' accounts are largely shaped by the context of their production. Although this is explicitly the case in legal contexts, where it is considered as rather normal that parties, witnesses and prosecutions or defence representatives orient their narratives according to their personal interests and stakes, this is equally true in ordinary situations, where issues of truth, identity, knowledge and worldview are radically context-dependent (cf. Moerman, 1974, 1987; Antaki & Widdicombe, 1998). This is a reason why stories about what happened within courtrooms are often so distant from real-time accounts of what took place in this environment: participants, orientations, relevancies, procedures, purposes, motives, ascriptions are necessarily context-dependent and cannot therefore be translated and inferred from one context to another (cf. Drieskens, this volume).

What Happened: Legal Truth in Muslim Societies

The different chapters in this book dealing with ‘stories in law’ focus on the multiple ways in which texts (whether oral, written, or a combination of both) are produced. Some texts are highly complex, such as ‘translations’ from oral to written forms. Attention is paid to the impact of those involved in the production of particular texts, such as scribes, judges, and professional witnesses, as well as the ways in which these legal specialists allow for or exclude particular voices. In this regard, it is important not only to trace the training trajectories of text producers and their positioning in the legal system, but also to understand how the public at large turns to them in order to ‘translate’ their cases in terms that make sense within the legal system. Amalia Zomeño addresses these phenomena through a discussion of the process of fatwa-giving, whereas Brinkley Messick, Rudolph Peters and Nathalie Bernard-Maugiron focus on the production of court records and legal judgments. Baudouin Dupret gives an ethnographer’s report of how the records of the police and the public prosecutor come into being in the present-day in Egypt. Emad Adly analyzes the letter written to Imam al-Shafa’i as requests for retribution, formulated as *shakwas* (complaints). Annelie Moors and Léon Buskens look at the ways in which marriage contracts were written down in Palestine and Morocco, respectively. Ghazzal and Wuerth show that the “fabric of the law” is not in the rules of law per se, but in the outcome of the complex schemes of documentation that make each legal case a concrete social reality.

Turning from the producers of texts to their readers and audiences, one central question focuses on the intended publics of these texts. Whereas some documents are only meant to be consulted in specific circumstances by a highly restricted number of people, other texts are intended for a general public, and this is especially the case in ‘stories about law.’ This calls for an investigation of how particular publics are addressed and how narrators calculate the possible uses and effects of their texts. Subsequently, the question is raised of how differently positioned publics interpret particular texts. Barbara Drieskens analyzes the way contemporary Egyptian newspapers report about healers who deal with djinns and how the public reacts to these stories. Dorothea Schulz focuses on the production of radio reports on domestic violence in urban Mali. Lynn Welchman reflects on her role as an observer in the courts of Tunis to report on human right issues.

This volume is divided into four parts. Part One examines aspects of the treatment of legal truth throughout Islamic history. Part Two focuses on stories from without the law, when people speak about law-related issues outside the framework of legal institutions. Part Three deals with the law as

it is unfolded and perceived both internally and externally. Finally, Part Four concentrates on the legal truth as it is produced within the legal contexts.

Part One of this book looks at legal truth in various contexts of Middle-Eastern history. In Chapter One, Zomeño examines legal opinions (fatwas). In a fatwa, both questions and answers were considered legal precedent and compiled as such, so that the social and legal stories were transformed into pieces of jurisprudence. Fatwas are literary constructions. The stories told to muftis are narratives of what happened at some point in the society of a certain place. They also have some textual history that makes them change with the dynamics of Islamic jurisprudence and the compilation process. However, these narratives were especially meant to last throughout time in their original form: they seek to establish the “official” version of particular events. Zomeño’s contribution raises a number of questions related to this volume: how stories transform into pieces of jurisprudence; how there are distinctive layers to the production of legal truth; how legal documents do or do not constitute reliable sources for telling the truth about past history; how cases are textual adaptations constrained by both legal relevance and procedural correctness.

In Chapter Two, Messick analyzes the records of Yemeni shari’a courts. These records are relatively verbatim in that they quote testimony and also reproduce the responses made by the parties during the litigation. Some of these responses involve the restatement of that party’s narrative and an attack on that of the other side, mainly through criticism of the opponent’s evidence. How may the structure of such legal narratives be analyzed, and what are the implications of such analyses for the use of legal narratives in the writing of social history? In technical terms, what do the patterns of its legal narratives tell us about the character of a particular shari’a court? Messick’s approach centres on the genre features of such legal narratives and on their dialogic nature, that is, how they develop in response to the opposing sides’ case. His contribution raises the question of how to use the people’s stories in order to make social history. He emphasizes the variety of narratologies among human societies, but also stresses the importance of looking at the legal structure of the sources. This shows that legal records are polished outcomes of legal practices.

In Chapter Three, Peters analyzes the records of the case of a young boy who was beaten in school by his teachers. By comparing the various depositions and the subsequent judicial decisions, he argues that during the course of the investigation of this case and in the process of sentencing, the different versions of the facts are transformed into an authoritative account containing almost exclusively the legally relevant elements and presenting a

logical and plausible narrative. The richness of often contradictory details found in the statements of the parties and witnesses makes way for a coherent account shorn of its irrelevant or troublesome details. Peters shows in this contribution how to read the structure of a judge's sentence, with its backgrounding and foregrounding of aspects of the case according to their relevance with regard to the law.

Part Two of this volume is made up of three chapters dealing with narratives about the law. Moors, in Chapter Four analyzes marriage contracts. Marriage contracts are different from most of the other legal texts discussed in this volume, as they do not involve the settlement of a conflict. Yet, similar to these other texts, dower registrations cannot be assumed to reflect 'what happened' in terms of a true account of what was given and received. This is the more so in the case of a 'token dower,' where there is a complete disjuncture between the sum registered and the gifts provided. Still, these contracts present us with a specific format of registering a prompt dower that the parties concerned agree about. At the same time, women's stories indicate that such token dower registrations are not a unified practice and that women in different positions employ different material and symbolic logics when they acquiesce in, consent to, or actively attempt to bring about a token dower registration. The author shows that there is an obvious gap between the different versions of 'what happened.' Contracts are written for all legal practical purposes and therefore never go beyond what is relevant to them.

In Chapter Five, Schultz examines a debate spurred in 1998, after a case of domestic violence had been broadcast on a local radio station in Mali's capital Bamako. It argues that the ways in which various actors and political interest groups framed this instance of a family altercation as a legal story and as an issue of public controversy shed the light on how issues of social reform are currently debated in Mali. The chapter details how the broadcasting of the story on local radio constituted a turning point in the framing of the episode as a legal case, and concludes that Malian media institutions presently play a critical role in the formulation of legal truth outside the formal juridical domain because they help construct a legal case through a series of publicly told stories. The political biography of the episode not only reveals the close link between particular definitions of propriety, public order, and the establishment of legal truth, but also shows that proponents of different political positions take women's moral disposition as an indicator of the moral state of society, and as a means to address on what notions of the common good the political community should be based. In this chapter, Schultz shows how much the language of the law is attractive

outside its institutional framework. She documents the process through which one of the existing narratives becomes the dominant one. By doing so, she empirically illustrates how ordinary cases can transform into causes of general and public interest.

In Chapter Six, Adly relates the story of Sheikh ‘Amr who, in 1994, started a 100 km-journey from Mahallat Rawh, in the governorate of Gharbiyya, in order to leave, on Imam al-Shafi‘i’s tomb in Cairo, a 17-line letter accounting for his affair with a woman, his sin, and the lady’s laxity of conduct. Such epistolary confession raises the question of how people address a saint who died more than twelve centuries ago and ask for his intercession in mundane disputes; how they can express the injustice from which they claim to suffer and how they try to rally the saint to their own truth and cause; how they formulate their claim and how they organize their stories. In his rather well formulated narrative, Sheikh ‘Amr pleads responsible but not guilty; for this purpose, he uses all possible means, ranging from appropriate words to consecrated formulations, valorisation process, generalisations, fact re-construction, legal formalism, and indictment formula. Adly’s contribution constitutes an illustration of what people expect from the law, which includes their background understanding of it. It also demonstrates how describing people and actions is a way to infer rights and duties and to ascribe responsibilities.

Part Three of this volume is made of contributions which try to capture law as it is seen from both sides of the mirror. Buskens, in Chapter Seven, examines documents and their roles in legal practice of the Muslim West. Professional witnesses, known in Morocco as *‘udul*, compose their documents according to models which are often collected in formularies. Legal documents contain highly formalized reports about events which might have legal consequences. Buskens studies the way in which professional witnesses construct a document by looking closely at a wedding ceremony which took place in Rabat, Morocco in 1989. He compares the events which he witnessed himself as an ethnographer to the written text of the marriage deed. The peculiarities of the legal document can be understood by looking at the formal procedures prescribed by the law and by the models available to the *‘udul* in books known as formularies. According to Buskens the practices of the professional witnesses can be understood by considering them as a kind of “cultural brokers” who mediate between the cultural understandings of ordinary people living their daily lives and the formal requirements of the law. The legal rules framing the events stem from state law, as well as Islamic law and local practices. The professional witnesses are involved in a process of translating notions taken from everyday life into

legally valid language. Buskens' chapter shows how lawyers work bearing in mind the potential conflicts arising from the texts to the writing of which they contribute. In other words, he shows how they operate in reference to both legal provisions and social norms. By doing so, they produce documents that are retrospective and prospective at the same time.

In Chapter Eight, Drieskens looks at differences and similarities between stories about healers and djinns in the different settings of the court, the press and the neighbourhood talk. Each narration presupposes and reflects other versions in other settings and every story about djinns forms in one way or another, the basis for a judgment. This judgment can be a verdict about the guilt or innocence of the protagonists; it is often the moral evaluation of their behaviour, but it involves also the audience's appraisal of the story and of the moral positioning and credibility of the storyteller. In her contribution, Drieskens examines the specific mechanism through which stories trigger further and conflicting accounts of events. She also shows how stories orient to their virtual public and anticipate their audience. It means that stories are always prospectively oriented to further judgements about their reliability, coherence, documented character, etc.

In Chapter Nine, Welchman looks at narrations of 'what happened' in a set of 'political trials' in Tunisia in the 1990s, examining not only the construction in court of 'what happened' as a basis for a ruling in a particular case, but also 'what happened' on a particular day in court. If, in the institutional context of state law, the judge's story constitutes the accepted truth that forms the basis for the judgement, in the context of the sort of trials under examination here the contention is not resolved by the judicial outcome; there is no agreement on the story of 'what happened.' The history of such trials in Tunisia locates the courtroom as an established site of contention between the 'authorised version' of the trial and the truth, as advanced by the prosecution and recorded by the judge, and the alternative version of the story put by defendants and their advocates and supporters. The latter may add to the 'meta-narrative' of the overall trial the short stories of dramas in court provoked by particular proceedings. The international trial observer (specifically, those mandated by non-governmental organisations) plays a key role in the public telling of an alternative narrative of what happened on the different levels. In its turn, the construction of this 'external' and 'observation' narrative is framed by purpose and intent, and is articulated within particular constraints of form. Welchman's chapter is an account of what can be said about the production of legal truth when conducting a proper ethnography. At the same time, it raises the issue of the observer's impact on such production. It clearly shows how truth in legal

contexts is framed by textual provisions and procedural constraints, but also by counter-narratives, while it also demonstrates how this functioning can be documented and influenced by just attending the trial.

Part Four of this volume concentrates on legal truth as it is produced within legal contexts. Chapter Ten (Ghazzal) is a textual analysis of a single criminal case from the province of Idlib in the north of Syria during the 1990s. There are numerous methodological benefits for understanding a legal system through a careful analysis of individual civil and criminal cases. To begin, the rules of law that presumably constitute the essence of civil and criminal codes, and which are commonly perceived as the ‘theory’ from which ‘practice’ is derived, do not in themselves dictate what happens throughout the complex proceedings of a case. To understand what happened in a single case, it is compulsory to primarily follow the actors’ documentation of the events from their own standpoints, which will eventually lead to a full reconstruction of the case from the actors’ various viewpoints. Consequently, the “fabric of the law” is not in the rules of law per se, but an outcome of the complex schemes of documentation that make each legal case a concrete social reality.

In Chapter Eleven, Bernard-Maugiron makes use of a 2002 decision of the Egyptian Supreme Constitutional Court (SCC) as a starting point for examining the reconstruction by courts of both facts and laws. The “*kebul*” law,” which was adopted by the People’s Assembly in 2000, was challenged for unconstitutionality before the SCC by a husband whose wife had asked for a *kebul* divorce. Through its analysis of the constitutionality of that legal provision, the SCC reconstructed different dimensions of what happened in the case itself; in its past decisions; in the elaboration process of the *kebul* law before the two houses of the Parliament and chose its own version of the famous *hadith* that the *kebul* law relies on. The chapter shows how courts undertake a retrospective formalisation of law and facts in order to meet the needs of procedural correctness and legal pertinence. Bernard-Maugiron’s chapter illustrates how the judge proceeds in order to give facts and statutory provisions a story that can be legally dealt with. It shows that courts are also looking at precedents as former legal narratives on related issues. Moreover, it demonstrates how the writing of legal legacy can influence the drafting of laws and the production of rulings.

Abuse and mistreatment of citizens have been a regular feature in the Egyptian police precincts. The scope of these phenomena is impossible to determine, with contradicting data from non-governmental and governmental organizations. In Chapter Twelve, Wuerth deals with legal and judicial (re-)constructions of police brutality and torture during the late 1990s.

She does not dwell on ‘what really happened’ in a particular case, but on the strategies and means – socio-legal and medico-legal – by which judicial institutions, governmental and non-governmental organizations, and individuals debate and construct police action. The competing legal and political ‘truths’ about police abuse and its prosecution are laid out in their current political context. Socio-legal police strategies are examined for their importance for judicial (re-)constructions of police abuse. Lastly, she discusses the role of medico-legal knowledge in prosecutions of policemen, and argues that the systemic relationship between law and medicine is predetermined by the legal system. Wuerth’s chapter shows how narratives concerning offences and offenders follow scripts which produce decontextualized accounts of facts. It also examines the relationships between law and science and demonstrates that the factual authority of science is often counterbalanced by its tendency to produce inconclusive reports, thus leaving to the judge the possibility to choose from among different possible hypotheses the one that best suits his purposes.

In Chapter Thirteen, Dupret conducts a praxiological study of a trial that was primarily concerned with the judicial definition of morality. Be it homosexuality, prostitution or mental health, it is possible to observe and describe in a detailed manner the work of the different parties who are engaged before the courts in cases related to morality. In such a situation, morality is constitutive of a specific domain, insofar as people orient to it as such; that is, as a particular object with which certain human activities, like religion, ethics, morals, philosophy and law, are concerned. The so-called Queen Boat affair serves as a case study. The author conducts a (membership) category analysis of the investigations conducted by the Public Prosecution and of other texts produced by the many professional agencies involved in the procedure. It allows him to observe the emerging modalities of categories, as well as their inferential properties. In different chapters of this volume, authors show how the authoritative version of ‘what happened’ is produced in the course of the judicial process, the final version of the facts forming the basis for a judgement grounded on legal rules. Dupret’s contribution illustrates, through the analysis of a concrete example, how also the moral categories within the rules and the interpretation and application of legal rules are not floating entities but belong to the interactions that produced them.

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LEGAL TRUTH IN ISLAMIC HISTORY

1

THE STORIES IN THE FATWAS AND THE FATWAS IN HISTORY

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Introduction

A fatwa is a story in which a Muslim tells an authoritative jurist a problem concerning the law. The jurist reacts by giving his opinion on the matter and providing a solution for the problem. Both the questions and the answers were considered legal precedents and compiled as such, so that the social and legal stories were transformed into pieces of jurisprudence. All in all, there is no doubt that the input of particular stories in the corpus of Islamic jurisprudence is enormous.

Western historians have made extensive use of fatwa collections in order to study the economy, society and culture of the Islamic world in the Middle Ages. Historians are always aware that whatever kind of sources we use should be corroborated and compared with the data taken from their contemporary sources. In addition, we should carefully ponder the context in which the historical texts were written (Shatzmiller, 1997).

A scholarly discussion on methodological issues concerning the use of fatwas for social history is to be found in many works dealing with Islamic legal sources, mostly the ones on fatwas.¹ In fact, this use of fatwa collections has shown great success, since fatwas, both the questions and the answers, are mines of social and economic data.² One of the main objectives in many of these methodological discussions is to understand, as M. Fadel pointed out, that a fatwa falls somewhere between the ideal and the real. A fatwa is ideal because the mufti expresses and looks for a universal rule, while it is “real” because it is “the empirical manifestation of his opinion and it emerges from a unique set of empirical facts” (Fadel, 1996: 32).

In his recent book on the *Mi'yar* of al-Wansharisi (d. 914/1508), D. S. Powers also included a methodological introduction and pointed out, that fatwas were not “transparent documents,” but “complex literary constructions that collapse and mediate among several levels of ‘reality.’” The historian – Powers says –, “attempts to unpack the narrative representation of the case and to engage in yet another round of translation, this one having as its goal a reconstruction of the case in a manner that is as faithful as possible to its actual development” (Powers, 2002: 21-2).

This is certainly relevant only for one part of the fatwas’ history, because when their texts are incorporated into the compilations, the writer-compiler selects, copies, abstracts and compares them with other stories, and the “levels of reality” are multiplied and the constructions of the texts become more complex. In other words, Powers explains the construction of the narrative, while we can see that once the text was established, it went through another long process.

However, this long and diachronic process is two fold. On the one hand the fatwas preserved in the compilations as well as in the manuals of substantive law suffered these different changes in their narratives, but on the other hand, as this paper illustrates, the stories were selected and copied faithfully because it was necessary to keep their ‘original’ form and thus, to establish a kind of official narrative of a given story for reference for the jurists when applying the law.

In this paper, I will analyse a group of fatwas and study how they were constructed as a legal story, focusing on who wrote the questions and the answers; who was meant to read them in their different versions; and also, who was interested in legally changing or keeping the original version.

I have selected several cases related to the settlement of matrimonial gifts,³ where the jurists describe a local custom, and discuss the question of whether this custom can be considered as a legal obligation.⁴ In fact, a similar story was told to muftis repeatedly from the beginning of the IV/X century. This repeated story says that fathers, when marrying off their daughters, were interested in paying them a dowry, so that they might induce a suitable husband into the marriage. This was not a legal obligation, because Islamic law does not make a rule on it. However, the existence of a widespread custom made fathers feel obliged to provide their daughters with a dowry, sometimes thinking that this was their legal obligation: this is the typical situation of *opinio iuris*.

Therefore, together with the social elements that the selected stories show for historical analysis, these cases specially allow us to discover the degree of knowledge of the individuals towards what was meant to be their Law.

The Questions: a Written Story

A fatwa (pl. *fatawa* in Arabic) is a legal opinion issued by a mufti when he answers a specific question. The individual who asks the question is called in Arabic the *mustafti* and the question is the *istifta'*. The mufti is a jurist considered to be of authority and knowledge in religious and legal matters so that people, and other jurists, look for his advice.⁵ However, in general, this dialogue was, and still is, not a spontaneous and oral process. On the contrary, evidence shows that fatwas were mostly written and the demand of a fatwa was a process that happened in a judicial context.⁶ No doubt this is the main reason why fatwas have been better preserved up until the present day.

According to D. S. Powers, in the writing of the *istifta'* we can find three stages in the construction of the narrative. The first is "the events as they happened, to which we have no direct access" and the second is "the same events as related to a local authority, frequently a qadi, either directly or with the assistance of a legal agent (*wakil*) who translated the litigants' oral accounts of what happened into the language of the law" (Powers, 2002: 21). In my opinion, for the second level we have no direct access either, so we cannot know whether there was a negotiation between the parties and the authority in such a way as to set an agreement on what facts and events are relevant for the case. What we have for historical analysis is the third level of reality, according to Powers, which is "the summary re-presentation of these narratives by the qadi, acting in his capacity as a *mustafti*" (Powers, 2002: 21), and this is the text of the question.

The Text of the Questions

As written texts, the questions have varied forms and styles, but also share a certain internal structure containing several parts:

1. Introduction: usually fatwas start with phrases like: "[A question] was written to Ibn Lubaba on" (*wa-kutiba ila Ibn Lubaba fi*) or "[Give us] your answer to" (*javaba-ka 'an*) or "He was asked about" (*wa-su'ila 'an*).

2. Focusing on the problem: The *mustafti* gives a quick mention of a chapter of *fiqh* or branch of the law, and thus directs the mufti to find a solution for the problem.

3. Description of the case: The *mustafti* describes the problem in detail, mentioning all the circumstances of the case. In theory, at least, he should be as clear as possible and provide the mufti with an accurate and 'objective' account. For this, he collects all the information possible and sometimes even transcribes full documents and dialogues between the parties.

Many questions were sent from one city to another in order to find legal advice from an authoritative jurist living in a capital city. In these cases, the letter of the question makes the process very restricted in terms of a dialogue, but

for the same reason the *mustafti* makes an extraordinary effort to provide the mufti with all the necessary information in just one letter, including detailed descriptions of the case.

This part of the question constitutes the main story of the fatwa and obviously, always appears in the questions, although its length depends on the difficulty of the case as well as on the style of the *mustafti*.

Story 1a: [A question] was written to Ibn Lubaba (d. 314/926) about a man who asked for the hand of another man's daughter and finally married her for a *sadaq*⁷ specified in the marriage contract (*sadaq musamma*). The father explicitly mentioned that he was going to hand over (*nabala*) to his daughter such [properties]. Then, the husband gave a *sadaq* according to this present promised by the father (*sadaq 'ala ma'na al-nibla*). Afterwards, the father went bankrupt and he was unable to pay the gift. The husband, therefore, said: "I only paid this *sadaq* to your daughter because of the present you stipulated before the consummation" (al-Sha'bi 1992: 396, n. 857; see also al-Wanshashiri 1981-3: III, 144).

4. External circumstances: The questioner may also include explanations related to external circumstances of the case, such as the specificity of the application of Islamic law in the city where the case happened or about the general behaviour of the community. He might also devote a part of the text to mentioning legal precedents for the case.

5. Specific question: Finally, the *mustafti* asks a direct, clear and concrete question, emphasising to the mufti again the specificity of the case.

6. Closing: At the very end, the *mustafti* might use stereotyped ways of finishing the question, using phrases like: "Please answer this," "Explain this to us," or just "God willing."

The Story in the Istifta'

The content of the story influences the style of the narrative. Thus, we can classify it in three categories:⁸

1. Individuals *versus* the judiciary: These are questions related to problems that individuals have with judicial instruments. In these cases, the *mustafti* especially asks for information related to the way individuals should follow the legal procedures, interpret legal documents or find witnesses.

Story 2a: I knew that Abu Bakr b. 'Abd al-Rahman (d. 432/1040) was asked about a man who married a woman. He claimed that her guardian

(*wali*) conditioned the [validity] of the marriage contract to the fact that the bride had some properties (*'arudan*) and presents (*'ataya*), as mentioned in the contract. The guardian denied this. The husband demanded the father to swear an oath, but he refused to do so. Is the husband now obliged to swear an oath and consequently the wife would have the right to these possessions? How can it be that the husband has to swear on something related to another person? (Ibn Mughith 1994: 81; al-Burzuli 2002: II, 239-40; al-Wansharisi 1981-3: III, 301)

2. Individuals *versus* individuals: These are questions related to litigations between two individuals. In these cases, the *mustafti* has to make the effort to be objective and reproduce the different versions of both parties and their interests.

Story 3a: [Ibn Rushd (d. 520/1126)], may God be satisfied with him, was asked about a man who married off his daughter to another man. Every obligation related to this marriage was correct and completed. However, the above-mentioned daughter died before consummating the marriage. The father then asked the husband to pay the *sadaq*, the maintenance (*nafaqa*) and the clothes he had had to pay throughout the marriage, from the day they were married until she died. The husband asked the father to give him everything he had acquired for the trousseau. Have both, or only one of them, the right to what they demand? Explain to us what the obligations and rights of both of them are, or the necessary procedures for or against each of the two parties. God willing. (Ibn Rushd, 1987: 188-9; Ibn Rushd, 1982: I, 164; al-Burzuli, 2002: II, 219; al-Wansharisi, 1981-3: III, 35)

3. Individuals *versus* society: These are questions related to problems that individuals have with the community where they live. They are problems with the local customs and the habits of the communities, as well as the legal evaluation of the transgressions of the social order.

Many of the stories concerning the payment of the dowry by the father are of this third category. Usually the text of the *istifta'* is a description of a custom among the people of a certain place and the transgression of this custom by a single individual.

Story 4a: [They] wrote to [Abu l-Walid b. Rushd (d. 520/1126)], may God be satisfied with him, from the city of Shalb (Silves, Portugal) asking him about a man who gave to his wife a nuptial gift (*siyaqa*) when

the marriage contract was written down and demanded that her father pay a dowry for an amount equivalent to this *siyaqa*. The custom among them is to pay a dowry, but the father refused to do so. The exact wording of the question was:

“Give us your answer, may God be pleased with you, concerning the people of the region whose custom in their marriages, is known by them and that they all know and which they do not transgress. The custom in their marriages is that the men among the people in this region give their wives a part of their properties. The usage among them and the custom (*al-ʿurf* *ʿanda-hum wa-l-ʿada*) says that when the men in this region gave their wives a certain part of their properties, that there was no other way for the father of the wife (*la budda li-walid al-ḡanjja*) than to take out of his own money a present with which he would pay back the amount that her future husband gave her, or something that would exceed this amount. This is among them an established, long-standing, inherited and uninterrupted custom that has not been replaced until now (*badbi-bi ʿada ʿanda-hum thabita, qadima, mutawaritha mustamirra, la takbluf*).” So, in this community there was a man who married a woman who was his equal and with whom a marriage was convenient. This man, according to the custom, gave her, from his own money, what custom dictates to a man of his status when he marries a woman like her. The bride’s father was one of the rich and well-established people who would marry their daughters for a *sadaq* similar to what the husband paid in this case. So, this man received the *sadaq* from the husband and gave a present to his daughter, but it was not sufficiently high to reach the amount that custom dictates for a man who marries a woman of her category. What do you think about this? May God grant you success.

Do you think that the custom (*ʿurf*) is like a condition (*shart*) and therefore the father must be legally obliged to provide what custom dictates? Please bear in mind that this gift of the father is one of the reasons why the husband marries her, but consider specially that he adds this gift over and above the amount of the [standard] *sadaq* in order to receive something in return. (Ibn Rushd 1987: III, 1418-9; Ibn Rushd 1992: II, 1260-4; al-Burzulī 2002: II, 213-4; al-Wansharisi 1981-3: III, 381-3)

Story 5a: [Al-Mazari (d. 536/1141)] was asked about a document in which it is said that the witnesses declare that they know *fulan* [so-and-so] and his in-law *fulan*, and that person, when he married his daughter *fulana* off in a certain month and year for a *sadaq*, which included an

initial payment in cash (*naqd*) for a stipulated amount, and a delayed part (*mahr*) for a certain amount, he included a written condition in the marriage contract saying that the father would provide his daughter (*yujabbizū-ha*) with 2,000 Mahdiyyan dinars.

The witnesses said: "We know that in our two cities, al-Mahdiyya and Zawila, anyone who marries off his virgin daughter, providing that he is rich, has the obligation to give a trousseau (*jihaz*) equivalent to the *sadaq* established in the marriage contract (*al-sadaq al-musamma*). Among these, there are some who write this in the marriage contract as a condition, while others use custom as a point of reference, so they do not include the condition in the contract (*wa-min-hum man ya'tamidu 'ala al-'ada min gayr shart*). When the latter happens, both contracting parties understand that they are taking into account the existence of custom."

"We know that the custom in Zawila is that fathers are obliged to pay an equivalent to the *sadaq*. Is it deemed compulsory to neglect the well-known opinion (*al-mashhur*) because of this testimony? In this case, the father died and the husband now asks for an amount equivalent to the *sadaq* he had already paid." (al-Burzuli, 2002: II, 346-7; see also al-Wansharisi, 1981-3: III, 324-5)

The Legal Record of What Happened

The wording of the questions is the result of the *mustafti*'s work and shows a high degree of knowledge of the law. The questions are descriptions of social problems in a legally relevant language. Apart from the use of formulaic ways of posing an official legal question to an authoritative scholar, this legally relevant narrative can be appreciated in different aspects:

1. The language and terminology used throughout the narrative. In these cases, the *mustafti* uses a standardised terminology regarding the marriage donations, such as *nihla*, for the father's present, or *siyaqa* for the husband's increase of the obligatory *sadaq*, as he knows the terminology should be discernible for the mufti.

2. The manageability of legal instruments. In these cases, the questions show different legal procedures that become the centre of the narrative, as for example the necessary order for taking an oath in the procedures (2a), the conditions inserted in the marriage contracts and the forms for proving the validity of a custom (4a and 5a). For example, in the second case issued by Ibn Rushd (4a), it is clear that the *mustafti* knows how to describe a custom in a legally relevant way, when he mentions its stability, continuity and the locality of it; all of these are characteristics of a legally valid custom.⁹

3. When posing a specific question, the *mustafti* centres the story within a legal framework and neglects the social implications. This is also very clear in the case of Ibn Rushd (4a), when the *mustafti* interrogates regarding a theoretical issue of Maliki law, e.g. the general consideration of custom as a legal obligation: “Do you think that the custom is like a written condition?” (*hal tara anna al-’urf ka-l-shart*).¹⁰ In al-Mazari’s case (5a) the *mustafti* shows his concern about the fact that the existence of a testimony which proves the existence of custom might make the judgment diverge from the well-known opinion already established by the school.

4. The record of what happened does not introduce the proper names of the litigants or individuals involved, other than in very few cases;¹¹ not even when the documents are transcribed, as in Zawila’s story (5a). In some cases, the questions mention specific quantities, although this is not very frequent. Usually, all of them are substituted by *zanj*, *bint*, *imr’a*, *rajul*, *kadha wa-kadha dinaran*, *amlak*, and in the document partially transcribed in story 5a, the *mustafti* uses *fulan* (so-and-so) and *fulana* instead of the personal names.¹² Since the cases are meant, from the beginning, to be included in the legal tradition of the school, it is important to take out any reference to the particularity of the case, and produce a text that might be used for the universality of the law. Not in these cases. It is not only relatively frequent to find references to specific places, but it is necessary when the case needs a description of a local custom. The fact that the names of places are included undoubtedly means that the *mustafti* is aware of the fact that the case might only be applicable in this city or region.

The Construction of a Legal Text and the Narrative of the Story

The question is the most interesting part of the fatwas in terms of social data, but at the same time, it is the part of the fatwa that has more of a translation of social facts in legal terms. Therefore they are embedded in a legal frame. The historian, again following Powers, should “unpack the narrative representation of the case and engage in yet another round of translation, this one having as its goal a reconstruction of the case in a manner that is as faithful as possible to its actual development” (Powers 2002: 22). This new reconstruction of the cases does not mean separating the social data from the legal ones, but understanding the interaction of the individuals in respect with the law.

In the case of Ibn Lubaba (1a), the *mustafti* explains the position of both parties, although maybe because the husband is the plaintiff, his point of view is better reflected and the *mustafti*-writer even fully transcribes his words. In

fact, the husband is portrayed as very disappointed, to say the least, because of the lack of response of the bride's father concerning the economical exchange in the marriage. The second case (2a) is different because the *mustafti* is very careful in saying that the guardian conditioned the validity of the contract with respect to the fact that he was going to give some properties to the bride. Here the case is not a socially relevant promise, but a legal problem that emerged because of not obeying a written condition, so that the marriage could be annulled. However, having explained the source of the litigation, the *mustafti* focuses on the procedures and the way in which the judiciary might know whose claim is stronger in court. However, both cases show that fathers offered some properties to their daughters in order to force the husbands to increase the standard *sadaq*, which was the main social problem. In the third story (3a), a question posed to Ibn Rushd, the source of the problem is external to the marriage donations and obligations, since it happens only because of the death of the bride before the marriage was consummated. The social link therefore was not complete, and for the parties has no more meaning, so both parties wanted the payments returned. The law was only required for the application of the established rules on the matter. This is very frequent in marriage cases when there was no consummation: the parties just want to behave as if nothing ever happened.

In the other two stories (4a and 5a) the elaboration of the question is more complex. Now, the problem involves the common behaviour of the whole community and the transgression of it by an individual. These two cases show that it might be impossible to separate the legal from the social spheres.

The first one is the letter sent by the judge of the city of Silves to the capital, Cordoba, where the authority, Ibn Rushd, was living. The fact that the mufti is living far from the place where the problem arose, and therefore cannot master the social background of the case, means that the *mustafti* has to describe it in depth. In fact, the narrative of the story emphasises, repeatedly, the existence of a custom and the agreement of a part of the society when following it. On the other hand, the writer portrays the individual as a transgressor, because he does not follow this common behaviour even if he belongs to this part of society. Obviously, the way the question is posed might influence the answer and therefore, here the *mustafti* is very clear in his views concerning the father's obligation towards the payment of the dowry.

However, the *mustafti* also wants to know how he should act in other similar cases and his specific question demands a general answer: does the existence of a validly proved custom work as if this obligation were written into the contract itself? As in the case by Ibn Lubaba, the *mustafti* emphasised and

repeated the fact that the husband only gave the gift in the hope of receiving something in return from the bride's father.

In the story from al-Mahdiyya (5a), the question is related to a document that reflects the testimony of some witnesses concerning a legal problem. First, there is a description of the case in which a man conditions the validity of the marriage of his daughter to the fact that he was going to give her 2,000 dinars. Second, the witnesses declared what they knew, here again the existence of a custom, certainly parallel to that of Silves, whereby rich fathers have the obligation of providing their daughters with a trousseau equivalent to what the husband gave.

However, the case is mainly focused on the reflection of this custom in the marriage contracts, as was the case in other earlier stories. Witnesses say that the father's gift is sometimes included in the contract, but on other occasions, although unwritten in the contract, both parties take it for granted that they follow the custom. The result is that in any case and providing their inclusion among the wealthy, fathers have to respond to the *sadaq* with an equivalent amount.

Finally, the *mustafti* states a clear question by detailing the problem: the father died when the husband had already paid his part, so he asks whether the heirs should pay the debt.

The most interesting fact for the historian is therefore to interrogate on whether fathers and husbands alike, at this point, were identifying or confusing the obligations dictated by customs and the obligations of Islamic law as a universal legal system. The *mustafti*, when writing the question, seems to differentiate adequately.

The Answers: The Legal Side of the Story

The mufti is the second person in the dialogue which is a fatwa. He is a jurist who is considered to have legal formation to give authoritative answers to questions related to law. The *adab al-mufti* literature, as well as ethnographical descriptions of the mufti's activities, says that after the presentation of the text with the question, the mufti has to write his answer on the same piece of paper or on the back (Messick, 1986: 106).

The Text of the Answer

The wording of the answers is more difficult to include within a fixed frame. There is a freer and much more personal style for the mufti, so the variety ranges from a simple "no" (*la*) or "yes" (*na'am*), to a very elaborate answer of several pages.¹³

However, there is a certain structure influenced by the subject of the question:

1. Introduction: The text of the answer is usually marked by the standard phrase “he answered” (*fa-ajaba*). There is also a kind of personalized way of answering. At the beginning of his reply, the mufti sometimes adds some formulaic sentences with which he wants to make it quite clear that he can only answer according to the data provided in the question. He might use phrases such as: “According to what you described” or “If it is true that the husband mentioned in the question is really as you described.” In many cases, the answers start with the sentence: “I read your question and carefully considered it.”

2. To focus on the solution: Obviously the main aim of the questioning is to find a solution for the legal story.

In many cases, the beginning of the narrative of the mufti is an evaluation of the problem in the legal context. He situates the case as a divergence from the universal norms, as a transgression, or just as divergent behaviour from the normal or most common. In many cases he also evaluates the case in terms of frequency, since an isolated problem of a single individual will not attract as much attention as a repeated practice.

Story 5b: [Al-Mazari] answered: this problem has become very common. It is convenient to decipher the words: “Fathers are obliged to pay an equivalent to the *sadaq*.” Sometimes [fathers] become ruined on account of the huge amounts that are paid for this. This custom is valid, but fathers do this in accordance with their pride and the importance [of these gifts] that became common among the rest of the fathers, except to those of them who became isolated because of their lower social situation. But they might also do it because they believe it to be their obligation and that they might be compelled to do it if they refuse.

So, if fathers pay the gift because they think that it is their obligation, and a testimony [like the one you described] is considered valid, then it is the testimony that should be taken into account. However, if they do so in order to emulate what other fathers do, then there has been until now no opinion on the matter that gained a consensus in the [Maliki] school. As for example Ibn al-Mawwaz (d. 281/895) in the case of the nuptial gift (*hadiyya al-‘urs*). In his time, it was a common practice to give this as a matter of courtesy (*mukarama*). He was told that no one issued a judgment on the matter, since it was only out of

courtesy, and giving a sentence on this meant taking the custom as a basis, but customs change. So, they told him: No, there was a sentence which took this problem as if it were stipulated as a condition in the contract, so there should be a compensation (*mu'awada*). So, here there is no other way but to corroborate the witnesses' testimony, as I said before, because, according to the principles of the law (*asl al-shari'a*), there is nothing that obliges the bride or her father to provide a trousseau (*jibaz*). The *sadaq* is a compensation for the physical body of the wife and this is its main purpose. However, if there is also a compensation for the use of the trousseau, then this is not known by the school and the marriage is corrupt (*fasid*), since this is not the purpose.

In the Maliki school, there is an opinion (*riwaya*) considered isolated (*shadhdha*) and strange (*ghariba*), according to which the bride should not acquire her trousseau with the money given to her as *sadaq*. I think that this is in the *Watha'iq* by Ibn al-'Attar. Another opinion says that she should do it precisely with the *sadaq*. But the existing trousseaux are not the same as the ones stipulated by tradition, although if custom dictated in this direction, then it is convenient to follow it.

Fifty years ago, a *nazila* was issued here and scholars disagreed with it. The question dealt with a virgin woman who died before the marriage was consummated, and then the father asked the husband for the *sadaq*. On the other hand, the husband asked for the inheritance of the trousseau that the father had given.

'Abd al-Hamid issued a *fatwa* saying that the father had no obligation to give what he had promised as a trousseau, but al-Lajmi issued another stating the contrary.

'Abd al-Hamid said: "Bear in mind that fathers, during the life of their daughters should try to improve their social status and increase their personal perspectives, at the same time as taking care of the opinions that their husbands might have about them. So, if the wife dies, this might be against the person who gave the trousseau. One custom should not be compared with another one."

I had a long conversation with al-Lajmi, who wrote to me consulting me about the best way to find a solution on this matter, and I answered him with what I had already written in this *fatwa*. In this case, custom is corroborated by testimony, so there is no ambiguity and, therefore the fathers are obliged to give a trousseau to their daughters in as much as they are able to during their lifetime and until they die. So, fathers have to provide an amount as compensation to the *sadaq*.

In this very case, the testimony only concerns this, and if the judges repeat their sentences against them, then it is to testify as far as the witnesses know about the practice and make a point of writing the custom in the marriage contract.

With respect to these questions, there were already some anomalies and maybe the right solution will be closer to this answer. God willing. (al-Burzuli, 2002: II, 346-7)

3. Opinions: In many cases the evaluation of the case needs to master the jurisprudence of the school, and so explicitly quote and consider earlier opinions issued on similar cases, as well as different views on the matter. In doing so, the mufti is also preserving other precedents in the form of a fatwa. That is to say that our stories are also made out of other earlier stories.

4. Decision making: The main task of the mufti is obviously to find a solution for the problem or give advice that will help the *mustafti* in understanding what to do subsequently. A decision must be taken, or the best one selected from all the opinions he quoted.

Story 1b: “[Ibn Lubaba] answered (*fa-qala*): the father has to pay the gift to the husband and [when he does] the marriage can go ahead, since the husband married her because of this gift. If the father cannot afford the donation before the consummation, then the husband has the right to choose [between two possibilities: 1)] accepting the marriage and thus renouncing receipt of the gift [or 2)] dissolving the marriage and therefore not paying anything himself. This can only take place with the permission of the authorities.” (al-Sha’bi 1992: 396, n. 857; see also al-Wansharisi 1981-3: III, 144)

Story 2b: The master (*shaykh*) [Abu Bakr b. ‘Abd al-Rahman] replied to this: in this case my opinion is that if the father refuses to swear an oath, then the husband should in turn do it [for maintaining his argument]. When he does so, then the amount of the *sadaq* should revert to the standard for a woman of her status (*sadaq mithli-ha*) and the father should give back to the husband whatever he already paid over and above the standard dowry. In any case, the wife should receive all of her stipulated dowry. This case should be understood as being similar to those in which the guardian lies about the defects of his pupil, because in these cases she also receives everything and the husband acts judicially against the one who lied. So, here also the wife should take her whole *sadaq* and the

husband should ask the guardian who refused to take an oath to give him back what he increased over the amount of the standard *sadaq*. God is the one who leads to the right way. (Ibn Mughith 1994: 81-2; see also al-Burzuli 2002: II, 239-40; al-Wansharisi 1981-3: III, 301)

Story 3b: [Ibn Rushd] answered, may God help him: if whatever the father bought for the trousseau of his daughter is already given and separated from his properties, then it should be considered as part of her inheritance, [and so the husband can have his part]; the same as for the rest stipulated in the marriage contract. On the other hand, the husband does not need to pay the maintenance, nor the clothes. In God is the success. (Ibn Rushd 1987: 189-90)

Story 4b: [Ibn Rushd], may God help him, answered as I am writing in this text: “I read your question and considered it carefully. If the father refuses to provide his daughter with a trousseau according to what usage (*urf*) and custom (*ada*) say to a man of his position and to a girl like his daughter and also according to what the husband gave as the cash part of the *sadaq* (*naqd*) and the gift (*siyqa*) like the one he gave, then he has the right to chose between being obliged by the marriage [like it is] or dissolving it, and then they will give him back what he gave as a *naqd* and both the deferred part and the gift. Success is in God, who has no partner. (Ibn Rushd, 1987: III, 1419; see also Ibn Rushd, 1992: II, 1260-4; al-Burzuli, 2002: II, 213-4; al-Wansharisi, 1981-3: III, 381-3)

5. Closing: The muftis may also use some formulaic sentences for finishing the wording of the legal stories, which almost always demonstrate their fear for error. So they write sentences like “God knows best” or “In God is the success.”¹⁴ Many muftis also sign their answers.¹⁵

The Mufti as a Writer

The study of the mufti and his role in the administration of justice in Islamic history is not an easy task. This is because we can find evidence of his activities both in the public and private spheres, on religious as well as merely legal matters, working with the legal theory and also finding solutions for practical cases that came up in the courts.¹⁶ An important part of his work was also in teaching institutions and his job was to transmit the knowledge of law and its practice. This pedagogical activity of the mufti and the dialectics of teaching and discussions on law, although not the origin of many of the fatwas in the

collections, is undoubtedly an essential part of the dialogue that constitutes a fatwa. (Daiber, 2003)

One of the main functions of the mufti was counselling the judge in court. In fact, it is strongly recommended to judges in difficult cases to consult with one or several muftis, although their final opinions were never considered binding.¹⁷ The relationship between judges (here mostly the writers of the questions) and muftis (the writers of the answers) was already studied in different areas in the Islamic world, always giving precedence to the mufti over the judge since he was considered more independent. This supposed independence reinforced the moral qualification of his function and gave authority to his opinions, since he was outside the possible corruption of political powers that influenced the judges.¹⁸

When the mufti searches for a norm applicable in a specific case, he also has to bear in mind his general knowledge of the law. The answers reflect the relationship between the universality of the law and the locality of the case, the individualities of each person as compared with the principles of law applied to all Muslims. The answers should be understood somewhere between the ideal of the law and the reality of the facts that produced the problems in the community (Fadel, 1996).

Legal Story and Universal Law

The main aim of asking for a fatwa is to solve a legal problem or, at least, to provide some guidelines in order to find an agreement for the parties involved.

When the case reflects litigations between two individuals, the *mufti* has to confront both parties with the universal rules applied to all Muslims. That is why the judge goes to the mufti. In the case of Ibn Lubaba (1b), the mufti refers primarily to the main lines of the Maliki school concerning these cases, and thus gives the husband the right of option between accepting the marriage or annulling it because of the husband being disappointed with the promise given by the father. In the case of the answer by Abu Bakr b. 'Abd al-Rahman (2b) he compares the case of a single individual with other cases, when the father lies or does not stipulate faithfully the defects of his daughter when he marries her off. The same happens in the first case of Ibn Rushd (3b).

However, in the other two cases, both Ibn Rushd (4b) and al-Mazari (5b) were confronted not only with a litigation, but with the common behaviour of the community and with a custom carefully proved as valid by the *mustaftis*. A custom is certainly not considered universal, but limited in space and time and its existence might influence the cases.

Ibn Rushd (4a) seems to be convinced by the insistence of the *mustafti* about the validity of the custom and thus he bases his answer on this fact. Only if the case were as the *mustafti* explains has the husband the right of option between accepting the marriage or annulling it, as in the previous cases. In this sense, Ibn Rushd does not make a balance, or even mention the universal, but merely gives a solution as it should be applied to all.

The answer given by al-Mazari is more complex. He organizes his answer in a very clear way starting with the most specific problems of the case and finishing with the general rules of Islamic law concerning the donations given by fathers. Maybe because he is close to the facts, since he carried out his activities in al-Mahdiyya, al-Mazari situated the question in the first place in the framework of the society where the *opinio iuris* is evident: as the fathers believed that law obliged them to make payments to their daughters, and as they aspired to belong to a certain social class, they were faced with the payment of gifts which they were later unable to fulfil, and they ended up bankrupt. This situation should change, since it even gave place to disorders. Al-Mazari demands clarity in the wording of the documents and their interpretation, in order to understand each of the cases in particular. In other words, what al-Mazari wants to understand first is why fathers give a dower to their daughters, because he is willing to explain that it is not Islamic law that obliges them to do so.

Even so, al-Mazari seems to have doubts on whether Islamic law should interfere in these matters. Therefore he quotes a previous story, solved by Ibn al-Mawwaz (d. 281/895) four centuries earlier, in which a gift was made out of courtesy alone, and in fact for this reason the law did not wish to intervene in the matter. But, this does not seem to be the case here. In al-Mahdiyya, fathers hand over the gift in imitation of the attitude of other fathers. The question is open to legal discussion and the general line of proceeding of the judiciary must be made clear and applied to all.

Al-Mazari's narrative then focuses on comparing the case with the universal: "in the principles of the law (*asl al-shari'a*), there is nothing that obliges the bride or her father to provide a trousseau (*jihaz*).²" In fact, if this were done, the marriage might be considered null and void. In the school it is understood that the *sadaq* of the husband is a payment for the use of marriage, and if he adds an additional amount and receives a trousseau, this means that at the same time as a marriage, a sale is also being made, which is not legal. In this case, al-Mazari has found and contrasted the universal rule with a specific case.

In order to support these opinions, what he does is to mention the cases previously known to him. In the same way as he quoted the parallel case solved

by Ibn al-Mawwaz, and the unusual opinion of Ibn al-‘Attar – providing us with other comparable stories –, he demonstrates his knowledge of other cases where there is a debate over whether the father should make a gift to his daughter with what the husband has handed over as a first part of the *sadaq*, or whether he should do it out of his own money.

While the stories 1, 2 and 3 seem to concern only litigation between individuals, the stories 4 and 5 show the individual *versus* society and the two being evaluated by the eyes of the law. Here, the fatwa is able to explain the relationship established among the three. The study of this narrative, therefore, shows not only one specific story of a Muslim, but also the stories of individuals in a community and the way in which the law looks for a place for influencing their behaviour. Even if the validity of the custom were doubted, the muftis take for granted that the proof of its existence demands that it be fulfilled.

Fatwas in History

The authority of the opinions issued by the muftis resulted in fatwas being considered, from very early in history, as legal precedents. In fact, knowing and quoting the stories was imperative in the daily administration of justice and thus it was essential to have easy access to them. Fatwas, and the stories in them, were gathered in compilations that form a specific genre in legal literature, called *kutub al-nawazil* or *kutub al-fatawa*.¹⁹ These collections show the massive input of individual and personal stories in Islamic jurisprudence.

Selecting the Stories

A century after the mufti Ibn Lubaba received the question and gave it his answer (1a and b), the story was selected by al-Sha‘bi al-Malaqi (d. 497/1103) to form part of his compilation (al-Sha‘bi, 1992: 396, n. 857). This is the first version of the story, the older one among the published material and therefore, the closer to the actual facts. Among many others, al-Wansharisi also included this story in the *Mi‘yar*, four centuries after the “original” text was established. For the historian therefore, the main question is also to know why al-Wansharisi, and earlier al-Sha‘bi, selected this social and legal story produced in Ibn Lubaba’s time.

For the use of these sources, the historian should first be aware of the fact that the compilers had a selecting criterion. There are many *fatawa* collections in which the selecting criterion is related to the preservation of the jurisprudential legacy of a single mufti. In the Islamic West, examples of this kind are the *fatawa* issued by the *qadi* ‘Iyad (d. 543/1148-9), gathered by his own son²⁰ and the collection of the famous jurist Ibn Rushd (d. 520/1126), compiled

by one of his disciples, Abu l-Hasan Muhammad b. al-Wazzan. The ones by Ibn al-Hajj (d. 529/1135) or Ibn Ward (d. 540/1146) are of the same kind.

Other criteria used for preserving fatwas were more ambitious. Wider collections contain all the fatwas issued by muftis of a certain geographical area, city or region, with the main purpose of having an overall view of the local or regional legal tradition. The *fatawa* by al-Mazuni (d. 883/1478)²¹ were compiled with this purpose and also the *al-Hadiqa al-Mustaqilla*, in which the fatwas issued by several muftis of Granada are compiled.²²

Another criterion is wider, containing fatwas compiled with the purpose of providing the reader with all the opinions of a certain legal school throughout time. This happened especially in a period when it was considered that the school had to form unified criteria, something that occurred during different periods in the history of the school (Fadel, 1996). Of this type are: the above-mentioned *al-Ahkam*, by Abu l-Mutarrif al-Sha'bi (d. 497/1103; al-Sha'bi, 1992); the collection by al-Burzuli (d. 841/1438; al-Burzuli, 2002); and the famous *Mi'yar* by Ahmad b. Yahya al-Wansharisi (d. 914/1508; al-Wansharisi, 1981-3).

The compilation made by Ibn Rushd's disciple is somewhat obscure; although we can only guess that he might have had access to his archives and papers and put together all he knew about his answers. These are considered as "primary" fatwas because of the close relationship between the mufti and the compiler, therefore we are close to reality in as much as the compiler might have witnessed the case. The compiler does not organize Ibn Rushd's opinions according to the chapters of *fiqh* nor introduce his own comments on the opinions, but merely gives some notes on how he is doing his job in the copying process. While in the first case (3a) he only copies the narrative of both question and answer, in the second (4a) he introduces the text of the letter received from Silves – and that is why we can locate the custom –: he informs the reader that he is giving the full text of the latter. In addition to that, he also links the case with two other cases, also issued by Ibn Rushd on the same matter thus leading the reader to know more about the story. In his first additional case, which is similar to the description of Silves, the question is whether, after the death of the bride and before the consummation of the marriage, the donations are still effective and compulsory. The answer is also similar to the first one, except that in this occasion Ibn Rushd adds the fact that they should take into account the standard *sadaq*, to which the husband can always come back in cases of disagreement. The compiler also adds another story, similar to these two. In this third story, although the question is also the same, the disagreement emerges because the father claims that he only gave

the gift to his daughter as a commodity (*'ariyya*). The compiler also adds information related to the actual facts from his own knowledge, because he knew that the case was especially important for the judge of Silves when he married off his own daughters.

A story describing the problems that the daughters of an unknown judge in a peripheral little town had in their marriages was going to be a legal precedent for the whole Maliki school jurists, since Ibn Rushd gave his opinion on the matter and since the disciple of Ibn Rushd decided to include it in his compilation. The question was also selected and still quoted in XVII century Fez by al-Sijilmasi (d. 1214/1800; al-Sijilmasi, 1898: 14).

The earlier version of al-Mahdiyya's story, as it has been passed down to us, dated two centuries after it was issued, when it entered the compilation of al-Burzuli (d. 841/1438). Since we do not have access to al-Burzuli's source, we are unaware of how true to it he was.

In the case of the *Mi'yar* by al-Wansharisi, which has been the best studied collection until now, we have many references to his job as a compiler, as he explicitly mentions this in his introduction. We know that he had access to the extensive library of his friend Ibn Gardis, where he supposedly might have found earlier compilations. In fact, what is fascinating about the *Mi'yar* is that together with an enormous number of cases dating back as early as the IX century, five centuries before his time, al-Wansharisi also includes cases and stories from his contemporaries, to which he might have had access from their own archives. In these latter cases he includes many details; they are full of transcriptions of documents and sometimes even judicial decisions, something that is very rare in the older ones (Powers 1990). This means that the compiler had indirect access to certain stories only through earlier collections, where other compilers might already have introduced changes in the narratives, while he also has direct access to other cases from his contemporary jurists, where he is the one who introduces the changes for the first time for the elaboration of his work. Therefore, in the *Mi'yar* we find both secondary *fatawa* and primary ones.

Both al-Burzuli and al-Wansharisi demonstrated a huge effort in compiling their works. But the 'historiographical' problem remains the same: did they have a selecting hand or did they just copy everything they found?

Copying the Stories

The author-compilers, as a first task, had to make sure that the names of the muftis, the element that gives the most authority to the fatwas, were placed at the head of the text. Although this is certainly an essential part of the narrative,

some of the compilations do not introduce it explicitly. For example, al-Wansharisi copies several questions from the same mufti and only the first one starts with his name.²³ Thus, when al-Wansharisi copies a question, he adds the name of the mufti or takes it out depending on the order in the chain of questions, as he did with Ibn Lubaba's case (1a), where he only changes the original "it was written to Ibn Lubaba" for "he was asked." This establishment of the authority is related to the standardization of the texts inside the compilations, based on earlier ones. Almost all fatwas start with a standard formula "he was asked" (*wa-su'ila 'an*), and begin the answer with "he answered" (*fa-ajaba*).²⁴ If the author-compilers add their personal opinions or comments, they use the formulaic phrase: "I said" (*qultu*) and when finishing the copy of a certain paragraph or changing the source, they also add "finished" (*intaba*), as it was usually done in other sources.

Al-Burzuli (d. 841/1438) in the middle of the XV century and al-Wansharisi (d. 914/1508) almost a century later compiled and copied the fatwas issued by Ibn Rushd. No doubt he was already considered an authority in the Maliki school. However, the copying activity was very different in both author-compilers.

Al-Burzuli is not as careful as al-Wansharisi in copying the texts, since he introduces important changes and tries to mention only the relevant elements of the text.²⁵ In the case of Silves (4a), for example, al-Burzuli does not include the location of the custom and does not copy the description offered by the judge, but only refers to the custom as "uninterrupted (*mustamirra*) and longstanding (*da'ima*) in some areas,"²⁶ without paying attention to the general behaviour of the society concerning this matter, which the judge wanted to emphasise repeatedly in his 'original' narrative. Even the posing of the problem is different in the sense that he does not portray the father as such a transgressing individual as the judge does, but as someone who merely wanted to pay an amount different from what custom dictated to someone like him. He later proceeds to copy his source, which also concerns the two other fatwas of Ibn Rushd. In these two stories he summarizes even more and the possible repetitions, because of the similarity of the cases, are avoided. However, al-Burzuli proves to be more respectful concerning the answers. The texts are almost exact. For the historian, therefore, al-Burzuli, at least in this case, gives less details from the social sphere and avoids the original story.

On the other hand, as D. S. Powers pointed out, the way in which al-Wansharisi subordinates his own voice when copying the material for collecting the *Mi'yar* is certainly striking (Powers, 2002: 6). This subordination is especially clear because he only rarely comments on the cases when he copies his sources.

The question of Ibn Lubaba appears exactly the same in the *Mi'yar*, that is to say that the library of Ibn Gardis contained a copy of the *Ahkam* by al-Sha'bi, a large number of cases dating from the end of the XI century. The same is true for the copies he includes of Ibn Rushd's fatwas. The only substantial difference again is the suppression of the place where the custom originates: he substitutes "[They] wrote to [Abu l-Walid b. Rushd], may God be satisfied with him, from the city of Shalb" for the standard formula "He was asked about." Al-Wansharisi is "conservative" in his criteria for copying.

Organizing the Narratives

The task of the author-compiler also means establishing an order in his work. Usually, the *fatawa* compilations are organized according to the chapters of the law²⁷ so that the cases are easier to find and consult in order to administer justice. This new order also means that the compiler brings together similar stories, which share certain aspects of both the legal theory or the application of the law following similar procedures. The connection of the cases is not always explicitly mentioned by the author-compiler and does not respond to social criteria, but to legal criteria.

Al-Wansharisi seems to be aware of the fact that the story of al-Mahdiyya and the different stories of Ibn Rushd had similarities in as much as they both explain a custom among the wealthy, and the litigations between husbands and fathers concerning the obligation to give a dowry were not isolated cases, but a repeated phenomenon on both sides of the Mediterranean. Therefore, the necessity of linking several stories had to be reflected in the *Mi'yar*.

Al-Wansharisi copies the main narrative of the story 3a presented to Ibn Rushd at the end of the chapter dedicated to marriage, again faithfully from its source (al-Wansharisi 1981-3: III, 379). In fact, he had already copied the case in earlier pages with the very same wording (al-Wansharisi 1981-3: III, 35). However, after the copy, he also decides to include a part of al-Mazari's answer to al-Mahdiyya's story, but without the question. The answer by Ibn Rushd might not be satisfactory for al-Wansharisi or it has no connection with the general principles of the law, but the compiler thinks it useful to "complete" Ibn Rushd's answer with the one by al-Mazari. However, he only deems it necessary to include the main line of the argument developed by al-Mazari since he only starts to copy when the mufti refers to the universal law: "according to the principles of the law (*asl al-shari'a*), there is nothing that obliges the bride or her father to provide a trousseau (*jihaz*)."²⁸ Together with this, al-Wansharisi also copied al-Mazari's answer in full somewhere else in his work.²⁹

When al-Wansharisi copies only a part of al-Mazari's opinion, this story now lacks its own contextualization, and the specific story which happened in society would be lost for the historian using only this particular case. At the same time, following the hand of the compiler, the historian and al-Wansharisi's contemporary jurists have the two legal reactions to the same social problem.

The task of evaluating different opinions can only be made after the presentation of the different legal views. B. Johansen argues that the qualification and evaluation of different legal opinions did not mean that fatwas would be dismissed, but that they should be juxtaposed and compiled, studied and discussed together with the selected ones (Johansen 1993).

In the cases I have selected here, there is not an evaluation of the cases, except the one given by the muftis in their answers. As Johansen says, the authors have another task, since their clear job is only and merely to provide the reader with the jurisprudence of the school, avoiding their own opinion. This is the main objective of al-Wansharisi, but not the one of al-Burzuli because his comments on the cases are certainly more elaborate. The series of *fatawa* that he provides are frequently followed by a number of quotations taken from different sources. However, these other quotations, almost always in the form of a fatwa never include evaluations of the opinions by the muftis. He also avoids establishing a hierarchy of the different views. The author-compilers mainly focus on the idea of the preservation of a jurisprudential legacy intact.

Conclusions

In the manuals of substantive law, these same stories by al-Mazari and Ibn Rushd have entered the circuit of evaluation for explaining the rules. The different authors, both in *mukhtasars* or in legal poems, changed the stories and their contexts, but the compilations have to rescue them in their original form. Maybe this is the meaning of the enigmatic words of al-Wansharisi in the introduction of his *Mi'yar*, when he says that he extracted them "from their hiding places on account of their being scattered and dispersed and because their locations and the access to them are obscure."³⁰

The evolution and change of Islamic law should also be studied, as many authors wrote, by means of a diachronical analysis of *fatawa* compilations.³¹ In itself, the writing of the fatwas and their adaptation and incorporation into bigger compilations, both with the process of selecting and abstraction, is already the main instrument for allowing Islamic jurisprudence to grow (Hallaq, 1994).

The stories told to muftis, the narratives of the stories which took place in the society of a certain place, have in them a textual history that makes them change with the dynamics of Islamic jurisprudence and the compilation process. However, in my opinion, the stories are especially meant to last throughout time in their original form, which is the main aim of *fatawa* compilations. After the answer by the mufti is compiled, the main process that fatwas went through goes in the direction of it establishing the 'official' version.

The only access we have to knowing what really happened in society comes from a text constructed by a jurist. Our access to this record happens only after the *mustafti*, who is in most cases a judge, makes a selection of the relevant events in the legal sphere. Historians depend on the job of the *mustafti*, who, in principle, should be objective and provide the mufti with accurate information on the story.

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2

LEGAL NARRATIVES FROM SHARI‘A COURTS

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Introduction

In a highland Yemen shari‘a court murder case from 1960 (Messick; 1998), the claimants, the parents of a deceased man, asserted that the defendant had stabbed and killed their son. Their recorded claim and the statements of their witnesses relate that a sheep belonging to their son wandered onto a cultivated terrace belonging to the defendant and that the animal began to eat the tender and valuable young qat plants growing there. Seeing this, their story continues, the defendant became enraged and went to his terrace, grabbed the sheep and began dragging it back toward his house. Their son, the owner of the sheep, followed to get his sheep back from the defendant. When he caught up with him, however, the defendant drew his dagger and stabbed the young man below the ribs on his left side and he immediately fell dead. The claimants’ basic narrative then concludes that the defendant fled to his house where he was soon detained by a group of villagers.

As the trial proceeded, an opposing narrative was initiated and developed by the defendant. The thrust of this different account of what had happened is that there was significant prior animosity between the defendant and the group of villagers, who became the main witnesses for the claimants, and that this prior animosity led them to falsely accuse him of the murder. Witnesses for the defence described a conspiracy, detailing how they overheard witnesses for the claimants boasting about how they had lied in court. The first thing the defendant said he knew was that the group of men suddenly burst into his house and told him he was a murderer and wrested his dagger away from him. The defence asserted that it was in fact the deceased’s brother who had

killed him, and defence witnesses also reported statements made at the time by the deceased's father to this effect.

Both sides agreed the deceased had been killed, but beyond this fundamental fact their stories diverged. It was the difficult and, as there was no institution of the jury, characteristically solitary task of the shari'a judge to sort through these conflicting narratives and attempt to ascertain the truth. The judge's task was greater than these summaries I have just given indicate since the opposing narratives were developed and detailed in the testimonies of over forty witnesses and in lengthy substantive statements entered in the record of the court proceedings by each of the two parties to the case.

All lawsuits are built of conflicting narratives. In compound cases such as the 1960 murder case, in which evidence is presented by both sides, two narratives are at issue. But the structure of opposed narratives is also found in the simple or normative type of shari'a proceeding, where only the claimant side presents evidence. In such a situation, the defence rests on the *status quo ante*, which itself represents a default or implied narrative. Such a defence also relies, for example, on a presumption of innocence, in a criminal matter, or, in a civil matter, on the existence of a completed contract.

In the court setting, 're-presented' before the judge, what may have been merely differing stories or versions of events become specifically legal narratives. Legal narratives are constructed out of formally entered claims and responses to claims, presented evidence from witnesses and in the form of documentation and statements and arguments by the litigant parties. A case proceeds into litigation proper when the claimant's initial narrative, as expressed in the opening claim, is formally denied by the defendant. For their part, defendants in compound cases commonly introduce counter-claims which form the initial basis for their opposing narratives. During the trial, with introductions of evidence, and ongoing assertions and denials, such opposing narratives are further elaborated, often in direct response to the other side's case. At the conclusion of the litigation, the judge's ruling selectively evaluates these conflicting narratives and either finds for one or imposes his own final narrative.

How may the structure of such legal narratives be analyzed, and what are the implications of such analyses for the use of legal narratives in the writing of social history? In technical terms, what do the patterns of its legal narratives tell us about the character of a particular shari'a court? My approach centres on the genre features of such legal narratives as texts and on their dialogic nature, that is, on how they develop in response to the presentations by the opposing sides. I start with an introduction to the archaic culture of the shari'a court system of pre-revolutionary (pre-1962) Yemen.

Archival Culture

In the shari'a practice of Yemen in the mid-twentieth century there were two basic archival formats: registers that pertained to the courts and that were controlled by judges or their secretaries and collections of legal documents held by private individuals. Where a text inscribed in the court register had the status of a copy, the privately held document, whether a judgment record or a legal instrument, had the rooted identity of an "original" (*asl*). Original court judgment documents were made in pairs, one for each of the litigant parties. As opposed to the copies entered in the flat pages of court registers, these original *bukm* (or *ruqm*) documents were written on vertical rolls, on heavy, water-marked document bond. To create such a roll, individual paper sheets were glued top-to-bottom with the written words "valid joint" (*wasl sahih*), sometimes with a signature or a seal, appearing across the seams on the back. The rolled original *bukm* of the 1960 murder case measures about eight inches wide and is thirteen feet long. The great length of many such documents is due to their extensive evidence sections and also to their interspersed records of litigant responses. The relative proportions of the segments in the murder case are as follows: of a total of four hundred thirty-four lines, the opening claim and the initial response together extend for twelve lines and, at the other end of the document, the judge's concluding judgment runs to twenty lines. The massive middle sections of such documents, approximately four hundred lines in this case, are devoted to the recording of evidence and related responses by the parties.

The mid-century Yemeni shari'a court *bukm*, or final judgment record, comprised several named sub-genres. These included the opening claim and response texts, any later responses (by either party), primary evidential texts (including, as sub-varieties, both oral testimony and a range of written documents, including notarial instruments), and the judge's concluding ruling itself (*bukm* in the narrow sense), all of which were quoted in the terminal judgment record. Discursively, a *bukm* of the period had two main parts. The first of these, starting at the beginning with the initial claim and response and extending through the evidentiary struggle and including any ensuing responses from the parties, was the main part of the process known informally as the "take and give" (*al-akhdh wa al-radd*) and formally as the "litigation" (*al-muhakama*). The typically much smaller second part was the judge's ruling, the part known as the *bukm*, or the *jazm*. Between the two parts a transition occurred from the judge listening to the parties in their litigation (*muhakama*) to the parties listening to the judge give his ruling (*bukm*). This transition was from the open-ended, undecided plurality of the competing verbal exchange (*al-maqal*) to the final, decided unicity of the ruling (*al-qawl*). In the records of

litigation, judges of the mid-century period (unlike contemporary Yemeni judges) are relatively passive, intervening only rarely, but they turn active to commence the ruling proper. As they do so, the general language of the text shifts from the third to the first person, and judges' voices change from the "We" of their infrequent earlier questions during the litigation proper to the "I" of judgment.

Behind the preparation of these rolled originals were the record-keeping practices of the court. Two types of shari'a court registers were associated with Yemeni lawsuits, one for ongoing entries as the court processes unfolded, the other for the recording of completed case records. These two registers, known as the "entering register" (*daftar al-dabt*) and the "recording register" (*daftar al-qayyid*), are described in general terms in the court "Instructions" issued in 1936 by Imam Yahya (d. 1948). "Entering" registers contained the ongoing minutes of court litigation sessions, including claims and responses, evidence presentations and any other submissions or statements, oral or written. If a lawsuit continued for more than one session, as many did, the records for the case appeared on different days with intervening entries from other cases. Cases that were dropped, as many were, left incomplete records in this register. In contrast to this open-ended and interspersed method, "recording" registers contained completed and whole texts, either of the finished litigation or of this plus the judge's ruling, constituting a final judgment record, the document known as a *bukm*.

This two-register pattern also was standard in the larger Middle Eastern history of the shari'a court, as both Little (E.I. *Sidjill*, 539) and Hallaq (1998:420) have noted. Where the first type of register contained the court "minutes" (*mahdar*), the second (referred to in the Ottoman period as the *sijill*) comprised the overall record of the case, the completed minutes together with the judge's ruling. In the same terms, Nawawi (d. 1277), the noted Syrian Shafi'i studied in Lower Yemen, made a distinction between the minutes, written in conjunction with court activity that does not culminate in a judgment, and a second type of register for the recording of judgments rendered. In both interpretive and physical senses the text of the second register was derived from the first. Interpretively, the minuted record of the litigation (*muhakama*) was the substantive basis for the judge's ruling (*bukm*).¹ Physically, the scattered minutes of claim, response, evidence and later responses entered in the first register were gathered together and then transferred to the second register where they were joined with the judge's ruling as the final record text.

If the two-register format of mid-century Yemen was similar to that of the former Ottoman system, the relatively verbatim style of the final Yemeni

judgment record was not. In contrast to the extensive final judgment records produced in the mid-century highlands, final Ottoman records for lawsuits were characteristically brief, even radically summarized, such that one commonly finds entries for more than one case on a single register page. A basic difference between the two recording traditions is that where the Yemenis carried the fullness of the minutes entered in the first register over into the second register (and also onto the two 'original' rolls issued to the litigants), the Ottomans did not. This meant that, in Ottoman as opposed to Yemeni practice, evidence not constituting the basis for judgment, not to mention the rambling statements of one or both parties (if such occurred in Ottoman courts), was cut from the final case record. It also meant that there was little room in final Ottoman records for transcripts of witness testimony, which instead was concisely characterized by the court. Finally, it meant that the litigants' opening claims typically were restated by the Ottoman court rather than reproduced with any verbatim character.

At the end of a lawsuit, an important textual transfer thus took place between the two principal types of court registers. In Yemen this involved a form of wholesale quotation. This transfer began with the court secretary bringing together the dispersed entries of separate court sessions into an initial "draft," the first unified record of the litigation process. This draft then had to be reviewed, corrected if necessary, and approved by the judge before the final records could be written. These behind the scenes textual preparations involve the court secretary and the judge working together, as is envisioned in Article 11 of the imam's "Instructions." The relevant passage begins by checking off a series of procedural steps:

after the statement of the two sides that the litigation (*muhakama*) had ended, and after their explicit request for the ruling (*hukm*), and their refusal of a settlement, and [then] the occurrence of the ruling from the judge, the secretary should extract a draft of the judgment record from the entering register and show it to the judge for him to correct it. After he has finished this correction he places a sign on it indicating that the secretary is permitted to transcribe it from the draft and put it on bond, the official paper on which an imamic order was issued [to the effect] that judgment records must not be written except on it. And two versions or more according to need, will be written of it, one version for the party ruled for and one version for the party ruled against. And the judge must write the text of the ruling in his script in the entering register and in the draft.

Article 7 of the “Instructions” provides a view of the judge’s control of the shari’a process, beginning with the claim, and it also points to the open-ended quality of such litigation:

The secretary takes down the claim, in the presence of the judge, in the designated register, until the judge states that the claim has been validly completed. The claimant is required to place his signature at the end of it. And likewise the response: the defendant is required to place his signature under his response. Likewise, the witnesses place their signatures under their testimonies. And [it continues] thus until the litigation is ended and the litigants request that the judge rule as to what is required in their dispute, since they have no more defence other than what has taken place, and no evidence other than what they have presented. And they also place their signatures on this last request.

Witness Testimony

Court register entries also included directly reported verbatim texts, initiated by such formulas as “In his words,” in the case of speech, or “In its wording,” in the case of a writing, and also a variety of indirect reports. Testimony is consistently framed in the third person, past tense. According to standard word order in Arabic, the entries begin with the verb, “Bore witness” (*shahada*), although sometimes this is preceded by “Appeared” (*badara*). The witness’s name is then followed by the crucial marker of indirection, “that” (*anna*). Thus an entry from the murder case begins, “Muhammad bin Muhammad Nasr from the town of Ibb appeared and bore witness to God that between the defendant... and the [claimants’ witnesses] there was pre-existing enmity caused by a dispute between them about land...”

Witnesses always were witnesses “for” one side and there is no indication of an institution of professional witnesses. Approached and prepared in advance of a session, witnesses were presented in court as part of the unfolding of that side’s case. In addition to reports of things seen and heard, testimonies also represented efforts to introduce legally relevant facts and language. In court, spoken statements by the witnesses were converted into written minutes. The resulting entries contain what must be considered the essential information in the testimonies from the perspective of the court. If some form of editing, selection or restatement occurred, this would be the work of the judge and the secretary together and would vary depending on the occupants of these posts. In post-revolutionary court practice that I have observed, judges commonly restated testimony for the record.

The basic template for entries of a single individual's testimony could be elaborated, as in entries for groups of witnesses. The entire, somewhat longer report on the opening set of three eyewitnesses for the claimants in the murder case is:

There appeared from the side of the claimant and his wife [three named witnesses] from the village of... locality of... Each of them bore witness to God, individually, in the formula of the *shahada*, that a sheep owned by [the deceased] entered the property of the killer, namely, the defendant Muhammad b. Muqbil Ahmad, a terrace named al-Dar, and on that property were young qat plants known as "*badatha*," and when Muhammad Muqbil saw the sheep on his property, he came from his house, took the sheep, and dragged it towards his house. And when 'Abduh Muhammad 'Aziz saw him, he ran toward him and wanted to take the sheep from the hand of the defendant. Muhammad Muqbil Ahmad simply pulled out his dagger and stabbed 'Abduh b. Muhammad, a stab which he died from, in his side. The defendant killed 'Abduh b. Muhammad 'Aziz with intent and with enmity, and this at noontime, Monday the twenty-third of Jumada II, the year 1380 [1960]. Then the killer fled toward his house. Each of them also bore witness that the killed individual's heirs are limited to his father and his mother and that he has no heir except for them.

Clearly the product of summarization, but quite detailed nevertheless, and seeking to establish both the legal fact of a witnessed murder and the status of the claimants (as the victim's only heirs), collective entries such as this covered witnesses who appeared in the same session and who testified to the same facts. These witnesses would have appeared serially and, ideally, according to the doctrine, separately. The fact that they could be represented as having testified to the "same" facts is anticipated in the formal chapter on evidence, where the underlying assumption in the basic doctrine of "differences" is that the testimony of the normative two witnesses on a given side should be the same. More commonly, such sameness was accounted for by means of the concise formula, "like" (*mithl*). Following a full text entry for a preceding witness, the record of the "same" testimony given by the next named witness would be that he "bore witness to God like the one before him." A subset of these entries of sameness, however, recorded small items of divergence, in phrases that begin with "except" or "he added."

First person direct quotation also appears fairly frequently in these records of testimony, but always couched within a larger third person frame. In the recording of testimony, first person quotation captured authoritative evidential passages. There were even attempts to reproduce relevant features of regional dialect. Since there were no quotation marks in the handwritten Arabic of this place and period, the only indicators of direct quotation of speech in testimony derive from the verb “to say” (*qala*). In the following example, from a marriage case, the shift from the third person frame of the entry (“bore witness... that”) to the first person, “I said” (*qultu*), occurs via the third person report, “he said” (*qala*), resulting in formulation “he said, I said...” In this example there is direct quotation within the direct quotation. In the report of the statement made in court (“he said”), the witness quotes himself (“I said”) about a statement that he made at a prior point in time (“Why is that girl crying?”):

Al-Faqih ‘Abd al-Wali al-... bore witness to God that he arrived in the village of... in the month of al-Qa‘da, in the year 1376 [AH], and found al-Hajj Ahmad Naji [the claimant] gripping the daughter of his brother, and she was crying. And he [the witness] said, “And I said to him, ‘Why is that girl crying?’ And he [the claimant] said, ‘We want to contract for her with the boy ‘Aziz.’” And he said to the witness, “come with us into the house to be a witness to the agency and the contract.”

To read such an entry is to be confronted with concrete choices made by the court regarding indirect and direct modes of reporting testimony. Like choices as to the reporting of substantive detail, we may presume such discursive decisions that were also connected to perceptions of legal significance. All such recording choices had direct implications for the narrative contents of the record. The final judgment rendered in the murder case demonstrates that judges found a certain level of detail, especially differences among details, useful in reaching decisions, and also that judges explicitly understood or presumed that some such testimonies and their narratives were false. Relatively fine-grained reporting is a characteristic of these mid-century minutes, but for much of this rich record there is no explicit evaluative response in the rulings from the presiding judges. Many assertions, including for example an accusation of magical attack, or even one of murder, thus remain just that, assertions, mentioned in passing in the transcript but unnoticed by the judge’s ruling. Isolated testimonies can be better understood, of course, when they are reinserted into the flow of evidence presentation and into the ongoing construction of the presenting party’s legal argument and narrative.

Litigant Responses

Another important view of the significance of testimonies, however, is revealed in critical responses from the opposing party. Reported statements by the two parties loom large in these shari'a records. Their particular significance in mid-century Yemeni shari'a courts has to do with the fact that there was no institution of interrogatories, as is common in Anglo-American practice (and among contemporary Yemeni lawyers and prosecutors). Witness testimony was neither framed nor generated by questions, nor was it followed by confronting questions. In this historical period, the defending party, his or her legal representative or a court appointed delegate had to be present at the giving of testimony, but there was no concurrent questioning or examination whether direct or cross. Instead, at a later interval, after the testimony was concluded, the opposing party or that party's legal representative could attack the recorded evidence in a "response" (*ijaba*). Special witnesses (*jarh* witnesses, again, non-professional) also could be brought after the fact to attack the credibility of an opponent's witness (for a detailed discussion of this institution, see Messick, 2002). For their part, shari'a judges of the era (again, unlike contemporary Yemeni judges) did not direct or elicit testimony by posing questions, as is common in continental European procedure. In the litigation records of the period Yemeni lawsuit, shari'a court judges appear to be relatively passive. Aside from the necessary overall direction of the proceedings exercised by the judge, which is indicated as such in the record, there are only rare entries containing questions posed by judges to witnesses, and these only for minor clarification.

Reported statements by the parties begin with the opening claim and the response. At the opening of a record, after the court is identified and the claimant and the defendant are named and, if necessary, their identities verified, another variant of the verb "to say," namely, "saying" (*qa'ilan*), introduces the entry of the formal claim (*da'wa*). However, since the standard phrase, "saying in his claim," which is in the voice of the court or the record itself, typically is followed by the marker of indirection, "that," the speech act indexed in "saying" is immediately converted to a third person report. Occasionally, within reported *da'was*, there are brief switches to the first person, such as "This is my claim," which appears at the end of the entry of a long and otherwise third person-framed claim in a commercial case, which begins, "Saying in his claim... that the claimant purchased..." In a case over ownership of a house, the claim is mixed: "Saying in his claim that the defendant is holding my share from my father..." At one juncture in this lengthy detailing of a property claim, there is a brief change to the first person to meet the

specific doctrinal requirement of pre-emption. This part of the claim states that, if it turns out “that the defendant has purchased anything from any of the heirs, then I am pre-empting.”

In many cases, the required initial response (*ijaba*) from the defendant is formulaic, consisting of a one-word denial (*inkar*) of the claim a denial without which the litigation proper would not have been engaged and staged, and the court record created. Initial responses were required in the sense that an adversary was brought in by force if necessary and at the opening of the proceedings the judge would turn to the defendant and ask “What do you say to that statement?” Slightly more elaborated initial responses consist of a concisely introduced rebuttal or counter argument, or a partial acknowledgment. All initial responses are phrased in the third person. The one-word type states that the defendant “responded with a denial;” those that go further do so employing the marker of indirection, “responded... that...” In a ‘compound’ case, the party that initially responds as the ‘defendant’ – the side that does not present evidence in the ‘simple’ case model – also goes on to present evidence.

After the initial required response to the claim, and after some evidence presentation, further litigant statements commonly appeared in these records and they, too, were called “responses.” They were different from the first response from the defendant, however, in that they were reactions to evidence and opposing statements rather than to the original claim. They also were optional rather than required, and they could come from either party. Some later responses were very short, such as, in the murder case, the defendant’s reported reaction to the first group of witnesses against him. The record states, “the defendant responded, after hearing the testimony, in his words, ‘I am not denying’.” The introducing phrase, “in his words” (*bi-qawlīhi*), now using the noun *qawl* (word, saying, opinion, and when given by a judge, ruling), marks the direct quotation of spoken words. These words uttered by the defendant were quoted directly since they constituted an apparent acknowledgment, which could prove decisive in a ruling. Later responses could be quite lengthy and could comprise, beyond a variety of stock laments and exhortations, detailed critiques of opposing evidence, characterizations of the party’s own evidence and arguments as to the relevant legal issues.

Verbatim quotation of such litigant responses underscores their significance in the legal culture of these record-keepers. Regardless of length, such responses always were entered in their entirety, apparently without editing, and often in the first person. Where entries on witness testimony sometimes quote actually uttered words amid otherwise edited or summarized entries, it is notably in connection with reported statements by the litigant parties that these court

records appear to enter the fullness of uttered words. Had these lengthier responses been given orally in court, their simultaneous verbatim transcription certainly would have taxed the secretary. The longest, however, together with some of the more detailed claims, took the form of written submissions to the court, and were most likely prepared, their narratives re-structured, by a party's legal representative (*wakil*), although, like American court motions, always in the voice of the client litigant.

We correctly think of the lawsuit records issued or retained by courts as the products of court personnel such as judges and secretaries who interpretively and physically managed their construction. But to the extent that verbatim notation occurred, an important measure of narrative power also pertained to the litigants themselves. Who wrote these court records? Literally, the secretaries and judges. Who authored them? Again, these records were created under the auspices of the courts and court officials. Yet, by design, this particular historical style of record-keeping provided an open-ended forum for extended expression by the litigants and, with direct quotation, included the precise language of that expression. If the final *hukm*, in one sense, was the all-incorporating "utterance" of the presiding and signing judge, and, in another, the recording and drafting work of the secretary, in still another, but less recognized sense it was the dialogic creation of the litigant parties, and, in many instances, their talented *wakils*.

Entered Documents

Written documents also regularly appeared in these court records, as writings within writings. Among them there were two routine types. Standard legal instruments presented as evidence and the written texts of the just mentioned litigant responses, although many other written documents also were entered. Legal instruments presented as evidence in litigation generally were not quoted in their entirety in the minutes, but were selectively inventoried for their significance by the court. This was perhaps due to the fact that these texts were relatively standard, varying mainly as to their substantive details. Recording formulas, such as "the gist (*haasil*) of it" or words from the root h-k-a, "to relate" or "to narrate," opened indirect passages on such texts, which probably also included some inevitable bits of quotation. Mechanisms for the direct or verbatim entry of writings included such formulas as "its wording" (*lafẓihi*, or *ma lafẓahu*) and "letter for letter" (*harfiyan*). Alternatively, written documents entered verbatim could be introduced by the phrase "He said in it" (*qala fiha*). In the murder case, for example, it is recorded that, "the defendant presented a written document (*waraqah*). He said in it, "The defendant responded that..."

Various other uses and combinations were possible to indicate full quotation of such writings: e.g., for the commercial case, “Here is the text (*nass*) of the reply, letter for letter... its wording, after the Basmala...” Partial quotation also occurred. “He said in it” opens a quoted passage from a document in a landed property case, but then the record reports a skipping, “the remainder of the text continues on until he said, ‘...’”

Entries of certain important written texts were accompanied by recorded remarks by the court about signatures and appended writings, which usually involved notes of various types located in the space above the main text. These observations were recorded because they bore on the authority of the main written text. Reading over the shoulders of the court officials, the historian may benefit from these detailed assessments and verifications of key reported documents. Having completed the entry of a lengthy letter, for example, the record of the commercial case states, “below it is the seal of [name] and [name], and the seal of [name]. On the upper part, in the handwriting and signature of the Governor [name], God protect him, in its wording: ‘...’” Following the entry of a document in a marriage case the minutes add, “with the signature of its writer [name] and, under the signature of its writer, the authentication (*tasdiq*) in the hand and signature of the witnesses [names], and on the upper part of the document the authentication of the District Officer of [place].” After the partial quotation of a legal instrument in an inheritance case, the next line states, “On this is the signature of [the litigant] and its witnesses, and on the upper part of it, from [the same litigant], is that which conveys his satisfaction... in his handwriting and signature.”

Dialogic Narratives

In the course of litigation, within the constraints of the specific archival culture and the given genres of legal texts, litigants also contested and actively deconstructed their opponents’ cases. In endeavouring to refute the other side’s narrative, a litigant also reaffirmed and redirected his or her own case. Presided over by the judge, again with some degree of largely implicit reference to the doctrine on shari’a proceedings (including the *fiqh* chapter on “Judging”), the two sides engaged in a “take and give” that reciprocally impacted their respective legal narratives. In this sense, narratives in the court setting were not static objects, nor was their truth value known until the very end of the proceedings, when it was determined by the judge’s ruling.

In the court record of the 1960 murder case, litigant responses undertake several tasks. They enter into critical dialogue with already presented testimony from the opposition, restate and sometimes adjust their own versions of the facts

and events, and implicitly and explicitly invoke legal principles. Unlike the lengthy statement from the claimants, which appears at the very end of the litigation record, the major response from the defendant indicates early on in the trial some of what the defence will attempt to do in the remainder of its case.

This thirty-six line statement text from the defendant is mainly in the first-person and, as with pleadings or motions in American courts, it was most likely written for him. Such texts are among the many perishable writings associated with the legal process. Having no status outside of the specific litigation context, their originals not otherwise preserved, we know them only from recorded entries. Earlier, I referred to the line introducing this entry which indicates that what follows is in direct quotation: "After [this], the defendant presented a document (*waraqā*). He said in it:"

The defendant responded that the wording of the testimony of the witnesses presented by the claimants indicates the enmity in their hearts which led them to perpetrate false testimonies and to attribute the crime of murder to me. I am innocent of this. The enmity is continuous between me and them since the dispute was with [being handled by] Sayyid 'Abd al-Wahhab b. Hasan al-Jalal, and it has gone on until the present date, according to what is contained in judgments from al-Jalal and the Judge of the Province of Ibb and Our Master the Governor of Ibb Province. Then the Judicial Council ordered, [together] with His Majesty, Commander of the Faithful al-Nasr [Imam Ahmad] when he was Heir to the Throne [i.e., before 1948], God support them, until this now.

Here the defendant refers in some additional detail to the prior history of conflict, which had been described in more substantive terms by his initial defence witnesses. The case had been handled first in Ibb then in Ta'izz by the then Heir to the Throne. The legal assertion is that prior animosity had culminated in the present case: "I could not have imagined," the defendant states, "that it would reach, with the opponents, the situation of attributing the crime of murder to me."

The defendant's document goes on to critically address elements of the opposing case and to flesh out his alternative narrative. He first claims not to have been at the scene of the murder: "I was not present, nor did I come to the property claimed to be the site of the murder. Instead, I was in my house trusting in the security of God and the security of the Mutawakkilite [imamic] government when the first thing I knew was the attack by the aforementioned

witnesses and their helpers against my house.” He continues, “Their intention was to tear me apart, and they stripped my dagger from me and they did atrocious things to me.”

Next he cites contradictions in the purported eyewitness testimonies presented by the claimants. “One indication of their falsification,” he asserts, “is that the place where the murder is claimed to have occurred is at a distance from the village; the place of the murder cannot be seen from it.” This then is related to specific detailed examples of the testimony given for the claimants: “Among the witnesses [were individuals who] stated that he was with his associates, whose names are enumerated, at the door of the mosque, and some of them explained that there was a big black rock there, etc.” The defendant thus juxtaposes the impossibility of seeing the site of the murder with specific examples drawn from his opponents’ eyewitness testimony, namely, the report that a witness observed the acts from the village mosque and that another gave physical details about the scene of the crime. Looking back at the claimants’ evidence entered earlier in the record, as the defendant must have, we can see that the references here are to Witness No. 6, a certain ‘Abd al-Ghani, who spoke of standing in front of the mosque, and to Witness No. 8, who mentioned a “large black stone.” ‘Abd al-Ghani is one of the claimant’s eyewitnesses who were not implicated in the earlier defence testimony regarding the history of conflict with the defendant.

The defendant also points to differences in the opposing testimony. According to the evidence doctrine (Messick, 2002), “difference” in witnesses’ testimonies can make it impossible for the judge to give a ruling for the claimant. “Their testimonies,” the defendant states, “differed to the extent that some of them stated that I fled without it being verified that [a single] one of them was present in the place claimed to be that of the murder.”

In connection with the alleged murder weapon the defendant states:

It is well-understood that murder is the greatest of the “great ones” [i.e., sins] and the most dangerous of matters, and their stripping of my weapon, the dagger, from me on an order from one of them so that I could not defend myself against them with it, and their holding [it] with the intent of establishing the attribution of an accusation of murder to me is obvious. Whereas the dagger was found on me, and I deny that it is possible for them to establish the accusation against me and I am here ready (to present) evidence about the aggression of the group who have made themselves witnesses against me with the attack on my house and on me, establishing their enmity and its continuance to this date.

The defendant's text then counters the report of the District Officer (which earlier had been quoted into the court record), focusing on the question of his presence and on its (recognized) non-evidential character. "I could not have been more amazed at what the District Officer wrote without my presence and without questioning me, sometimes claiming that I was present, sometimes saying that I was not present." The District Officer simply "recounted what was stated to him by those who he assumed to have been present and [acting as] verifiers for him, and this without either the testimony formula or my presence."

The foundational language of intent (Messick, 2001) is woven through the defendant's statement (e.g., "Their intention (*qasd*) was to tear me apart..."; "... with the intent (*qasd*) of establishing the attribution of an accusation of murder to me"). As for the formal claim of homicidal intent made by the claimant side, the defendant states, "It is well-known that the witnesses said in their testimony, 'with intent and enmity,' but I do not know what their motive (*mustanad*) [in this testimony] is if it is not [their own] strong enmity." In connection with the matter of the sheep, the defendant criticizes the claimants' purported precipitating motive:

They claimed that there was a sheep that entered my property, etc., and they made this their motive. I do not know whether the sheep was killed or lived; if it lived they did not make this clear. Whereas they claimed that the conflict concerned it [the sheep] and that insults occurred about it, and that the aforementioned [deceased] was attached to it. All this is an absolute lie and strong enmity by which they wanted to achieve my murder with their claim by shari'a means. This is a satanic stratagem without a trace of validity.

He asserts that, "this murder, with the killing claimed to be attributed to me, does not have between me and him [the deceased] what is required of a murder with 'intent and enmity' as they claim." This, because the murdered individual was not one the defendant's long-time adversaries, individuals who he says did have the requisite enmity: "He [the murdered man] was only one of the helpers of the enemies, no more." Looking forward in the litigation, he states, "the evidence I will come with in the way of judgments presented and testimony of just individuals will reveal the truth and establish the matter otherwise than in their enemies' testimonies."

As with the responses of the claimants, invocations of the divine set the tone. At one point, the defendant states, "God the Sublime and Almighty wills

that the truth appear and the false be rejected, even if the aiders of falsehood are many and the aiders of the truth few.” At another point, he states that “The decision is for the Shari’a of God the Sublime.”

Finally, the defendant’s written response opens an effort to specifically discredit certain opposing witnesses. In the two-part mechanism of formal witness criticism, this is the “wounding” (*jarb*) counter to *ta’dil*, the earlier entered attestations of the justness and probity of the claimants’ witnesses. This, however, is talk about *jarb* rather than the *jarb* procedure itself, which must be carried out by witnesses. Here the discrediting also remains formulaic: “Most of the witnesses [for the claimants] are among those who do not pray nor fast, and do not forbid the forbidden, and do not permit the permissible, and do not deny the denied.” Specific attacks by *jarb* witnesses for the defence will not come until late in the court sessions. The defendant’s statement closes with a precise quotation of a technical doctrinal point, confirming that this aggressive pleading was prepared by a trained legal mind. He cites a principle from the standard Zaydi *fiqh* manual, *Kitab al-Azhar* (quoted here in italics), concerning the important privileging of the negative *jarb* witness over the positive *ta’dil* witness: “[the Judge] well knows that *the disparaging witness takes precedence, even if the supporting witnesses are many.*”

Conclusion

Overall, the ‘verbatim’ and otherwise detailed character of these records — features of the greatest interest to the social historian in search of the views and ‘voices’ of actual individuals and their circumstances — had to do with aspects of the judicial processes of the period in the mid-century highlands. The great length of some transcripts reflected the fact that they fully accommodated the occasional lengthy statements made in the course of the trial by one or both of the parties to the case; and also that entries were made for every witness, even when, as in the 1960 murder case with its forty-five witnesses, the numbers greatly exceeded the very limited requirements of the doctrine (i.e., two just witnesses). By design, in short, specifically with regard to such aspects, the process was intended to be exhaustive. The relevant caution for one working with such records, however, is not to be fooled by what seems to be a full transcript, or by the apparently ‘unscripted’ nature of such materials. Despite their great length and, at times, rambling quality, these texts were patterned in expression and fundamentally determined by the fact that they were uttered in, and were intended to address the shari’a court judge.

The specific constraints of the legal record involved two broad dimensions. The first pertained to the general archival culture, the existing usages of

recording and creating legal texts. Behind these usages and potentially informing them lay, second, the formal doctrinal constraints, which might directly structure drafting practices. Thus a claim text, for example, would adhere to locally accepted notions of what a claim text should look like, while it also could be structured, explicitly or implicitly, by relevant principles found in the chapter on "Claims" in the law books (the *fiqh* literature) (e.g., al-'Ansi 1993 [1940] vol. 4). Much of the structuring by the formal doctrine would be implicit, however, since background doctrinal principles did not need explicit restatement in applied texts. Regarding claims, to continue the example, an important doctrinal discussion concerns which of two conflicting assertions initially presented to the judge would become the defendant side in the litigation and which the claimant side. The judge decided this depending upon which of the two initial assertions was most at variance with what appeared to be the status quo: the closer to the apparent status quo assertion would become the defendant side and the furthest the claimant. This decision had important implications because the claimant side (in simple litigation) assumed the burden of proof. All this occurred, however, prior to the onset of litigation, and, although it might be squarely based on the doctrine, no trace of this prior decision by the judge would be found in the court records. There were other doctrinal considerations regarding claims: for example, the evidence presented must "fit" the claim, and the eventual ruling by the judge must be in relation to it. These and many other doctrinal concerns implicitly structured the proceedings and its various texts. Thus evidence texts, including both oral testimony and written documents, also had to adhere generally to what was accepted form in the local legal regime while they were potentially also, if largely implicitly, structured by the dictates of the relevant doctrinal chapter, "Testimonies" (see Messick, 2002).

Social historians who seek to extract data or more complex "stories" from legal records must be mindful of the dictates and emphases of specific archival cultures, aware of the forms imposed by legal genres and also attentive to ongoing dialogic developments between opposing narratives in the course of a given trial. The overarching archival culture and the available genres set the conditions of possibility for legal narration. Courts differ markedly as to their archival cultures, and this is true as well within legal traditions. Thus while there are important structural similarities between late Ottoman and mid-century Yemeni jurisdictions, their final documentary products were strikingly different. Pre-and post-revolutionary Yemeni court records also are markedly distinct, the latter notably having introduced various formal interrogatories, by lawyers, prosecutors and judges, among many other 'modern' features. Even where the recording tradition is characterized by a fullness or

exhaustiveness, as in the Inquisition records famously read by Carlo Ginzburg for *The Cheese and the Worms*, at the risk of serious misunderstandings the extraction of the social historical account should not simply override legal-discursive features, that is, the limitations and possibilities imposed by the records themselves. For those who would seek to understand the legal system in question in its own terms, an understanding of its various levels and types of writings is not epiphenomenal, but rather foundational to the analysis.

What is left of the opposed courtroom narratives after assertion and counter-assertion, attack and counter-attack? What is left is the judge's ruling, which may identify one of the narratives, or at least a relevant part of it, as being in the right, providing a basis for the ruling. Having read such a decisive concluding ruling, a reader of the judicial record may return to the beginning of a litigation and then pass back over the testimony and argument, now with a sense of what has been authoritatively determined to be true, and what false. But it may not be clear from the court record whether the ruling actually was implemented, or whether it was accompanied by other, supporting actions, such as a further settlement, which might shed different light on the conflicting narratives of the litigation.

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THE VIOLENT SCHOOLMASTER

The ‘Normalisation’ of the Dossier of a Nineteenth Century Egyptian Legal Case

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Introduction

On nine Safar 1280 [26 July 1863] ‘Ali Ghunaym, a seven-year-old pupil of the Qur’an school of the village of Dimas, Daqahliyya province, was beaten by the head master and the assistant teacher of the school, as a result of which his arm was fractured. His grandmother reported the case to the village head (*‘umda*), who sent the boy with one of his men to Mit Ghamr, the centre of the administrative district. The following day he was examined by the government doctor, who, in his turn, sent him to the provincial hospital in al-Mansura for treatment. When the boy came out of the hospital, the fracture had healed but the arm was paralysed.

We know of the incident because it gave rise to legal proceedings that left written traces. The first time I came across the case was while working in the shari‘a archives located in the *Dar al-Mahfuzat* in Cairo. There I found the records of a shari‘a sentence (*i‘lam shar‘i*) passed on 28 Rabi‘ al-Awwal 1280 [12 September 1863] by the qadi court of al-Mansura and awarding financial compensation for the boy’s injury.¹ Some years later I came across the minutes of a session of the highest judicial council at the time, the *Majlis al-Ahkam*, dated 15 Shawwal 1280 [24 March 1864], in which it was decided to punish the offenders in the same incident.²

In the following, I will first discuss the two documents and point out the differences in their textual structure and relate them to the different functions of both courts. My main aim, however, is to compare and analyse the narratives found in them. I will show how the narrative was constructed during the court

proceedings and went through a process of ‘normalisation’ during the investigation and the trial. Those who took the statements of the complainants, the witnesses and the experts and finally compiled the dossier to be used by the courts, wanted to produce a ‘clean’ account of the facts. That is to say that the dossier must show that the relevant procedural rules had been followed and that the facts are presented in such a way that the substantive legal categories to be applied are clear. In order to do so, legally irrelevant facts were omitted and certain versions of the events were implicitly rejected in favour of others that presented the facts in ways that were more plausible in the eyes of the investigators and clerks.³ The text of the record in its “raw” form, therefore, is a construct and does not necessarily reflect ‘what really happened.’

The Qadi’s Sentence

The proceedings before the qadi were adversarial and the record tells us what happened during the public session and contains, apart from the judgement, only the statements of the parties and the witnesses made during this session. We are left in the dark about the investigation before the trial, since the record is constructed on the assumption that the proceedings are civil litigation, between two essentially equal private parties. The sentence settles the dispute between them. The document is formulaic and includes only legally relevant information. Moreover, it is a public document since authenticated copies are handed over to the parties so that they could enforce the sentence or defend themselves in case a plaintiff who had lost the suit would again sue the defendant for the same issue. As a rule, these sentences have the following basic structure:

Introduction and identification of the parties The plaintiff’s claim The defendant’s reply The plaintiff’s rejoinder Evidence The sentence In the first part, the plaintiff and the defendant are introduced with their own and their father’s name and their places of residence. Their identity and, in cases of representation at law (e.g. if parties act as agents or guardians for others), the ground of their authority to act as such are established by the testimonies of witnesses. In this case the plaintiff was ‘Ayusha, the boy’s grandmother, who had become his testamentary guardian (*wasīyya*) when his father died shortly after the incident. The defendant was ‘Umar Hassan, the blind assistant teacher.

After the identities of the parties had been established, ‘Ayusha introduced the following claim:

My grandson, who was a pupil in the Qur’an school of Mustafa al-Aswad in the village of Dimas, was slapped in his face by this Mustafa, and was then handed over to the aforementioned ‘Umar [the defendant]

in order to recite the Qur'an. 'Umar, then, hit him on his right arm with the *falqa*⁴ that was there to be put on the legs of the children for chastising them, as a result of which the [boy's] ulna (*'azam al-mirfaq*) was fractured. After treatment in the hospital, the arm remained paralysed and could not be used anymore. Therefore I demand my due according to the shari'a.

In reply, the defendant said at first:

Mustafa first hit the boy with a stick and subsequently handed him over to him, having given permission to chastise him further. Then I struck the boy with a stick, aiming at his back, but without knowing where I hit him, due to my blindness. However, I did not break the boy's arm.

Later, however, he admitted that the boy's injury was the result of either his or Mustafa's beatings.

It was uncontested that both the assistant teacher and the headmaster had beaten the boy. The grandmother claimed that the assistant had caused the fracture, whereas the assistant maintained that it could have been the result of either beating. In her rejoinder, however, the plaintiff blamed only the assistant and exonerated the headmaster. Although the rules of procedure did not require so, since the plaintiff had not introduced a formal claim against him, the headmaster, who apparently was also present during the session, declared that he denied all responsibility for the fracture. The qadi regarded the assistant teacher's reply as a denial of the plaintiff's allegation and requested that the latter produce proof, which she could not. When the qadi exacted the oath of denial from the defendant, as prescribed whenever a plaintiff is unable to substantiate his claim, he refused to swear it. As a consequence, the judge found for the plaintiff. In order to determine the amount of damages to be paid, he had recourse to experts, who stated that the price of a slave with a similar defect would be one third less than that of a sound slave. The qadi then fixed the compensation for the loss of the use of the boy's arm at one third of the full blood price (*dīya*). The assistant teacher was ordered to pay the amount of 5.031 piasters and 10 fidda within one year.⁵ This must have been a heavy financial burden for him, since it represented the value of five horses, or 11 donkeys, or seven months' salary for a high court mufti.⁶ The record mentions that the defendant paid the sum of 810 piasters and 3 fidda to the grandmother.

The Decisions of the Regional Majlis and the Majlis al-Ahkam

Structure of the text of the minutes of the Majlis al-Ahkam

The minutes of the session of the *Majlis al-Ahkam*⁷ (*madbata*) where the case was discussed are more complicated than the qadi's sentence. They contain a summary of the dossier and the verbatim text of the final decision. The document consists of the following elements:

- Introduction
- The reporting of the case to the authorities
- The medical examination of the victim
- The investigation
- Statement of the accused
- Statement of the boy's grandmother
- Interrogation of witnesses proposed by the grandmother
- Second interrogation of the accused
- Medical report on the healing of the injury
- Trial before the qadi
- Claim
- Reply
- Evidence
- Qadi's sentence
- Payment
- Recording the sentence
- Investigation of the handling of the case by the officials concerned
- The *'umda*
- The deputy chief of the district
- Inquiry into previous convictions
- Approval of the qadi's sentence by the mufti of the council
- Decision of the regional council of al-Mansura
- Regarding the assistant teacher
- Regarding the schoolmaster
- Regarding the *'umda*
- Regarding the deputy head of the district and the district's clerk
- Approval of the qadi's sentence by the mufti of the *Majlis al-Ahkam*
- Decision of the *Majlis al-Ahkam*
- Regarding the sentence of the council of al-Mansura
- Instructions for the future
- Conclusion

The recorded minutes of the *Majlis al-Abkam*, like the qadi's sentence, contain a legal decision and the grounds which have led to it. However, as a result of the difference in functions of the two courts and the procedures followed by them, the documents have different structures. The minutes of the *Majlis al-Abkam* do not register what happened during a public trial, but give a chronological narrative spanning, in our case, a period of about eight months. It tells the story of the investigation of the case by the various administrative authorities in all its ramifications, beginning with the notification of the local authorities, and records the statements of all persons involved in the case, both the suspects and the witnesses. The minutes also include the judicial decisions taken at the various levels. They end with the text of the judgement passed by the *Majlis al-Abkam*, endorsed by the stamps of the members' signets. This final decision is not taken after a public trial, but entirely on the basis of the documents, although the councils were entitled to interrogate suspects and witnesses in order to clarify certain points.

From the minutes it is clear that the proceedings before the qadi were incorporated in the procedure of the state courts (see no. 6 in the schedule above). In cases of homicide, wounding, sexual offences and verbal abuse, a trial in a qadi court, initiated by a claim of the victim(s), was required in order to establish whether he (they) were entitled to financial compensation or, as private prosecutors, could demand punishment, such as retaliation for homicide or injuries. These shari'a proceedings took place during the session of the local council where the case was tried. At the level of the *Majlis al-Abkam*, the qadi's sentence was checked by a high ranking mufti.⁸

Unlike the proceedings in the shari'a courts that were adversarial and public, those followed by the regional councils and the *Majlis al-Abkam* were inquisitorial and took place in camera. There was no public trial and parties and witnesses were questioned and heard not in order to present their cases, but only to establish the facts and create a dossier, containing all information necessary for the final decision. The minutes we find in the *sijills* of the *Majlis al-Abkam* were meant for internal use and not for the parties. They contain a summary of the dossier that was submitted to the *Majlis al-Abkam* and the *verbatim* text of the decision. The complete dossier with all relevant documents and the decision would be sent to the Khedive's Household (*Ma'hyya*) for an *exequatur*. In the margin of the *sijill* the scribe would record the number and date of the covering letter with which the dossier was forwarded and the date of the Khedive's decision.

The principal elements of the record of our case, which is typical for all cases involving injuries, are the following:

- The investigation of the complaint, consisting of the statements of the plaintiff, the accused and witnesses and medical reports on the victim's injuries and their healing [1-5] (the numbers between brackets refer to the numbered outline of the document above)

- The decision of the qadi regarding the plaintiff's claims under the shari'a; this decision is embedded in the proceedings before the state court and must be approved by the mufti of the council [6, 9]

- The examination of the handling of the case by the executive officials [7]

- The decision of the regional council concerning the punishment of the offender and the officials that handled the case or were otherwise involved in it and instructions to officials for the future if the case gave reason to do so [10]

- The review of that decision by the *Majlis al-Ahkam* [11]

Its scope, evidently, is much wider than that of the litigation before the qadi. In criminal cases shari'a courts dealt with the victim's private rights to damages and to demand retaliation for death of injuries or punitive satisfaction for insults and brawls. In our case the damages for the boy's injury were at stake. The regional councils and the *Majlis al-Ahkam*, on the other hand, examined the matter from the point of view of the administration and the public interest. That meant that they would look into the question of whether the behaviour of all persons concerned, including those charged with the investigation, deserved correction. The *Majlis al-Ahkam*, therefore, not only acted as a supreme court of criminal law, but also as a watchdog overseeing the proper functioning of the administration, meting out punishment to negligent officials and issuing instructions for the future wherever deemed necessary. In addition, the mufti of the *Majlis al-Ahkam* would check whether or not the qadi's sentence was correct. In the following I will concentrate on the issue of the grievous bodily harm inflicted on the boy and not discuss the way the *Majlis al-Ahkam* dealt with the officials who investigated the case.

The Investigation

The case started when the boy's father brought the incident to the notice of the district chief of Mit Ghamr:

A man called Mahfuz Khunda, a resident of Dimas, Daqahliyya Province, informed the district chief (*nazir qism*) of Mit Ghamr that he has a seven year old son called 'Ali Ghunaym, who was being taught the Qur'an in the school of the schoolmaster (*mu'addib al-atfal*) in that village, called

Mustafa al-Aswad, who for his teaching received one piaster weekly. When the boy came to the school on 9 Safar 1280 [26 July 1863], the aforementioned shaykh Mustafa asked him for the tuition, since it had not been paid for three weeks due to his [the father's] absence. His son then asked that teacher (*faqih*) for respite until he [the father] would return from the place of his absence at that time, but then the teacher slapped him with his hand on his face with the result that the signet ring left a mark on it. Thereupon he handed him over to shaykh 'Umar Hassan, the assistant teacher (*'arif*) of the school, to let him recite and to beat him. The latter then also beat him, wielding a stick made of acacia wood [*sant*, acacia nilotica], which was used as *falaqa*, and hit the boy's right arm, which was fractured. Therefore he requested that what he had mentioned be investigated.

This is the first written report of the case we find in the minutes. However, from the dossier it is clear, as we shall see, that this was not the actual beginning of the investigation. The first one to report the incident was the boy's grandmother (who remained nameless in the minutes of the *Majlis al-Ahkam* but whose name we know from the shari'a sentence as she was a party in the trial before the qadi). Immediately after she learnt of the incident she went to the local *'umda*. Upon hearing her complaint he summoned both teachers for questioning. However, he did not make an official report, but sent the boy with one of his men to the district centre, in order that the boy be examined by the government doctor there. The boy's father accompanied the boy and notified the deputy district head, who made a report and ordered that the boy be medically examined. Since the doctor had urgent business elsewhere, the boy was not examined until the next day. He then was sent to the hospital in al-Mansura for treatment and further investigations were carried out by the provincial administration (*mudiriyya*) in that town.

There, the father was asked to confirm the statement he had made earlier at the district centre, which he did. However, shortly thereafter he died. Then the boy's grandmother, with whom he was apparently living and who had been appointed as his guardian, was called in for questioning. She confirmed what the boy's father had said before and added:

On the day the boy had been wounded, some children of the school came to her house to inform her of what had happened. She immediately went to the school to find out the facts of the matter and met the boy on her way to the school, clutching his arm. When she asked him what had happened, he told her as stated above. She then took him with her

to Abu al-Majd 'Abd al-Rahman, the *'umda* of the village. When she informed him of the matter, there were with him a number of people, some of whose names she specified. The *'umda* then summoned the schoolmaster, who admitted to him that after he had beaten the boy, he had handed him over to the assistant teacher and had ordered him to beat him because he had difficulties in memorising [the Qur'an] and that the assistant schoolmaster had administered a beating to him with a stick made of the wood of Indian cotton. (4.2)

When the accused were first called in for questioning at the Mudiriyya, they denied everything. The headmaster had even claimed that he had not been at school on that particular day, having assisted at a funeral. This was confirmed by the assistant teacher (4.1). Thereupon those who had been present in the *'umda's* office were questioned and they corroborated the woman's statements. Confronted with these testimonies the headmaster admitted before the provincial authorities that he had beaten the boy with a stick made of the wood of the cotton plant because the boy had problems in memorising the Qur'an and that he had then handed the boy over to his assistant. The assistant admitted that he also had beaten the boy with that stick and that that had been the cause of the boy's fracture. This, however, had happened inadvertently, because he was blind. (4.4)

Sentencing

When the boy's fracture had healed, the chief physician of the state hospital sent a medical report, in which he explained that although the bone had knit together, the boy could not move his forearm since the joint had got locked. Further, he notified the administration that the hospital had spent 138 piasters and 26 *fidda* on the boy's drugs and food. Now the case was ready for being heard by the qadi of al-Mansura. The trial, which took place on 28 Rabi' I 1280 [12 September 1863], about six weeks after the incident, has been discussed above. The minutes of the decision of the *Majlis al-Abkam* contain a summarised report of the trial. The sentence was then approved by the mufti of the regional council.

Before the council could give a decision, an investigation took place on whether the defendants had been convicted previously. The result was negative.

The council regarded the following facts as being proven:

During the investigation of the matter, shaykh Mustafa al-Aswad has finally admitted that after he had beaten that boy on his feet with a stick

of Indian cotton wood, as usual in schools, because it was difficult for him to memorise, he had handed him over to the assistant teacher, named 'Umar Hassan, in order to let him recite. The aforementioned assistant teacher admitted that the master had given him not only permission as stated before [i.e. to let the boy recite], but also to beat him. He then had beaten the boy in that situation with the aforementioned wooden stick, with the result that his arm broke. However, that had happened accidentally and not wilfully, because he is blind.

Concerning the assistant teacher, the council decided not to impose any punishment in view of the shari'a sentence ordering him to pay damages for the injury, "considering the fact that he is blind and has no previous convictions," and only to condemn him, in addition to the obligation imposed by the qadi, to pay to the Mudiriyya the sum of 138 piasters and 26 *fidda*, the costs of the victim's medical treatment. In addition, the council ruled that "he and his likes are instructed to abstain in the future entirely from beating."

The headmaster was sentenced to imprisonment "in the provincial prison for the period of one month, to teach him a lesson and as an example for others, (...) taking into account that he neither has previous convictions." The ground for his punishment was not related to the beating, but to the fact that he had made a false statement during the investigation. The council examined the question of whether the headmaster had ordered or permitted the assistant teacher to beat the boy, but decided that this permission could not be a ground for punishment, arguing:

that the aforementioned shaykh Mustafa has not admitted that he has given permission to the assistant teacher to beat the boy; that his denial is not taken into account since it has been established by the testimony of witnesses that he has acknowledged in their presence that this [permission] was given because he [the boy] had difficulties in memorising; that, however, it cannot be inferred from this permission that he had the intention that the beating would be administered as it actually occurred, but only that he intended it to be administered in the way that is usual in Qur'an schools.

After the mufti of the *Majlis al-Abkam* had endorsed the sentence of the qadi of al-Mansura, the *Majlis al-Abkam* confirmed the sentence of the Regional Council. The *Majlis al-Abkam* only objected against the instruction forbidding schoolmasters to beat their pupils,

since in schools, as a rule, it is sometimes unavoidable to chastise the children because good education depends on it. Therefore a prohibition of chastisement cannot be approved. But it is neither permitted that a chastisement is of such a nature as to cause damage, since what has happened [in this case] was excessive.

Therefore, the *Majlis al-Abkam* ordered that the Chief Mufti and other religious dignitaries draft an instruction concerning the methods and limits of how schoolmasters were allowed to chastise their pupils.

The Various Accounts of the Events

We may assume that the statements of the parties, recorded during the investigation and the trial were subjected to a process of selection and logical arrangement. This, however, is impossible to prove. What we can establish is that the clerks, confronted with several contradictory versions of the facts, tried to create a 'clean' dossier by presenting only those accounts that at first sight appeared logical and plausible and by leaving out 'abnormal' or legally irrelevant details. This dossier, which constituted the basis for the decision of the regional council and the *Majlis al-Abkam*, must have contained the reports of the plaintiffs, the reports of the questioning of the accused and of the witnesses, the medical reports and, in this case, the sentence of the qadi. Unfortunately, these full dossiers are not available anymore (although they may be reconstructed by going through the *sijills* of the police, the provincial administrations and the regional courts). What we find in the records of the *Majlis al-Abkam* is a summary of these dossiers, drafted by the clerks of the *Majlis al-Abkam* after the session where the decision was taken. Details that were irrelevant to the final decision were sometimes left out. It even occurred that the summarising was too drastic and details were omitted that later appear in the text of the final decision. An example in our case is that the verdict of the council mentions that the headmaster struck the boy on the soles of his feet, whereas this is not recorded in the summarised report of his questioning. This detail must have been included in the full dossier, or else the council's decision would not have mentioned it.

Concerning the qadi's sentence, we still do not know very much about how the statements made during the court session were drafted. My impression is that the authorities charged with investigating the case (the provincial administration (*mudiriyya*) in the regions and the police (*dabtiyya*) in the cities) would assist the plaintiffs and the witnesses in formulating their claims and testimonies and that the court clerks, who would record their statements,

would edit or reformulate them to clarify their legal implications. Most legally irrelevant details, i.e. details that would not in any way affect the liability under the shari'a (such as the fact that the beating may have been prompted by the arrears in the payment of the tuition) are left out.

In the narratives of the events, we find the following differences regarding the presentation of the facts.

The motive for the beating: When the father reported the incident, he suggested that the beating of the boy was motivated by the fact that the father was in arrears with the payment of the tuition. Both the accused, on the other hand, emphasised that the boy was beaten because he had difficulties in memorising the Qur'an.

The headmaster's instructions to his assistant: Both the father and the grandmother in their initial statements, as well as the assistant teacher in his reply before the shari'a court, reported that the headmaster had ordered or given permission to the assistant master to chastise the boy. Although the headmaster had confirmed this during the first questioning by the *'umda*, he later denied it.

The nature of the chastisement: The father and the grandmother claimed that the headmaster had slapped the boy in his face and did not hit him with a stick. On the other hand, the headmaster admitted having beaten the boy with a stick on the soles of his feet.⁹ The assistant teacher claimed in his reply before the shari'a court, that the headmaster had also hit the boy on his arm and that the fracture could have been caused by either of them. As to the assistant teacher's chastisement, the boy's father reported that he had struck the boy with a *falaga* made of the wood of the acacia tree (*sant*), whereas the assistant master maintained that he used a stick made of the wood of the Indian cotton plant.

In the following I will analyse these differences and show that in the course of the proceedings the clerks and judges, often without further argumentation, accepted the version that conformed to their idea of normalcy. This was essentially the head master's version. His – successful – strategy to exonerate himself was based on the following assertions that were all accepted by the court:

- that the reason for punishing the boy was pedagogical;
- that he himself had first punished the boy with an ordinary bastinado on the soles of his feet, administered with a light stick;
- that he had nothing to do with the way the assistant master punished the boy.

The first point is the motive of the beating: did the boy incur the punishment for not memorising the Qur'an, or was it an act of revenge on the boy for his

father's default in paying his tuition? The boy's father and grandmother claimed that the boy was beaten for the latter reason. The schoolmaster, however, realised that it would create a bad impression of him if it was accepted that he had chastised the boy for something of which he was innocent. Therefore, he maintained that the chastisement was prompted by the boy's difficulties in memorising the Qur'an, presenting the punishment as a routine matter, a pedagogical correction that, inadvertently and regrettably, had resulted in a serious injury due to the blindness of his assistant. This latter version of the events was accepted by the Regional Council and the *Majlis al-Ahkam*.

The investigators and the council focused on the assistant master as the one whose beating had caused the boy's fracture. However, neither his motive for the beating nor the circumstances surrounding it played a role in the proceedings and the final outcome. In the trial before the qadi, they were not mentioned since the only question that matters for establishing a financial liability under the shari'a in cases of homicide and wounding is that of who caused the death or the injury. The liability does not require that the person who killed or wounded acted at fault, e.g. on the ground of criminal intent or neglect. Nor does the motive of the person who caused the damage affect in any way the liability. Therefore, the trial before the qadi of al-Mansura had only one issue: the question of whose beating caused the boy's injury. As we have seen, the qadi held the assistant master liable. Since the Council regarded the payment of damages as an adequate penalty, it did not consider the possibility of imposing additional punitive measures for the determination of which the motive might have been important. The council's decision was confirmed by the *Majlis al-Ahkam*.

Although the qadi did not hold the headmaster liable for the fracture of the boy's arm, the Council could have examined whether he had committed an offence punishable under statute law and sentenced the headmaster if his beating was regarded as exceeding the limits of what was normal. The headmaster, however, successfully presented his role in the incident as an ordinary and acceptable form of disciplining: without further argumentation, the investigators and the Council, in spite of the statements of the boy's father and grandmother that the boy had been maltreated because his father had not paid the school fees, accepted his explanation that the beating was a punishment for the boy's bad scholastic performance.

According to the accepted custom in Qur'an schools, the teachers were entitled to discipline their pupils with a light bastinado. This is exactly how the headmaster presented his beating of the boy. There were, however, two other accounts that were implicitly rejected by the council. The boy's father

and grandmother maintained that he has slapped the boy in his face, whereby his signet ring left an imprint on his face (*aththar fihi*). This might indicate that the act was prompted by sudden anger because the boy had not brought the money for the school fees. This would be inconsistent with the headmaster's version that he disciplined the boy for pedagogical reasons. The assistant teacher claimed that the headmaster had beaten the boy with a stick before him and shared in the responsibility for the boy's injury. However, being blind, he cannot be regarded as a reliable eyewitness. In the shari'a court, however, the beating administered by the headmaster was no issue, since the plaintiff did not sue him. The council, holding as proven that the headmaster had beaten the boy on the soles of his feet with a stick of cottonwood, regarded this implicitly as a normal form of chastisement in schools and did not regard this as a ground for punishing the headmaster.

Although he had originally admitted it, the headmaster during later interrogations denied that he had instructed his assistant to beat the boy. The other parties, however, insisted that the assistant teacher had acted by order or by express permission of the headmaster. It is clear that the headmaster wanted to exonerate himself by denying any responsibility for the way his assistant chastised the boy. In view of his earlier admissions and the evidence against him, the council held as proven that the assistant teacher has acted under orders. However, the council argued that these instructions must be understood as an order to beat the boy in a way that is usual in schools and not as a command to punish the boy in the way the assistant master actually used. Therefore the council exonerated the headmaster from any responsibility for the boy's injury. Nevertheless the headmaster was sentenced to one month imprisonment. The ground for this punishment was the fact that he had made false statements by denying that he had given instructions to his assistant.

Conclusions

The documents that I have analysed here show that during the investigation and the hearing of the incident, its account was streamlined and made to conform to what the clerks and judges regarded as an ordinary and routine event in a Qur'an school. Some details were not further investigated because they were immaterial for the application of legal categories. There are two main versions of the story. According to his relatives, the boy, when he told the headmaster that he had not brought the tuition money, was slapped by the latter, whereby the headmaster's signet ring left a mark on his face. Subsequently, the headmaster instructed his assistant to give the boy a thrashing, for which the assistant used the heavy wooden *falaqa*. Due to his blindness, the

assistant struck him on his arm with the result that it became fractured. The account, however, that was finally accepted by the council, was essentially the headmaster's version, except that the council regarded as proven that the headmaster had given instructions to his assistant to chastise the boy. According to this account the headmaster first gave the boy a bastinado with a light stick on the soles of his feet, because the boy had been negligent in memorising the Qur'an. Thereupon, he ordered his assistant to punish him, which the latter did, also using a light stick. How the arm then was broken remains unexplained. Since the type of instrument was irrelevant for establishing the assistant's liability, the matter was not further examined by the Council, although it is highly improbable that he would have broken the boy's arm with the stalk of a cotton plant, as mentioned in the documents.

Legal documents never present the exact words of statements of the parties. This is true of documents like contracts, especially those recorded by public writers or notaries. But also the statements taken from parties and witnesses during civil or criminal proceedings do not reflect the exact words, but are edited in order to construct a logical case, including the elements recognisable by and relevant for those who must work with these documents. In this paper, I have shown that during the course of the investigation of a criminal case and in the process of sentencing, the different versions of the facts are transformed into an authoritative account containing almost exclusively the legally relevant elements and presenting a logical and plausible narrative. The richness of often contradictory details found in the statements of the parties and witnesses makes way for a coherent account shorn of its irrelevant or troublesome details. This happens at various stages. First, in recording the statements of those involved in the case. This, however, is difficult to prove. But secondly in the compilation of the dossier by the investigators and its summarising by the court clerks after sentencing. Historians who want to use these documents as sources for social history ought to be aware of the distortions they contain.

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STORIES ABOUT THE LAW

REGISTERING A TOKEN DOWER

The Multiple Meanings of a Legal Practice¹

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A new legal practice, the registration of a token prompt dower in marriage contracts, has become increasingly popular in Jabal Nablus, Palestine from the 1960s on. Marriage contracts are different from most of the other legal texts discussed in this volume, as they do not involve the settlement of a conflict. Yet, similar to these other texts, dower registrations cannot be assumed to reflect ‘what happened’ in terms of a true account of what was given and received. This is the more so in the case of a ‘token dower,’ where there is a complete disjuncture between the sum registered and the gifts provided. But whereas token dower registrations do not tell us anything about financial arrangements at the time of marriage, they do something else. These contracts present us with a specific format of registering a prompt dower that the parties concerned agree about. This then begs the question: What do they agree about? How do the stories the contracts tell us relate to the stories the women concerned present us with?

This article zones in on one entry in marriage contracts from the Nablus shari’a court that usually does not amount to much more than a few words, the slot where the marriage registrar fills in the amount of prompt dower to be paid by the groom to the bride or her representative. Beginning in the 1920s, marriage contracts were recorded on printed forms and kept in separate registers.² Such forms included space to record the name, age, place of residence, religion and profession of bride and groom, the names of agents or guardians, of witnesses, and of the court registrar. The marital status of the bride was defined as virgin (*bikr*) or non-virgin (*thayyib*), the amount and nature of the dower were written down, including whether payment of part of it was deferred

(only to be claimed in the case of repudiation or widowhood), and marriage stipulations could be included. In the early 1950s the Jordanians introduced a new registration form which solicited, in addition to the above, information about the place of birth and the nationality of groom and bride, and the marital status of the groom. Also a separate entry for “addenda” (*tawabi*) to the prompt and deferred dower was created.

In Jabal Nablus the prompt dower is registered in two very different ways, either as an amount that bears at least some resemblance to what is given, or as a ‘token prompt dower,’ when a very small sum is recorded (often 1 Jordanian Dinar), creating a complete break between the amount stated in the contracts and the value of the gifts the groom has provided the bride with. The narratives ‘in the law’ about the growing trend in registering a token dower can be presented in a few paragraphs. In contrast, the narratives ‘about the law’ are considerably more complex. Shifting the focus from legal practices embodied in the marriage contract to the stories women told me about these practices brings to the fore a number of substantial issues, including questions about the relations between legal history and social history. As it turns out, token dower registrations are not a unified practice. In contrast, women positioned differently in society employ different material and symbolic logics. It is through an analysis of a substantial number of dower stories that we may gain insight into recurrent patterns and their transformations.³

Let me start with the narratives of Zahir and her mother about registering a token dower that bring out some of the complexities involved. I had met Zahir initially when she was studying at the al-Najaah University in Nablus in the mid 1980s. When I started research in the Balata refugee camp on the outskirts of Nablus, where she had been born and raised, I got better acquainted with her. Before she went into the details of how her dower had been registered, she pointed out how difficult it had been to get the marriage arranged. She had met her husband-to-be when she was studying at university. Although Zahir, her family and her future husband all shared a history of political activism, her mother had resisted the marriage for a considerable period of time. “My father and brothers agreed,” Zahir pointed out, “but my mother had rather seen me marry a doctor or an engineer. Because she herself had a very difficult life, she wanted me to have it easier.” Still, Zahir persisted and, in the end, her mother also agreed to the marriage, but Zahir had to compromise with respect to the dower. Zahir had only wanted to register a token dower. She knew that it would be difficult for her husband-to-be to collect a large sum of money to buy gold and clothes, and did not want him to be pressed to do so. Still, because of her mother’s wishes, an amount of 2,000 JD (Jordanian Dinar) was registered in the marriage contract as prompt dower with, in

addition, a deferred sum of 1,500 JD. When her mother joined us, she explained why she had wanted it this way by pointing to the differences between Zahir's marriage and that of her eldest son. In her words: "The family of that girl agreed with a token amount, because, living closely together, we know each other for over thirty years. We know them and they know us. They know that we will bring everything for the bride; that we are not stingy. But we had only seen the family of Zahir's fiancé a few times; we only knew the boy. We were worried that when we would ask for gold and clothing for our daughter, they would say, 'that is much.' That is why we wanted to register a set amount. Also, the boy is still studying and does not have a job. So, we said, 'We take the money as a guarantee for our daughter and provide her with whatever she wants.' For 1,000 JD we buy her gold and for 300 to 400 JD clothing, the rest we put for her in a bank account." And so it happened.

One issue to be discussed when marriage arrangements are made is whether to opt for registering a high prompt dower or for writing down only a token amount. In the Nablus region, the trend to register such a token prompt dower started in the early 1960s and became rapidly more widespread; by the late 1980s about 40% of the marriage contracts included a token dower, most often one JD, and occasionally five or ten JD, or perhaps one gold coin.⁴

As Zahir's mother indicated, dower registration is not a trivial matter. For many women, the dower is an important means to gain access to property and to acquire some measure of financial security. Women's dower rights have a sound legal foundation; according to Islamic family law men are not only obliged to maintain their wives, but are also to pay them a dower, the amount of which is registered in the marriage contract. Marriage does not entail community of goods between husband and wife; the dower is the property of the wife; neither her husband nor her father can legally exert control over it. Why then do women willingly give up legal entitlements to financial resources?⁵ This trend towards registering a token dower has not been brought about by marriage registrars; on the contrary, the court personnel may well attempt to discourage people from registering a token amount, as they are aware of the problems this may cause in the future. Brides who are dissatisfied with the gifts their husbands have provided them with, may turn to the court to seek redress, but if a token dower is registered, there is little the court can do. Neither is this trend towards registering a token dower imposed by men upon women in an attempt to limit women's access to property. Virtually all women I talked with had fully agreed with registering a token amount. In fact, it was more common that brides themselves would prefer to register a token sum, while their families may well be apprehensive about this, because they considered this too much of a risk, as happened in Zahir's case.

Women who register a token amount all tend to relate their motivations for doing so, in one way or another, to a move towards 'modernity.' Recent studies have focused on modernity as an ideological construct rather than as a mode of social organization, mainly focussing on prescriptive texts of reformers, intellectuals and politicians. Some authors, however, such as Rofel (1998) and Brenner (1999), have argued for the need to focus on the narratives women themselves present on modernity. Rather than dealing with the texts of men of authority, they investigate how women position themselves with respect to modernity in everyday life and relate these positionings to such mundane fields as labour and market exchange. In a similar vein, I analyze how women talk about modernity in relation to another field of social practice, the dower. More specifically, I will focus on how modernity is at stake in women's narratives about the token dower. In doing so, I will take up an issue Kandiyoti (1998: 271 ff.) raises when discussing debates about women and modernity in the Middle East. She points to the need to pay attention to how modernity is locally constructed both in relation to ancient regimes and with respect to local women defined as 'others.' Such a focus on internal processes of differentiation fits well with the ways in which women in the Nablus region discuss token dower registrations, that is in positioning themselves vis-à-vis local others⁶

Whereas women from different walks of life link the token dower to modernity, their understandings of registering such a dower are not necessarily the same; their narratives show some similarities, but there are also major disparities and divergences. In this paper, I intend to disentangle the various lines of argumentation present in the stories about registering a token dower and modernity, and to link these argumentations to localized economic and social transformations that enabled, or worked against, such token dower registrations. I will set out with the contrasting logics of urban professionals, on the one hand, and of rural peasant women, on the other. In both cases the trend towards token dower registrations ties in with major transformations in women's work, yet the ways in which the women concerned employ their (non-)engagement in particular types of work to claim modernity vary widely. Differently positioned women have different fields of possibilities available to them. Hence, both the incentives to support a token dower and the effects of such form of registration may differ considerably. This argument will be carried further in a brief discussion of token dower practices of lower class women, which points to ever-greater ambiguities, ambivalences and contradictions in this seemingly unitary practice.

Professional Men and Their Wives: An Alliance of Trust and Wealth

As Zahir's narrative already indicated, registering a token dower is an indication of trust, something the better off can easier afford than those with less financial means available. The link between wealth and trust was highlighted when I discussed marriage registrations with Imm Shakir, the daughter of a wealthy trader, who had married into a family of similar status.

Going back to her daughter's marriage in 1976, she explained how, after she had finished junior college abroad, a number of men had come and asked for her hand, but, in Imm Shakir's words, "she refused them and chose a husband herself." Imm Shakir was obviously pleased with her daughter's choice, a man from a prominent urban family, who held a top position in a bank in Amman. She emphasized that her daughter had "not taken a dower." As she pointed out: "His family gave her gold and diamonds, a ring with a three carat solitaire and other items, not a dower, only gifts. She does not need a dower, her father can provide her with whatever she may need, of course, we knew that his family would do the same... Still, his father insisted on registering 10,000 JD as deferred dower for her. We did not demand that, but so it happened." The arrangements of her own marriage had been very different, Imm Shakir pointed out. She was married in the late 1940s, shortly after graduating from high school. "Our marriage was traditional," she said, "it was a family marriage. My husband was the son of a friend of my father. He had seen me in the street, but we had not talked together before the marriage contract was signed. My own family may have agreed to us sitting together before marriage, but his family was more conservative." Imm Shakir had not been very eager to marry, but felt the pressure of her family. "My family said, 'as you wish,' but of course, that was not what they really wanted; they considered him a very good match." In the marriage contract 1,000 PP (Palestinian Pound) was registered as prompt dower and 1,000 PP as deferred; as everything she needed was given to her, she did not spend any of the prompt dower.⁷ "When we were engaged, my fiancé had already given me a lot of gold. My father put the dower in a bank account for me and my own family paid for clothing and household goods, that is how it was common with us in those days," Imm Shakir explained.

Imm Shakir's narrative about her daughter's marriage fits well with what the registers tell us about the background of the men writing down a token dower. The first to do so were well-educated professionals; in the early 1960s the occupation of the groom most commonly mentioned in these marriage contracts was engineer. At first glance, registering a token dower of 1 JD

appears as an abrupt break with existing practices of registering large sums as prompt dower, as is evident when comparing this to how Imm Shakir's own dower had been registered. Yet, the notion of a stark rupture becomes modified when social practices (the provision of gifts) and other contractual aspects of the dower (the deferred dower) are taken into account.

First, as Imm Shakir's narrative also indicates, amongst the elite the registered dower was only part of what women were expecting to receive when marrying. Next to the dower, women like Imm Shakir would obtain lots of expensive gifts both from their husband and from their own family, in particular their father. Whereas amongst lower class urban families, husbands were also to provide furniture and household goods, amongst the higher classes it was the father of the bride who would do so. Many of the women who had married during the 1950s told me that a high prompt dower was still registered in order not to go against "our habits and traditions," but that the gifts they received from kin had been at least as important. The registration of a token amount can then be seen as the next step in a process in which gifts had already become increasingly central in marriage prestations. To the women and their families registering a token dower was an expression of trust. In this way, their fathers showed that they did not need juridical guarantees for their daughters' economic security and that they trusted their sons-in-law to provide their daughters with all that was expected. Also, daughters in wealthy families could afford to give up legal guarantees; even if their husbands would not live up to their expectations, they always had their own families to fall back on, who could easily afford to support them.

Secondly, a token prompt dower is usually accompanied by a high deferred dower; in the 1980s the amount registered as deferred dower could well reach 5,000 JD and in a few cases 10,000 JD. This also may be seen as the continuation of a development that had started earlier. Before the emergence of the token dower, the relative weight of the deferred amount (*vis-à-vis* the prompt) had already steadily increased. If in most urban contracts in the 1920s the prompt dower was higher than the deferred, in the 1940s almost three-quarters of these contracts had a deferred dower at least as high as the prompt, and in the 1960s the deferred dower was usually higher than the prompt. The combination of a token dower with a high deferred dower then may be seen as the last step in a process in which the deferred dower was becoming the central element in the marriage contracts.

To higher class women then, the material effects of registering a token dower have remained limited. It is true that a high amount is no longer written down for the bride as prompt dower to which she holds a legal claim. Yet,

also previously this amount was only part of what she was to receive, and in practice brides obtained similar gifts as when a high set amount was registered for them. Yet, if in higher circles the material impact of the shift towards a token dower is far less radical than may appear from the contracts, in symbolic terms such a shift is highly significant. Registering a token prompt dower with a high deferred dower is a statement about what modern higher class kin and marital relations are about. The token prompt dower makes visible that women do not need to have a high sum of money registered at marriage, but that they and their families are willing and able to contend with the gifts the groom will provide voluntarily, while the high deferred dower underlines the importance attached to the conjugal relation. To these women a token dower is eminently suited to a “modern marriage.” Before elaborating on what such a modern marriage entails, I will first return to the women most eager to have a token dower registered, that is, those involved in professional employment themselves.

Professional Women: Pioneers in the Quest for Modernity

The very first to register a token dower in the late 1940s and the 1950s were a very small number of women teachers, the top female professionals in those years. From the 1970s on, when women also began to register their occupations in the marriage contracts, it became evident that a token dower was most often recorded for women registering professional work as their occupation.⁸ Khawla, from a prominent, wealthy urban family, is such a professionally employed woman. After completing her studies abroad in the 1960s, she returned to Nablus where she started to work for an institution of higher education. When her marriage was arranged in the early 1970s, her brother was the one to discuss dower arrangements, as her father had passed away. Khawla pointed out to me that she had not needed a dower. She held a share in the estate of her father, she had a good and secure salary, and her husband-to-be was a well-known businessman. The gold she wanted, she had already bought herself. To her, registering a token amount was self-evident. Her husband would provide her with exclusive, diamond-set jewellery, she would receive many gifts from her own family, and a high deferred dower would be registered in the marriage contract. So, when her brother asked her whether she wanted a high dower in her marriage contract, she had indignantly answered him with “Am I a donkey that he has to pay for me?”

While the material significance of the dower is even less important to professional women than to their non-employed (higher-class) counterparts, the symbolic meanings involved carry an ever-heavier weight. These women saw themselves as pioneers in the quest for modernity, first by gaining access to

formal education and becoming involved in public social activities (for instance, in charitable organizations), and then by engaging in professional employment.

During the British Mandate period, educational opportunities for girls in Nablus had not only remained very limited, but in those days it had also been far from self-evident that girls' education was desirable.⁹ It was commonly assumed that families would have more difficulty in controlling girls, who by attending classes would gain more freedom of movement, and who might employ their newly acquired skills in reading and writing to write love letters to boys.¹⁰ Yet, the development of a new class of professionals, drawn at least in part from the more progressive learned families, brought about a shift in ideas about the desirability of educating girls. For it was the daughters of these prominent and highly reputable families who were the first to be allowed to continue their education. With a long-standing interest in education, their fathers, some of whom held high religious positions, were proud that their daughters had been selected to continue their education and did not object to them spending four years at the Government Teachers Training College or at a private Christian boarding school in Jerusalem. Beginning in these circles, notions about educating girls started to shift. Instead of being defined as a category 'at risk,' educated girls came to be seen as more responsible than their uneducated counterparts. With the educational system producing new forms of self-discipline, these girls were seen as more in control of themselves and, as such, also as better prepared to enter the 'public' world.

Education opened the door for professional employment. It provided women both with the qualifications needed and the field itself became an important employer of women professionals. After the British Mandate ended, many women teachers and other female professionals continued working after marriage. Whereas British policy had been to dismiss all women government employees once their marriage contract had been concluded, under the Jordanian administration there were no such obstacles to married women's employment. The number of girls' schools expanded greatly and women's options for professional employment increased rapidly. It was these professional women who opted for a token dowry. Often also socially and politically active, they saw themselves in the forefront of modernity. Whereas they may have recognized that having a high prompt dowry might be a source of economic security for non-employed women, registering such a high amount was anathema to their self-image of, as they phrased it, "productive members of society."

Writing down a token dowry in the marriage contract also fits well with professional women's views about what a marriage should, and should not, be

about. Their notions about a modern marriage are in strong contrast to those that had been, and at times still were, current amongst the elite. For it was especially amongst the upper classes that marriages used to be strictly arranged with an eye to family interests and kin connections. In particular amongst the landed elite, early marriage and forced patrilineal cousin marriage had been common.¹¹ Registering a high prompt dower is strongly associated with such strict family control over marriage. Women professionals developed very different notions about marriage. In their view a modern marriage was to be a companionate marriage, with the husband as a partner in life. Ideally, a marriage arrangement was to leave space for some element of choice; it was to be based on personality rather than on monetary considerations. These women underlined the importance of the conjugal tie, and held a strong preference for modern nuclear family living arrangements.

Earlier generations of women may well have held some of these preferences too. It was, however, the emergence of a class of professionals whose position was not directly linked to the ownership of property, especially landed property, that allowed women more space in their own marriage arrangements. Amongst the modernizing elite, in general, strictly arranged marriages have increasingly become seen as old-fashioned and daughters have gained more of a say in their own marriages, both with respect to when and with whom they are to marry. In these circles, imposed cousin marriage and marriage at an early age have become increasingly rare. Still, women who *themselves* are professionally employed are best able to turn their ideals into practice. Engagement in higher education in itself has raised their marriage age substantially. During the British Mandate, furthermore, the dismissal at marriage policy encouraged women to postpone marriage, while at the same time their stable and relatively high income made it easier for them to refuse suitors not to their liking. More generally, professionally employed women stand a better chance of being already acquainted with their husbands-to-be before marriage.¹² And because of their age, level of education and work experience, they are seen as more responsible persons, whose opinions are taken more seriously, and who, as such, are allowed a greater say in their marriage arrangements. Registering a token dower rather than a high amount fits such a focus on the person involved rather than on the property aspects of the marriage; in the eyes of women professionals a high prompt dower amounts to “the sale of women.”

Peasant Women: The Modernity of Domesticity

If initially the registration of a token dower was an urban phenomenon, beginning in the mid-1970s villagers also started to record such a dower. How

transformations in marriage arrangements amongst the small landowning peasantry occurred becomes vividly visible in the narratives of Imm Salim, her daughters and granddaughter, all living in a village to the east of Nablus.

Reflecting on her youth, Imm Salim described the circumstances under which her marriage had been arranged for in the early 1930s. "As my mother had died while I was still a small girl," she said, "my father wanted to remarry. But in those days many people were poor, and he did not have enough money to pay the dower for a new wife. So instead of paying the dower, he promised to give me in exchange as bride to the brother of his future wife." In the marriage contract for each of them 50 PP was recorded as prompt dower, but the girls did not receive this money. Neither did Imm Salim receive gold. As she said, "People did not have much money at the time. Instead of gold my in-laws registered three dunums of land with olive trees for me, for the future." This was the beginning of a large number of small transactions Imm Salim engaged in, selling the produce of her land to buy some goats, engaging in small trade, buying livestock and so on.

A comparison of Imm Salim's marriage arrangements with those of her daughters and granddaughters points to the experiences of different generations of rural women. Her eldest daughter, Imm Rushdi emphasized that her marriage in 1958 had been much more similar to that of her mother than that of her younger sisters, as she was also married at a very young age in an exchange marriage with a small peasant landowner. But with a bit more cash available by then, her prompt dower of 80 JD was largely used to buy her some Turkish gold coins. The marriage arrangements of Imm Salim's second daughter, Imm Nidal, were quite different. She was married in 1971, eighteen years old, to her paternal cousin, who had started to work in Kuwait at a young age. For her not only a prompt dower of 200 JD was registered in the marriage contract, but also a deferred dower of the same amount. By then it was no longer standard for fathers to keep part of the dower. "The full dower was given to me, my father did not keep anything for himself. He took the dower and brought me gold," Imm Nidal said. She spent some years with her husband in Kuwait, then returned to the village where he went to work as a taxi driver. After living for some years with her in-laws, she moved into the large villa her husband had built for her and his children on his father's land. In fact, Imm Nidal had given him some of her gold to help him start building; in contrast to her mother and elder sister, she hardly worked on the land, and her material standard of living was considerably higher. It was when Imm Rushdi's daughter, Hanan, married in the early 1980s, also with a close relative working in Kuwait, that only a token prompt dower was registered, accompanied by a deferred

dower of 1,000 JD, a high amount for a village girl in those days. That she was only entitled to a token prompt meant little in practice; she received at least as much gold as the girls for whom a high amount had been registered. After at first living briefly with her mother-in-law, she moved for a while to Jordan where her husband had rented an apartment and then returned to the village when he was able to start building her a new house. Neither agricultural work nor holding goats were something she would aspire to.

The shari'a court registers show that registering a token dower had not only become rapidly more widespread in urban settings, but had also gained in popularity in the rural areas. By the mid-1980s, a token dower was written down in about one-third of the village contracts, often by a groom who registered his profession as trader, employee, teacher, or skilled labourer.¹³ As in the urban areas, such a token dower is usually accompanied by a relatively high deferred. But the trajectories of change in the city and in the rural areas are different. If amongst the urban professionals the rupture with previous dower practices was much less sharp than the sudden appearance of the token dower suggests, in the rural areas the dower system changed more radically.

First, whereas the average amounts registered as prompt dower in the rural areas were similar to those in the city, de-facto prestations show a divergent pattern. Rather than providing lots of valuable gifts to his daughter at the time of marriage, as common amongst the urban elite, in the rural areas up till the 1960s the bride's father usually kept a considerable part of the dower himself. It was only by the early 1970s that rural daughters would, as a rule, receive the full amount of the dower. Registering a token dower highlights this new development. If previously grooms had to wait and see whether the bride's father would transfer the full dower to his daughter, when a token dower is registered a father has to trust the groom to provide his daughter with what is expected.

Second, in the rural areas the deferred dower has only more recently become a central element in the dower registrations. In the 1940s most rural contracts did not have a deferred dower registered at all; by the 1960s rural contracts often contained a deferred dower, but the amounts were still low. Ten years later, however, registrations in the countryside had become very similar to those of the city: in the 1970s also in the villages a deferred dower was virtually always registered and the amount was usually higher than that of the prompt. Registering a token dower is the culmination of this shift in weight from prompt to deferred dower.

In the rural areas, changes in the dower system have not only been more pronounced and have occurred in a shorter time-span than in the city, but,

more important, these have taken place in a different context. Whereas agriculture directed towards self-sufficiency was previously the main source of livelihood, in the 1950s labour migration of men rapidly increased, in particular to the East Bank and to the Gulf States; after the Israeli occupation in 1967, male commuting to Israel also became widespread.¹⁴ The ownership of land has remained important as a source of security in hard times, but income from (migration) wage labour has rapidly become more central for household sustenance than the often insecure income from dry-farming agriculture. These developments had far-reaching consequences for the relations between the generations. Due to the growing employment opportunities outside the family and the declining importance of inherited property, sons became less dependent on their fathers and kinship became less central in social organization. Married sons started to set up their own households at an earlier moment than had been the case previously. With higher demands for separate housing, the costs men have to cover for housing has gone up much more rapidly than the amount registered as prompt dower. At the very moment that daughters started to receive most of the prompt dower themselves, the relative value of the dower had declined in comparison with the costs of houses, that are male property.

These developments had major consequences for the gender division of labour and the valuation of women's labour. When agriculture was still the mainstay of the village economy, the notion of men as providers contrasted with women's active participation in agricultural production and the high evaluation of their productive qualities. Male migration labour, the marginalization of agriculture and the increased impact of the cash economy have devalued agricultural subsistence production and have turned men into de-facto providers. As a result women are no longer seen as producers, but more and more as consumers, even if they still work the land. The greater emphasis on men as providers, in turn, has also influenced what women are able and willing to do with the prompt dower. Whereas up to the 1960s women regularly sold their dower gold in order to buy livestock or, less often, land, in the following decades they did this much less often. Buying productive property clashes with the definition of women as dependent wives. And with women selling their gold to help their husbands with the costs of migration or with building a house, they are, indeed, increasingly dependent upon their husbands.

The increase in the number of contracts with a token dower fit with the definition of women as 'consuming wives' rather than 'productive daughters.' When a token dower is registered, women do not necessarily receive less, but what they obtain are voluntarily provided gifts, rather than a legally guaranteed

set amount. This does not only express the increased dependence of wives on their husbands (rather than on their fathers), but also contributes to it. For in the case of a token dower women have no legal redress if the gifts are not up to their expectations. It is true that also if a substantial prompt dower is registered, it may occur that the husband cannot fulfil his financial obligations completely. Yet, in that case it is at least evident that the wife refrains from claiming her rights, which then may be seen as a gift to her husband. If a token dower is registered, such 'sacrifices' remain invisible. In addition, the increased importance of the deferred dower makes it clear that a woman is no longer expected to enter marriage endowed with property, but that she needs financial guarantees in case the marital relation is discontinued.

Why then do some women agree with, or even actively encourage a token dower registration? Part of the answer is that women expect to receive the same sorts of gifts they would acquire had a high prompt dower been registered for them. But they also see certain advantages in giving up property rights. For women in the rural areas, owning property (in particular, productive property) coincided with being defined as productive members of the household. This, however, did not necessarily imply control over their own labour, but rather a very heavy workload, while being able to refrain from agricultural labour was seen as an indicator of higher social status. Women then, may well see their loss of control over the dower as compensated for by both a lighter workload and a rise in social status. To them withdrawal from agricultural work is a progressive move towards modernity.

At the same time, the dower is also part and parcel of the process of marriage. While rural women generally have lost some control over the dower, they have simultaneously gained more say in their own marriage arrangements. Also women in the villages argue for some sort of companionate marriages, or rather, they argue against forced marriages, in particular when girls are very young, when it entails an exchange marriage (with brothers marrying each other's sisters) and when there are large age differentials between the bride and the groom, all forms of marriage in which women have a relatively weak position vis-à-vis their husbands. Although rural women generally do not have the options available to urban professional women in choice of marriage partner, the lesser centrality of property and of women's subsistence labour as a source of livelihood has made it more acceptable to refuse unattractive suitors. Indeed, the marriage forms mentioned above that are particularly unattractive to women, have become much less common.

Still, only a minority of rural women sees a token dower as more befitting to the trend towards companionate marriage than a high prompt dower. For

rural women changes in marriage arrangement are not accompanied by their entry into a well-paying field of professional employment, but by withdrawal from agriculture. As to them the dower is still important as a source of financial security, token dower registrations in villages ask for strong ties of trust between the families concerned. If previously relations of 'closeness' (often in terms of kinship, but also in terms of location, and more recently political affiliation) might either help to lower the dower or to excuse a groom if he could not pay the full amount, now 'closeness' enables registering a token dower. Still, registering a token dower is far from self-evident, and also those who do so reject the equation of high prompt dower registrations with 'the sale of women.'

In the previous sections, I have constructed two contrasting logics of token dower registration, that of urban professionals and that of peasant women. The former ties in with the development of an urban professional class. Token dower registration started in the early 1960s, and by the late 1980s the large majority of these women registered such a dower. Professionally employed women see a token dower as the only form of dower compatible with higher education, professional employment (their position as 'productive members of society') and companionate marriage. Peasant women started registering a token dower later, from the late 1970s on, and those doing so have remained a minority. In their case registering a token dower follows its own dynamics. It ties in with the marginalization of agriculture and rise of male migration labour, the lesser centrality of kinship for social reproduction and a devaluation of women's labour. The effect has been a withdrawal of women from agricultural work and more space for women within the marriage system. To end with, I will further complicate the issue by drawing attention to countervailing tendencies and different incentives. Also in cases where a token dower is registered material considerations may be at stake, and women's strategies are more diverse than the two models presented suggest.

The Urban Lower Classes: Taking Risks

Marriage contracts show us two developments that go against the trend of legally guaranteed material aspects of marriage becoming less important. Whereas during the 1960s and 1970s the percentage of token dower marriages increased rapidly, by the later 1980s this was no longer the case; in more than half the contracts a set prompt dower is still registered. This is in particular the case amongst women from the poorer sections of society, but also some women professionals from a lower class background go for a set high amount. The trend towards a token dower seems to have reached its zenith. At the same time, arrangements for registering household goods in the contracts

have become more popular. That is, a set amount of money is recorded under the separate heading of 'addenda' to the prompt dower, with sometimes the various items mentioned in detail, that may vary from a cupboard with a specific number of mirrors to a washing machine. People would often say that only the poor feel the need to register such goods, as they cannot be sure that the husband will indeed provide these; it is taken as an indication of distrust, brought about by poverty. But the contracts present a different picture. It is true that the lower middle classes started this type of registration in the 1950s. Gradually, however, this practice has become more widespread, also amongst the middle classes, and by the 1980s about three-quarters of the urban contracts included a clause about household goods. This means that a considerable number of contracts with a token dower contain some financial guarantee for the bride at marriage. Yet, these financial guarantees are expressed in the form of household goods, often in set phrases, that link women to the domestic.

The spread of registering a token dower from the better off to the middle and lower middle classes has further complicated its meanings and effects. This becomes evident in the stories two women told me who had married into the same, rather impoverished refugee family living in the old city of Nablus. 'Abir, from a lower middle class family, had married Faris in the early 1980s. At that time Faris was working as a garment worker; he had sacrificed himself to enable his older brother to continue his studies. Only a token dower was registered as prompt dower, exactly as 'Abir had wanted. Her husband and she herself had both been active in the same political movement. They had waited six years to marry, as 'Abir wanted to first complete her university studies, her fiancé wanted to build himself a future, and both needed to be certain about their choice. "I did not want a high dower," 'Abir had emphasized. "The best way is for a husband and wife to build up the house together. Not all men are able to pay a high dower and the poor are the ones who will suffer. And what is the use of gold if the marriage is not good? I have only taken a little bit of gold, gold is not important to me." Whereas 'Abir was quite content with her situation, Amani, herself from a poor urban family who had worked briefly as a hairdresser before she married Faris' brother, a disenchanted worker in Israel, was in great distress. In her marriage contract also, a token amount was registered as prompt dower but, as she was quick to point out, it did not take long for problems to arise. "The problems started," Amani said, "when it became clear that his family did not realize how expensive a token dower is. Then the groom is supposed to bring everything: gold, clothing and household goods. But he only gave me six thin gold bracelets and two of these

had been borrowed from his sister! That was at most 180 JD and that is very, very little.” To underline her argument, Amani compared her dower with that of her sister who married a few weeks later. “My father did not make the same mistake again,” she pointed out. “Everything was written down in the marriage contract, 1,500 JD as prompt dower, 2,000 JD as deferred dower, and household goods were also registered.”

While the prompt dower was relatively insignificant for the economic security of women from prominent families, for those with few resources registering only a token dower entails a real risk. On the one hand, registering a token amount, the family of the bride may well expect to receive more valuable gifts than would have been the case had a set amount been written up. The impetus behind registering a token dower may then be to gain materially, rather than in symbolic terms only. For that reason, a token dower is sometimes called ‘expensive,’ and some men are reluctant to register such a dower, as they worry that the family of the bride will ‘continue asking.’ If, however, the bride does not receive what she and her family expect, there is no recourse, for it is the very ‘voluntary-ness’ of the gifts which is central in token dower arrangements. Amongst the lower classes, then, a token amount is only written down when the families know each other very well and when there is strong mutual trust.

Finally, individual women may well use registering a particular type of dower as a strategy with respect to the person of the groom. Some women from poorer families consider a high prompt dower as a means to reproduce social inequality. Whereas wealthy men have no problem to marry, those with a limited income have to save for considerable periods of time to be able to pay the dower.¹⁵ And while it is true that a marriage with a wealthy man may heighten a woman’s social status, at the same time there is a good chance that it increases gender inequality, as “you then are no more than a piece of furniture in his house; whenever he wants to, he can marry a new wife and put you to the side.” When marrying someone of a similar socio-economic background however, chances are higher that “he will be a partner in life with whom you will build up a household, together.” To facilitate such a marriage, women may well prefer registering a token dower; they are willing to give up financial guarantees in order to achieve more equal gender relations. More generally, if women already know the person, have talked with him and are ‘convinced’ of him, they may well attempt to facilitate arranging the marriage by opting for a token dower, similar to what Zahir had tried to do.¹⁶

Concluding Remarks

The rapid dissemination of the token dower from the urban elite to the rural and lower classes may be interpreted as the latter emulating the example of those higher in the social hierarchy, while the widespread embeddedness of the token dower in a discourse of modernity may easily evoke a perception of this practice as unitary. In this contribution, I have taken a different approach. Rather than focusing on how ideals and ideas travel from one context to another, I have highlighted how strongly localized processes of socio-economic change have facilitated the development of particular discourses and practices. The development of an urban professional class has stimulated women's education and produced notions of female responsibility that allow for and even encourage female professional employment, while in the rural areas the marginalization of agriculture, the rapid growth of migration labour for men, and the resulting devaluation of women's agricultural work, have produced a modern concept of women as dependent consumers.

That women from various walks of life often link the token dower to modernity does not make it less urgent to investigate the impact of the different positions from which these women operate and the perspectives they employ. Operating in different fields of possibilities, these women follow disparate trajectories when they acquiesce in, consent to, or actively attempt to bring about a token dower registration. The contrasting notions urban professionals, on the one hand, and rural women, on the other, employ with respect to 'productive labour' bring this to the fore. Urban professionals see themselves as distinctly modern because their professional employment turns them into, as they phrase it themselves, "productive members of society." Recognizing the modern divide between the public and the domestic, and the higher evaluation of the former over the latter, they aim at partaking in the new public sphere.¹⁷ For rural women, in contrast, the token dower is linked with a different take on modernity. To them, being modern becomes visible in their withdrawal from agriculture labour, the relegation of women to 'the domestic' and the concomitant construction of husbands as providers.

Yet, whereas in the field of 'productive labour' urban professionals and rural women follow divergent trajectories, with respect to marriage arrangements there are major similarities. Both categories of women have gained more say in the arrangement of their own marriages, as the increased importance of paid employment vis-à-vis (landed) property and subsistence labour, both dependent on kin relations, has created more space for women in the marriage system. Still, in their evaluations of token dower registrations, there are differences. Urban professional women see a high prompt dower as

incompatible with both their strivings to be a productive member of society and their preferences for companionate marriage; to them a high prompt dower epitomizes 'the sale of women.' Rural women emphasize their non-engagement in agricultural labour and highlight the conjugal relation by rejecting the old, traditional model of marriage that may include forced marriage, exchange marriages and fathers keeping part of their daughter's dowers. Still, even if agreeing with a token dower, they do not place this form of registration in contrast with high prompt dower marriages. As dower gifts, especially gold, have remained a major source of economic security for them, they do not link registering a high dower with 'the sale of women,' but see it is an entitlement.

From the above then it has become evident that registering a token dower is the tangible result of different trajectories towards modernity. The effects of these moves are often ambiguous, that is, they may both be disciplining and enabling. With different categories of women differently affected, this may lead to new divisions and hierarchies amongst women. Once registering a token dower is seen as a symbol of modernity, registering a high dower turns into an archaic and backward practice. Still, the notion of high dower registrations as archaic is far from hegemonic and a substantial number of women, even some of those for whom a token dower is registered, would disagree with such an understanding. More important then are the divergent material effects of registering a token dower. For professional women and the higher classes in general, the token dower has a strong symbolic meaning, but because of their secure economic position, the move towards token dower registrations has hardly affected them in material terms. To rural women, on the other hand, dower gifts have remained a major source of economic security, and while relations of trust are central in making token dower registrations, there is always the possibility that things will not work out. Especially amongst those families, both rural and urban, who expect material gain from token dower registrations, things may turn out very different. Here the modernity of the token dower ties in with processes of 'commercialization,' not in the sense of the sale of women, but as extracting the maximum value of gifts from men. The contrasting strategies women themselves at times employ, that is giving up financial security to facilitate a marriage with a man they are convinced of, is not always successful either. Both strategies mean taking a risk: men may not pay up either in financial or in emotional terms. Having household goods registered and hence legally guaranteed is hardly a solution to these problems, for it contributes to modern notions of domesticity rather than providing a form of financial security, as had been the case with gold. A

focus on how women link the token dower to modernity not only foregrounds the plethora of meanings and effects of token dower registrations, but also brings to the fore the multiple modernities involved.

To end with, what do these stories tell us about the use of legal sources for writing social history? The narratives ‘about the law’ indicate the complexities of working with sources such as dower registrations to gain insight into the material meanings of the dower to women. As indicated in the above, token dower registrations can easily be misread, if we assume that registering a token dower does away with the financial obligations of men at marriage, “as there is no *mahr*.” Still, also when goods are exchanged similar in value to what women would receive had a high amount been registered, the fact that a token dower is registered *is* meaningful. In order to gain insight into the meanings of token dower registrations, we then also need to acknowledge that registering a token dower is not a unitary practice. The narratives women from different walks of life present, point to different historical trajectories, linking token dower registration with such transformations as greater participation in the modern public sphere through professional employment or moves from agricultural subsistence labour towards new notions of domesticity and consumption. Yet, the story does not stop here. Registering a token dower is not simply the effect of such transformations; it also has its own dynamics. Precisely because it turns a legal entitlement into a gift, it further contributes to these transformations, such as the shift from defining women first and foremost as ‘daughters,’ highlighting kinship, to foregrounding conjugality. Simultaneously, although women from different backgrounds register a token dower, registering such a dower may also work to produce differences and hierarchies between women, both along lines of material wealth as well as those of cultural capital; for it is only when token dower registrations occur that registering a high prompt dower can be seen as ‘old-fashioned.’

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PUBLICIZING PROPRIETY, “TELLING THE TRUTH”

Extra-court Constructions of Legal Stories in Mali

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Introduction: A Case of Domestic Violence That Never Became One

In August 1999, a private radio station, located in a popular neighbourhood of Mali's capital Bamako, publicly announced that a “case of [domestic] violence against women”¹ had occurred in the close proximity of the station. The radio coverage of the incident focused on two *dramatis personae*: a husband and his second wife. The former, enraged by a remark of his wife that he considered a serious sign of disrespect towards his mother, had taken a stick to seriously beat her up “as a consequence of which, she was not only no longer able to move, [but also] feared that irreversible damage had been done to her right eye.” The battered woman, the radio reported, had left the home for a cousin's house in another quarter, where she was “recovering from her injuries and considering what course of action to take against her husband.” The broadcast ended with an exhortation of female listeners to bring similar cases to the radio's attention, as a first measure against abusive husbands.²

The immediate consequence of the broadcast was that the family altercation, presented as a case of domestic violence against women, was successfully brought to the attention of a legal counselling service established by a women's rights nongovernmental organization (NGO). But the conflict never reached the court. Upon the legal advice of the counselling service, the woman commissioned a male relative to let her husband know that she would take legal action against him unless he would guarantee the non-recurrence of such treatment. The conflict was settled in a family reunion lead by senior male

representatives of both families. The crucial step towards the settlement was the husband's promise to grant his wife the right to use her own salary exclusively for her own needs and ends. In short, a confrontation that pitted a woman against her husband and mother-in-law, originally conceived (at least by the latter party) as an instance of "lack of respect" towards elderly authority, was subsequently turned into an act of domestic violence by a husband against his wife. The final version of the episode presented it as a disagreement over the spouses' respective contribution to the family income.

The event would have gone unnoticed by urbanites beyond the proximity of the radio station, had it not become a stake in a long-standing public controversy over governmental policymaking with regard to "women's rights." The origins of this controversy date back to the years after the Beijing platform, when the "improvement of women's living and legal conditions" was made a priority by the government. In the following years, officials from the Ministry of "Woman, Child and Family" and female rights activists had clashed with Muslim interest groups and with officials from the Ministry of Justice³ over the question as to whether, and how, women's status should be enhanced through legal reform.

Only a few days after the broadcasting of the event as a case of "domestic violence against women," the radio was attacked by a speaker of the national Muslim association AMUPI.⁴ On *Radio Islamique*, the Muslim association's radio station in Bamako, the speaker dismissed the broadcast as an "attempt to introduce strife into the family" and as an instance of the "destruction of our values by agents of Western influence."⁵ The speaker was sided by other Muslim voices broadcast on local radio and tape-recordings that mounted similarly scathing attacks on "these men-women who, since the arrival of democracy, seek to turn family life into a tyranny by women." Common to these interventions was a strongly moralizing tenor and the framing of the issue as an onslaught on the integrity of Mali's authentic traditions (which most speakers equated with Islamic values).⁶ Because "the Malian woman" epitomized Malian cultural integrity, the speakers argued, it was the government's duty to safeguard women's honour and dignity. Support for their position came from several male journalists who similarly presented the issue as a matter of "female propriety" threatened by foreign and more specifically, Western feminist influence. In other words, actors from various locations in the national political arena linked the altercation between the woman and her in-laws to a broader struggle over the normative foundations of the commonwealth. The main protagonists of the controversy were officials from the Women's Ministry and women's rights activists on one side, and Muslim activists and other government officials and journalists on the other.

This article examines these forms of "public reasoning" (Bowen, 2003) as extra-court constructions of legal stories. The divergent framing of this case of "domestic violence" by various actors sheds light on how issues of legal activism and social reform are currently debated in urban Mali.⁷ It illustrates which political actors are able to participate in and bend the terms of negotiation to their advantage, and how their respective positions in a national arena are shaped by and influence national and international structures of intervention. The broadcasting of the story on local radio constituted a key turning point in the construction of the episode as a legal case. Media institutions thus play a critical role in the formulation of legal truth outside the formal juridical domain because they help construct a legal case through a series of publicly told stories. The political biography of the episode reveals the close link between particular definitions of propriety, public order and the establishment of legal truth (see Dupret, 2001). Women's propriety, in particular, is taken by proponents of various political positions as an indicator of the moral state of society, and, ultimately, as a means to address the normative understandings on which the political community should be built.

How do the different versions of the incident relate to the competing notions of the "common good" to which these actors lay claim? Calhoun (1998), in a recent critique of Communitarianism, argues that its central weakness consists in its conception of the "common good"⁸ as being substantively defined and as existing prior to historically constituted communities. This view, Calhoun contends, fails to address whose version of "common good" is made the normative basis of the political community, and to specify the political and social locations of those who proposed this definition. What a political community accepts as shared normative foundations is the temporary outcome of a historically specific power constellation. Opponents struggle not only over the foundations of the common good, but over the very right to participate in its definition.

This observation raises the question as to whose definition of the "common good" prevails in contemporary Mali, and what national and international institutional and political processes are at the origin of its predominance. In Mali, a constructionist view of the "common good" clashes with the views of many protagonists of an Islamic moral renewal. Their arguments revolve on a view of the "common good" as the result of revealed and eternal truth. Still, as I shall demonstrate, the notions of the "common good" formulated by different Muslim groups only loosely derive from interpretations of the foundational texts of Islam. They reflect a particular historical, political, and institutional context that places those who formulate Islamic viewpoints, as well as their secularist supporters and opponents, in particular socio-structural

positions. All contending parties seek to impose their normative understandings of the relationship between public order and individual conduct, and thereby participate in a dialogic construction of issues of legal and political intervention and thus of notions of common interest.

The Political and Institutional Context

Current debates over women's rights, propriety and over the normative foundations of the political community take place in a field of three overlapping discursive and institutional domains of public reasoning. The dynamics and features of these domains are crucial to the formulation of certain incidents as political or legal cases; they simultaneously inhibit other ways of framing social issues and of bringing them to public attention.

The first domain is structured by activities of women's rights activists and by their competitive relations to governmental institutions. Women's rights activism came into existence in Mali after the end to the single-party rule of President Moussa Traoré and his party UDPM⁹ in 1991. When Alpha Konaré came to power in 1992 as the first democratically elected president of Mali, political and administrative structures for the promotion of women's legal and living conditions were created.¹⁰ The mushrooming of various state and non-state structures reflected the influence gained by a new female professional elite since the democracy movement of the late 1980s.¹¹ Many of these women, originally members of the *Movement pour la Démocratie*, felt increasingly excluded from power and created their own NGOs to improve women's living conditions and offer legal assistance (*Cliniques Juridiques*) in matters of divorce, inheritance and physical abuse. While most of these NGOs stress their role in limiting the prerogatives of state power, they are obliged to adjust their programs and goals according to governmental priorities that, in turn, tend to follow the directives of an international donor consortium. Moreover, it is widely recognized that NGOs, as well as other civil society associations, strongly depend on external resources, and on the government-mediated access to international funding agencies. Many intellectuals and people from the urban uneducated masses deplore that in the current era of neo-liberal economic reform, local NGOs and the government are an easy prey to the changing development agendas of Western donors. They therefore look at NGO leaders' claims to intellectual autonomy with suspicion.

Muslim activists who denounce the degradation of Mali's authentic values by "Westernized" intellectuals echo a more widespread scepticism vis-à-vis the current political elite.¹² Current controversies over the values to which policy-makers should subscribe, are structured in more complicated ways than

simply opposing secularist intellectuals and their "religious" critics. While many women's NGOs form temporary and highly unstable alliances around particular policies and goals, their relations are shaped by considerable competition over their respective ties to the ruling party and the access to international agencies that these ties facilitate.¹³ Most NGO leaders portray this competition as a disagreement over who legitimately represents "women's interests," in a situation in which, following the World Women's Conference at Beijing in 1995, the move of "women's rights" to the forefront of policy-making has come under cross-fire from various sides.¹⁴ Among the most vociferous opponents are individuals who all highlight the Islamic foundations of their convictions. Closer scrutiny reveals that their positions vary and derive from long-standing disagreements among different Muslim groups over authoritative interpretation and proper Muslim practice. At present, these disagreements feed into the differential locations of Muslim actors in a national field of political clientilism.

Historical Dynamics of Muslim Public Deliberation

Muslim leaders in many areas of today's Mali only rarely acquired the same political influence they had played in other areas of colonial West Africa.¹⁵ In pre-colonial polities (that is, until the second half of the nineteenth century), lineages of religious experts and scribes, often associated with Sufi orders,¹⁶ were influential in several towns.¹⁷ Today, these lineages are considered representatives of "traditional" Islam.¹⁸ Since colonial times, they have encountered the opposition of Muslims who, influenced by reformist thought in the Arab-speaking world, denounced as unlawful innovation many practices and beliefs related to local Sufi orders. Although these opponents do not constitute a homogenous group, popular parlance refers to them as "Wahhabi," while they call themselves "Sunni" that is, those who follow the example of the prophet (*sunna*).¹⁹

Although Modibo Keita, the first president of independent Mali, limited the influence of Muslim clerics and merchants in local and national politics, they maintained an important political role.²⁰ President Keita's successor, Moussa Traoré, made substantial concessions to Muslim authorities, in spite of the secular constitution.²¹ By granting these privileges, President Traoré extended his control over established religious lineages and over the funds that "Sunni" businessmen received from the Arab-speaking world to expand a religious and educational infrastructure in the name of Islamic proselytizing (*da'wa*). Traoré's favourable attitude towards influential Muslims and his creation of a national Muslim organization (AMUPI²²) facilitated their growing influence throughout the 1980s. Although the flow of aid money from the Arab world

has diminished dramatically since the early 1990s, Muslim leaders continue to enjoy great popular support. Their associations offer social and financial support and render their invocation of a pristine Islamic moral order credible in the eyes of many people from the urban and rural lower classes who are deeply disillusioned about the new, post-1991 regimes whose promises of democratic rule were not borne out.

The introduction of multiparty democracy after President Traoré's fall from power in 1991, and the concomitant pluralization of the media landscape facilitated the public expression of Muslim diversity. Some representatives of established religious lineages and "Sunni" leaders have gained greater public recognition after 1991. They sometimes are in a relation of fierce competition over patronage relations to the new political elite. A remarkable feature of current Muslim activism is the central role of women in associational life, a centrality that is reflected in the creation of a female branch of the national Muslim association, UNAFEM, in 1997, which publicly tends to endorse the position of leading AMUPI representatives (but, as we will see below, espouses a more differentiated viewpoint in private conversations).

A second, numerically and politically relatively unimportant, group of Muslims take a more radical stance. Commonly referred to as *Intégristes*, these Muslims experienced a major backlash in 1991, the year of the first democratic elections, when their attempt to create religious parties failed. Yet they continue to call for the introduction of (what they refer to as) the "shari'a", without clearly defining what this would entail. In spite of the heterogeneity of viewpoints put forward by Muslims in public controversy, they share an idiom of religious virtue centred on the notion of "female propriety."

A Mass-mediated Public

The fact that the case of "domestic violence" was brought to public attention by a local radio station is indicative of the political significance of a pluralized media landscape that has been emerging after 1991. While local radio stations have put an end to 30 years of state-controlled broadcasting,²³ their limited reach, lack of financial and professional resources, and the generally poor quality of their programs restricts their capacities to undermine state-orchestrated representations of national identity and history.²⁴ Local radio stations face a heightened competition with other stations over listeners and over financial support from national and international funding agencies.²⁵ Most local stations have lost the critical edge of the first years of their existence partly because of the lack of popularity of their political information programs. Music and entertainment programs make up the major share of broadcasting

time. Still, instances such as the broadcasting of the "domestic violence" case, suggest that on the long run, the creation of new local mass-mediated arenas of communication will effect changes in governmental media policies by introducing new dynamics into a national media landscape.²⁶

The radio station that initially broadcast the domestic violence case holds a particular position in the capital's mass-mediated arena, partly because its programming targets different groups of female urban consumers. Journalists from the national and other local radio stations tend to express their strong reservations towards the radio's agenda. Employees of the radio station, in turn, preserve a critical distance vis-à-vis their colleagues from other stations and towards women's rights activists, who, they feel, make themselves overly dependent on international donors and governmental institutions. At the same time, the radio station lends strong support to the political agenda of women's NGOs through a variety of broadcasts that aim at the making of a critical public opinion.²⁷

"Domestic Violence" in Mali: Social, Normative and Judicial Dimensions

The dearth of qualitative and quantifiable data on domestic violence and its invisible nature makes any assessment of the pervasiveness of instances of domestic physical abuse a difficult task.²⁸ Already, the definition of domestic violence is problematic because it may include various victims and forms of action, and does not have an equivalent in Bamanakan or in local French parlance. The women to whom I spoke defined domestic violence either as directed exclusively against women by their husbands²⁹ or as physical abuse of a family member (most often, a junior's) by another (senior) one.³⁰ This semantic indeterminacy hides a sliding sense of what constitutes an act of "abuse", and what a "regular" sanction. Beating and other forms of physical aggression are part of the standard repertory of "educating" social juniors (including women) by "disciplining" them.³¹ Beating serves as a common way of reasserting status hierarchy and elderly authority. Muslim authorities, whenever questioned on this matter, defend the physical disciplining as part of the marital arrangement. The broadcast station's naming it an act of "violence" in need of justification was thus a significant political step because it moved the act out of the protected realm of "normalcy." This explains why the broadcast encountered such an extraordinary opposition by various actors supportive of the dominant normative order.

Most victims of physical aggression are reluctant to talk about it as an abuse and thus to question its normalcy.³² Even if victims suffer from, or

seek recourse against, recurrent beating, they still believe in its legitimate character as a standard form of punishment for acts of insubordination, obstinacy, and laziness.³³ Put under considerable pressure by their social environment,³⁴ they tend to view their experience as a proof of their own failure to comply with the standards of proper female behaviour. Because they fear to be ridiculed by neighbours and friends, most victims contribute importantly to keeping domestic violence a taboo area.³⁵ Another reason for women's reticence to render their personal experience public is the lack of institutional and social support. Legal counselling services offered by women's rights activists have improved the situation, but only in a few urban centres of the south. Activists can offer only limited support in these matters because legal provisions in the Malian criminal code (*Code Pénal*) deal with assault with or without battery, but do not specifically cover cases of domestic violence. Women who have been lucky enough not to be seriously injured will leave the *Clinique Juridique* with the information that no legal action can be taken against their husband, unless they return with a serious injury. The only advice the women receive is to put pressure on their husbands by threatening them that a future act of physical aggression *might* provide the basis for legal action against them.

Many women hesitate to turn to the *Cliniques Juridiques*. They are aware of the widespread scepticism (particularly among older women) towards women who work in these *Cliniques* and who do not hesitate to publicly denounce abusive practices against women.³⁶ That is to say, religious authorities and male journalists are not the most important opponents of women's rights activists and of other elite women with a feminist agenda. Similar to other African societies, it is the senior generation that has a strong interest in maintaining patriarchal norms under the cloak of "protecting tradition" (see Ofei-Aboagye, 1994: 263-266, 269).

Three points follow from this analysis. First, women's rights activists walk a thin line between their aim of transforming local conventions and normative perceptions on one side, and the danger of being considered mere pawns of Western cultural imperialism on the other.³⁷ Second, contrary to the claims by female activists and officials from the Women's Ministry, it is unlikely that legislative reform will bring about substantive changes in the attitudes and practices relating to women's rights.³⁸ Third, women's rights activists as well as state officials and politicians, by publicly framing the issue of "domestic violence" as one of the relations between the sexes, gloss over an essential point. They downplay the challenge resulting from the conflict over control, authority and distribution of responsibilities among women of different

generations.³⁹ Intergenerational conflict is entrenched in the social set up of polygamous households. With the worsening economic conditions in town over the past twenty years, conflicts over the division of financial responsibilities between the spouses have been exacerbated and have lead to new tensions.⁴⁰ The conventional intergenerational pact according to which seniors base their authority on their capacity to control the labour product of juniors is no longer valid. The conflicting expectations between the generations translate into recurrent conflicts and into almost daily altercations between women and their senior in-laws. As I shall argue, the tendency of women's activists to remain silent on the intergenerational dimension of family conflicts restricts not only their course of action, but the efficacy of their interventions.

The Conflicted Construction of a Legal Case

Romany (1994), in her account of how debates on domestic violence are currently framed in Puerto Rico, argues that the categories of the "helping professions" play a central role in defining the terms of public controversy. The discourse of the "helping professions," Romany argues, excludes female victims' experiences and reduces them to individual cases of private anomaly and dysfunctional families. By presenting the physical and emotional effects of abuse as an entirely private and individual affair, the systemic character of violence against women, and its correlation with social and economic inequality and injustice, remains unexposed. Furthermore, law enforcement officials draw on the discourse (and expertise) of the helping professions to avoid prosecuting perpetrators, and to forestall implementing the legal consequences of the recent criminalization of violence against women in Puerto Rico. Finally, Romany detects a gender-bias in current debates in Puerto Rico as to whether domestic violence should be approached and eradicated through legal measures or by focusing on extra-legal solutions. The ways in which law enforcement officials and the media address the problem, reveal their tendency to declare something a structural problem for which extra-legal solutions should be found. In other words, by presenting men's misdemeanour as a social problem, they allow men effectively to forego legal punishment.

The categories on which various actors draw to frame the event as an instance of conflict make certain social, legal or political solutions appear realistic while blocking alternative possibilities of conflict resolution. In the case of Mali, this raises the question of how different actors and interest groups, by "framing" the incident in a particular way, relate it to larger societal issues and thereby define the stakes of public debate and who may legitimately participate in it.

Version 1: The Initial Story

When the battered woman, her neighbour-friend, and a younger brother reported the incident to the radio personnel, they explained that the physical assault had been the culminating point in a series of altercations during which the second wife tried to convince her mother-in-law, husband and co-wife to move to a neighbourhood located nearby her working place. A new living arrangement, the woman argued, would help her save on her salary, rather than spending most of it on public transportation and lunch meals. Because her in-laws had refused to move, the woman had occasionally stayed overnight at a cousin's house located in close proximity to her working place. Her husband's physical assault had been triggered by a clash between his mother and second wife after she had not returned home for three consecutive nights.⁴¹ The woman, infuriated by her mother-in-law's reproach that she was "selfish" and a "greedy slut," retorted that the latter was "only interested in controlling her (money)" and guilty of "continually planting the seed of distrust" between herself and her husband by alleging her to be sexually promiscuous. The victim and the neighbour who accompanied her to the radio station justified her remark by reference to the mother-in-law's verbal abuse. The husband and mother-in-law, in contrast, considered her retort a sign of disrespect and a serious insult.

It was the idea of the victim's neighbour to report the incident to the radio station.⁴² Her motivation, she explained to me in private, was to muster support for the victim whom she considered "defenceless" in the rather inimical atmosphere of her in-laws' family setting.⁴³ Yet, as the neighbour added with a slightly embarrassed smile, she had expected the episode to be broadcast, not in the news program, but in one of the talk radio programs which frequently feature debates on family conflicts.⁴⁴

Version 2: A Conflict Between the Sexes

In a discussion following the report by the victim and her *company*, radio employees altered the framing of the incident.⁴⁵ The victim and witnesses had presented the clash as one between women of different age and status, a clash into which the husband had intervened in an inappropriate manner, namely by fuelling the conflict, rather than by reconciling the conflicting parties. The story was reinterpreted as a case of domestic violence by the radio director who advised a radio speaker to present it as such in the next radio news program. Whereas the initial report had highlighted a conflict between women across the generational divide, the broadcast version presented the confrontation as one between the sexes.⁴⁶ This reinterpretation of the incident constituted

a crucial move towards the version presented by various proponents of women's rights, among them legal advisors and members of the Ministry of Women. All these parties reframed the confrontation as a marital conflict and a matter of gender inequality. What we see here, then, is the appearance of a certain rift between individual ethics and societal norms (Boetsch and Ferrié, 1997), a rift that makes room for the reinterpretation of the confrontation as an issue of political and legal intervention.

Version 3: A Case of Domestic Violence

Following the broadcasting of the episode, representatives of two *Cliniques Juridiques* described the episode as an instance of domestic violence and as a proof of the "systematic discrimination of women." Interviewed on local radio, they emphasized the pervasive nature of women's physical abuse in the family and called for legislative change (in the *Code Pénal*).⁴⁷ Challenged by the radio speakers, they insisted that the woman's battery constituted a legal case, in spite of the lack of legal provisions against domestic violence. In the absence of political solutions capable of effecting changes in society and custom, only the judicial system would provide a remedy. The interviewees observed that there was a need to raise awareness in the international community of the "vacuum" in the Malian criminal and matrimonial code. Some of the interviewed women's rights activists emphasized their desire to protect Mali's authentic values, but only as long as it did not collide with women's dignity and right to bodily integrity.

These statements show that women's rights activists, in their public interventions, need to straddle the needs and expectations of different groups whose support they seek. In their role as legal counsellors and publicly interviewed experts, they represent altercations within the family as cases of domestic violence against women. At the same time, because they aim to appeal to broad segments of an illiterate urban population, they are under strong pressure to respond to the "framing" offered by Muslim activists and religious authorities. The latter portrayed the issue as a matter of lacking female propriety. Women activists countered their charges by emphasizing the need to protect authentic traditions which ensure women's dignity. This suggests the emblematic relevance of "women's morality" to the claims by both women's rights activists and their critics. The trope of "women's propriety" can be used to justify opposed political and ideological positions.

Whereas women activists have gained a leading role as "moral agents" (Dupret and Ferrié, 2001) in public debate in Mali, their repertoire for the presentation of the episode as a social and legal issue remains limited. Their

silence about the crucial role played by older women reflects their attempts to operate within the socially sanctioned space of “decent” and “respectful” conduct. Also, there are no legal categories that allow for an alternative framing of the issue of domestic violence. This means that although a focus on “women’s rights” offers strategic advantages, it may spawn serious drawbacks. Those who claim to protect the “dignity” of women tend to reduce the complexity of power differentials in the family. They narrow down the intricacy of the social and normative context and exclude a dimension central to the perpetuation of an order that “normalizes” (Dupret, 2001) and thus legitimizes women’s physical abuse.

Version 4: An Attack on the Moral Foundations of Society

The fourth version, presented by religious authorities and Muslim activists from different political locations, explicitly linked the question of “women’s rights” to the on-going debate over the normative foundations of the political community. Yet, rather than articulating a uniform standpoint, their interventions reflected diverse, sometimes contrasting definitions of the issues at stake. Their heterogeneous views on substantive definitions of the common good hint at their rivalry over political support by the government and over being recognized as representatives of civil society.⁴⁸

Representatives of the national Muslim association (AMUPI) who discussed the case on *Radio Islamique*, the association’s radio station, tended not to dwell on the episode per se, but to focus on the activities and claims by the radio director and by women’s rights activists who took up the case. Some speakers focused on the conflict between husband and wife and took the woman’s “recklessness” as a starting point to deplore the loss of patriarchal family authority.⁴⁹ Others directly attacked women’s rights activists and denounced their “attempts to make the episode a public issue” as an assault on the “teachings of Islam,” without, however, ever advancing substantive arguments based on the foundational texts of Islam.⁵⁰ Their references to “a woman’s rights and duties in Islam” did not go beyond general observations about Islam requesting women to “acquiesce to their husbands’ directives,” to “maintain social stability” and to protect “the family as a refuge of man’s affection and well-being.” Most speakers stressed the need to “rescue and rejuvenate” Islam’s relevance to everyday life, in a situation where “Islam’s moral message” was undermined by “the efforts of these agents of Western values,” that is, by government officials and women’s rights activists. This claim reveals a tension between the assertion of “Islam’s” immutable nature and a call for a reassessment and re-reading of its significance to contemporary society.

Female representatives of the national Muslim association, too, focalized the issue of a woman's duties towards her in-laws. Yet they advanced a more differentiated line of reasoning than their male counterparts,⁵¹ who sweepingly dismissed the support provided by women activists for the battered woman as an improper endorsement of an appallingly dismissive attitude towards "traditional values." Muslim women stressed the woman's "disrespectful behaviour" towards her seniors and claimed that the ensuing conflict between the generations reflected one of the most serious contemporaneous challenges to a "harmonious" family life. In doing so, these Muslim women pointed to a significant feature of the normative and institutional context that was by and large neglected by male AMUPI representatives and by their major political opponents, the women's rights activists and government officials.⁵¹

A number of intellectuals with close ties to the AMUPI were invited by *Radio Islamique* to give an "informed Muslim opinion" on the case. After introducing themselves as representatives of the consensus (*ijma'*) of the Malian learned community, they portrayed their own standpoint as a moral counterpoint to the "irreligious" Westernized government and as the only possibility of saving the ethical foundations of the nation.⁵² Although they never expressly used the term "common good" (in French or Bamanakan) or referred to the notion of *maslaha* or *maslaha 'amma* ("public interest"),⁵³ they nevertheless framed the issue as an attack on the "moral foundations of our culture, our nation."⁵⁴ The way these different representatives of a politically moderate Islam framed the issue hints at a fundamental ambivalence. They claim the immutable and incontestable nature of the "common good" as the result of divine revelation. Yet their reasoning makes room for its worldliness and mutability, and thus clearly reflects how they pragmatically take into consideration the potential social and political repercussions of their interventions (see Bowen, 2003: 258ff).

A similar ambivalence emerged from the few statements of *Intégristes*, the more radical Muslims critics of governmental policy.⁵⁵ Their arguments centred on the danger of "foreign values" eroding tradition⁵⁶ and the foundations of political community.⁵⁷ To them, this case of "female insubordination" pinpointed the need to enforce an Islamic regulation of family matters. But because their references to the Islamic foundations of family regulation were relatively vague, it remained unclear exactly how they imagined the state to intervene in this domain.⁵⁸

Thus, in spite of these different Muslim groups' invocations of the government's responsibility in safeguarding "traditional" Islamic values, they disagree on the nature and extent of state intervention.⁵⁹ They all – implicitly

or explicitly – appeal to an idea of “common good” conceived as an alternative to the one proposed in current governmental rhetoric and practice. Yet closer scrutiny reveals that they operate within the same normative and institutional register as their opponents do, whose “secularist” position these Muslim leaders claim to challenge (Schulz, 2004, chapter 1; see also Dupret and Ferrié, 2001). Muslim activists and traditional authorities seem to be caught uneasily between a substantive conceptualization of “common good” and their occasional recognition of its historically dynamic and contested nature. Their reasoning thus implies a sliding sense of the nature of the common good. The strong moralizing undertone of the positions articulated by representatives of an “Islamic” viewpoint reveals their two major concerns. They feel threatened by the on-going erosion of conventional structures of family authority. And they react with fear and suspicion to the greater leverage that civil society initiatives have gained. Supported by the government, they intervene in matters hitherto more firmly controlled by family elders and religious authorities.

Version 5: A Conflict Over Financial Responsibilities

I already mentioned that, at a public level, women’s rights activists presented the episode as a case of female social and legal discrimination and as a confirmation of the urgent need for the creation of legal provisions against domestic violence. The woman’s legal advisors from the *Clinique Juridique* counselled her not to return to her husband’s home directly, but to threaten him to implicate “the authorities” if another physical attack occurred. The woman, after consulting with her confidants, decided to proceed differently and to threaten her husband with another radio appearance. The husband, clearly intimidated by the publicity his act of “disciplining” had gained, agreed to “settle matters” in a reunion of older representatives from both families.

The family reunion revolved on two competing interpretations of the altercation. Ultimately, the uneasy coexistence of these two versions remained unresolved, even if the session was concluded with a temporary conflict settlement. The husband’s senior representative (his mother’s older brother) denounced the conflict as an instance of a woman’s “insolent” and “rebellious” behaviour towards her husband and senior in-laws. His presentation was countered by the woman’s senior representative (a remote male relative) who portrayed the conflict as one over the spouses’ respective contributions to the family budget.⁶⁰ What emerged from the succeeding debate was that there existed a longer-standing disagreement within the marital couple and among family elders over decision-making control and financial responsibilities. The family meeting ended with the agreement that the woman could use her income

at her discretion, as long as she paid "due respect" to her husband and mother-in-law. This "clause" left room for the latter's claim to the woman's financial support. The woman's husband and mother-in-law, in turn, were exhorted to be "more patient" with the woman and to "watch over her as the mother of future off-spring," an allusion to the legal action the woman would take in case of future injury.

Thus, until the end, two parallel versions of the incident continued to exist. In public debates, the incident served as a bone of contention among Muslim actors and their political opponents. The conflict partners themselves returned to an earlier construction of the case, that is, to the framing of the incident as a struggle over seniors' control of juniors and their budget, as well as over the spouses' respective contributions to the family subsistence.

Concluding Reflections

A guiding concern of this paper was to understand how the competing normative orders that Muslim activists and their political opponents invoke relate to, and translate into, constructions of a legal truth and of a "true" rendering of past events. The discussion proceeded in two steps. First, it examined what social stakes were involved in the conflicted, public construction of a family altercation as a legal case. Second, it explored the institutional conditions that allowed some actors to establish their views of what should constitute the normative basis of the political community as the dominant one, and to achieve wider recognition with their version of legal truth. Here, special attention was given to the ways in which state agents intervene into the relationship among political opponents, who claim to draw on different normative orders, by lending greater institutional support to one group.

Several features of the current political context played a decisive role in the construction of the episode as a case of domestic violence. One is the new international institutional framework of donor agencies. In their adoption of a liberal legalistic agenda, they importantly affect current fields of public reasoning in Mali, but in sometimes paradoxical ways. Their legalistic discourse and orientation enable some actors (such as the women's rights activists) publicly to enforce their reconstructions of 'what happened', and simultaneously to delimit the ways in which the "true story" can be publicly presented. The family altercation had to be framed as a "legal case" in order to receive political support. At the same time, it is precisely this focus on women's rights that makes it difficult, if not impossible to address the crucial role played by older women in the maintenance of the patriarchal normative and social order. In other words, women's rights activists cannot sufficiently

address the fact that domestic violence against women, that is, a violence effected against women of the younger generation, should be seen as the result not only of the power inequality between husband and wife, but of a hierarchy among women of different age and status.

Other factors that introduce new dynamics into the conflicted construction of legal cases are the competitive arena of radio broadcasting and a pluralized political landscape in which different segments of the elite compete for privileged access to the resources of the state. The broadcasting of the family altercation constituted the turning point in the episode's public construction as an issue of legal and political intervention. In a situation in which a victim of "domestic violence" can not take recourse to a court procedure, publicizing the event as a "story" constitutes an effective tactic. This form of intervention challenges the conventional interpretative framework which denies the existence of violence *as* violence. In this fashion, local radio stations, and the form of publicity they create, have turned into an extra-court institution capable of bending prevailing societal norms. The publicity that the "case" received was also crucial for the way it was resolved within the family. Local radio stations thus play a novel and decisive role both in the controversial construction of legal stories and in public deliberations over notions of order, normativity, and community.

The instrumental relevance of media to the forms and outcome of public reasoning has been complicated by Mali's political liberalization since the early 1990s, and by the consecutive greater financial support by Western donor organizations. Local radio stations create a platform from which to challenge official constructions of social issues and legal cases. By publicizing dissonant views of "true events," they enforce the social and political standing of groups who have been excluded from state-monitored fields of public reasoning. But in their greater inclusiveness, radio stations have very equivocal effects. They invigorate conservative forces in a national arena as much as they give force to politics that, from a standpoint of Western liberal political philosophy, have progressive and liberating effects.

The public interpretation of the episode as an issue of legal and political intervention, and the underlying construction of a close link between individual morality and public order remained a "work in progress." The question of 'what happened' continued to be the contested outcome of a struggle among Muslim actors, and between them and their Western-oriented political opponents. The ways the different versions of the episode were established in public debate suggest that the various lines of confrontation that structure the field of politics do not run along a neat divide between "religious" versus "secular" conceptions

of the relation between personal faith, propriety, and politics. Representatives of both sides of this alleged divide turned "female propriety" into the centre-piece of their reasoning about the nature of public order.

The positions articulated by Muslim intellectuals who intervened in the debate revealed little grounding in scholarly, legal reasoning or in controversial discussions of the foundational texts of Islam. Non-Islamic understandings played into the understandings and claims of these Muslims, without being recognized as such. This suggests that in Mali, Muslim activists' current interventions in public controversy build on Islam primarily as an idiom of cultural authenticity and political legitimacy. Contrary to the claims of those who intervene in the debate by presenting themselves as defenders of "Islamic values" and who seek to exert political influence through official institutions or informal networks, they do not share a common viewpoint. Rather, the debate hinted at the on-going struggle among Muslim activists over the authority to publicly articulate an Islamic viewpoint, and hence over their legitimacy to speak on behalf of all Muslims.

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THE SAINT, THE SHEIKH AND THE ADULTERESS

Letters From the Heart Addressed to Imam al-Shafi'i in Cairo

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"To know how to carve a story out of a terrible action allows one to set a distance between oneself and the event, at worst by deluding oneself, at best by forgiving oneself"

Natalie Zemon Davis, *Fiction in the Archives, Pardon Tales and Their Tellers in Sixteenth-Century France*

Between October 1993 and April 1994, around fifty letters a week reached the mausoleum (*darib*) of Imam al-Shafi'i¹ situated south of the Cairo Citadel, at the very heart of a necropolis (*al-qarafa al-sughra*) of which he is both the eponym and the patron saint. The correspondence arrived either by mail from the four corners of Egypt, or was directly deposited on the saint's tomb by the believers themselves, on their way out from a pilgrimage (*ziyara*). Some of these letter writers solicit the intercession of al-Shafi'i (150/767-204/820) to obtain spiritual and temporal goods: blessing, recovery from illness, procreation, debt payment, protection, exorcism, etc. Others, however, who consider themselves persecuted (*mazlūmun*), relate to him in detail all sorts of traumas and conflicts that oppose them to their family, friends, professional colleagues or neighbours and implore his transcendental power. The problems submitted in those letters cover an extensive variety of fields: usurped inheritance, arbitrary loss of a job, polygamy, battering and wounds, witchcraft, the poisoning of orphans or cattle, fraud, non-payment of alimony, robbery, libel, professional harassment, etc.

The present article raises the question as to how and not as to why address oneself to a saint who died almost twelve centuries ago and solicit his magico-religious intervention in order to solve earthly litigations, most of which are juridically receivable. For there are, indeed, different ways of telling a story, of concocting a tale, one does not write any which way, even to a saint; particularly not to a saint. It is appropriate to search for the adequate word, to use accepted formulas, to give the supplications a presentable form. Otherwise, the supplication runs the risk of remaining unanswered. In order to make the injustice appear clearly, such spontaneous tales are usually articulated in a more or less elaborate form. Some of the narrators do not hesitate to set themselves on stage. They endeavour to build up as coherent and convincing a tale as possible. In many cases, the drafting of the supplication seems like a veritable epistolary effort where nothing is spared – rhetoric, affirmation of one's innocence, and true or false oaths – to win over the saint to one's cause, whether right or not. We shall attempt to show the narrative mechanisms resorted to in support of one's quest, as well as the processes of accusation, of justification and the different kinds of artifice deployed in order to achieve the purpose.

That is why we are concentrating on the analysis of a corpus of five hundred letters that we collected from inside the mausoleum² of al-Shafi'i — a real masterpiece of the Ayubid era (608/1211-2). In order the better to centre our analysis, we have selected a single letter, considered to be sufficiently representative of the entire corpus, even if it has to do with a lover's quarrel (a misunderstanding between a lover and his mistress). A conflict of persons perhaps less serious than other types of differences, yet no less devastating for the protagonists.

Introduction to the Corpus

Beforehand however, it would be appropriate to briefly introduce the corpus from which the letter was taken. In his analysis of a collection of one hundred and sixty three similar letters addressed to al-Shafi'i between 1952 and 1958, the Egyptian sociologist Sayyid 'Uways (1913 to 1989), depicted al-Shafi'i as a sort of confessor giving absolution to his supplicants ('Uways, 1978). The latter "*are totally convinced that the imam will not seek revenge from them as long as they have confessed their misdeeds and that he would never denounce them to the police*" ('Yzzat al-Sa'dani, 1965). But that is not so, since Islam does not incorporate the ritual of confession which is fundamental to Christianity. Those letters must then be considered not as a confession religiously muttered, but rather as private denunciations. If the terms "complaint" (*shakwa*) and "plea" (*mazluma*) are frequently used by the majority of those supplicants the term "denunciation"

(*balagh*) is sometimes explicitly mentioned: “*this is a denunciation submitted by ‘Uthman, son of Warda persecuted by his children...*” (247).³ These private denunciations are not supposed to be read nor dealt with save by their one and only addressee, *i.e.* the saint. They are, anyway, systematically gathered and burnt in the mausoleum’s courtyard under the supervision of a person in charge.

It cannot be done any other way, since the letter contains verses from the Qur’an and, consequently, must not be thrown in the garbage. Anyway, any piece of paper with Arabic writing to be found on the ground must be collected and set apart, lest it contain the name of God and thus be stepped on (Westermarck, 1935). The habit of never throwing anything written in the garbage is also widespread among oriental Jews who, in every synagogue, set a room apart for texts destined to be eliminated (Denoix, 1996). Firmly hostile to such popular practices of devotion, the officials of the al-Shafi’i mausoleum, aim, by burning those letters, to discourage the faithful from pursuing such practices, which are looked upon as being a low class of idolatry. Yet the voluntary and systematic destruction of the imam’s mail constitutes, unfortunately, a considerable loss of valuable data, which would allow a better understanding of contemporary Egyptian society and its evolution at the socio-religious level.

The discretion surrounding that correspondence is theoretically absolute and it encourages the supplicants to express themselves without reservation and to reveal indices and coordinates that would, eventually, allow many of them to be traced. Our intrusion in this confidential mail between offended individuals seeking redress and a righteous judge of a saint who is supposed to rush to their help is, in fact, pure indiscretion that only socio-anthropological study can justify. This is a fundamental difference from, for example, the letters of public denunciation sent to the newspaper *Le Monde* that were the subject of a masterful study by Luc Boltanski (1990). Contrary to those open letters, the denunciations addressed to Imam al-Shafi’i are written in solitude and surreptitiously transmitted by their very authors, without any outside help (from lawyers, public writers,⁴ paralegals, etc.). Thus, they are different from the letters of remission of the Middle Ages analysed by Nathalie Zemon Davis, in the drafting of which notaries, clerks, chancellery officials, men of law and secretaries of the king played a rather important role (Zemon Davis, 1987). Contrary to the authors of quests for pardon of the sixteenth century, the present supplicants of al-Shafi’i do not express any *mea culpa*. For them, repentance gives way to vengeance; an eye for an eye and a tooth for a tooth supersedes pardon. The comparison of these two published corpuses of Boltanski and Zemon Davis with that of Imam al-Shafi’i is worth developing. Unfortunately, it goes beyond the scope of this article.

The sending of letters to the mausoleum of al-Shafi'i is rather a matter pertaining to adults: in our corpus, only twelve are written by minors out of 362 by adults and 126 by supplicants of indeterminate age. Also, 47% of the letters are written by women, while 27% are written by men. In variable degrees, this phenomenon seems to apply to the Egyptian territory as a whole. The expanse of the geographic zones concerned indicates the religious and spiritual influence of the imam over his faithful. Moreover, this phenomenon persists, since the similar corpus studied by 'Uways in the sixties also came from fifteen governorates: 47.2% from Lower Egypt and 46.5% from Upper Egypt ('Uways, 1978: 124-5). Nevertheless, the majority of the letters seemed to emanate from rural areas and poverty-stricken circles. Most of the Cairene writers of letters in our corpus live in over-populated neighbourhoods (Shubra, Bulaq, 'Abbasiyya), in the new cities and poorer suburbs (Madinat Khamastashar Mayu, Helwan, Dar al-Salam). Finally, the authors of the letters are widespread from the socio-professional point of view, with, nevertheless, a majority of manual workers. Among the thirty-one supplicants who either openly mentioned their profession or hinted at it, we find nine farmers, six shopkeepers, a butcher, one artisan, a housemaid and a duty orderly. Yet, this gallery of portraits also includes three civil servants: one engineer, one real estate agent and a professor of informatics.⁵

Submitted to the impartial judgement (*hukm*) of al-Shafi'i, this correspondence is a setting for confrontation of two types of actors:

1) someone who denounces and is a victim who, in his own name, hands down a devastating indictment; with the exception of a few cases where the denunciation is submitted by a third party (a mother revolting against the problems suffered by her son, a husband expressing his indignation at the injustice suffered by his wife, etc.). The writing of the pleas is generally a personal act, which commits only one individual, even if its repercussions will sometimes affect his whole family or his entourage. Our corpus, however, contains twenty-one joint pleas. They are written by one of the partners — probably the oldest or the most eloquent — and sometimes signed by all the plaintiffs. Thus, a common cause or a common foe succeed in mobilizing:

- A group of men: against a third person (26, 58)
- A group of women: mother and daughter against a third person (220, 301, 341); two sisters for a marriage (162); two women of undetermined relation against other women accused of witchcraft (391)
- A man and a woman: for a marriage (201); for childbearing (22); a couple against a mutual friend (19); son and mother against a third person (299); a man and a woman of an undetermined relation against a third person (307, 347, 371, 427)

- A man and his children (247)
- A woman and her children (300, 328, 329, 428, 429)

2) One or often several denounced persecutors who, being absent, are naturally deprived of defence and cannot have their say. Faced with al-Shafi'i the judge, who is supposed to know nothing of the conflict which has sometimes been building up for years, the one who denounces has every possibility of explaining his case, of telling his story. It goes without saying; he cannot be expected to say the truth, the whole truth. He will convey only his share of the truth. His version of the facts will thus be in keeping with his own interests. The tale will sometimes reveal weaknesses, shortcomings, redundancy, silences or exaggerations.

Letter no. 383

Let us now go back to letter number 383 of our corpus that reached the mausoleum in the course of the first fortnight of February 1994. The absence of an envelope with a postage stamp⁶ suggests that it was deposited on the tomb of the saint by the author himself or by his emissary. In fact, some pilgrims come to the mausoleum bearing, in addition to their own pleas, those of their parents, friends or acquaintances who were physically unable to come (sick or old people), or who could not come for other reasons. In this context we witnessed, during a visit undertaken in 2001, a rather extraordinary scene: a peasant pulls out of his bundle a number of letters from other inhabitants of his village, al-Sharqiyya and conscientiously pushes them in one by one through the wooden balustrade surrounding al-Shafi'i's tomb, while reciting verses from Surat Yasin⁷ (Qur'an XXXVI).

The letter in question is handwritten, composed of seventeen lines written in classical Arabic, without any punctuation, in blue ink on a loose-leaf paper. The graphic and stylistic characteristics of the text (legible and fluid writing; no scratches or spelling mistakes; simple and sober language, sustained style devoid of any unacceptable language) seem to indicate a certain degree of education and a familiarity with written texts. Despite the emotion, which must have been felt while it was being written, the letter seems written with a steady hand, at one go, without any sign of hesitation or reticence, or indication of self-censorship.

Introduction

Like the majority of the corpus, this letter follows, *grosso modo*, a format in keeping with its stylistic form. It is articulated around four main axes: a preamble, the substance of the plea, the substance of the request and a prayer.

When they are not semantically separate, these four subdivisions are sometimes graphically so, a specific positioning of each component, skipping a line, bullets, etc. The preamble begins with the *basmala*, the propitious formula "In the name of God, the Merciful, the Compassionate" (*bism Allah al-Rahman al-Rahim*). This use of the *basmala* or the *tasmiya* as a heading of letters is quite in conformity with the widespread belief that anything which does not begin with the *basmala* is inevitably bound to fail. This conjuring and purifying formula is systematically recited before undertaking any activity or before any public address. Then comes the prayer of benediction (*tasliya*), which consists of saying: "May the blessings of God be upon our lord Muhammad, his kin and his kith" (*salla Allah 'ala sayyidna Muhammad wa 'ala alibi wa sabbibi wa sallam*). To each of these sacramental formulas or incantations specific virtues are attributed, virtues that the claimants do not seem to ignore. Sometimes the use of such consecrated formulas is simply a matter of routine, of established conventions.

Identity of the Supplicant

Whether laconic and dry, as is the case in this letter, or verbose and obsequious as in so many others, this introductory protocol is almost a must dictated by the rules of propriety. For it is not fitting to rush the saint or to approach him headlong. Before formulating the request, the proper thing to do is to introduce oneself. Following a skipped line, the author of letter number 383 declares his identity: "I, Mr. *Sheikh 'Amr*,⁸ am submitting my complaint to be who is closer to God than I or any other. I submit my complaint to my lord the honourable and venerable imam, my lord Imam al-Shafi'i, may God approve of him." The great proximity to God gives the saint extraordinary powers that allow him to better intervene in favour of the living.

It is to be noted that 57% of the supplicants in our corpus have clearly mentioned their names (*ism*, pl. *asma'*). The Muslim system of names takes on a complex and crucial character. Complex enough to make it difficult to establish any alphabetical order of the main characters (companions of the Prophet, learned men, jurists, Sufis, wise men, etc) or any index of the "*tabaqat*"⁹ or "*ta'rikh*."¹⁰ Crucial to the point where the traditionalist and jurisconsult Shafi'i, al-Nawawy (631/1233-676/1277) states that even a still-born child must be given a name and even the foetus (al-Nawawy, 1995). The importance of the *ism* and its precision sometimes justify the addition of an alias (*shuhra*). This importance becomes capital when it is a matter of naming one's enemies and designating them for the saint's vengeance. Is the *ism* not an essential and substantial component of the person? To name someone or something is

already to have a tremendous power over them. "Any violation of the name is *ipso facto* a violation of the person," rightly states M. Simonsen (1994).

In letter number 320, the plaintiff establishes a black list of alleged guilty ones, a list of thirty men and twelve women designated by name! When in doubt, it is better to widen the circle of suspicion by providing Imam al-Shafi'i with a maximum number of suspects. The latter can, of course, sort them out himself by punishing the criminals and sparing the innocent "*among those, if there is a persecutor who oppressed me.*" Accuser number eighty-four is the exception that confirms the rule. After having exposed the reasons of his complaint, he exhorts al-Shafi'i to avenge him against his persecutors whose identity he does not know and, consequently, he refrains from naming them, for fear of accusing the innocent. In 27 cases, the plea is reduced to an inventory of the names of the aggressors. It goes without saying that the exploitation of the name in the rituals of spell casting and exorcism is not an aspect of Muslim magic, since it is to be found in all popular beliefs. By hammering the cartouche of their rivals, the ancient Egyptians reduced the existence of the latter to a shower of sparks beaten on the anvil of eternity. Similarly, Madame Flora, a soothsayer and spell-breaker in Taron, firmly recommends her clients to clearly name all their enemies: "*What is essential is not so much to pray to God as to name the evil one... (to name is to kill)*" (Favret-Saada and Contreras, 1981).

Such a recommendation is fully expanded here. It is with great precision that Sheikh 'Amr will further on designate his enemy: "Fahima, daughter of Nadya, alias mother of Manal." This calls to mind the old and widespread habit in Egypt as well as in most Arab Muslim countries of designating individuals, not by their given names, but by their (*kunya*). The *kunya* is composed of two elements: "Abu" (father) or "Umm" (mother) to which is added the *ism* of the eldest child: "so-and-so, father or mother of so-and-so". In the absence of a male descendant, the *kunya* of the individual uses the name of the eldest daughter: "Fahima, mother of Manal." In our corpus, the individuals are also designated by their maternal affiliation (*nasab*) introduced by the word "ibn" (son) or "bint" (daughter): "Fahima, daughter of Nadya." Thus the surname tends to disappear before the matronym, which seems to contain a highly magical potential.¹¹

Social Rank of the Supplicant

As for the titles used by the author to qualify himself, they take on a great importance. They clearly announce that one is dealing here with a "*sayyid*" (pl. *asyad, sada, sadat*). Originally the term was used to designate a tribal chief, the master of many slaves and servants, or any charismatic leader, before it became an honorific title of the descendants of the prophet Muhammad (al-Mu'gam

al-Wasit, 1985). Today, it only means “mister,” *i.e.* a distinguished person, hence neither a manual worker nor a peasant. The title of “*sheikh*” (pl. *shaykh*, *mashayikh*) has several meanings. It either indicates a function (the superior of a religious establishment, the predicator in a mosque, the spiritual master of a brotherhood, etc.), or a high social rank (a person whose mature age, knowledge, experience or origins impose a certain respect). Where the saint is concerned, the use of a title (*laqab*) or of a polite term just like the use of prestigious qualifying terms bestow upon the accuser an aura of dignity, a halo of honourability, or, to borrow a term from Luc Boltanski, a “guarantee of morality” (Boltanski, 1990). Hence a moral guarantee that leaves no doubt as to the veracity of the incidents reported. Such a person worthy of trust would never lie nor unjustly accuse. The version of the facts submitted by the accuser must be true, or at least believable. Sheikh ‘Amr will use this moral guarantee the better to avoid any kind of misconduct (having sexual relations with a married woman), as we shall later see.

On the other hand, four letters from our corpus are written on stationery with a heading. This has to do with a request for procreation formulated by a couple on a paper with a heading that reads Misr Company for Chemical Industries “*sharikat Misr li-sina’at al-kimaniyat*” (22, 23); also a family complaint written by a supplicant on a paper with the heading Vortex Hydra (27) and, finally, a request for revenge sent by a plaintiff on a paper bearing the heading of the giant of construction, Arab Contractors Osman Ahmad Osman and Co. “*al-muqawilun al-‘arab ‘Uthman Ahmad ‘Uthman wa shurakah*” (90). Undoubtedly, the use of such a support could be a simple coincidence. Those who solicit the saint write their requests on any paper they can lay their hands on. In the final analysis, what is most important is what is written, isn’t that so? Yet the paper with the printed heading could also be a deliberate choice. Even if this heading has nothing whatsoever to do with the content of the request, yet it is there — just like the titles — to add value to the supplicant by linking him to a firm or group (enterprise, union, association, etc). It is as if the logo gives more weight to the quest, as if such a procedure confers an administrative and collective aspect to a distress that is entirely personal. By means of the heading, the quester tries to stand out from the crowd of ordinary supplicants: I am not anybody, you cannot ignore me, and my case deserves to be carefully examined. It is of no importance that the heading is usurped, as is the case of the two supplicants numbers 27 and 90. In a way, this is an attempt to intimidate the saint. A way of forcing fate.

In the absence of stationery with a heading, of words of praise or honorific titles, some accusers prefer to elicit pity by describing themselves as “a

persecuted widow" (258); "a woman in charge of orphans" (449); "I have five children and I am pregnant" (453); "I am an orphan without father or mother and only God is my refuge" (466); "I am a heart patient and cannot bear all this" (178); "we are poor and miserable" (79); "my husband is an old man, blind and has no resources" (60); "I am oppressed, an orphan and very, very miserable" (109). To present themselves as martyrs seems to give the supplicants the right to receive an answer from the saint. It is as if suffering and persecution inevitably constitute a right: the right to have one's request granted.

Yet, Sheikh 'Amr will not say more about his identity. In the mail addressed to al-Shafi'i, other objective facts (age, profession, home address) are only explicitly mentioned if they really serve the tale or if relevant to the very substance of the request. Otherwise, they are not mentioned. A victim of professional harassment will not fail to inform the saint of her or his profession and the information concerning their employer (75). An old maid arduously seeking matrimony will stress her critical age so that the imam may rapidly intervene: "I am nearing the age of thirty five and I am still unmarried" (214); "I have been engaged to be married for the past five years" (109). A person whose property has been illegally taken will give al-Shafi'i an exact address: "I am the owner of the building situated in Muhammad b. Maghzal Street, near Hafiz café at al-Hadar, Alexandria, across the street from the Institute of Medical Research" (268). But in matters of the heart as is the case of Sheikh 'Amr, all such details are superfluous.

Text of the Complaint

After the preamble, we find the text of the complaint that represents the descriptive part of the supplication. In a way a *raison d'être*, the reason for writing to al-Shafi'i. It is in fact a detailed and passionate description of what the plaintiff is suffering, of the drama he is living and his vain attempts — if there have been any attempts — to put an end to it. A re-examination of the matter, a self-criticism and awareness are generally absent whereas we find an assertion that one is "entitled" (151), a victim of fate and that hell is in fact all the others. All rhetorical means are used to describe the aggression in detail.

Lost in the labyrinth of hatred and rage, pushed by an unquenchable thirst for revenge, some accusers totally lose the thread of their tale. Sometimes, this appears in the form of an endless enumeration of torts and complicated intertwined matters, or in the form of endless insults. The request turns bitter and is rapidly transformed into a mass of accusations that are not clear, a flood of ill directed anger. The narration becomes twisted and sometimes incomprehensible.

The Reconstruction of the Facts

This is not at all the case of Sheikh 'Amr who placidly opts for the chronological tale well expressed. He plunges to the very roots of his love misadventure and gives the details and the background of his affair of the heart. Let us hear what he has to say¹²: "Considering that Fahima daughter of Nadya, alias mother of Manal, living in the village of Mahallat Rawh came to see me. Considering that her visits were often repeated. At the beginning, after having visited me more than once, I refused to see her twice because my feelings for her had changed. However, after she repeated her visits, she even asked me to sleep with her (*talabat minni al-nawm ma'aha*). But God did not wish it to happen. She was very upset. Her insistence was such that we committed a fault and continued to do so. And God knows that at the beginning I did not want to commit any of that. Our meetings continued at my place and hers. She opened her house to me. Then I loved her (*ahbabtuha*) so much that she became everything in my life. That is when I began to suffer (*ta'ibt*). She did not leave me any possibility to get away from her. She wanted to desert her home, but in that I did not obey her."

In six lines everything was said. Let us review the situation; a determined temptress, a hesitating partner who finally gives in, a sin undoubtedly committed. The deed is done. This is followed by passion, by sexual pleasure and all the ensuing remorse and regrets. Of course the story of Sheikh 'Amr is in the final analysis a very banal one. Not in its form however. Because after careful examination of Imam al-Shafi'i's mail, one notices that the accusers describe themselves as being entirely peaceful, innocent and inoffensive: "I never do any harm to anyone, because I fear God" (178); "I never cause anyone harm and never envy others for what they have" (116); "I am not prone to causing harm to anyone" (40); "Oh god, never have I thought nor will I ever think of causing prejudice to others" (18); "I have done nothing to offend God" (181); "I have never done him any harm and had no intention whatsoever of harming him" (432); "I love people and wish nothing but good" (40). On the other hand, the foes are, naturally, at the other extreme. When they are not too numerous "an entire gang" (*'isaba*) (389), they are particularly infamous: "My lord the Imam, had I not carefully written for an entire month or even more, I would not have been able to describe [in full] the wickedness of that lady... Had I had a thousand pages, they would not have sufficed to cover all the faults and the calumnies [committed] by that lady" (37).

Pleadings

The accusers declare themselves surprised by the evil plots concocted against them and deny any kind of aggression on their own part. But, there is always a regrettable mishap, an ill-chosen word or an individual with bad intentions who cunningly seeks to provoke them and ends up by making them lose their temper. That is when they legitimately lash back without premeditation in answer to such provocations. They put themselves in a situation of self-defence, in one of a counter-offensive. In the detailed writings to al-Shafi'i, they look for alibis, excuses, at least for attenuating circumstances; in order to make their action forgivable, their errors redeemable by throwing the responsibility on the others. If Sheikh 'Amr's resistance to the sirens of fornication keeps the reader in suspense for a moment, yet the assiduity of his seducer sweeps it away and leads him almost naturally to the dramatic moment where he says: "we committed a sin" (*akbta'na*).

Let us make no mistake; the "we" here is to be taken with a pinch of salt. Indeed, having begun with "me, I," the narrator proceeds to cleverly vacillate between the first and third person singular. On the one hand, the "I" is subjected to the impetuous assaults of seduction; he struggles honourably before giving in to temptation. On the other hand, "she, her" is active, uses her wiles and tightens the circle. The only time he uses the plural "we committed a sin" deserves, consequently, to be noted. It is not aimed at recognizing his own errors as much as it seeks to dilute the responsibility. Because, after all, Sheikh 'Amr pleads responsible but not guilty. He throws the heavy burden of adultery (*zina*) on his partner that, needless to say, is considered by Islamic law a major sin (*kabira*, pl. *kaba'ir*) punishable by a hundred lashes of the whip and even by lapidation if the guilty one is married. He was not the one who took the initiative to break the rule: she was the one who took the first step. He was not the one who then relentlessly persevered in his errors; it is "the sin which continued" (*tamada al-khata'*). His discourse however does not reveal any repentance. Even worse, he succeeds a veritable *tour de force* by describing himself as the abused victim of sexual harassment. And, when he refuses at the beginning to respond to the advances of his temptress, he declares that she "was upset" (*ta'tbarat*). Where the pathos reaches a peak is when he insinuates that he finally gave in to please her, that he "sacrificed himself in order to relieve her"!

It is not without interest to note that Imam al-Shafi'i never acted as a judge save only once during his lifetime, when he was appointed judge (*qadi*) in Nagran, in northern Yemen. This appointment, which did not last long, ended by what the hagiographers considered to be a "trial" (*mihna*) for al-Shafi'i which

almost cost al-Shafi'i his life¹³ at the age of thirty four. Until the end of his days, he refused to take any official function and avoided falling back into the circles of juridical administration; he devoted himself exclusively to religious studies. Even though his only stay in Egypt (198/814-202/820) was entirely devoted to the teaching and spreading of his doctrine away from juridical turbulences, contemporary Egyptians see him mainly as a man of law, to the point of nick-naming him "the judge of Islamic law" (*qadi al-shari'a al-islamiyya*) (14, 252, 411). In fact, his reputation as a competent and honest judge remained unchanged throughout the centuries in the minds of those who had suffered and obtained no justice. In the eyes of the accusers, al-Shafi'i remains the arbiter (*al-bakam*) (413), the equitable judge (*al-hakim al-adil*) (5, 25, 195) a master of judgement (*sahib al-hukm*) and even the supreme judge (*qadi al-qudat*)¹⁴ (190, 247, 339).

Juridical Formalism

Always bearing in mind the fact that they are addressing themselves to an eminent jurist (*faqih*), the supplicants are naturally tempted to use juridical terminologies and expressions, syntactic constructions and particularities that belong to verbatim reports, official acts and notaries: "drafted on the..." (*tabriran fi...*) (223); "I whose name is so and so" (*anna al-mad'u*) (89); "I went to the house of the person named so and so" (378); "the address of the above mentioned lady" (*al-sayyida al-mazkura*) (37); "I am submitting the following" (*a'rid al-ati*) (16, 450); "your Excellency, your highness, my lord Imam al-Shafi'i. It is with the utmost respect that I am submitting what follows before your honourable court" (427). This official tone also takes the form of an added *nota bene* (*malbuz'a*) (37, 190), a *post scriptum* (112, 222), or a fiscal stamp (7, 286, 348). Finally, the obligation for any official paper to be signed and dated also applies to some of the letters of our corpus. Twenty-eight percent of those submitting pleas append their signatures or — when they are illiterate — their thumb print (427, 485) at the bottom of the page. As for the date, it systematically appears in the last line, with the exception of letter number 432 where the date is written in the first line; it follows either the Roman calendar (63, 223, 244, 297, 432), or the Hijra calendar (35, 471), or sometimes both (445).

For those who resort to the justice of Imam al-Shafi'i there are several correspondences and analogies between procedural justice and supernatural justice. In a previous article we described how supernatural justice is copied from the model of institutional justice (Lebon, 1997). The tale of Sheikh 'Amr is the best illustration of the fact. Facing al-Shafi'i seated in a veritable tribunal

of saints, he is going “to wax juridical” by the repetition of the conjunctive “considering that” (*haythu*) which is used to introduce the motives of any sentence or judgement. It is also seen in the use of the juridical expression “residing at...” (*al-ka’ina fi*).

A veritable accumulation of tribulations and indignations, the mail of Imam al-Shafi’i belongs, not in the realm of love and forgiveness, but in the realm of right and reparation. The justice that the pleaders hope to see applied often adopts an accusatory procedure in the course of which the saint is invited to pronounce judgement only on the basis of the assembled elements of truth submitted by the plaintiffs. He is not supposed to undertake an investigation or to ascertain the veracity of their allegations. Hence the temptation to lie or to misrepresent the facts, if they are against their interests. These letters of denunciation bear the mark of bias, in the sense that their authors do not provide all the whys and wherefores of their affairs. Thus, the tale of Sheikh ‘Amr is not transparent and is rather laconic where certain points are concerned. For example, he does not explain the motives that make him want to get rid of his amorous conquest who, moreover, is ready to “abandon her home” to live with him. “She became everything in my life. That is when I suffered”; the causality in the previous statement is not very clear, is it lassitude? Is it a terrible scandal that such a liaison would have provoked in the village community where everything will inevitably come to be known? Does he feel stifled by scruples and the agony of guilt feelings? Does he fear the reactions of the betrayed husband? Are there any financial interests involved? Difficult to say. One thing is certain: Sheikh ‘Amr elects to break off to the detriment of any attempt at conciliation. Let us give him the chance to speak for himself for the last time:

Act of Accusation and Proposed Sentence

“I, consequently, appeal to your Excellency to restitute my right that she has denied, because she took everything from me. And those acts that she commits in her home are not acceptable to God or to the law (*shar’*) I appeal to your generosity. It is my faith in God and in your person that encouraged me to write this complaint, so that you may punish her and re-establish my right. May you¹⁵ for the love of our lord Muhammad, do anything to her so that she may realize that she who betrays her home and herself [deserves] to be punished publicly so that she may not commit that sin again. For she has not admitted the sins that she has committed. Reveal to me your mystery for which you are known and which encouraged me to do this [write to you]. May God keep you as a refuge for the oppressed. Oh my lord al-Shafi’i, for the love of the

Prophet, do something [bad] to her so that I may rejoice, so that she may no longer commit a sin that offends God; and give me back what she has taken. And may the peace of God and his blessings be upon you.”

Turning the Singular into General

First of all, one should note that at no moment does Sheikh ‘Amr solicit al-Shafi‘i’s opinion about what he should or should not do. Quite often, the one who solicits does not expect any particular advice from the saint. He does not ask him, for example, to enlighten him as to the best way to get out of the dilemma, nor to guide or inspire the way he should behave the better to solve the problem. No, the accuser arrives with HIS own solution ready made and solicits the assistance of the saint only to implement it. This makes it a condemnation without appeal, a sentence handed down, and a cause that has already been examined. In a peremptory tone, Sheikh ‘Amr totally disapproves the conduct of his loved one guilty of sins (*ẓanb*), of her disobeying divine prescriptions (*ma’sya*) and of committing faults (*akhta*). Accusations of acts with strong moral and religious connotations. The act of denunciation is further accentuated by the fact that she does not even admit her sins against him and which, over and above, offend the divinity. In plain words, the “bitch” must be punished not only for the evil nor for the harm that she causes others, but mainly to restore the moral values shaken by her sins. One can clearly see that Sheikh ‘Amr attempts to build up his private cause into a much more general cause. It is even to be expected that this litigation would, in addition, have an economic dimension: “she took everything from me... give me back what she has taken.” But this personal problem is disguised here into an allegedly collective one and, consequently, worthy of retaining the saint’s attention. From the depth of his turpitude, the accuser manages to formulate an ethically receivable request. The defence of his own interests becomes a crusade of the good against the evil, of virtue against the dishonour of illicit sexuality. A confusion of facts: the conflict related to exercising justice is transformed into a crusade of the faith against lack of piety, of order against chaos. That is how the submission is transformed into what resembles a trial for heresy. Can the saint remain indifferent to such dichotomist concepts?

This same effort of turning the personal into the general is to be seen in most of those seeking justice who give their private psycho-drama, their own singular case, a collective dimension, a universal scope. Not only do they ask for the condemnation of the offender, they also demand that the punishment be exemplary. The guilty must not only “reap the fruits of the evil he has sown” (266) he must also serve as an example. Supplicant number 16 seeks

the aid of al-Shafi'i "to punish [his] thief, so that he may serve as a lesson (*ibra*) for others." Accuser number 464 claims punishment for the one who poisoned his geese "so that he may serve as an example (*mam'izu*) for others." Insulting a woman accused of "casting spells to turn away all those who asked for her hand in marriage" (85), a young girl exhorts the saint to deliver her and says to him: "Prove to me that the good and the truth will prevail against evil, injustice and witchcraft."

There is no need to multiply the examples: the wrath of heaven must fall upon the guilty, so that they may serve as an example (468, 487). As a matter of principle. Where punishment is concerned, the accusers who appeal to Imam al-Shafi'i do not generally give any quarters. Faced with what they consider to be an irreparable offence, they call for "the worst kind of vengeance" (*sbar al-intiqam*) (338, 339), they want the offenders "to suffer all kinds of torments" (67) that they be stricken by a "fatal disease" (18) or "the most horrible of miseries" (25). Some of them dictate their will, they themselves dictate to the saint a cruel and excessive sanction. In these circumstances, al-Shafi'i does not have much leeway and absolution is not a cardinal value: "I do not forgive" (358); "we demand an eye for an eye and a tooth for a tooth" (*al-qasas*) (26). There are no attenuating circumstances nor prescription, no suspended sanction, nor any possibility of making up for what has been committed. Unable to forgive and forget, the accusers often decree a disproportionate punishment, one that is not commensurate with the crime or the injustice, which they claim to have suffered. That is the case, for example, of that vindictive brother who, for some obscure reason, proffers several imprecations against his own sister: "misery, affliction and sadness... diabetes, cancer and tuberculosis... humiliation... ruin... death" (291). That is also the case of that farmer who claims against the person who destroyed his field of sweet peas "a terrifying vengeance that will certainly astonish everyone" (320).

On the other hand, other accusers give the saint every freedom to hand down his own sentence and to select an appropriate sanction: "kindly do what needs to be done" (*argu ittikhaz al-lazim*) (304); "do to the thief whatever you deem right" (349); "punish him as you see fit" (312). Even if Sheikh 'Amr leaves it entirely up to Imam al-Shafi'i to inflict the punishment he considers adequate, he, nevertheless, expresses the precise wish for a "public" punishment (*alanann*), one harsh enough to "please him" (*yasurruni*). A double punishment to afflict the offender and render her infamous, in other words, torture and shame.

Conclusion

From Mahallat Rawh, situated in the governorate of al-Gharbiyya, and up to Cairo, Sheikh 'Amr travelled almost 250 kilometres both ways to deliver his letter and to plead his own cause before Imam al-Shafi'i in his mausoleum where "the trials are resolved, the sentences handed down and the innocence declared" (33). During that long trip and during the pious visit (*ziyara*) and the protocol of praying and circling the tomb (*tawaf*), he must have had sufficient time to think calmly of his case and to examine the situation in all its aspects. Whatever the result of the step he has taken — which may seem anachronistic —, he cannot but feel a certain relief. A relief for having poured out to al-Shafi'i his crushing feeling of helplessness and injustice. The saint, just like the exorcist, is a being who delivers one from evil, turns it away and takes it upon himself. The therapy resides essentially in "this transfer of the evil from one to the other, from the victim to the avenger who enjoys supernatural power" (Favret-Saada and Contreras, 1981: 111). In fact, it is on the imam that one "throws one's burden" (*himl*) (30, 230, 290). From this point of view, the mail and the *ziyara* have an important psychological impact on the visitors who, by emptying their sack, leave feeling better and sometimes better able to see the situation clearly and to control their own affairs once again.

The letters and the accusations sent to Imam al-Shafi'i may be considered as a way, among many others, of expressing the sense of justice. The fact that they appeal to him to answer as quickly as possible, that they give him a deadline or even an ultimatum, is for those who solicit his justice, an expectation, the hope that things will probably change, the certainty that Imam al-Shafi'i will not and cannot abandon them, they who were left to fend for themselves. Is he not "the vicar of God on His earth and in His kingdom" (*khilafa Allah fi ardihī wa mulkīhī*) (308, 311)? Naturally, this makes it imperative for him to intervene in order to save the moral order and to re-establish the principles of justice every time they are violated. Thus, the plea becomes akin to a survival strategy, attenuating all kinds of frustrations, limiting excesses and, without definitively solving problems or satisfying expectations, acts as a non-negligible sedative. Not to forget that the simple fact of putting down on paper one's anxieties and desires constitutes a deliverance in itself and creates an effect of establishing a distance capable of preventing conflicts and of engaging the protagonists into possible negotiations and compromise.

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**LEGAL STORIES FROM WITHIN
AND FROM WITHOUT**

TALES ACCORDING TO THE BOOK

Professional Witnesses (*'udul*) as Cultural Brokers in Morocco¹

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Introduction

In the summer of 1988, at the beginning of my fieldwork on family law in Morocco, I met a *'adl* (professional witness) at the house of a befriended family. I was eager to talk with him about his profession as writer of legal documents, such as marriage contracts and repudiation deeds, and asked him whether I might visit him in his home town to pursue the subject further. His answer was clear and firm: I was welcome to enjoy his hospitality, but there was no question of me being allowed to discuss his professional activities with him. If I wanted to know more about his work I should buy the manual by Hammad al-'Iraqi, which would teach me everything I needed to know. I tried to push my luck a bit further and explained that for me it was of crucial importance to understand how what he was actually doing related to the theory as presented in the book. My suggestion that there might be a divergence between theory and practice was the most stupid move I could have made. He snapped that such a presumed gap did not exist, everything he did was completely “according to the book.” His sharp reply left no doubt that this was his last word to me on the subject of his profession.

In the following years it became clear to me that this unfortunate encounter was more than an incident. Professional witnesses were not too eager to discuss their practices with me. The statement that “everything goes according to the book” turned out to be a cliché in encounters with *'udul* and judges. Maybe we should understand this statement as an attempt to keep out an all too curious professional stranger, who might even discover practices not according

to the book (about which I heard rumours). But this cliché offers also a starting point for a further investigation into the activities of these professional witnesses, who are among the most important actors in legal practice in Morocco. *ʿUdul* (singular *ʿadl*) are men who are appointed as professional witnesses by the Minister of Justice. Under the supervision of a special judge, a *qadi al-tawthiq*, they write down documents concerning all kinds of legal transactions. Most of their work is related to the conclusion of marriages and repudiations, to the division of inheritances, as well as to the transfer of real estate (cf. Buskens, 1999; Lapanne-Joinville, 1957).

The documents written down by professional witnesses can be understood as a genre of legal tales. These documents are highly formalized reports of what happened, which might serve as legally valid evidence. Many cases are “trouble-less,” the documents are produced just “for the record.” But some cases may become “troublesome,” or have already become so, and hence a document might turn out to be an important instrument of legal proof.

In this article I analyze the process in which professional witnesses in Morocco construct legal tales in the form of documents. I will start with the description of the conclusion of a marriage that took place in Rabat in 1989 and the way it was reported in a document. From this case I will move to more general questions concerning the law and regulations concerning professional witnesses, the procedure for the writing down of a document, also regulated by state law, and the relationship between actual documents and models laid down in books, the so-called formularies. The legal framework of the events discussed is the Moroccan family law generally known as *Mudawwana*, as codified in 1957-8. Later reforms in 1993 and 2004 have led to some changes in the procedures for the writing down of marriage contracts.

This analysis leads me to the conclusion, as a hypothesis for further research, that the *ʿudul* act as “cultural brokers,” who translate events of everyday life into legally valid language. They mediate between the discourse of “ordinary people” and the requirements of the law, Islamic as well as state law. As such, this essay is also an attempt to contribute to the discussion of the more general issue of the relations between legal writing and everyday life (cf. Messick, 1993).

Latif’s Marriage: An Ethno Grapher’s Report

Latif was a thirty-two year old assistant in the bookshop of my friend Ibrahim in Rabat, the capital of Morocco. As I was visiting the shop almost daily we got to know each other quite well, passing our time partly with small talk. Every time I asked him when he would marry, he replied that it would be soon, God willing. He never provided more details about these intimate matters. I only got to know about his marriage plans when Latif confided in

me and asked me to lend him 250 dirhams in order to pay the *'udul* for their services. The amount of the 'bride price'² and the expenses for the celebrations were so high, that he did not know how to provide for this sum otherwise. In fact, Latif had never asked me for any money before. He beseeched me not to tell anybody else about his request. It was as if he felt ashamed that he had to borrow money. When Latif told his employer about his upcoming marriage, my friend Ibrahim immediately understood how important the event would be for my research and arranged an invitation for me to be present at the conclusion of the marriage contract.

Latif explained to me that he had to pay the *'udul* more because they would come to his house. The plain tariff was only valid if they could draw up the marriage contract in their office, which would mean that the parties concerned would come to the *'udul*, instead of the other way around. He had asked the *'udul* to come to his parental home because his mother was ill and would not have been able to go to the witnesses' office. I got the impression that their coming to the house was also a matter of prestige. His mother's poor health was again the reason that the marriage conclusion would take place at the groom's house, instead of at the bride's parents.

On the arranged Saturday, I met Latif around twenty minutes to six at the bookshop. Together we walked to his mother's and stepfather's house in the *mellah*, originally the Jewish quarter of the old walled city of Rabat. Most Jewish families had left for abroad or moved to a better neighbourhood. Nowadays, mainly poor Muslim families were living there. Latif intended to stay with his kin after his marriage, just like his married sister and her child, whose husband had a job in France. Latif was able to marry because he did not have to look for independent housing. At the same time he could not move out, because he was the only member of the household with a salaried job.

After we had arrived at the house, Latif had me seated in the salon. This was the best room of the house, which was only used to entertain guests. The room was furnished with benches, *sdader*, covered with a somewhat more expensive fabric, on which were matching cushions. These benches were against the walls of the room, to all sides. The rest of the room was empty, except for a low round table in the middle, on which food and drinks could be served. The floor was covered with wall-to-wall carpeting. The walls were painted, but barely decorated. As soon as we had sat down the bride's father and his son arrived. The father was living in Temara, a suburb of Rabat, and worked as a civil servant. The son was a soldier living in Ben Slimane, near Casablanca. They immediately asked me whether I was a Muslim. After I had explained what were my interests and my research, the father showed himself quite eager to talk. Soon Latif disappeared in order to look for the *'udul*. He

had arranged to meet them in a mosque near-by, after the evening-prayer, around seven o'clock. While they were acquaintances of Latif, according to him, they would not be able to find the house on their own. The father-in-law preferred to perform his prayers at home. After this, Latif's stepfather and his brother Ali served glasses of water, and later coffee and cakes.

Salwa's father explained to me which documents were required for a marriage. He had gone to see the *muqaddam* at the *muqata'a*, a kind of municipality, to obtain two documents. The first was a certificate to prove that his daughter was not married, a *shahadat al-'uzuba*. The *muqaddam* knows everybody living in his district personally and is qualified to issue these types of statements. If such a document would be lacking, then the mere presence of the father as the marriage guardian, *wali*, should suffice. The second document was a certificate taken from the Civil Register, also to be had from the *muqaddam*. However, both were signed by the *qaid* or the *ra'is baladi*, the civil servants ultimately to be held responsible. The father added that it was not necessary to show a national identity card if one could show these two certificates. Later it turned out that Salwa did not have such an identity card. According to her father she did not need one, because she never ventured out of doors by herself. Only after marriage would it become necessary to apply for a card. In case a woman married a soldier, several extra documents were required, such as a certificate of being alive (*shahadat al-haya*), a statement concerning her criminal record delivered by the court (*shahadat al-sijill al-'adli*), and a certificate establishing her place of residence (*shahadat al-sukna*). Furthermore, three copies of the certificate taken from the civil register should be presented. According to the father, these extra requirements followed from the fact that the woman would become part of the *makhzan*, the administrative apparatus of the state, through her marriage (*ka-tedkbel l el-mekhzen*).

Salwa's father continued by explaining that three persons were indispensable for the writing down of a marriage contract: the husband, the wife's father, and the wife herself. Sometimes the groom's father would also be present. However, Latif's father had died. Apart from that it was also necessary for the future husband to offer a *sadaq*, or 'bride price'. According to the father, some time might elapse between the drawing up of the marriage contract and the celebration of the wedding, the beginning of the actual living together as a married couple.

While we were talking, Ali, Latif's brother who was constantly busy serving the guests, clearly expressed his annoyance about Salwa's father smoking. The father extinguished his cigarette the moment Latif entered with the two '*udul*, around half past seven. Both witnesses were dressed in a traditional way, in

jellaba, with felt caps and slippers. Upon their arrival they were offered coffee and cakes and treated with clear deference. Immediately after having finished their coffee they started to work. The eldest of the two, addressed as *le-fqih*, took the lead. It seemed that they were just working together for this occasion.³ The *fqih* used to receive his clients at home, while the other witness had a separate office (*banut*) and also worked at the court. The younger *'adl* did not do more than just be present. He hardly listened to what parties had to say, but started an extensive conversation with me. During most of the meeting he gave the impression of being rather aloof. For him, the conclusion of a marriage contract seemed to be an act of routine, which hardly had a solemn character.

The *'udul* proceeded with their work in a rather informal way. After having had his coffee *le-fqih* asked both parties for the documents required for a marriage according to the *Mudawwana*, the Moroccan code of personal status. The father-in-law handed over the certificate of birth taken from the Civil Register, and the certificate declaring that his daughter is not married, together with his own identity card. Latif also gave his identity card and his birth-certificate, and linked to this last piece an administrative declaration concerning his status as betrothed, *shabada idariyya tata'allaq bi-l-makhtuba*. The eldest *'adl* gave Latif's certificate to Salwa's father so that he could ascertain that Latif was still a bachelor. *Le-fqih* also told him to present a similar certificate for his daughter, a *shabada idariyya tata'allaq bi-l-makhtuba*. When it became clear that the father did not have such a document some confusion arose. Because of the fact that they were "amongst acquaintances," as Latif put it, the conclusion of the marriage could nevertheless continue. However, the father had to bring the document to the *'udul* on Monday morning without further delay. If it would turn out that the authorities concerned would not be willing to antedate the document, it would be better if they would not mention a date at all. The *'udul* would mention Friday as the date of the marriage contract, as they were not supposed to work on Saturdays. The second *'adl*, who was until then either talking with me or looking somewhat absent-minded, immediately engaged in this discussion. He agreed without any reserve to the solution of the missing document being brought on Monday.

After inspection of the documents *le-fqih* took a notebook called *mudhakkira li-l-hijz*. Also at this stage of the proceedings his younger colleague was just looking on. He did not take any notes himself. After opening the book *le-fqih* first wrote down the date and the time of the session. The informal character of the gathering again showed in the fact Latif quickly left the room at the beginning of the conclusion of the marriage contract in order to arrange

something in another part of the house. Upon his return he made me change places. I had to sit between him and the younger *'adl*, so that I would be able to follow the proceedings properly. The bride's father was sitting next to *le-fqih*, to whose right was his younger colleague. At some distance from the bride's father was his son, the soldier. Latif's stepfather was also at some distance, sitting in front of the company, next to the door.

After having written down the date in the register, *le-fqih* turned to Latif. He asked him the groom's name, his father's name, to which Latif added that he was deceased, and the name of his father's father. He also noted down the family's place of origin. In the writing down of these data, the *'adl* based himself both on the oral information given, and on what was mentioned on the groom's identity card. Next *le-fqih* noted that the groom was a bachelor and his profession. When he heard that Latif was originally a printer – the profession he would write down in the marriage contract – but was now working in a bookshop, *le-fqih* seized the occasion to ask whether this bookshop was selling a certain kind of paper, for which he had been looking for a long time. Nor did the younger *'adl* stick to his business, as he kept talking with me. After having noted down the personal data, *le-fqih* handed back the identity card to Latif. Next he wrote down Salwa's data. He did so on the basis of the documents that her father had offered him. He also noted the name of the marriage guardian, the father, referring to his identity card.

The next subject was the 'bride price.' The elder *'adl* asked Latif how much he would give to the bride. Latif mentioned the amount in *riyal*, but he had to convert this into *frank* for *le-fqih*.⁴ Latif offered an amount of 2,500 *dirham* as a 'bride price.' *Le-fqih* asked whether Latif would pay the sum immediately in its entirety, or whether he would hand over only part of it, deferring the rest to a later moment. Latif replied that he would give the full amount now, at which he took a bundle of 100 *dirham* notes from his pocket and handed these to *le-fqih*. *Le-fqih* counted the banknotes and put them on the table. Somewhat later, the *'adl* handed the money over to Salwa's father.

Meanwhile the younger *'adl* summarized the proceedings for me once again. He told me that a written marriage contract had four *arkan*, or principles:

1. the names of the bridegroom and bride
2. the *mahr* or *sadaq*, 'bride price'
3. the presence of a *nali* for the bride
4. the *sigba*, offer and acceptance of the proposal of marriage, as proscribed in article 4 part 1 of the *Mudanwana*.

My informant presented these *arkan* as if he once had to learn them by heart.

The witnesses had dealt with the first three elements, hence the *sigba* would be next. The elder 'adl summarized the contents of the marriage contract for both parties. He mentioned the names and the amount of the 'bride price.' Then he asked the father whether he was willing to give his daughter in marriage. He answered in the affirmative with a pious formula. After this confirmation *le-fqib* had the father sign in his notebook. He then asked the groom a similar question. Latif also replied with a pious formula, and signed in his turn in the notebook. It was remarkable to see that offer and acceptance did not take place directly between the parties concerned, but through the offices of the 'adl.

Then it was the bride's turn to express her consent to the marriage contract. Salwa had not been present in the salon until then, but was staying in another room with the women of Latif's family. Her father left the salon in order to bring her. She entered the room looking at the floor with a grumpy expression. Stiffly she avoided any eye-contact with the men present. Thus she was *ka-tehsbem*, showing *hsbama*, the modest behaviour that people value particularly in females. Her father left the salon while *le-fqib* was talking with her. The 'adl summarized the contents of the marriage contract for her. As far as I can remember he did not mention the amount of *sadaq* to her. In any case he did not count the money in her presence. After *le-fqib*'s account the bride uttered a short and barely audible yes, as befitting a virgin, and placed her signature in the personal notebook. She did all this without raising her face. Because she did not have a national identity card, the 'adl had to give a description of the bride in the marriage contract, called *ta'rif* or *wasf*. He described her features and asked a question concerning her teeth. This part of the proceedings clearly was a matter between *le-fqib* and the future spouse. It seemed as if the other men present should not be involved in this. After the completion of the requirements Salwa immediately left the room again.

The younger 'adl later explained to me that the woman's presence was required at the conclusion of a marriage. In the past it might have happened that the entire procedure was completed without the 'adul seeing the bride. But at present this was definitely no longer possible in Rabat. The husband as well as the woman's father – in his quality as marriage guardian – might authorize (*wakkala*) somebody else to conclude the marriage contract on behalf of them. However, the bride did not have this right to *tawkil*, she had to express in person her consent with the marriage contract, in the presence of the two 'adul.

With the expression of the bride's consent, all required elements were fulfilled. *Le-fqib*, who did all the writing down, asked his younger colleague to

sign in his personal notebook. Then he signed himself, after which he closed his *mudhakkira li-l-bifz*. He proposed to say a prayer. All men present put their hands together in their lap, with the hand palms facing up, their eyes turned to their hands. The men started with the recitation of the *Fatiha*, the opening chapter of the Qur'an. Some other prayers followed. Finally, the men swept their faces with the palm of their hands. The praying concluded the formal part of the session.

Immediately, Ali rose to his feet to congratulate his brother Latif. Thereafter all men present shook hands. Ali and the stepfather quickly left the salon, to return with glasses of milk and a big plate full of dates. They also brought in the necessities to make tea, a task which was bestowed to Latif's stepfather. Cakes were again served with the tea. The *'udul* were repeatedly invited to stay for dinner. They protested in their turn, saying that they did not have much time. But it seemed as if they would not mind having something. After everybody had washed their hands, a big plate of couscous was placed on the table. The pile of couscous was crowned by a lump of meat with onions and raisins. Upon my return home to Salé, the female members of my host family asked me extensively about what food had been served. They told me that this plate was traditional at the conclusion of a marriage contract, and that it was called *kesksu b-tfaya*.

During the meal the younger *'adl* explained to me the further proceedings to be followed. The *'adl* who had written down the data during the conclusion of the marriage contract would take his personal notebook home and would copy the marriage contract on a separate sheet of paper. In principle he would do so in his own hand, to avoid errors in writing. He would also copy the marriage contract in the register of the court. Upon my asking the name of this register, my interlocutor hesitated for a moment, as if he had to invent its name on the spot. Then he came up with *kunnash tasjil al-'uqud al-'adliyya*, "the notebook for the registration of professional witnesses' deeds." This seemed to me a general term for all kinds of registers for professional witnesses' deeds. In the right-hand margin of the marriage deed, the stamp concerning its registration in the court's register was mentioned as the name of the register: *kunnash al-ankiba*, "the notebook of the marriages." My informant told me that some *'udul* employed a clerk to do the copying work. Next the *'adl* would submit the marriage deed together with the required documents, such as in this case the administrative declaration concerning the status as betrothed, to the judge charged with the affairs concerning the professional witnesses. The judge would check the documents and place his signature. The required documents then would be filed in the court's archive. The woman was entitled

to the original marriage deed, whereas the husband would get a copy. The *'adl* said it happened quite often that a father would keep the marriage deed for his daughter. Another man once told me about cases in which the bride's mother wanted to watch over her daughter's interests and her freedom of movement by keeping her marriage deed.

Finally, I asked the younger *'adl* from what moment both persons would be considered as married. He replied that from now on they were married, but then he would add the distinction between *shari'a* and *qanun*, that is, Islamic law and the state law in force. According to the *shari'a*, two persons would be married when two *'udul* have acted as witnesses. However, according to state law the judge's signature, who he called in this context *al-ra'is*, was required as homologation, *khitah*, of the witnesses' deed for the marriage validly to be concluded.

The Professional Witnesses' Report: Document and Model

The text of the *'aqd al-nikah*, the marriage deed, as written down by *le-fqih* gives a highly formalized account of what happened during the conclusion of the marriage between Latif and Salwa. Only those 'facts' that might be legally relevant are presented. The text might be summarized in English as follows:

1. *Dibaja*, or opening, consisting of pious formulae and eulogies.
2. The beginning of the text proper: the young man Latif has married the girl Salwa, with God's blessings and help.
3. The identities of Latif and Salwa are described in terms of family name, patrilineal descent, geographical origin, nationality, residence, marital status, profession, and year of birth. Reference is made to Latif's national identity card. Both names are embellished with honorific expressions.

For Salwa the following is added: that she has never been married before (*biker*), that she is under the legal as well as marriage guardianship of her father, free to marry (*hillan li-l-nikah*), and devoid of legal impediments.

4. The amount of the 'bride price' (*sadaq*), 2,500 dirham, is specified, which the woman's father has taken with her consent, as the witnesses have seen. Thus, the husband has been acquitted of all claims concerning the 'bride price.'

5. The father as marriage guardian has given his daughter in marriage according to the Qur'an and the *Sunna*. The identity of the marriage guardian is described, under reference to his name as mentioned in the description of the identity of the bride, in terms of nationality, residence, marital status, profession, year of birth. Reference is made to his national identity card.

6. The conclusion of the marriage by the father has taken place with his daughter's consent and her authorization (*tawkil*). The witnesses have heard this

from the daughter on the same date as the marriage has taken place. She has clearly accepted this marriage.

7. The husband has been informed of her consent and he has also accepted the marriage. Again God's blessing is implored.

8. The witnesses have been present at this exchange of consent.

9. The features of both men involved comply with the photographs in their identity cards which have been referred to before.

10. A description of the features of the bride (*wasf*) is given in physical terms: brown skin, neat (*munaẓẓama*), wearing a veil, with a small nose, of slender limbs, and short. (This description was necessary because Salwa did not have a national identity card.)

11. Reference is made to the official documents required for the conclusion of a marriage which have been presented by both parties.

12. The conclusion of the marriage took place at eight o'clock in the evening on Monday 13 Rabi' al-Thani 1410/ 13 November 1989. The document was written next day, on Tuesday. It was noted down in personal notebook no. 4 of the first *'adl*, under number 79, on page 56.

13. Follow the signatures (*ashkal*) and stamps of the two *'adul*.

14. The document is concluded with a stamp mentioning the homologation formula, the date, and the signature of the judge charged with the control of the *'adul*, as well as the stamp of the court.

The text is written down on a printed form, with headings mentioning the competent court in Rabat and allowing for references to the register and personal notebook. The paper is ruled, and in the right margin there is a further stamp referring to registration. The paper is headed by the five pointed star, the symbol of the *makhzan*, the Moroccan royal administration.

The ruled form headed by the star, the stamps and references to registers, and also the formal and archaic language show that the witnesses' report in the form of a marriage deed integrate the events in an official framework. For many Moroccans the text is barely accessible, not only because of its style; the document has been written in the typical Maghribi ductus of Arabic script, but the handwriting is often notoriously difficult to read. It is characteristic for the writings of the *'adul*. As such it is a text for specialists only. It even does not have the decorative value some other marriage deeds have, which are written in a fine calligraphy and filled with ornaments, or on colourful pre-printed forms. The only element of decoration is the semi-calligraphic bold *tazannaja* at the beginning of the deed. This "underlining" also has a practical purpose: it shows the insider immediately what the document is about. I have not been able to find a model for this particular deed in the formularies which

I have consulted. Elements can be traced back to Bannani (1949) and to al-'Iraqi (1961).

For many common people the marriage deed is a symbol of a legally concluded Islamic marriage. From a specialist legal point of view the text constructed by the *'udl* is an instrument for legal proof, with a "prospective dimension." In case of problems, the parties concerned can defend and claim their rights by referring to the document. For this purpose a *'udl* has written his report down following a procedure fixed in the law, and according to models laid down in formularies which form part of a rich tradition of legal scholarship in Maliki law as developed in the Maghrib and al-Andalus.

Rules and regulations concerning professional witnesses and their formularies

The formal framework into which the *'udul* fit the events by writing the document is first of all the law of evidence. On the one hand this is the classical Maliki tradition as it has developed in the Muslim West (cf. Pesle, 1942); the institution of the professional witness is one of the most characteristic traits of this Maghribi tradition (cf. Tyan, 1945; Lapanne-Joinville, 1957; Geertz, 1983: 190-195; Buskens, 1999). On the other hand, it is the state law which is heavily influenced by the French colonial experience in formal matters and archival culture (cf. Buskens, 1993; Buskens, 1995). Before the colonial period, the *'udul* would only write the original document. The French obliged them to keep personal registers as well as file copies at the court. Also the use of special forms and tax stamps was imposed.

These requirements, closely linked to the rise of a centrally governed state, have been further formalized in a law of 1982 and in a ministerial decree concerning the *'udul*, issued in 1983. These texts specify the conditions for becoming a professional witness, the exercise of the profession, its control by the judge, and the procedures to follow for the writing down of documents (cf. Buskens, 1999).

Specific requirements for the writing of marriage deeds are laid down in the Moroccan code of personal status, the *Mudawwana*, which was originally codified in 1957-8, shortly after Morocco had regained independence from French and Spanish colonial rule. In this, the lawgiver has detailed what documents are required for the conclusion of a marriage, and what the *'udul* should mention in the marriage deeds which they put in writing (cf. Buskens, 1999).

The official formulary with models for deeds concerning the family law is al-'Iraqi, 1961. This prolific legal scholar was also involved in the codification

of Moroccan family law in the *Mudawwana*. His book with models for deeds according to the law of personal status was dedicated to the Minister of Justice and has a preface by him. From the introduction it becomes clear that al-‘Iraqi places his formulary in the venerable tradition of Maliki scholarship in the Muslim West, but that he also pays attention to the reformist ideals of the Salafiyya movement, of which the *Mudawwana* was a product.

The other formulary from which *le-fqih* took guidance by Bannani is much older, but still held in high esteem by many practitioners. Its author Muhammad b. Ahmad b. Hamdun Bannani (ob. 1261/1845 or 1281-2/1865) was a practicing ‘*adl*’ and mufti in Fez, and is commonly known under the name Fir‘awn. Hence, his formulary is called *al-Watba’iq al-fir‘awniyya* in the specialists’ parlance. His formulary has been printed several times as a lithograph (cf. al-Idrisi al-Qaytuni al-Hasani, 1988: 43; ‘Abd al-Razzaq, 1989: no. 433). Nowadays a version printed with movable type, printed in Fez in 1368/1949 can occasionally still be found on the market. The earlier edition of 1348 and the lithographic editions are much rarer. In these editions, the models of Fir‘awn are explained in a commentary by ‘Abd al-Salam b. Muhammad al-Huwwari (ca. 1258-1328/1842-1910).⁵

The formularies of al-‘Iraqi and Bannani form part of a venerable tradition of books of models for professional witnesses (cf. Wakin, 1972; Hallaq, 1995). Especially in the Muslim West, al-Andalus and the Maghrib, many scholars have composed formularies for professional witnesses (cf. Zomeño, 2002; Zomeño, forthcoming; Buskens, 1999: 211-216). In a brief history of the Maliki school in the Muslim West, al-Jidi gives a list of 89 authors of formularies (1989: 122-128). Hoenerbach lists 35 authors of formularies for al-Andalus, which was a centre for this type of legal learning (Hoenerbach, 1965: xxxx-xxxxiv). According to al-Jidi, the scholarly study of legal documents and their models started in Morocco in the sixth century of the Hijra (al-Jidi, 1987: 120). In his *Muqaddima*, Ibn Khaldun describes the activities of the ‘*udul*, who were an integral part of the legal system and were to be found in every city (Ibn Khaldun, 1967: vol. 1, 462). In the course of the centuries many Moroccan scholars composed formularies, which were often linked to regional practices and customs. Thus, the formulary composed by Ibn ‘Ardun contains many references to his region of origin, Northern Morocco.

Conclusions: ‘Udul as Cultural Brokers

In this article I have presented what some legal anthropologists would call a “trouble-less” case. There has been no discussion of conflicting narratives, as in lawsuits in a court. Rather, I have focused on the way professional

witnesses construct a legal narrative by writing a document. This is one of the most common legal activities in present-day Morocco. My purpose is to understand this process of document writing. To this end I have presented my own report as an ethnographer of the session next to the written document of the *'udul*.

On the one hand the professional witnesses take guidance for the process of document writing from the Maghribi-Maliki tradition of legal scholarship and from state law. Models for documents are laid down in several authoritative formularies. Further requirements for the contents of the deeds are stipulated in the Moroccan code of personal status, the *Mudawwana*. The formal procedure to be followed is extensively laid down in a law (1982) and a ministerial decree (1983).

Until now I have not been able to trace the marriage deed discussed here to any specific model. Like most deeds, it seems to be a mixture of several models, adapted to the personal style of the *'adl* who wrote it. It is interesting to note that formal references to the *Mudawwana* are lacking, although al-'Iraqi (1961) suggests in his models to include such references. These differences can partly be understood as the result of differences in education. Regional styles also seem to play a role: for example, *'udul* from Northern Morocco present items in a different order in their documents compared to their colleagues from Rabat (cf. Brouns, 2000). The witnesses' selection of information to be included in the document seems partly to be guided by these models, and by the elements which article 42 of the *Mudawwana* stipulates as to be included in a marriage contract. There always seems to be a presupposition of a possible conflict to which a marriage might lead. If the case becomes troublesome, the parties can claim or defend their rights by using the deed as an instrument to prove what happened at the conclusion of their marriage.

On the other hand the *'udul* have to deal with the peculiarities of a popular ritual, the conclusion of a marriage contract. In this ritual people mix elements from Islamic and state law, with local customs and personal values. This is most obvious in the use of language. People normally speak in a Moroccan Arabic dialect, or in a Berber language, not in the archaic language of the documents.⁶ However, at certain moments they might use standardized pious expressions, taken from the Islamic literary tradition, to confer even more solemnity to the event. My ethnographic description of Latif's marriage shows that the *'udul* were not just plain recorders of 'what happened,' but social actors. When a problem arose concerning a required document which was not available, they solved it, because "they knew each other." Thus they were willing to come to the groom's house on a Saturday, although in the deed they

declared that the marriage took place on a Monday. They were flattering in their descriptions of the three persons concerned, the groom, the bride and her father, adding honorific forms. Thus *le-fqih* described the groom as a printer, although he worked in a bookshop, and the bride was presented as *munazzama*, "neat." Most professional witnesses do not seem actively involved in promoting a reformist interpretation of the possibilities which the *Mudawwana* offers. Research done by Louis Boumans in 1989 in Rabat and Salé suggests that the '*udul*' hardly ever encouraged women to insert clauses and conditions in the marriage documents, which would make their legal position stronger (Boumans, 1992).

The intermediate position of the '*udul*' between the requirements of the law and the discourse of daily life shows itself in the language of the document. On the one hand they use highly specialized legal concepts to describe what happened, such as the formulae concerning the transfer of the 'bride price', and the description of the bride as *bikr*. In common parlance people understand this term, or rather its dialect variant *bekra*, as "virgin." However, in the legal language of the '*udul*' this term does not necessarily imply a statement on the physical condition of the woman, but refers to her legal status as a woman who has not previously been married, or whose marriage has been dissolved before consummation (cf. Toledano, 1981: 54). In details, the text of the marriage deed shows that its writer shares the language of everyday life and common people. It contains spelling mistakes due to the influence from Moroccan Arabic, such as writing a *ta'* instead of a *tha'* in several places, and the use of dialect terms, such as *bhal*, "like."

The intermediate position of the '*udul*' also becomes manifest in the different meanings people attach to a marriage deed. In the legal domain, the document embodies the compliance with requirements which the state law stipulates for the conclusion of a valid marriage. Article 5 of the *Mudawwana* requires two '*udul*' to be present at the conclusion of a marriage. The rest of Book I of the *Mudawwana* gives rules according to which the contract should be concluded. Article 42 specifies the elements which the witnesses should mention in their report, the marriage deed. The writing of a marriage deed signifies the fulfilment of these administrative obligations. The document also has a "prospective dimension." It is an instrument with which the parties can prove that they have been legally married. In case of conflict, for example at divorce, both parties can claim their rights by referring to the document.

For ordinary people in daily life the presence of the '*udul*' and of the marriage document primarily have symbolic value: they render a marriage legally valid and properly Islamic. The document is for many people an illegible symbol,

which is however carefully kept. In case of conflict most people need a specialist to handle the text, or even read it. These symbolic meanings may differ greatly according to social background. Many city-dwellers seem to consider the presence of *'udul* and documents as an integral part of their wedding rituals. Marriage documents are cherished family possessions, which symbolize the social standing and urbanity of the family. In the countryside people often give less importance to the paperwork imposed by the government, or even outright try to escape from its expenses and nuisance. For many villagers a marriage is a ritual among people who know each other, and who do not need strangers to proof what they have agreed to, nor to provide religious legitimacy to what they consider their understanding of Islam (cf. Buskens, 1999).

The intermediate position of the professional witnesses and the mixed meanings of their documents lead me to propose as a thesis for further research to consider the *'udul* as "cultural brokers." This concept can be traced back to the work of Clifford Geertz (1960) and Eric Wolf (1956).⁷ In French historiography a similar notion of *intermédiaire culturel* was extensively discussed at a conference in 1978 (Vovelle *et al.*, 1981). Richard Antoun used the concept of "cultural broker" to analyze the activities of a preacher in a Jordanian village (Antoun, 1989).

In my view, the *'udul* are involved in a process of cultural translation while writing their documents. They translate notions from everyday life into legally valid language, thereby fitting 'what happened' into the official system. Of course this process should not be understood in terms of a simple binary opposition between folk and learned culture, between high and low, or theory and practice. I think that the process of mediating is much more complex. Carlo Ginzburg offers a dialectic view of the complex relationships between "popular culture" and the world of the *litterati* in the introduction to his famous book *The Cheese and the Worms* (1980). In the Moroccan case which I have presented, there is no clear-cut divide between "legal" and "popular" conceptions of a marriage. On the contrary, people are from the outset oriented toward the legal nature of the marriage ritual. It is also of vital importance to pay attention to the political framework in which these processes are taking place. The state uses the law and its representatives to exercise control over the lives of its subjects. The marriage deed is full of subtle references to this process of control, in which people are indexed and registered.

The *'udul* introduce legal concepts in daily life, but they also bring daily life into the law. Their formularies are ideal sites to study how Islamic legal thinking is adapting to the requirements of daily life. One way to understand this process of accommodation better would be to study the discussion of written

documents in fatwas, to see what happens with the documents when trouble arises.⁸

The introduction of the concept of “cultural brokers” is meant as an agenda for further research on the dialectic relationships between legal thinking and writing, and local practices of ordinary people in Morocco, in the context of a process of state-formation. It is part of a larger trend in the social sciences which considers reading and writing as social phenomena worthy of research (cf. Messick, 1993; Darnton, 1991). Further fieldwork might prove whether this concept is helpful in understanding how ‘udul in Morocco construct their stories of ‘what happened’, and what clients do with their texts. How do professional witnesses write a document? How do they choose a model? Where does the model come from? What do people do with their documents? How do they store them? Do they ever refer to them? These are some questions for future research, now that I have learned that I should never say that some things might not be according to the book.

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WHAT TO DO WITH DJINNS STORIES ABOUT LAW?

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Many of the articles in the Egyptian press deal with court cases and in some of these cases djinns show up in the stories of witnesses and in the accusations. Healers are accused for being charlatans, violent behaviour is ascribed to a possessing djinn, etc. These newspaper stories render the accounts of those involved in a case in a very partial and distorted way. The selection of the arguments and the journalist's interpretation deform the courtroom stories and orient them towards the potential reader. These newspaper stories are a fascinating source for everyday stories in the lower middle-class Caireen neighbourhoods where I did my fieldwork.¹ They are subjected to comments and compared with other stories and personal experiences. In this paper I intend to look at the differences and comparisons between stories about the same or similar events in the different settings of the court, the press and the neighbourhood talk. Even if from a formal point of view it is very easy to distinguish between these different stories, their content and their effects are often comparable. Furthermore, each narration presupposes and reflects other versions in other settings and every story about djinns forms, in one way or another, the basis for a judgment. This judgment can be a verdict about the guilt or innocence of the protagonists; it is often the moral evaluation of their behaviour, but involves also the audience's appraisal of the story and of the moral positioning and the credibility of the storyteller.

Stories and Talk as the Cause of Legal Action

In the Egyptian press, stories about unconventional and abnormal or deviant behaviour often have a trigger function. Journalists report for example about

their visit to a healer who pretended to know about the causes of illness and misfortune, to cure infertility, to make students succeed in their exams and to restore virginity. The publication of such articles, which appear mainly in weekly magazines, such as *al-Nabaa* and *al-Midan*, often leads to the arrest of the healers.

Usually, these healers and diviners – sheikhs as they are called in Egypt – are known by the police. Some have already been arrested but continued practicing healing after they were released from prison. As long as their behaviour is not overtly deviant and as long as the authorities can pretend to ignore their occupation, they let them work in relative peace. When their stories are, however, reported in the press, their presence and practices become public and cannot be overlooked anymore. The arrest of Sheikha Nadia in October 1999 was not caused by journalists publishing her story; rather, she had become so successful that everybody knew about her. Every week hundreds of patients visited the sheikha in her village in the Delta in search for healing. Normally, healers operate secretly in their neighbourhood and the persons in their surrounding pretend that there is nothing special about them, that people just visit them as normal acquaintances or to hear their advice. As long as others can pretend that they do not know about their practices, healers constitute no obvious threat for the public image of normality.² When, however, a journalist writes about their activities as healers, when too many people invade the village in search for healing, or when people in different cities and regions of Egypt have all heard about this healer and recount his or her miraculous cures; it becomes impossible to pretend not to know.

One of the roles of the articles in these weekly magazines is in fact this: to bring stories into the open and to cause scandal about the sexuality of actors and actresses, about the corruption of important persons, about homosexuality and about healers. The tone is one of indignation. Journalists see it as their task to show the inconsistencies between the displayed behaviour and the reality behind it and this is part of the style of their articles: “He looks like a holy man, living in poverty and following the religious prescriptions, but in fact he is a cheater and misuses the credulity of the poor and ignorant Egyptians for his own profit.”

Stories about healers have a similar function at the level of the neighbourhood: they cause a scandal. Cairens distinguish between on the one hand *kalam al-nas*, ‘things that people say,’ and that are not confirmed and, on the other hand *fadiba*, the scandal, which occurs when the behaviour of someone is so obvious and the talk so generally shared that it obtains the status of fact. The distinction between practical advice, juicy stories and scandal is a very fragile one. It is the difference between: “I’ve heard about a

healer who might be of use for your relative who is ill and if you're interested I might find her name and address" or "Did you hear about this sheikha in Bahariya who is so popular that hundreds of people visit her everyday?" and "Did you know that Sheikh Mustafa pretends to heal the possessed and the bewitched?"

Sheikh Mustafa was imam in a mosque in the citadel neighbourhood. We first met in 1997. At that time, people came to see him after the Friday prayer to be cured from spirit possession and witchcraft. He healed those who visited him in the mosque for free. The choice to heal for free was his way to protect himself against accusations of cheating and abuse. If his patients became better and felt grateful or indebted to him, they could give him a present. Sheikh Mustafa's reputation grew fast and too many patients came to see him. People in the neighbourhood started talking about him and referred more and more openly to his reputation as a healer, which became more important than his function as imam. At a certain time, this rumour inevitably reached the ears of those who were responsible for the mosque and Mustafa was forced to leave his position as imam. He moved to a smaller prayer place (*ṣamīya*) further in the street where he continued to receive people who came to him for healing. When he became too famous as a healer, he lost his official and prestigious position.

Stories about healers give them a certain reputation, which at first instance works in a positive sense. Rumours confirm their special powers and their success, but often these rumours become public knowledge in the end: the story of the healer is then openly told, not anymore to help those in search for healing but as public knowledge, as an interesting and fascinating story. On the level of the neighbourhood people's talk easily turns into scandal, since the publicizing of healing practices calls into question some of the established norms of religion, rationality and modernity.

These stories force those who have a certain authority to do something in order to restore the order, or more precisely, the public image of order. In many ways the Cairene social order is a displayed order. The issue is not so much the actual behaviour of people, but their presented and publicly acknowledged behaviour. As long as practices can be overlooked and their behaviour is not openly discussed, these practices are not felt to be an imminent and direct threat for the 'social order.' When their stories become public,³ their behaviour is scandalizing and action needs to be taken to reinforce the norms or, at least, to restore the image of normality. Depending on the level on which the scandal occurs, this correction will be the responsibility of the elder of the family, the elder of the neighbourhood or, on the level of the formal authorities, the judiciary apparatus.

Stories of What Happened as the Basis for a Judgment

When Sheikha Nadia was arrested, her case received ample attention in the Egyptian press and different newspapers reported her story. Al-Ahram, which is considered to be a very serious newspaper in Egypt, titled the article “*al-Malhufun*,” “the desperate ones,” and placed the story in a framework of modernity, drawing the contrast between, on the one hand, progress and technology on the verge of the 21st century and, on the other, the backwardness of superstition and believing in the reality of magic and witchcraft. The author expressed his perplexity at the fact that the patients of Sheikha Nadia were engineers and rich people coming from all over Egypt and from Cairo to visit the sheikha and not only poor and uneducated people from a rural background. Favret-Saada shows very clearly how this tone also prevails in French journalistic sources: “When the press writes about witchcraft and healing, it is always to denounce the cheating of healers and the credulity of their patients who are presented as ignorant, backward, marginal, rural and poor” (Favret-Saada, 1977: 61). In Egypt also the antagonism between healing and modernity, rationality, education are widely spread stereotypes. The impact of the story of Sheikha Nadia was at least partly due to the fact that it contradicted these stereotypes.

The journalist gave a broader context to the story of Sheikha Nadia by referring to the story of two other healers and a miraculous child showing that this was not an isolated case and had more impact and a wider relevance for the Egyptian society. The credulous patients did not belong to the categories which are mostly suspected of believing in djinns and healing; even so, they were presented as credulous and therefore laughable victims of the charlatan and the journalist situated both himself and his imagined public outside this category of people.

The author cites three official sources to enrich his analysis of ‘what happened’ and to give an indication of how we could interpret the event: a spokesman of the official religious institution of al-Azhar, a representative from the state security and a citation from the penal code. The law, which the journalist cites, does not refer to djinns, healing or supernatural forces. It mainly deals with the crime of making profit by telling lies or making promises that are not kept. Through the citation of this law, the event is not only presented as a social incongruity but also as a legal infraction.

The official from the state security suggests that the presence of so many people from different social backgrounds is due to their despair to find healing – an idea that is also expressed in the title of the article. He explains that healers often take advantage of their credulous clients in order to make money

and that some even abuse their female patients sexually – another well-known prejudice about healers in Egypt.⁴ He says that some of the impostors have the talent to understand people, while others work with the devil in order to attain their goals. In his answer he mixes a rational, psychological explanation for the success of healers – referring to the needs of the sick and the talent to understand and influence people –, with a supernatural interpretation that they work with the devil in order to know the unknown.

The testimony of the representative from al-Azhar confirms the existence of witchcraft as a cause of illness and the possibility to heal by means of Qur'an recitation. He insists, however, that only those who have the necessary knowledge and who are not cheating could be permitted to perform healing, and this could only be guaranteed for specialists from al-Azhar. The explanation of this official refers to an issue which is absolutely central to stories about djinns: The existence of djinns cannot be denied, since it is confirmed by the Qur'an. Nevertheless, the authority to decide whether djinns are involved and the capacity to deal with these djinns is very much disputed. Some say only deeply religious men with special training can deal with djinns; others go even further and say that this talent is a rare gift from Allah, which is only granted to the saints. The reporter plays with the suggestion that there might be some truth in witchcraft and healing without taking the responsibility for this affirmation. By citing an official from al-Azhar on the topic of djinns, the author of al-Ahram avoids any risks for his reputation or that of his newspaper.

Akhbar al-Hawadith is a weekly newspaper reporting mainly about accidents and other events in and outside Cairo. At the time of Sheikha Nadia's arrest, the weekly published a three pages article in which all the aspects of her case were recounted with much detail. The title promises: "The text of the investigations concerning Sheikha Nadia: Exciting surprises in the case of Sheikha Nadia." The author combines different sources: his own observations in court, the written reports of witnesses and the reports of the interrogations of those who were arrested, the testimonies of the lawyers and the prosecutor, and interviews with police officers at the place of the crime. Those who only read the title, the first lines and the headings certainly have the impression that it is not just a case of fraud but that something extraordinary and spectacular is going on. In the title and the first lines the accent lies on the miraculous aspects, the surprises of what was revealed in court and on the mystery of her disappearance. The first line quotes "Sheikha Nadia... disappeared! Dangerous accusations oppose the defence of Sheikha Nadia who is charged with charlatanism and practicing magic." The mystery of her disappearance is an element which is amply used by the journalist to fascinate

his public. One of the headings states, “The mystery of the disappearance of Nadia after the court decided her temporary release!” Another heading claims, “One of the witnesses stated before the prosecutor: The accused was afflicted by magic and recovered by healing herself!” These titles emphasize the spectacular character and the incredible details about the case. Also the pictures strongly accentuate this impression. Except for the large picture covering almost the whole first page of the article with the Sheikha crying in court, the other images show her in the middle of a crowd during the healing rituals. Some of the patients have fallen into trance and lie at her feet while she holds a microphone reciting verses and her brothers walk around with sticks to keep the order. The first impression conveyed by this article is a rather favourable image of the sheikha or at least the suggestion that there was something more about her than only a crook ripping off people.

A thorough reading shows how the journalist tries to play the card of the extraordinary as much as he can, without compromising his credibility and the integrity of his weekly. He carefully balances between exciting titles and the dry tone of the investigation reports cited in his text. When he cites the witnesses’ reports against the sheikha, the witnesses appear as credulous and almost naïve persons:

My name is Amin Deif Allah ‘Abd al-Raziq Hamida, born in 1949 and employee in Kom al-Barka in the region of Kafr al-Dawar.

q: What is the reason for your presence here in the house of the one who is under investigation?

r: My wife is ill and has an illness that has no cure according to the decision of the doctors and when she heard about Sheikha Nadia who heals all the illnesses, she went to her several times.

q: Did this result in the payment of money that day in the house of the one under investigation, when you were looking for healing in a private session?

r: When her cure did not have any result, I heard that the sheikha organizes private sessions in exchange for money and I went that day together with my wife and I paid 100 LE to two persons who said that they were her brothers and who were sitting with us in the house.

q: And did the health of your wife become worse when she stopped taking her medicine and followed the cure of Sheikha Nadia?

r: Yes.

q: Do you have anything else to say?

r: Yes, I want my money, I have lost more than 500 LE, which I have paid to the brothers of the sheikha.

The journalist cites four very similar testimonies which all confirm the same story. The witness was desperate for healing and heard about the sheikha. S/he hoped to be healed but paid a lot of money for nothing. The journalist does not report his own discussion with witnesses but cites fragments of the police report on the case. The fragments he selects put the sheikha in a bad light. She takes advantage of her patients' despair, gives them false hopes and pretends to do things that she cannot do. She even dangerously advises them not to take the medicine that the doctor prescribed and she makes them pay big amounts of money, not to her personally but through her brothers.

In contrast with the accusations of the witnesses, the author cites Sheikha Nadia and her brothers from the interrogation report in a paragraph titled: "*Ma basalsh*," "it did not happen." Her brothers and husband admit that they rented chairs for 2 LE and stones to sit on for 1 LE and that they sold tea, but they denied having received money for healing. The reporter selects precisely those phrases which contradict the declarations that he cited from the witnesses.

q: "What about the 500 LE?"

r: "It did not happen."

An interesting point is that, while al-Ahram cites official representatives from the state security and al-Azhar, Akhbar al-Hawadith selects the testimony of another healer as an argument against the sheikha. This healer from Bahariya asserts that Sheikha Nadia has no power over djinns. She visited him a few years before and he healed her from witchcraft. According to the journalist this testimony proves that she had no knowledge on the matter and only copied the one who healed her. The journalist, hereby – whether intentionally or not – ignores the fact that most persons only become healers after an initiating illness and usually learn how to deal with djinns by overcoming their own affliction. This was exactly the story that Sheikh Mustafa told me as an argument to confirm his authenticity and not, as the author presents it, as an argument against the reality of Nadia's healing capacities. The attitude of the journalist is confusing in this regard because he not only places himself outside the official discourse by citing another healer as a valuable source, but also places himself outside the popular discourse on healers and their initiation.

While al-Ahram from the outset places the story in a framework of modernity and rationality as opposed to superstition and fraud, Akhbar al-

Hawadith pulls the audience's attention with spectacular and surprising titles but subsequently gives a quite dry account of the facts and a negative image of the sheikha. The third article about the case, in *Hadith al-Madina*, carries the title "Sheikha Nadia determines the future of the old ministers." *Hadith al-Madina* is a weekly paper with a preference for scandals and a taste for the extraordinary. In the article on Sheikha Nadia the headings read: "The visit of highly placed persons of the ministry to the sheikha in order to stay in the ministry" and "Red stuff helped the minister to remain in his chair." The first paragraph contrasts their own story about Sheikha Nadia with other sources:

"Sheikha Nadia became the evil crook in a short period and was condemned to three years in prison. Many have written about her story and her reputation. They did not touch on the relation between the sheikha and some of the highly placed persons of the ministry."

Typical for *Hadith al-Madina*, they claim to write a truth that others don't dare to report. The newspaper is full of sex scandals, accusations of corruption and spectacular stories about djinns and miracles. Still, these articles respect certain limits. First of all there are no names of ministers; the reporter mentions that one of them was his informant but he does not give more details on his sources. Also, about djinns and the supernatural world, the journalist respects a specific and constraining framework. Each edition of this paper has a full page dedicated to the topic of djinns, with advice to readers and articles informing them about the world of the invisible. The framework is strictly Islamic; not every wild story is acceptable: the existence, behaviour and characteristics of djinns should conform to what is written in the Qur'an and the Hadith. Healing by means of Qur'anic texts is, for example, acceptable but magic and witchcraft are disapproved of. This throws light on the last heading of the article: "Infection amulet for the friend of his Excellency without use" because, in the tendency of this weekly, amulets are a form of superstition which is not Islamic ("infection amulet") and which does not work, ("without use").

Judging and Being Judged

In the newspaper articles, the positions of the journalists change according to the public that they orient to. On the one hand, they try to capture the attention by pointing to the incredible and amazing aspects of the case; on the other hand, they have to be credible and their presentation of the case has to fit with the general style of the newspaper. Stories related to the invisible world

are never neutral, and always entail questions related to the rational and positivistic attitude of the narrator and to his religious positioning. In both domains the author tries both to satisfy the expectations of his public, and to anticipate the possibility of censorship or apply some kind of self-censorship. His way of presenting and interpreting the stories is therefore very constrained because a story always pre-supposes the judgment of the readers, who will evaluate the religious, scientific and moral position of its author and of the newspaper. At the same time, it is the way the journalist judges the sheikha which will determine the way the public judges him.

Both al-Ahram and Akhbar al-Hawadith condemn the sheikha for fooling the credulous and the desperate. Also, Hadith al-Madina is not entirely positive about the sheikha but on different grounds. She is presented as a real healer and diviner, but there is a negative tone in the discussion of her methods, which are considered to be not entirely in accordance with religious prescriptions.

In the end, Sheikha Nadia was condemned to three years' imprisonment, but on what grounds was she judged: which aspects of her story were selected as meaningful to form the ground of the judgment? These are questions which I cannot answer here, because I was unable to have access to the legal documents of this case. Previous cases of healers clearly show, however, that the Egyptian courts try to minimize the role of djinns in the stories of the accused and select different grounds to sustain their judgment.

In October 1997, a man was convicted for murdering his neighbour. He was a civil servant who retired and who convinced his neighbour of the fact that she was possessed by an evil spirit. He took her to the apartment of his son in a scarcely populated area (6th of October City) to pray on her to exorcise the djinn. The woman was later found dead; she had been strangled and beaten to death. The man admitted that she had died while he was trying to exorcise the djinn; he asserted however, that he did not kill her, but that it was the djinn who had done so. The court sentenced him to twenty-five years' imprisonment.⁵ The reason given in this judgment is that even if the devil can harm a person in his body, he cannot take hold of his soul (*ruh*) because there exists no authority over the soul of a human being except with Allah (*la sulta 'ala ruh al-insan illa al-labi*).⁶

It might seem remarkable that the judge is not denying the existence of spirits and the reality of spirit possession but this should not surprise us in the Egyptian context, since the existence of djinns is established in the Qur'an⁷ and anyone doubting this fact could be considered to be an unbeliever. When the judge argues that the spirit has no authority over the soul he presumes

that a djinn cannot urge a man to commit a crime unless he, the man, agrees with it. In this way, the judge conceives of a narrative of djinns compatible with the judicial context. Djinns are not denied recognition, but rather are turned into powerless beings unable to control human action.

More recently, there was another case of a sheikh who was held responsible for the death of a man. Also here, the presence or absence of djinns was transformed into an irrelevant fact for the judgment in the formal setting of the court. A sheikh or diviner convinced the owner of a flat in Ain Shams (Cairo) that djinns had told him about a treasure that was hidden in the soil underneath his ground-floor apartment. With the help of two other men they dug a hole of 9 meters' depth in search of the treasure. While one of the young men was digging, the sand suddenly started shifting and he was buried alive. Also, this case was considered a case of fraud. The sheikh was accused of convincing others of something that was not true, and thereby bringing their lives in danger. The formal judgment did not take into account that there might have been a djinn protecting the treasure, pulling the young man into the earth and causing his death. This was, nevertheless, the explanation formulated by the other assistant of the sheikh, who was interviewed by the journalist, and this was a quite credible explanation for different people who I heard commenting on this case⁸. Djinns are not denied existence in the context of the court, but they are irrelevant here and incompatible with positivistic law. In court the role of the djinns is minimized and their presence is not taken into account as relevant for the judgment. By contrast, it is exactly the question of the presence or absence of djinns that keeps the public busy.

During my fieldwork in Cairo, I had many discussions with both men and women about these cases. The questions that recurred were whether the civil servant really thought he could heal his neighbour or only brought her to the isolated apartment to steal her jewellery and to kill her; whether Sheikha Nadia really wanted to heal all those people who came to see her or was just performing a show to gain money; and whether the diviner really heard from his djinns that there was a treasure under the house in Ain Shams or just invented a story to be interesting in the eyes of his companions. In a first encounter with strangers or in the presence of a large and heterogeneous audience, most of my interlocutors formulated their doubts about the reality of djinns, stating that all those stories are nonsense and that these so called healers and diviners are only misusing their influence on others and taking advantage of the misery or credulity of their clients. They referred to this category of healers using the word *daggal*, meaning cheater, imposter and charlatan, and constructed a narrative of what happened in accordance with

their idea of rationality and modernity, while identifying with the ideal of the positivistic city-dweller.

The point of attention changed when there was an atmosphere of confidence; the issue was no longer to appear as modern and rational, but here there were other elements at stake. Did Sheikha Nadia have access to the world of *al-ghaib*, the absent or invisible; was she in contact with djinns; was she spiritually inspired by angels or was it only that she had good psychological insight? Was she able to heal her patients because she had real spiritual powers or only because she was very convincing and people believed that they would be healed. And what happened to the sheikha when she disappeared? The answers formulated by my interlocutors were never neutral. The one who pronounced his or her opinion not only judged the sheikha's behaviour, but inevitably also submitted his own position to his audience's judgment. To believe in djinns and witchcraft and hidden treasures not only threatens a person's reputation as a modern and rational person, but also endangers his reputation as a good Muslim, therefore the judgments people made about healers were formulated very carefully.

At the time of the court case, people asked themselves whether Nadia was a real sheikha, but even her most faithful defenders avoided using the term 'wali' in relation to her. They spoke of her as being blessed or being very close to Allah, without explicitly referring to sainthood. To put a living person on the level of saint is, according to different religious authorities, an act of *shirk*, of polytheism. A blessed person, such as Sheikha Nadia tried to be, puts him/herself in a very ambiguous position. If s/he is really close to Allah s/he should not feel the desire to earn money from his/her talents and should not care about reputation and appearances. This ambiguity permits us to understand why the journalists insist on the fact that Nadia asked for money, and explains why it was important to know whether it was only her brothers and not her who earned something by renting chairs and stones and parking places, for the magistrate in court but also for the public to judge the sheikha accurately. If it were only her associates who were involved in money-making, then the sheikha could still be a real and purely Islamic healer, who trusted only in her deep conviction and her knowledge of the Qur'an to heal others. One of the most important arguments against Sheikha Nadia in this context was that she had hired a lawyer to defend her in court. This was interpreted as a sign that she did not trust in Allah. If she were a true saint or truly close to Allah, she would not need a human defender because Allah would protect her.

Most Cairens I spoke to are convinced that saints exist but they considered them to be exceptions. They consider that real blessedness and true miracles

are very rare and therefore they readily doubted the truth of the sheikh, whose position is twisted by the tension between the religious basis of his practices and the Islamic denial of sainthood. Most healers and diviners in Cairo do not claim to obtain their knowledge only as a gift from Allah. They admit that they listen to the whispers of the djinns and that they are assisted by these invisible creatures. To work with the djinns is considered to be in contradiction with the religious prescriptions. To consult these healers (*sahir*), or only even believe in their existence and in the efficacy of their practices, is also considered a sign of backwardness and a form of superstition, which does not stroke with the real Islamic doctrine. Believing in djinns is one thing; it is hard to publicly deny their existence since they are mentioned in the Qur'an. But from here to the assertion that djinns inspire healers, that they help them to heal patients, that they perform surgery at night without the patient noticing anything or that they pull people into the earth to protect a treasure is still another thing. Some persons I spoke with openly asserted that it must have been a djinn who pulled the man into the earth while he was digging for the treasure, or that it was the djinns who kidnapped Sheikha Nadia. Most interlocutors preferred, nevertheless, a vague vocabulary and only referred to the presence of djinns indirectly.

The fact that Sheikha Nadia had several lawyers to defend her in court was seen as an argument against her authenticity as a healer, but her disappearance, on the contrary, was a widely discussed fact. Rather than seeing it as an escape from justice, most people I talked to speculated about the question of whether she had been carried away by djinns who had hidden her in their own world to protect her against humiliation. They supposed that the djinns had kidnapped the sheikha because they were angry with her for having betrayed their secrets during interrogations. It was such a widespread hypothesis that even al-Hawadith used it as the opening sentence of its article, contradicting it later, but nevertheless suggesting it as a teaser to pull the reader's attention. When discussing the relation of the sheikha with the djinns, an important issue was also whether or not she dealt with them in an acceptable way or not. Acceptable meant that she had power over the djinns only by means of her strong beliefs and her knowledge of Qur'anic verses; unacceptable meant that she placated the djinns and seduced them to assist her by using magical charms, by deliberately transgressing religious prescriptions of ritual cleanness or by sacrificing to the djinns. This differentiation between religiously acceptable and illicit ways of healing was not at stake in court, but was an implicit and central issue in the different newspaper articles and was openly discussed among the public. A Coptic Christian told me that he visited Sheikha Nadia

with his wife. She suffered from pain in her legs and they went to see many doctors, but to no avail. Someone had spoken to him about a sheikha between Alexandria and Damanhour. They visited Nadia three times. They never saw the sheikha herself, only heard her voice through the microphone, but the man asserted that her words worked like a miracle and that his wife was healed. The sheikha had only read Qur'anic verses and did not ask for any money at all. He was sure that it was the doctors in the region who denounced her and filed her in court, because they were jealous and afraid that they would have no more work (Shubra al-Khaima, 18 October 1999). In his story about the sheikha, he combined many reasons to affirm the sheikha's innocence; not those arguments that are necessarily relevant for the law, but arguments related to the norms which determine the judgment of the public and which determine her reputation. For him, the criteria for her guilt were not whether or not she broke the law, but whether or not she was a good healer in the sense of being both a good Muslim and able to heal her patients.

Many interlocutors considered that the controversy was in the first place whether or not the healer or sheikh was capable to do the job right. They judged that this was the problem with the healer who killed his neighbour and with the sheikh who was looking for a treasure. Both of them tried to deal with djinns and both of them failed. What exactly happened when the civil servant tried to heal his neighbour remains uncertain: Some suggested that the djinn had suffocated the woman at the moment he had left her body. Others thought that the angry djinn, upon leaving the woman's body, had instead possessed the healer and forced him to perform the cruel act of strangling her. In the case of the treasure, the sheikh had not been able to untie the magic that protected it and this caused the death of the young man who was buried alive. In both cases the answer as to whether or not the healer or diviner was guilty remained the same for the court and for the public, but the reasons for condemning them were very different. In court it was theft, murder and fraud; among the public it was the fact that the specialist was too weak to handle the forces which he tried to manipulate, and that because of his incapacity, he put his patient's life in danger. In the case of Sheikha Nadia, there was on the contrary no consensus on the question of whether or not her punishment was justified.

Some people believed in her healing capacities but nevertheless agreed with her punishment. They considered that even if she was a good healer and did not act against the Islamic prescriptions and did not harm anybody, the law should limit these practices anyhow. The mistake of the sheikha was that she became too famous, that her practices were not hidden anymore⁹. Through

her success she made public what should have stayed hidden. Many persons asserted that they agreed with her punishment for this reason. She was not really mistaken, but should carry the responsibility for what happened. They considered that the overt character of her practices was harmful for the public order and that she was giving a bad example. If the authorities would let her continue practicing healing, very soon there would be numerous healers everywhere and not all of them would be of good faith. Others did not agree, and considered it a pity that a good healer was now in prison. They asserted that they would return to see her as soon as she was released. For them, her reputation as a healer remained intact.

Conclusion

In this paper, I have introduced the distinction between stories about law in settings which are very different in quality: First, there are the stories of the accused and the witnesses in the official setting of the court, which are reflected in the judgment where the role of djinns is often minimized. Second, there are the reports of these cases in newspaper articles, oriented towards an imagined public, balancing between the spectacular and the credible and between the extraordinary and the normal. Third, there are the comments and stories of the public whose judgment might be more pertinent and influential than would be expected at first sight. Through the discussion of different examples, it became clear that this qualitative difference does not exclude many similarities between the way the stories are told and the issues at stake in telling them. The way the stories about djinns are presented always entails some kind of judgment on behalf of the public as well as the narrator. The selection of certain facts, the irrelevance of others, and the tone of the story in one way or another imply a judgment of the healer and his or her capacities and practices. To recount these stories also demands a positioning of the author vis-à-vis religion and rationality. This positioning is a moral positioning as well as a social one, when the narrator contrasts his or her position with the credulous and ignorant poor, and/or to the superstitious and deviant Muslim.

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TRYING TIMES IN TUNIS

Notes From a Purposeful Observer¹

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I received my first invitation to act as an international trial observer in 1995. I had spent most of the past dozen or so years working with the West Bank-based Palestinian non-governmental human rights movement, and had also worked with international human rights groups elsewhere. I was asked by FIDH² to act as international observer on their behalf at an upcoming trial in Tunisia. Before I left, an international lawyer friend gave me a 1982 article by Professor David Weissbrodt, a comprehensive consideration of the history, legal basis, role, activities and ideal-type conduct of international trial observers, in just under a hundred pages.³ For all I know, although over twenty years old now, the article is still being recommended to those anxious to prepare themselves thoroughly for the task, at least in theory. Less exhaustive and more immediate guides to conduct are of course routinely provided by the sending organisation to the person charged with observation on their behalf.⁴

I still have my original copy of Weissbrodt's article, marked up in psychedelic highlighter and pencil, with underlinings, asterisks, question marks and exclamation marks, indicators of my anxiety to internalise theory and rules before embarking on implementation. As an international trial observer, your function is to observe 'impartially,' but not incidentally; you are looking for certain things. You are directed as to what to observe – that is, what to look out for – and you are directed as to how to observe – that is, what to do. The function is not passive: it is purposeful. Perhaps in research terms it could be described as a very particular form of 'participant observation,' a function-focussed form of action-oriented research activity. In court, you are instructed to make yourself known to the presiding judge, to sit in a prominent position, to make a point of being seen taking notes on the proceedings.⁵ Out of court,

you actively seek out further information from a variety of actors. From all this, you produce your report, your story of 'what happened.' That story, of course, is constrained by your purpose and by the form of your final narrative; it ranges wider than the story told in the court's judgment, but it does not tell the 'whole story' of your day in court, nor your time (in my case) in Tunisia.

Depending on the situation, the function of international trial observer will often focus on the deconstruction of the 'official' narrative, the court's story of what happened, on the basis of which acquittals or convictions were secured. This of course also means the construction of an alternative (or perhaps parallel) narrative. In this paper I seek to examine the construction of this 'alternative/parallel narrative' in my own international trial observation reports relating to a series of court hearings for three successive political trials in Tunis over the period 1995-1999. The location of Tunisia is chosen simply because that is where I have performed this function; a comparison with trial reports from states beyond the Muslim world and beyond the Middle East/North Africa would render commonalities as well as differences – most obviously because the evaluative framework of international human rights law imposes its own narrative structure. Through the use of the first person narrative form, I have attempted to close the distance between my experience as an observer, and the written output of that function, the trial observation report: that is, examining the dynamic and the impact of my own engagement with the subject on the process of observation and construction of the story of 'what happened.'

I begin this consideration by setting out relevant parts of the Tunisian context and Weissbrodt's exposition on international trial observation, proceeding from there to examine certain points of the three cases, and concluding with a consideration of the sorts of stories that trial observation reports do not tell.

The Tunisian Context for International Trial Observation

A key feature of Tunisia as a destination for international trial observers is the effort invested by the government in promoting, regionally and internationally, an image of strong commitment to international human rights principles, a discourse which largely revolves around the law and its implementation. Tunisia signs on to all the international human rights instruments and actively participates in various UN human rights bodies. As human rights organisations observed in 2001:

The Tunisian authorities devote considerable resources and efforts to project an image of Tunisia as a country where human rights protection and promotion is a top priority. To this end, the authorities, often

assisted by obscure non-governmental associations of dubious political independence, conduct vast public relations campaigns overseas and have created an array of official human rights bodies within the administration. [...] Paradoxically, while the official human rights bureaucracy flourishes, members of the independent human rights community and their relatives have been increasingly targeted and repressed. (Human Rights Watch, et al., 2001)

Besides human rights, other notable planks in the official discourse on the features of Tunisian public life are stability, modernity, and the status of women, as well as strong economic performance and efforts to eradicate poverty (Wood 2002: 97). The official narrative is exceedingly tightly controlled; and a significant part of that narrative consists of stories about the law. In 1994, the Geneva-based International Commission of Jurists/Centre for the Independence of the Judiciary and Lawyers (ICJ/CIJL) denounced the Tunisian government “for having intimidated Tunisian judges who took part in a seminar on judicial reform,” accusing the government of having forced judges to withdraw their names from the final document of the two-week programme, which set out guidelines for judicial reform in Tunisia, and to sign a letter annexing a different version. According to the ICJ/CIJL, when the organization contacted some participants for clarification, “the judges confirmed they had signed the letter under pressure, adding that they had never even seen the new document intended to replace the original” (ICJ Newsletter, 1994).

Also in 1994 the United Nations Human Rights Committee, concluding its consideration of Tunisia’s fourth periodic report on implementation of the International Covenant on Civil and Political Rights, stated that it was “concerned, in particular, with the growing gap between law and actual practice with regard to guarantees and safeguards for the protection of human rights.” The Committee expressed particular concerns on the independence of the judiciary, continuing reports of “abuse, ill-treatment and torture” of detainees, “the reports on harassment of lawyers who have represented clients accused of having committed political offences,” lack of tolerance for dissent and criticism of the government, and limitations on the freedom of opinion and expression.⁶ It related the latter limitations to provisions of the Press Code, which encourage ‘self-censorship’ by the Tunisian media. After the considerable attention paid by international and Tunisian organizations to the second trial considered here, a correspondent for a French newspaper observed: “*Signe des temps: la presse tunisienne a fait silence sur le procès et sur la condamnation*” (“Sign of the times: the Tunisian media kept silent over the trial and the conviction”), *Le Nouvel Observateur*, 19-25 February 1998. In the face of probably even

greater attention to the third case, “Tunisian media ignored it completely.” (Human Rights Watch, et al. 2000, 13) In the period during which I was attending trials in Tunisia, major French and some English newspapers were frequently unavailable. The first internet cafés didn’t open until late 1998, the state maintained control over the only international gateway, and Human Rights Watch (1999, 64) reported that “without exception, the Tunisians we interviewed said they believed the government monitored email correspondence.”⁷ The internet was also the site of a battle over the human rights narrative; in 1999, a feature in the *Guardian* reported that:

Internet users in Tunisia who look up Amnesty, for example, are likely to be directed to a site resembling that of Amnesty International, the agency that campaigns for human rights. But instead of seeing data documenting the country’s poor record in the field, they will be offered descriptions of the Tunisian government’s wonderful achievements in human rights. (Whitaker, 1999)⁸

The Tunisian ambassador denied that the authorities had any role in the website, which according to Human Rights Watch was registered to a Paris-based “private firm with friendly ties to Tunisia” and “closely tracked the government’s own rhetoric on human rights.”⁹

The point here is not to review as a whole the human rights record of Tunisia, but to emphasise the intensity of the efforts to maintain and protect the ‘official’ story about the law, in particular human rights-related law. This focus feeds directly into the issues raised in the case studies discussed below, and the role of the international trial observer in telling a different story. On the goals of trial observers, Weissbrodt tells us:

The immediate goal of the observer is to determine whether the defendant has received a fair trial under applicable law. There is no doubt, however, that the work of observers also contributes to public awareness and influences the ultimate public judgment of the trial [...] Observers facilitate the public debate and reckoning that are among the primary purposes of public trial. (Weissbrodt 1982: 32)

In the absence of local media coverage, the trial observation report is more likely to facilitate public debate outside Tunisia. Inside the country, the absence of a forum for public debate on this issue in the media (and the rules on ‘unauthorized meetings’) renders the court room the site of urgent attempts,

by defendants and their defence counsel, to deconstruct the official narrative and to tell stories about the law other than those so carefully constructed and controlled by the state.

In this situation, the court may take on even more of the form of a 'theatre' than courts usually do. On the one hand, you have the staging of what are in some senses 'show trials,' not least since cases such as those discussed below may appear to primarily serve a purpose of making important points to the Tunisian audience about the limits of rights and freedoms, the red lines of public dissent. On the other hand, defence counsel may make their own dramatic interventions, signing on in their scores to speak in defence of the accused, or withdrawing – individually or en masse – in protest at the conduct of the trial. The international trial observer is rarely able to convey the tension and passion of the drama that unfolds in court – or indeed perhaps its less law-like 'meanings' – within the confines of the trial observation report.

Weissbrodt on International Trial Observation

Weissbrodt tells us that the first trial attended by a legal observer sent by a foreign government was 'very likely' that of Captain Dreyfus, with Queen Victoria sending her Lord Chief Justice, Lord Russell, to France "in response to widespread public concern about the fairness of the proceedings." (Weissbrodt 1982: 3) Governments continue to send observers to 'significant political trials' – representatives of European and North American diplomatic corps have observed some trials in Tunisia, including two of the cases considered in this paper. The definition of 'political trial' is not exhaustively drawn, no more the term "political offence." (Weissbrodt 1982: 36 and n.172) However, the three trial types given as examples of 'political trials' by Weissbrodt pertain to Tunisian political trials, either singly or in combination. These include trials involving offences against the state, "cases in which the defendant may desire to make a political statement, either in committing the crime itself or in mounting a trial defence," and cases "in which the government may use a trial to make a political point of its own." (Weissbrodt 1982: 37) Specific factors motivating international human rights NGOs to send observers include, as listed by Weissbrodt, the identity of the accused; reports of torture being used against the accused; "concern about the general state of human rights in the country, as represented by a particular trial;" and "anticipated procedural irregularities." (Weissbrodt 1982: 38) Some or all of these concerns were raised by the trials I attended as an observer in Tunisia.

Weissbrodt identifies 'four principal reasons' for sending observers to trials of particular human rights interest:

The first function that an observer can perform is to gather facts firsthand and prepare an impartial, independent, and objective report. Second, an observer's presence necessarily makes the participants – particularly the judge and prosecutor – more circumspect in the face of authoritative and independent criticism. Third, an observer gives the defendant, the defense attorney, and the defendant's supporters a sense of international assistance and renewed confidence. Fourth, the observer represents an organization or government and expresses its concern about the fairness of the proceedings.” (Weissbrodt 1982: 32-33)

These four functions will be invoked as I look at the three case studies below, but it will already be clear, as Weissbrodt observes, that they are “inherently contradictory” (Weissbrodt 1982: 35). I am not at this point going to examine the meanings of ‘impartial, independent and objective’ in the context of producing a trial observation report, but rather, as noted above, focus on the way in which such reports set out to tell another story about the law. The report-focussed purpose of the international trial observer is to address the same ‘facts’ as are available (in principle) to the court, to examine the construction of the story by the court, and where necessary to construct an alternative narrative. One of the most significant methods through which the international trial observer does this is by expanding the narrative beyond the ‘microscopic truth’ examined by the judge. South African judge Albie Sachs, reflecting on the Truth and Reconciliation Commission, recalls the distinction he has made between “microscopic truth” and “dialogic truth”:

Microscopic truth is discerned when you observe a limited, prescribed field – you control the variables, you exclude everything else and you make your observations in terms of the relationship between the variables. Microscopic truth can be found in positive science. It is what is examined in a legal case... (Sachs 2000: 97)

Sachs compares this to ‘dialogic truth’ which he summarises as the multiple perspectives making up a ‘social truth.’ While I would not describe international trial observation reports as manifestations of ‘dialogic truth,’ they do attempt to tell a wider story. Weissbrodt’s caution against a conflation of the observer’s range of vision with that of the judge, for purposes of telling the story, also gives a South African illustration:

If an observer interprets her Order of Mission too narrowly, she may render an inadequate report. For example, several observers of South African trials proclaimed the proceedings fair because they looked only at the court procedure and failed to consider the draconian, overbroad, and ultimately racist substantive laws being enforced. (Weissbrodt 1982: 72)

For Weissbrodt's international trial observer, the wider range of human rights norms provide context for the fairness of the trial. Weissbrodt's recommendations for the contents of international trial observation reports indicates the range of vision that he considers suitable for the observer:

To the extent that time permits, observers should include the following information in their reports: 1) the instructions of the sending organization and any terms of references; 2) the legal, historical and political setting of the case; 3) the facts of the case as revealed at trial and independently verified by the observers; 4) the charges, applicable laws, pre-trial procedures, trial, judgment (if any) and subsequent proceedings; 5) a description of the conditions of confinement and their impact on the mental and physical condition of the defendant(s); 6) an evaluation of the fairness of the proceedings, the applicable laws, and the treatment of the defendant(s); and 7) a conclusion describing any significant problems the observer noted. (Weissbrodt 1982: 73-74)

Defendants and defence counsel in political trials also, of course, frequently seek to bring various of the above categories of information within the narrative of the court. A feature in many political trials in Tunisia is the insistence of the court on keeping the variables it considers extremely limited, rendering the end of the story (the judgment) 'plausible' in the official record. Besides including these other parts of the story, which may not be allowed to be told in court, in the Tunisian cases described below, the task of the international trial observer was also to tell the story as it was told in court, by defence lawyers and defendants, as compared to the story told in the official summary record of the court proceedings, as dictated by the presiding judge. The other stories about the law that come under examination in trial observation reports are, as indicated in the previous section, those told about the law by the Tunisian government, which are compared to the findings of international bodies, and to the stories of individual processes told by international trial observers, for the purpose of more general conclusions.

Case One

In the first case in which I acted as an international trial observer, the record shows the court of first instance holding matters of constitutionality and procedural guarantees for the defence to be external to the matter at hand, and preventing the lawyers from continuing their pleadings and from getting these parts of the story into the 'official' summary of proceedings.¹⁰ The recording of this missed or denied narrative is a central feature of international trial observation reports from Tunisia. In this first case, key among the issues under contention was access by the defence lawyers to copies of the leaflet forming the basis of the prosecution. In one session, the record states:

Advocate Tarifi requested a record of his withdrawal and delivered a statement from Advocate Bida representing his withdrawal from pleading on behalf of the accused saying 'this is a violation of the rights of defence.'

After the defence refused to plead on the substance (*al-asl*) Advocate Marzuki came forward and pleaded outside the file of the case about defence and the rights [of defence] and for this reason the court decided to foreclose the intervention of Advocate Marzuki who left the courtroom immediately.

In a subsequent session:

Advocate Nasraoui came and pleaded on behalf of her client explaining that the claim had lapsed by prescription and adding that the text of the transfer [to trial] was unconstitutional. The president of the session intervened, cutting [her off] and explaining that her pleading had departed from the subject of the case, thus ending her pleading. Therefore the court decided to terminate the pleading of Advocate Nasraoui. Advocate Bida refused to plead in the case in protest, as he said [in his words] he refuses to plead before a president who does not respect the law. Therefore the court decided to end the pleading and to reserve the case to negotiation after the session...

The report later disseminated by FIDH, after reviewing the wider story, drew conclusions on the matters that the court at first instance had refused to address, concluding *inter alia* that "the procedure was marked by flagrant and repeated violations of the rights of defence and thus the right of fair trial" and that the accused's rights to freedom of expression and opinion appeared to have been gravely infringed.¹¹

This case also showed the courtroom as the site of extended challenge by defence lawyers to the court. Repeated demands were made by the defence to be allowed to obtain, for their files for the purpose of defence, a copy of the leaflet on the basis of which the defendant was facing charges. The prosecution repeatedly objected on the basis that the leaflet affected public order and was defamatory of a public figure.¹² After negotiations, the judge offered lawyers the opportunity on two occasions to view the leaflet in his office during specified hours. The defence lawyers declined to accept these conditions, and ultimately, one by one, withdrew from the case without submitting their pleadings, stating that the rights of the defence had been violated, the conditions for them to perform their tasks had not been met, and they were therefore unable to continue. The defendant was sentenced to three years in prison plus a fine for 'possession with intent to dissimulate of leaflets of a nature injurious to general security,' and two years in prison plus a fine for 'defamation of the public order.'¹³

This case also raises questions as to Weissbrodt's second listed function of producing increased circumspection on the part of judge and prosecution. At the first session of the appeal hearing, which I attended, one could speculate as to the relationship of two distinct actions – or rather one action and one omission – to the presence of an international trial observer in the session. Firstly, the appellant was not produced before the court, which was informed by the prosecution that the prison authorities 'had been unable to locate a prisoner by that name' and an adjournment was accordingly requested and granted in order to allow the prisoner to be 'found.' The report subsequently produced by FIDH noted:

It cannot be ruled out that the fact that Mohamed Kilani was not presented at the hearing may have been directly linked to the presence on Tunisian soil of an international observer charged with following the case. On the occasion of previous cases, other international observers have come up against unjustifiable postponements of trial with no prior notification. (FIDH 1995, n.26)

Secondly, during this very short hearing, and after submissions by the defence regarding access to the evidence, the presiding judge affirmed the rights of defence and held that the defence should be provided with the complete dossier. It is impossible to know whether the president was encouraged to take this position by the presence of an observer.¹⁴ In the end, his undertaking was not tested as Mohamed Kilani was granted a presidential pardon just before the next scheduled hearing.

Case Two

In the first case, the substance of the story being told in the offending document – notably the caricature – was not the focus of the defence, not least because they had no access to it. The 1998 case of Khémaïs Ksila highlighted the courtroom as the locus of articulation by defendant of an alternative narrative about the conduct of the Tunisian authorities in the face of silence on the part of other domestic public forums, and the absence of avenues of redress. Khémaïs Ksila, at the time vice-president of the *Ligue Tunisienne des Droits de l'Homme* (LTDH), was arrested a matter of hours after issuing a written Declaration to Public Opinion in which he announced a hunger strike in protest at 'an oppression on the part of the powers that be which has exceeded the limits,' detailing a series of specific incidents and measures to which he and his family had been subjected over the previous few years. He acknowledged having contacted a number of foreign organisations with a copy, including the Arab, Moroccan and Egyptian Organisations for Human Rights, the International Commission of Jurists, and Amnesty International, as well as having described the contents to French and British radio agencies. The examining magistrate sent him for trial on charges of attacking the public order through defamation, spreading false information with the intent of disturbing public security, and inciting others to break the law.¹⁵ There was outrage among the human rights community locally, regionally and internationally, focussing on the right to freedom of expression, and Ksila's subsequent trial was attended by a number of international trial observers along with representatives of the foreign diplomatic corps stationed in Tunis.

At the trial, the sole basis for the charges was the Declaration: the issue in court was the 'truth' of the story told by Ksila, a story that the state (as represented by the prosecuting authorities) was intent on constructing as defamation and false information. Along with presenting arguments about violations of pre-trial procedure, the defence pleadings revolved around the 'meaning' of different parts of the Declaration and the 'meaning' of the charges and the law, including appeal to the Constitution's guarantees of freedom of expression and association¹⁶ and to international human rights instruments to which Tunisia is a party. They also suggested ways in which the court might seek to satisfy itself as to the truth of at least parts of the story, such as calling certain witnesses (the court did not take up these suggestions). Khémaïs Ksila was found guilty as charged and sentenced to three years' imprisonment on the charge of 'defamation of the public order,'¹⁷ a year for spreading false information and a year for inciting citizens to break the law, the sentences to run concurrently, together with a fine.¹⁸ The sentence was upheld on appeal.

The following extracts of proceedings in the case are taken from the subsequent international trial observation report compiled for FIDH and the Observatory for the Protection of Human Rights Defenders.¹⁹ I drafted the report as a whole from the court documents, from the notes taken by myself and two other observers²⁰ at different sessions of first instance and appeal hearings and on interviews with other persons, notably defence lawyers. Together they seek to give an abbreviated account of the way the court dealt with the issue of the ‘truth,’ and the way the defence sought to challenge it.

Extract 1: on the findings of the court at first instance

On the substantive issues of the charges, the court’s findings do not appear to have differed substantially from the arguments of the examining magistrates in the decision to transfer Khémaïs Ksila for trial.²¹ The court found the argument that M. Ksila was setting out a personal opinion to have been rebutted on the basis that personal opinions could not in any circumstances justify defamation, and that defamation was defined in the Press Law even if ‘public order’ was not. The accused had not proven that his dismissal from his post had come about as a result of pressure ‘from high up,’ nor that his car had been destroyed by elements associated with the authorities, nor the matter of surveillance. The information was to be considered false as a result of the inability of the accused to establish its veracity. Moreover, the accused had deliberately made such false information known to the public by circulating it to international organisations and the contents to radio agencies. ‘Publication’ or ‘publicity’ of the type to which the defence referred was not required for the establishment of the crime under the Press Law. On the question of the burden of proof for the purposes of the charge made under Article 49, the court held that there was no burden of proof on the prosecution to prove a negative fact – that is, to prove that the information was in fact false; rather it was up to the accused to prove that what he had said was in fact true. (FIDH 1998: 21)

Extract 2: on the first appeal hearing:

In the first hearing, in a vigorous address, Khémaïs Ksila himself reaffirmed the contents of the Declaration as an expression of his opinion, denied that the contents constituted defamation or false information, and called upon the Appeal Court as his final recourse to have his freedom of expression upheld by the Tunisian judiciary. His lawyers, in powerful

pleadings, pointed out that the prosecution had proved nothing except the existence and provenance of the Declaration, readily acknowledged by the accused. Questions were raised as to why the first instance court had not indeed made inquiries of his former employer as to the reasons for his dismissal, why there had been no inquiry into the destruction of his car; as to the question of telephone surveillance, the point was made that many human rights defenders in Tunisia, including some of the lawyers present in court, were subjected to exactly the same measures to which Khémaïs Ksila had referred and which the lower court had apparently found to be unsubstantiated allegations. The defence stressed that in the court of first instance, the burden of proof, along with the principle of presumption of innocence upheld in the Constitution, had effectively been reversed. (FIDH, 1998: 22)

I think these extracts reflect, at least to some degree, the fact that as an observer at the time, I found the construction of the narrative (or the ‘truth’) by the court to be verging on Kafkaesque. But there are also differences between them in style, which reflect my experience as observer. The first extract was based on my reading of the full written judgement of the first instance tribunal, which was not made available to defence lawyers until the day before the first scheduled session of the appeal hearing. The second is based on my observation of that first hearing at appeal; and while it seeks to set out in summary the key points raised by the defendant and the defence, it also tries, within the constraints of a trial observation report, to give some indication of the intensity of that day in court – hence the adjectives, the ‘vigorous address’ and the ‘powerful pleadings.’ My personal notes (and my memory) confirm that these adjectives related not only to the compelling nature of the arguments, but to the manner in which they were delivered, and the impact they had on those present – or at least, those present in solidarity with the defendant. I do not have the written decision from the court of appeal to compare how these interventions appeared in the official record.

Case Three

The third international trial observation report to which I contributed was the most detailed of the three. (Human Rights Watch, et al., 2000) The 1999 case was on the face of it more complex, involving twenty-one defendants accused and eventually convicted on accounts of ‘maintaining an association that incites hatred, defaming public authorities and judicial authorities, distributing leaflets and spreading false information capable of disturbing

public order, inciting the public to violate the country's laws, and hosting, or participating in unauthorized meetings.²² As in the case of Khémaïs Ksila discussed above, fundamental issues of freedom of expression were provoked. The case attracted considerable international attention, partly due to the fact that one of the accused was advocate Radhia Nasraoui, described in the report as 'Tunisia's most outspoken human rights lawyer,' who had originally been acting as defence lawyer for some of her co-defendants. Most of her co-defendants were students. The charges related to alleged activities connected to the PCOT,²³ which the report describes as "a small, unrecognised party which employs a militant left-wing discourse but which has not been linked to acts or incitement of violence" (Human Rights Watch, et al.: 3). PCOT spokesperson Hamma Hammami, the husband of Radhia Nasraoui, was also charged and sentenced *in absentia* in this trial.

The only physical evidence produced and examined during the trial was the statements made by seventeen of Nasraoui's co-defendants during incommunicado pre-trial detention, consisting of 'confessions' to the police, which they subsequently unequivocally repudiated, both to the investigating judge and the trial judge, most of them claiming the 'confessions' had been extracted through torture and ill-treatment.²⁴ Many of them claimed they had been arrested prior to the dates shown in the records, some of them naming witnesses who could be called to verify these facts and therefore establish the period of incommunicado detention to which they had been subjected. Repeated requests were made by defence lawyers for medical examinations and for investigations of the allegations of torture and ill-treatment. Neither the investigating judge nor the first instance court called such witnesses, ordered medical examinations, nor otherwise investigated the torture allegations. All the defendants were convicted and given prison sentences; Nasraoui's was suspended. The convictions and sentences were upheld on appeal.

The trial observation report listed four issues under 'pre-trial procedure and concerns': torture and ill-treatment, harassment of human rights defenders, limitations on freedom of expression, association and assembly, and 'the judiciary's lack of independence and denial of the right to a fair trial.' In the latter section, it notes concerns 'about the influence of the executive branch over decisions by the judiciary, and the lack of respect given the right to a fair trial' and continues:

In the case at hand, these issues were dramatized most clearly by the fact that neither the state prosecutor nor the investigating judge responded, as required, to the repeated requests by the detainees and their lawyers for medical examinations and for investigations into the

allegations of torture and ill-treatment; nor did they allow the defense to present evidence that the arrest dates contained in the police record were false. (Human Rights Watch, et al.: 10)

The thrust of the report is firstly to examine the story the Tunisian government tells about the law, notably in its 1997 report to the UN Committee against Torture, against the findings of UN and other bodies on practice in Tunisia that tell a different story; and secondly to examine the construction of the narrative by the court, both through focussing on the issues excluded from consideration or investigation (allegations of falsification of arrest dates and of torture and ill-treatment), and through comparing the story of proceedings recorded by the *greffier* at the dictation of the judge with the fuller story told – and heard – in court. The report annexed extracts from the written judgment in support of its comments upon the conduct of the case.²⁵

The insistence of the court on not hearing certain parts of the story is illustrated, for example, in the report on the first instance hearing of 19 June 1999, where interventions from some of the accused ‘were cut short and were not recorded in the written judgment.’ In its account of the next hearing of 10 July, which lasted until dawn the following day, the trial observation report provides an alternative narrative of what was heard in court, detailing the methods of torture described to the court by defendants and observing:

The defendants’ testimonies of torture were omitted from the court’s fourteen-page-long summary of the proceedings, which forms part of its written judgment. The judgment employs the word torture only rarely, often rephrasing the defendants’ complaints of torture as “extremely difficult circumstances of detention” and “use of violence,” sometimes adding “on sensitive areas of the body.”

The fact that the summary contains even limited references to torture is exceptional in Tunisia. In most trials where defendants allege torture, their allegations simply do not appear in the official summary of the proceedings. In this trial, the references to torture were due most likely to the presence in court of a large number of Tunisian lawyers and foreign observers, and to the lawyers’ insistence that when the judge read the detainees’ claims into the record that “torture” be mentioned. (Human Rights Watch, et al.: 16)

Another example relates to an intervention from a lawyer around dawn on the last day of the first instance trial:

Bida pointed out to the court that an article in the French weekly *Le Nouvel Observateur* that described Tunisia as a “police state” had been distributed in Tunis without the government lodging charges of defamation against it. [...] After Bida used the phrase to illustrate his point about selective enforcement of the law, the judge instructed the court clerk to record Bida’s presentation as if the lawyer had himself characterized Tunisia as a police state, and prevented Bida from continuing his arguments. The defence team objected, and, after a heated exchange with the judge, withdrew en masse to protest the judge’s actions toward their colleague. The judge immediately ruled to refuse all the demands of the defence, including the release of the detainees, referral to medical examinations, correction of the dates of arrest in record [...] He announced the end of the trial and the reconvening of the court on July 14 to announce the verdict. (Human Rights Watch, et al.: 20)

My final extract from this report is chosen because it is the only one of the three in which I was involved that seeks to describe the physical setting of the trial at first instance:

Physically, the courtroom was noisy and uncomfortable for defendants, lawyers, and observers alike. The presiding judge sat behind an elevated table, with the two other members of the bench to his right and left. To the right of the judge as one faced the bench, at a detached desk, sat the prosecutor. To the left of the judge sat the court clerk, who wrote the minutes of the hearing as dictated to him by the judge. The defendants sat on backless benches in front of the judges’ elevated bench, and behind the defendants, at the barre, stood and sat the defence attorneys. The barre physically separated the defence lawyers from their clients. The area between the attorneys and the judge’s bench was filled with approximately a dozen uniformed security officers.[...]

The interaction between the judge and the defence attorneys during the trial was tense. The judge frequently slapped his hand on the table and used his microphone to shout down defendants and lawyers, cutting them off after a few minutes and thereby preventing them from developing their defence as they saw fit. When some of the defendants sought to name their alleged torturers, the judge cut them off and then refused to enter those names into the summary of the proceedings. Frequent interventions by the judge, the defence attorneys’ often frantic attempts to intervene on behalf of their clients during their examination,

the lack of amplification of the defendants' voices, and the generally hostile and dismissive attitude of the presiding judge conspired to make the proceedings chaotic at times. (Human Rights Watch, et al.: 14)

The above description hints at some of the stories that are not told in international trial observation reports; the story, for example, of reconstructing your narrative of the day in court not only from your own observation but, of necessity, from follow-up with lawyers and others, to clarify parts of the proceedings that you missed because you were watching something else, that went too fast for you to take complete notes, or that proved momentarily more than your language skills could cope with.²⁶ This is of course good human rights (and research) practice, of verifying or 'triangulating' information from more than one source, but as shown from the above extract it may be vital to the 'reconstruction' of the narrative in a complex and sometimes chaotic situation – so as to impose on the 'chaos' the order required for the trial report, as indeed it is required for the court record.

The above accounts have focussed on the reporting function of the international trial observer. Among the other functions identified by Weissbrodt, the third is 'giving the defendant, the defence attorney and the defendant's supporters a sense of international assistance and renewed confidence.' Although I might have phrased it differently, this certainly and consciously formed my purpose in accepting the task. The second and third cases described above involved substantial numbers of international observers from national, regional and international human rights organizations, as well as representatives of various diplomatic missions, at the same time an indication of international concern (Weissbrodt's fourth function) and a show of solidarity with the defendants. A function of 'solidarity' continues outside the court, as you meet, variously, defendants, defence lawyers, family members and others. While some of these events form part of the wider context that you introduce into your report, the intense impact of some of them is, of course, rarely articulated in the published report. They make up, again, some of the stories that may be defining in your experience as an international trial observer, but that are not told in your formal narrative.

Untold Stories

Some of the many stories that remain (formally) untold by international trial observers thus include the physicalities²⁷ of the process and function of observation and construction of the narrative for the report, including also out of court events. It is possible to give some indication of the feeling in the

courtroom by noting, for example, who turned up to observe and how many lawyers were involved in the defence. The report of the trial of Khémaïs Ksila, for example noted that some 40-50 lawyers had signed on to act as defence counsel, while over a hundred signed on as co-counsels in defence of Radhia Nasraoui (FIDH 1998: 20; Human Rights Watch, et al., 2000: 13). What the reports do not convey is the sheer physical intensity of the moment when the lawyers press to the barre at the court's call for counsels for the defence to be named, a moment of enormous and lasting impact – a moment of high drama, if we return to the courtroom as theatre. And while we noted in the report of the third case that defence lawyers sought an adjournment in the first instance hearing of June 19 because Radhia Nasraoui had the evening before given birth to a daughter (Human Rights Watch, et al., 2000: 15), what I remember most vividly from that particular visit to Tunisia in 1999 was visiting her in hospital the morning after, on my way to the airport, finding her under obvious surveillance, indicted on what the sending organisations called 'trumped up charges',²⁸ with a new-born daughter and her husband unable to be with her, himself in hiding and on charges in the same case.²⁹

Another set of parallel stories is similarly hinted at in the trial observation reports. These are the stories of another observation process, the observation of the observers. Thus in my report to FIDH on my first experience as an international trial observer, I noted I had received a cordial welcome from all those I met, adding somewhat coyly that "I was however followed very obviously throughout my stay by members of the Tunisian security/intelligence apparatus." The report from the Ksila case notes that "it should also be stressed that during the debates before the Court of Appeal, a large number of members of the Tunisian security forces were present in the chamber, in uniform and apparently also in plain clothes."³⁰ In the third case, the report notes that "for their part, various branches of the Tunisian security forces were tasked with the close and conspicuous surveillance of the international observers in addition to their ongoing surveillance of Tunisian human rights lawyers and defenders" (Human Rights Watch 2000: 13). As a colleague pointed out, there is something of a paradox in allowing international observers in to attend trials – sometimes in considerable numbers – and then having them conspicuously followed and monitored; on the other hand, refusing to allow observers in would probably inflict a higher political cost in terms of damage to Tunisia's image.³¹

While this kind of surveillance is obviously not comparable to that faced by Tunisian human rights defenders and activists, it nevertheless formed an integral part of my experience in Tunis. The agents detailed to follow and watch international trial observers were, in my experience, like us, engaged in

purposeful and conspicuous observation. In the notes from one of my visits I have frequent references to one agent who sported a particularly eye-catching and (purposefully?) memorable yellow check jacket; and I'm sure I'm not alone in having wondered, in the untimely absence of available taxis, whether the squad waiting for me to leave the hotel might not perhaps offer me a lift, as we were all obviously headed for the same place... Although the surveillance was carried out on the observers, the target audience was presumably first and foremost domestic: whether to intimidate and deter Tunisians from contacting us, and to monitor those with whom we did meet, or more generally, having let the observers in, to dissuade the Tunisian audience from reading any change into developments. Whether they intended by their very visibility also to have an impact on our own process of observation and the various functions we were carrying out can only be a matter of speculation.

These stories, however, remain largely in 'the field' where they took place. They are part and parcel of your own story about your experience as an international trial observer (obviously not only in Tunisia), but they are stories that you tell to an audience and through media other than that of the trial observation report. The media is oral, which I suppose makes them 'unwritten' rather than 'untold' stories, and the audience tends to be those who have had similar and/or shared experiences, not necessarily confined to human rights activists. In this sense, they are stories told in the same way as the apparently bottomless supply of 'airport stories' swapped among those of us foreign passport holders who attract special attention at Israel's Ben Gurion airport on our way to and from work and research in the occupied Palestinian territories, the comic narrative driven by an unspoken political subtext. In the case of international trial observation, such stories form part of the unofficial narrative about 'what happened' in the process. I am unable to assess the significance of these unwritten stories to the official version of the story that observers tell about the law in their reports; but in my own case, they certainly reinforced my purpose in the function of observation.

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STORIES IN THE LAW

THE INSANE SHEPHERD-WHO-WRITES

Is He Competent to Stand Trial?

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The question “What happened?” in a judicial context looks as if its prime concern is the presumed borderline between facts and fiction. In criminal investigations in particular, where lives are often at stake, there is a concern on the part of the judicial authorities to demarcate facts from fiction. But how is that done? Students of the law know very well that every penal code claims that its prime concern is to seek the truth, and that there are clearly formulated rules and procedures for that purpose. Most researchers remain, however, trapped like fish in water in the rules of law and their normative underpinnings: they are either studied as logical statements that carry specific meanings, and hence would be textually tied together in some global rationalistic pattern, or else they are simply rules to be followed—in principle by every person in the community—and their rational, moral, or social underpinnings (or lack thereof) should be of no concern to the judiciary. To all those who attempt to contextualize the rules of law within their social, economic, and historical contexts, a line of jurists and scholars stands firm that such contextualizations are hardly relevant for judicial decision making and for assessing punishment. For its part, by posing the rules of law as norms, the law-and-norms school has thought to tackle crime, among other things, in terms of the failure of some individuals to abide by the norm.¹ In other words, the law-and-norms school has attempted to bring complexity to the notion of the rule of law by strongly attaching motivation and intent to human behaviour, and also to bring some of the findings of the social sciences to the attention of jurists and judges. In its concern to be scientific, however, the law-and-

norms school, in all its varieties, has brought more reductionism and parsimoniousness to human behaviour than anything else: norms were thus reduced to their most common denominator in order to detect presumed effects on the law. As to the law-and-economics school and in the language of one of its most ferocious proponents, if “murder is deliberate unlawful killing,”² it follows then that “crimes are in effect torts by insolvent defendants, because if all criminals could pay the full social costs of their crimes, the task of deterring antisocial behaviour could be left to tort law.”³ Criminals (and actors in general) are therefore either self-deterred through norms, or else through the economics of punishment. The law-and-norms school hence converges with its law-and-economics sibling in that both look at crime in terms of social cost: norms are there to be followed, and if they are not then there is a social cost to the damage. There is also a cost for implementing norms, simply because people give up some of their individual freedoms to abide by norms—the alternative being nothing but a Hobbesian state of nature.

One can see why the notion of norm has so much preoccupied legal theory.⁴ By looking at law primarily in terms of the rules that it engenders—the rules of law (*règles de droit*)—legal theory thought that the latter are only exceptional and much narrower instances of broader normative values that coexist in society at large. The real rules are those existing in society while the legal rules are only a clichéd version of the latter; and while the former remain implicit and diffuse, the latter are explicit and drafted in codes, and their non-application is subject to punishment (material and/or moral). Broadly speaking, however, by focusing so much on how norms relate or fail to relate with the rules of law, the norms-cum-economics schools have missed the opportunity to study how rules of law are used by the actors (users), and how in so doing economic strategies may be deployed. Norms and rules of law are not simply followed or interiorized, as they are primarily represented in language and practice. When, for instance, a crime takes place, witnesses are expected to narrate what they saw. To the crucial question of “What happened?” witnesses come up with alternative accounts, in the same way that police, prosecutors, and judges will propose narratives of their own, which in turn are based on those of the witnesses. The whole process can therefore be looked upon as one of representing norms and rules of law through narratives situated along different social spectrums. Norms and rules of law are linguistically expressed in narratives that are supposed to account for the facts of a happening. Once pressed by an investigator or judge, what in effect actors narrate is the normative world that they themselves, their kin, opponents and victims all inhabit: they inform their investigators about rules that ought to be followed, restrictions

and prohibitions, and contractual settlements. For the researcher, such documentary evidence ought to constitute the prime tool of research, out of which a reconstruction of the “case” in question is made possible in the actors’ own words. Rather than begin with constructed notions of what the rules of a particular system are and how they operate, we shall begin with the narratives themselves and examine how they are constructed. Judges often proceed like researchers in that they want, within the shortest delays possible, to transform their cases into factual evidence: the whole case miraculously metamorphoses, like in a final judgment, after all evidence has been carefully weighted, into a matter-of-fact. But considering that establishing factual evidence is no easy matter, it would be more rewarding to see what the *concerns* of actors truly are, how they inhabit their worlds, and how they represent their being-in-their-worlds.

What Happened?

How is it possible then to reconstruct a single criminal case from the viewpoints of the actors themselves? Each homicide is an event that has been witnessed by at least two persons: the assailant and victim, assuming of course that either one or both are still alive after the murder or attempted murder. Each homicide begins therefore with those who witnessed it and ends up with a sentencing. In the meantime, the process that begins with the police and prosecution investigations and ends up with the final ruling could be summed up in the following: the subjective statements of witnesses—“I saw,” “I heard,” or “I was told”—are transformed through the judicial process into objective entities and factual evidence. The final metamorphosis takes shape in the ruling: various statements are incorporated in the *text* of the sentencing, statements that originally have been uttered on various occasions in the presence of legal authorities. Like the rules of law, the rulings would aim at reconstructing an objective reality outside the confusing subjectivities of the actors. In sum, the judiciary aims for an objective reality not unlike that of the social sciences model. For the researcher, the aim is not so much one of destabilizing such objective validities, as much as a *description* of the process that creates them, brings them into existence, prior to posing them as objective truths. To use the language of Bruno Latour,⁵ we would like to move from the matters of facts, which the judiciary cherishes so much, and upon which final rulings are based, to the matters of concern, namely what constitutes the concerns of actors in the aftermath of a homicide. Once a killing occurs, a web of social relations and practices emerges at the surface, from which the judiciary attempts to reconstruct its case: an object—the “case” per se—emerges out of such

entangled relations, and the object in question is constructed out of matters of fact that are objectified realities out of the subjectivities of the actors that made them. The judiciary, however, is neither interested in the concerns of actors nor in their entangled narratives and relations. Out of such relations, subjectivities, claims and counter-claims, it aims in the final analysis towards an objectified reality of the disputed event. Whether we think that for a particular instance, the process was “fair” or “unfair” to the participants is not the heart of the matter. What interests us here is how the aforementioned process of *making law* concretely takes shape.

Threads of Narratives

Like all stories, this one has many twists and turns, as the “same” events could be recounted from the points of view of different actors. Let us therefore begin with the official version and see what the Idlib criminal court (*Jinayat*)⁶ had to say when it elicited its final ruling six years after the crime.⁷

We are told that the killings that occurred on 12 March 1994 in one of the villages in the vicinity of Idlib were an outcome of a land conflict. There was land that was a ‘left over’ (*matruke*) near the village school. The accused Hilal (b. 1945) wanted to divide the disputed land with his rivals, while the latter preferred to leave it as an open space for their sheep to graze. The day of the incident the accused was allegedly at his home, which happened to be near the disputed land. When the shepherds came as usual with their sheep to the disputed land, the accused warned them not to approach his home. A quarrel followed. The accused went home and picked up his Russian rifle, then went back to the land, and when his foe Ibrahim saw him rushing in their direction, he attempted in vain to contain him, but the accused shot and killed him immediately. He then shot to death Ibrahim’s son Muhammad and his daughter Shamsa (he never admitted killing the woman), but missed Ibrahim’s other son ‘Akal⁸ because there were no ammunitions left. The accused Hilal and the surviving brother had a fist fight prior to Hilal running away, leaving behind three bodies. Hilal then surrendered to the police, and gave them his rifle. Hilal claimed that his three victims attempted to take his gun and he shot them in self-defense.

On 26 April 2000, the Idlib criminal court sentenced Hilal to life imprisonment but reduced the penalty for what it called “the mitigating appreciated causes (*al-asbab al-mukhaffifa al-taqdiriyya*),”⁹ to 20 years with hard labour. In its final ruling, the court quoted statements from dozens of witnesses from both sides, some of which allegedly witnessed the crime from neighbouring lands and homes. It also quoted the defendant’s first deposition

to the police: "The victims Ibrahim and his two sons and daughter have left their sheep graze over my crops. When we were arguing, Muhammad grabbed me from behind while his brother 'Akal hit me with a hammer on the face. I fell on the floor. My son Anwar came with a gun, with which I fired three warning shots in the air. But the victim Ibrahim pushed his sons to attack me. I therefore fired towards Ibrahim, and when his son Muhammad tried to take the rifle from my hand I shot him too, then I shot the other son..."

As each case begins with a police investigation, our starting point will be the depositions to the police right after the murder. In the Syrian penal system, depositions to the police must be looked upon as second-degree narratives, or as narratives based on prime accounts,¹⁰ simply because the original depositions in their question-and-answer colloquial Arabic form are seldom reported.¹¹ The police is therefore already constructing its *own* narrative, as statements come carefully filtered and polished in official Arabic for the purposes of presenting the case to the prosecution and higher courts. As a result, such depositions take disproportionate importance for the final ruling, even though, according to the Damascus court of cassation (*Naqd*),¹² they should not (more on that later). The contrived nature of the police depositions (or the "seizure form," *naraqat dabt*, as they are more commonly known) should not discourage us from looking beyond their surface. Let us see how that works.

The "seizure form" (or "deposition") generally begins with the way the police knew about the homicide: they either witnessed it on their own, or else had a witness and/or informant who volunteered to inform them (not all informants are direct witnesses, even though at times they are introduced as such). The police form explains how the information was received, the first contacts with the crime scene, witnesses, and preliminary material evidence. It then goes on to question the first witnesses available. In this instance, after interrogating the village informer and following a full description of the crime scene, the first victim-cum-witness was interrogated the night of the murders.

My name is 'Aql Ibrahim, born 1962, from the village of al-Warida, the farm of al-'Adliyya, married and illiterate, do not carry at the moment an identity card,¹³ Arab Syrian.

I inform you that we¹⁴ the inhabitants of the farm we own a wall for grazing (*jidar li-l-ra'i*), used by all the people of the village. Today we were grazing our sheep in front of the home of the defendant Hilal, which is close to our land and north of the school. In this location where

we are now, where my relatives (*ahl*) are, it was there that the defendant Hilal was sitting in front of his home, came to me and said: 'Stop mingling with me.' I don't know why he said that. He then tried to hit me, but my brother Muhammad pushed him away. He then told us: 'That's fine you sluts!' He went to his home and brought a Russian rifle that he had kept at home and tried to hit us. But when my father was attempting to push him back he came to us charging his rifle. At that moment he fired several shots and hit my father who fell on the floor, then headed south towards my brother Muhammad and shot him too. He also killed my sister Shamsa and tried to shoot me, but there were no bullets left in the rifle. I then went after him, but my nerves broke down. I couldn't catch him. I request a full investigation, posing myself as a personal plaintiff (*mudda'i shakhsi*) against Hilal al-Khalif for having killed my father Ibrahim, my brother Muhammad and my sister Shamsa. That's my deposition. The deposition was read to him, he accepted and signed it.¹⁵

That was the deposition of the only surviving victim who, according to his own account, managed to survive simply because the assailant had no bullets left. The syntax is here typical of depositions in general. Since the questions posed by the police were not included in the text, only the answers were left, and kept for the most part in the first-person singular form. Instead of the original question-and-answer form, the deposition achieves a first-person "narrative": it flows smoothly, describing the events that led to the alleged crime and its aftermath. The tone is a bit formal, unemotional, comes directly to the point, and seems contrived in what it is attempting to convey. Moreover, the transcription, besides precluding the original line of questioning, has reshaped all utterances in official Arabic. Hence the transformation is a double one: no questions and answers and no colloquial Arabic. Some utterances may have also been cut altogether. In sum, the *performative* side of the speech act is considerably muted, narrowing the use of language at best to its *descriptive* level.¹⁶ But what the only survivor (and future plaintiff) managed rather well, in spite of all limitations, was to give that unmistakable impression that "the village wall" was a common property, avoiding even to mention that it was at the centre of all conflicts.

Before we describe more fully the deposition as a form of witnessing, I would like to bring forth two additional depositions, one by an "independent" witness, and the second by the defendant himself.

'Aziz 'Umar al-Shaykh was introduced, immediately following the previous deposition, as a "witness to the incident (*shahid li-l-hadith*)":

My name is 'Aziz b. 'Umar al-Shaykh and 'Aysha, born in 1977, from the farm of 'Adliyyah, I do not carry at the moment a personal identification card, single, literate, worker, and Arab Syrian. I inform you that this evening I was sitting with the victim¹⁷ Muhammad Ibrahim al-Hasan in front of the house of Hilal al-Khalif, located roughly a 100 meters from us. He came to us and requested from the victim Muhammad to go away with his sheep. Muhammad replied that this land is for grazing for all the people of the farm, and we're one of them. As they exchanged harsh words, Hilal went running to his home and pouring insults over Ibrahim and his kids. Ibrahim the father followed him to stop him, as Hilal stood by the door with a Russian rifle. But the killer Hilal shot him to death three times. When Muhammad approached him he shot him to death too, emptying five bullets in his body and without even talking to him. He then shot and killed Shamsa who was standing east to her brother. But he couldn't shoot 'Akal because the rifle was empty. Hilal used to come to the victim and shoot at him directly. The causes have to do with grazing. This is what I've seen and know and that's my deposition.

His deposition was read to him, he confirmed and signed it.

Notice here, as before, the witness' strategy was to underscore the alleged common ownership of the village wall, without, however, presenting the hearer (or reader) with any historical background. Such strategies of historical denial tend to be common, as they opt for giving more weight to the present—the immediacy of the killings. We now come to the accused Hilal's statements.

My name is Hilal b. Khalif al-Khalaf, born in 1945, resident in the al-'Adliyya farm, I carry an identification card number X, issued in 1985, married and literate, my job is a worker, Arab Syrian.

I inform you that this evening I was sitting in front of my house located at the 'Adliyya farm, north of the school, when I saw Ibrahim al-Muhammad, his son 'Aql¹⁸ and daughter Shamsa leaving their sheep graze over my plantations. I went to 'Aql and told him 'Stop mingling with me.' He replied 'You're a sick man and I don't feel [like] fighting with you.' Then came his father Ibrahim and told them 'Slaughter him,' because I warned you a long time ago to leave the farm. 'Aql then came back to me and beat me up. I told them 'I'm going to complain.' His sister Shamsa came and separated us. Then came his brother Muhammad and

grabbed my mouth, and then ‘Aql came back and hit me with a hammer. I fell on the floor and managed to escape from them. I went home and brought a Russian rifle which I had filled at home. I went out and shot three times up in the air hoping that they would run away. But they assaulted me while their father Ibrahim was encouraging them to do just that. He told them ‘Slaughter the dog.’ Ibrahim and his son Muhammad attempted to take the rifle from me, and I told them for the last time ‘For the sake of God leave.’ But they kept coming to me. It was then that I shot Ibrahim several times in self-defense. When he fell on the ground his son Muhammad assaulted me, and we were only a meter apart, and while he was trying to take the rifle from me I shot him several times. I then headed east and started shooting randomly. I don’t know if I shot Shamsa... I ran away north and gave myself up to the police at al-Buwaydir...

The three accounts, even though emanating from three different “witnesses”—a victim, an “outside” witness, and the assailant himself—are remarkably very close in content, style, and syntax. Assuming that the police did not “play” with the content of the depositions, there nonetheless seems to be an unreflective, if not deliberate, attempt to create cohesiveness from the accounts of differently situated actors. As we shall see later, and as has become the norm in Syrian penal procedures, there will be a heavy reliance in the final drafting of the sentencing upon the early depositions, which for the most part were collected the night of the murder. It is as if coming up with a relative cohesiveness has become one of those hidden normative rules in the Syrian penal system: we need to know from day one what happened! Rather than come up with divergent loose statements, the police is searching for a “narrative” structure from day one. Notice, for instance, how all three “witnesses”—even the two directly implicated—were not pressed to give more: in other words, they were not squeezed with a hard line of questioning to detect inconsistencies and the like. The way depositions are constructed is obviously not only related to the line of questioning that police, prosecution, and courts adopt. (We need to see whether each one of those instances adopts a different stance, or whether the form of questioning is *grosso modo* very similar and is not subject to much change when witnesses are interrogated either by the police, the prosecution, or the courts.) What witnesses decide to say or not say in the presence of a police officer, prosecutor, or judge, is related to a host of circumstances. People learn what to say and *how* to utter something when they are in private or public. There are unreflective normative rules that

guide ordinary talk and discourse as well, and while trespassing such rules is not as remote a possibility as one might think, it might nonetheless create problems for the actor in question. If actors are not that free to say what they want to say, or “what is in their mind,” it is because they are part of a normative order to which they feel they belong, and which provides them with the security that they need. Consequently, when a crime happens in a community, and even though crimes are generally not routine occurrences, describing or narrating such a happening, being mediated by the rules of speech and language, is subject to all the societal pressures that one could imagine. What is unsaid may therefore prove even more crucial than what is said. For the researcher, detecting silences, hesitations, contradictions, and blanks in what actors have uttered when examined, may prove even more important than analyzing the utterances of actors.

As Paul Ricœur has pointed out, the activity of witnessing is crucial for both the judicial process and historiographical writing.¹⁹

In historiographical writing, the document stands as proof (evidence) that what the historian claims to have happened effectively took place. In other words, the document is not only what brings forth evidence, but it is what stands in lieu of the act of witnessing *per se*. The document is therefore the witness. Historians thus typically use documents to construct factual evidence. Such factual evidence is then narrated in terms of both its temporal and logical (rational) elements, and out of this narration emerges more abstract factual constructions.

Judges like historians find themselves in the situation of searching for factual evidence to narrate their final ruling. It is in effect up to judges to *select* from the myriad of utterances, depositions, narrations, discourses, left by witnesses and official authorities, the ones that will ultimately survive the test of factual evidence: which of the “facts” will become factual evidence, and which ones will be relegated to the dubious role of personal testimonies, unreliable data, and tampered with evidence? It is up to judges to sanctify the personal testimonies of witnesses into factual evidence that has been rigorously tested through judicial procedures, and which will be ultimately quoted in the final ruling as objectively valid. The researcher must therefore keep an eye on how the individuated personal narratives of social actors—all of which using the “I” form of witnessing—either metamorphose into more “reliable” accounts approved and endorsed by the judiciary, or else are forgotten and invalidated.

Following once more Ricœur, we can discern three different stages in the making of historiographical and judicial narratives.

1. The factual phase. Facts are valued for their own sake: they are verified and assessed, prior to being approved as factual evidence.

2. The explicative phase. The approved facts are brought together in order to causally explicate the making of an event.

3. The representative phase of historiographical narration and writing. The primacy of representation of an event or happening often subdues steps (1) and (2) to the final operation of narration in a premature shortcut operation.

For our purposes here, that of judicial narration, it is worth noting that only judges *assess* the facts, while police and prosecutors are supposed to *present* (and not re-present) the facts to the judiciary. Since judges are the ones who have access to the *totality* of the file, they develop that ability to compare utterances, statements and depositions, prior to deciding what ought to be included as a matter of fact in the last instance—that of the sentencing. In principle, therefore, the police and prosecutors ought to do their best in presenting as much factual evidence as possible, and from a myriad of viewpoints. They are not supposed to explain anything, or even tie up the event/happening in its totality. An ideal police officer or prosecutor should push the cross-examination process to its limits,²⁰ and while realizing that actors deploy all kinds of strategies when pressured for more answers, they should also doubt what actors present as self-evident and acceptable. In practice, however, we have noticed²¹ that depositions tend to be blatantly *repetitive*, and the cycle of repetition begins with the police, continues with the prosecution up to the higher courts, as if the *representation* of the event has already taken shape from day one, ignoring what Ricœur has labelled as the factual and explicative phases.

This rush towards the final stage of *representation* seems to have alerted many observers. To begin, lawyers routinely accuse police officers for having maltreated and abused of their clients, or for haphazardly assembled facts. Quite often witnesses, once in the presence of a prosecutor (or investigative judge), deny *in toto* their earlier statements to the police, either on the basis that they were brutally intimidated or tortured, or else that they were not under full control of their mental faculties. Defendants who, say, had upon their arrest acknowledged any wrongdoing, may fully deny it later when cross-examined by an investigative judge. All such instances are fully documented, and the documentation is always available to judges in the case-file (folder) that circulates around, but is seldom seriously taken into consideration; and more importantly, no one seems to think that it is worth it to investigate allegations of torture or rape, and at no point did I see much willingness to push police and prosecutors to investigate more thoroughly.

All such negligence—assuming, of course, that it is only a question of “negligence,” if not pure incompetence and ignorance of the procedures—is further consecrated in the first systematic report of each case, namely what is known as the “*ihala* judge report.” The *ihala* judge (“referral judge,” *juge de renvoi*) is a kind of *rapporteur*, someone who gives his approval over the facts presented thus far by the police, prosecution, and medical authorities, and consequently judges that the case ought to receive the full attention of the criminal court. He therefore drafts a preliminary synthesis, narrates the facts, and concludes with further proposals on how to proceed with the case, and the kind of punishment the defendant(s) should receive. The problem, however, is that by the time the referral judge drafts his report, the case is almost sealed, meaning that no surprises are to be expected until the very end. What ought to have been *preliminary* reports by the police and prosecution are now *endorsed* by the referral judge and taken for granted. Once this stage is achieved, it would be difficult to imagine that the case would take an unexpected turn. Crucial in this respect is the *indirect endorsement* of the preliminary police reports. When I reported to retired judge Hanna ‘Abd al-Nur, who was at the head of the Damascus based cassation court in the late 1990s, my personal concerns regarding the way the police investigates, and how those preliminary investigations metamorphose into validated facts throughout the various stages of the trial, he claimed that “as judges we do heavily rely on the police reports. We generally assume that what comes in those reports has some truth in it... The police usually manages to get the truth from the mouths of the plaintiffs, suspects and witnesses in one way or another... even through intimidation or torture... We find such reports reliable enough for our final rulings...”²²

This is not the way, however, the cassation court looks at those police investigations. Now that the cassation rulings are regularly compiled and indexed,²³ it is possible to realize how much the higher cassation court in the last couple of decades has been incessantly reminding judges that what witnesses utter in the presence of police officers have no value per se, *unless the witnesses repeat what they had uttered during the cross-examinations in the hearings of the criminal court*. I shall limit myself to a couple of such rulings as an illustration to my general argument.

Rule 406. The confession (*i’tiraf*) in the presence of police officers should not be considered as evidence (*dalil*) unless it has been confirmed by another confession in front of the judicial authorities (*al-qada’*), or it has been proven sound (*sabih*) and in congruence with other evidence of the case.²⁴

Rule 421. The defendant's statements in a police deposition, even though such depositions in criminal matters are for the sake of information (*ma'lumat*), should be taken into consideration, including the defendant's confession in the deposition, even if the defendant withdraws his statements in the presence of an investigative judge and the court. But that should be done only if the court feels comfortable (*itmi'nan*) with [such information], and after it corroborated it with further evidence, which is part of its objective power (*sultatuba al-mawdu'yya*) that grants its independence, as long as it assesses (*tuqayyim*) evidence on solid grounds.²⁵

Rule 426. Police depositions in criminal matters are only ordinary information (*ma'lumat 'adiyya*), while an accused's preliminary confession (*i'tiraf annwali*) should be confirmed through other evidence, in particular if it turned out that it came from him through violent and harsh means.²⁶

The cassation rulings are abundant with rules of that kind, either framed with slight variations, or redundant in their substance, even though at times contradictory and confusing. The general tendency, however, is not to give the early statements by plaintiffs, defendants, and witnesses, more than what they deserve. They ought to be considered as preliminary information collected by the police in the aftermath of the crime for the sake of presenting the case to the prosecution and ultimately to the criminal court. But, revisiting a sample of cases of the last couple of decades, we know that such guidelines are seldom followed. In other words, and following the three steps proposed by Ricœur to understand the process of historiographical and judicial writing, what characterizes the system is a bypassing of thorough data collection and analysis and a rush towards representation, which is a rush towards judgment. We will in due course, by the time we expound upon the case, discuss the implications of "the primacy of representation," and how it might affect the objectivity of facts. Suffice it to note at this stage that the primacy of representation *de facto* implies that from the early stages of the investigation "raw facts" are transformed into "factual evidence." Needless to say, how such a transformation occurs is of prime importance for the subject matter under consideration here. To pursue the matter further, I will follow Ricœur more closely on the crucial issue of witnessing.²⁷

1. The basic premise behind witnessing is to discover how an autobiographical story or *récit* metamorphoses into an objectively accredited narration. The main purpose of the autobiographical *récit* would be to assert

the factual reality of the witnessed event: is the author/narrator a trustworthy person? In the Syrian penal system, witnesses in criminal matters have their “kin” background routinely checked: what kind of “relationship” do they nurture towards the main participants? But if kinship is overtly checked prior to an investigation, and explicitly indicated by the investigative judge on each “interrogation form,” the biggest drawback remains the “autobiographical” element in witnessing. As we shall see later, the autobiographical side becomes more visible, for instance, in the memos addressed by the defendant to his attorney, while remaining muted in the first police deposition and in later statements addressed to officials. In effect, if many of the witnessing accounts seem like deliberately staged, it is not because of a cover-up or conspiracy, but mainly due to the heavy restrictions that actors place upon themselves. It is indeed as if they witness from the viewpoint of their “group” rather from the standpoint of the “I.” Similarly, police and prosecution behave with a “group”-like mentality, attempting not to trespass the borderlines set by their communities. The assumption here is that the more a society becomes “individualistic” the more actors are prone to manifest their “auto-biographical” side.²⁸

2. By the time the actor metamorphoses into a witness, he or she learns—or develops that innate ability—to narrate what is relevant. It is at this stage that the “I” which has witnessed the event withdraws behind the dubious status of an “objective witness” whose aim is to account for what is relevant from the judicial and/or social perspective. What we often notice is a deliberate rush towards representation and judgment, which in the final analysis conceals as much of the “I” as possible. In other words, by rapidly aborting and placing pressure on the process of fact finding, not only are alternative representations avoided, but all kinds of individualistic accounts are also evacuated.

3. The witness-cum-narrator always narrates as if a third person is present, besides himself (herself) and the prosecuting official authority or judge. In societies where kin feeling is predominant, the third person tends to represent the normative values of the group directly or indirectly implicated in the crime in question, thus diminishing the possibility of the “I” to surface at the forefront, at least in the presence of an official authority. In this case, the attorney or some other privately appointed authority may assume the role of a confidant for the accused or witness. Moreover, since the receptor will not necessarily perceive the narration in the same eyes as the narrator, the investigative authority tends to deploy strategies to demarcate itself from what witnesses have stated, in preparation for the final verdict. But those same authorities, however, will also have to convince the actors that their version

of the story has been objectively validated, thus pushing them to borrow statements from the various parties involved in the conflict. That is particularly true whenever the community in question is bound by strong kin norms and the like.²⁹

4. Considering that a narration is a structured account of an event, which may carry a meaning and purpose, the issue that is relevant for our purposes here would be to see whether it would be beneficial for analytical purposes to push for the distinction between “raw accounts” and “structured narratives.” During an investigation, actors are seldom permitted to freely narrate on their own, since their utterances are framed within a question-and-answer formula. Their statements tend therefore to de facto fall into isolated fragments, which police reports artificially piece together into first-person narratives without any transcription of the original utterances. Only in the second stage, when actors are in the presence of an investigative judge is the question-and-answer mode kept in its original form. And even here the utterances are re-transcribed into an official Arabic, which, once more, metamorphoses the original into something else. In short, what we notice all along is a willingness to transfer each case to the criminal court in sets of already articulated narratives. But whose narratives are they? When, under special circumstances, we get a rare glimpse of actors narrating on their own, the picture may shift in another direction, pointing to other concerns, different at least from the factual evidence constructed by the judicial authorities. Finally, a parallel issue ought to be considered, regarding that of a possible distinction between narrative and discourse: when a narration is constructed in such a way that it intends to go “beyond the fact” into a self-articulated meaning (with social connotations), it is then constructing a de facto *discourse* of the witnessed event. Ricœur is careful, however, not to push too narrowly the distinction between narration and discourse: “The attested fact must be meaningful, which renders problematic a harsh distinction between discourse and narration.”³⁰ For our purposes here it may be useful to speak of a “discourse of justice,” while keeping the possibility of individual or collective discourses by social actors an open one.

Let us see how narrations develop throughout the investigative process. The encounters that plaintiffs, defendants, and witnesses have with investigative judges immediately tag along police investigations. But while the police examinations of witnesses are all filtered in a single report (known as the “seizure sheet,” *waraqat dabt*), the depositions drafted by judges are on a one-to-one basis. Consequently, as each witness receives his or her own individual account, the question-and-answer style is better preserved, even though the

attempt to bring cohesiveness to the case remains as strong as before. Let us discuss first a couple of the accounts of independent witnesses.

One of the witnesses (b. 1937), described as “close to both sides” (*qarib al-tarafayn*) in the kinship (*qaraba*) field, had his home located close to the crime scene.

I was at home during the fight, which is only 300 meters away. I heard the sound of shots. I went out and my son gave me a ride on his motorbike. When I reached the scene of the fight I saw ‘Akal³¹ al-Muhammad beating the defendant Anwar b. Hilal with a rifle’s magazine over his head. When I asked him why, he said that his father killed my family (*ahl*). I saw the bodies on the ground in front of Hilal’s home. I saw the defendant Hilal a hundred meters away, who was then joined by his son Anwar and his wife. They then ran away. A day before the incident I saw the defendant Hilal drinking tea with the victims. The causes of the dispute (*kbilaf*) is that there is an uncultivated land (*ard bor*) that we call “the wall,” estimated at six hectares, and the victim used to summon the defendant Hilal not to graze his sheep on the land. The defendant Hilal also summoned the victim not to come with his sheep to the wall zone. I think that’s the cause of the dispute. [Dated 2 April 1994]

Such single-passage statements are quite common when it comes to depositions uttered in the presence of an investigative judge in the privacy of his office located in the Palace of Justice. As the statements are seldom followed by a more thorough cross-examination, the information carried in those depositions replays the same themes of the police reports, adding slight modifications. At times, however, the witnesses seize the opportunity to completely deny what came in the police report, on the basis that they were either under the shock of the incident or tortured and intimidated. But here again the “accounts” are quasi-complete, de facto taking the role of structured narratives, in particular that the implicit general policy of investigative judges is not to disrupt the fragility of the police reports. Thus, from the first week of an investigation, from the moment the police seizes the case, up to the depositions approved by the investigative judge, the case is ready to receive its first synthesis by the referral judge.

Another witness, also introduced as “close to both sides” was interrogated by a judge.

The day of the incident I was 200 meters away from the defendant's home Hilal. I saw him in front of his house, and the three victims and the plaintiff 'Akal were close by grazing their sheep in front of the defendant's home Hilal. The defendant Hilal summoned the plaintiff 'Akal to move out from his space with his sheep. He refused and they started a fist fight. The victim Ibrahim said: 'Shame on you!' And he shouted: 'Let us behave properly as all people do.' Suddenly the defendant Hilal entered his house and went out with a Russian rifle in his hand. Right in front of his home he met with the victim Ibrahim and shot him to death. Close to him were his three kids: 'Akal, Muhammad and Shamsa. He shot to death Muhammad and Shamsa, then pointed his rifle towards 'Akal but no bullets were left. He dropped the rifle on the ground and ran away. As to the defendant Anwar al-Hilal he was working on the land cultivating potatoes and has nothing to do with the fight. But when he heard about the fight he followed his father out of fear for himself. I add that a day prior to the fight the two sides did spent an evening together, and that there were no disputes among them. [Dated 5 April 1994]

There were more accounts like the ones quoted above. If they look all similar it is because neither police nor prosecution were aggressive enough to work out the details and hammer the witnesses on subtle discrepancies and the like. If we look at the five accounts as specimen, including that of the defendant, we realize that they add little to one another as long as we remain at the macro level of events. But as soon as we go into the details the discrepancies soon begin to surface, in particular regarding the defendant's son, and alleged utterances and provocations by the victims prior to their being shot by Hilal, not to mention the status of the village "wall," and the exact positions of the victims when they were shot. But do all such details matter? The crime seems simple enough not to go any further: after all, the defendant gave himself up and confessed his crime on the spot, and he only denied killing Shamsa (we shall see the relevance of this denial later). So why bother? From its early days, the case seemed already clear cut and locked into Hilal's full responsibility. It became a question of deciding on the punishment and compensations for the victims' heirs. Do details therefore matter? And which details? The actors' obstinacy at ruling out incongruent details stems from an inner feeling that "all is clear." A shepherd shot to death three family members over an alleged land dispute and then ran away: in the actors' mindset, not much could be done to "save" the defendant. But the real issue here is the *withholding* of details, minute descriptions, and data that may not fit with the

already constructed whole. To quote Bruno Latour, “If social scientists wanted to become objective, they would have to find the very rare, costly, local, miraculous, situation where they can render their subject of study as much as possible able to object to what is said about them, to be as disobedient as possible to the protocol, and to be as capable to raise their own questions in their own terms and not in those of the scientists whose interests they do not have to share!”³² What Latour admonished to his fellow social scientists, could be reiterated regarding actors in general, including in our case here, witnesses, policemen, prosecutors and judges. We will encounter some disobedience later, but *not* in any of the official documents. (Hilal’s three-page deposition to the investigative judge was indeed the most detailed. It provided a background for the alleged land conflict, a description of the events that led to the crime, and was concluded with a brief question-and-answer session with the judge, which I will discuss later. Since the second part of this paper is entirely devoted to Hilal, I will skip his deposition for the moment.)

The Criminal Case as a Legal Artefact

A common mistake while dealing with criminal matters, and which goes back to a notion of the “social” that owes much to Émile Durkheim,³³ would be to assume the existence of a broader “cohesive society” whose normative values the actors obey or fail to obey. So when, for instance, we are faced with a criminal case whose witnesses and prosecutors seem reluctant to go beyond certain facts, we attribute such a behaviour to a presumed “norm” within “society” at large, that is, the community in question. The problem with such an approach, however, is that we will fail to see how *a criminal case concretely proceeds*. What in effect holds a given “society” together are not simply the presumed “norms” which push actors to behave in a certain way, whether predictable or not, but all kinds of *networked experiences* which at some juncture translate into objectified “artefacts” or “things” through which actors deploy their strategies. Once a crime takes place within a community, it immediately translates into a “case” in the hands of the police, who in turn begin to transform it into a “file” with documents, depositions, reports, photographs, procedures, and hearings. In other words, a routine crime, which initially has no particular shape or structure, and per se does not causally obey to any rational “social norm,” is soon transformed into a *method of inquiry*, as something that appears to exist only as an *artefact* because of the way things, data, and events are examined. It is the existence of a multitude of such artefacts that would constitute the solid ground for the presumed cohesiveness (or lack thereof) of a “society” of individuals and groups.

A crime therefore metamorphoses into a method of inquiry, a thing that is objectified into the documents and images that constitute the case-file. When actors discuss the crime, say, in the privacy of their own homes, they will in all probability not adopt the same language and behaviour that they would in the presence of a prosecutor or judge; because, as an outcome of institutional constraints, the crime-as-artefact pushes them to different forms of expressions, some of which may be more constrained than the ones adopted in private, or conversely, the objectivation of the crime may push them towards new forms of expression and representations. To come back to our case here, once the case passes the initial stages of police and investigative judge, it is picked up by a referral judge who provides it with its first preliminary synthesis.

“In the name of the Arab people of Syria,” thus begins the referral report, a statement that is there to remind us that justice is both majestic and always performed in the name of the people. Now eight months after the crime, and after the police and investigative judge interrogations were done with, the case finally begins to receive its shape. It is in effect in the handwritten referral report, dated 6 November 1994, that all previous depositions and memos converge into a global structure that is there to influence the case until its very end. The case now receives a purpose, an assessment of the facts, an elucidation of who said what and which accounts ought to be taken more seriously than others, which of the accounts overlap (an indication that facts are corroborated), and finally, the judge’s proposals to go on with the case: who should or should not be punished, and what should be the regiment of punishments and compensations. Experience shows that the referral reports are very decisive, and that one is to expect little change from this point on either in terms of factual evidence or the defendant’s status. A case could still drag on, however, for several years in a row for a variety of reasons, chief among them is the difficulty of getting the witnesses on time during the court hearings (see below), even if no new factual evidence is brought into the picture.

In what may seem like a pure exercise of judicial authority, the referral judge *orders* the case around seven points, which in his own words, reads as follows:

1. Stop the trial of the defendant Anwar b. Hilal for the crime of deliberate homicide (*qatl ‘amd*) and participating in it for lack of evidence.
2. Pass all relevant papers to the district attorney to pursue all necessary procedures, and to the referral judge, in order to proceed with the accusation of the defendant Hilal Khalif al-Khalaf with the crime of intentional killing (*qasd*) for more than two persons, based on article

- 534, section 6, of the penal code, and the accusation of an attempt to intentionally kill based on article 533, section 199, of the penal code.
3. Try him at the criminal court in Idlib.
4. Proceed with the suspicion against the plaintiff 'Akal Ibrahim al-Muhammad for allegedly committing the felony of bodily harm, based on article 540 of the penal code.
5. Try him at the Idlib criminal court.
6. Charge the defendants 'Akal al-Muhammad and Hilal al-Khalif for the military fee.³⁴
7. Once the sentencing is finalized, forward the file to the military judiciary in order to investigate the illegal possession of military firearms attributed to the defendant Hilal al-Khalif and Faysal al-Khalaf.

Now the tone is set for the case. The referral judge is *ordering* all kinds of authorities to do what he just told them to do. He then, in a single 20-line paragraph, states all the known facts of the case, prior to listing all witnesses one by one in conjunction with the statements attributed to them. The third section of the report consists of a "legal discussion" of what the second section revealed in terms of accounts, individual statements, and evidence: facts are assessed and some of them are outright rejected. In the final section the judge pushes forward his proposals: the defendant must be tried for his killing of three persons and punished accordingly. In sum, all what has been done and said in the previous eight months receives its preliminary structure: the *method* of investigation is now set, statements and facts have been assessed, and the results that will follow will be an outcome of the deployed method. But whether the judge is simply "stating" the known facts, or "discussing" them in light of the penal code, he is in fact *ordering* all actors to restrict themselves to the contents of his report. The case has fully metamorphosed into an objectified artefact: lawyers from both sides of the spectrum will from now on only debate the pros and cons of the referral report; for judges, the report provides them with a structure without which they would not be able to survive.

The section on "legal discussion and its application" (*fi al-munaqasha wa-l-tatbiq al-qanuni*) is of special relevance for our purposes here.

Since medical expertise has established (*thabuta*) that the bodies of the victims Ibrahim and his son Muhammad and daughter Shamsa all lost their lives as an outcome of wounds from bullets;
and since the statements of the plaintiff 'Akal, his mother, and witnesses

X and Y, in their depositions, and the confession attributed to the defendant Hilal al-Khalaf in the police report and his cross-examination [by the investigative judge], all point to Hilal shooting at the victims; and since what the defendant Hilal claimed in his police deposition and cross-examination—that while the victim Muhammad was holding him, the plaintiff ‘Akal hit him on the head, and as a result he fell on the ground, he then saw his son Anwar holding a rifle, which he took from him, and then he fired three warning shots in the air, which pushed his victims to assault him, and that he then shot Ibrahim and his son Muhammad, while not knowing how Shamsa was shot—has not been confirmed with any evidence, but to the contrary all evidence shows that such statements are untrue;

and since his minor son Anwar denied having been present at the murder scene, and certified that when he came he saw the bodies of the three victims on the ground, which also has been confirmed by the victims’ relatives and the witnesses, and by the statements of witnesses X and Y in their depositions, which means that the defendant Hilal, as soon as he shot to death his three victims, attempted to kill ‘Akal, but was unable to do so for lack of ammunitions, so he dropped his rifle on the ground and ran away: *he was therefore the only one shooting*, and consequently, he was the one who shot Shamsa, contrary to his claims; in addition, the aforementioned two witnesses confirmed in their depositions that the defendant Hilal, as a result of a small dispute with the plaintiff ‘Akal, hurriedly rushed towards his room and stepped out with a rifle, and soon afterwards started shooting, *which shows that the defendant Hilal was not in self-defence, contrary to his claims*;

and since the act of the defendant Hilal... *constitutes a single crime under article 534, section 6 of the penal code*...

the defendant Hilal al-Khalaf is accused of murdering... based on article 534, section 6 of the penal code... [*all italics are mine*]

I have deliberately highlighted the three sentences in the referral report which all of a sudden become the *punctum* of the whole case: 1. Hilal was the only one shooting, and no one else had firearms; 2. Hilal did not act in self-defence; and 3. Hilal should be punished under article 534 of the penal code. By choosing article 534 rather than 533 the judge deliberately opted for a higher punishment, but he also saved Hilal from the death penalty. In effect, while article 533 sentences the accused to between 15 to 20 years with hard labour for intentionally killing someone (*qatl qasd*), article 534 extends the

punishment to life imprisonment, for instance, if two or more persons were killed (section 6). Only if the accused committed a deliberately planned killing (*qatl 'amd*) would capital punishment apply (article 535).³⁵ (A deliberate *'amd* killing is also intentional, *qasd*, but of a higher level.) When the case-file reached the referral judge, it was composed of a multitude of police depositions, cross-examinations, medical reports, and lawyers' memos and the like: it still lacked, however, a clear focus, even though the police report that contained all the preliminary depositions clearly made Hilal the prime and only suspect. Now the referral report stated what the three main *issues* were: but were the arguments well founded? And was there enough reliable evidence? If we look carefully at the referral's concluding statements we realize that they were mostly based on the accounts of the two witnesses X and Y, which as we shall see later, were presumably kin related to the victims. More importantly, from the four specimens quoted above neither depositions nor cross-examinations seem thorough enough to warrant any reliable witnessing.

With the referral report behind, the case now moves to a higher level, that of the criminal court. The only novelty at this level are the court hearings: will they bring anything new? They should, in principle, but various limitations imposed on the structure of the hearings act as an impediment towards the flowing of information. To begin, once the case reaches the criminal court—at times years after the crime was committed—the judges cannot, for all kinds of logistic reasons, devote themselves to one case at a time. In effect, in a typical three-hour court session, dozens of cases would have to be dealt with, most of them for a routine rescheduling of their hearings. The big problem for every criminal court in Syria is to get all witnesses on time for the hearings: either witnesses claim that they had not been informed on time, or else they manage to bribe the police officers who come to them with a convocation, so that they avoid coming to court, or witnesses are subpoenaed on time but fail to come to the hearings, and another convocation has to be issued. Consequently, during a three-hour hearing session, the court handles dozens of cases at a time, listening to a witness in one, rescheduling that of another witness for a second case, reading the sentencing for a third case, and listening to a counsel's plea in a fourth one. Such a lack of concentration on a single case at a time definitely places limits on the efficiency of the system: the chief judge seems at times overburdened and unable to distinguish the contents of one file from another, and needless to say, serious errors might ensue. Quite often the chief judge begins his examination of a witness with a "Tell us what you know about the case," as if apologizing beforehand for being lost in a

mountain of files. Finally, as already noted for police depositions, the biggest drawback in the system of hearings is that they are not recorded verbatim: every once in a while the judge dictates to his scribe a brief summary of the proceedings, so that the original utterances are lost forever.

In our case here, the hearings stretched for a year, from November 1996 to December 1997, producing in all 20 pages of court summaries. By the time the referral report was drafted only one new issue came to the forefront, with which I will deal extensively in the second part of this essay, and which has to do with the “sanity” of the accused. Other than that, the referral report has refocused the case on a couple of issues: 1. To whom did “the wall” belong? Was its ownership common to all the inhabitants of the farm? 2. Did the accused Hilal clearly and unmistakably inform his victims that “the wall” was “his” own property? 3. How were the protagonists situated vis-à-vis “the wall” at the moment of the crime?

Let us consider in some detail the session of 29 December 1996 as an example of how court hearings normally proceed.

- The witness X was called, born 1937, identification card number...
- The representative of the district attorney pointed out that the medical report confirmed that the accused was fully responsible of his acts at the date of the crime. I [the DA representative] accept what the report has stated.
- He showed the five-member medical report, which he read.
- I [the chief judge] wish we leave the matter of the medical report for the court [to examine].
- Witness X was called, born 1937, identification card number..., paternal cousin to the victim Ibrahim and the husband of his sister, and also cousin of the accused, with the same kin degree (*nafs darajat al-qaraba*). After taking oath, and stating that he has no hostility (*adawa*) to anyone and is not kin biased (*kbali al-qaraba*), he was questioned and said that he confirms what he had stated earlier on 2 April 1994. He did not hear the accused Hilal summoning the victim Ibrahim not to graze his sheep in the wall zone of the village when they were drinking tea the night of the incident. That's my testimony.³⁶
- Replying to a question,³⁷ he said: the wall of the village is for the entire village and ready for grazing.
- Replying to a question addressed by the defence, he said: The wall of the village is not cultivated by anyone in particular, while there are east of the location where the three victims were killed plantations that

belong to the accused Hilal, and the sheep of the victims grazing inside the village's wall were outside the plantations of the accused Hilal.

- Responding to a question, he replied: The victims never had their sheep graze over Hilal's properties.³⁸

- Replying to a question addressed by the defence, he said: When I heard the shots, and as soon as I came to the location of the shots, and saw the [dead] victims, the sheep of the victims had already strayed and were located inside Hilal's plantations.

- Witness Y was called, born 1973, identification card number..., knows both the accused and the victims. The victim Ibrahim is the husband of his paternal aunt. After taking oath, he said: The day of the event I was asleep, the time was roughly 3:00 in the afternoon, because as a conscript I was on vacation, I heard several shots. I woke up and headed towards the place of the shots, and saw all three victims—Ibrahim, his son Muhammad, and daughter Shamsa—lying on the ground. The bodies were roughly 8 meters apart, close to the accused Hilal's house. I realized that the accused Hilal had dropped his rifle on the ground, which was then picked by the plaintiff 'Akal, and I took it from 'Akal. When Hilal did run away, 'Akal attempted to stop him, but he couldn't. I also saw the suspect (*zanin*)³⁹ 'Akal hitting the accused's son Anwar on his head after his father, brother and sister were all killed.

- Responding to a question from the court, he said: When I reached the location of the incident, the sheep of the victim Ibrahim were grazing inside the village wall, and then spread over the lands. I estimate them at 80 sheep. The victims' sheep never grazed over Hilal's plantations.

- Responding to a question, he said: The location of the three victims was roughly 7 meters from Hilal's home, which in turn is 100 meters from the victims' home.

- Responding to a question from the defence, he said: The closest body to Hilal's home was that of the victim Ibrahim, roughly 6 meters apart. That's my testimony.

- Witness Z was called. She's 60 years old and was the wife of the victim Ibrahim, while Muhammad and Shamsa were her children. She knows the accused since he's one of her paternal cousins. After taking oath, she said: I reiterate what I had previously stated in my deposition dated 12 March 1994 in its totality. That's my testimony.

- The other public witnesses were not present. New convocations were issued to them. The next hearing will take place on Sunday, 16 February 1997.

- [The court moves to another case.]

I have deliberately selected one of the longest hearing sessions, which occupies two full handwritten pages from the 20 that constituted the totality of the one-year hearings. In effect, in many of the hearings, witnesses are called (the judge names them, then a court employee shouts their names through a microphone) but often do not show up: the court reschedules the hearing and moves to another case. Moreover, as with Ibrahim's wife above, she was subpoenaed to simply reiterate statements that she had uttered to an investigative judge two years earlier, while no one bothered to cross-examine her anew.

We finally come, once more, to the crucial issue of leaving to the chief judge the task of paraphrasing and summarizing the statements of witnesses. We have seen a similar policy with the police depositions, and even with the examinations conducted by the investigative judge. Needless to say, when the original utterances of witnesses are overlooked in favour of summaries dictated to a court scribe, the judge *de facto* acts as an *interpreter of speech acts*, and the case is "constructed" even more swiftly as it moves from one authority to the next. Considering that when a person issues a serious utterance he or she will always be doing something as well as saying something, an utterance has therefore what J.L. Austin labelled as a certain illocutionary force, which is equivalent to understanding what the speaker was *doing in* issuing their utterance. But such a power to "understand" is left to the judge's discretion, which is reflected in the way *some* utterances are rendered into official Arabic (a great deal never makes it to the official script). Notice in the above hearing that even though the text is mostly kept within the third-person singular, it moves at times to the first-person mode in abrupt shifts, as if the chief judge chose to do so simply to give more emphasis to the "I" whenever he felt like it. The text also avoids even a minimal paraphrasing of the questions, as if only the answers matter. In sum, there is so much filtering in the transcripts of the court hearings that, in the aftermath of the referral report, the case begins to swiftly receive its final touches, leaving less and less room for the actors to manoeuvre.

Is He Competent to Stand Trial?

But what makes the case different from all others is neither the verdict nor the witnesses' depositions. At some point the defendant Hilal started sending short notes and memos to his lawyer, all of which written from his prison cell. As the handwriting and style keep shifting, and since all the documents included in the file were undated, it is impossible to determine how much of those notes were drafted by Hilal himself, or the kind of outside help (from inmates, family and friends) he might have received. As we only come to know

defendants from their official depositions to police and prosecution, Hilal's "writing"—whether "his" own, or through outside help—does constitute a unique opportunity to look at his mindset. After all, not that many shepherds have memoirs or express their views in writing.⁴⁰

In what seems like his first attempt to communicate with his lawyer, an undated two-page memo details the events that eventually led to the crime.

Dear master and lawyer,⁴¹

From your client Hilal a summary of how the incident took place. The day of the incident I was alone in *my* land⁴² working and cultivating. The land is roughly 100 meters away from my house. Four hooded shepherds came by with their sheep, and they've let them graze on *my* land. I've asked them to move their sheep out. They've refused and said that we've already warned you to leave this place a long time ago. At this point I was able to identify them: Ibrahim Hasan Muhammad and his two sons and their maternal cousin.⁴³ I told them that when I finish ploughing and the season is over I'll sell you whatever you need. They replied that we won't pay you a single piaster, and you'll leave whether you like it or not. Ibrahim said to one of his sons: 'You told me that once my brother Muhammad comes from Damascus we'll slaughter Hilal because he's the son of a dog, and he owns all the village.' At this point Muhammad came towards me and hit me with a stick. Then it was his brother's turn to hit me with a hammer several times. As I fell on the floor all of them started beating me. They pulled me all over the ground as I was severely bleeding. My wife came and started screaming. She attempted to save me. They started hitting her, she fell on the floor, and they began pulling her around, and took some of her clothes off. They left us. We went to our home while our condition was difficult. I saw my son Anwar⁴⁴ with a Russian rifle. I took it from him and put it at home. When they heard my wife saying 'let's go and complain to the police,' they came back and Ibrahim was pulling the strings: 'Slaughter him, and I'll sell the sheep and tractor.' We were only separated by a distance of 15 meters. I went back home, picked up my rifle and told them: 'Stop for God's sake!' But they persevered. My wife attempted to mediate, but they hit her again, insulted her, pushed her to the floor, took off some of her clothes, and said: 'We'll do it with her right in front of you!' I received a hit on my head from the back, while someone was holding me from behind. I was left with no other alternative but to fire warning shots up in the air without being conscious (*bidun wa'i*),

since I couldn't run away. While they were attempting to take the rifle from me Ibrahim got shot and fell on the ground.⁴⁵ When his son Muhammad rushed towards me the second shot was fired, and hit him directly.⁴⁶ I have no knowledge how the girl got shot.⁴⁷ I ran away with my wife and son Anwar towards the east in the direction of the police station at al-Burid, and before we got there Nuri al-Nawwaf⁴⁸ was able to follow us, and with him was the rifle, which he managed to take [from my adversaries.] He said to me 'don't take your wife with you to the police station, and don't say that she was with you, because they'll arrest her.' I've sent my wife to the al-Burid village, and drove with my son in Nuri's car to the police station. We gave ourselves up. The director and head of the police station then showed up. I was in a pretty bad shape, having received so many blows on my head and body. They brought a doctor who examined me and gave me some medicine. After a while I heard my son Anwar screaming. They were beating him and he was screaming for help. And then I stopped hearing from him. A judge came and took my deposition. I wasn't fully conscious. I told him about the fight, but did not mention my wife, being afraid that they would arrest her. After the investigation was over, they took me to Idlib's prison.

We now come to the public witnesses (*shuhud al-haqq al-'amm*).⁴⁹ Muhammad Shaykh Muhammad, his son Walid, 'Umar Shaykh Muhammad and his son 'Aziz,⁵⁰ who was present during the incident, and who was previously involved in an earlier fight. The witnessing of all those is unacceptable from both the point of view of God's Law (*shar'*) and law (*qanun*),⁵¹ because there's between us previous litigations (*khusuma*) and blood [was shed], considering that my father had killed their father, and the wife of the victim Ibrahim happens to be their sister. Those are witnesses who are attempting to corner me while in prison, in order to benefit from the land and homes,⁵² and they've got what they wanted...

Whether the above letter was the first in the series or not is hard to determine. Its significance comes from the fact that it is the most complete when it comes to describing the incident itself, its aftermath and possible causes. More importantly, it sheds some light as to links with previous episodes regarding alleged feuds and bloodshed between the two families. Let us focus for the moment on the following:

1. The shooting of the three victims remains the most obscure part of the narrative. Hilal claimed that his opponents were beating him, and, when he

started shooting, one of them was holding him from the back which is awkward and hard to believe. The shootings were described in the most detached style possible, as if the bullets went out on their own, without anyone being specifically responsible.

2. The letter brings two elements that were precluded from the court's final ruling: the alleged longstanding feud between the two families; and the interest that the other party might have nurtured towards the defendant's properties. Even though economic relations may have been at the core of the conflict, the court would not handle them.

3. Perhaps the most important element was regarding the status of witnesses. While the defendant clearly identified the witnesses' alleged kin affiliations and motivations, the court failed to do so. Which raises an interesting question: considering that in such worlds, plaintiffs, defendants, and their witnesses, are in all likelihood kin related, what is the value of their testimonies, and should special procedures be devised to take into consideration kin interests? In another undated letter to his lawyer, the defendant Hilal claimed that even the certified doctor who examined the three bodies was "from the kin and tribe of the victims." "I even suspect," Hilal went on alleging in that same letter, "that the locations of the bodies had been altered either by the police or the doctor."

We will have to keep in mind all three points when going through the other memos drafted by Hilal to his defence lawyer. A point that has constantly emerged in later letters is the possibility of peaceful settlement.

Within a month of my arrest, 'Akal al-Muhammad⁵³ went and met with Nuri al-Nawwaf, and asked him to intervene in the peaceful settlement (*sulh*) and solve the matter. Nuri al-Nawwaf had forwarded a proposal to me which would solve the matter for SP600,000 (\$12,000). I replied by giving him authority to sell one of my lands and pay the requested sum. But 'Umar Shaykh Muhammad and Muhammad Shaykh Muhammad had objected to the proposal and threatened 'Akal for attempting a peaceful settlement. They've made an agreement with one another to usurp (*ighṭisab*) my homes and land,⁵⁴ and appointed themselves as public witnesses in the case. They've thrown my family out of their homes and land to a free zone (*mantaqa muharrara*).⁵⁵ My brothers had met God's will and their children have now joined my family, which has grown to 33 souls (*nafas*), all of which homeless and with no place to stay. Our land has been robbed from us by 'Akal al-Muhammad and his maternal uncles 'Umar al-Shaykh and Muhammad al-Shaykh. My

generous master if you can bail me out (*ikbala' sabil*) I'll take it upon myself (*ata'abbad 'ala nafsi*) that within a month there will be a peaceful settlement and I'll bring together my homeless family.

In what looks like one of his last—and shortest—statements, Hilal makes a final plea to his defence counsel.

Dear master, God be on your side,
 I ask you to delay the verdict, hoping that a peaceful settlement would come, because I'm working on one more than ever before. I ask you to prolong the verdict for some time.
 And if you can bail me out for a cash guarantee I'm sure that I'll be able to reach a peaceful settlement within a month, if God wishes, and I'm ready for the court hearings, the ruling, and other matters.
 The inmate Hilal.

Since the note, like all others, was left undated, it is impossible to know how close it was to the final ruling. In the sentencing, six years after the crime, the court, in addition to the 20 years with hard labor, summoned the defendant to compensate, in lieu of the blood money (*dīya*), the heirs of Ibrahim and his sister each victim for SP600,000 (\$12,000), to be distributed according to shari'a law, while the plaintiff 'Akal Ibrahim al-Muhammad (the only survivor) would receive SP50,000 (\$1,000), and the heirs of the victim Muhammad (Ibrahim's son) would receive for their part SP800,000 (\$16,000). The punishment was indeed severe, and was definitely far above what Hilal himself had hoped for a settlement (SP600,000 *in toto*). Moreover, when it comes to cash compensations the court's language surprisingly borrows from tribal customs: compensations are looked upon as blood money. If, as Hilal's letters to his attorney testify, he was hoping, through a friend's mediation, to work out all by himself a settlement, then such mediations must have surely failed, and the Idlib court proceeded with its own harsh settlement. Because the courts generally compensate far less than the expectations of the plaintiffs, the disputants tend to settle on their own and then drop their personal rights over the case, leaving the courts with the *public* part of the verdict only. In rural and tribal areas, since blood money settlements are the norm, when the courts make their own assessments, not only do their verdicts tend to overlap with local norms, but compensations have to meet expectations; otherwise, the cycle of violence might be once more revisited. By contrast, in urban areas like

Aleppo, particularly among the middle and bourgeois classes where blood money settlements are not normative, compensations are assessed on the expectations from past courts' rulings, which on average tend to be low: the plaintiffs would then assess whether to go for a private settlement and "get more," or proceed with the case.

Our *démarche* assumes that the use of rules by actors is as crucial as the understanding of the rules of law. Rather than simply focus on the rules of law, their internal logic and coherence (or lack thereof), we have deliberately shifted our analysis to how social actors understand and make use of the legal rules in combination with their customary practices. The behaviour of actors is detected mainly, though not exclusively, through their speech acts and utterances. What could be detected in the language of users (plaintiffs, defendants, witnesses, police and investigators, judges and lawyers, and even doctors and psychiatrists whose language is assumed to be "scientific") is an ability to index action according to one's needs and strategies. They do so while they will have to keep an eye on the rules, and, at the same time act in conformity with their own social and economic interests. In effect, it is through practice—the use of rules by actors—that the link between law and the economy reveals itself. Through language, the social actors index and document a conflict or crime: in other words, they provide their own representations of the case, hoping in the meantime that their actions would tilt the case in their favour. But, in so doing, they are planning for symbolic and material compensations, hence they are looking at their economic status once it is all over and they are back to normal life. Our case here reveals some of the economic interests of all protagonists. What the defendant Hilal was attempting to do in his letters and notes to his defence counsel was a representation of the crime in his own language.

Consider the following undated memo in which Hilal listed what he considered as "evidence":

"My master, below is some evidence (*adilla*) and I have witnesses to support them."⁵⁶

Hilal's Statements (numbering is his own)

A. 1. The immediate deposition (*dabt fawri*) [at the police station] has been organized according to the opponent's will—bribed (*marshumma*)—and one of those who drafted the deposition—policeman Jamil al-'Abid—would confirm this.

2. When the deposition was being recorded, I wasn't fully conscious at all. The police brought me a doctor who gave me medicaments, but my statements were nevertheless recorded, without having gained my consciousness.

3. I've tried a lot to have my statements heard by an investigative judge, as I placed several demands, to no avail, and the only statements I made were to an assistant judge.

Observations

Hilal immediately delegitimizes his deposition at the police station on the ground that his opponents bribed the officers there and imposed their will. In principle, as the Damascus cassation court has constantly emphasized, such depositions have no value unless suspects reiterate their statements during the court hearings. But in practice such depositions have a value beyond proportions as the courts heavily rely on them even if suspects subsequently deny every word they said.

The deposition is further delegitimized with the allegation that he was not fully aware of what he was saying. Even though a simple denial in the presence of a prosecution judge would have been enough—at least in principle—what Hilal was attempting here was to posit his opponents as having “something to hide.” Hilal killed three persons in a row, and he was expecting a punishment that could be severe. He was therefore left with two options: (i) a peaceful settlement based on blood money compensation; and (ii) to throw doubts on his opponents with the hope that the court would alleviate the punishment.

The file I had access to confirms this. The only statements that were recorded, after the deposition to the police the night of the murder, were to an assistant judge in Idlib the day after the crime (see below). As noted earlier, suspects tend to seize the opportunity

B. The public witnesses in the case are *in toto* my adversaries (*khasm*) because my father killed their father, and despite that, the source of instigation and trouble (*fitna*) are the witnesses and their sister, the wife of the victim [Ibrahim], and there is lots of witnessing (*shawahid*) on their assaults, etc.

C. The land of the victim and the witnesses is 2-3 km far from mine, and despite that their sheep only graze over

of their encounter with an investigative judge to deny *in toto* what they had stated earlier to the police.⁵⁷ It remains unclear why Hilal was denied access to a judge, an issue that the court did not even raise in its final ruling.

Hilal was here attempting to historicize the crime in light of a previous killing, or what might be termed chain-killings. But there is also an *indirect* contextualization regarding the motivations of his three victims and their witnesses—that all of them acted or were acting in retaliation to the killing of their father. (Note that Hilal did not care to explain *why* his father killed their father: was it also over a land dispute?) The witnesses are suspicious because they are kin related to the victims *and* like the victims are retaliating for a previous killing. Now the whole episode looks more “understandable”: victims and witnesses are tied together in a *single* act—retaliation. Interestingly, the court *excluded* all this material in its final ruling. As contextualization is the main strategy deployed by the actors attempting to provide explanations for their actions, the principle of exclusions and inclusions is what governs the policy of the court (and all other judicial instances). Whenever the court excludes contextualization attempts by either party, it is *de facto* re-contextualizing the disjunctive elements in the case through its own judicial language.

The process of contextualization proceeds even further than in B, as victim and witnesses are lumped

my cultivations with a pretext—the village wall—and it is known that the wall is no good for the sheep to graze, and the intention (*ghaya*) of the victim and witnesses is to force me out of the farm, from my home and land.

D. The rifle had been deposited with me, and when I went to the police station [right after the killings], relatives (*aqarib*) of the rifle's owner came to me and requested that I say that the rifle is mine.

together under a single conspiracy theory. But the status of the disputed land is left unexplained here, and it is in another letter (which could have been drafted earlier or later) that Hilal explains how property ownership has shifted since the 1960s: "The [disputed] land was [classified] an agricultural land since 1963 [when the Baath came to power], distributed by the agrarian reform program to the peasants who benefited from it: [five persons are listed including a woman]. I purchased the portions of X and Y since 1981, and constructed my home on the upper portion of the land, then gave another portion to the state to construct a primary school, which is still there."

The defendant was constructing a systematic narrative, explaining the case from his *own* point of view, but which the court did not care to consider.

The ownership of the rifle is not important per se, considering that Hilal confessed his crime and there was plenty of evidence that he did it. Ownership of guns, however, is authorized only with a permit, and not having one is a felony. The genuine owner might therefore have had to hastily dispatch his relatives to deny ownership, either because he had no permit himself, or else he did not want to get involved. More importantly, considering that in this tightly controlled society of honour and violence, guns are the most common weapon of crime, and their *circulation* from one individual to another, from

home to home, is in itself a means for consolidating relations and establishing bonds, ownership—like crime—cease to be a *private* matter: guns “protect” groups as much as they “protect” individuals.

In his cross-examination by an assistant judge the day after the murder, Hilal stated that he purchased the rifle in Lebanon 15 years ago: “I used to go and work there, I purchased the rifle, and brought it with me [to Syria.] Everyone at that time had guns, and I’ve got sheep that I take with me to the eastern region.”

As with the rifle, the decision not to mention his wife’s presence at the murder scene was *not his own*, but a *collective* one. Hilal was attempting to shift responsibility from the individual to the collective.

[The rest of the paragraphs were left unnumbered.]

After the incident I went with my wife and son Anwar in the direction of al-Burid, and on the road I passed by the village of Jibb Abyad at the house of X. They told us not to mention the name of the woman [my wife] so that she does not get imprisoned and arrested from justice.

[In the remaining three paragraphs the handwriting changes and the language considerably deteriorates from plain to colloquial Arabic, indicating a likely change in authorship.]

All the inhabitants of my village have seen everything before anyone else, and they’ve seen the distance of the bodies from the door of the house.

The legal doctor who examined the bodies is from the same tribe (*‘ashira*), and he might have heard the talk of those present after we had run away.

Same strategy as before: even the *seeing* was collective—by all the village inhabitants. Notice that prosecution and court went towards the other end: to *individualize* witnesses—those same ones that Hilal attempted in vain to discredit on the basis of their kin relations to the victims.

After having discredited all witnesses, now it is the doctor’s turn. The process of contextualization goes even further with the attempt to indicate that in a milieu where everyone is kin related, and crimes are not

The witnesses are opponents (*akhsam*) and the instigators. After the incident one of the witnesses Walid al-Shaykh attempted to kill my son Khalid in Latakia, while others have assaulted my brother in his village and beaten him up, and they're the ones who have damaged houses and burned their doors to the ground.

individual acts, then how is objective truth possible?

The crime supersedes those involved in it, as it soon progresses to engulf other family members from both parties.

The witnesses' alleged kin bias was picked up by the defence counsel in one of his memos to the court on August 1995: "Your honourable court, being a court of substance (*mahkamat mandu'*), will notice that it is not permitted to judge by the law and deduct from evidence through bypassing the witnessing of neutral persons (*ashkhas biyadiyyun*), while taking into consideration only the statements of the plaintiff and his relatives." The counsel refrained, however, from contextualizing the case within the broader perspective of the defendant—that of the ongoing feuds between the two families, beginning with his father's alleged assault and the killing of Ibrahim's father. The counsel nevertheless kept nailing down the case to its main components: the disputed land, and the victims' constant trespassing over Hilal's property, the witnesses' kin problem and their contradictory statements, and the state of mind of a defendant who had been with his wife insulted, beaten up, and humiliated by all three victims. The counsel went at great length, while quoting rules, procedures, and interpretations from scholars in Syrian, Lebanese and Egyptian laws, explaining that the court ought to draw a distinction between someone "who has become vulnerable (*ta'arrud*)" under a certain condition, and the assault (*i'tida'*) itself: "A rightful defence does not set as a precondition the occurrence of an assault, since it is enough that an unjustified confrontation over the soul (*nafs*) had taken place, as elicited in article 183 of the penal code." And he then added with confidence: "We have to understand the meaning of *ta'arrud* in its right context, since it implies the danger from an assault and not the assault itself, because the act of defence orients itself towards that danger so that it does not occur."

Was He Insane?

Social actors index their speech in such a way that each utterance ought to be “understood” by the hearer within its proper social meaning. That is at least how *in principle* a verbal exchange between speaker and hearer ought to proceed. It is, of course, quite common for speaker and hearer not to “understand” one another—or at least the hearer might understand the speaker only *literally*, while the symbolic social meanings are lost. More importantly, even routine utterances assume and generate a system of meanings that is made and unmade while people speak and act. For the researcher, such assumptions and generations of meaning are what social actors typically take-for-granted, and which research relies upon to understand the behaviour of individuals within their proper institutional contexts. From the vintage viewpoint of the social scientist, the *assumptions* in the way people talk and act prove to be the most important vehicle for social action. In effect, within a specific institutional context, between what is “accepted” and not “accepted” as a form of speech, lie deeply seated and taken-for-granted relations of power. When, for instance, a suspect is being interrogated by a prosecutor, every question and answer assume an implicit understanding of the situation at hand, but which is not directly revealed to either speaker or hearer.

Consider as an illustration the following exchange between an assistant judge and the suspect Hilal at the Idlib prison just a day after the crime.

Q: Did you shoot [Ibrahim’s daughter] Shamsa?

A: I swear to God the almighty that I did not shoot her, nor do I know who shot her.

Q: X and Y claimed that they saw you shooting at the victims, then drop the rifle on the ground and run away. So how come you deny shooting on Shamsa? And if you did not shoot her, then who did it?

A: What the aforementioned witnesses said is incorrect, and I completely deny shooting her. When I did run away she was standing with the women.

Q: We’ve seen the bodies of the [three] victims at the place of the incident located from one another by approximately 10 meters forming a triangle, which confirms the falseness of your statements regarding the shooting of only the victims Ibrahim and Muhammad in one place, so what do you say?

A: When I shot Muhammad he went east and fell close to his father [Ibrahim] who had fallen before him, and I confirm that I did not shoot Shamsa.

For a while the whole case had been hinging on Shamsa: Who shot her to death? Hilal denied from the very beginning that he did so, while those present on the scene confirmed that he was the one who shot her. The *implicit assumption* in the whole Shamsa episode is that *as a woman* she was a defenceless creature who would do harm to no one—certainly not to the likes of Hilal. Her killing would therefore rebuke the defence thesis that Hilal acted in self-defence, or as his lawyer pointed out, because of the *ta'arrud* that he was subject to from the others: savagely beaten up and humiliated with his wife, he was left with no other choice. What is revealing in the above cross-examination is Hilal's depiction of Shamsa as he ran away: "When I did run away she was standing with the women." Whether his description was factually correct or not is beyond our means, but suffice it to say that it does indeed conform to a common social understanding of the role of women in rural societies: they stand together and watch the violence perpetrated by "their" men, and assaulting them would be dishonourable. Hence Hilal's denial to the very end. While the examiner attempted in vain to corner him, the cross-examination would not have carried the same weight had it not been over a woman's body.

In similar vein, the issue of Hilal's "insanity," first brought up by his lawyer in 1995, carries similar taken-for-granted assumptions. In his first memo addressed to the *jinayat*, the defence counsel noted that "my client is known to be an idiot (*abbal*), and this was confirmed in the attached memo from the department of conscription (*tajnid*), when he was summoned to serve his compulsory military service, but was soon released (*u'fya*) because of his idiocy (*habal*)."¹ The memo attached to the counsel's address emanated from the Syrian army headquarters, and pointed out that Hilal served in the army for one month only, in April and May 1965, prior to his permanent release. The doctor's report, which did not exceed five lines, described Hilal as someone who "has a brain deficiency (*naqs 'aqli*) to the point of idiocy (*bi-darajat al-balaha*) and should therefore be permanently released from military service."² The medical report, which was approved and signed by the chief doctor and three officers, did not even bother to explain how such a conclusion was reached.

In light of Hilal's previous problems at the military, his attorney requested from the court that his client be subjected to a medical examination, a request that received the court's approval. In light of the medical examination conducted in Aleppo, which regrettably was not included in the file I consulted in 2004, the defence counsel rebuffed the medical committee's claim that his client's "actions were sound" (*tasarrufat salima*): the medical committee reached its conclusion after realizing that "the accused was not positive, since he did not

respond to the questions posed to him... We have been informed by the accused's relatives that the latter, prior to his move to Aleppo for the medical consultation, had been advised by some inmates in his cell to keep silent in fear of the committee's members. The accused rejects the committee's competence on the basis that it is not possible to detect the mental capacities (*al-mulkiyya al-'aqliyya*) for any person in an hour or in a question. The accused suffers in effect from a brain deficiency (*naqs 'aqli*) to the point of idiocy (*li-darajat al-balaha*),⁵⁸ and if someone is an idiot (*ablah*) it doesn't mean that he would be unable to utter a single true or sound word, which prompts us to place him under observation and consultation by a medical committee, and in light of that [the latter] would give its opinion regarding the fitness of his mental capabilities (*salamat malikatuhu al-'aqliyya*), and check whether he does not suffer from any mental or psychological illness (*marad 'aqli aw-nafsi*). For that reason we request that the accused be placed under the supervision of a five-member medical committee, comprised of specialized doctors ready to take hold of their responsibilities, which would place him in a state-owned hospital for psychic illnesses (*amrad nafsiyya*) for an acceptable period of time, and then in light of that, draft a report."

The counsel's plea for a second medical examination did not seem to have had much of an effect on the defendant's status (the five-member medical report was not included in the file I consulted), and the whole issue of the defendant's "mental deficiency" was only brought to light once more in the court's final ruling in 2000: "The defence has pleaded that his client is not responsible for his actions since he has a mental illness (*marad 'aqli*), based on the fact that the accused Hilal was dismissed from his compulsory military service [in 1965] for his idiocy (*balabatih*). That was confirmed in the attached military medical report, but the [defence] plea is rejected because the medical reports of the three- and five-member committees have both confirmed that the accused Hilal does not suffer from any mental illness (*marad 'aqli*), making him responsible of his actions from the day of the crime until now. His mental powers are normal..." The court, which described the dispute as "simple (*basit*)," then rebuffed the defence's other claim, namely, that Hilal acted in self-defence, arguing that the victims did not carry any weapons, hence posed no immediate threat on Hilal's life and family.

Writing Insanity

"The accused rejects the committee's competence," wrote the defence counsel in light of the three-member medical committee findings, which found Hilal's behavior "normal." The defence's statement would have indeed seemed strange,

were it not for its legal fiction: “On behalf of my client, I’m requesting that the committee’s findings be revised,” was what the lawyer had in mind. Otherwise, the accused, on his own behalf, would be objecting to the fact that his medical examiners did find him “normal” and doing rather well. But the twist of irony in such statements only highlights the real issues: *Who* determines that a person is insane? And *how* would insanity be diagnosed and described? Since in the modern world “insanity” and “madness,” like the rest of “psychic disturbances,” are looked upon as *medical* phenomena, there is little awareness, however, among medical teams, doctors, judges and lawyers, and various other authorities of professionals and laymen, that *describing* and *diagnosing* such behavioural phenomena leads to a constructed artefact whose assumptions are seldom explicitly stated as such. Witness, for instance, the confusion of the various authorities—the medical and legal—over the proper description of Hilal’s “mental problem.” In 1965 the military medical committee diagnosed Hilal as suffering from “a brain deficiency to the point of idiocy.” Then three decades later, in light of Hilal’s triadic crime, his defence lawyer, who took the military medical committee’s findings for granted, described him as an “idiot,” using a set of expressions in Arabic—*babal*, *ablah*, *abbal*, *balaba*—all of which hinge on the fact that Hilal might have been “simple minded,” suggesting in all likelihood that there was no awareness from his part of the gravity of the crime that he committed. Finally, the court adhered by the three- and five-member medical committees, both of which found that Hilal did not suffer from any “mental illness.”

What characterizes such common-sense descriptions, besides their use of a set of confusing terms that poorly describe Hilal’s condition, is that there’s nothing in them that is either medical or legal per se. Harold Garfinkel argued that “A common-sense description is defined by the feature ‘known in common with any bona fide member of the collectivity’ which is attached to all the propositions which compose it.” Basing himself on Alfred Schütz’s phenomenological feature of what is “known in common,” Garfinkel concludes that “These constitutive features are ‘seen but unnoticed.’ If the researcher questions the member about them, the member is able to tell the researcher about them only by transforming the descriptions known from the perspective and in the manner of his practical ongoing treatment of them into an object of theoretical reflection. Otherwise the member ‘tells the researcher about them by the conditions under which severe’ incongruity can be induced.”⁵⁹ Regarding Hilal’s so-called “mental illness,” both medical and legal authorities (doctors, lawyers and judges) shared in their memos similar common-sense descriptions drawn from what is “known in common.” What was here “seen

but unnoticed” were Hilal’s “bizarre manners” which were classified by some medical sources as an outcome of a “mental illness.” But what remained unnoticed, however, were the conditions that make such formulations possible: the 1965 medical report, for instance, was so short and concise that all what it did was place a tag on Hilal’s “mental illness,” as if embarrassed to admit that the symptoms of the “illness” were so “visible” and “common knowledge,” that no expertise was needed.

Bona fide common-sense descriptions are embedded within the common stock of knowledge in a given society and without that, “known in common” routine daily interactions, whether institutionalized or not, would not be possible, and society as we know it would cease to exist. For the researcher, the problematic character of “common knowledge,” as expressed in language, gestures and images, stems from the fact that a great deal of decision making, judging, labelling, sentencing, policy making, economic and social well being, unreflectively relies on such taken-for-granted common stock. A severe incongruity can be induced whenever the social actors are unable to understand the meaning of their actions and the causal links that bind together various disparate spheres—economic, juridical, political and social—of the lifeworld. In the various *linguistic situations* that we have examined for this case—lawyers’ memos, investigations, cross-examinations, medical reports, verdicts, and, above all, Hilal’s own writings—the common knowledge, which enabled speaker and hearer to agree or disagree with one another, prepare their strategies, and reach conclusions for the sake of the final verdict, all bear the imprints of the taken-for-granted “subjective constructions of reality.”⁶⁰

If legal theory generally looks at the rules of law as the most important component of any system of justice, it is presumably because they constitute the “theory” out of which other elements (e.g. procedures and fact finding) are constructed. Judges are therefore supposed to “apply” the rules of law, meaning that they have to “find” the adequate rule for each case, and whenever no such rule is available ready at hand (or no clear precedents are available)—for instance, in what Ronald Dworkin labels as a “hard” case⁶¹—judges may “interpret” the rules accordingly, in order to extract, through analogy and judicial reasoning, the corresponding rule. Consequently, if much attention has been devoted to the rules, their interpretation, and procedures, it is because they presumably constitute the core of a system of justice; and if the legal cases tend to receive so little attention, it’s because they’re perceived as an “application” to the rules of law.

Our approach does not intend to reverse the dubious equation between “theory” and “practice,” for the simple reason that we do not believe that a

system of justice functions through falsely constructed academic categories of this kind. To understand the fabric of law we have proposed to follow the *construction* of a single case—any case—from beginning to end. The rules of law, like the rules of a chess game, are a set of entirely man-made ideas that do not necessarily describe anything in the real, material world. When we claim that a system of justice is a construction, the implication is that it is solely composed of man-made rules rather than, say, of natural, divine or magic elements (what is often referred to as “natural” or “sacred” law). Thus, even if the actors claim that they are part of a system of justice that is sacred and religious, we approach the system as it is constructed through the actions of those actors. The rules are by their very nature general and abstract, while a case is concrete and theoretical, in the sense of deploying a *method in inquiry* through its construction of the case in question as a *legal artefact*. Consequently, we are only interested in how the rules of law are used by the actors, and how such a practicing of the law gives the rules their shape and meaning. In sum, the rules of law become concrete and real in the proceedings of a legal case.

As in any criminal case, the crime that we’ve concentrated upon begs the question, “What happened?” When social actors compete for various versions of the same event, they alternate between straightforward accounts, structured narratives, and possibly discourses. There is no clear cut difference, however, between an account that could be proven, and hence in principle would determine what actually happened, and one that is *accepted* as true. The reason is that when actors are accounting for what they saw and heard, they are doing so because they have been summoned by an official authority, which in turn will repackage their statements in a particular way. At each step of the judicial process, what stands as “raw information,” which we will assume are the original statements uttered by the actors themselves, are immediately filtered, then transcribed in an official Arabic for the sake of receiving their final form as officially approved or disapproved accounts or narratives. Consequently, a witness account, which, say, was originally uttered in a police station in the aftermath of the crime, acts in the deposition form like a *segment of information* among other segments, all of which forming the stuff from which subsequent reports are constructed. How do then such segments of information get verified? Is there a reality principle, which behaves like a laboratory, and which tests the truthfulness of statements? If a system of truth is constructed it does not mean that anything goes. Each system of truth is constructed in a particular way, and it is *how* it is constructed that determines the robustness of its claims.

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THE JUDICIAL CONSTRUCTION OF THE FACTS AND THE LAW

The Egyptian Supreme Constitutional Court and the Constitutionality of the Law on the *khul'*

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On the fourteenth of July 2001, 'Ala' Abu al-Ma'ati Abu al-Futuh decided to challenge the constitutionality of Law No. 1 for the year 2000, organizing certain forms and procedures of litigations related to personal status.¹ He did so after his wife, 'Aliya Sa'id Mohammad, had seized the Alexandria First Instance Court, Personal Status Section, of her request for *khul'* in order to unilaterally put an end to their marriage which had been concluded three years earlier. She had accepted, in exchange, to reimburse the dowry she had received (*'ujil al-sadaq*), as well as the *shabka*²; she had also accepted to relinquish the deferred dowry (*mu'akhhbar al-sadaq*). According to the claimant, discord had broken out between her and her husband, so much so that she could no longer bear to live with him and was afraid of God's displeasure because of the aversion she felt towards her husband and because she no longer wished to live with him. The court made a first attempt at conciliation, but the wife refused whereas her husband had accepted. The judges then decided to appoint mediators. The latter carried out their mission and submitted a report in which they recommended the separation of the couple through *khul'*. They were convinced that life in common had now become impossible for the couple. They added that they had made certain the wife was ready to relinquish all her financial rights.

That is when Abu al-Ma'ati Abu al-Futuh raised his claim of unconstitutionality. In his opinion, article 20 of the year 2000 law, concerning

the procedures of *kbul'*, should be declared unconstitutional for three reasons: the draft law had not been submitted to the Consultative Assembly; the legislator had made no provisions for an appeal against the decisions concerning the *kbul'* and, above all, the article in question was in violation of Islamic shari'a, since it did not necessitate the prior agreement of the husband. The First Instance Court, considering the challenge serious, decided to stop its examination of the affair and authorized the claimant to seize the Constitutional Court.

It is in those terms that the Supreme Constitutional Court presents the facts that led it to be seized of the case in July 2001. Contrary to a judge dealing with the substance, a constitutional judge is not called upon to hand down a decision in a litigation between individuals, nor to pronounce concerning the facts of the affair itself. He must hand down a decision concerning a conflict related to norms by giving priority to the hierarchically superior norm, i.e. the constitution, on the hierarchically inferior norm, i.e. the law or an executive regulation. Thus, the Constitutional Court was not asked to decide whether 'Aliya deserved to obtain her divorce by *kbul'* or not, but to examine the constitutionality of the provision establishing the possibility for a wife to put an end to a marital union by resorting to such a procedure. Was article 20 of Law No. 1/2000 in conformity with the 1971 constitution?

The provision in question, a substantive provision,³ had been included in what officially constituted a simple text of procedure, aimed at unifying and at simplifying the judicial procedure relevant to personal status.⁴ The nickname given by the media to the law of the year 2000 "*qanun al-kbul'*" (the law on *kbul'*), indicates the importance acquired by this provision in comparison to the other seventy eight articles of that law. Adopted mainly for considerations of a social nature – to allow couples to obtain an automatic and relatively rapid dissolution of an unhappy marriage – the *kbul'*, as codified by that law, gave rise to several controversies, particularly concerning its religious legitimacy.

In order to judge the constitutionality of article 20 of that law, the Supreme Constitutional Court had to successively examine the three aspects raised by the claimant. It had, first of all, to study the process at the end of which the law had been adopted, in order to make sure that the procedure had not been in violation of the 1971 constitution and, in particular, that the Consultative Assembly had indeed been seized of the draft law. As to the second complaint, the Court referred itself to precedence and decisions handed down in similar affairs. Finally, to deal with the third reason for which unconstitutionality had been raised, the Court had to go back to events that had taken place in the times of the Prophet. Each time, the Court had to present the facts, in its own terms, concerning what had happened in those different circumstances and had to resort to a selection of facts in order to satisfy needs of a legal nature.

Apart from its purely constitutional aspect, the affair also raised the question concerning the process of elaborating the draft law. Indeed, when the Constitutional Court examined the affair, its president, Fathi Najib, declined to take part because he had participated in the elaboration of that law when he had been the adviser to the Minister of Justice. What then had really happened at that time?

Under the guise of neutrality, texts of laws and judicial decisions hide many things at stake. The interaction between actors fades before the abstract nature of legal jargon, yet this should not hide the fact that those texts had been adopted for a given objective and after many debates, negotiations and compromises. The law on *khul'*, adopted in January 2000 in Egypt is no exception, even if the way in which it is evoked in the judgment handed down by the Constitutional Court in December 2002 occults the entire polemic dimension that had surrounded its adoption. A more careful reading of that decision also shows how the court first proceeded to a construction of the original facts in the affair, before constructing the law to be applied and interpreting it.

The Facts at the Origin of the Affair as Submitted by the Constitutional Court

As we have seen, the court begins by referring to the facts that led the claimant to seize it with the challenge of unconstitutionality. It may be noted that the narration of the facts is structured around the procedure stated in article 20 of the year 2000 law:

1. The wife seized the First Instance Court. As in all cases of an ordinary divorce, the wife must resort to the court in order to obtain the dissolution of her marriage.⁵ In conformity with article 10 of the year 2000 law, it is the First Instance Court which is competent to examine any such request, be it by divorce or by *khul'*. Let us note, however, that since October 2004, it is now the Family Courts which examine all claims related to personal status. This reform allowed a centralization of all litigations related to family law that had previously been scattered among different courts, forcing women each time to submit a different claim (for example in matters of divorce, for the payment of alimony, for the custody of the children, for visitation rights and for residence, etc.). The reform should also make it possible to accelerate the procedures.

2. The woman asked for a final separation (*talqa ba'ina*), indicated the constitutional judge. According to article 20⁶, the *khul'* does indeed put a final end to the marriage, unlike certain forms of repudiation which allow the husband to decide to "take back" his wife before the end of the *'idda*, (a

deadline to ascertain absence of pregnancy). In our present case, the former couple cannot remarry except by virtue of a new marriage contract and a new declaration of acceptance by both.

3. The woman commits herself to reimburse the part of the dowry which had been given her as well as the *shabka* and she relinquishes the part of the dowry that should have been paid in the case of an ordinary divorce. The *kebul'* is indeed a unilateral way of putting an end to marriage, one that allows the woman to obtain a dissolution of the union in exchange of relinquishing the financial rights⁷ she could have claimed, as well as accepting to reimburse the dowry she had received at the moment of marriage.⁸ She can no longer claim alimony (*nafaqa*),⁹ nor can she claim financial compensation (*mot'a*).¹⁰ Moreover, she has to relinquish the unpaid part of her dowry.¹¹

Let us note that, according to the court, the wife declared herself ready to reimburse the *shabka*. Yet, for many scholars, the *shabka* does not represent a part of the gift that the wife has to give back in order to end her marriage through *kebul'* (Mansur 2001: 270). Indeed, since they were offered during the engagement, the gifts are not directly related to the marriage but should be considered as a donation. It is nevertheless true that the application of article 20 gave rise to widely different interpretations by the judges. In the absence of a published explanatory note of the law¹² and, notably, the absence of executive regulations, judges dealing with substance found themselves at a bit of a loss. Because they are allowed a large margin of freedom of interpretation, some judges follow their own personal feelings concerning the legitimacy of that procedure. Being opposed to the *kebul'*, they will tend to bring in bigger financial charges to be paid by the wife, for example, imposing that she reimburses the *shabka* and, sometimes, that she pays her husband the deferred dowry.

4. The Constitutional Court calls to mind that, according to the wife, the conflict with her husband had become so serious that she no longer could live with him and feared God's anger because of her hatred for her husband and her desire to no longer live with him.

According to the law of the year 2000, it is sufficient for the claimant to declare before the judge that she no longer wishes to remain married to her husband, that marital life has become intolerable for her and that she fears to violate God's orders (*tubghid al-hayat ma'a zanjiha wa (...) la sabil li-istimrar al-hayat al-zanjijyya baynahuma wa takhsba ala tuqim hudud allah bi-sabab hadha al-bughd*)¹³ she were forced to go on living with him. She does not have to justify her request nor to prove that it is well founded. Unlike a "classical" request for divorce, she does not have to prove the existence of a fault or prejudice.

It is to be noted that the wife did invoke her fear of disobeying God's orders, even if the terms she used were not exactly those appearing in the law of the year 2000.¹⁴

5. The Constitutional Court goes on to indicate that the judge dealing with the substance did make an attempt to reconcile the couple, but that the wife had refused even though her husband had accepted.

Article 20 does stipulate that the court must not grant a divorce through *khul'* without a prior attempt at reconciliation (*muhawalat as-sulh*). If he does not manage to convince the couple to put an end to their conflict, the judge has to recognize the impossibility of reconciling them.

6. The judge pursues his narration by recalling that following the failure of the attempt at conciliation, the court had decided to appoint two mediators (*bakamayn*). The latter had accomplished their mission and submitted a report recommending the separation of the couple by means of *khul'*, having realized that their life in common had become impossible.

The law of the year 2000 stipulates that in case the attempt at conciliation fails, two mediators must be appointed by each party from among the members of their respective families. They must then try for a maximum period of 3 months to reconcile the couple (*li-mawalat masa'a al-sulh baynabuma*).¹⁵ If they fail by the end of that deadline, and if the woman maintains her claim, the judge must dissolve the marriage, even if the husband does not agree.

The judge, however, is free to follow or not the conclusions of their report. The law of the year 2000 does indeed indicate that the court can select to accept the conclusion of the arbitrators or the conclusion proposed by only one of them, or to adopt any other solution drawn from the examination of the file. The arbitrators do not have the authority to decide.

This stipulation making it imperative to resort to arbitration did not appear in the first draft of the law submitted to the People's Assembly; it was added when the text was introduced by the Minister of Justice in answer to a pressing request by the Consultative Council. The Minister justified that amendment before the People's Assembly as being in conformity with the prescriptions of the school of thought of Imam Malik which authorizes the judge to appoint two arbitrators to try and reconcile the couple in case of *khul'* for a maximum period of three months before pronouncing his decision. The president of the People's Assembly, Fathi Surur, also affirmed that such a measure was indeed in conformity with the principles of the Maliki school, applied in Morocco and in other Arab countries. The adoption of that amendment helped to overcome the reticence of some deputies concerning article 20.

The Supreme Constitutional Court then stops its narration of the facts to introduce the constitutional dimension which led to its intervention in the case, that is when, the court notes, the defence raised the question of the unconstitutionality of Law No. 1/2000 and, in particular, that of article 20 thereof. The judge dealing with the substance, having considered this challenge serious, allowed the claimant to resort to the Constitutional Court.¹⁶

One realizes that in its narration of the facts, the court only dwells at length on the elements of the procedure stipulated by article 20, not mentioning anything that was unnecessary to legally justify the regularity of the procedure followed by the judges dealing with the substance and, therefore, the regularity of why and how it was seized of the case. Even though the report of the commissioners' body¹⁷ indicates that a female child had been born to the marriage; that the wife had asked her husband to repudiate her; that the family and friends had intervened more than once in an attempt to find an amicable solution and that the mediators appointed by the court had been social workers and not members of the couple's family, the Constitutional Court did not deem it necessary to go back to all those elements in its own narration. The choice made by the court shows that the work of the judge does not only consist of a decision regarding the facts (or regarding the law), but that it "deals, at least in part, with their foundation and their legal qualification. Yet, the facts in themselves cannot be taken into consideration unless they are formulated within concepts and within a legal system" (Spiz 1995: 289). Even if the Constitutional Court is not a judge of facts and is not called upon to legally qualify them it, nevertheless, has to make sure of the legality of its being seized of the case. Thus it must verify that the procedure that led to the question of constitutionality was not incorrect and that the claimant did indeed have an interest in the case. To do so, it refers itself to the procedure stipulated by article 20 of the law of the year 2000, deleting from its narration everything unnecessary for the justification of its objective.¹⁸

Following this reference to the facts at the origin of the case, the constitutional judge will give answer to the three arguments concerning unconstitutionality advanced by the claimant, starting with the procedure that led to the adoption of Law No. 1/2000 which the court will briefly call to mind.

The Court Examines the Procedure Followed for the Adoption of the Law

In answer to the allegations claiming that the law on the *kebul'* had not been submitted to the Consultative Council whereas it is among the texts that have to be submitted imperatively for a prior opinion, the court underlined the fact

that the draft law had indeed been submitted to the Consultative Council on 25 and 26 December, 1999 and had been approved after being debated.¹⁹ The complaint is thus not founded. The court clearly indicates that it does not have to pronounce itself with regard to the necessity or lack of necessity of consulting the Consultative Council since, anyway, the draft had been submitted to it.

If the Constitution of 1971, as amended in 1980, stipulates in its article 195 that “the laws completing the Constitution (*al-qawanin al-mukammila li-l-dustur*) must be submitted to the Consultative Council for its opinion, it does not, however, give a definition of the meaning of “laws completing the Constitution” nor does it enumerate them. It is only in 1993, in a case also concerning personal status law, that the Supreme Constitutional Court clearly indicated, finally, what those laws consist of. It recalled that several provisions of the 1971 Constitution referred to a law in order to organize their implementation or in order to define the framework and limits within which they are applicable. If this reference by the Constitution to the law is a necessary condition for a law to be considered as “completing the Constitution,” it is not, however, a sufficient condition. The court added that not all the texts referred to by the Constitution must be considered as such. Only the laws explicating a fundamental rule (*qa’ida kulliyya*) are to be considered part of those complementary laws. In other words, only rules that are protected by all constitutions, because to omit them would deprive the text itself of any value. As an example, the Court mentioned the rules related to the protection of the independence of the judiciary. In that case of 1993, the recourse concerned Law No. 100 of the year 1985 amending the provisions relevant to personal status. The court noted that no stipulation of the 1971 Constitution referred to the adoption of a law regarding personal status. Thus, since the first condition had not been met, the law of 1985 could not be considered as a law “completing the Constitution”.²⁰ The fact that the Consultative Council had not been consulted when the law was adopted did not involve its invalidity.

The report of the commissioners’ body calls to mind this jurisprudence and, therefore, the non obligatory nature of submitting Law No. 1 for the year 2000 to the Consultative Assembly, since it was also a law dealing with personal status matters. The fact that the Government had, nevertheless, elected to submit the text to the Assembly for its opinion despite the 1993 decision, could be the result of excessive prudence following the invalidation in 2000 by the Supreme Constitutional Court of the procedure of adoption of the law concerning associations, adopted in 1999, which had not been submitted to the Consultative Assembly. The Supreme Constitutional Court

had decided in that case that the 1999 NGO law was a law “completing the Constitution” and had judged it unconstitutional on procedural grounds.²¹ It is also perhaps because of the fact that some consider the law of the year 2000 to be related to the right to a fair trial, a right contained in the 1971 Constitution.

The way in which the Supreme Constitutional Court determined the significance of the term “laws completing the Constitution” shows the freedom of interpretation given to the court. Not only did the court determine the criteria necessary for such, it also was the one to decide, case by case, which laws were to be recognized as “completing the Constitution.” The criterion of the “fundamental rule” is, in itself, open to interpretation. That decision shows that the court’s reasoning is only deductive in appearance. In fact, the interpreter, in our case the court, at its own discretion, establishes for itself the norm that it subsequently applied. It is only later that it sought the principle or principles of interpretation allowing it to justify the meaning attributed to the text and that established the deductive process in giving the motive of its decision. The judge does not interpret a text through a process of pure deductive logic; several subjective elements of appreciation are taken into account.²²

After having been submitted to the Consultative Assembly, the law was then communicated to the People’s Assembly in January 2000 and was adopted. What the decision of the court does not, however, allow us to retrace, are the very heated debates that took place in both assemblies, mainly concerning the Islamic nature of the *khul’* as well as its possible effects on Egyptian society.

The Court and the Conformity of *khul’* with the Principles of the Shari’a

The court next dealt with the conformity of article 20 with the principles of Islamic shari’a, since the claimant had affirmed that the shari’a demanded the prior agreement of the husband. The revolutionary nature of the law of the year 2000 resides indeed in the fact that it does not require the agreement of the husband. Yet, with the exception of divergences as to certain details, the four Sunnite schools seem unanimous in demanding the husband’s agreement as part of the *khul’* procedure.²³ In answer to this argument, the Court examined successively two types of events that had taken place in the past, events that it related in its own terms: its previous decisions regarding the interpretation of article 2 on the one hand, and principles of the shari’a on the other.

What Happened in Previous Decisions of the Court?

The Supreme Constitutional Court began by calling to mind that “in conformity with its constant jurisprudence,” article 2 of the Constitution, as amended in 1980, means that legislative texts must not contradict the rules of the shari’a whose origin and significance are absolute (*al-ahkam al-shar’iyya al-qat’iyya fi thubutiba wa dalalatiba*), those rules being the only ones for which interpretative reasoning (*ijtihad*) is not authorized. Since they incarnate the foundations (*thawabit*) of Islamic shari’a, they admit no interpretation and no modification (*ta’wil aw tabdil*).

To the contrary, there exist relative rules (*ahkam zanniyya*) either because of their origin, or because of their significance or also because of both. The latter can be submitted to interpretative efforts (*ijtihad*) within the framework of the organization of human affairs (*shu’un al-’ibad*) and in order to protect their interests which change and multiply as life evolves and as changes take place in both space and time. The Court also called to mind that the “person in authority” (*wali al-amr*)²⁴ is the best placed to undertake such an *ijtihad* and that he may resort to reasoning whenever there is no explicit text. The Court added that the shari’a does not attribute a sacred nature (*qudsiyya*) to any opinion.

In a consideration based on a basic principle established for the first time in 1993,²⁵ and later systematically repeated in all its decisions regarding the conformity of texts with article 2 of the Constitution, the constitutional judge thus affirmed that he had to make a distinction between absolute and relative principles of the Islamic shari’a.²⁶ In his opinion, only the principles “whose origin and significance are absolute,” i.e. which represent uncontestable Islamic norms, be it because of their source or their meaning, must necessarily be applied. They are fixed; they cannot be subject to interpretative reasoning and thus cannot evolve with time. They represent the fundamental principles and the fixed foundation of Islamic Law.²⁷ The role of the Supreme Constitutional Court must, therefore, be limited to verifying whether or not they have been respected and that any contrary norm shall be considered unconstitutional.

Apart from those absolute principles, however, the Constitutional Court also identified a group of relative rules, either with regard to their origin or to their significance, or with regard to both at the same time. They are rules which can evolve in time and space, they are dynamic, they give rise to different interpretations and they are adaptable to the nature and the changing needs that take place in society. It is up to the *wali al-amr*, i.e. the legislator according to the Constitutional Court, to carry out the task of interpreting and establishing the norms related to such rules, guided by his individual reasoning and in the

interest of the shari'a. Such an interpretative effort should be based on reasoning and will not be limited by any previous opinion.²⁸

In 1985,²⁹ the constitutional judge, called upon, for the first time, to pronounce himself with regard to the interpretation of article 2, had established the principle of non-retroactivity of the 1980 amendment, declaring himself not competent to verify the conformity with Islamic Law of laws adopted prior to 1980. Noting that article 2 of the Constitution had been amended in 1980 to read as follows "the principles of Islamic shari'a are the main source of the legislation" (*mabadi' al-shari'a al-islamiyya al-masdar al-ra'isi li-l-tashri'*) instead of "the principles of Islamic shari'a are a main source of legislation" (*mabadi' al-shari'a al-islamiyya masdar ra'isi li-l-tashri'*), the Court had interpreted this stipulation as introducing a new obligation, one that did not have to impose itself except as of the moment of its promulgation. Laws subsequent to the constitutional amendment of 22 May 1980³⁰ must then respect the principles of Islamic shari'a or else be declared unconstitutional for having violated article 2 of the Constitution. On the other hand, all the texts adopted by the Egyptian legislator before 22 May 1980 are exempted from such a control; in other words, the Supreme Constitutional Court is not competent to verify their conformity with the principles of Islamic shari'a. These texts will, consequently, remain in force as long as they have not been abrogated or amended by the legislator.

If the Court recalls in principle this distinction in all the matters related to article 2³¹, we note that, in the present case, it did not explicitly quote the decision to which it was referring. The Court only referred in general to its own "constant jurisprudence"³². In this case, the text, subject recourse, had been adopted in 2000, i.e. much after the 1980 amendment. The exception of non-retroactivity of article 2 could not, thus, be applied and the Court had to examine the substance of the case.

This interpretation in 1993 by the Court as to the scope of article 2 was more or less well-received. It shows, once more, how a text can be the bearer of several significances and that the choice of the judge constitutes the authoritative interpretation. Moreover, let us note that the Court invokes its own decisions handed down in previous cases. When, as is the case here in 2002, the principle in question in the claim has already been the object of a previous decision, but that the stipulation itself is for the first time submitted to its control, the Court repeats a full presentation of its motives and does not only refer to the previous decision in which it had already established the principle. It very often happens, as is the case here, that the Court repeats word for word the same justifications.

Even if its own precedents do not bind it legally, the court thus attributes an indirect normative scope to its own jurisprudence by giving its own interpretations the value of being a precedent. One may object that this solution, even if it allows for a certain stability of the legal order, may, however, prevent the Supreme Court from adapting its own interpretation of the Constitution to transformation in the normative, social and institutional field in Egypt. Even though on the strictly legal level, nothing can prevent the Supreme Court from not applying its own jurisprudence.

What Happened in Islamic Fiqh?

After this reference to its jurisprudence relative to the interpretation of article 2, the Supreme Constitutional Court launched into an explanation as to the significance of marriage in the shari'a, explaining that it had been conceived as meant to last forever or, at least, as long as the personal relationship between the couple was such that they had an appropriate marital life. But, if aversion came to replace compassion, if dispute intensified and made understanding more and more difficult, added the Court, shari'a had authorized the husband to put an end to the marital relationship by means of repudiation, to which he was entitled in case of necessity and within the limits fixed by shari'a.

In exchange for this right given to the husband, the Court underlined, it was necessary to allow the wife to ask for a divorce for various reasons and, moreover, that she be allowed to free herself by reimbursing the husband what he had given her as a prompt dowry (*'ajil al-sadaq*), a procedure known as *khul'*. In either case, explained the Court, the wife must address herself to the judge.

The constitutional judge then invoked a Qur'anic verse as well as a *hadith* by the Prophet which, according to the Court, were at the origin of the *khul'* procedure. Thus the Court quoted verse 229 of the Surat of the Cow (*al-Baqara*) according to which "Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself (...)." The Court stressed the fact that the woman's right to resort to *khul'* and to set herself free in exchange of repudiation, figured indeed in a Qur'anic text of absolute origin.

Then came the *sunna*, added the Court, and the *hadith* of Ibn-Habath as narrated by al-Bukhari, according to which the wife of Thabit b. Qays, though

she had nothing to reproach her husband in matters of religion nor morals, was afraid of being unfaithful to Islam. The Prophet asked her if she was ready to give back a piece of land that she had been given by her husband. She answered that she was indeed ready to give back the piece of land and even more. The Prophet answered that it was not necessary to give back more. After she had given back the piece of land, he ordered Thabet b. Qays to repudiate her and the latter did so. The Court reminded of the fact that several versions of this *hadith* existed and that according to some, the Prophet pronounced the repudiation formula himself in the absence of the husband. The Court added that, however all the versions agreed as to the authorization of *khul'* and that the latter does indeed figure in a text of the *sunna*, also absolute in its origin.

Though the *khul'* does indeed constitute part of the principles which are absolute in their origin, added the constitutional judge, the details of its organization had not been fixed in a definite manner. This had led the Islamic scholars to give their own interpretation. Some of them held that the husband's agreement was indispensable for the woman to be able to resort to *khul'*. Others, however, deemed that it was not necessary for the couple to be in agreement. Now, the text that was the object of the constitutional challenge had been founded on the Maliki school to authorize the wife to resort to *khul'* in case of necessity, if she could no longer bear to live with her husband. This was only a logical solution (*wa laysa dhalika illa i'malan li-l-'aql*), specified the Court, which in no way contradicted the rules of Islamic *shari'a*. One cannot force a woman to live with a man.

As underlined by the Court, the compulsory nature or not of the husband's prior consent for *khul'* is a matter on which the authors of the past had not agreed. What the Court does not add, however, is that this matter gave rise to very heated debates in parliament when the text had been adopted in January 2000.

On the day the People's Assembly adopted the draft law on the principle, January 16, 2000, Sheikh al-Azhar had come personally to defend the law, affirming that it was entirely in conformity with Islamic *shari'a* and that the *khul'*, in particular, figured in both the Qur'an and the *Sunna*.³³ During the debate in the Consultative Assembly, the Minister of Justice had also underlined the fact that the Academy of Islamic Research (*Majma' al-bubuth al-islamiyya*) of al-Azhar had guaranteed the "Islamicity" of the procedure. In the People's Assembly the Minister of *Waqf* also justified the text by the fact that there was no possible discussion that "the *khul'* is an Islamic principle for which there exist several interpretations (*ijtihadat*) among the schools of thought,

and that there was no harm in referring to the predominant opinion considered to be in conformity with general interest.” The minister of justice added that marriage should not be a prison for wives and that the draft law aimed at alleviating suffering and at ensuring equality. The representative of the majority party at the People’s Assembly called upon the deputies to vote in favour of the text, invoking the agreement given by the Academy of Islamic Research which, according to him, put an end to any possible contestation. He went on to say that a wife must not be deprived of the right to *khul'*, a right given to her by Islamic shari'a.³⁴

On the other hand, those who were opposed to the law maintained that draft article 20 was contrary to the shari'a, since the latter deemed the husband's agreement indispensable. Moreover, the conservatives believed that the *khul'* was a major threat to the foundations of Egyptian society. At the Consultative Assembly, one deputy declared that he was opposed to the draft law because it would lead to the dislocation of the family (*tafakkuk al-usra*) and would have nefarious consequences for the children. He added that “the text, in its present form, gives priority to the individual aspect at the expense of the social aspect. Yet Islamic shari'a considers marriage to be a social function (*was'ifa ijima'iyia*). A woman may make wrong use [of that text] by declaring that she detests her husband and asking for the *khul'*, and the judge may grant her a divorce even if the words she had uttered were not true, but just an abusive use of the right in question (*ta'assuf fi istikhdam al-haqq*).” He added that it was up to the legislator to protect the existence and the cohesion of the family and went on to conclude: “this text is dangerous (...), it should be submitted to further discussion in order to establish rules to protect the family from the suffering of the husband and the obstinacy of the wife in order to defend the interests of society.” This declaration elicited an immediate intervention by the Minister of Social Affairs who reacted strongly by declaring: “If the deputy is opposed to granting a wife this right, why is he not opposed to the right given to the man?” This reaction immediately led to several protests within the Assembly: “No! No! No! This is a principle of the shari'a Madam Minister! And you are trying to violate this principle! You should be ashamed of yourself (*haram 'alayki*)!”

One deputy declared before the People's Assembly: “*Khul'* is a kind of irrevocable divorce that requires two conditions: first of all, the agreement and the consent of the couple and, secondly, divorce is in the hands of the husband and it is up to the husband and not the judge to pronounce clearly the word divorce. All four doctrines are unanimous about it. The draft law, in its present form, is contrary to the shari'a in that it gives a woman the right to *khul'* without the husband's consent. The law should be amended so as to

be in conformity with the unanimous opinion of the Islamic scholars (*ijma' al-fuqaha*)” (Ferrié and Dupret 2004: 273). The representative of the liberal party al-Ahrar also insisted on the necessity of the husband’s prior consent. To which another deputy, member of the Academy of Islamic Research, answered by affirming that, if the couple did not reach an agreement to proceed with the *kbul'*, then Islamic shari'a authorized the wife to resort to a judge as being the representative of the authority (*na'ib 'an wali al-amr*). He also added that “article 20 in its present formulation is not contrary to the principles of Islamic shari'a, and is in conformity with both Imam Malik and Imam al-Shafi'i who authorized the woman to redeem herself by mutual consent or by addressing herself to the authorities (*sultan*).”

Other deputies questioned the acceptance of the draft law by the Front of the Ulema of al-Azhar (*Jabhat ulama' al-Azhar*), and blamed Sheikh al-Azhar for not having consulted them. It is true that some members of this institution had written a statement published in different newspapers, in which they had asked for a three months postponement of the discussion of the *kbul'* so that they may proceed with an in-depth study of the draft article. The deputies of the Wafd party withdrew from the People's Assembly in protest against the fact that article 20 constituted a matter of substance and not one of form and that it should not have been included in a law on procedure. Above all, they considered that it was not in conformity with the shari'a and that it was wrong to pretend that the Academy of Islamic Research had given its unanimous approval since only 23 members out of the 40 had participated in the debate.

This lively controversy that had shaken both the People's Assembly and the Consultative Assembly does not appear in the Court's narration. The latter recognizes that there are different versions of the *hadith*, but maintains that all of them authorize the *kbul'* and that, since there is no unanimity among the Islamic scholars about the meaning of *kbul'*, the legislator was entitled to legislate in the matter. By mentioning the fact that there are indeed several versions of the *hadith* in question, the Constitutional Court however proved itself more concerned than the legislator about stating the fact that there existed more than one opinion. Indeed, the legislator by means of the presentation made by the Minister of Justice before the People's Assembly or in the explanatory note to the law of the year 2000, only gave one version of the *hadith*, the one in which the Prophet ordered Thabet b. Qays to divorce his wife, giving him no chance of refusing: “*aqbal al-hadiqa wa tallaqlha tatliqa*” (accept the piece of land and divorce her).

What did actually happen at the time of the Prophet? Each protagonist gave his own version and interpretation of the facts about what happened at

that time. For some, the prophet had ordered Thabet b. Qays to divorce his wife. For others, he only suggested to him to do so. By choosing one of the versions of the Prophet's *hadith* and by proceeding to undertake an *ijtihad*, the Court did indeed give its own version of what *fiqh* and the law of the year 2000 actually meant. The debate concerning the "Islamicity" of the *khul'* as codified by the Egyptian legislator in Law No. 1/2000 shows, moreover, the flexibility that the norms of Islamic shari'a can have according to the interpretations thereof.

The *khul'* and the Right to a Fair Trial

Finally, the claimant was attacking the fact that the judge's decision concerning the *khul'* was without appeal.³⁵ Here, the Court answered by invoking its "constant jurisprudence," to declare the claimant's objection not receivable, recalling that it had, in the past, judged that limiting the action before the courts to one single instance of jurisdiction was not a violation of the constitution since it fell within the discretionary prerogatives of the legislator when organizing the laws, on the condition that such a limitation should have objective foundations.³⁶

It is true that the constitutional judge had affirmed more than once the discretionary prerogative of the legislator to decide that a judgment would be handed down first and last and that such a principle was not in violation of the constitution.³⁷ With all due respect for parliamentary sovereignty, the constitutional judge is indeed seeking to maintain a margin of appreciation for the legislator, one that is sufficient for him to carry out his legislative function. Nevertheless, the judge established limitations to this discretionary prerogative of the legislator: the prohibition of any judicial recourse must be motivated by general interest (*al-saleh al-'amm*).³⁸ This prohibition must also stem from a clear text (*sarih*) and must be based on an objective foundation.³⁹

Thereafter, the Court sought the intention of the legislator when he established the regulation of the procedure of *khul'* in the law of the year 2000. The Court explained that all the provisions of the article completed one another and that they constituted an indivisible whole. The intention of the legislator was to put an end to the prejudice and the discomfort of both parties to the marital relationship, since the article leads to putting an end to the injustice suffered by the wife because of the husband's obstinate refusal to repudiate her even though there was no possible remedy to the situation. Similarly, added the Court, it dispenses the husband from any financial burdens that he would otherwise have had if the marital relationship had been ended by a conventional divorce.

The Court then recalled how the legislator had regulated the *khul'*. The wife must reimburse the sum of the dowry as stated in the marriage contract or as determined by the court in case of a litigation about the sum. This precision given by the Court is interesting because, practically speaking, the judges of substance when dealing with cases of *khul'* are faced with several such litigations. Indeed some husbands contest the sum indicated in the marriage contract; they declare that it does not correspond to the sum which had actually been paid. Problems related to the application of the law arose, particularly concerning the reimbursements by the wife of the part of the dowry paid at the moment of marriage, the one appearing in the marriage contract being one that does not always correspond to the actual sum paid by the husband. The State levies certain taxes proportionate to the sum of the dowry, that is why the husbands tend to declare a sum inferior to the one actually received by the wife. If one is to stick to the wording of the law, however, the wife is only called upon to reimburse the sum mentioned in the marriage contract, i.e. very often 1 Egyptian pound. Faced with the protests of the husbands, some judges resort to article 19 of the Law No. 25 for the year 1929 in order to evaluate the sum to be reimbursed by the wife. According to that provision, in case of contestation about the sum of the dowry, the burden of the proof falls upon the wife. If she can provide no proof, then the judge will accept the sum indicated by the husband under oath. If the judge deems that the sum indicated by the latter does not correspond to general custom concerning dowries paid to women of the same social standard as the wife in the case, then the judge can fix another sum.

The explanatory note of the law of the year 2000 makes it clear, however, that article 19 of Law No. 25 for the year 1929 should only be applicable if the sum of the dowry is not mentioned in the marriage contract. In case of litigation about the sum indicated, the personal status judge must respect the sum registered in the contract and the husband may contest that sum before the competent courts. The Court seems to stand in favour of contesting husbands and complacent judges by envisaging the possibility of having the exact sum of the dowry contested.

In concluding its reference to the functioning of *khul'*, the court added that the legislator had based himself on the consensus of the Islamic scholars (*akhadha bima ajma'a 'alayhi fuqaha' al-muslimin*). Upon reading the parliamentary debates and recalling the divergent views of the different schools of thought, one can however, query the court's affirmation.

The court ends its explanation by affirming that it was logical for the legislator not to make allowance for any appeal of decisions concerning the

kbul', since the latter is founded on personal considerations that only the wife can know. Only God can bear witness of her animosity against her husband and of the impossibility to continue living with him. The judge must then believe her declarations and it would be useless to allow an appeal's procedure. To claim *kbul'* is different from any other claim, added the court. To allow an appeal would go against the social objectives sought by the legislator.⁴⁰

The President of the Court Disqualifies Himself: What Happened During the Preparation of the Draft of the Law?

After having examined the content of the Supreme Constitutional Court's decision, what remains for us to do is to query the absence of the Court's president during the examination of the case.

The Court's decision gives a list of the members who took part in the examination of the case and adds that it met under the presidency of its vice-president, Mahir al-Bahiri. What the decision did not specify, is that the court's president Fathi Najib, had disqualified himself in conformity with article 15 of the law governing the court, which refers to the conditions of withdrawal applicable to the members of the Court of cassation. In conformity with the Code of civil and commercial procedures, judges must disqualify themselves in different circumstances where a lack of impartiality might be feared vis-à-vis the parties involved or the case itself.⁴¹ Why did the president of the Constitutional Court fear that he might not be impartial with regard to this decision?⁴²

We must go back to the history of the preparation of the draft of this law in order to understand the reasons behind Fathi Najib's decision. As was recalled by the Minister of Justice before the Parliament when he introduced the draft, the preparation thereof lasted nine years. The initiative had been launched by a group of activists, lawyers, NGOs and other scholars (Singerman, 2003). Various past experiences and several failures show that it is not easy to reform personal status law in Egypt. The feminists who undertake this task are soon considered traitors being paid by the West or are accused of supporting anti-Islamic reforms: "patriarchy has had the temerity to label feminism in Egypt as Western (akin to its labelling feminism un-Islamic) in an effort to discredit feminism by undermining its national legitimacy (Badran 1993:144). In order to reject these accusations of anti-Islamism, the group in question chose to place itself at the very heart of the religious reference, i.e. on the very terrain of its detractors, in order to seek the support of modern and liberal religious men.

That is what Mona Zulficar explains, one of the main instigators of the draft. She thus openly admits having used the strategy of religious reference,

particularly on the occasion of the campaign for reforming the marriage contract (Zulficar 1999:14): “for the first time in the Egyptian women’s movement, we reclaimed our right to redefine our cultural heritage as Muslim women under the principles of the shari’a (...). The religious extremist groups consistently place women’s issues at the forefront of their publicized agenda to implement shari’a principles or “codify” shari’a and assert their cultural identity. They, therefore, accuse any secular feminist opposition of being anti-Islamic, an agent of either the “non-religious” Eastern block or “the corrupt” Western block. It was therefore essential for the women’s movement to diversify its strategies and adopt a credible strategy that could reach out and win the support of simple, ordinary religious men and women” (Zulficar, 2003:14). In exactly the same way as in the early XX century, the feminists had used the nationalist discourse in order to gain recognition and to formulate a certain number of claims. At the time, some of them had justified the necessity of improving the status of women by the fact that children are educated by mothers and that illiterate and uncultured mothers can not properly bring up children; this weakens the families and, consequently the nation. Also at that time “a nationalist/feminist alliance of progressive men and women produced a new discourse on women and the family which was predominantly instrumental in tone. Women’s illiteracy, seclusion and the practice of polygyny were not denounced merely because they so blatantly curtailed the individual human rights of one half of the population, but because they created ignorant mothers, shallow and scheming partners, unstable marital unions and lazy and unproductive members of society. Women were increasingly presented as a wasted national resource” (Kandiyoti 1991:9 and following).

Conscious of the fact that any attempt to reform the personal status law is quickly politicized, the legislator always made an effort to justify his laws by resorting to endogenous solutions, legitimized by having recourse to the precepts of shari’a. He consequently presents any transformations introduced into the law as being the result of an internal process of renovation, one that respects the requirements of Islam, but not as the result of importing codes and principles from abroad. The reference to Islam seems “in a way, to have become a condition for ‘audibility’ and respectability – one leading to the other – that very few people think of doubting” (Ferrié and Dupret 2004:264).

The coalition wherein the initiative of the draft law originated had also positioned itself in relation to the religious repertory and resorted to arguments from Islamic law in order to justify the adoption of article 20 of Law No. 1/2000. The call for a new reading of the classical texts, and for the need to re-interpret them in order to restore their initial spirit deformed by

patriarchal interpretations by men, is not something new as such: "male bias in traditional interpretations of the Islamic sources can be seen as the major problem in reconciling the Islamic tradition and human rights (...). As a whole, members of the Islamic religious establishment have tended to be conservative, if not reactionary, in their attitude towards women's rights" (Mayer, 2001:368). Some progressive Muslims have already attempted to break this masculine monopoly and to associate women in the re-interpretation of Islamic sources: "One task facing Muslim feminists is to disaggregate what is properly Islamic from patriarchal attitudes and customs and to highlight the elements in the Islamic heritage that are favourable to women's claims to freedom and equity" (ibid :369). What is new is that even the NGOs and women's rights defenders who had so far been secular now place themselves resolutely on the grounds of shari'a and claim the right to proceed to a new reading of classical texts and to the necessary and logical amendment of the present personal status laws.

This argument was repeated by the Minister of *Waqf* himself when he affirmed before the People's Assembly that a wife's right to resort to *khul'* would lead to the establishment of a balance with the right to repudiation recognized to the husband, and that Islam respects the feelings of women: "the *khul'* is in conformity with the Qur'an and the Sunna," he added, "we must get rid of obsolete and static habits and customs (*al rakida wa al baliyya*), and we must come back to Islamic shari'a for it is the source of legislation, in conformity with the constitution." The government defended its draft mainly by referring to the Islamic repertory, going directly to the Qur'an and *hadith*, without any mention of the contrary interpretations given by the four Sunnite schools of thought.

By claiming a reform of women's right on the basis of an Islamic reference, the Egyptian coalition adopts the point of view of Abdullah an-Naim who considered international standards of human rights as having little legitimacy in Muslim countries because they are perceived as alien to their values. For this scholar, the defenders of human rights must place themselves within the framework of Islam if they want to be effective: "The only effective approach to achieve sufficient reform of shari'a in relation to universal human rights is to cite sources in the Qur'an and sunna which are inconsistent with universal human rights and explain them in historical context, while citing those sources which are supportive of human rights as the basis of legally applicable principles and rules of Islamic law today" (An-Naim 1990: 171).⁴³ Let us note that this is also the position adopted by the Supreme Constitutional Court, who affirmed the legitimacy of its re-interpretation of the relatives rules of the shari'a.

Fathi Najib, then advisor to the Minister of Justice played a basic role in the preparation of the draft. "He is recognized by many activists in the coalition as one of its prime 'architects' and strategists, who for a variety of reasons that are both professionally and personally-motivated, believed that women should have greater access to divorce and that personal status law needed substantial reform on a variety of fronts" (Singerman 2003: 19). He defended the draft up to when it was submitted to the People's Assembly, the Minister of Justice, at the opening of the debate in the Assembly on January 16, 2000, having requested the Assembly to authorize his presence. In an interview given in 2001 and in answer to the question "What challenges did you face as a legislator in the process of issuing this law?" he answered: "A culture that upholds the supremacy of men and uses religion in that manner. A patriarchal culture based on male chauvinism. That is why no one can imagine that women can be given the right to break their chains."

A few months following his death in 2003, a coalition of twelve non governmental organizations paid him tribute by organizing a special day of commemoration for him. It was even decided to set up an annual award in his name, to be given to a defender of the rights of men or women.⁴⁴

Conclusion

It may be noted that the international and the constitutional repertoires of human rights were not even mentioned in the debates⁴⁵. The only time when a member of the People's Assembly criticized the draft of article 20, considering it in violation of the principle of equality stipulated in article 40 of the constitution, he did so because according to him, only well-to-do women will be able to resort to the *khul'* procedure. When the notion of women's rights was mentioned in the parliamentary debates, it was with reference to the rights granted to her by Islamic shari'a and not in relation to the rights guaranteed namely by the International Convention against all Forms of Discrimination against Women, ratified by Egypt.⁴⁶

The Constitutional Court itself makes no mention of the international law on human rights in its decision, whereas the same Court had, more than once, referred to international treaties for interpretation purposes, in order to confirm the existence of a fundamental right or in order to shed light on its content (Bernard-Maugiron 2003: 436 and following).

As we have seen, the activists themselves stood on the grounds of Islamic law in order to establish the legitimacy of their claims. No mention was made of international human rights law nor of the conventions regarding the rights of women. This position was due to a strategic choice: "It was evident that

we could not rely on modern constitutional rights of equality before the law, as these did not equally apply under family laws, which claimed to be based on the principles of shari'a. We could not afford to shy away from the challenge and continue using solely a strategy based on constitutional and human rights. We had to prove that the religious discourse could also be used by women to defend their cause" (Zulficar 2003: 14).⁴⁷

The compatibility of the *kbul'* law with international human rights law is, anyhow, contested by different sources. The United Nations committees responsible for supervising the implementation of conventions regarding human rights ("treaty bodies"), criticized the fact that the wife had to relinquish her financial rights in exchange for putting an end to the marriage; according to them, this only perpetuated the inferior status of women. The Human Rights Committee also criticized the *kbul'* in its conclusions: "The Committee notes with concern that women seeking divorce through unilateral repudiation by virtue of Act 1/2000 must waive their rights to financial support and, in particular their dowries {articles 3 and 26 of the Covenant}. The State party should review its legislation as to eliminate financial discrimination against women."⁴⁸ In its conclusions, the Committee for the Elimination of all Forms of Discrimination against Women (CEDAW) noted with concern that "women who seek divorce by unilateral termination of their marriage contract under Law No. 1/2000 (*kbul'*) must in all cases forego their rights to financial provision, including the dowry."⁴⁹ Similarly, Human Rights Watch in its report published in December 2004, criticized the *kbul'* procedure for the same reasons: "While *kbul'* has clearly helped some women have easier access to divorce, it has not adequately remedied the fundamental inequality of the divorce process. Human Rights Watch interviews reveal that because of the need to forfeit both the rights to any marital assets and the rights to any future support, this option is limited to women with significant financial resources or those who are desperate for a divorce" (Human Rights Watch 2004: 24). It is true that, to the contrary, the UNDP report on human development of 2000 considered the *kbul'* as representing a major victory for women's rights in Egypt: "The start of the 21st century witnessed a major victory for women's rights in Egypt – the passage of a law in February 2000 enabling a woman to obtain a divorce without her husband's consent" (UNDP 2000: 114), adding, rather inaccurately: "Egypt recently became the second of the Arab States after Tunisia to grant equal divorce rights to women" (UNDP 2000: 37).

Mona Zulficar welcomed the decision of the Supreme Constitutional Court, considering that it represented "a victory for human rights, women's rights and for all those working for social progress in this country" (Tadros, 2002),

adding that “the first turning point in Egyptian women’s history was made by Qassem Amin a hundred years ago [by encouraging women’s emergence into public society], and the second was made by the Supreme Constitutional Court when it ruled that the law is in full compliance with the shari’a and that it does not violate the right of appeal” (ibid).

Does article 20 represent or not a certain progress in favour of improving the status of women? It all, in fact, depends on what will happen when this law will be implemented by the judges dealing with substance. Unlike the Supreme Constitutional Court, they will be examining facts. Yet, like the constitutional judge, they too will proceed to a retrospective formalization *de jure* and *de facto* in order to satisfy the requirements of correct procedure and legal relevance. This may differ from one judge to another, since it will essentially have to do with an act of will.⁵⁰

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INVESTIGATING AND PROSECUTING POLICE ABUSE IN EGYPT*

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Police Violence in Egypt

Ill-treatment of suspects and detainees in custody appears to have been a regular feature of Egyptian police and, more broadly, of officials' behaviour in general over the past two centuries.¹ Recurring attempts to regulate official violence (making it the exception and not the norm) were not inspired by humanitarian or legal considerations, but were rather part of the overall attempt to assert governmental authority over state officials.² British rule in Egypt (1882-1922) brought about an increasing militarization of the police.³ After independence, Egyptian police were used as one of the instruments for crowd control, and often acted with excessive violence; in the criminal justice system, abuse of suspects remained part and parcel of police investigative techniques.⁴ Despite several attempts to reform the police, improve performance and rebuilt trust,⁵ Egyptian police remain under-trained and underpaid and still display few traits of a service institution. While there are no reliable data on how many persons have suffered abuse at the hands of Egyptian police, human rights groups have consistently reported tens of deaths in police custody per year, and many more incidents of abuse at police stations, mainly by sustained beatings, suspension from hand and feet, and electroshocks.⁶

Since the late 1990s, the media and the judiciary have picked up on complaints about police violence. The reasons for this increased attention appear numerous: Police brutality seems *de facto* to have increased and spread beyond the major cities. Whether this is related to impunity encouraging police

abuse or to internal pressures on police generated by the attempt to counter the public perception of rising crime rates⁷ cannot be determined. Local human rights organizations have used the narrow margin of free speech⁸ to document and denounce police abuse, and have been given some publicity in the press. Parallel to increased media attention, the judiciary has prosecuted several policemen and some prison guards in connection with deaths in custody. Reasons for this are even harder to assess. Maybe media attention has led the Egyptian government to value accountability for deaths in custody more than it used to in previous decades. More cynically, one could interpret judicial attention to police accountability as a substitute for the prosecution of State Security Officers, who committed grave human rights abuses while hunting down Islamists and their alleged sympathizers since the 1970s.⁹ But even that explanation would assume some susceptibility of the government to the blame-and-shame-tactics exerted by human rights groups and some media.

This chapter will analyse legal and judicial (re-)constructions of police brutality and torture during the late 1990s. I will thus not dwell on ‘what really happened’ in a particular incident of police abuse. Rather, I will examine the strategies and means – socio-legal and medico-legal – by which various actors in the criminal justice system, the government and in human rights organizations debate and construct police action. In what follows, I will first assess the competing legal and political “truths” about police abuse and its prosecution, and their relevance in the current Egyptian context. I will then examine socio-legal police strategies, and their importance for judicial (re-)constructions of police abuse. Lastly, I discuss the role of medico-legal knowledge in prosecutions of policemen, and argue that the rules for the systemic relationship between law and medicine are made by the legal system.

The Legal Context: Torture, Cruelty, and Assault as Criminal Offences

The Egyptian constitution forbids “physical or psychological injury to detained or imprisoned citizens.”¹⁰ There is no statute of limitations for criminal complaints or civil compensation claims if this constitutional guarantee has been breached.¹¹ Any statement proven to have been made under duress is deemed null and void.¹² The Egyptian Penal Code devotes its sixth chapter to regulating “the use of force and ill-treatment by public servants.” But Article 126, the key penal code provision relating to torture and death in custody, is weak, with a significant loophole:

An official who orders the torture (*ta'dhib*) of a suspect (*muttabam*) or commits this act himself to extort a confession, is punished by hard

labour or imprisonment between three to ten years. If the victim dies, the ruling will be as for premeditated murder (*qatl al-'amd*).

The Egyptian Court of Cassation ruled in 1966 that for article 126 to be applicable, it was not necessary that a confession be actually extracted but that intent was sufficient.¹³ However, if torture is ordered or used against a person other than a suspect (for example, a suspects' family member or a convict) or with another goal than extracting a confession (for example, to threaten or to punish), article 126 is, according to its own wording, not applicable.

The government disputes that article 126 and similar articles in this chapter fall short of the international definition of torture (which is unrestricted in respect to the status of the victim and the intent of the offender)¹⁴ and stresses that article 126 is adequate since it criminalizes torture, and provides for a harsh penalty.¹⁵

However, since article 126 defines torture narrowly, offenders are usually charged with other offences, carrying lenient punishments.¹⁶ Thus, article 129 punishes civil servants who use cruelty (*qaswa*) "infringing upon honour or inflicting physical pain" with a prison term of no more than a year or a fine of £E 200, provided that the offence did not occur during arrest.¹⁷ Illegal detention carries an undefined prison term or a fine of £E 200 (article 280). If illegal detention is accompanied by infliction of bodily harm (*ta'dhibat badaniyya*) or death threats, the sentence will be a term of hard labour (article 282). In legal practice, the most frequent main charge against police officers transferred to criminal trial is "assault leading to death" (*i'tida' afda ila mamt*) (article 236).¹⁸ This latter offence carries a maximum penalty of three to seven years in prison. Like other provisions regulating assault, article 236 does not differentiate between offenders. The penalty is identical whether committed by citizen or a public servant.¹⁹ Administrative and disciplinary sanctions for offending policemen consist of different degrees of admonitions, pay-cuts, demotions, and ultimately, demission. Legal provisions appear not too clear as to whether criminal offences – like cruelty, assault and/or illegal detention – may be addressed by administrative or disciplinary sanctions. In practice this seems to occur more frequently than criminal prosecutions (see below, Table 1).²⁰

While torture is defined as a serious offence, in substantive terms, Egyptian law recognizes torture only if committed against a suspect during judicial investigations.²¹ This falls short of the definition of torture under the Convention Against Torture mentioned above and limits the provision's application. As I will discuss below, non-legislative factors limit the article's application even further.

Police Abuse in Numbers: Governmental and Non-governmental Perspectives

Recent official statistics as to abuses committed by police were submitted by the Egyptian government to the U.N. Human Rights Committee in its 2001 report on compliance with the Covenant on Civil and Political Rights and its 1998 report on compliance with the Convention Against Torture. The following table combines the data from both reports.

Table 1. Complaints Against Police Officers and Measures Taken by the Government, 1993-2000

Year	Number of Complaints	Administrative Sanctions	Disciplinary Proceedings	Criminal Proceedings	% of complaints not sustained
1993	63	No data	6	5	83%
1994	61 [or 71]®	No data	2	6	85% [or 75%]
1995	55	No data	6	5	80%
1998	No data	17	3	29	No data
1999	No data	22	1	29	No data
2000	No data	13	7	20	No data

Source: Compiled from: U.N. Doc. CCPR/C/EGY/2001/3, para. 669; U.N. Doc. CAT/C/34/Add.11, para. 152-154.

® Data for 1994 are contradictory: the government claims that there were seventy-one complaints, but details only how sixty-one complaints were processed by the justice system.

The number of complaints received by the Egyptian prosecution (*nijaba*)²² between 1993 to 1995 appear amazingly low for a country of Egypt's size,²³ while the percentage of non-sustained complaints against police appears at least as high as in other countries.²⁴ Unfortunately, in 2001 the government did not provide the total of complaints received by the prosecution.²⁵ Instead, it gave the number of officers held accountable in some way, which has increased considerably. Whether the percentage of non-sustained complaints has decreased proportionally cannot be ascertained from the government's 2001 data. If the percentage of non-sustained complaints reported for 1993-1995 remained constant between 1998-2000, one could calculate a tentative average

of 376 complaints received at the prosecution offices annually; a quite spectacular increase of the average of sixty-three complaints between 1993-1995. If this calculation were correct, this increase could reflect either

- the spread of police maltreatment, and/or
- an increasing willingness of the population to complain about it, and/or
- an increasing willingness of the prosecution to register complaints, and/or
- a serious problem of underreporting in previous years, either by the population or by the prosecution, or both.

If, conversely, the increase in judicial measures against allegedly abusive policemen has reduced the overall percentage of complaints not sustained by the prosecution, this would reflect changes in the criminal justice system's approach to police abuse. For either scenario, the government's data do not allow firm conclusions. More confusion is added when non-governmental sources are taken into account. Lawyers and activists emphasize that the number of complaints submitted to the *niyaba* is only a fraction of actual incidents, since most citizens who have suffered police abuse are too frightened to report it. Many may think that this is what police behaviour looks like and complaining will not get them anywhere: Hafiz Abu Sa'da of the Egyptian Organization for Human Rights (EOHR) estimated that one case of torture in a hundred is reported to his group.²⁶ And yet, a study by the Association for Human Rights Legal Aid (AHRLA) found more than 300 allegations of police maltreatment submitted to the General Prosecution in Alexandria from 1994 through 1996,²⁷ an average of 100 complaints per year in one of the major Egyptian cities. In the second half of 2001, AHRLA claimed to have found 176 police irregularities in one precinct in Alexandria, but they did not indicate how many of those included physical abuse.²⁸ The Human Rights Association for the Assistance of Prisoners (HRAAP) sent 200 torture-related complaints to the prosecution from 1997 to 2001;²⁹ and in 2003-2004, EOHR recorded forty-one complaints, among them fifteen about death in custody.³⁰

Overall, a confusing picture emerges from these data: citizens appear scared to report police maltreatment, but do so to some degree; the prosecution does not handle most complaints adequately, but nevertheless sustains some. Obviously and not surprisingly, there are no reliable data on how wide-spread abuse by the police actually is; nor are there generally accessible and informative data on how many complaints are received at the prosecution and how the prosecution deals with them.³¹

This absence of reliable data is indicative for two essentially incompatible pictures concerning police abuse, both striving to be accounts of the politically relevant truth. For Egyptian NGOs, police brutality constitutes one of the

most pressing human rights issues, condoned if not supported or ordered by the authorities. EOHR, for example, has characterized torture as an “authorized, programmatic policy.”³² In contrast, the government, in recent years far from denying that police abuse occurs, claims that

[t]hese offences are merely individual excesses by particular members of the police, a phenomenon from which no society is exempt. It is not possible to characterize these violations by a minority of policemen as part of a systematic pattern of behaviour ...³³

Due to the political stakes involved for the government and NGOs alike, the respective “truths” will most likely remain. And maybe the tension between these two pictures will, in the long run, increase the pressure to take some measures against impunity. The question remains what effect these measures will have on the day-to-day conduct of policemen and whether they will help to prevent abuse.³⁴

The government’s position and the clear increase in police officers actually put on criminal trial since the late 1990s (see above, Table 1) make the NGO position vis-à-vis the prosecution of police abuse even more ambivalent. Egyptian NGOs work on the basis of research into allegations by victims and/or their relatives. An allegation turns into a legally relevant truth only if (re)-constructed as such by the criminal justice system or if it is convincingly demonstrated that the criminal justice system systematically and permanently fails to find any “truth” in the majority of complaints submitted by citizens. Since the late 1990s, both of these circumstances concur in Egypt: while the criminal justice system has (re)-constructed an increasing number of incidences as cruelty, assault, and, rarely, torture, NGOs continue to claim with credibility that the criminal justice system fails to prevent police abuse, by failing to prosecute and punish all offenders stringently and adequately. Thus, Egyptian NGOs applaud every criminal prosecution of an officer accused of abuse; but, at the same time, also view it as verifying their claim that abuse by police is endemic – considering the large number of complaints not sustained by the prosecution, and thus not submitted to a court’s determination; the often minimum criminal charges abusive officers face; and the frequency with which police are sanctioned administratively or disciplinarily for clearly defined criminal offences.³⁵ Additionally, NGOs have demonstrated how citizens use the civil justice system to address vicarious liability of the Ministry of Interior for torture, illegal detention, and abuse. But while civil courts award numerous victims (albeit minimal) compensations, its rulings remain without consequence

for individual offenders who are not transferred to a criminal investigation.³⁶ Overall, NGOs fundamentally doubt the political will and the criminal justice system's capability to curb police abuse while still hailing every prosecution and conviction the criminal justice system produces.

This ambivalent relationship to the criminal justice system and, in extension, to the state, being viewed as "offender" and "protector" at the same time, is a familiar and maybe irresolvable quandary for non-governmental human rights groups, demanding an end to impunity in a politically constricted environment.

Judicial Constructions of Police Action

Judicial constructions of police actions are determined by legal categories and socio-political contexts, outlined above, but also by an evaluation of socio-legal strategies employed by police and their lawyers. In what follows, I will first discuss prosecution procedures in processing a torture-related complaint, and then debate the strategies police employ to tell their version of 'what happened' and the significance of these strategies.

The Fate of a Complaint at the Prosecution (niyaba)

Modelled after the French *parquet* and introduced in the 19th century, the Egyptian prosecution represents the state and, at the same time, is charged with protection of the public interest. The *niyaba*'s most important functions relate to investigation and prosecution of crimes. The Egyptian prosecution is a hierarchical, centralized institution; there are more than 200 prosecution offices in Egypt. At the lowest level in smaller towns and villages, are local offices (*niyaba juẓ'īyya*), which are supervised by district offices (*niyaba kullīyya*) in the provincial capitals. These report to the head office in Cairo. The Minister of Justice formally supervises all *niyaba* members.³⁷ Investigation procedures in police abuse-related cases are initially handled by the *niyaba* office where the incident occurred. After notifying his³⁸ superiors and the Ministry of Interior, the local prosecutor has to decide whether an allegation is credible and serious enough to warrant an investigation. This will usually be conducted by *niyaba* officials at the district level. Judging from the cases which were prosecuted since the late 1990s, deaths in custody do indeed warrant a *niyaba* investigation,³⁹ while abuse not leading to death appears usually not to do so (for one exception, see below).⁴⁰ Often, the prosecutor himself looks at the victim, and inspects his/her injuries; but even clearly visible injuries on a detainee who is still alive do not necessarily lead to an investigation.⁴¹ It is thus not clear what type of considerations motivate a *niyaba* investigation into an allegation of abuse if

the victim survived ill-treatment, but it appears that these considerations are neither primarily legal nor medical.

If the *niyaba* investigates, the prosecutor communicates his opinion to his superiors as to whether and on which grounds the case should be brought to criminal trial, be transferred to the Ministry of Interior for administrative or disciplinary sanctions, or be shelved, that is, not sustained.⁴² Only the prosecutor-general (*al-na'ib al-'amm*) or the attorney-general (*al-muhami al-'amm*) can give the order to institute criminal proceedings against a public official. Likewise, a *niyaba* decision can be only appealed to these higher-ranking *niyaba* officials, as there is no independent avenue for appeal once a complaint has been shelved. In general, the *niyaba* is the sole authority to bring abusive officials to trial; the harmed detainee or his/her heirs are no party to criminal proceedings.⁴³

The *niyaba* is thus the single most important judicial institution producing legal accounts about an incident of police maltreatment. Since the *niyaba* investigates and prosecutes at the same time, it alone defines whether an incident constituted any kind of ill-treatment and what kind of ill-treatment: it decides whether to register a complaint in the first place, shelve or close the file, transfer the policeman to administrative trial, or indict the offender and with what to charge him. Ultimately, the *niyaba* is also the sole authority to appeal a criminal sentence. Hence, it is police and *niyaba* records, and not court records, which provide insights into how police abuse is constructed and handled in the criminal justice system. Significantly, the former are less accessible than the latter.

Images of Legitimate Policing: Police Strategies

Once a death in custody is investigated by the prosecution, the examination centres on what acts were committed and, in the (rare) case of charges for torture under article 126, the offenders' intent. In all cases, prosecution focuses on the direct liability of the individual officer.⁴⁴ Due to the focus on direct criminal liability of individual officers, *niyaba* investigations and court proceedings have to distinguish acts of legitimate and illegitimate policing. Since these are socio-legal categories, policemen use respective strategies to counter the charges. How well these work is impossible to evaluate. In those incidents which were criminally prosecuted, they obviously failed to avert prosecution, however lenient the charges were. But in the unknown number of cases which were not prosecuted, police strategies described below may have been more successful.

Normalizing Deaths in Custody

Since the *nijaba* will invariably look into a death in police custody (see above), a dead detainee in a police precinct will warrant some kind of explanation. In the cases that were actually prosecuted, police only once delivered a dead body to the family without explanation. As a result, riots ensued in Balqas in April 1998.⁴⁵ Usually however, police strive to normalize a death in custody. Suicide, fights between inmates, and previous health conditions are the main normalizing explanations for deaths and injuries in custody.

For example, police charged that the October 1999 death in custody of Sha'ban Shahata Sha'ban was due to injuries received in a fistfight between fellow detainees, which Sha'ban had provoked. In another case in March 2000, thirty-four-year-old 'Abd al-Hamid Ramadan Zahran was not released despite being acquitted on drug charges, but kept in police custody and died there.⁴⁶ The officer responsible at the precinct reported that when Zahran had trouble breathing, his fellow cell inmates tried to resuscitate him, pushed too hard and broke his rib cage. Three detainees supported this story first but, according to the family's lawyer, later changed their testimony, charging that they had been pressured by police to testify in favour of the officer.⁴⁷ When police at al-Muntaza precinct in Alexandria notified the family of Farid Shawqy in late September 1999 of his death in custody, they claimed he died of drug abuse.⁴⁸ Later, they alleged the young man had committed suicide and brought eleven witnesses, most of them other policemen, who supported that version of events. Upon noticing that he was being followed by informers (*mukhbirin*) and policemen, Farid Shawqy

clung to one of the iron pillars at the parking deck, yelled at them, and threatened that he would end his life. He started to hit his head on the iron pillar while they were trying to get him away from it ...

one of the witnesses claimed.⁴⁹ Photos were taken to support this version of events. Police also attempted to normalize Ahmad Tamam's death in police custody in July 1999, again with different versions of why happened what happened. Immediately after the incident, the police charged that Tamam, allegedly under the influence of drugs and wanted by the prosecution for some offense, died in the police van "due to a sudden drop in blood circulation."⁵⁰ By early September, the press reported that officers asserted that Tamam committed suicide in the van,⁵¹ witnessed, one needs to infer, by police guards.

Police cites previous health conditions serve to normalize a death in custody of older detainees. Fifty-nine-year-old Samir Ramadan, for example, died in custody in 1998 due to a heart attack, according to the Ministry of Interior, while Ramadan's son charged that his father was covered with bruises.⁵² Police also gave a previous heart condition as the reason for the death in custody of fifty-one-year-old Rajab Muhammad Khalil Fu'ad in June 1996.⁵³

Fighting Crime and Drugs

Without exception, all detainees who died in custody during the past decade were repeat offenders, drug-users and/or addicts, at least according to police. Doubtless, police deal with crime suspects on a regular basis, but not everybody who comes in contact with the police is *ipso facto* a criminal. Depicting all those families who complain about maltreatment at a precinct as families of criminals thus serves as a powerful socio-legal strategy to legitimize rough-handling and delegitimize a complaint.⁵⁴ The head of the Criminal Investigation Department in Cairo's al-Azbakiyya quarter, for example, commented on one death in custody:

Hany Kamal Shawqy was accused in case 4771/1998, Qasr al-Nil, theft, and case 3724/1999 Misdemeanours, second precinct Zaqaziq, car theft, and case 38/97 Molestation... [he] was arrested in *flagrante delicto*; and we did not need to torture him [to obtain a confession], and while we were taking him to the *niyaba*, he suddenly died without having been subject to torture. [This] 'Umar [Hany's friend who witnessed what occurred in the police station] is a thief, and this Hany is also a thief, and both were high on drugs.⁵⁵

Tamir Muhsin Muhammed 'Ali, who died in custody in 1997, was described in a similar fashion by the Security Director in al-Daqahliyya:

Tamir Muhsin Muhammed 'Ali, sixteen, unemployed, ... had a criminal register, ... under the number 4/12/2511, general thefts, due to the theft accusation against him in case ..., felonies, first precinct Mansura 1997.⁵⁶

Farid Shawqy, who died in 1999, was also portrayed as a repeat offender:

... Secret investigations [i.e. informers] had shown that Farid Shawqy ... practiced his criminal activities stealing cars and car parts and that he was responsible for the theft registered under case 49199/1999 misdemeanours/al-Muntaza.⁵⁷

The same tone distinguishes the court ruling against four policemen charged with the death in custody of Sha'ban Shahata Sha'ban in October 1998:

[Sha'ban] had been accused in a number of cases and was in preventive custody for burglary with use of force and possession of drugs with intent to consume them ... His being in the police precinct did not prevent him from continuing his criminal behaviour in a way that has been unanimously described by all who were interrogated in the investigations ... and [these were persons] who were with him in the cell. [They all said] that he demanded protection money from them, searched their clothes, and extorted money from them against their will, and beat whoever attempted to oppose him. And the accused [officer], who by chance was on shift for interrogation in the precinct on the night of the incident, not only attempted to advise the victim to stop his behaviour but also undertook a reconciliation between him and those he was quarrelling with in the cell and afterwards returned to his job ... But then he was disappointed, for it was only moments before [Sha'ban] returned to violence by beating one of the detainees who had refused to [submit] to his robbery, thus leading to another flare-up of violence. This propelled the accused to commit his crime [of whipping Sha'ban to death] in an attempt to resolve the situation in the cell.⁵⁸

One of the officers was charged for assault leading to death (under article 236), carrying a prison term of at least three years, but the court deliberated mitigating circumstances,

[c]onsidering the personal circumstances of the defendant, and his performance before the crime occurred, and that it can be expected that he will not commit any violations again ...

and sentenced the officer to a one-year prison term, suspended for three years.

In Egypt's current socio-economic climate, characterized by gross social inequalities, police disciplining of "criminals" also holds some legitimacy among the general public, particularly middle-and upper-class families.⁵⁹ The family of Sha'ban Shahata Sha'ban, for example, conceded that their son may have been involved in fistfights, ready to defend honour and manliness, but not in theft and drugs as police had charged, and thus did not deserve the police brutality that killed him.⁶⁰ A lawyer, whose brother had been beaten while in custody at

the security office in Damanhur in July 2000, explained that his brother was not a criminal and thus did not deserve this treatment at all.⁶¹

To portray all those who are abused by police or die in precincts as criminals builds on the public's perceptions of uncontrollably rising crime rates and conveys that the methods employed were legitimate vis-à-vis hardened criminals who will always state that they were ill-treated by police to get off the hook. Very much in the same vein, the Egyptian government stated, in its correspondence with the U.N. Special Rapporteur on Torture in 2001:

The defence of torture is the most widespread defence invoked before the DPP [Department of Public Prosecution] and the courts by defendants trying to have the charges against them dropped or seeking acquittal. The courts must therefore determine the soundness and reliability of this defence.⁶²

Counter-charges: Resisting Arrest, Possession of Drugs, and Terrorism

While many situations police encounter are dangerous, require split-second decisions, may entail violent resistance to arrest and endanger individual policemen, counter-charges may also serve to dissuade a complainant or his family from filing or following through with a complaint on police abuse. Charges or threats of charges might also dissuade witnesses to testify against police at the prosecution or court; but obviously any such story rarely enters the ambit of judicial determination.⁶³

For example, in one 1996 case, a family insisted that police was responsible for the fall of a young woman from the fifth floor in their apartment and her ensuing death. Three policemen had chased after her and, during a scuffle in the apartment, the woman fell off the window. The post-mortem could not establish with certainty whether she had been shoved or had fallen out; the *nijaba* shelved the file but the family continued to push for a criminal investigation. Subsequently, one of the brothers was accused of drug possession with intent to trade but was acquitted. Another brother was charged with resisting the authorities and sentenced to a six-month suspended sentence. Drug charges against other family members followed, which led to acquittals. In autumn 1996 the entire family was arrested two times and taken to the precinct in their pyjamas. The women were later released while two sons and the father were again charged with drug possession. In mid-June 1997, a court found the father innocent, but sentenced the two sons to three years of prison each.⁶⁴ The father told the Nadim Center, a Cairo-based NGO counselling victims of violence, that one implicated officer had warned him that if the complaint

in regard to the young woman's death was not withdrawn, "he would ... either fabricate drugs or weapons charges, or kill me under pretext of fighting terrorism."⁶⁵ In the July 2002 deaths in custody of Nabih and Muhammad Shahin, this threat was translated into practice: the two men were kept for two weeks in Zifta and Mahalla precincts in Tanta, following a fight with a street vendor in which a shot was fired. A release order by the prosecution was not implemented. Instead they were transferred to Wadi al-Natrun prison, on the basis of administrative decrees issued under emergency law. They died several hours after arrival in Wadi al-Natrun.⁶⁶ In another 1996 case, police threatened to file terrorism charges to extort a confession relating to the unresolved death of a young girl in the neighbourhood. Police threatened to detain Muhammad Badr al-Din Gum'a as a terrorist suspect, since, as he said "I was wearing a beard, my wife the face veil, and police had found a lot of religious books while searching my apartment."⁶⁷ The threat combined with torture worked: Gum'a rewrote his story completely. He had turned to the police earlier in the year to file a missing person report with respect to his minor daughter; he then confessed that he had murdered her, and had filed the missing person report only as a cover-up. However, the daughter turned up alive and well, and the confession collapsed. Police then charged that he had murdered an unrelated girl. Under severe beating, he also confessed to this crime: This girl had died while he was attempting to exorcise her djinn, apparently a concomitant circumstance of some Egyptian homicides.⁶⁸ The court hearing the murder case threw out Gum'a's confessions in no uncertain terms:

The court considers the acts of this officer [extorting Gum'a's confession], who, unscrupulously, did not fear God, as obduracy and persistence in falsifying and fabricating. ... [T]he court holds that the negligence and fabrication in the investigation ... reach the degree of premeditation. ... The case file also uncovered the use of cruelty and torture against the suspect and his wife. Torture was so severe that it forced the suspect to confess in detail to a crime he did not commit ... Thus, ... the Court refers the case to the General Prosecution to investigate the above-mentioned crimes that were committed by ... the policemen ... so that punishing them would deter others and prevent recurrence of such a tragedy.⁶⁹

It took the prosecution eight years until six of the thirteen implicated officers were on trial for forgery and torture; three officers were convicted to

a suspended prison term of one year in March 2004, with suspension from office for two years; three other officers were acquitted.⁷⁰

Gum'a's case and the ensuing prosecution of police are exceptional. They resulted in the first high-profile prosecution of police abuse which a victim had survived. Somewhat ironically, the police officers who tortured him were only prosecuted because the *nijaba* had not bothered to gather corroborative evidence to support the coerced confession.⁷¹ Had the *nijaba* done so, they would have probably not charged Gum'a in the first place. But then his complaint that police tortured him may have very well ended up as another allegation shelved by the prosecution and would not have been submitted to a court's determination.

Police deals with crimes and crime suspects, and will on numerous occasions confront situations which challenge professional integrity. If police abuse is wide-spread, the question arises whether abuse is professionally or politically motivated or, in other terms, whether it is exceptional or systematic.⁷² As comparative research has shown, the likelihood that police abuse is judicially constructed as exceptional increases in settings where police plays some (if usually not the decisive) role in the repression of political opposition and where social inequalities lead to a criminalization of poverty and the poor.⁷³ Both settings are very much in evidence in Egypt – therefore, strategies employed by police to avert prosecution might be of limited legal success, as in many of the cases discussed above, but may continue to be acceptable among police and, partly, in society.

Establishing the “Truth”: Law and Medicine

A medical report by the Department of Forensic Medicine is a necessary, albeit not sufficient, condition for a complaint on police abuse to be sustained by the prosecution. The Department of Forensic Medicine was founded during the 19th century,⁷⁴ and is now a part of the Ministry of Justice. In contrast to doctors at the Department of Forensic Medicine, inspectors at the Ministry of Health are to certify death only if due to natural causes, but not if there is suspicion of criminal wrongdoing.⁷⁵ Neither are reports on injuries or death from governmental hospitals of same evidentiary weight as reports from the Department of Forensic Medicine. However, during a trial, other medical experts (based at universities or hospitals) are sometimes called as expert witnesses, particularly by the defence. As Fahmy has shown, medico-legal facts produced by institutions shaped during the 19th century have long been important for investigations and court proceedings; the results sometimes worked in favour of citizens, and often against them.⁷⁶ In an alleged abuse

by police, conclusive forensic and autopsy reports are very often the most important kind of evidence to throw doubts on police allegations and discern parts of what happened and how. But even if medical reports can establish with some certainty what happened in a particular incidence, it is obviously the legal framework which determines the respective charges and thus possible penalties. Furthermore, as will be discussed below, the conclusiveness of a forensic report is predetermined by the legal system. Medico-legal facts thus enter the criminal justice system solely on its own terms.

Autopsies as Evidence

Whereas the post-mortem in the young woman's death referred to above could not establish with certainty whether she had been pushed off the window or had fallen out, in other cases autopsies were more conclusive. For example, the post-mortem for fifty-one year old Rajab Muhammad Khalil Fu'ad who died in June 1996,⁷⁷ found

a previous health condition [which] would have caused death, if the victim had experienced a heart attack during his lifetime ... such a heart attack could have occurred due to the previous condition alone ..., or, as occurred to the victim, due to the infliction of injuries, some of them resulted from contact with a solid object, some of them from ... electroshocks. ... [T]hese injuries led to stimulation of the heart and blood circulation, which were already affected by the previous chronic, advanced heart disease. This brought about and speeded up the heart attack, in addition to bleeding in the brain which led to his death.⁷⁸

The prosecution charged the officer with assault leading to death, and the court sentenced him to three years in prison (a harsher penalty than in most other cases reviewed here). A charge for torture under Article 126 would have been impossible because Fu'ad was not a suspect in any crime, but convicted in absentia for a bounced check, according to records consulted by the court.⁷⁹ The acts committed by the officer, particularly the application of electroshocks all over Fu'ad's body, may have thus constituted acts of torture in the court's opinion, but Fu'ad did not belong to the group of persons – criminal suspects – whom alone the law recognizes as possible victims of torture. The same situation prevented charges of torture against prison officials, who had ordered and participated in the beating of inmate Ahmad Muhammad 'Isa in early 2000. 'Isa had quarrelled with his cellmates, and the prison administration had ordered to discipline him, which led to this death. The autopsy report established

the injuries and their cause – sustained beating with solid objects all over ‘Isa’s body, and an ensuing blood poisoning; unusually, other inmates and some prison guards testified unisono at the trial as to the chain of events. However, ‘Isa – like Fu`ad, a convict – was not “torturable” in a legal sense, that is, he did not belong to the legally defined possible victims of torture. The prison guards were thus charged with assault leading to death.⁸⁰

This was different in the case of Sha‘ban Shahata Sha‘ban, who died in the Qasr al-Nil precinct in October 1999, after having been arrested for a burglary suspicion. Once again, the autopsy report was the most important piece of evidence to convince the prosecution and the court that Sha‘ban had not died as a result of the fistfight between cellmates, as the police officers had claimed (see above), but as a result of having been beaten with a whip after the fistfight. The forensic pathologist testified in court:

that the two lesions [seen on Sha‘ban] were produced at the same time, and by the same object – either a stick or a whip. ... [D]eath was due to the primary lesion in the left testis, and what this caused as an adverse reaction, which led to circulatory and respiratory collapse.⁸¹

While the autopsy established what had happened inside the precinct, and the prosecution brought charges for assault leading to death, the court held that the officer used the whip to discipline Sha‘ban after the fistfight (see above for the court’s argument), and thus sentenced the officer to a one-year suspended prison sentence.

In Farid Shawqy’s death in custody, the last autopsy – conducted after an exhumation that the family had insisted on – first excluded drug-consumption as a cause of death and then explained that:

the injuries seen on the deceased were not consonant with the description [of events] given by the police. The injuries consisted of some bruises and scratches in the face, which came about by an attempt to extract information which Major Khalid admitted to have occurred ... even though we are not convinced that this [i.e. beating and scratching] was the method employed to extort information ... The cause of the victim’s death as established in the external examination and the autopsy was asphyxiation by manual strangling.⁸²

Despite the results of the autopsy, the prosecution decided to charge the officers with illegal detention, coupled with infliction of bodily harm (article

282); the first instance court acquitted all officers in April 2001. In Ahmad Tamam's case, who died in custody on 21 July 1999, the autopsy likewise established what occurred in the precinct. It found haemorrhages under the scalp, in the face, the soft tissues of the chest, and in the upper and lower extremities. In addition, there were congested blood vessels in the brain, and blood drops on the heart's surface. The report concluded:

Apart from [discoloration of] the scrotum, all other lesions ... are traumatic ... developed due to friction with a solid object or objects, ... and not enough to cause death. According to the report of the pathology lab, the lesion seen in the scrotum is thermal and occurred as a result of contact with electric current ... We conclude that his death was due to electric shock. Death might have occurred, as his family described, at a time coinciding with the date of the incident. The autopsy was conducted one day after his death.⁸³

Ahmad Tamam's family, a relatively well-off middle-class family from Giza, reflected:

Many people assumed that the report of the forensic doctor came out supporting our complaint because we had bribed the doctor. Everybody thought that you had to bribe the forensic pathologist in order to get a report in your favour. We had been very apprehensive that the report would not ascertain that Ahmad had been tortured, because we also assumed that the police will bribe the forensic doctor.⁸⁴

For the family, the autopsy report was the only piece of evidence the criminal justice system produced which lent some credibility to their conviction that their son had been tortured to death with electric shocks at the precinct. The prosecution then charged the officer with assault leading to death; the court, however, changed the charge into premeditated light assault, a misdemeanour, and sentenced him to one year in prison. Upon appeal by the prosecution and the defendant, a review of the ruling in 2003 at the Court of Cassation came to the same result. The court argued that while there was enough evidence by witnesses to establish the officer's beating of Tamam, it was not established that he also applied the electroshocks that caused his death according to the post-mortem.⁸⁵

As in other legal systems, medico-legal evidence is subject to contention – and courts have to consider conflicting medico-legal evidence presented by

different experts. In Ahmad Muhammad 'Isa's death, medical experts called by the defence declared that the initial autopsy did not establish whether 'Isa had died of his injuries or due to lack of medical treatment for these injuries. Another expert held that the injuries found on 'Isa's feet may have occurred due to contact with a stiff object during ordinary daily life. Furthermore, the expert argued, 'Isa was a drug addict and suffered from an immune deficiency,

which smoothed the way for the injuries [to develop] into an infection with microbes. ... [I]t cannot definitely be said that blood poisoning occurred from the [injuries].⁸⁶

Likewise with respect to Fu'ad's post-mortem, the defence lawyers claimed that a causal relation between the beatings, electroshocks and death was not established with sufficient legal certainty, due to the previous heart condition.⁸⁷ During the trial for Shawqy's death, the lawyers for the accused officers brought a consultant pathologist to the Department of Forensic Medicine. He claimed that his study of the medical evidence led him to conclude the cause of death had been a sharp drop in blood pressure,⁸⁸ thus stressing the irrelevance of the determinant cause of death.

Apart from establishing when death occurred, an autopsy report needs to find the determinant cause of death, in contrast to the immediate cause of death. As shown above, many post-mortems do indeed establish the determinant cause of death. Regardless, medical experts and Egyptian authorities cite "a sharp drop in blood pressure" as a frequent (if not the most frequent) cause of death in custody. For example, the Egyptian government claims that 19 out of 23 deaths in custody of police precincts and prisons during the 1990s were due to "a sharp drop in blood pressure."⁸⁹ It is hard to evaluate whether the Ministry of Interior officials who answer respective questions posed by U.N. treaty bodies or special rapporteurs are ignorant of the medical technicalities, or whether this is a cover-up strategy. Be that as it may, in the context of forensic medicine the "sharp drop in blood pressure" is analogous to the "visitation by God," cited in late 18th century England as the most frequent cause of death in custody.⁹⁰ Both "causes" signify that there will not be a judicial investigation into the death.

As shown above, even if an autopsy establishes the determinant cause of death, the respective findings are subject to dispute medically, as well as legally. The proliferation of medical experts in Egypt, based at the Department of Forensic Medicine, at universities, and at some hospitals, thus adds another layer to the already complex nature of prosecutions against abusive police. In addition,

it is the legal framework which determines the relevance of medico-legal facts in a specific death in custody: there is a legal relevance to the relation between cause and effect in a death in custody and there is the larger legal framework regulating the offences prosecuted. A post-mortem may very well establish acts of torture having caused death, but since the torture is defined so narrowly, in regard to intent and possible victims, in the majority of cases, the criminal justice system will not recognize acts of torture as the offence of torture.

Access to Medical Experts

As said above, post-mortems may be inconclusive for a variety of reasons. Medical diagnostic possibilities are even more limited if the person is alive. One of the main non-medical reasons is the passage of time between the incident and the exam. The following example illustrates this:

After we examined [the suspect], we found the following: (1) A dark brown discoloration in the right wrist with indefinite shape. Maximum dimensions were 3 x 2 cm. (2) A dark brown discoloration in the left wrist and another one in [illegible]. Both have indefinite shapes with 3 x 2 dimensions. (3) Bluish bruise on the right knee with indefinite shape and 3 x 2 dimension. According to the above findings, we conclude that the lesions seen in the suspect have changed their original characteristics due to the healing process and the passage of time. This makes it, technically, impossible to decide the reasons and the manner of incidence and the kind of device used to inflict those lesions ...⁹¹

In another case, the examining forensic pathologist established with certainty that one detainee had died due to electroshock administered by a hand-driven electric generator. He then confirmed that the injuries inflicted on a second detainee – who survived police abuse at the same precinct – could stem from beating and electroshocks, the latter not necessarily leaving marks. He explained that the second detainee had been examined by a forensic doctor more than two weeks after the incident, which made it probable that physical traces of electroshocks would have vanished.⁹²

If someone survived maltreatment, forensic pathologists need to examine him or her speedily in order to produce a conclusive report. Access to forensic exams is, however, tightly regulated and may only be granted by the *niyaba*. Whereas in many incidences of police brutality detainees are beaten all over the body with fists, clubs or whips, leaving lasting and visible marks, increasingly, electroshocking devices are used and marks left by those disappear quickly.

Depending on the injuries, delays may cause forensic experts to be unable to determine cause and timing of the injuries with the certainty necessary for legal proceedings. If no injuries are found or marks have faded, the *nijaba* will rule that the evidence from the forensic report is insufficient, and close the file.

The data supplied by the Egyptian government to the Special Rapporteur on torture in 2000 and 2005 suggest that most persons who survived alleged ill-treatment by the police are not even granted access to a forensic exam, delayed or otherwise. In responses delivered to the Special Rapporteur in 2000, the government mentioned the existence of forensic reports only in three out of nineteen allegations. In one case, the injuries allegedly inflicted by police in custody stemmed from resisting arrest, in another case the injuries did not coincide with the date of arrest and in a last case, the forensic report established that the injuries were self-inflicted. In most cases, fourteen out of nineteen, the government claimed that “there was no evidence.” In two additional cases “the complaint was unfounded.”⁹³ This may imply that in sixteen out of nineteen cases the prosecution never granted the victims access to the forensic department – indicating a certain unwillingness of the prosecution to start processing a complaint against police.

The decisive role of the prosecution in handling complaints against police and granting access to the forensic department may at least partly⁹⁴ explain why during 1993-1995 about 84% of all maltreatment complaints were found to be baseless (see above Table 1), and why almost all criminal prosecutions in recent years were initiated for deaths in custody but not for maltreatment that the detainee survived.

Ending on a More Optimistic Note?

A 1986 ruling of the Egyptian Court of Cassation deals with the systemic relationship between law and medicine in a very different fashion than the one described above. The Egyptian government quoted the ruling in its report to the Committee Against Torture, as establishing that

... [I]n order for the offence of torture to obtain, Egyptian law does not stipulate that a specific degree of serious pain or suffering should result from the torture or that the torture should leave marks. Consequently, the offence of torture obtains however negligible the pain and irrespective of whether or not it leaves marks.⁹⁵

This ruling defines torture solely by its intent to extort a confession and it also reverses the current rules governing investigations of complaints against

the police. Whereas currently the *niyaba* will not sustain a complaint in the absence of a forensic report establishing clear marks, their probable cause and timing (and often not even if there is such a report), the Cassation Court ruling claims that physical marks are unnecessary for the offence of torture to obtain, and in extension, are not necessary to warrant an investigation into an allegation of torture.⁹⁶

The practical implications of this ruling, if applied to *niyaba* investigations, are not my concern here. But the ruling demonstrates that there are different legal opinions on how medical facts should enter legal proceedings, and, more generally, how the relationship between law and medicine should be structured in torture-related complaints. Currently, the criminal justice system, or more precisely the *niyaba*, decides whether a medical opinion will be sought and, largely, predetermines the medico-legal quality of forensic expertise. Far from being objective evidence, medico-legal facts are thus as constructed as legal facts by decisions of the prosecution.

To conclude: Regardless of the root causes for the endemic nature of police brutality and the current political and social contexts in which police brutality takes place, three factors determine Egyptian judicial constructions of police abuse. First, there is the complex interaction between international and national law, resulting in legislation attempting to fulfil international obligations while minimizing its domestic impact. Second, criminal prosecutions of police centre on questions of legitimate and illegitimate policing, and do not address structural questions of oversight and discipline. Last, but not least, medico-legal knowledge, in theory a powerful tool in the hands of victims or victims' families, enters the criminal justice system according to rules made by the prosecution. These appear to be influenced by a wide array of considerations – legal, social, professional and political.

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THE CATEGORIES OF MORALITY

Homosexuality Between Perversion and Debauchery*

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This chapter analyses the categorization devices used in the course of the Queen Boat case. This trial made the international media headlines. It followed a police search on a boat moored on the Nile in Cairo and used as a nightclub. Several people were arrested on the ground of their alleged homosexuality. Two of them were also prosecuted for alleged contempt of religion, an accusation that justified the referral of the case to a state security court (Summary Court of Misdemeanours (state of emergency), case No. 182 of the year 2001, Qasr al-Nil, registered as No. 655 of the year 2001, High State Security). Considering that there is no explicit condemnation of homosexuality in Egyptian law, criminal prosecution was only through the use of penal categories considered as analogous. This trial was therefore the occasion for the activation of many categorization devices through which homosexuality was designated, labelled and provided with penal consequences. In this essay, I seek to observe the production of these categories, their organization, their praxiological grammar, the functioning of their inferential power, and their legal fixation and formalisation.

The many judicial documents concerning the accused in the Queen Boat case refer to the criminal categories of perversion and debauchery. It is unusual that homosexuality be assimilated to these categories on an explicit basis. There is neither any definition of homosexuality nor category-binding criterion that is ever given. This is why, in the examination of this practical grammar of categories and their intelligibility, the present analysis must also concentrate on the role of the implicit. The implicit is constituted by a conception of normality that is never given once and for all, that is constantly produced and reproduced;

its invocation generates temporary category fixation, responsibility ascription, and the imputation of category-bound consequences. In the practical production of legal meaning, the place occupied by implicit categories is characterized by their fluidity and the strength of the basis they provide to interactions.

In order to treat these different categorization devices, I use membership categorization analysis. First, I identify in the many documents related to the Queen Boat case numerous types of categorizations at work and I focus on inferential mechanisms operating in the production and transformation of categories. Second, I concentrate on the open texture of law, which results from intertwined categorization devices and close relationships between its rational and moral dimensions. Third, I analyse the paired functioning of many categories. In particular, I study the categorical organization of relational pairs (debauchee/society), disjunctive pairs (debauchee/sick) and antithetic pairs (normal/aberrant). Fourth, I elaborate on the sequential organization of categorizations, not only at the internal level of documents, but especially at a dialogical level involving all the components of the judicial file.

Law, Categories and Inferences

According to Hester and Eglin (1992: 17), ethnomethodological legal research operates at three levels. First, it describes the methods through which actions of a legal and judicial nature are produced and recognised. Second, it is concerned with the methods through which legal and judicial contexts and situations are socially organized. Third, it analyzes the methods through which legal and judicial identities are accomplished within social interaction. Each level of analysis concerns the social world as a moral and cognitive phenomenon producing order and is constituted by its members' practical methods of reasoning. As for the law, the ethnomethodological approach seeks to comprehend the mechanisms, categorical among others, through which some factuality is submitted to a jurisdiction formally constituted and organized. In this sense, categorization is at the heart of legal and judicial action.

The whole file of the so-called Queen Boat case is full of categorizations. They are of different types, as it appears from the reading of the examination of the main accused by the Prosecution. We find categorizations of a bodily nature:

Excerpt 1 (High State Security Prosecution, Case No. 655, 2001)

Question of the Prosecutor (Q): Describe to us the two abovementioned accused

Answer of the accused (A): Yahya when I knew him his body was very athletic and of an average stature and at that time he was approximately

19 years old and Ahmad is a little small and dark and they are taken on photo

We also find the use of categories of a temporal nature:

Excerpt 2 (High State Security Prosecution, Case No. 655, 2001)

Q: When did your relationship with him end

A: The same year it means the year 1996 because the owner of the hotel fired him and I don't know where he went and in a general manner the issue of perversion decreased during the period from 1997 until today because I made three *'umru* and I swore to myself as far as possible that I would stop that thing especially after I got a car accident in 1998 and I felt that it was God's displeasure

Categorizations can even take a professional dimension:

Excerpt 3 (High State Security Prosecution, Case No. 655, 2001)

Q: It was about what topic your summon

A: At the beginning my father informed me that I was asked by the State Security because there was a question about the company Natco and the officer wanted to speak a little bit with me and the question about the company Natco it is that we in the company when I worked there some workers who were trained there were forced to sign checks so as to guaranty that they would continue after the end of the training and some of these workers complained but when I went to the Security I was surprised that the officer talked about another issue that is the cause of my interest for photographing the Israeli embassy and the Jewish synagogue and some other places

These categorizations also take a geographical dimension:

Excerpt 4 (High State Security Prosecution, Case No. 655, 2001)

Q: And where did you have these practices when you got used

A: When the soft was possible it was on the streets or in cars or in a third-class cinema or in the toilets but when it was a full penetration it happened in hotels or in a house but nothing happened in my own house and most the practices took place in 1996 because I at that moment I met by chance someone he was capable to bring me boys and there was a kind of hotel at the Pyramids and the meetings repeated in his house and I photographed there these boys

Geographical categorizations sometimes take an identity, ethnic, or even national colour.

Excerpt 5 (High State Security Prosecution, Case No. 655, 2001)

Q: You mentioned in your former talk that you alluded in your discourse during your conversation with the State Security to sexual perversion and since when do you have these practices

A: The beginning of this practice it was when I was studying at the German school of Doqqi and it arrived only once with three of my buds and I didn't practice at school after that but at the university that's when I was studying at Cairo University faculty of engineering it arrived [that I had] relationships with people in the street that's the first time it happened in 1983 approximately

Some categorizations are more of a legal nature:

Excerpt 6 (High State Security Prosecution, Case No. 655, 2001)

Q: And was it with an absolute consent on your side

A: Yes and I accepted and I let him do

Other categorizations appear as more straightforwardly moral.

Excerpt 7 (High State Security Prosecution, Case No. 655, 2001)

Q: In what manner were there these perverse practices

A: I'd like to say at the beginning that I repented and that I'll never start again this sin because I realized that it was that which caused me this problem and concerning the manner of the practice well sometimes I practiced it actively and sometimes passively

Last, in this non-exhaustive list, I can mention the existence of categorizations of a relational nature.

Excerpt 8 (High State Security Prosecution, Case No. 655, 2001)

Q: How did you know him

A: I met a boy who's named `Id and him I met him by chance on Tahrir square so that we had sexual intercourse and I asked him whether he knew a place and he took me to Nasir

People routinely use descriptions, categorizations and typifications in order to perform certain tasks such as legally characterizing a set of facts. To say of someone that he gives himself up to sexual perversion means providing an anticipatory justification to his condemnation as a debauchee. It means that typifying someone as perverse serves as a scheme underlying the interpretation of facts and purporting to give them a legal value.

Excerpt 9 (Summary Court of Misdemeanours (state of emergency), Case No. 182 of the year 2001, Qasr al-Nil)

When interrogated, the first accused, (...), answered in substance what is consigned in the report dated (...), previously cited in detail, and added (1) that he had accompanied the officer to his domicile in `Ayn al-Sira and that he gave him the keys of his apartment willingly, just as he gave him his photos, the personal notes, the books and all the things on the list [...]

(2) He had during his sleep a vision of the “Kurdish pageboy” [...]

(3) He practiced sexual perversion passively and actively (*ijaban*) with people, most [of whom he met] in the streets and well known places like Tahrir square, Ma`mura Casino and cinemas, that his most important practice dates back to the year 1996 and that his last full (*kamila*) practice took place in the year 1998. Then, he limited himself to incomplete “soft” practices, the last one [...] being a mere frivolity (*abath*) [...] He was treating the perversion. His parents knew that. The practice of perversion began when he was a pupil at the Dutch school and intensified when he was at the engineering faculty at Cairo University. He took pictures of anything that gave him feelings of danger. He began to take pictures of naked boys in sexual positions and began to take pictures of himself with those with whom he practiced sexual perversion. He would attain [orgasm] by looking at these pictures. He has decided to repent since his arrest in this case. The goal of his charity project was to cleanse himself of his sins (*takfir `an dhunubibi*) in matters of sexual perversion.

(4) He practiced sexual perversion with three of the people arrested, namely (...)

(5) Confronted with the accused, he recognized the three aforementioned accused.

(6) Confronted with the pictures, he declared that three pictures of (...) belonged to him.

Conversely, the accused's legal characterization as a debauchee allows fixing the meaning of the underlying scheme of the perverse.¹

Excerpt 10 (Summary Court of Misdemeanours (state of emergency), Case No. 182 of the year 2001, Qasr al-Nil)

The crime designated in [this text] is only committed by fornicating (*mubasharat al-fabsha*) with people indiscriminately and habitually, whether [the prostitute in question is] male or female. Once a [woman] has fornicated and sold her virtue indiscriminately to whomever asks for it, we are in the presence of *di'ara* [...]; on the other hand, the term *fujur* applies to a man who sells his virtue to other men indiscriminately.

Considering that the General Prosecution has accused all the accused of habitual practice of debauchery/prostitution (*fujur*). After having scrutinized the documents, the forensic physician's reports, the photographs and what occurred during the sessions, the court is convinced that the accused [...] have committed the crime of habitual practice of debauchery/prostitution, on the ground of: [...]

The importance of categorization practices comes from the fact that the mobilization of a category orients participants to the attributes of this category, and vice versa. Indeed, there is an inferential relationship between membership categories and their predicates: one can deduce a membership category from the use of a predicate, as one can infer a certain number of rights, duties and consequences from the binding of someone or something to a category. In the Queen Boat case for instance, it clearly appears that the activity of the masseur referred—at least in the way of a presumption the rebuttal of which belonged to the accused—to the categories “perverse”/“homosexual” and to the legal category circumstantially constituted as an equivalent, i.e., “debauchee.”

Excerpt 11 (Summary Court of Misdemeanours (state of emergency), Case No. 182 of the year 2001, Qasr al-Nil)

(3) As for the 47th accused, the first accused testified against him during the investigation [by claiming] that he works as a masseur in [...] gymnasium. [...] (He began by massaging his body normally and after [the first accused] said that he did sexual things with many people, girls and boys, in the gymnasium and that those who had experienced [it] kept on wanting it. He asked him whether he wanted it or not and he replied: “Do whatever is good,” and [the masseur] did so with his hand

on surface, approximately one month ago). The [masseur] also established that the first accused presented himself at the gymnasium and accomplished only one session. He denied the allegations against him.

As already mentioned, the addressee of a categorical ascription becomes susceptible, after having been categorized as such, of a description in the moral terms bound to the category, without necessary additional evidence. Categorization processes can therefore be analyzed as resources allowing people to situate, construct or foreground certain events, persons, groups or actions as a problem (Stetson 1999: 94) and, starting from such an identification of a “problem,” to give it a “solution.” This feature pertains to the activity of judging itself, which aims at sanctioning the behaviour that is identified with a penal category.

Excerpt 12 (Summary Court of Misdemeanours (state of emergency), Case No. 182 of the year 2001, Qasr al-Nil)

Insofar as the court is convinced of the establishment of the fact that the accused [...] committed the crime of habitual debauchery/prostitution, it finds it necessary to condemn them to the [penalties stipulated by] articles 9c and 15 of Law No. 10 of the year 1961 regarding the practice of prostitution for the reason that they habitually practiced debauchery/prostitution in the aforementioned manner.

The same remark holds true for activities which are prior to the court's decision, anticipating therefore this decision and giving it a prejudicial character. In excerpt 13, activities reproached to the accused are selected, on the basis of a police report also oriented toward the description of behaviours formerly defined as perverse. Such pre-definition and description of what is supposed to substantiate the accusation place the blamable character of the incriminated behaviour in the realm of obviousness. It leads in a quasi-automatic manner to the transformation of what was initially defined as perverse into a punishable action.

Excerpt 13 (High State Security Prosecution, Case No. 655, 2001)

Question of the Prosecutor: Likewise the investigation indicated that insofar as you're afflicted by sexual perversion you practice these perverse sexual practices with those who're convinced of your thought and that you count them among the rituals of the faith of which you're convinced
 Answer of the accused: God save me and be Him satisfied of his

lieutenant this who said those things concerning me placed the 10 yellow books which are attributed to me²

Q: And what do you have to say about what the investigation established that you and those who're convinced of your thought got used to convene licentious feast in your residences and on certain boats like the tourist boat Nariman Queen whose anchorage is in front of the Marriott hotel in Cairo and this on Thursday evening of each week

A: These words it didn't happen and I I never knew this boat [...]

Q: You're accused of having committed contempt of religion through propagating and encouraging extremist thoughts in the aim of denigrating and despising and provoking sedition

A: It didn't happen

Q: Likewise you're accused of practice of debauchery in the manner indicated in the investigation

One of the major properties of legal categories is to make explicit the inferential character of categorical bindings. The condemnation to the penalty stipulated by Egyptian law proceeds necessarily from the characterization as "debauchery" of facts reproached to the accused. In this sense, the legal issue is not the binding of some characterization with its consequences, but the former categorical definition, that is, the assimilation of an action, a behaviour, or even a situation with a legal definition endowed with precise consequences. If the law of 1961 repressing prostitution and debauchery reduces the uncertainty that might hang over the penalty inflicted for acts of prostitution and debauchery, it leaves untouched the problem of what these two terms refer to. Sudnow (1987) speaks of "normal crimes," i.e., the class of crimes and misdemeanours that are not defined legally but correspond to ways to characterize in a typical manner behaviours encountered in the performance of routine activities or in everyday life. This characterization includes typifying the modalities of the incriminated behaviour, the people who practice it, the context of their performance, their possible victims. If the crime is said to be "normal", it is because it is endowed with certain general features: it concerns types of behaviour rather than specific persons; its attributes are not legally codified; its features are proper to a particular social group; they are socially shared and ecologically specified.

Sudnow links the identification and repression of crimes of a "normal" type to the performance of some routine professional practice. In the Queen Boat case, it probably holds true of the police, in its ordinary activity of vice control, even though it did not correspond in Egypt, up to then, to any

systematic practice of homosexuality repression. In this case at least, it seems that the normality of the crime is not limited to the routine of police activities but is linked upstream to the ordinary disqualification of exposed homosexual intercourse and to the police decision to organize its repression. In that sense, the Queen Boat affair is a case of a normal crime inception. However, this inception does not proceed unilaterally, in the form of the *ex nihilo* criminalization of an up-to-then totally legal homosexuality, but collaboratively: the parties (accusation, defence and judge) do not challenge the blamable nature of homosexuality,³ but attempt to negotiate (as far as the accused is concerned at least) the degree of responsibility and the possible excuses.⁴

Excerpt 14 (High State Security Prosecution, Case No. 655, 2001)

Q: In what manner were there these perverse practices

A: I'd like to say at the beginning that I repented and that I'll never start again this sin because I realized that it was that which caused me this problem and concerning the manner of the practice well sometimes I practiced it actively and sometimes passively

Excerpt 15 (High State Security Prosecution, Case No. 655, 2001)

Question of the Prosecutor: Have you other things to say

Answer of the accused: First I want that this who'll read this investigation know that I repented and that I'm resolved not to come back to perversion and I think that this trial came from God because of that [...] and I ask the God Almighty first that he forgive me and that you'll forgive me and I'm trustful in His forgiveness and I implore Him to soften your hearts so that you help in repentance to cure me not to punish me [...] and I hope that you know that all human beings commit mistakes and the best of offenders are these who repent and this who protect a Muslim in the world God will protect him on the day of the Last Judgement and in the hereafter and last I want to confess in front of God and then in front of you my fault from the point of view of my practice of sexual perversion which I didn't practice in a full manner since 1996 and I promise to God that I won't do it again any more [...]

Lexical Choices and Categorical Co-selection, Connection and Transformation: An Inferential Grammar

In this collaborative production of homosexuality as debauchery, in the negative solidarity on the blamable nature of homosexuality, there operates a mechanism of term co-selection, by which I mean that the understanding of a word does

not operate in an isolated way, but conjunctively with the choice of other words preceding or following it. For instance, the word “perversion” is understood conjunctively with the word “practice,” which is the operator of an intentional action, or with the phrase “being afflicted,” which is the operator of a pathological ailment explaining aberrant practices. This co-selection determines the register in which an action is collaboratively situated—e.g. penal law—and consequently the register in which it is possible for the parties to operate without any risk of discrepancy or disqualification—e.g. the defence can play in a credible way on the absence of participation in the incriminated facts or on irresponsibility.

In the Queen Boat case, the different parties, both professional and lay, rely on a category void of legal ground, “perversion” (*shudbudh*), the contextual meaning and implication of which they collaboratively produce and negotiate. The category “perversion” is a commonsense category endowed with features (place, time, culture, morality, casting, technique) which, far from functioning autonomously, are closely intertwined and morally and normatively loaded. The strength of the argument criminalizing perversion comes from its capacity to tacitly call upon “what-everybody-knows-about-homosexuality-which-has-not-to-be-detailed-here.” The argument is simple: homosexuality is a perversion that is assimilated with debauchery.

Excerpt 16 (Summary Court of Misdemeanours (state of emergency), Case No. 182 of the year 2001, Qasr al-Nil)

Considering the facts of the petition, upon which the court based its conviction and the veracity of which is not in doubt, regarding what the court deduced from the examination of the documents and the investigations [...] as well as from the evidence that was submitted to it and from what was related to it during the trial sessions: [these facts] lead to what was consigned in the record [...], according to which information came to [the Prosecution] from secret and reliable sources, confirmed by its careful investigations, and such information suffices [to show that the first accused] adopted deviant (*munharifa*) ideas inciting to hold revealed religions in contempt (*izdira'*) and to call to [the performance of] abject (*radhila*) practices and sexual acts contrary to revealed laws. [...] He undertook to propagate these ideas among his acquaintances and those who are close to him; he incited them to adopt [those ideas]. Such information also shows that he is afflicted with sexual perversion (*musab bi'l-shudbudh al-jinsi*) and practices it with people who are close to him by considering [these practices] as one of [the sect's]

rituals; that he and his company set about organizing licentious celebrations (*hafalat majina*) at the domicile of some of them or on boats, among which the tourist boat “Nariman Queen” [...] which many of his sexually perverse acquaintances attended, and this on a weekly basis, every Thursday evening [...] He undertook to film these sexual meetings, to develop the pictures and to print them at a photo shop [...], on the basis of his agreement with some of the studio employees, that is [...]. Insofar as the court is convinced of the establishment of the fact that the accused [...] committed the crime of habitual debauchery/prostitution, it finds it necessary to condemn them to the [penalties stipulated by] articles 9c and 15 of Law No. 10 of the year 1961 regarding the practice of prostitution for the reason that they habitually practiced debauchery/prostitution in the aforementioned manner.

Considering that the court indicates that, with regard to the accused whom it condemned, it stipulated the penalty that it estimated as corresponding to each of them according to the circumstances and the conditions of the request it examined, in the limits established by the law when it exists and according to what appears from the Court of Cassation's case-law [...]

For these reasons

The Court of Misdemeanours / State Security (Emergency) rules:

1°) That the first accused serve [...] [a prison sentence] of five years, with labour, effective immediately, for the two accusations simultaneously; and that he be placed under police control for a term of three years, beginning upon the date of the end of the prison sentence and the expenses.

All inferences function through anticipations, which, if they do not materialize, allow the reflexive transformation of categorization. Let us take the example of a child. When he is brought to the dentist and does not cry, we could hear said of him: “he’s a big boy!”, because his behaviour is associated with that of a “man,” something that conventionally implies the exclusion of the activity of “crying.” Since the child has ceased to perform the category-bound activity (crying) his categorization is opened to transformation (from “child” to “man”) (Jalbert 1989: 238). Here Law represents an institutionalized form of this type of reasoning. Someone can be characterized as “debauchee” on the ground of his practice of activities considered as sexual perversion, and these practices are evidenced by confession (and duress in the extraction of confession must itself be eventually proved) or through medical expertise,

with the consequence that this person is criminally condemned to the penalty stipulated by the law for the type of misdemeanour with which his behaviour is assimilated. Evidence works as a categorical connector: it helps confirm the membership category or transform it into another category, making it translate from the status of “presumed debauchee” to the status of “debauchee” or “innocent.”

Excerpt 17 (Summary Court of Misdemeanours (state of emergency), Case No. 182 of the year 2001, Qasr al-Nil)

Considering that, as for the rest of the accused [...], the court examined the documents with shrewdness and proper judgment and looked into the circumstances with the evidence [available]; it appeared that there is insufficient evidence to justify a ruling condemning the accused. The accused defended themselves by denying, at all the steps of the procedure, the allegations against them. Nobody testified to committing the practices of which they were accused, and none of them was caught red-handed. As a result, [the court finds it] necessary to [issue] a ruling clearing them of the allegations against them [...]. What appears in detail from the aforementioned investigation does not change anything since the investigation, [the veracity] of which the court is convinced, does not stand alone as long as it is a simple presumption and does not constitute evidence. Criminal rulings that condemn must be grounded on evidence and not only on presumption, a fact established by the Court of Cassation [...]

An important part of the activity of parties to a judicial case consists of acting on categorical connections and transformations, not only at the formal level of the bill of indictment or the ruling, but also at all the levels leading from the police investigation to the implementation of the judicial sentence. The description of facts, the choice of the applicable rule and the production of evidence are levels at which parties collaboratively (even though it is also, at the same time, conflictually) intervene for the practical purpose to produce, with regard to professionals, a decision that is procedurally correct, legally relevant and adequate vis-à-vis the “normalcy” of the crime; and, with regard to laypeople, for the practical purpose of obtaining the legally (reduced penalty), as well as morally (blame attenuation without contesting dominating categories), least damageable solution. This process generally operates, in the former case, through the production of some legal category which the ruling will tend to confirm and, in the latter case, through the quest for the transformation of the category selected by the accusing party.

Within descriptive practices, a connection is sometimes created which is neither constitutive nor links categorized persons with the activity that was performed, but relates various categories through the creation of an affiliation between two activities perceived as similar enough to guarantee their linking (Jayyusi 1984: 44sq.) This form of categorical transitivity occurs when activities ascribed to members of one category are transferred to another category whose members can be said to perform activities at first glance similar. For instance, when a man is perceived by an observer as having an “effeminate walk,” this activity can call from the same observer the selection of the category “homosexual.” The observer’s stereotypical prejudice operates so as to link the man’s activities to those perceived as bound to the category “homosexual,” therefore assimilating the man in question to that category (Jalbert 1989: 238). This is obviously the situation of the masseur in the Queen Boat case. The charges against him proceed from the sole testimony of the main accused, to the exclusion of any forensic report. Nevertheless, it is clear that his professional categorization binds him directly, by a transitivity effect, to the category of sexually perverse and thus debauchee (see above, excerpt 5).

There is also a type of categorical reasoning that grounds the resort to forensic expertise and the use of its conclusions. In the background, there is the presumption that homosexual practice leaves physical marks. The referral to the forensic physician is thus ordered to confirm a presumption based, for the majority of the accused, either on suspicion (their frequenting of suspicious places or some police informant’s report) or on some contiguity effect (their co-presence on the place of the police roundup). In theory, the physician’s report confirms or rebuts the presumption, but in practice it works so as to support the presumption in a way that leaves open the door of its rebuttal in the event of a non-conclusive medical report. Categorical transitivity, which allows the forensic physician to associate some physical symptoms to the passive practice of sodomy, does not function in both directions, since the lack of symptoms does not implicate the automatic category transformation from accused into non-guilty.

Excerpt 18 (Forensic Medicine, Case No. 655, 2001)

Drawing from what precedes in our examination of the Prosecution’s report and in the former forensic report and from our re-examination of the accused Sharif Hasan Mursi Farahat, we state:

- that the aforementioned is an adult male that reached the age of approximately 32 years, of an ordinary body, of an ordinary health and muscular strength, devoid of the awaited wounds.

Following our local examination of his anal area, [it is clear that] he does not present the forensic marks of a repeated homosexual use of the rear by a former penetration.

- that it is known that touching and external sexual contact does not leave any mark that can be testified to on the occasion of examination.
- that it is equally known that the homosexual use by penetration, one time or several, with regard to adults, with the use of lubricants and by the taking of the adequate position between the two parties (the subject (*al-fa'il*) and the object (*al-maf'ul bihi*)), does not leave any mark that can be testified to on examination.

The Open Texture of Legal Categories

The Intertwined Nature of Legal Categorization Devices

Categorization devices can intertwine in the course of the judicial activity and its specific categorizations. For instance, in another case, we see how the Egyptian press was concerned with the issue of the legitimacy of the reconstruction of a raped woman's hymen. Two categorization devices co-existed obviously in the debate. On the one hand, there was a device organized around the notion of sexual honour, which translates the possibility for someone (generally a man, the protector of the family name) to be seriously affected in his dignity, or even to be stained, by the sexual situation of another one (generally a woman)⁵ (Ferrié 1998a: 133; Douglas, 1981). On the other hand, there is the device organized around the notion of sexual morality, in which someone bears an individual responsibility for his/her own wilful sexual behaviour by virtue of external obligations (Ferrié 1998: 135). In the former device, categorizations are independent from any act of the will of the person whose honour has to be defended, whereas, in the latter device, categorizations proceed from the linking of the wilful behaviour of an individual with the rules by which he/she has to abide. The Mufti of the Republic issued a communiqué that made it religiously legitimate for women to ask for the recovering of their virginity when its loss has resulted from a rape, while the same surgery is deemed illegitimate when it aims at erasing the marks of the woman's wilful behaviour. The Mufti made therefore a clear distinction of status between women according to the use they make of their will. Stain, however, is totally impervious to the intention of people.⁶ Those who opposed the raped woman's hymen recovering justified their position on the ground that the woman has to bear the stigma of the sexual relationships she had, so that her future husband cannot be cheated "about quality." According to one doctor's commentary, "if one gives a woman the right to recover her virginity, how shall we know if this membrane

is artificial or not?”⁷ These two categorization devices are closely intertwined: on one side, facts are considered independent of any human agency; on the other side, human agency is allowed to act to modify fact issues. Although, in the device centred on honour, the loss of virginity outside legitimate wedlock affects the woman and depreciates her status, independent of any will on her side, it remains that people are allowed to act on their own body so as to change, erase or modify their condition, providing they are not taken as individually responsible for this situation.

Various categorization devices co-exist and intermingle in the production of categorizations in the Queen Boat case, especially when the first accused refer to the pathological argument in the conclusion of his questioning by the Prosecution. I want to stress now the intertwining of categories of human and divine justice.

Excerpt 19 (High State Security Prosecution, Case No. 655, 2001)

Question of the Prosecutor: Have you other things to say

Answer of the accused: First I want that those who'll read this investigation to know that I repented and that I'm resolved not to come back to perversion and I think that this trial came from God because of that and during the time I spent in jail I thought about my life and I think that it isn't good that man think about whatever he wants and it's necessary that he doesn't become inflated excessively [...] and I ask the God Almighty first that he forgive me and that you'll forgive me and I'm trustful in His forgiveness and I implore Him to soften your hearts so that you help in repentance to cure me not to punish me [...] and I hope that you know that all human beings commit mistakes and the best of offenders are these who repent and those who protect a Muslim in the world God will protect him on the day of the Last Judgement and in the hereafter and last I want to confess in front of God and then in front of you my fault from the point of view of my practice of sexual perversion which I didn't practice in a full manner since 1996 and I promise to God that I won't do it again any more [...] and I implore you to help me to live a respectful life far from the first sin and following the good I received from God in a moderate way not extremist [...] and I ask God for forgiveness and He is the Compassionate Forgiver

The repentance argument aligns the accused's concluding turn of speech on the theme of religious morality, which is confirmed when he presents the

trial as a test coming from God. Religious morality works here as the ultimate criterion for the evaluation of human action. Human justice, which is another categorization device the relevance of which inexorably imposes itself to the accused, proceeds from this superior authority: it is to God that forgiveness belongs firstly, and to the judges secondly; it is to God that pity belongs, so as to soften the judges' heart afterwards; it is to God that mistakes must be confessed, and to judges only afterward. The categorization device of human justice, on which many activities like investigating, imprisoning, caring or punishing depend, is therefore embedded in the divine categorization device if justice is dispensed in conformity with the accused's clemency expectations ("this who protects a Muslim in the world God will protect him on the day of the Last Judgement and in the hereafter"), as the negation of the same divine categorization device in the opposite situation (overwhelming the culprit means *a contrario* not protecting the good Muslim and henceforth incurring God's anger; even more, one must hear, when he says that "all human beings commit mistakes," that the judge can also commit mistakes, in his ruling among other things, and that his non-repentance would exclude him from the category of "the best of offenders"). In this epilogue (but also formerly; see excerpt 8), the accused makes use of categorization devices that are different, though related. The use of these devices corresponds, not only to a semantic behaviour allowing him to express his worldview, but also and mainly to the practical finalities of action in which he is engaged, that is, his defence against the accusations against him and thus the formulation of justifications, excuses, and mitigating circumstances.

The Moral, the Rational, and the Legal

The intrinsically categorical nature of law proceeds from the articulation of its moral and rational dimensions. Criminal law is grounded on two fundamental assumptions. On the one hand, criminal law presupposes that crimes are evil doings. In that sense, criminal law is based on a value judgement and on the individual's capacity to make such judgement. On the other hand, there is the assumption that people subject to law are rational, that is, that they have the capacity to understand the concept of crime, to know the law, to evaluate circumstances, to define their objectives, to identify the means at their disposal and, therefore, to adopt a behaviour that avoids the sanctioned action. In other words, the assumption is that a morally evil action cannot be attributed but to some reasonable being. Here we find two of the constitutive elements of crime, as defined by criminal jurisprudence. In the Queen Boat case, the ruling of the State Security court considers that the material element of crime is

constituted of the fact that “a man undertakes to practice debauchery with a man.” Concerning the moral element, the judge considers that it is constituted by the fact that “the guilty person committed debauchery, while he knew the [illegal character of the action], without distinction (*duna tamyiz*) and without any consideration for financial compensation (*ujir*).” The judge adds that, with regard to the notion of habitual practice, this is constituted as soon as debauchery is committed more than once.

As shown by Jayyusi, however, morality and rationality do not evolve in parallel, but are closely dependent on each other. In order to acknowledge the benefits of the belonging to the community of human beings, “we are drawing the boundaries of rational membership through the use of a standard of moral membership” (Jayyusi 1984: 183). Causation and motivation constitute the centre of gravity of this intertwining of morality and rationality. This is why an action characterized as deviant will be considered as pathological if it does not proceed from some rationally explicable motivation (e.g., attraction of profit) inducing the possibility to justify it, whereas the identification of a rational cause will lead to its criminalization as a consequence. This flexibility of categories, in general, and of the pathological, in particular, can be observed in the Queen Boat case. In the conclusion of the questioning, the first accused constantly characterizes his fault as a disease in need of cure, which would avoid him and his family the stain attached to criminal condemnation.

Excerpt 20 (High State Security Prosecution, Case No. 655, 2001)

Question of the Prosecutor: Have you other things to say

Answer of the accused: First I want that those who'll read this investigation to know that I repented [...] and I ask the God Almighty first that he forgive me and that you'll forgive me and I'm trustful in His forgiveness and I implore Him to soften your hearts so that you help in repentance to cure me not to punish me punishing me will do for my family and for all those who're attached to me [...] and I implore you to help me to live a respectful life far from the first sin and following the good I received from God in a moderate way not extremist and as I said it cure me don't punish me [...]

In his verdict, the judge considers that the first accused performed his sexual actions with full knowledge of the facts. It remains to ascertain how the accused is supposed to know the interpretation given by the Court of Cassation, in a non-published ruling, to legal provisions whose formulation is not explicit (there is no text explicitly condemning homosexuality in Egyptian

law). Such an establishing of criminal intention is possible only if legality is situated in the field of normality and commonsense, that is, if the criminalization of homosexuality refers to something evident whose explicit legal formulation is not a necessity, because its assimilation to debauchery imposes itself in an apodictic manner, morally as well as factually and legally. This is why the judge seeks to demonstrate that the law of 1961 is applicable to homosexuality, drawing from a report presented by the Senate in 1951 in support of a law proposal on the repression of prostitution and on a ruling of the Court of Cassation of 1988, according to which “the jurisprudential custom got used to use the word *‘di’ara* to [designate] female prostitution (*bagha’ al-unthi*) and the word *‘fujur’* to [designate] male prostitution (*bagha’ al-rajul*)”.

Excerpt 21 (Summary Court of Misdemeanours (state of emergency), Case No 182 of the year 2001, Qasr al-Nil)

The crime aimed at in [the 1961 law] is only realized by the fact of fornicating (*mubasharat al-fahsha’*) with people without distinction, and this in a habitual manner, be it male or female prostitution. As soon as she fornicates and sells her virtue to those who ask for it without distinction, it is *di’ara* [...]; on its contrary, *fujur* concerns the man when he sells his virtue to other men without distinction [...]

Considering that the General Prosecution has blamed all the accused for their usual practice of debauchery/prostitution (*fujur*). After the scrutiny of the documents, the forensic medicine’s reports, the photographs and of what happened during the sessions, the court is convinced that it is established that the accused [...] have committed the crime of usual practice of debauchery/prostitution, on the ground of: [...]

(1) As for the first accused, the 34th, the 35th, the 36th and the 37th, for the reason that their explicit statements given during the aforementioned investigation of the Prosecution revealed their perpetrating of the crime of which they are blamed, beside the first accused’s statement on the fact that he practiced sexual perversion with the 36th accused and the statement of both of them on the fact that they have obscene (*jadiha*) photographs [...]

Legal rules have an open texture, in the sense that it is the concrete circumstances of concrete cases that give rules their situated meaning, against the background of ordinary mores and usages toward which people orient in order to ground their conception of the normal and the natural. This reliance on commonsense procedures, shared practices and ordinary knowledge is

organized around categorization processes. "In describing persons, their actions, their motives, reasons, obligations, knowledge and the like, we build our accounts in accordance with substantive and formal features of a cultural grammar of possibilities" (Hester & Eglin 1992: 84). This is the criminal-law assumptions about mores and usages that make this law available as a device used to draw the borders of the belonging to society for any particular person in any particular case.

Categorization Pairs

"Debauchee" and "Society": A Relational Categorization Pair

In any criminal trial, there is a whole series of standardized relational pairs: offender-victim, accused-judge and prosecutor-witness. Criminal law, in the civil-law family, has however an important specificity: the person who is physically the victim is no party to the trial, because the harm is deemed to be done to society, which is itself represented by the General Prosecution. In the Queen Boat case, there is indeed no "victim" other than society and a certain conception of public order and good manners. The relational pair that comes first in the categorization device of this case links "debauchees" and "society," although the latter only appears by default and is embodied by "law and order officials." The words selection performed by the various parties is done in a way articulated around this categorization pairing. Terms are coherent to each other. "Certain categories are routinely recognized as paired categories, and [this] pairing is recognized to incorporate standardized relationships of rights, obligations and expectations" (Payne 1976: 36). Each member of the pair implies the other so that the mention of one of them makes the other relevant. In a criminal trial, to speak of the "offender" invites to look for "society" to which some evil is supposedly done.

Moreover, attributes specific to each element of the pair are also paired: "to harm" is predicated to the "offender," while "being a victim" is predicated to "society." "To be arrested" is predicated to the "offender," while "being protected" is predicated to "society." To say of someone that "he was arrested" implies that it was done by "social order officials," which in turn implies that the said person belongs to the category "offender." To say that someone is "sexually perverse" implies that he breached "social order," which in turn implies that he belongs to the legal category of "debauchees."

The many activities bound to categorization pairs are also linked to each other: "arresting," "interrogating," "accusing," "judging," which represent activities bound to the category "law and order officials," are paired with, respectively, "committing a crime," "breaching public order," "acting against

morality,” which are activities bound to the category “debauchees.” The invocation of one of these activities serves to confirm the identity of the other element of the pair and the nature of its activity. To speak of “practicing debauchery” allows considering immediately that someone who practices it is an “offender,” because it goes without saying that it constitutes a “breach to social order” that must be protected by society’s “representatives,” i.e., the “law and order officials.” “Social order representatives” will protect law and order by prosecuting “offenders.” The “offence” becomes the cause of the “law and order representatives” action. Hester and Eglin (1992: 127) speak of “motivational attribute.” In the Queen Boat case, homosexuality constitutes a “breach to society” and is identified by law professionals as the motivational attribute of the accusation formulated by the police and the Prosecution and the condemnation issued by the judge.

“Debauchee” and “Insane:” A Disjunctive Categorization Pair

In his praxiological exploration of cognition Coulter (1979) shows that the categories “belief” and “knowledge” constitute a disjunctive categorization pair. Other pairs of the same type would be vision/hallucination, ghost/optical illusion or ideology/science, moderate/extremist, resistant/terrorist. When one of the two constitutive parts of such a pair is called on characterizing a phenomenon, “the speaker’s belief-commitment may be inferred, and the structure of subsequent discourse may be managed in terms provided for by the programmatic relevance of the disjunctive category-pair relationship” (Coulter 1979: 181). So, for the non-believer, Jeanne of Arc suffered from hallucinations, whereas these are divine visions for the believer; or, for the Palestinian street, a Hamas activist is a resistant, whereas he is a terrorist in the Israeli government spokesman’s mouth. The use of disjunctive categorization pairs is often done by the selection of one of the two categorizations in which the person categorized does not recognize him or herself (for instance, calling a “terrorist” the Hamas candidate for a suicide attack). The praxiological upshot of the use of this type of non-self-avowable category consists of depreciating these persons, collectivities or activities through the presentation to the receiving third party of a first preferential and non-critical reading (Jalbert 1989: 240).

Criminal liability is a categorization device largely organized around disjunctive pairs, such as, for instance, the pair “capable of distinction/lacking the capacity of distinction.” The selection of one part of the pair instead of the other implicates that the subsequent discourse can be inferred and managed accordingly. Each of the parts of this categorization pair conveys a sum of

conventional assumptions like “capable of distinction – legally capable – intentional – criminal intention” or “lacking the capacity of distinction – legally incapable – unconscious – legally irresponsible.” Thus, category selection is not only descriptive, but it presupposes some opposite belief affiliations, with all the epistemic consequences deriving from it.

The pair *debauchee/insane* belongs to these disjunctive categories. This categorization pair was present in a case of sex change in which the identification of some pathological cause to the call for sex change organized the whole debate about the licit character of the surgery.⁸ In this case, there are, on the one side, those who sue the transsexual and her doctors on the ground that the former solicited without any justification his mutilation by the latter. The following is their position as summarized by the Public Prosecution:

Excerpt 22 (Report of the General Prosecution, case No. 21, 1988)

[The student registered on the rolls of the University] was male and only male. He had no internal or external female reproductive organ, but underwent surgery that led to the suppression of his male reproductive organs and to the creation of an artificial orifice slightly beyond (*khalff*) the external urinary orifice. The student in question became, as a consequence of this surgery, a male lacking his external reproductive organs, so that the diagnosis of the physician [...] establishing his psychological hermaphroditism totally contradicted the committee’s report and the examination of the student. The surgery performed on the student was not related to any organic medical requirement; on the contrary, instead of this surgery, one should have focused on a psychological therapy and terminated the taking of female hormones. Al-Azhar’s report concludes by claiming that this constitutes a serious professional mistake on the part of the physician [...] and that, because of his faulty intention, what he dared to undertake constituted battery leading to permanent incapacity.

On the other side, there is the Public Prosecution and its representative for whom the condition to be satisfied in order to accept the sex-change surgery depends, not on the concerned person’s free will and consent to the surgery, but on the identification of some pathology, namely psychological hermaphroditism. As soon as this pathology is identified, the surgeons’ therapeutic intention is presumed and the surgery is considered as licit.

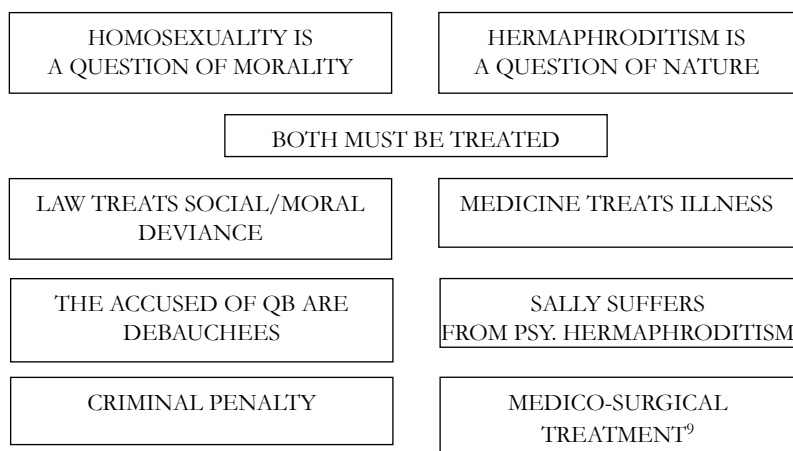
Excerpt 23 (Report of the General Prosecution, case No 21, 1988)

We recommend a conclusion as to the legality of these change-sex surgeries, since they correspond to bodily or psychological medical necessities, provided the transformation is performed with the patient's consent and [provided] the latter is an adult, not previously married, not having (in the future) the capacity of giving birth, and [provided] he presented his request to the competent government authority that shall examine its validity and charge, if convinced of the validity of these justifications, to one of the competent governmental psychological institutions, for a term of at least two years, under the supervision of a team of psychiatrists, psychotherapists, specialists in social problems, plastic surgeons, urologists and gynaecologists, and if at the end of this term they conclude that the patient effectively suffers from psychological hermaphroditism, that he does present the symptoms of dementia and that he will not make any profit from this surgical intervention.

Condemning certain people to criminal penalties or, on the contrary, excusing them and allowing them therapeutic treatments depends on the former categorization of their "deviance" in terms of amorality or biological abnormality, that is, in terms of morality or nature. This categorization is nothing but clearly conflicting. Thus, al-Azhar University or the Doctors Syndicate consider Sally alternatively as "a-man-seeking-to-illegitimately-frequent-women," "a-man-seeking-aberrant-relationships-with-other-men," or "a-man-sexually-mutilated-for-non-therapeutic-purposes." In the Queen Boat case, the first accused invokes the pathologic character of homosexuality, which he presents as a natural given that escapes his control, from which he suffers, which he would like to cure, but of which he cannot be held responsible (see above excerpts 9, 13, 14), while all law institutions (the police, Public Prosecution, the judge) seek to describe the accused's behaviour in terms of "the satisfying of perverse desires."

When comparing the treatment of transsexualism in the Sally case and that of homosexuality in the Queen Boat case, we see how the management of sexuality is judicially organized, in Egypt, around the disjunctive categorization pair opposing "morality" and "nature".

Figure 1



'Normal' and 'Aberrant': An Antithetic Categorization Pair

Beside relational pairs and particular cases like disjunctive pairs (see above) and asymmetrical pairs (Jayyusi, 1984), I noticed the existence of what I call antithetic relational pairs that unify in the same categorization device a thesis and its antithesis.

In the Queen Boat case, there is such a standardized antithetic pair in the categorization device “sexual relationships” that brings together “heterosexual” and “homosexual” relationships. The first part of the pair, i.e. “heterosexual relationships,” can itself host another antithetic pair, that is, the pair of “legitimate” and “illegitimate” heterosexual relationships. However, the second part of the pair, i.e. “homosexual relationships,” cannot host any other antithetic pair (e.g. “legitimate” and “illegitimate” homosexual relationships) since there is no recognition of homosexual marriage in Egypt.

Through the identification of these antithetic pairs one can describe the articulation point and flaw of the reasoning followed by the Office of International Co-operation of the Office of the Prosecutor General in a document seeking to justify the Egyptian judicial authorities’ attitude vis-à-vis the critiques addressed to them from all over the world.

Excerpt 24 (General Prosecution, Memorandum Concerning the Apprehension and the Trial of 52 Men on Charges of Contempt of Religion and Male Promiscuity)

[Article 9 (c) of the Law No. 10 of the year 1961] criminalizes the material conduct of habitual promiscuity with consent whether perpetrated by a male or a female and without any bearing whatsoever on the sexual orientation. And hence, whoever intentionally commits the material conduct described above falls within the ambit of this crime.

Indeed, the argumentation of Ahmed Zohny, the prosecutor who signed the document, is the following: (1) the law of 1961 condemns consenting sexual practice outside wedlock; (2) this law concerns women as well as men; (3) there is henceforth no discrimination on the basis of gender or sexual orientation. Through categorization analysis we observe the existence of an antithetic pair: “consenting sexual practice within wedlock”/“consenting sexual practice outside wedlock.” Because of the 1961 law repressing sexual relationships outside wedlock, the antithetic pair reads “legitimate sexuality”/“illegitimate sexuality.” The prosecutor argues that sexuality is illegitimate because it takes place outside the legal framework of marriage, not because it is homosexual. However, these categorizations operate only subsequent to the antithetic pair “heterosexual relationships”/“homosexual relationships.” It is only the first part of this pair, i.e. “heterosexual relationships,” that legally authorizes its bound activity and reflexively legitimates it: “marriage.” In other words, it is indeed because they are homosexual that certain sexual relationships are prohibited, because they do not open the right to marriage that solely legitimates sexual relationships. Consequently, the prohibition depends at a first level on the partners’ sexual orientation. The category “homosexual relationships” does not open the possibility for subsequent antithetic pair “legitimate relationships”/“illegitimate relationships,” because it constitutes, in the categorization device of sexual relationships, the antithesis “aberrant relationships” of the thesis “normal/natural relationships.”¹⁰

Antithetic pairs are endowed with a number of particular properties. First, the distribution of rights and duties proper to each of the two parts operates in a way that is neither asymmetrical nor disjunctive, but inverted. If the first part of the antithetic pair “heterosexual relationships”/“homosexual relationships” permits marriage, the second part excludes it. If the first part of the antithetic pair “legitimate sexual relationships”/“illegitimate sexual relationships” permits the procreation of “legitimate children,” the second part implicates the procreation of “bastards.” It is moreover a standardized relational

pair that constitutes the border line between the two parts of an antithetic pair. Thus, the relational pair “man/woman” constitutes the border line between the two parts of the antithetic pair “heterosexual relationships/homosexual relationships.” In the same manner, the relational pair “spouse/spouse” constitutes the border line between the two parts of the antithetic pair “legitimate sexual relationships/illegitimate sexual relationships.” In that sense, it is the standardized relational pair “man/woman” that draws the border line between the two parts of the antithetic pair “heterosexual relationships/homosexual relationships.” that draws in turn the border line between the two parts of the disjunctive pairs “natural/pathological” and “normal/deviant.”

Categorizations and Sequentiality

The mobilization of categorization devices operates on a contextual, circumstantial, local and punctual basis. Therefore, the institutional and sequential positioning of the concerned parties exerts a direct influence on the categorizations they produce. The parties in charge of investigation, prosecution and adjudication manifest a tendency to legally construct the moral condemnation of sexual behaviour. The incriminated parties, on their side, produce what J.N. Ferrié calls negative solidarity, that is, they first acknowledge the norm and its constraining character and second seek to justify the discrepancy between that norm and the committed misdemeanour.¹¹

Watson (1994, 1997) shows how, in an often discrete or even surreptitious way, the study of the sequential dimension of conversational interactions resorted to membership categorizations as an analytical resource. When, in my analysis, I quote the speech of the parties to an interview, I systematically identify utterances with a Q (for question) and A (for answer), following the original Arabic texts that use the letter *sin* (for *su'al*) and the letter *gim* (for *gawab*). These letters reflect the categorization work of the Prosecution's clerk who, instead of the parties to the interview, provided all the participants with their membership category (the letter Q referring to the deputy prosecutor, who is the only one entitled to ask questions, and the letter A referring to the person interviewed, who is required to answer the questions without him/herself asking any). These letters, which provide a sense of the sequentiality specific to the interview, can be studied as categorization terms and, in particular, as adjacent relational pairs (and not only as the evidence of the pre-allocated character of turns in institutional context). Actually, this technique of transcription of categorical incumbencies belongs to a type of textual practices seeking to make institutional discourse visible and readable as such (Watson, 1997: 52). It reveals the intertwined nature of categorizing operations (e.g., being the deputy prosecutor or the

witness) and the sequential organization of interactions (e.g., the sequencing of questions and answers). Categorizing a speaker as “deputy prosecutor” and an addressee as “witness” can concur to give sense to their speech as constitutive of “judicial investigation;” in the same way, the features of a sequence (how it is constituted and placed, what it performs) show that it is category-bound, that it is conventionally identifiable as an investigation sequence putting together a deputy prosecutor and a witness. Independent of the letters assigned to each turn, the interview provides continuously the means for categorical and sequential identification necessary to its “normal” accomplishment, i.e. according to what everybody as a competent member of society expects from an interaction within the law courts between a magistrate and a witness. Categorization and sequentiality point together toward the underlying scheme of the interview, which serves at the same time as a documentary means that allows consideration of the many speech turns as questions and answers taking place within the framework of some judicial investigation.

Watson’s work on membership categories and sequentiality stands mainly at an intra-conversational level, that is a level circumscribed by a sequence the parameters of which (participants, place, moment) are available within one single set of turns. Sequentiality has also a broader meaning that resituates a succession of turns within the process of a larger unit, like a judicial procedure in its entirety. Considering the broader sequence has direct implications on the categorization work of the many parties to the procedure. In the Queen Boat case, the categorizations operating in the many documents are distributed differently according to the time and the document in which they appear. By way of illustration, one can list in the form of short excerpts the different steps of the chronological and procedural sequence of their production:

- Police record:

Excerpt 25 (Police, Record, 25 May 2001)

Information [coming] from our secret and reliable sources was given and our secret and careful investigations confirm them, [which] report that the named [...], living in [...], adopted some deviant ideas inciting to the contempt of revealed religions and to the call to abject (*radhila*) practices and to sexual acts contrary to revealed laws [...]

Information and investigations add that the named [...] is affected by sexual perversion (*shudbudh jinsi*) and practices some sexual acts with people who are close to him and adopted the same thoughts by considering them as one of the rituals [aiming] at infringing revealed laws, [these rituals] implicating, according to their erroneous convictions,

that he and his company set about organizing licentious feasts at the domicile of some of them or in the same way on boats among which the tourist boat “Nariman Queen,” anchored in front of the hotel Marriott, [feasts] which many of the acquaintances of the abovementioned among sexually perverse people attended, and this on a weekly basis, the Thursday evening of every week [...]

- Prosecution record:

Excerpt 26 (High State Security Prosecution, Case No. 655, 2001)

Q: What happened then

A: [...] I told him also that I had perverse sexual practices that started suddenly when I was at the German school and increased when I was at the engineering faculty at Cairo University and I made him understand that I tried to repent especially after I completed three `umra and that I made pictures of naked boys or in sexual postures and that I photographed myself with those with whom I had these sexual practices and I took pleasure in looking at these pictures like any other young guy who's my age and has this type of speech [...]

Q: Likewise the investigation indicated that insofar as you're afflicted by sexual perversion you practice these perverse sexual practices with those who're convinced of your thought and that you count them among the rituals of the faith of which you're convinced

A: God save me and be Him satisfied of his lieutenant this who said those things concerning me placed the 10 yellow books which are attributed to me

Q: And what do you have to say about what the investigation established that you and those who're convinced of your thought used to convene licentious feast in your residences and on certain boats like the tourist boat Nariman Queen whose anchorage is in front of the Marriott hotel in Cairo and this on Thursday evening of each week

A: These words it didn't happen and I I never knew this boat [...]

- Ruling

Excerpt 27 (Summary court of misdemeanours (state of emergency), Case No. 182 of the year 2001, Qasr al-Nil)

Considering the facts of the petition, upon which the court based its conviction and the veracity of which is not in doubt, regarding what

the court deduced from the examination of the documents and the investigations [...] as well as from the evidence that was submitted to it and from what was related to it during the trial sessions: [these facts] lead to what was consigned in the record [...], according to which information came to [the Prosecution] from secret and reliable sources, confirmed by its careful investigations, and such information suffices [to show that the first accused] adopted deviant (*munharifa*) ideas inciting to hold revealed religions in contempt (*izdira'*) and to call to abject (*rudhila*) practices and to sexual acts contrary to revealed laws. [...] He undertook to propagate these ideas among his acquaintances and those who are close to him; he incited them to adopt [those ideas]. Such information also shows that he is afflicted with sexual perversion (*musab bi'l-shudbudh al-jinsi*) and practices it with people who are close to him by considering [these practices] as one of its rituals; that he and his company set about organizing licentious celebrations (*bafalat majina*) at the domicile of some of them or on boats, among which the tourist boat "Nariman Queen" [...] which many of his sexually perverse acquaintances attended, and this on a weekly basis, every Thursday evening [...] He undertook to film these sexual meetings, to develop the pictures and to print them at a photo shop [...], on the basis of his agreement with some of the studio employees, that is [...]

The crime designated in [this text] is only committed by fornicating (*mubasharat al-fahsha'*) with people indiscriminately and habitually, whether [the prostitute in question is] male or female. Once a [woman] has fornicated and sold her virtue indiscriminately to whomever asks for it, we are in the presence of *di'ara* [...]; on the other hand, the term *fujur* applies to a man who sells his virtue to other men indiscriminately.

Considering that the General Prosecution has accused all the accused of habitual practice of debauchery/prostitution (*fujur*). After having scrutinized the documents, the forensic physician's reports, the photographs and what occurred during the sessions, the court is convinced that the accused [...] have committed the crime of habitual practice of debauchery/prostitution, on the ground of: [...]

(1) As for the first accused, the 34th, the 35th, the 36th and the 37th, because their explicit statements, given during the Prosecution's aforementioned investigation, reveal that they have committed the crime of which they are accused, beside the first accused's statement on the fact that he practiced sexual perversion with the 36th accused and the statement of both of them on the fact that they have obscene (*fadiha*) photographs.

For these reasons

The Court of Misdemeanours / State Security (Emergency) rules:

1°) That the first accused serve [...] [a prison sentence] of five years, with labour, effective immediately, for the two accusations simultaneously; and that he be placed under police control for a term of three years, beginning upon the date of the end of the prison sentence and the expenses.

These various speeches and documents, all belonging to the same material entity (i.e., the file of the Queen Boat case), are “collaborative ‘turns’ in a developing dialogical network” (Nekvapil & Leudar 2002: 62).¹² The dialogical network constituted by the judicial file is a phenomenological, social, legal and judicial unit toward which the various protagonists explicitly orient at every step of their case-bound activity. The institutional setting of this network constrains its nature and organization. Its importance depends on the legal and procedural complexity, the number of parties concerned, and the solicitation of expertise (medical or not). However, it does not depend on the spontaneous involvement of people in an ongoing social debate, unless we extend it to the media coverage of the case – this might be justified in certain particular cases.

There is a thematic cohesion between the many documents constituting the file of the Queen Boat case. This cohesion is made of shared statements, re-use of argumentative structures, and sequential structures. We find the features of the face-to-face conversation, but with a time differed from one turn to another which allows different documents (possibly originating from different people and partly contradictory) to play the role of the second part in an adjacency pair. Thus, for instance, to the question asked by the magistrate at a time *t* on the accused’s passive practice of sodomy, an answer is formulated at a time *t’* by the forensic physician’s medico-legal report, which concludes to the inexistence of any mark testifying to that practice (while adding that the lack of evidence does not equate to the lack of practice), and at a time *t’’* by the accused’s testimony admitting such practice several years ago, all this leading the judge at a time *t'''* to consider as established the facts constitutive of debauchery, grounding his decision on his inner conviction, despite the confession retraction at time *t''''*.

The judicial file also works in an intertextual way. At several occasions, participants to some judicial interaction orient toward two different audiences, one present and the other one virtual (Livet, 1994). In the conclusion of the interview, in which he asks God and the judge for their pity and forgiveness, the first accused addresses the deputy prosecutor as well as the judicial

authorities who will judge him afterwards. The intertextuality of the many documents of a dialogical network shows how the authors of these documents formulate them in a constantly evolutionary manner, in the course of the unfolding of the case and of the constitution of the file. Whereas, for instance, the Prosecution's interview relies on the police record, it aims at establishing a basis on which the judge will later ground his decision, which includes direct or indirect references to the former stages of the trial. The judicial trial's impact on its protagonists and in a broader way on society occurs through the production of documents providing argumentative resources that will be used at further procedural and media stages and times. Through the notion of a dialogical network we see how it is used prospectively, in the projection on ulterior stages at any point of the procedure, and retrospectively, in the support given by former documents to ongoing activities.

The permanence and evolution of the terms used to characterize the incriminated behaviours illustrate the relevance of the idea of a dialogical network in the study of the judicial file constitution and unfolding as a material unit of the many activities stretching from police investigation to the successive rulings and their implementation. Far from being understood in a frozen manner, in a purely semantic approach, categorizations function in a sequential dynamics that must be accounted for. For instance, the expression "sexual perversion" (*shudhubdh jinsi*) runs through the whole judicial sequence, from the police record (see excerpt 25) to the State Security Court's ruling (see excerpt 27), via the Prosecution's investigation (see excerpt 26). However, the incriminated action changes characterization: whereas the blamable character of homosexuality, presented as sexual perversion, belonged to the realm of absolute obviousness in the police and Prosecution documents, its legally problematic character (Egyptian law does not explicitly prohibit homosexual behaviours), as some defence attorneys and human rights organizations stressed, induced the transformation of its wording, which became "habitual practice of debauchery" (*mumarasat al-fujur*). The expression makes its first appearance at the end of the Prosecution's interrogation, when the deputy prosecutor formulates the accusation (see excerpt 13). Consequently, categorizations, far from proceeding from formal semantics, are sensitive to the context of their formulation, which is necessarily situated in space and time. However, this time is not instantaneous but sequential, made as of both a before and an after, actualisation in the present and projection in the future, within one and the same dialogical unit, that is, the legal case and its file.

Implicitness, Ambiguity, and Implication

In the study of common beliefs, we must analytically develop the notion of presupposition. As Coulter (1979: 167) points out, "members display and assign beliefs to each other in virtue of the occasioned production and understanding of utterances analyzable for what they presuppose." Categorization devices largely lean on these tacit significations that take form and substance only when mobilized. Predicates ascribed to people, situations, activities and collectivities are not simply denotative and descriptive, but they are also connotative in the sense that they associate the categorized person, situation, activity or collectivity with a set of features made available by the mere fact of their categorization. The selection of the relevant category, the identification of the categorization device on which it depends and the binding of the features, rights and duties that can be associated to it is performed in a mainly tacitly understood manner.

It is neither sex nor gender that professional actors involved in the Queen Boat case seek to define, but the concept of sexual relationships in the specific context of a homosexuality trial for all legal practical purposes. Underlying this definition is the scheme of sexual-relationship-as-an-activity-binding-a-man-and-a-woman-within-wedlock. Sex and gender take here the dimension of a legal-organizational concept (Hester & Eglin 1992: 77). Beyond this concept, however, stands a set of commonsense assumptions on the world's sexual organization, sexual normalcy, natural sexuality, deviant sexuality, the pathological character of sexuality, the sharing of active and passive roles in sexual relationships, places where relationships are established, the role of medicine in the establishment of scientific truth in cases exceeding the normal framework, and so forth. Garfinkel (1967: 122) showed that sexuality is an organized accomplishment that answers to "a preliminary list of properties of 'natural, normally sexed persons' as cultural objects." Normalcy is here assimilated to the orderliness of things, that is, usages and mores as well as nature. Criminality becomes what contravenes to it.

The definitions used by the Egyptian judges and magistrates who reacted spontaneously to questions I raised on the issue of "sexual relationships" underscores the efficiency of categorizations, the intertwining of their technical and commonsensical dimensions, and the importance of what is tacitly taken for true by the members of a given social group. For these male lawyers with whom I talked during a series of lectures given at the National Centre for Judicial Studies between 1995 and 1996, the category "licit sexual relations" that binds an adult man and an adult woman within the frame of a legal marriage constitutes the basic reference for evaluating sexual actions. The

creation of such legal bind involves the right to sexual relationships, independent of the issue of consent or the use of constraint, so that the concept of rape can never characterize relationships between a legally married couple. More precisely, "sexual relationships" implicate the relationship of a man and a woman through the intromission within the woman's genitals of any organ of the man or any object he holds, and these relationships become "licit" as soon as they take place within the framework of marriage. It is against this underlying notion that the conception of rape becomes the performance by the way of constraint of sexual relationships between a man and a woman outside the legal framework of marriage. In turn, this categorization of rape excludes any inversion of the protagonists' roles (a woman cannot rape a man), any relationship that would not strictly correspond to the one described above (like sodomy) and any homosexual situation (a man cannot rape another man).

At first glance, it seems that there is a discrepancy in the way the many file documents account for the Queen Boat case. On the one hand, there is the account of the case as a telling-in-so-many-words and, on the other hand, the account as a telling-of-despite-itself (Jayyusi, 1991). The properties and organization of these different texts give the possibility of an equivocal reading, even though it was obviously not their authors' intent. At a first level, these documents, whose authors are legal professionals, seek to secure their procedural correctness and legal relevance, and to systematically produce the marks of their logic and validity. Nevertheless, these documents present a second level that cannot be totally concealed by the force of legal formalism, a level at which commonsense morality and normalcy operate. Without having to be analytically opposed to legal sense, commonsense morality and normalcy offer another intelligibility structure of the case. To know which one of these two discourses is conclusive and imposes itself as the authoritative reading depends on its addressee's institutional position,¹³ his/her knowledge of the case, his/her propensity to believe what police and judicial sources tell him, the depth of his/her sharing of the background of morality and normalcy, his/her legal knowledge, his/her own experience of the police and judicial institutions, his/her will to confer value to their respect, etc. Nevertheless, all the activities bound to the criminalization of homosexuality—police, Public Prosecution, judges, attorneys, forensic physician, accused—are only intelligible in the context and practice of "what-everybody-knows" on "sexual perversion." The understanding of these activities depends on knowing what can be analyzed as the articulation of membership categorization methods used by the people concerned. The facility with which the protagonists of the Queen Boat case

refer to this category is explainable only by the seen but unnoticed use of sense-production methods and interpretive procedures, among which include categorization devices.

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NOTES

Chapter 1

- ¹ See, among others, Idris (1970), Zomeño (2000), and Powers (2002). For a discussion on the matter, see also Fadel (1996), and Shatzmiller (1997).
- ² The bibliography of these works is enormous; see the bibliographical appendix in Lagardère (1995).
- ³ On this subject, see Rapoport (2000). See also Moors (1995) and Jansen (1984).
- ⁴ See Zomeño 2000: 131-50.
- ⁵ His job in the administration of justice is called *futya*. We use the term ‘fatwa’ for both the question and the answer. See Masud, Messick and Powers (1996), Tyan (*EF*), Powers (1993) and Vidal Castro (1998).
- ⁶ The works on *adab al-mufti* clearly recommended writing the question. In the Islamic West already, in the beginning of the X century, the judge al-Habib Ahmad b. Muhammad b. Ziyad (d. 291/903) introduced the judicial custom of also having the answers written by the mufti himself. See al-Khushani 1914: 176; see this reference in López Ortiz 1941: 76, n.7. It is also possible that even before this date, political or exceptional cases were also written down; see Fierro 1990: 110, n. 33.
- ⁷ The *sadaq* – or *sidaq* – is the term used in al-Andalus to designate the obligatory payment of the husband in a Muslim marriage, see Zomeño (2000: 23 and 81-106).
- ⁸ Fadel (1997) classifies the story in the *istifta*’ in a similar way: 1) judicial, 2) quasi-judicial and 3) non-judicial.
- ⁹ On the concept of custom in Islamic law as it was elaborated in the Maliki school, see Masud 1995: 212-8.
- ¹⁰ Ibn Rushd had a discussion on the matter. See Ibn Rushd 1987: II, 1176-7.
- ¹¹ There are exceptions to this, since in some cases the parties are named. One example is the story of Muhammad b. Yusuf al-Ghasil (d. 464/1071), a state employee in charge of the *abbas* in Calatrava. He was married to two women, ‘Aziza and Shams, at the same time and both divorced him at the same time, when they knew about the existence of each other’s

- marriage. Thus, not only his name, but also his job was mentioned (and he was a real person as his tomb is also known, located among the few Andalusian Arabic funerary inscriptions). See Marín, 1991: 583-6. This story was collected by al-Wansharisi 1981: III, 417-9.
- ¹² The written questions given to the muftis of Ibb (Yemen), for example, do not include the names. See Messick, 1986: 102-19.
- ¹³ See the many questions studied by Powers (2002).
- ¹⁴ See for example in al-Wansharisi, 1981: III, 106, 122, 155, 157. Other formulaic endings include “*in sha’ Allah ta’ala*.”
- ¹⁵ Tyan, 1960: 339; Vidal Castro, 1992: 166. See for example, the usual signature of the mufti al-Haffar: *Wa-salam ‘ala man yaqif ‘alay-hi min Muhammad al-Haffar*, in al-Wansharisi, 1981: III, 147 and 148; or the one of Ibn Lubb: “This is what I consider regarding the question that you described to me. This was written by Faraj,” in al-Wansharisi, 1981: III, 190. See also Messick, 1986: 106.
- ¹⁶ For a good study on the mufti, see Masud, Messick and Powers, 1996.
- ¹⁷ Tyan, 1960: 327; Vidal Castro, 1992: 159. See also Marín, 1985: 25-51.
- ¹⁸ On this independence, see Brett, 1980: 6; Marín, 1994: 139.
- ¹⁹ For a classification of *kutub al-nawazil*, see al-Habib al-Hilah, 1992: 71-78.
- ²⁰ We know a lot on the selecting criterion used by the son of ‘Iyad when compiling the fatwas of his father. In his introduction he says that he compiled some single papers (*bata’iq*) to which he gave form by organizing them. He also asked the friends and disciples of his father and, finally he had access to the archive of the court when he died. With all this material, he added some additional notes by himself. Muhammad b. ‘Iyad 1990.
- ²¹ As far as I know, this compilation is still in manuscript, in the Maktaba al-‘Ammā in Rabat, with the numbers q 521 and d 883 and the title *Al-Durar al-maknuna fi nawazil Mazūna*. See Berque, 1970b: 1325-53 and Berque, 1970a: 31-9.
- ²² Also still in manuscript; see López Ortiz, 1941 and Fadel, 1997.
- ²³ This is not explicitly mentioned by the author and leads to confusion from historians, especially because in his introduction, he says that all the fatwas have the name of their authors. We should keep in mind that the only way of dating a question in most cases, is by knowing the biography of the mufti.
- ²⁴ In the manuscripts, this is usually emphasized with the use of a bigger pen or ink of a different color, most of the times in red.
- ²⁵ Compare the story 3a in Ibn Rushd, 1987: III, 188-9 with al-Burzuli, 2002: II, 219.
- ²⁶ Compare Ibn Rushd, 1987: III, 1418-9 with al-Burzuli, 2002: II, 213-4.

- ²⁷ With the exception of the *fatawa* by Ibn Rushd.
- ²⁸ See al-Wansharisi, 1981: III, 35, line 19. Compare with al-Burzuli, 2002: II, 346, line 23.
- ²⁹ See al-Wansharisi, 1981: III, 324-5.
- ³⁰ Al- Wansharisi 1981: I, 7 [the translation by Powers 2002: 6].
- ³¹ Unfortunately, to my knowledge, there is no systematic study that compares these compilations and analyses the ways in which different author-compilers used their sources. The work by Hallaq (1994) does a lot in this direction, although it cannot be considered as a systematic comparison of *fatawa* collections. An additional problem is the inadequate edition of one of these sources, the *Mi'yar*, that makes this task extremely difficult.

Chapter 2

- ¹ In the 19th century Ottoman Empire, the distinction was between two types of registers, the *jarida* and the *sijill*. (Marino and Okawara 1999:54, cf. 56). Introduced in the 19th century, the *jarida*, in which the minutes were recorded, and which was sometimes known as the register of *dabt*, as in Imam Yahya's "Instructions," "recorded all stages of cases which went to trial and which were subsequently recorded in the *sijills*." According to Marino and Okawara, the identities of such court registers are specified in the Ottoman-era "Instructions" (*Ta'limat*), as they are in those issued by Imam Yahya in Yemen.

Chapter 3

- ¹ Mahkamat al-Mansura al-ibtida'iyya al-shar'iyya; Madabit al-murafa'at, makhzan 46, 'ayn 142, sijill 286, p. 59, 28 Rabi' I 1280.
- ² Madbata of the Majlis al-Ahkam, 15 Shawwal 1280, no. 626. Dar al-Watha'iq al-Qawmiyya (Egyptian National Archives), Sin 7/10/21, p. 16-19.
- ³ For the process of the moulding of the facts of a case into legal form, ready for handling by courts and judges, see Baudouin Dupret, "The practice of judging: The Egyptian judiciary at work in a personal status case," in *Dispensing justice in Islamic courts: qadis, procedures and evidence*, ed. M. Khalid Masud, R. Peters, and D.S. Powers (Leiden: Brill, 2005).
- ⁴ A piece of hard wood with a rope looped though its ends used to secure the feet of those undergoing a bastinado.
- ⁵ The full *diya* had been fixed at 15.093,75 piasters by a decree of the Majlis al-Ahkam issued on 25 Rab. I, 1275 (1858). Rudolph Peters, "Murder on the Nile: Homicide Trials in 19th Century Egyptian Shari'a Courts," *Die Welt des Islams* 30 (1990).
- ⁶ Ibid.

- 7 For the competence and jurisdiction of the Majlis al-Ahkam, see: Rudolph Peters, "Administrators and magistrates: The development of a secular judiciary in Egypt, 1842-1871," *Die Welt des Islams* 39 (1999).
- 8 For the jurisdiction and competence of the qadi in criminal cases, see Rudolph Peters, "Islamic and secular criminal law in 19th century Egypt: The role and function of the qadi," *Islamic law and Society* 4 (1997): 70-90.
- 9 The fact that the beating was administered on the soles of the boy's feet was only mentioned in the decision of the council and not in the report of the questioning of the accused.

Chapter 4

- 1 Parts of this contribution are based on Moors (1995); more extensive versions of some of the narratives can also be found there.
- 2 This in contrast to marriage contracts in, for instance Morocco (see Buskens this volume), or in 18th and 19th century Nablus (see Tucker 1988) that were written out. Allowing for some choice in wording, they provided considerably more information about, for instance, the backgrounds of the bride and groom.
- 3 Dower stories are a particular form of topical life stories. For the use of such topical life stories to gain insight into social relations, see Bertaux (1982).
- 4 The fieldwork on which this article is based, was done in the 1980s and early 1990s in the Nablus region, situated in the northern part of the West Bank. In addition to some formal and many informal talks with Palestinian women from divergent backgrounds, I also engaged in research in the Nablus shari'a court, where I selected and analyzed a sample of marriage contracts, divorce registrations and summaries of court cases covering the period between 1920-1990. For more details about methods, cases, and results of this research project see Moors (1995).
- 5 The token dower is a specified dower, not a proper dower. If it were a proper dower (that is, if nothing is registered as dower in the marriage contract), the bride would be entitled to a dower suitable to someone in her position. When, in contrast, a particular sum (however small) is written down, as is the case with token dower registrations, she can only claim that particular amount.
- 6 Authors such as Chatterjee (1989) and Ahmed (1992) have pointed to the ways in which Western influences and internal differences produce each other and are intricately intertwined. Ahmed (1992) deals with the ways in which protagonists of discarding the veil not only felt affinity towards

Western cultural notions of modernity, but also distanced themselves in the same move from Egyptian lower class culture. Chatterjee (1989) underlines how nationalist reformers constructed the 'new woman' not only in contrast with notions of Western femininity, but also in contrast with previous generations and with women of the lower classes.

⁷ PP stands for Palestinian Pound, the currency in use during British Mandate rule in Palestine; 1,000 PP was a very high amount; in 1944 the average urban dower was 126 PP (Moors 1995: 93).

⁸ In a sample of women marrying to professional men in the 1980s ($n = 31$) a token dower was registered for 57% of the non-employed women, while this was the case for 82% of the women who themselves registered professional employment (such as doctor, dentist, pharmacist, university lecturer and engineer).

⁹ Up till the 1940s there was only one school for girls with a program up to the seventh grade. If they were to continue their education, they needed to go to the government Women Training College in Jerusalem, which was highly selective, or to one of the private foreign Christian boarding schools, located in Jerusalem and Ramallah.

¹⁰ See for instance, the autobiography of Fadwa Tuqan (1990), who was to become a famous poet and writer. In the late 1920s her brother took her out of school and sentenced her to "compulsory confinement to the house till the day of my death" (1990: 48), because he had discovered that a boy had been following her on the way to school and that she had been given a jasmine flower.

¹¹ Based on an analysis of marriage contracts and other legal documents, Tucker (1988) points out that child marriage and polygyny were largely limited to the upper classes in 18th and early 19th century Nablus. About landowning families pressuring their daughters to marry their patrilineal cousin (or otherwise to remain single) so that the land will stay in the lineage, see Canaan (1931: 178).

¹² My sample of marriage contracts for the 1980s shows that almost one-third of women teachers marry male teachers; for the total sample this was less than 5%.

¹³ Rural women are much less often engaged in professional employment than women in the cities, and, if they do, they usually do not register this in their marriage contracts.

¹⁴ The contracts show that whereas in 1952 76% of rural men in Jabal Nablus still registered their occupation as farmer, by 1964 this had decreased to 48%, in 1976 it was 21% and in the 1980s 15%.

- 15 Throughout history the differences in wealth in Nablus have been much greater than the differences in the prompt dower.
- 16 In contrast, women may also have ‘personal reasons’ (that is reasons referring to the person of the groom) to prefer registering a high amount. This may be the case when a disadvantageous marriage has been arranged for them, such as with a much older husband, someone from a remote village, or as second wife in a polygynous household.
- 17 While at the same time the demands of household labour and care have become higher, these women are able to shift part of these burdens to poor women as domestic help.

Chapter 5

- 1 *Acte de violence contre la femme au sein de la famille*, literally “an act of violence against a woman in the family.” In Bamanakan, the *lingua franca* of southern Mali, there exists no equivalent to the term “domestic violence” (against women). The fact that people refer to such cases as instances of “battered” or “punished” women indicates a semantic slippage (and normalizing process, see Dupret, 2001) which I shall discuss more extensively in section 4.
- 2 “Incidents like this one happen everyday. Everywhere, women are subjugated and humiliated by their husbands. But this particular woman has been lucky because her case has been brought to the attention of women who may help her (and advise her on what to do). Women need to stand up to take a stance against these instances of male aggression. We exhort all women who made a similar experience to step forward, to come to our station and to make it public. There is no use in relying on your own family to smooth things out. Because the traditional way of going about works against women.”
- 3 The confrontation between women’s rights activists and members of the Ministry of Justice occurred in unofficial meetings.
- 4 *Association Malienne pour l’Unité et le Progrès de l’Islam*.
- 5 “Dear compatriots, this case is serious. Once again, we are confronted with the task of defending ourselves against the intrusion of foreign values that are detrimental to our culture. This intrusion is brought about by these so-called educated women. They seek to turn our world upside down by aping Western women who, for a long time now, have been mounting on their husbands’ head” (*Radio Islamique*, Bamako, August 8, 1998, identity of speaker unknown).
- 6 To equate Malian “traditional” culture with “Islamic culture” is misleading because only ca. 95 per cent of the Malian population engage in some kind of Muslim religious practice.

- 7 The episode was clearly constructed at several levels and with different outcomes (as an issue of policy-making in public debates and in the family as a matter of moral responsibility). My discussion will concentrate mostly on the former level, in other words, on its construction as an issue of debate in the public arena.
- 8 Calhoun calls it “public good” to draw attention to the institutional context of the public sphere in which the “good” is debated and fought over.
- 9 *Union Démocratique du Peuple Malien*.
- 10 The *Ministère de la Femme, de l'Enfant et de la Famille* was created in 1997 to replace the *Commissariat de la Promotion de la Femme* (established in 1994).
- 11 Intellectual women have been occupying leading positions in the administration already before 1991. Since the late 1980s, a new group of elite women became prominent in the *Mouvement pour la Démocratie* which was instrumental in the overthrow of President Traoré. Many of these women earned a degree from universities in West Africa, Europe or the United States. An influential organization created after 1991 by female members of the new professional elite is the “Association of Malian (Female) Jurists” (*Association des Juristes Maliennes*).
- 12 An example of this representation of international and governmental interventions is female excision, against which certain women NGOs have been waging war. Until the early 1990s, it was inconceivable to address this practice in private conversations, let alone to denounce it in public. Since then, with the support of international donor funds, several women NGOs have turned female excision into a privileged domain of activity. Even if they are increasingly questioned about the efficacy of their interventions, most NGOs continue to make measures a top priority that seem to prove the immediate success of their interventions.
- 13 CAFO, the umbrella organization of all women’s NGOs, remains closely connected to the current Women’s Ministry (via various ties of personal obligation and “friendship”). In the new government under Alpha Toumani Touré (elected in 2002), the majority of the seats in the *Assemblée Nationale*, the legislative assembly, is still held by the ADEMA.
- 14 The most important recent controversy was over the PRODEJ reform project executed under the tutelage of the Ministry of Justice and including various measures, such as the improvement of the Malian judiciary system and legislative reform (Schulz, 2003; see Hock, 1998, chapter 5).
- 15 Large segments of the Malian rural population, in particular in the south, converted to Islam only after the 1920s. Today, ca. 95% of the population engage in some form of Muslim religious practice.

- 16 These are the Qadiriyya-Mukhtariyya, the Tijaniyya and the Hamawiyya.
- 17 Most notably, Timbuktu, Gao, Mopti, Djenne, Segu, and Nioro.
- 18 French colonial policy constituted a crucial step towards this portrayal of Sufi lineages as a homogenous group. Starting in the 1910s, Colonial administrators, who feared a pan-Arabic Islamic movement, started to support certain Sufi lineages as representatives of an "African Islam" who, they hoped, would limit the increasing influence of a new generation of Muslim intellectuals and businessmen with strong ties to the Arab-speaking world (Kaba, 1974; Harrison, 1982; Brenner, 2001; see Soares, 1997, chapters 1-3).
- 19 Rifts among Muslim opponents to the clerical establishment deepened in the 1980s, when young Sunni graduates from institutions of higher learning in the Arab-speaking world (the *arabisants*, cf. Otayek, 1993) returned to Mali and entered in competition with an older generation of Sunni businessmen over access to state resources.
- 20 The mobilizing capacity of these Muslim groups was instrumental in the destabilization of President Keita's regime which led to his overthrow in 1968 by a group of army officers (Amselle, 1985).
- 21 Moussa Traoré, a leader of the military overthrow of President Keita, presided over the military committee which ruled the country until 1979, when a new constitution was put into effect which established the single-party rule of the UDPM (*Union Démocratique du Peuple Malien*) and President Traoré.
- 22 *Association Malienne pour l'Unité et le Progrès de l'Islam*. The official raison-d'être of the organization in 1985 was to reconcile two Muslim factions whose competition has shaped national Muslim debate since the 1940s. The integration of these different Muslim orientations and groups into a national organization allowed the ruling party to channel the substantial monetary donations from the Arab world that had flooded the country since the early 1980s. For a historical account of the confrontation between the two Muslim camps, see Kaba (1974) and Brenner (1993:65-71).
- 23 In early 1999, more than 80 local radio stations were officially registered.
- 24 Relatively few local radio stations operate in the northern triangle of Mali, where the broadcasting in local languages would be of special importance. Similar to local radio stations in southern Mali, they cover very limited areas in the proximity of rural towns.
- 25 About 80% of the local radio stations are commercial. Other radio types include community stations (financed mostly by international donor organizations) and local relay stations of the national broadcast station.

- ²⁶ Competition with local radio stations has obliged those in charge of the programming of national Malian radio to revise official language policies and to adapt the programs to the expectations of particular groups of consumers, for instance by designing programs that allow for greater audience participation. Local radio stations provide a platform for speakers who address a public constituted around the moralizing assessment of social life. (2000).
- ²⁷ Employees of the radio station stress that the radio station's political significance is due precisely to the lack of legal recourse for battered women. In this situation, observed the director in a conversation in 1999, broadcasting a public warning to husbands becomes the only possibility to protect a woman from further aggression.
- ²⁸ The following discussion is based on 24 in-depth interviews conducted in 1999 and 2000. I made initial contact with most interviewees at the legal advice institutions (*Cliniques Juridiques*) created by members of the Association of Malian (Female) Jurists since the early 1990s. Interviews of actual victims of physical abuse were complemented by interviews with family members, female lawyers working at the *Cliniques*, and other women's rights activists.
- ²⁹ These were 18 out of 32 interviewees.
- ³⁰ Only two women mentioned cases of female physical aggression against husbands. I shall use the term domestic violence to refer to women's abuse by husbands, while keeping in mind that the domestic violence directed against women coexists with recurring acts of physical aggression against other status-inferior family members.
- ³¹ It is revealing that most people commonly use the Bamana term "beating" (*bugo*) to talk about the "disciplining" of a woman or child (for a striking parallel to the situation in Ghana, see Ofei-Aboagye, 1994).
- ³² My discussions with battered women revealed that most of them consider beating by a husband as acceptable and even expect it as an expression of his "disagreement" with their behaviour. Only excessive beating was described by them as a deplorable treatment (most often defined by its "durable" effects, in other words, by the causing of permanent injuries, such as scars or fractures).
- ³³ Commonly cited incidents that caused the beatings included "disagreeing (with the husband) in public," "obstinate conduct towards in-laws" (especially the mother-in-law), "spending too much money."
- ³⁴ The import of social pressure is illustrated by the frequency with which women referred to the lack of support by their own relatives and their

fear of social sanctioning as principal reasons for the decision to stay with an abusive husband.

35 According to lawyers who work at the *Cliniques Juridiques*, social pressure to “settle” the case within the family is so strong that most women who bring forth legal charges against their husbands return shortly afterwards to withdraw their complaint.

36 This attitude is most widespread among women without a Western school education.

37 Afoi-Aboagye (1994) therefore employs the metaphor of the “fabric” of traditional culture, the parts of which need to be changed without destroying it.

38 The lack of fit between legislation, institutions of enforcement and support for women, and the extra-judicial normative system became evident in the debate of the family law reform (see Schulz, 2003).

39 In private conversations, all of them admitted that the resistance by older women to their activities was a major issue of concern. It seemed to me that many activists downplay the existence of an intergenerational conflict not because they ignore it, but because rules of propriety (that is, the “respect” they should pay older women) prevent them from publicly naming this issue.

40 For example, women in polygamous marriages tend to form with their children a sub-unit and to compete with their co-wives over the husband’s contributions to the family budget. This conflict constellation tends to affect marital unions in town more than those in rural areas, where most women enjoy a certain degree of economic autonomy. In town, by contrast, many women depend exclusively on their husband’s income and therefore are threatened to a greater extent by the arrival of a co-wife with whom they will have to share the husband’s (very often scarce) financial resources.

41 Conversations with the husband’s mother and his first wife suggested that the conflict between mother and daughter-in-law was fuelled by a competition between the husband’s two spouses. The first wife was on relatively good terms with her mother-in-law to whom she entrusted most of her income (gained from selling processed food in front of the house), whereas the second wife, who worked as a secretary, has repeatedly refused to do so.

42 She was a remote relative of one radio speaker.

43 The neighbour explained to the radio personnel that, because the assaulted woman’s immediate relatives lived in Guinea, she had lacked the necessary social support in previous confrontations with her husband and in-laws.

- ⁴⁴ Her remark suggests that she had hoped to gain greater recognition in her neighbourhood by bringing the domestic conflict to the attention of the radio station.
- ⁴⁵ I happened to sit in the waiting area of the station when the battered woman gave her tale of sorrow to the radio personnel.
- ⁴⁶ When I asked the radio director for her motivation to present the case the way she did, she answered that it was her duty to offer a “counter-narrative” to the prevailing tendency of normalizing and naturalizing the physical abuse of women.
- ⁴⁷ Female jurists and women’s rights NGO representatives similarly placed the episode in the context of the legal reform debate by presenting it as an illustration of rampant practices of social and legal discrimination of women.
- ⁴⁸ Governmental support of particular Muslim groups is reflected, for instance, in its granting of access to the national radio and television station.
- ⁴⁹ Of the broadcasts on *Radio Islamique* that I followed, only one speaker provided a consistent account of the sequence of events that led to the actual confrontation between husband and wife. The speaker’s word choice insinuated the woman’s sexual permissiveness and her “scandalous” defiance of the directives given by senior in-laws and husband. He ended his account with the observation that the “world would turn upside down if wives no longer obeyed to the authority of family elders.”
- ⁵⁰ The few references to the written sources of Islam were passages dealing with the implications of questioning the Divine Truth. One speaker, for instance, announced that any attack on Islamic values was ultimately bound to fail because “the Qur’an says ‘they want to extinguish with their words the Divine Light, but God does not cease to improve this Light to spite the infidels’.” For a similar line of reasoning presented in an earlier confrontation between AMUPI representatives and women’s rights activists, see Hock, 1998, chapter 5 and appendix II.
- ⁵¹ “Muslim women’s” criticism was directed principally at their opponents’ “shortsighted” goals. Not only did “Islam” improve “women’s rights within the family” (for instance by guaranteeing equal treatment of the spouses); staying within the normative framework of Islam rendered women their dignity and moral protection. These values, “Muslim women” argued, were put into question by “these so-called educated women’s” search for “a foreign notion of freedom (i.e. from male control), a freedom that cannot exist in our families where the generations depend on each other.”

- 52 Most of them implicitly equated national and religious identity and asserted the unity and sameness of all Muslims.
- 53 Zaman (2002) maintains that, while *maslaha* “can broadly speaking, be understood as ‘common good,’... it is more accurate to see it as the means, or legal criterion, through which the common good is to be realized” (2002: 3, underline in original).
- 54 Some speakers associated the activities by women’s rights activists with the dangers of “sexual promiscuity,” “contamination with sexually transmitted diseases,” “psychological disorientation,” “moral degeneration,” and “irreligion.”
- 55 They did not issue public statements, but expressed their positions in private conversations.
- 56 One interlocutor denounced the legal advice offered by women’s rights activists in support of battered women as “yet another element in the chain that holds us in bonds by forcing upon us foreign cultural values that are inimical to our moral and religious values. These women help destroy our established traditions by opening the door to influences from around the world” (O.L., Bamako, September 14, 1998).
- 57 Interview with K. Touré, Bamako, September 2, 1998. Not mentioned in his (and others’) apologetics of the “traditional” family is that the younger generation of “Wahhabi” merchants, who are predominant in the ranks of the *Intégristes*, draw on this religious community as an alternative social network that allows them to free themselves from the influence of, and obligations towards, patriarchal family authority (see Hock 1998, chapter 5).
- 58 I argue elsewhere (Schulz, 2003) that the *Intégristes*’ call for a state-orchestrated endorsement of Islamic family values should be seen as part of their effort to gain official recognition in the form of religious parties.
- 59 For example, representatives of the AMUPI who participated in the debate of the family law reform, vehemently opposed the greater interference of the state with family matters.
- 60 In urban households, a husband is expected to pay for the rent and basic ingredients of the three daily meals. With the shrinking of income opportunities in the formal and informal sector of the economy over the past 20 years, it has become increasingly difficult for men to meet these requirements. In many households, women are obliged to contribute importantly to the survival of the family. In the family in question, the husband had recently lost his job and, at the time of the conflict, earned only an irregular income from trade activities. On several occasions in the

past, the second wife (who earned an independent income) as well as her male relatives, had refused to cover the costs for housing and daily family maintenance, arguing that the husband should rely on his older brother (who occupied a lower rank in the administration).

Chapter 6

- ¹ For imam al-Shafi'i, see al-Dhahabi (d. 748/1374), 1982. See also al-Razi (240-327), 1993; al-Shablangi, 1989.
- ² For the mausoleum of al-Shafi'i, see 'Abd al-Wahhab, 1946. See also Wiet, 1933.
- ³ The numbers in parentheses refer to the chronological classification of the pleas in our corpus as in the order of their collection.
- ⁴ In the past, public writers (*kataba 'umumiyyun*) occupied the porch of the mausoleum of Imam al-Shafi'i. Their services were hired by illiterate pilgrims wishing to deposit a letter to the saint. Their existence in the 1960s is mentioned twice in the book by 'Uways. In fact, when the latter comes to request the help of the person in charge of the mausoleum at that time in order to obtain some letters, the man — suspecting the researcher to be trying to put an end to that custom — attempts to dissuade him by pretending the futility of wanting to eradicate beliefs that have been deeply rooted for centuries; he asks him “to leave those who are making a living such as the public writers” (p. 28). In another part of the book, 'Uways declares that not all those wishing to send a letter to al-Shafi'i necessarily do so, either because they are illiterate, or because they do not have the means to pay a public writer (p. 24). Later on, those *kataba 'umumiyyun* were rivalled by civil servants of the Ministry of Waqf, established in the mosque. In order to make difficult ends meet, the latter did not refuse to hire their services for a coin. Nevertheless, they were forced to stop, so as not to encourage those practices unapproved by the Administration. Nowadays, most of the visitors arrive carrying their already written pleas. Some of them scribble them when inside the mausoleum or solicit the help of other visitors. The stylistic and graphical analysis of the letters in our corpus as well as the careful examination of the site leads us to believe that public writers are no longer present. This is probably due to the progress of education in the course of the last decades.
- ⁵ To varying degrees, this phenomenon seems to apply to all the social categories, whatever their level of education. This important fact is in contradiction with the widespread clichés concerning popular religion being specific to illiterates and to the proletariat. Between the orthodox

religion, that of the intellectual elite on the one hand, and between popular religion as well as that of the “wild masses” and the small people on the other, the frontier — if there is a frontier — is much more permeable than one is willing to admit. The study of our corpus allows a way of seeing things with a wider degree of nuances. To attribute, as one often tends to do, these very often criticized manifestations of piety to what we consider to be the least favoured socio-professional social groups, is a serious error which does not take into account the complexity of the religious context in contemporary Egypt. Because in this domain, as in many others, one observes in Egyptians a sort of duality, a paradoxical behaviour, which takes the form of a difference between what one thinks and what one says, between what one says and what one does, particularly among the Westernised social strata. Popular religion has many followers, even if they do not prefer to admit it or to talk about it.

- 6 Given the sacred nature of this mail, many are the postmen who are willing to deliver the letters addressed to Imam al-Shafi‘i even if the postage stamps are not sufficient or even absent, or if the address is incorrectly written.
- 7 Considered to be “the heart of the Qur’an” in the Islamic creed, the Surat Yasin has a particular prestige. It is reproduced in its entirety in three letters in magic practices (67, 85, 87). The frequent recital of this surat, about a hundred times with some repetitions, is designed as a “*‘idyyat*.” A well-proven recipe in wishing good or evil for someone is: “I am reciting ‘*idyyat* Yasin against whoever has oppressed me and wishes the destruction of my home” (51). Its coercive power is such that the mere fact of threatening someone to recite it against him is generally sufficient to stop him — unless he is particularly ill-intentioned. Supplicant no. 378 relates that when the conflict reached a dead end: “My mother said to him [his enemy]: I shall recite ‘*idyyat* Yasin against you.” He answered: “I don’t give a damn!” Finally, the recital of Surat Yasin is even used by Copts in order to “upset someone, cause a project to fail, or obtain the opposite of what is being proposed.” (Viaud, 1978).
- 8 All the names and coordinates of the supplicants have been substituted in order to preserve their anonymity.
- 9 Biographical dictionaries introducing the saints (*wali*, pl. *awliya*) in a chronological order or by generations.
- 10 Dictionaries containing historical and geographical notes referring to such or such a city, as well as to important personalities who either lived or spent some time therein.

- 11 Uterine descentance, much more certain than paternal descentance, is probably an automatic throw back from a matriarchal society, where parentage was transmitted by the women (Doutté, 1984). The day of resurrection (*yawm al-qiyama*) each individual will be called by his *ism* followed by that of his mother in order to be judged (Sha'rani, 1281. See also al-Mas'udi, 1962-1971).
- 12 Regardless of the dangerous and unsatisfactory nature of any attempt to translate the pleas, we made an effort to remain, as much as it can be done, as close as possible to the text in order to preserve the personal style of each one of them, and to render the atmosphere inherent in any literal translation. If their format was strictly respected, we nevertheless deemed it necessary to introduce a minimum of punctuation in order to make them more understandable.
- 13 The perfect administration of justice and commitment to the application of shari'a (revealed law) earned Imam al-Shafi'i the respect of the population and the relentless hostility of the tyrannical wali of that province. The latter accused al-Shafi'i of stirring political troubles at the head of nine *'alawits* and of fanning the flames of a rebellion aimed at overturning Calif Harun al-Rashid in favour of a descendant of 'Ali ibn Abi Talib. Undoubtedly, al-Shafi'i did not conceal his sympathy for Imam 'Ali and his descendants whom he frequented in Yemen. Sent with a military escort to Baghdad by order of the calif, the nine "conspirators" vainly proclaimed their innocence; they were summarily beheaded. As for al-Shafi'i, he only owes his salvation to his eloquence and to his courage. His encyclopaedic knowledge greatly impressed Harun al-Rashid who soon rehabilitated him and awarded him fifty thousand dinars (al-Bayhaqi (384 – 458), 1970. See also al-'Asqalani (d. 852/1449), 1301 H.).
- 14 Created in Bagdad by Calif Harun al-Rashid (766-809), this eminent function of *qadi al-qudat* was aimed at controlling the entire juridical organization. Until it was abolished in the nineteenth century, this task was administered by a high-ranking dignitary and underwent several changes, for example, the appointment in Egypt under the Mamelukes of four supreme qadis representing the four juridical schools of thought (*mazhab*, pl. *mazahib*). In fact, Imam al-Shafi'i never undertook this function. It is undoubtedly because of their ignorance or with the purpose of flattering him that the supplicants call him *qadi al-qudat*.
- 15 In this passage which is literally translated, Sheikh 'Amr will vacillate between using the formal "thee, fearful and respectful" and the familiar and reassuring "you."

Chapter 7

- 1 With many thanks to the late Mostapha Naji, and to Saïda Kharaza, Nico van den Boogert and Amalia Zomeño for their help with the research for this article. I also thank the editors and the participants in the workshop for their comments.
- 2 I opted for the term 'bride price' as 'dowry' would be *jihaz* in this context.
- 3 When Latif married anew in April 1991, after having repudiated Salwa before consummation of their marriage, *le-fqih* again acted as a witness. However, on that occasion the second '*adl*' was somebody other than the person who was present at the marriage described here.
- 4 In common parlance in the agglomeration Rabat-Salé, people divide a dirham into one hundred franks or in twenty riyals. In daily life, people quote amounts normally in franks or riyals, the unit of the dirham is only in use among some modern businessmen and among foreigners. In other parts of Morocco different monetary units are in use. Thus, in the North one dirham equals two riyals. Officially, one dirham is divided into one hundred centimes.
- 5 See also Schacht 1960: 1019; Berque 1949: 102; 'Abd al-Razzaq 1989: no. 262.
- 6 On the use of Berber language and the writing of documents by 'udul, see: Berque 1950.
- 7 Geertz discusses the work of professional witnesses in Morocco in his famous essay "Local Knowledge: Fact and Law in Comparative Perspective" (1983: 190-195). However, he does not use the concept of "cultural broker" in this context.
- 8 I owe this suggestion to Amalia Zomeño, who told me about several fatwas from al-Andalus and the Maghrib in which legal documents are extensively discussed. These discussions seem to have led to further doctrinal developments in Maliki legal scholarship (cf. Zomeño 2002; Zomeño forthcoming; Hallaq 1995).

Chapter 8

- 1 Between September 1998 and September 2001, I did my fieldwork in different neighbourhoods of Cairo, such as Imbaba, Bashtil, Dar al-Salam, Bab al-Luq, 'Abdin, Darb al-'Ahmar and Shubra al-Kheima. Most of the stories and comments in this paper were recorded in 'Izbat al-Sayda, a quarter of Imbaba.
- 2 In many aspects of daily life on the level of the neighbourhood, social order is not so much based on the actual compliance to the norms, but it

is maintained as an image of order where individuals are not punished for transgressions, as long as they pretend to respect the norms and as long as others can act as if they do not know about these transgressions. In comparison to this performance of normality, see Wedeen (1999) about the performance of adoration in a political context.

³ With public in this context I do not refer to a specific place, time or sphere, but I simply mean “that which cannot be ignored anymore.”

⁴ Favret-Saada confirms that this prejudice is not only common in Egypt. In France also, healing is considered to be practiced for money and for sex only. (Favret-Saada, 1977: 65)

⁵ al-Ahram, 20 /10/ 1999. Cf. Dupret, 2003.

⁶ The judge refers here to Jewish, Christian and Muslim sources to sustain his argument.

⁷ Qur'an, XLVI: 29-32.

⁸ For similar stories see Drieskens and Lucarelli, 2002.

⁹ Hoffman (1995: 91) mentions that hiddenness is an important characteristic of saints and that it is considered to be proper for saints to conceal their sainthood from other people.

Chapter 9

¹ This paper has been produced using material from my personal files. No person or organisation has provided me with any material subsequent to my involvement as international trial observer, apart from my access to the public documents of international human rights organisations; and aside from where I quote from my personal notes, the documents and reports are on the record. My salutations to Tunisian human rights defenders, particularly those it has been my privilege to meet, and gratitude for their time and example. I would like to thank friends and colleagues from Amnesty International, FIDH and Human Rights Watch for reading and commenting on this article before its publication, including Donatella Rovera, Philip Luther and Eric Goldstein; and particular thanks to Anne Fitzgerald.

² La Fédération Internationale des Ligues des Droits de l'Homme.

³ Weissbrodt, 1982. My thanks to Wilder Tayler, at that time with Amnesty International and now Legal and Policy Director of Human Rights Watch.

⁴ And a less organisation-specific consideration of more recent date than Weissbrodt's piece comes in Bohler, Dolva, Gomien and Moehlum, 2002.

⁵ Providing this is allowed, see Weissbrodt 1982: 67 on a Spanish prohibition.

⁶ UN Doc. M/CCPR/52/COM/TUN 3 D.7. See FIDH, 1998.

- ⁷ See pages 58-66 of this report on the internet in Tunisia, including government regulation in provisions of the Press Code.
- ⁸ The website in question was <www.amnesty-tunisia.org> and was subsequently moved to a different address.
- ⁹ For the story of Amnesty International's 'counter-offensive,' see Human Rights Watch, 1999: 66 and cited newspaper reports.
- ¹⁰ Court of First Instance in Tunis, ruling in case no. 9610/695, 27/4/95. This account of this process is taken from the record; I attended the subsequent Appeal hearing, as noted below.
- ¹¹ FIDH, 1995: 4. A journalist and leading figure in the 'unauthorised' Parti Communiste des Ouvriers Tunisiens (PCOT), Mohamed Kilani had been in hiding for just over two years at the time of his arrest, and had been sentenced *in absentia* to two years and six months in prison for belonging to an unauthorised association and holding unauthorized meetings.
- ¹² Amnesty International reported that the leaflet was believed to have been produced in 1991 by an Islamist group (AI Index: MDE 30/12/95). The leaflet apparently included a caricature of a former Minister of the Interior, his hands bloodied, a dagger in his belt and a body stretched out at his feet, walking free from a 'commission of enquiry' made up of individuals in Western dress. There is some significance, for the purposes of this article, in the centrality of the law/legal process figuring in this depiction (or story) of impunity.
- ¹³ On the basis of articles 50, 51, and 62 of the Press Code, and articles 162, 170 and 191 of the Code of Penal Procedure.
- ¹⁴ Weissbrodt (1982: 84-88) seeks to assess the impact of observers on trial participants. One of the sources on which he draws is principles from experimental psychology, although not conducted directly on trial participants. "First, people who are observed while performing tasks that they already know tend to perform better than usual. Second, people tend to have difficulty learning new tasks when they are being observed. Third, if the observed person believes the observer to be an expert capable of evaluating his conduct, he will perform better. Fourth, the observed person will tend to behave more in conformance with societal norms in the presence of an observer who share those norms. Finally, the observed person will grow accustomed to the observer's presence, causing the observer's effect to diminish over time" (Weissbrodt 1982: 84-86, with lengthy explicatory footnotes).
- ¹⁵ According to articles 44, 49, 51 and 50 of the Press Code. See FIDH, 1998.

- 16 Article 8 of the Constitution constrains these rights as follows: “*Les libertés d’expression de presse, de publication, de réunion et d’association sont garanties et exercées dans les conditions définies par la loi...*” (“The freedoms of expression of the media, of publication, of assembly and of association are guaranteed and practiced under the conditions defined by the law...”)
- 17 The viability of this charge was attacked by the defence on the grounds that ‘public order’ was neither a person nor a constitutional body and therefore could not be ‘defamed’ under the terms of articles 50 and 51 of the Press Code.
- 18 Court of first instance in Tunis, Ruling in case no. 697/67846 of 11 February 1998. Khémais Ksila was conditionally released in 1999 after two years in prison. Comité pour le Respect des Libertés et des Droits de l’Homme en Tunisie, 1999.
- 19 The Observatory for the Protection of Human Rights Defenders is a joint project of FIDH and the OMCT (World Organisation Against Torture).
- 20 Maître William Bourdon and Maître Sam Wordsworth. See FIDH, 1998. My original draft was in English and I have used that text for the purposes of this article.
- 21 The report of the examining magistrate’s investigation showed no record of an examination of any person or material other than Ksila and the Declaration. Office of the Dean of Examining Magistrates, *Qarar kbatm al-bahth* in case no. 1/7729, 16/12/1997.
- 22 Human Rights Watch, et al., 2000: 2. See pages 25-26 for details of charges against individual defendants.
- 23 Compare the trial of Mohamed Kilani above.
- 24 The literature allegedly confiscated from some of the accused was never ‘presented in court or shown to the defendants at any stage of the judicial process.’ The defence lawyers were allowed to view it in the judge’s chambers but were not allowed to take copies or to have it examined in court. Human Rights Watch, et al.: 11.
- 25 Human Rights Watch, et al.: 27-29. Verdict in case 21018/099/6 before the Tunis Court of First Instance.
- 26 On issues of translation for international trial observers, see Weissbrodt, 1982: 53-54; again, this issue can give rise to many ‘untold stories’ in which the international trial observer is a participant. Individual language skills have less immediate implications for the particular function of showing support and concern through attending the trial.

- ²⁷ For example, the issue of where and with whom to sit, particularly in the scramble for seats in a packed-out courtroom. This again may be affected by particular function. On the theory, see Weissbrodt, 1982: 64-66.
- ²⁸ See the title to the joint report: Human Rights Watch, et al.
- ²⁹ Hama Hammami was convicted *in absentia* in this case and sentenced to nine years and three months in prison. Together with two other members of the banned PCOT in similar situations, he came out of hiding to challenge his conviction in a new trial, in accordance with Tunisian law, in a pre-announced move at the Correctional Chamber of the Court of First Instance in Tunis in February 2002. Human Rights Watch reported that "present at the court that morning were foreign diplomats and journalists, observers representing international human rights organisations, and some 200 Tunisian lawyers, many of whom had signed on to the defence team." Before proceedings were opened, plainclothes police agents "pushed away the lawyers and forcibly removed the three defendants from the courtroom." Brought to another courtroom an hour later, they "stated that they had been beaten by the police and reportedly attempted to display their wounds" whereupon the police again removed them. These and subsequent events prompted Human Rights Watch to comment that "In the past, the government has often provided a legal veneer for its repression of non-violent dissidents [...] On February 2, the government seemed to dispense even with the pretense of the rule of law and of an independent judiciary" (Human Rights Watch, 2002, and attached Protest Letter to President Zine el-Abidine Bin Ali). The men's convictions were upheld the same day; the Appeal Court later confirmed the convictions while reducing the sentence, in the case of Hammami, to three years and two months in prison, and to 21 months for his companions with one of them taking an extra two years on a charge of contempt of court. (Human Rights Watch, 2002).
- ³⁰ FIDH 1998: 13.
- ³¹ Although Tunisia does occasionally bar the entry of particular human rights activists; see Wood, 2002: 99.

Chapter 10

- ¹ For a thoroughly critical evaluation of the law-and-norms literature, see Robert Weisberg (2003) "Norms and Criminal Law, and the Norms of Criminal Law Scholarship" *The Journal of Criminal Law and Criminology* 93, n°2/3: 467-591.
- ² Richard Posner (1993) *The Problems of Jurisprudence* Cambridge, Massachusetts: Harvard University Press. 230.

- ³ Posner, *Problems* 361.
- ⁴ Such preoccupations are expressed differently across the wide spectrum of legal theory. On the one hand stand the likes of Eric Posner [(2000) *Law and Social Norms* Cambridge, Mass.: Harvard University Press], whose main interest lies in detecting the social and economic reasons that may push actors to switch back and forth between the commonly accepted social norms and the legal rules. On the other hand, a social theory of law as propounded by Brian Z. Tamanaha [(1977) *Realistic Socio-Legal Theory: pragmatism and a social theory of law* Oxford: Clarendon Press], represents the kind of approach derived from symbolic interactionism, with added touches from the interpretivist concept of practice.
- ⁵ Bruno Latour (2004) "Why Has Critique Run Out of Steam? From Matters of Fact to Matters of Concern" *Critical Inquiry*, vol. 30, n°2: 225-248.
- ⁶ Idlib is a city of roughly 200,000 inhabitants located in the north of Syria, 50 km close to the Turkish border point at Bab al-Hawa. The *Jinayat* are the criminal courts in Syria. As Idlib is the capital city of its *Muhafaza* (province), all criminal cases in neighbouring towns, villages and farms are handled by the Idlib police and *Jinayat*. Inmates also serve their sentences at the Idlib main prison.
- ⁷ Idlib *Jinayat* 271/1994; final ruling 11/2000.
- ⁸ Used interchangeably with 'Aql in all documents.
- ⁹ Syrian criminal courts have the power to reduce the penalties below the ones proposed by the criminal code for various reasons; the most common being, however, "in appreciation of..." which implies that the amount of punishment was left to the discretion of the court.
- ¹⁰ I consider an account as a more preliminary form of a narrative. In other words, a narrative is a more structured version of an account. See *infra* for a discussion of the differences that ought to be made between account, narrative, and discourse, regarding the tendency within the Syrian judiciary not to give accounts their due course, and to transcribe them as if they were complete narratives.
- ¹¹ They also do not seem to have been taped in the first place.
- ¹² Which acts as the Supreme Court of the Syrian judiciary, an equivalent of the French *Cour de Cassation*.
- ¹³ Such an expression generally means that the witness does not possess any identity card, and not only at the moment he was seized and questioned. That's quite common for several reasons: either the witness did not carry the Syrian citizenship at all (for instance, he was among the estimated 250,000 Kurds that do not carry the citizenship, or a Palestinian resident

in Syria), or else, which is probably the most common cause, the witness never bothered to request an identity card (either due to a lack of concern, or because of problems with the authorities: for instance, having been an ex-inmate, or a Muslim Brother militant, etc.), even though he did carry the Syrian citizenship.

¹⁴ The first-person plural is typically used as a counter-balance to the “I” that narrates in an attempt to give more weight to the account.

¹⁵ Punctuation not in the original Arabic.

¹⁶ On the performative side of speech acts, see J.L. Austin (1962, 1975) *How to Do Things With Words* Oxford: University Press. On the benefits of applying speech act theory to historical discourse, see Quentin Skinner (2002) *Visions of Politics, Vol. I: Regarding Method* Cambridge: University Press.

¹⁷ I am translating *maghdur* as victim, even though *maghdur* (from the verb *ghadara* or *ghadira*) carries stronger connotations, as it involves an act of betrayal and treacherousness towards the victim.

¹⁸ Used interchangeably with ‘Akal.

¹⁹ Paul Ricœur (2000) *La mémoire, l'histoire, l'oubli* Paris: Seuil. 203ff.

²⁰ The notion of cross-examination is taken here very formally, considering that “in the system of civil law, the very principle of cross-examination does not really exist”; see Baudouin Dupret (2004) “Intention in Action: A pragmatic Approach to Criminal Characterization in an Egyptian Context” *Standing Trial: Law and the Person in the Modern Middle East* London: I.B. Tauris. 196-230.

²¹ Based on a hundred closely examined cases from the Idlib and Aleppo *Jinayat* courts in the 1980s and 1990s.

²² Interviewed in Aleppo, on 17 June 2004.

²³ *Majmu‘at abkam al-naqd fi qanun usul al-mubakamat al-jiza’iyya min ‘am 1988 hatta 2001 A.D.* (2002) ‘Abdul-Qadir Jarallah al-Alusi (ed.), 4 vol., Damascus: al-Maktaba al-Qanuniyya.

²⁴ *Majmu‘at*, 1:580.

²⁵ *Majmu‘at*, 1:613.

²⁶ *Majmu‘at*, 1:625.

²⁷ Based on Renaud Dulong (1998) *Le témoin oculaire* Paris: Éditions de l’École des Hautes Études en Sciences Sociales.

²⁸ It is, indeed, that relationship to power that individualizes, which in the case of a criminal investigation implies processing information on a one-to-one basis, while assuming that “actors” are “individuals” endowed with a consciousness of their own, and are hence responsible for their own

actions. But unless such actions are represented in public and become a matter of public concern—for instance, in a Habermasian public sphere—the roots of “individualism” will remain muted and subjugated to the larger “group”: see Michel Foucault (1994) “L’évolution de la notion d’« individu dangereux » dans la psychiatrie légale du XIX^e siècle” *Dits et écrits, 1954-1988, III: 1976-1979* edited by Daniel Defert and François Ewald, Paris: Gallimard. 443-64.

²⁹ When it comes to homicide investigations, I was struck with the differences between Aleppo and Idlib. Thus, while the Aleppo rulings tend to be much shorter than those of Idlib, they are also generally based on less systematic fact finding, all of which could be attributed to the visibility of kin relations in a small community like Idlib: police, investigators and judges, will all have to be more “convincing” in the way they are proceeding with a case, simply because of their own links with the various groups in their community.

³⁰ Ricœur, *La mémoire*, 203.

³¹ Used interchangeably with ‘Aql in all documents.

³² Bruno Latour (1999) “When things strike back. A possible contribution of science studies” *British Journal of Sociology* 51(1): 105-123.

³³ Emile Durkheim (1997[1950]) *Leçons de sociologie* Collection Quadrige, Paris: Presses Universitaires de France.

³⁴ The accused are normally charged with the so-called military fees whenever expertise from the military is needed.

³⁵ Mamduh ‘Utri (2003) *Qanun al-‘Uqubat* Damascus: Mu’assasat al-Nuri. 197-8.

³⁶ Note the abrupt change from third- to first-person, from the paraphrased statements to the presumed direct quotes.

³⁷ The hearing sessions minutes usually do not fully quote the questions addressed by judges and lawyers to the witnesses.

³⁸ The implication here is that “the wall zone” is outside Hilal’s properties, contrary to what the defendant had claimed all along.

³⁹ ‘Akal was a “suspect” for having allegedly used force against both the accused and his son.

⁴⁰ Since the lawyer’s heirs kindly authorized me access to the folder’s case in 2004 (the lawyer in question died in 2001, a year after the verdict), only some of the original letters that were included in the file are quoted here. It remains uncertain, however, whether the defence forwarded them to the prosecution or whether they were later included in the court’s file. In a number of cases, I have seen letters of inmates originally addressed to

either the prosecution or defence, or to the criminal court itself, included in the final file upon which the verdict was based. What goes on between lawyers and their clients is after all strictly confidential, and it is up to the former to decide what to include or exclude from their presentation of the case.

41 Punctuation not in the original Arabic.

42 Italics added: the land—or the village wall—is already categorized as “privately” owned, hence excluding the claims of others in what appears as a subtle strategy to rebuff the victims’ claims.

43 Notice how Hilal substitutes Shamsa, which to the very end he denied killing, with maternal cousin, which by all accounts is incorrect.

44 Anwar was a minor at the time.

45 Observe the passive form (shift of agency).

46 Notice how the narrator Hilal (or whoever wrote on his behalf) uses a third-person indirect anonymous style, instead of the direct “I,” to describe the shootings, and the purpose of which was obviously to minimize any wrongdoing on his part.

47 Both the police and the court’s final ruling mention that Ibrahim’s daughter////sister was shot to death, side-by-side with Ibrahim and one of his sons, while a second son who was on the scene accidentally escaped the same fate simply because no bullets were left in the rifle. It is not clear, however, why Hilal got the woman’s shooting wrong: was it intentional or not?

48 Nuri’s identity and relation to the protagonists was not revealed.

49 Literally, the witnesses of public right, or those that were summoned by the prosecution, because the victims are not directly parties to the trial: it is indeed the prosecution in its quality of protector of the society’s rights.

50 All of which were from the victims’ and plaintiffs’ family.

51 The Syrian penal code, which was enacted in 1949 during the brief dictatorship of Husni al-Za’im, and which is based on the modern Egyptian and French codes, is entirely modern and secular, and hence does not borrow much from the shari’a.

52 Hilal uses homes in plural throughout his correspondence, but it remains unclear what he owned besides his main house.

53 The third son and only survivor of Ibrahim al-Muhammad who was also present at the crime scene when his father and brother and sister were shot to death.

54 Hilal tends to mention his homes in plural, even though the official documents refer to a single home, the one close to the crime scene. By

contrast, land is in most cases singular, even though in the preceding sentence it was used in its plural form.

- 55 Unclear what is meant by this expression. It could be public lands with no specific owner.
- 56 Punctuation added in the translation below.
- 57 Based on a sample of 100 cases.
- 58 The expression originally occurred in the 1965 military medical report, quoted above.
- 59 Harold Garfinkel (1968) "Common-Sense Knowledge of Social Structures" C. Gordon and K. Gergen, eds. *The Self on Social Interaction* New York: Wiley: 71-4, reproduced in *The New Modern Sociology Readings* Peter Worsley, ed., New York: Penguin, 1991: 543-8.
- 60 Peter L. Berger and Thomas Luckmann (1967) *The Social Construction of Reality* London and New York: The Penguin Press.
- 61 Ronald Dworkin (1988) *Law's Empire* Cambridge, Mass.: Belknap Press.

Chapter 11

- 1 Official Gazette, 29 January 2000, No. 4 bis, p. 2 and following. The law entered into force on the 1st of March 2000.
- 2 The jewellery received as a present from the future husband.
- 3 In that sense, see for example Mansur 2001: 269. See also various interventions at the People's Assembly during the debates concerning the adoption of the law on the principle.
- 4 For a study of the main provisions of this law, see Bernard-Maugiron, 2004 and Bernard-Maugiron and Dupret, 2002.
- 5 Except if the couple is in agreement about ending the marriage, in which case, they can resort to the *ma'dhun* who will register that the marriage has come to an end in conformity with the traditional form of *kbul'* (*ibra'a*).
- 6 Article 20 para. 4 of Law No. 1 for the year 2000.
- 7 The other rights of the wife are however, not affected. She will obtain custody of the children, her former husband will have to pay her alimony for the maintenance of the children (article 20, para. 3) and she will be able to keep the marital residence until her children are of an age to be taken away from her custody.
- 8 The husband must pay a sum as dowry to his wife, a sum of money that is her very own. In Egypt, it is customary to divide the sum into two parts; one is to be paid at the time of the marriage (*muqqadam*) and the other payable at the time when the marriage comes to an end either through divorce or because of the husband's demise (*mu'akhhbar*).

- ⁹ According to articles 17 and 18 of decree No. 25 for 1929 *concerning certain matters related to personal status*, the divorced wife is entitled to a personal alimony (*nafaqa al-'idda*) for a maximum period of one year following the divorce.
- ¹⁰ Article 18 bis of Law No. 25 for the year 1920 *concerning alimony and certain other matters related to personal status*, added by Law No. 100 for the year 1985, entitled the wife to a compensation on condition that the marriage be legally valid and that it was brought to an end without the wife's consent and without her being responsible for it. The sum of this financial compensation must be at least equal to the total sum of two years' alimony. It is to be calculated on the basis of the financial situation of the husband, to the circumstances of the divorce and the duration of the marriage.
- ¹¹ In the case under study, however, the Court does not specify that the woman must relinquish her alimony as well as her compensation (*mut'a*). Yet the law of the year 2000 is clear on this point and it would be surprising if the judge dealing with the substance and the husband's defence lawyer were not aware of this provision. Moreover, the Court indicates further on that the wife declared to the mediators that she was ready to relinquish all her financial rights.
- ¹² This explanatory note was not appended at the publication of the law in the Official Gazette and seems not to have been made public subsequently either. For the text of the explanatory note, see the annex to the minutes of the relevant People's Assembly session of 16 January, 2000 or Mansur 2001: 215 and following.
- ¹³ The end of this stipulation repeats the formulation of verse No. 229 of *Surat al-Baqara* (The Cow). Among such infringements of God's orders could be her being disagreeable with her husband and making living together very difficult, lack of respect for his property and his honour, refusal to allow him his legitimate rights, disobeying him or failing to keep family secrets or speaking to him in an unseemly manner (al-'Aguz 2001: 368).
- ¹⁴ In filing a request for *khul'*, lawyers generally repeat the formulation appearing in the law of the year 2000.
- ¹⁵ Two attempts at conciliation, with a minimum interval of 30 days and a maximum of 60 days must be made in case the couple has had a child.
- ¹⁶ The Supreme Constitutional Court cannot be seized of a claim of unconstitutionality save through a challenge expressed during the examination of a case by the judge on substance.
- ¹⁷ The commissioners' body is composed of magistrates responsible for preparing the case for judgment and for submitting a report to the Supreme Constitutional Court along with their conclusions.

- 18 For a study of the production of facts and law in the course of qualifying a case within the context of Egyptian law on divorce, see Dupret 2004 to be published.
- 19 The report of the Consultative Assembly was submitted to the People's Assembly and is to be found in the annex to the minutes of the session held on 16 January, 2000.
- 20 SCC, 15 May, 1993, No. 7/8e, *Digest of Cases adopted by the Supreme Constitutional Court* (thereafter *Dig.*), vol. 5, part 2, p. 290 and following.
- 21 The Court explained that, on the one hand, article 56 of the constitution referred to it expressly and that, on the other hand, freedom of association is a fundamental principle guaranteed by all democratic constitutions. SCC, 3 June, 2000, No. 153/21e, *Dig.*, vol. 9, p. 582 and following.
- 22 In this respect, see namely, M. Van De Kerchove, 1978; F. Ost and M. Van De Kerchove, 1989 and Amselek, 1995.
- 23 See for example Arabi 2001:175 and following.
- 24 The term *wali al-amr* is a Qur'anic term, to be found in verse No. 59 of the Sura No. IV.
- 25 SCC, 15 May, 1993, No. 7/8e, *Dig.*, vol. 5, part. 2, p. 290 and following. For the translation and analysis of a subsequent decision close to this one, see Dupret B, 1997.
- 26 The Supreme Constitutional Court only adopted a classical *fiqh* distinction, that the preparatory committee set up by the People's Assembly in 1979 during the elaboration of the constitutional amendment had itself already undertaken. See the minutes of the session No. 77 of the People's Assembly, 30 April, 1980, p. 7402, quoted by Sharif 1988: 219 and following.
- 27 The preparatory committee op.cit. gave the *hudud* as an example or the rules governing the shares of inheritance (Sharif 1988:220).
- 28 SCC, 26 March, 1994, No. 29/11e, *Dig.*, vol. 6, p. 231 and following.
- 29 SCC, 4 May, 1985, No. 20/1e, *Dig.*, vol. 3, p. 209 and following.
- 30 Date of the publication of the results of the referendum consulting the people, in conformity with article 189 of the Constitution, for their approval of the constitutional amendments proposed by the People's Assembly.
- 31 See Bernard-Maugiron 2003:339 and following; Bernard-Maugiron and Dupret, 1999; Dupret, 2000 and 1995; and Lombardi, 1997.
- 32 The report of the commissioners' body, however, repeated in detail all the previous jurisprudence of the Court, including the one regarding the non-retroactivity of the amendment of 1980.
- 33 Minutes of session dated 16 January, 2000 of the People's Assembly, p. 7. The president of the People's Assembly asked the deputies, "out of

- respect for the *shaykh* of Islam,” to address any comment that his intervention may elicit to the government and not to the *shaykh* personally.
- 34 For a praxeological study of those parliamentary debates, see Ferrié and Dupret, 2004.
- 35 Article 20 para. 5 of Law No.1 of the year 2000.
- 36 The report of the commissioners’ body stressed the fact that Islamic shari’a does not mention any appeal against judicial decisions. The Supreme Constitutional Court did not refer to this argument in its decision.
- 37 SCC, 7 February, 1981, No 7/1e, *Dig.*, vol. 1, p. 160 and following.
- 38 Ibid. See also SCC, 7 February, 1998, No. 64/17e, *Dig.*, vol. 8, p. 1108 and following.
- 39 SCC, 4 February, 1995, No. 39/15e, *Dig.*, vol. 6, p. 511 and following.
- 40 SCC, 15 December, 2002, No. 201/23e; Official Gazette, No. 52 (suppl.), 26 December, 2002.
- 41 See namely articles 146 and 147 of the Code of Civil and Commercial Procedures.
- 42 The report of the commissioners’ body referred to a book in the process of being published, of which Fathi Najib was a co-author, on the procedure in matters related to personal status, that was in favour of considering the judge’s decision as definitive.
- 43 For a critique of this position, see Afshari, 1994.
- 44 Amira El-Noshokaty, “Honouring a Pioneer,” *al-Abram Weekly*, 18-24 December, 2003, No. 669.
- 45 The Wafd newspaper considered this law to be contrary to human rights because it interfered in an abusive manner in family affairs (al-Wafd, 29 January, 2000, quoted by Tadrus 2003:87).
- 46 It is however true that by referring to “the rights of women” recognized by Islamic law, the activists positioned themselves, anyway, on the grounds of the defenders of women’s rights by accepting the very idea that women can have “rights.”
- 47 Mona Zulficar was explaining the strategy at the time of the reform of the marriage contract but a similar strategy was followed during the campaign that led to the adoption of Law No. 1 for the year 2000.
- 48 Concluding observations, 01/11/2002, CCPR/CO/76/EGY, p. 2.
- 49 Concluding observations, A/56/38, 02/02/2001, para. 328.
- 50 For a first assessment of the application of article 20, see Bernard-Maugiron, 2005 and Sonneveld, 2005.

Chapter 12

- * Most of the research for this chapter was conducted in conjunction with Hania Mufti in 2001 while I was fellow for Human Rights Watch. I would like to thank the numerous lawyers, judges, and individuals in Egypt who were so kind as to talk to me and let me look at their files. The participants of the workshop ‘What happened’ – Telling Stories about Law in Muslim Societies” gave me helpful comments and Cynthia Brown and Joe Stork shared their insights in dealing with this kind of material. I also owe Kilian Bälz and Jan Goldberg who commented critically on an earlier draft.
- ¹ See for several examples from the mid-19th century: Fahmy 1999a: 255ff. and Fahmy (1999b), 370-74.
 - ² Peters 2002: 261-62; see more generally on the political use of penal law reform for purposes of state-building Brown, 1990.
 - ³ See Tollefson, 1999, Bakr 1987 and Brown 1990.
 - ⁴ Peters 2004: 389, discusses the complex reasons for the continuity of state violence.
 - ⁵ See Bakr (1987), and for more recent attempts: “The Egyptian Police: Challenges, Successes, and Ambitions (in Arabic),” *al-Sha‘b*, 4 February 2000, summarizing a report by the Ministry of Interior covering the years from 1998 to 2000. Attempts at reform concentrated on building “a well-defined security strategy aiming at re-building of trust towards the police apparatus.”
 - ⁶ See for the reports: Egyptian Organisation for Human Rights (EOHR), *Torture in Egypt: A Phenomenon without limitations* (in Arabic), Cairo, 29 May 2004, at <http://www.eohr.org/ar/report/2004/re6/htm> [30.6.2004]; Egyptian Association Against Torture, *Stop Torture Now* (in Arabic), Press Release, 5 March 2004, at <http://www.hrinfo.net/egypt/eaat/pr031208.shtml> [5.7.2004]; Human Rights Association for the Assistance of Prisoners (HRAAP) 2002.
 - ⁷ Whether crime rates are actually sky-rocketing stands to doubt; statistics appear to be inconsistent, see Dupret/Bernard-Maugiron (2002), xlviii. Whether internal performance pressures on police to apprehend suspects and ‘solve cases’ have increased during the 1990s is hard to evaluate with Ministry of Interior internal guidelines shrouded in secrecy. On the political use of sky-rocketing crime rates, see Brown 1990: 266ff. and Koch 1979: 14-16.
 - ⁸ Sobering accounts on the state of free speech in Egypt: Kienle, 2001 and Singerman 2002: 29-30.
 - ⁹ For a thorough report, see Middle East Watch/Human Rights Watch (1992).

- ¹⁰ Constitution, article 42. Compare for the evolution of penalties for abusive officials during the 19th century: Peters 2002: 261-62, notes 46, 47 and 52.
- ¹¹ Constitution, article 57; Code of Criminal Procedure (CCP), article 15. On civil compensation for torture and illegal detention by the authorities, see below and more generally HRAAP (2001).
- ¹² Constitution, article 42. A defence motion that a confession was extracted by force needs to be explicitly discussed by the court if a sentence is to be based on the confession and corroborative evidence: CCP, article 302; see 'Akida 1999: 627f. for jurisprudence.
- ¹³ As quoted in *Supplementary reports of States parties due in 1996: Egypt*, U.N. Doc. CAT/C/34/Add.11, 28 January 1999, para. 168. Unlike rulings of the Supreme Constitutional Court which exercises an ex-post review on the constitutionality of law, the Court of Cassation rules on points of law, see Dupret/Bernard-Maugiron (2002), xxxi, xxxv.
- ¹⁴ Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), article 1: "... the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." On the controversies surrounding this definition: Boulesbaa 1999: 4-27; cf. one position in the post 2001-debate in the U.S.: U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, 1 August 2002, at www.gwu.edu/~nsarchiv/NSAEBB/SNAEBB127/02.08.01.pdf [8.7.2004].
- ¹⁵ See *Consideration of reports submitted by State parties under Article 19 of the Convention. Fourth periodic report due in 2000, Addendum Egypt*, 18 October 2001, U.N. Doc. CAT/C/55/Add.6, para. 37; *Consideration of Reports submitted by State Parties under Article 40 of the Covenant, Addendum, Comments by the Government of Egypt on the concluding observations of the Human Rights Committee*, 4 November 2003, U.N. Doc. CCPR/CO/76/Add.1, para. 17-62.
- ¹⁶ The use of subsidiary provisions to indict offending police officers is by no means limited to Egypt, see for Romania: Uldriks (2001), 275; see also Uldriks/van Reenen (2003).

- 17 According to the government, this was established by the Court of Cassation in a 1964 ruling, quoted in CCPR/CO/76/EGY/Add.1, para. 55.
- 18 See *ibid.*, para. 59, Table B, which details eighteen cases against officers between September 1999 to January 2003. Fourteen officers were charged with assault/battery, three with use of force, and only one with torture.
- 19 Only offenders “implementing terrorist aims” are, following the 1992 anti-terrorism amendments to the Penal Code, singled out for a considerably harsher punishment for assault.
- 20 See Police Law 109/1971, article 99; Center for Legal Research and Studies (2001), articles 566, 1003.
- 21 On the use and disuse of torture as proof in European judicial proceedings, see Longbein (1976).
- 22 See below for details on the *niyaba*.
- 23 Compare, e.g., data from Poland, with less than two-thirds of Egypt’s population, where almost 600 allegations of maltreatment were filed in 2000; data quoted in Uldriks/van Reenen (2003).
- 24 Uldriks/van Reenen 2003: 171-72, for Poland, where the percentage of non-sustained complaints is even higher.
- 25 Even though the table is captioned as such in the Egyptian government report to the U.N. Human Rights Committee: CCPR/CO/76/Add.1, para. 669.
- 26 Interview, Hafiz Abu Sa’da, Secretary General of EOHR, Cairo, 31 March 2001.
- 27 Interview, Muhammad ‘Abd al-Mun’im, Director, and Samir al-Bajuri, Lawyer, at the Association for Human Rights Legal Aid (AHRLA), Cairo, 1 April 2001.
- 28 AHRLA, “AHRLA hails imprisonment of three officers from al-Muntaza precinct for torturing a citizen to death (in Arabic),” Press Release, 19 March 2003, at www.ahrla.org-prs-ar/list/prsara19-6-03.html [2.7.2004].
- 29 HRAAP 2002: 54.
- 30 EOHR, *Torture in Egypt*, at <http://www.eohr.org/ar/report/2004/re6-2.htm> [30.6.2004].
- 31 Again, this is not a phenomenon limited to Egypt; see Human Rights Watch (1999), Human Rights Watch (1998), Amnesty International (2004), Mars (2002: 131-69) all focussing – among other issues – on the lack of transparency with respect to the number of incidents, complaints, and investigations.
- 32 EOHR, *Torture in Egypt*, at <http://www.eohr.org/ar/report/2004/re6.htm> [30.6.2004].

³³ CCPR/CO/76/Add.1, para. 61.

³⁴ There is considerable debate as to how accountability measures impact on the prevention of maltreatment and abuse, see Uildriks/van Reenen (2003: 212-15).

³⁵ For examples, see AHRLA, "AHRLA hails imprisonment;" AHRLA 2001: 59-60; AHRLA, "A new legal victory: six policemen transferred to criminal trial on charges of torture and forgery" (in Arabic), Press Release, 19 February 2004; AHRLA, "One step forward: a partial victory in torture-related cases" (in Arabic)" Press Release, 11 March 2004; EOHR, *Torture in Egypt*, at <http://www.eohr.org/ar/report/2004/re6.htm> [30.6.2004].

³⁶ See HRAAP, 2001.

³⁷ See Hill, 1979, Dupret/Bernard-Maugiron 2002, xxxvii, xli.

³⁸ Extremely few women hold office in the Egyptian judicial system, therefore the use of the male pronoun for Egyptian judges and prosecutors seems justified.

³⁹ This is in line with the *niyaba's* mandate, extending to an examination of all suspicious deaths, including those after administration of vaccinations and anaesthesia, see Center for Legal Research and Studies (2001), articles 283, 445.

⁴⁰ In its correspondence with the U.N. Special Rapporteur on Torture, the government replied to 19 allegations of ill-treatment by police that the victims survived. None of the 19 cases elicited a full-fledged investigation, and accordingly, none of the officers were criminally held accountable, see *Report of the Special Rapporteur, Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43*, 25 January 2001, U.N. Doc. E/CN.4/2001/66 para. 433-470. Later correspondence with the Special Rapporteur reveals the same pattern of response, see *Report of the Special Rapporteur on Torture*, Theo van Boven, Add.: Summary Information, including individual cases, transmitted to Governments and replies received, E/CN.4/2005/62/Add.1, para 575ff.

⁴¹ The most glaring examples come from the prosecutions of homosexuals in Egypt: Human Rights Watch 2004: 37, notes 107, 64 and the prosecution of individuals charged with terrorism offences, see Human Rights Watch (1992). Admittedly, prosecution of homosexuals, those suspected of extremism, and allegedly abusive police officers do not form the bulk of cases at the prosecution. But they all appear to constitute a considerable headache for the prosecution; and the pressures to charge alleged homosexuals and suspected extremists appear to be analogous to the pressure not to charge police.

- ⁴² There are important technical differences between different modes of discontinuing a case; “shelving” refers to a temporary administrative decision, “closing” to a permanent judicial decision to discontinue the case. Only the latter can be appealed in court, see Center for Legal Research and Studies (2001), articles 531, 805, 809, 812, 868. In practice, almost all complaints not sustained by the prosecution are shelved, and may thus not be appealed in court.
- ⁴³ The CCP, first issued in 1950, retained the possibility of investigations being conducted by an investigative judge instead of the *niyaba*, or the appointment of an investigative judge by the Minister of Justice. Law 353/1952, however, abolished that system, giving the *niyaba* unfettered powers of investigation and prosecution. In theory, however, the office of the investigative judges still exists: CCP, articles 64, 65. Another reform followed in 1956. Before that, a party harmed by an official could sue directly in court, if the offence involved misdemeanours and contraventions, CCP, articles 63 (1), (3).
- ⁴⁴ Institutional or vicarious liability of the Ministry of Interior, that is lack of oversight and discipline, is addressed by civil courts which may award compensations to victims. Compensations are paid by the ministry, not individual officers. A ruling on the Ministry’s vicarious liability does not appear to have any financial or other consequences for individual officers.
- ⁴⁵ See on the circumstances surrounding the 1998 death in custody of Wahid as-Sayyid Ahmad ‘Abdallah below and EOHR 2000: 76-81.
- ⁴⁶ It seems frequent, if not the norm that convicts who have served their time as well as acquitted pre-trial detainees are not released from prison but sent from one police precinct to the next for processing of paperwork.
- ⁴⁷ EOHR interview, ‘Isam Mahmud Kamal, Lawyer, 30 March and 1 April 2000, on file with EOHR.
- ⁴⁸ Memorandum by *niyaba* Technical Office, institution of proceedings in case 28384/1999 Administrative al-Muntaza, registered 229/2000/2 Technical Office, 19 November 2000.
- ⁴⁹ Ibid., statement by witness for the defence.
- ⁵⁰ Al-Wafd, 23 July 1999.
- ⁵¹ Al-Sha’b, 3 September 1999.
- ⁵² Al-Ahali, 26 August 1998.
- ⁵³ Judgment, Criminal Court Cairo, case 8803/1999 Manshiyat Nasir, 12406/1999 District Prosecution, 10 December 2000.
- ⁵⁴ It also counters the often decontextualized accounts by human rights groups, where victims are introduced by name, age and profession only.

- 55 EOHR interview, Khalid ‘Abbas, Head of al-Azbakiyya Criminal Investigation Department, 27 May 1999, on file with EOHR.
- 56 Letter to EOHR from Mahmud Yasin Ibrahim, Director of Security, al-Daqahliyya Province, 24 February 1997, on file with EOHR.
- 57 Memorandum by *Nijaba*, case 28384/1999, Administrative al-Muntaza. Lawyers for the family produced a copy of his criminal register devoid of entries: Interview, Muhammad al-Tunisi, AHRLA lawyer, Alexandria, 8 April 2001.
- 58 Judgment, Criminal Court Cairo, Case 3707/2000, 246/2000 District Prosecution Central Cairo, 28 October 2000. While whipping of prison inmates was a legal disciplinary punishment in Egypt until December 2001, whipping of detainees in a police precinct was not.
- 59 See on the class-based nature and public perception of police abuse in Latin America: Chevigny 1999: 49-70.
- 60 Interview, family of Sha‘ban Shahata Sha‘ban, 7 April 2001.
- 61 Interview, Ahmad al-Sahi, Lawyer, Cairo, 5 April 2001.
- 62 E/CN.4/2001/66 para. 473.
- 63 One exception is the 1998 death in custody of Wahid as-Sayyid Ahmad ‘Abdallah. When all witnesses retracted their testimony, the court questioned them: Q: Were you arrested with the knowledge of the Balqas Police? Answer: This did not happen since I was not arrested. Q: Was your brother Wahid arrested? A: I don’t know. Q: The interrogation reports said that the second and third accused arrested you...? What is your comment on this? A: This did not happen. Q: The interrogation report also says that the second, third and fourth accused tied you up and then the first accused electroshocked you and abused you sexually – what is your comment? A: This did not happen. ... I was afraid of the people in the village ... who told me to testify this way, that the officer and the informers had arrested me and tortured me and had arrested my brother Wahid and tortured him until he died and they threatened me. Q: Did you reconcile with the accused? A: No, we did not. Q: What is the reason for your injuries listed in the medical report? Q: That was a problem with a customer ... Another witnessed said upon questioning: A: [The villagers] said that they will destroy my family, and turn my children into beggars, and they said that I must say that officer Ihab and the informers killed Wahid, and I said that ... Q: What do you say to the complaint ... that the informers have offered you money, in order to alter your testimony from what it was during the investigation to what it is now? A: This has not happened at all, and the truth is what I have testified [here]: Record

of court proceedings, Criminal Court al-Mansura, examination of witnesses, hearing 7 May 2000.

- ⁶⁴ Ahmad Abu al-Ma'ati, "From 'Yusra' to 'Badawi': the crimes of police officers (in Arabic)," al-'Arabi, 7 April 1997; "Zawiya al-Hamra: A family's problem with an informer and a police officer (in Arabic)," Rose al-Yusuf, 22 July 1997.
- ⁶⁵ Letter of the Nadim Center to the Ministry of Interior, "Save the family of Ahmad Badawi from reprisals by the Zawiya al-Hamra precinct (in Arabic)," Rose al-Yusuf, 11 November 1996. Fabrication of drug charges is said to be rather frequent, "five charges a day in each precinct," according to a Ministry of Interior official fallen from grace quoted in Andrew Hammond, "Reining in the police," *Cairo Times*, 5 March 1998. Allegations of extremism/terrorism under emergency law may lead to contact with State Security Investigations, and indefinite detention in prison; EOHR calls emergency law "a fertile ground for the spread of torture, with guarantees of impunity for offenders," EOHR, *Torture in Egypt*, at <http://www.eohr.org/ar/report/2004/re6-3.htm> [6.7.2004]. See also: *Report of the Special Rapporteur on Torture*, E/CN.4/2005/62/Add.1, para. 574-578, 639-640, 645-646 on recent deaths in custody at State Security facilities.
- ⁶⁶ Egyptian Initiative for Personal Rights and Nadim Center for Rehabilitation of Victims of Violence, "Four months and the deaths of Nabih and Mohamed Shahine remain uninvestigated," Press Release, c. November-December 2002; EOHR letter to vice Prosecutor-General, no. 423, 16 July 2002.
- ⁶⁷ Interview, Muhammad Badr al-Din Gum'a, Alexandria, 8 April 2001.
- ⁶⁸ For another homicide involving djinns see Dupret (2003), 33f.
- ⁶⁹ Judgment, Criminal Court Alexandria, Case 43806/1997 al-Muntaza, 1312/District Prosecution East, 17 October 1998.
- ⁷⁰ See on this case: AHRLA (2003) and AHRLA, "One step forward," Press Release, 11 March 2004.
- ⁷¹ This also illustrates the tensions between the prosecution and the police. While in theory the prosecution is the only investigative body, in practice police does most if not all of the investigative work, and the prosecution merely translates the results into juridical categories; for a similar and likewise unresolved tension in the German criminal justice system, see Pütter 2003: 266.
- ⁷² The same issue obviously holds true for abuses committed in prisons; see for investigations and conclusions on what is termed detainee abuse by U.S. forces in Iraq as being of an exceptional nature: Department of the Army,

The Inspector General, *Detainee Operations Inspection*, 21 July 2004, at [www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/detaineeereport.pdf)

[srv/world/iraq/abughraib/detaineeereport.pdf](http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/detaineeereport.pdf) [28.7.2004].

⁷³ See Chevigny (1999), Rodley (1999) and Uldriks/van Reenen (2003).

⁷⁴ On the history of Egyptian medico-legal institutions, see Fahmy (1999a).

⁷⁵ General Prosecution, Circular 18/1998, 29 December 1998.

⁷⁶ See Fahmy (1999a) for examples.

⁷⁷ In al-Ahrar, 24 June 1996, it was alleged that the post-mortem was conducted in the presence of the officers from the precinct where Fu'ad had died.

⁷⁸ Judgment, Criminal Court Cairo, case 8803/1999.

⁷⁹ Ibid.

⁸⁰ Judgment, Criminal Court Shibin al-Kum, 1400/2000 Prosecution and 71/2000 District, 7 February 2001.

⁸¹ Autopsy report, as quoted in judgment, Criminal Court Cairo, case 3707/2000.

⁸² Autopsy report, as quoted in memorandum by *Niyaba* Memorandum, case 28384/1999, Administrative al-Muntaza.

⁸³ Forensic Report 181/1999, al-Giza, Dr. Muhammad Ashraf Ibrahim 'Abd al-Jawad, assistant forensic pathologist, 13 November 1999.

⁸⁴ Interview, family of Ahmad Muhammad Tamam, Cairo, 25 April 2001.

⁸⁵ Ruling, Cassation Court, Penal Circuit, appeal 7791/2003 prosecution; 7791/73 court, 19 May 2003.

⁸⁶ Judgment, Criminal Court Shibin al-Kum, 1400/2000 Prosecution.

⁸⁷ Judgment, Criminal Court Cairo, case 8803/1999 Manshiyat Nasir.

⁸⁸ Court Proceedings, Criminal Court Alexandria, case 67909/2000 al-Muntaza, hearing 11 January 2001.

⁸⁹ E/CN.4/2001/66 para. 432-484.

⁹⁰ See Sim/Ward (1994), 247.

⁹¹ Forensic Pathology, no number/1996, Cairo, 15 July 1996, Dr Khalid 'Awad [last name illegible], Forensic Pathologist.

⁹² Forensic Pathologist as quoted in ruling of Criminal Court Aswan, 5th circuit, 3154/1999 Felonies Aswan, 520/District, 16 November 2000. In general, electroshocks often do not leave marks; therefore, some forensic experts favour biopsies, while others dispute their reliability, see Istanbul Protocol, *The Manual on Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Physical Evidence of Torture at http://www.phrusa.org/research/istanbul_protocol/isevidence.html [7.7.2004].

- ⁹³ Compiled from E/CN.4/2001/66 para. 432-470. The government responded roughly along the same lines to more recent allegations of torture in its later communications with the Special Rapporteur on Torture, see his report E/CN.4/2005/62/Add.1, para. 575ff.
- ⁹⁴ Another factor would be medical incompetence, demonstrated in Human Rights Watch (2004) in respect to examinations on gay men.
- ⁹⁵ As quoted in CAT/C/34/Add.11, para. 47(c).
- ⁹⁶ I have seen this ruling only in this truncated version.

Chapter 13

- * I want to express my gratitude to Marc Schachter for his comments, suggestions and corrections on a former draft of this chapter.
- ¹ “The descriptions form part of a ‘gestalt contexture’ built up around each case and not separable from it, in which background and foreground, context and particulars, mutually constitute one another” (Hester & Eglin 1992: 221).
- ² In other words, the accused says that the police placed in his flat the evidence of his alleged contempt of religion.
- ³ On the contrary, they produce together its categorization in terms of “perversion,” law professionals stating the criminal character of the behaviour and the accused expressing their assent to this characterization, while seeking to escape its detrimental consequences. It constitutes a concrete example of what J.N. Ferrié (2004) calls “negative solidarity.”
- ⁴ This is not a trial about the issue of whether homosexually can be criminalized or not, but a trial about whether X or Y practices homosexuality, providing that homosexuality is a criminalized practice.
- ⁵ In other words, sexual honour is the process through which what A does to the body of B has an incidence on C because of his kinship with B.
- ⁶ Stain is the effect of something, like a homicide. Its occurrence is independent of any intention, like the intention to kill, and it asks for reparation (Williams, 1993: 84).
- ⁷ The co-existence of two categorization devices is particularly obvious in the law. In Syria, for instance, the Criminal Code makes honour crimes a distinct category whose punishment is weaker. Moreover, legal practices show a very deep understanding of the judiciary towards this kind of behaviour (Ghazzal, 1996). However, one must also consider the fact that Syrian law, though lenient, punishes an honour crime as a crime that has causes of excuse, while to a certain extent customary law can consider it a duty for a person to kill a relative who, because of kinship, stains his

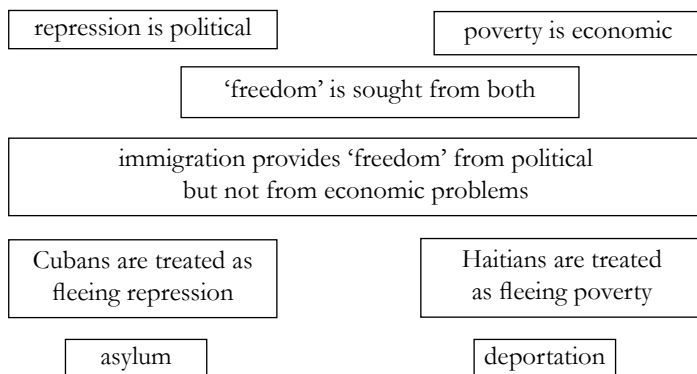
honour, though she may not bear any responsibility in what happened. Safia Mohsen gives the example of a young girl who was raped by her uncle and then killed by her brother who maintained before the court that he was defending the honour of the family and of his sister (Mohsen 1990: 22). These two devices, one centred on stain and the other centred on the intentional individual, influence each other. In Egypt, like in Syria, the law explicitly or implicitly recognizes the category of "honour crimes" and treats it differently according to whether it is a man or a woman who is the offender. Article 237 of the Egyptian Penal Code states that a man who surprises his wife in the act of adultery and kills her and/or her partner is punishable with a maximum sentence of six months in prison instead of being sentenced to the legal punishment for wilful homicide. However, if it is the wife who surprises her husband in the act of adultery and kills him and/or his partner, there is no cause of excuse for reducing the sentence. It must be added that the provision of Article 237 does not apply if the husband himself has been convicted of adultery or if he has not acted in circumstances of surprise (Mohsen, 1990).

- 8 In 1982, Sayyid `Abd Allah, a medical student at al-Azhar University who claimed to suffer from a severe depression, consulted a psychologist. After examining him, the psychologist concluded that the sexual identity of the young man was disturbed. After three years of treatment, she referred him to a surgeon so that he might undergo a sex change operation. The operation, performed on 29 January 1988, had many administrative and legal consequences for the patient. First, the dean of al-Azhar University's Faculty of Medicine refused to allow Sayyid to write his examinations and he also refused to transfer her to the Faculty of Medicine for Women. In his effort to obtain such a transfer, Sayyid submitted a request for a name change to the Civil Status Administration Office. Al-Azhar University maintained that Sayyid, who in the meantime had changed his name to Sally, had committed a crime. According to the university, the surgeon who performed the operation had not changed his sex but had mutilated him for the purpose of allowing Sally to engage in legitimate homosexual relations. Meanwhile, the representative of the Giza Doctors Syndicate summoned the two doctors who had performed the operation before a medical board. The board ruled that the doctors had made a serious professional error by failing to establish the existence of a pathological condition prior to the surgery. On 14 May 1988, the Doctors Syndicate sent a letter to the Mufti of the Republic, Sayyid Tantawi, asking him to issue a fatwa on the matter. In a fatwa issued on 8 June 1988, Tantawi

concluded that if the doctor demonstrated that surgery was the only cure for the pathological condition, the treatment should be authorized. However, a sex change operation cannot be performed solely because of an individual's desire to change his/her sex. Tantawi was not clear as to whether or not the "psychological hermaphroditism" from which Sayyid suffered constituted an acceptable medical cause. Thus, each side claimed that the fatwa supported its position. On 12 June 1988, al-Azhar brought the matter before the courts, claiming that the surgeon had to be punished for inflicting permanent injury upon his patient, in compliance with Article 240 of the Penal code. At this point, the Attorney General and his deputy public prosecutor decided to examine the case. They referred to a medical expert, who concluded that from a physical point of view, Sayyid had been born a male, but that from a psychological point of view, he was not a male. Thus the diagnosis of psychological hermaphroditism was relevant and surgery was the proper treatment. According to the report, the surgeon had followed the rules of his profession, since he had consulted the competent specialists, had performed the operation correctly, and had not inflicted a permanent physical disability on the patient (*Niyaba* 1991). The patient could thus be considered a woman. The Doctors Syndicate rejected the expert's conclusions and organized a press conference in which it made the issue a question of public concern that required a moral and social choice. On this ground, the Syndicate decided to remove the surgeon from its membership list and to impose a fine on the anaesthesiologist for his participation in the surgery. On 29 December 1988, the Attorney General decided not to pursue the charge. The final report confirms that the operation was carried out according to the appropriate rules. One year later, the file was closed and, in November 1989, Sally received a certificate establishing her status as a female. In view of the continuing refusal of al-Azhar to admit her into the Faculty of Medicine for Women, she submitted another claim to the Council of State, which, one year later, nullified al-Azhar's decision and authorized Sally to register at whatever university she wished in order to complete her final exams. The case did not end with this ruling. In September 1999, the Cairo Administrative Court issued another ruling which recognized that Sally had taken all the necessary legal measures to register at al-Azhar University. The court therefore ordered the university to admit her to the Faculty of Medicine for Women (al-Hayat, 30 September 1999; Court of Administrative Justice, case no 4019/50, 1st circuit, 28 September 1999). On November 14, 1999, al-Azhar filed an appeal against the administrative

court decision, charging that Sally did not meet its moral and ethical standards (according to the court, al-Azhar held that belly dancing “is contrary to the provisions of Islamic *shari`a*” and “contradicts the conduct which must be adopted by someone who belongs to one of the faculties for women depending on al-Azhar University, which is singular in that it strictly imposes a specific conduct which may not be trespassed.”; Court of Administrative Justice, case no 1487/54, 20 June 2000) in view of the fact that “she performs as a belly dancer in night clubs and has been arrested several times on vice charges” (Middle East Times, 18-24 November 1999). The same Administrative Court issued a ruling, on June 20, 2000, suspending the implementation of the September 1999 ruling, on the ground that new evidence had been produced (interviews with newspapers, including photographs of Sally dressed as a belly dancer) which contradicted the conduct required of a woman belonging to this Faculty. Accordingly, the Court transferred the case to the State Litigation Office for further inquiry (Court of Administrative Justice, case no 1487/54, 20 June 2000).

- ⁹ Speaking of the granting of political asylum to Cuban refugees and of the deportation of Haitian refugees in the US, in the eighties, Jalbert (1989: 242) shows the existence and the functioning of a disjunctive categorization pair opposing “economic” and “political” refugees:



- ¹⁰ The counter-argument to the Prosecutor’s reasoning is therefore the following: (1) considering that sexual relationships outside wedlock are prohibited; (2) and considering that the law does not recognize homosexual marriage; (3) there is indeed a discrimination on the basis of sexual

orientation when condemning sexual relationships that are excluded from any legal framework.

- ¹¹ In rape cases, it generally occurs that the accused acknowledges sexual intercourse while claiming that the woman wanted or even initiated it (see Matoesian, 1993, 1995, 1997, 2001; Drew, 1992; see also Mozère, 2002, and Ans, 2003).
- ¹² The notion of dialogical network (Leudar, 1995, 1998; Leudar & Nekvapil, 1998; Nekvapil & Leudar, 1998, 2002; Leudar, Marsland, Nekvapil, 2004) show how media events like TV and radio programs, press conferences and newspaper articles function in a network: they are interactively, thematically and argumentatively connected, even though this dialogical interconnection is distributed in time and space.
- ¹³ Whether, for instance, it is an absent audience the document addresses (i.e., the judge for the Prosecution's interview; or the appellate judge, for the first instance decision) or a human rights militant.

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