

The Enactment of Agency During Judicial Divorce Claims: A Case Study of Syrian and Moroccan Legal Disputes

Most Saturday mornings throughout eight months of 2005/6, I met a lawyer on a street corner in Damascus, who usually arrived carrying a bagful of croissants for our breakfast. Catching a taxi, we travelled together to his colleague's office in the suburbs for a full day of court ordered arbitration sessions (*tah*k m*) related to judicial divorce cases. These two lawyers – F.M. and F.A. – would hear up to eight cases in a day, introducing me to claimants, their spouses, family and friends as an academic researcher who had been given permission by the judge to observe the process. Many of the participants in these sessions had already seen or spoken to me during their initial, *in camera* hearing in the family (*shari'a*) court. During these first meetings, the judge would explain the divorce process to couples and assign two professional lawyers to oversee their cases. The following description is of one couple's first session with the F.A. and F.M., who had several years combined experience of dealing with judicial divorce cases and an established relationship with the family court judiciary.

The Fs open the session with a quotation from the Qur'an, explaining that discussions during the arbitration sessions will remain confidential, and that they hope to avoid divorce and to bring about reconciliation between the couple. On sitting down the husband offers his wife a portion of the fruit left on the table in front of them, urging her to eat. She does not look at him and curtly refuses his offer. She is even more agitated than when I met them both discussing their case with the judge, and cries early on in her testimonial. The arbiters listen more than they speak. They rarely ask her to clarify her statements and when she is required to elaborate, she does so directly and to the Fs' apparent satisfaction. Her husband remains outwardly affable throughout, never raising his voice.

As the plaintiff, the wife is asked to speak first and is told that she will be asked for the details of her complaint, but is first asked general questions regarding her marital history including her age, the length of their engagement, whether there was a gap between the marriage and the couple's co-habitation. The husband adds information during this part of the session and she defers to him on several points. She notes that they had a wedding party, but only because he insisted on it despite her lack of enthusiasm since he loves celebrations. They are both professionals, and she earns a relatively good salary.

F.M., who tends to ask practical questions, asks if the house was adequately furnished when she moved in and she agrees with her husband that it was. When the arbiters ask her to outline her reasons for requesting divorce, her manner vacillates between an apparent determination to remain in emotional control and tearful rage.

Her complaints are numerous. She says that they had not been living together long before things started to go wrong. Before they married, she explains, she hoped for a husband who prayed, did not curse and enjoyed home life but was to discover that: "He's a man who loves parties and girls and cafes." F.A. intervenes to remind her that it is unnecessary to air everything since we are here to attempt reconciliation. She does not object. She says that they had a marriage party because he wanted one but that he left her during it to go off with someone else.

The Fs ask her if he is mean, to which she responds vividly. She says that he is generous when it involves things that he wants. F.A. asks her to elaborate. She tells a story in which he asked if she wanted anything as he was going out of the house. They were due to visit her parents, so she asked him to bring some sweets as: "It's normal to take something in our family." Before telling this story, she notes that the important thing is that she had asked him a specific kind of sweet, while he has a taste for a different type. He returned with a bag, which she began to unpack. "So, I took the bag, lifted out the first box and opened it. And there was a lot of (the type of sweet he likes) in it. And I thought 'ok', maybe (the sweet she asked for) is in the next box. So I took it out, opened it, and there was a mix of different kinds of sweets including some of (the kind of sweet he liked). Maybe there was as much as a kilo, or a kilo and a half, in total.

I thought this is strange. I'd got to the box at the bottom of the bag, but I took it out and opened it and in it – you know what this sweet is like – there were five tiny lines [draws a thin line in the air with both thumbs pressed against her forefingers in the air] of (the sweet she liked) at the bottom of the box. Why?"

In addition, she alleges that he dislikes her family. He says insulting things about them. He counters that her sister had a kitten with blue eyes and that she and her family joked that it looked like him. She continues by claiming that he is impatient with her commitment to regular prayer. She then relates a story in which she once returned later than usual from work to furious questioning about her whereabouts, although it was "only ten minutes" difference and the result of having run into a friend. F.M. asks: "He's jealous?" She replies: "Very." She says that he followed her into the bedroom, pushed her down onto the bed and "hit me for two hours." She becomes tearful and struggles to continue calmly. She is advised by F.A. to take her time and that they are here to listen to her.

Finally she objects to what she claims is his poor communication. She uses a generalised example of asking her husband what he would like to eat for dinner and him replying: "Whatever you like that's your department." Then says he will later complain when she presents his meal by saying: "Not this. Why didn't you make something else?"

At this point she leaves her first person narrative to ask: "What am I supposed to do?" Neither of the arbiters respond.

The interactions during this session clearly illustrate the complexity of the 'agentic dimension of social action'¹ during divorce hearings in the court. This couple met F.A. and F.M. for three further sessions before the judge finally issued a ruling on their case. During these hearings, both spouses expanded on and elaborated their claims and new actors entered the sessions in the form of spouses' friends and family members providing supporting testimony and lending moral support. Throughout this process the arbiters' attitudes towards this couple developed, albeit often elliptically, as they sought a legal conclusion to the dispute. Throughout the sessions they made it clear to the couple that that reconciliation would be preferable to divorce, and stressed that they could easily close the claim should both spouses decide to give their marriage a second chance. These efforts were unsuccessful. This wife persisted that she was unable to reconcile with her husband, and the judge eventually ruled for a judicial divorce on the arbiters' recommendation.

This paper draws on observation of this and other cases to assess the enactment of agency by couples and court personnel during judicial divorce hearings under the provisions of Syrian and Moroccan Muslim personal status laws, and its effect on legal settlements. Recent reform of Morocco's *Mudawwanat al-Usra* (2004) has significantly increased women's, and partly extended men's, access to divorce. Syria's Muslim personal status Law No. 59 (1953) has included a comparable provision since the law's enactment, which is routinely applied by judges in the Damascus family courts. Consideration of Syrian and Moroccan judicial divorce cases therefore allows interesting comparisons between actors' behaviours and interactions under two different Muslim personal status law systems at different stages of assimilating a legal provision into court practice.

Interactions between all the actors are significant for an understanding of the judicial divorce process but in this paper, I pay particular attention to women's enactment of agency. While Moroccan and Syrian Muslim husbands can effect divorce through unilateral repudiation (*t*al_q*), or negotiate an agreement to divorce their wives in return for some form of compensation (*mukh_la'a*), wives must apply to the court if they wish to end their marriage. Many Moroccan women requesting judicial divorce prior to 2004 found that their agency was constrained in court,

¹ Emirbayer & Mische: 963.

however legal reform has significantly transformed the enactment of women's agency in this respect.

Before analysing actors' interactions, claims and behaviours, I outline my working definition of agency and the specificities of the law and procedure governing these claims. I discuss both how the wording of the legal rules, court procedure, levels of legal awareness, socio-economic circumstances and social norms shape women's divorce claims, and to what extent the agency of court personnel is enabled and constrained by these factors, combined with the judicial culture in which they operate and their ties to the state. Through a close analysis of some cases, I then offer a loose typology of actors' behaviour in court during the judicial divorce process, analysing what contributions are made by actors' expectations and past experiences. In conclusion, I attempt to respond to three questions: 1/ What factors facilitate and constrain agency within the context of judicial divorce claims, 2/ How is agency enacted by actors, and 3/ What are its effects on court rulings on divorce?

Agency, Institutional and Discursive Structures and the Family Court

Although the instigation of a judicial divorce claim in court would seem to presuppose agency on the part of women orchestrated towards changing their personal situation,² this assertion should not neglect the observation that the "choice that agents make are always within the realm of structurally provided possibilities."³ This observation touches on the much-disputed issue as to what extent agency is strategic and negotiates structures, and to what degree it simply replicates them. Benhabib describes feminist scholars at extreme ends of this debate as conceptualising the enactment of agency as 'gender, class and race struggles through which power is negotiated, subverted as well as resisted by the so-called "victims" of history' [or] ... adopt[ing] a position influenced by Foucault that conceptualises agency as a product of 'mechanisms of social and discursive control'.⁴

Anticipating some of the findings of this paper, my working definition of agency emerges from observation of legal processes related to judicial divorce. During my fieldwork, I observed actors regularly both appealing to, and subverting, structures. Consequently, I situate the agency of legal professionals and lay actors during the hearing of these cases in the Moroccan and Syrian family courts as moving along a continuum between 'rational choice and norm orientated approaches.'⁵ This position accommodates actors both pursuing 'rational choice' *strategy* or *negotiation*, and demonstrating 'norm orientated' behaviours that *replicate*, or *acquiesce* to, structures. I intend in adopting this model to avoid over-simplified implications that rational choices are fully independent of structures, or that claims and behaviours referenced to 'mechanisms of social and discursive control' are uniform and always predictable. In addition, my data includes observation of 'uncontrolled emotional explosions'⁶ that cannot easily be categorised as strategic, and appeared to transgress normatively approved behaviour.

In order to explain the impact of structures on the Moroccan and Syrian judicial divorce process, and the level of predictability of actors' responses to them in the

² This change need not necessarily be the issuing of a court ruling. See Mir-Hosseini 2000 & Moors 1995.

³ Hays 1994: 64.

⁴ Benhabib 2004: 87.

⁵ Emirbayer & Mische 1998: 968.

⁶ Falk Moore 1995: 17.

Moroccan and Syrian family courts, I maintain that agency is shaped by both *institutional* and *social* structures. Furthermore, I follow the argument that actors' *reflexive* interpretations and mobilisation of these structures are responsive to both the court, and their social, environments. Although Hays notes that it is a truism to state that, "structures are both the source and the outcome of human action,"⁷ this position provides an excellent grounding for assessing the extent to which actors' initiatives, responses and interactions either replicate and 'reinforce', or negotiate and 'challenge' the structures mobilized during judicial divorce cases.

For the purposes of this paper, I understand *institutional* structures as including the legal rules including any related explanatory texts, established court procedure, economic (specifically financial) constraints and judicial culture.⁸ While these factors lend shape to the progress of court cases, they may be open to negotiation and contestation, such as in judicial interpretation of legal rules and litigants' decisions about how to legally frame their disputes. I understand *social* structures as norms and practices that can be mobilised to underpin, restrain and justify actors' arguments and claims during court hearings. My findings suggest that although actors may recognise the *general* dominance of some social norms and practices, the *specific* applicability of many is contestable. Actors in the Damascus court might concede that minor sons should remain under the direction of their estranged fathers or that wives should respect their husbands' opinions, while arguing that a teenage son's financial maintenance of his mother and siblings awarded him the right to be treated as a legal adult or that a husband's behaviour has undermined his claim to any respect from his wife. Moreover, actors may dispute the age a working son should reach in order to be considered an adult, and the type of behaviour that can be considered intolerable from a husband. Institutional and social structures therefore inevitably contribute to, but are not necessarily predictably prescriptive in, actors' enactment of agency.

Existing studies, if not explicitly theorised as such, have frequently identified both institutional and social structures shaping legal practices in Muslim family courts and have discussed the contribution that actors' agency makes towards final judicial rulings. Several of these socio-legal studies have considered the enactment of agency both inside and outside the court.⁹ Full analysis of the circumstances and decisions leading to a claimant's appearance in court to request a judicial divorce is beyond the scope of my data, but access to, and use of, the courts is clearly facilitated by lay actors' legal knowledge, their financial and psychological resources, social capital and support networks. As Mir-Hosseini has observed, legal cases are often part of a protracted disputes that is only partially reflected in the court's file.¹⁰ Whether claimants frame and submit their disputes as legal cases can depend on whether they have recourse to the support of family or their community, and their subsequent success may be reliant on access to reliable legal advice.¹¹ Even if a dispute evolves into a legal case, extra-legal negotiations may continue between disputants, their families, friends and lawyers.

⁷ Hays 1994: 63.

⁸ I recognise that many *institutional* structures are at least partly socially constructed. Judicial culture may be susceptible to political intervention, social and economic change, and/or litigants' normative claims (ie. child maintenance awards are calculated referring to the basic cost of living and financial guardians' abilities to pay). Although there will be variations in individual rulings, judicial culture does establish an evaluative 'range', to which judges tend to abide.

⁹ Mir-Hosseini 2000; Moors 2008; Shehada 2005.

¹⁰ Mir-Hosseini 2000: 50.

¹¹ Mir-Hosseini 2000: 111-2; Shehada 2005: 113; Wurth 1995.

Furthermore, the family court is an unfamiliar environment to most litigants. In entering it they find that their cases are subject to institutional structural constraints such as the content of statutory law, whether the police issue a defendant the summons, whether there is time to hear a case, what magistrates perceive as real grounds for a claim and the financial cost of pursuing a case.¹² In addition, many lay actors are not fully cognisant of the content of the legal rules and court procedure, which may not reflect their expectations. Mir-Hosseini notes discontent voiced by Iranian wives in the mid-1980s 'aware of a man's inability in the pre-revolutionary period to effect divorce without establishing grounds' when informed in court of legal reform enabling husband's to register unilateral divorce (*t*al_q*).¹³ In addition, the unequal power relationship between litigants and judges ill equips lay actors to challenge the interpretation and application of legal rules. Discussing Malay courts, Syed Hassan and Cederroth note that although court personnel are 'expected to operate strictly at the level of Islamic substantive and procedural law, not at the level of local knowledge of what is right and wrong'¹⁴ they are apparently influenced by social and religious norms in refusing to give divorces to wives with required statutory levels of justification.

Although the institutional structure of a judicial culture is more difficult to characterise than state legal rules and procedure, its influence is identifiable in most studies of Muslim family courts. Family court judges have been observed exercising their discretion in order to secure litigants favourable rulings *despite* a legal rule. Shehada provides evidence of Gazan *shari'a* court judges using various informal strategies, or invoking their authority, to reach a resolution that favours female claimants. However, as demonstrated in her account of a man who was insistent that the court should grant him a divorce against his wife's wishes,¹⁵ the importance of legal rules to the judicial culture cannot be discounted. Mir-Hosseini's assessment of Iranian and Moroccan family courts emphasises the interaction of legal rules and judicial practice in noting that the courts are environments in which 'approved marital behaviour is rewarded and spouses who violate the norm are punished.'¹⁶

Shehada shares a similar approach to Mir-Hosseini in focussing on how female litigants in Gaza 'often search for gaps of indeterminacy, ambiguity or uncertainty in the interplay of codified law, social customs and the multi-referential framework of the judiciary to find space to express and materialize their needs and interests'.¹⁷ Lay actors may be more successful in negotiating, or avoiding, legal rules out of the purview of the court. Antoun describes sister-exchange marriages in Jordan involving no payment of dower (*mahr*), commenting that from 'the point of the view of the court, as long as the marriage contract stipulates a *mahr* the court recognises the marriage as valid regardless of local custom, that is, regardless of whether or not the *mahr* has been paid to the bride as the law stipulates.'¹⁸ Moors finds that a rural bride in 1940's Jabal Nablus in Palestine would consider that 'it was self-evident that her father would take part of her dower.'¹⁹ Although both Antoun and Moors note that changes in the Jordanian and Palestinian socio-economic environments have lessened

¹² Lazarus-Black 2001: 390.

¹³ Mir-Hosseini 2000: 60.

¹⁴ *Ibid.* 204.

¹⁵ *Ibid.* 121-123.

¹⁶ *Ibid.* 54.

¹⁷ Shehada 2005: 11.

¹⁸ Antoun 1980: 457.

¹⁹ Moors 1995: 97.

social practices in which women do not receive their *mahr*, judges and lawyers during my Moroccan and Syrian fieldwork described lay actors' similarly negotiating and avoiding legal rules.

There is evidence that lawyers are better placed than lay actors to challenge family court judges and to negotiate the courtroom's institutional structures. Mir-Hosseini has commented that litigants who hired the services of lawyers in Moroccan courts benefited from access to legal know how.²⁰ Since family court judges in Damascus had good relationships with some lawyers, it seems reasonable to speculate that some meetings between the judge and lawyers might have been beneficial beyond the receipt of basic advice.²¹ However, the costs of taking on a lawyer are prohibitive for many Syrian and Moroccan lay actors, as are some of the other costs associated with court cases.²²

Institutional structures including the legal rules, habitual court procedure, financial considerations and judicial culture, whether negotiated or acquiesced to by actors, therefore establish the legal environment within which court cases are processed. Social structures, however, frame the arguments and claims that provide many of the justifications, claims and reasoning on which judges base their rulings. Actors are likely to be more conscious of activating arguments and rationales in court than in daily life, but they still largely draw on socially recognizable norms.

In discussing a plea for judicial divorce in an Egyptian court, Dupret argues that legal concepts such as harm are used in a 'stable, unproblematic and unquestioned manner'²³ by the judge who 'orients to a conception which he thinks he shares with, and which will be confirmed by, other people participating in the judicial process'.²⁴ These categories are understood by litigants and witnesses who orchestrate their testimony towards establishing 'the constitutive element'²⁵ of their case. During court hearings, the judge seeks to bring together all the necessary components to support a procedurally correct ruling in which facts are rendered into recognizable legal categories. Dupret, therefore, considers that 'most of the judge's work happens in his writing of the ruling'²⁶ which privileges and orders the facts.

Similar recourse to recognisable social structures is identifiable in studies of Muslim family courts that have found judges are conscious of litigants' class, comportment and dress when evaluating their cases.²⁷ Shehada argues that female litigants 'who appear totally victimised and wear highly conservative clothing receive sympathy from the *qudah* [judges]'.²⁸ Regardless of her assessment of judicial responses, Shehada seems to suggest that some women enact personas that they believe will gain them an advantage in court. Mir-Hosseini has also suggested that litigants exploit judges' assumptions about the significance of their social status, gender and personal morality when making claims.

²⁰ Mir-Hosseini 2000: 111-2.

²¹ Brittan comments that informal discussions between 'role-players or functionaries' are 'the bedrock of negotiation which feeds back into the formal apparatus of the legal system. Bargains are struck, deals are made, perhaps favours are distributed, and political pressures are applied ... Negotiations are conducted which are then translated into the formal institutional level.' Brittan 1981: 180.

²² One lawyer practising in southern Morocco told me that she had arranged to personally pay for the DNA test required to prove the paternity of a client's child.

²³ Dupret 2005a: 14.

²⁴ *Ibid.*: 19.

²⁵ *Ibid.*: 21.

²⁶ Dupret 2005b: 160.

²⁷ Mir-Hosseini 2000: 70.

²⁸ Shehada 2005: 91.

Lay actors, particularly women, have also been observed avoiding social structures that might be disadvantageous to them by reaching agreements outside of the courtroom that bypass court proceedings.²⁹ These negotiations can subvert both legal and social practices. Strategies adopted by women may involve the kind of ‘trade offs’ identified by both Welchman and Mir-Hosseini, in which they agree to forgo legal entitlements in order to settle their dispute. Mir-Hosseini has found that some Moroccan women in the mid-1980s persuaded their husbands to divorce them (through *mukhala ‘a* contracts) by agreeing either to relinquish custody of their children or to excuse the children’s fathers from having to pay child maintenance.³⁰ Welchman has also noted some women attending West Bank family courts during the past thirty years have agreed to give up their children in return for a unilateral (*tal_q*) divorce.³¹

Socio-legal studies of Muslim family courts have therefore extensively documented litigants’ agency within the context of the legal rules, court procedure, economic circumstances and social processes found within and surrounding the court, and have considered the extent to which claimants in court either adhere to or challenge the legal categories reproduced by the family court judiciary. My own analysis is confined to court and legal advice centres but shows that women, their husbands and court personnel both replicate and negotiate institutional and social structures during judicial divorce cases.

Fieldwork Data and Methodological Issues

The data for this paper was collected during ten months PhD observation of the work of a Damascus Muslim family (*shari ‘a*) court in 2005, and seven months post-doctoral fieldwork in Morocco – principally conducted in Rabat, Casablanca and Marrakesh – in 2007/8. Application of Muslim personal status law in both Morocco and Syria is the remit of specialised Muslim family courts presided over by judges who are graduates of university faculties of law.³² The law applied is codified, with recourse to dominant Hanafi opinion in Syria (SPSL Article 305) and Maliki doctrine and interpretation of classical Islamic law (*ijtihad*) in Morocco (*Moudawana* Article 400) should the judge be confronted by any matters not addressed by state legal rules. Both Moroccan and Syrian family courts are regulated by civil procedure, with some deviations in matters such as an often-observed requirement that women testify in pairs. Litigants are under no obligation to hire lawyers to represent them or to conduct their case, and such is competition for work that lawyers rarely specialise in family law cases. Legal documents are frequently drafted by self-employed clerks (*k_tibun*) operating from small offices, sometimes a table and two chairs, outside the

²⁹ It should be noted that lay actors may be motivated to enter these agreements in order to speed up a conclusion to their dispute, and to avoid institutional structures such as the legal rules.

³⁰ This is a divorce in which the husband agrees to repudiate his wife in return for some compensation. The form that this compensation takes varies across legal jurisdictions and between individuals, but is usually monetary.

³¹ Mir-Hosseini 2000: 151; Welchman 2000: 279.

³² The Moroccan Ministry of Justice announced plans to invest in the family court system prior to the *Moudawana*’s reform, including training for practising judges and the establishment of seventy specialist courts. Muslim family courts in Syria are referred to as *shari ‘a*, marking them apart from arenas processing family disputes falling under Syria’s other denominational family laws. While all of the family court judges I encountered in Damascus were law faculty graduates, some Moroccan informants noted that a few older Moroccan family court judges might be graduates of faculties of religion.

courthouse. Whether represented by a lawyer or not, both Moroccan and Syrian litigants and their witnesses will come into direct contact with the judge during the hearing of their case. In the Damascus court, at least, this contact could involve informal enquiries in the judge's office, or telephone calls.

The comparative perspective I will be adopting in the subsequent discussion of Damascus and Marrakesh judicial divorce cases is complicated from a methodological perspective by pronounced differences in the quality of my data. In Damascus I had extensive access to the family court, including permission to attend court hearings held *in camera*, access to active case files and authorisation to observe mediation sessions related to judicial divorce cases. I added to this data through informal discussions with the judge, professional mediators, lawyers, and litigants and their families. In contrast, I was not granted a permit to conduct research in the Moroccan family courts. Given my inability to openly conduct research in the Marrakesh family courts, the data I gathered in this field consisted of observation of the work of legal advice centres (or, *centre d'ecoutes*), semi-formal interviews with lawyers, legal advice workers, NGOs and interested academics, and attendance of press conferences, NGO round tables, skills training workshops and academic meetings.

In part, the qualitative distinction between these two sets of data is a product of the political character of the fields themselves. The Syrian Muslim family courts have been subject to little academic attention and, at least of the time I did my fieldwork, there was no noticeable public debate about Syria's Muslim personal status law (SPSL) which was enacted in 1953 and has remained largely unchanged since 1975.³³ It appears that as a result the Syrian Ministry of Justice saw no reason not to issue a research permit allowing access to the family courts. Conversely, Morocco's first codified Muslim personal status law, the *Mudawwanat al-Usra* or *Moudawana* (1957/8) was the subject of extensive and controversial reform in 2004. The implications of this reform were the object of intense scrutiny during the period of my fieldwork, with interventions by NGOs, the Ministry of Justice and media, and public speculation about their impact on society.³⁴ The practical implementation of the law was apparently consequently considered politically sensitive. The methodological difficulty posed by the resulting disparity between my types of data for a consideration of actors' agency is most acute in that I was unable to observe the mobilisation of institutional and social structures by lay actors and court professionals at close quarters in the Marrakesh family courts, as I had in Damascus.

Despite these discrepancies, I would defend the value of analysing Marrakesh judicial divorce cases in the light of my observation of the Damascus court. As will become clear the progress of Marrakesh judicial divorce claims demonstrate some interesting parities and differences from similar Damascus cases. Although my work raises some unanswered questions, comparison of the two sets of data suggests something about the evolution of legal professionals' work and litigants' behaviour. This comparison is of particular interest from the perspective of considering actors'

³³ Syria's first Muslim personal status law was enacted as Law No. 59 (1953) and comprehensively addressed legal aspects of marriage, divorce, financial maintenance, guardianship and custodianship of minors and inheritance. It was subsequently amended by Law No. 34 (1975) which included provisions limiting men's capacity to marry second wives, regulating dower, maintenance and arbitration in marital breakdown and enabling divorcees to make a legal claim for compensation (*mut'a*) from ex-husbands who have arbitrarily divorced them. The law was subsequently subject to a minor amendment in 2005 increasing the ages to which divorced or estranged mothers retain the custody of their children by ex-husbands.

³⁴ Minor amendments in 1993 made some procedural revisions to the *Moudawana*, but the 2004 reforms were significantly more radical.

agency in response to the introduction of an apparently ‘open norm’ into the legal rules, and their impact on emerging legal practice.

Institutional Aspects of Judicial Divorce in the Marrakesh and Damascus Family Courts

The *Moudawana*'s reform can be situated within a ten year span in which several existing Muslim personal status laws were subject to substantive or procedural amendments, and which witnessed significant drives towards establishing codified Muslim family law in some Gulf states.³⁵ Although the political and social forces provoking each of these movements should be understood in their specific contexts, many states ‘explain the provenance of particular provisions in their codifications through tracing them to the opinions of various past jurists and schools, combined with arguments made on the basis of changing socio-economic circumstances and the public interest.’³⁶

The preamble to the *Moudawana* (2004) states that the law was drafted within the limits of the Islamic legal tradition in response to ‘requirements of progress and development’ including changes within the family and to the status of women.³⁷ Criticism as early as the 1980s, notably voiced by intellectuals, argued that the pre-reform *Moudawana* supported a patriarchal ideal of the family, which did not recognise the financial contribution that women entering salaried employment were increasingly making to households.³⁸ Moroccan women have one of the highest levels of employment in the MENA, although most work in low paid jobs with little or no labour protection, such as textiles, agriculture, packing or domestic service. In addition, male migration to urban centres or Europe has led to an increase in female-headed households in rural areas, where illiteracy rates are high and health services are poor.³⁹

On his accession to the throne in 1999, Muhammed VI identified poverty as a government priority and advocated women’s and human rights, improved education and economic liberalisation. The success of subsequent programmes is debated, but issues such as HIV/AIDS, domestic and sexual violence, paedophilia and homosexuality have been introduced into the public sphere through the media,

³⁵ Law No. 1 (2000) & Law No. 10 (2004) in Egypt; Revolutionary Command Council Resolution No. 127 (1999), Law No. 19 (1999) & Law No. 22 (1999) in Iraq; Temporary Law No. 82 (2001) & Directive of the *Qadi al-Qudah* in accordance with Article 2 of Temporary Law No. 82 (2001) in Jordan; Law No. 51 (1984) as amended by Law No. 29 (2004) in Kuwait; Law No. 70-03 on the Family Code, Ordinance No. 1.04.22 (2004) & Joint Decision of the Minister of Justice and the Minister of Health No. 347-04 (2004) in Morocco; Sultanic Ordinance No. 32 (1997) on the promulgation of the Law of Personal Status in Oman; Amari Decree No. 22 regarding the Law of the Family (2006) in Qatar; *Qadi al-Qudah*'s Administrative Directive No. 15/1366 (1999), *Qadi al-Qudah*'s Administrative Directive No. 15/481 (2000), *Qadi al-Qudah*'s Administrative Directive No. 15/711 (2000), *Qadi al-Qudah*'s Administrative Directive No. 15/1358 (2000), Law of Maintenance Fund No. 6 (2005) & Draft Law of Personal Status (2005) in Palestine; Law No. 18 (2003) in Syria; Federal Law No. 28 (2005) on Personal Status in United Arab Emirates; and, Law No. 24 (1999) in Yemen. See Welchman 2007: 157-160.

³⁶ Welchman 2007: 13.

³⁷ Pressure to reform the *Moudawana* (1957/8) was identifiable within a decade of codification of the law, with active government consideration of the issue in 1965, 1970, 1974, 1979 and 1981. Buskens 2003: 77.

³⁸ For an assessment of the impact of these legal rules on women’s cases in the family courts during the same period see Mir-Hosseini 2000.

³⁹ <http://iwwraw.igc.org/pulications/countries/morocco.htm> 19/08/08

government interventions, and NGO sponsored awareness raising campaigns.⁴⁰ The state has also disseminated information about the reformed *Moudawana* (2004), although critics argue that these attempts have been inadequate and that there is still widespread confusion about the law.⁴¹

The practice of personal status law in the Marrakesh family court can therefore be situated within a matrix of social and economic transformations and adjustments that have ‘affected, reorganized and re-symbolized social institutions and gender roles.’⁴² Claims and debates about the implications that these shifts do and should have for women’s legal, domestic, economic and political agency clearly impact on the performance of that agency through the involvement of women’s NGOs, media criticism of government policy, academic critiques and political lobbying. However, a basic premise of my analysis is taken from Vatuk’s work in the Indian Muslim family courts that women are rarely consciously challenging social structures when they mount a legal case, but ‘are simply trying to improve their personal situation in a particular marriage.’⁴³ In some cases, the only legal remedy may be petitioning for divorce.

Both the *Moudawana* (2004) and the SPSL (1953) contain five comparable grounds on which litigants can make an application to the family court for a judicial divorce.⁴⁴ Judges are empowered to consider a wife’s request for a divorce based on her allegations about particular medical defects in the husband (SPSL Articles 105-108, *Moudawana* Articles 107-111), his absence (SPSL Article 109, *Moudawana* Articles 104-106) or his failure to provide her with maintenance (SPSL Articles 110-111, *Moudawana* Articles 102-103). These grounds were provided for in the *Moudawana* (1957/8) as was the fourth ground that the husband has caused harm (*d,arar*) to the wife (SPSL Article 112, *Moudawana* Article 99-101). Article 99 of the *Moudawana* (2004) states that ‘harm is caused both by a failure to respect a stipulation included in the marriage contract’, and ‘any ignominious behaviour by the husband or act against good character that causes the wife material or moral harm such that the continuance of the conjugal relationship is rendered unendurable’.⁴⁵ In addition to the innovative inclusion of failure to respect a condition in the marriage contract, this reformed 2004 provision removed a requirement contained in the 1957/8 law that the judge should take the wife’s social status into account when assessing the harmfulness of the husband’s behaviour. Article 112.1 of the SPSL similarly, if more loosely, defines harm as behaviour perpetrated against one spouse by another making it ‘impossible to continue to live together’.⁴⁶

The fifth shared ground for the granting of a judicial divorce, which was newly introduced into Moroccan family law in 2004, are that there are irreconcilable differences, or is discord (*shiq_q*), in a marriage (SPSL Articles 112-115, *Moudawana* Articles 94-97).⁴⁷ Both husbands and wives are entitled to request this form of

⁴⁰ Campbell 2003: 38.

⁴¹ See Alami Mchichi 2007.

⁴² Bargach 2005: 252.

⁴³ Vatuk 2006: 219.

⁴⁴ The *Moudawana* (2004) also makes provision in Article 112 for the granting of a judicial divorce on the grounds that the husband has deserted his wife, or taken an oath of sexual abstinence.

⁴⁵ Global Rights 2005: 27.

⁴⁶ Hinchcliffe and Alami 1996: 234-235.

⁴⁷ Provision for judicial divorce on grounds similar to harm and discord are found in Algeria’s Law No. 84-11 (1984) Article 56, Egypt’s Law No. 25 (1929) Articles 6-11, Iraq’s Law No. 188 (1959) Articles 40-41, Jordan’s Law No. 61 (1976) Article 132, Kuwait’s Law No. 51 (1984) Articles 126-135 and Libya’s Law No. 10 (1984) Article 39. See El-Alami & Hinchcliffe 1996.

divorce from the court.⁴⁸ The SPSL (1953) requires the judge to first consider claimants' pleas on the grounds of harm, and if these grounds are not proved to consider the case on the grounds of discord.⁴⁹ The *Moudawana* (2004) similarly provides for unproven judicial divorce claims on the grounds of harm to be subsequently considered on the grounds of discord,⁵⁰ although harm claims can only be made by wives and they are not a compulsory preface to discord cases being considered by the court.

Legal Interpretations of Harm, Discord as an 'Open Norm' and the Granting of Divorce

Neither the terms harm nor discord are defined by the provisions of the SPSL (1953) or *Moudawana* (2004) or apparently by any additional explanatory texts, giving them the appearance of an 'open norm'.⁵¹ Hesselink describes a norm forming the basis of a legal rule as 'more open when less situations are excluded from its applicability.'⁵² The content of such a norm becomes established through legal interpretation, except in the case of a 'completely open norm' which since it is applicable to all cases is 'no norm at all.' The 'open' character of judicial divorce provisions, by which I mean definitions of the proven circumstances in which courts will grant a claim, is therefore dependent on court interpretations of the meaning and applicability of the terms harm and discord. Although neither is defined by the legal texts, and the *Moudawana* (2004) no longer requires assessments of harm to take account of a wife's social status, in practice discord has proved to have by far the more 'open' quality.

After conducting extensive fieldwork in Moroccan courts in the 1980s, Mir-Hosseini noted that procedural regulations in Morocco required a wife to decisively prove that she had suffered harm although 'the type and nature of proofs provided and accepted by the court vary from one case to another.'⁵³ Previous to the 2004 reforms, Moroccan judicial divorce cases relied heavily on documentation and some of the court files described by Mir-Hosseini contained medical and police reports regarding physical injury caused to the wife by the husband. Although she found that in some cases establishing harm was 'straightforward',⁵⁴ such as in a case in which the husband was imprisoned for killing his son and another in which the husband had been sentenced for sexually assaulting his step-daughter, other pleas were based on a combination of complaints about absence, non-payment of maintenance and maltreatment. Finding that proving harm was difficult for most claimants, Mir-

⁴⁸ Husbands as well as wives can request a judicial divorce on 'discord-type' grounds in Algeria, Iraq, Jordan, Kuwait and Libya. This is a legal right only accorded to wives in Egypt. Only wives can petition for judicial divorce on the grounds of physical defect, absence or non-maintenance since these grounds indicate a failure by the husband to fulfil the contractual duties of marriage. (Although a husband might find himself divorced on the grounds of his impotence, women are not subject to petitions on the grounds of their inability to conceive.) Divorces on the grounds of non-payment of maintenance and absence are revocable should the husband begin to honour his marital obligations.

⁴⁹ Article 112, SPSL (1953) as amended by Law No. 34 (1975).

⁵⁰ Article 100, *Moudawana* (2004).

⁵¹ Published versions of the SPSL (1953) contain some judgements from the Court of Appeal, but no additional explanatory material. The Moroccan Ministry of Justice issued an explanatory text to accompany the *Moudawana* (2004) shortly after its enactment, but this simply restates the legal rules with regard to judicial divorce. This text is much more detailed in regard to other matters, such as the necessary conditions authorising the marriage of a minor.

⁵² Hesselink 1999: 445.

⁵³ Mir-Hosseini 2000: 107.

⁵⁴ Mir-Hosseini 2000: 107.

Hosseini stated that ‘[w]hile violence appears to be a common element in most [cases], the boundaries between the grievances are hazy.’⁵⁵

Court personnel in the Damascus *shari‘a* court openly acknowledged the difficulty of establishing the grounds of harm. In practice, the judge never investigated judicial divorce claims on these grounds but routinely referred cases onto arbiters to undertake the procedure for allegations made about discord. This was even the case when a female plaintiff made claims regarding domestic violence supported by medical or police reports.⁵⁶ The Damascus judge and lawyers with whom I discussed judicial divorce claims noted that rulings in favour of harm claims must be founded on evidence which it is difficult for wives to present in court, and that considering claims on the grounds of discord is a time efficient way in which to conclude a case.⁵⁷ In addition, claims made on the grounds of a husband’s illness, absence or failure to pay maintenance can be overturned or stalled if the husband contests the allegations or undertakes to honour his marital obligations.⁵⁸

Consequently, all of the judicial divorce cases I observed in the Damascus court were processed on the grounds of discord, with judges, lawyers and the family court administration habitually submitting claims citing the relevant legal articles. Similarly, lawyers and legal advice workers in Marrakesh in 2007 were directing clients seeking judicial divorce to register discord cases with the family court. Legal advice workers and lawyers in Marrakesh echoed the arguments that I had heard in Damascus, that establishing discord does not present the same evidential challenges as other judicial divorce claims, but is certain to bring about divorce. Although the discord claim had not established itself as exclusively in Marrakesh judicial divorce practice as it has in Damascus, repeat players in the family courts increasingly favour it as course of legal action. Marrakesh lawyers, legal advice centres and reportedly some judges therefore advise female litigants to pursue their judicial divorce claims on the grounds of discord, whatever their allegations about their spouses’ behaviour.⁵⁹

Regardless of court personnel’s pragmatic attitudes towards the likelihood that cases will end in divorce, the judge’s initial task in processing both Moroccan and Syrian discord judicial divorce cases is to attempt to reconcile the disputing spouses. Under the provisions of the *Moudawana* (2004), the judge is mandated to conduct a private consultation with the spouses that may include the hearing of witnesses and any other parties significant to the dispute in a strenuous effort to bring about reconciliation (*Moudawana* Article 94). During his initial investigation of the grounds of harm, the Damascus judge is also instructed to attempt to reconcile

⁵⁵ *Ibid.* 108.

⁵⁶ See Carlisle 2007: 245.

⁵⁷ These arguments accord with the findings of researchers discussing Muslim family court rulings on allegations of harm in other legal jurisdictions. See Mir-Hosseini 2000: 67 & 107-8; Welchman 2000: 289 & 292.

⁵⁸ In addition, the court will go to some lengths to summon a husband to attend hearings related to judicial divorce claims and the wife might have difficulty proving that maintenance has not been paid or medical reports may be requested. If a ruling has been issued in favour of divorce, the husband has the opportunity to revoke it by returning to the marital home (Article 109.2) or making a commitment to the court to pay maintenance (Article 111). A husband suspected of impotency or insanity can also request postponement of his wife’s claim for a period of up to a year if the judge is convinced that he might recover (Article 107).

⁵⁹ I heard some anecdotal evidence that female plaintiffs had been advised by Marrakesh family court judges not to agree to disadvantageous terms of a *mukhala‘a* divorce since they had ample grounds to request a judicial divorce on the grounds of ‘discord’. In intervening in this manner judges may have been referring to the *Moudawana’s* (2004) Article 118 that agreements bringing about a *khul‘* divorce should not involve any ‘abuse or exaggeration’. Global Rights 2005: 31.

spouses (SPSL Article 112:2). As I have already noted, in practice the Damascus judge bypassed consideration of the possibility of harm, however judicial divorce claims were a significant enough aspect of the judge's work for these first consultations to be regularly timetabled into his week. These appearances were brief and formulaic and there was limited, if any, exploration of the claimant's marital circumstances or their grounds for complaint. Typically the claimant or their lawyer simply confirmed the continuation of the case and were given a month in which to reconsider reconciliation.⁶⁰

Moroccan lawyers and legal advice workers reported judges as often having insufficient time in which to listen to spouses' complaints or attempt to effect reconciliation.⁶¹ In both Syria and Morocco, judges who fail to reconcile spouses should allow a month before re-attempting to resolve the dispute (SPSL Article 112.3, *Moudawana* Article 82). If the claimant persists in requesting divorce, however, the judge should appoint two arbiters to investigate and try to reconcile the couple (SPSL Article 112.3 & 113, *Moudawana* Article 95). While Moroccan law does not specify characteristics of these arbiters beyond referring to 'two persons who can assume this role' (*Moudawana* Article 95), Syrian law explicitly mandates a judge to appoint arbiters 'from the families of the spouses, or otherwise persons who the judge considers to possess the ability to bring about reconciliation.'⁶²

The Damascus court in which I was based heard up to half a dozen judicial divorce claims a week, with each second judicial session taking up to twenty minutes.⁶³ After their perfunctory initial meeting, the judge asked the claimant in this subsequent meeting to explain the nature of their complaint. If the respondent was also present, he or she was given the opportunity to rebut the claimant's statement.⁶⁴ This exchange often broke down into a continuation of the ongoing dispute itself with the claimant and respondent interrupting, contradicting or denying the other's account. The judge usually offered advice on marital life, challenged harsh criticism of one spouse by another and strongly urged reconciliation. There was no written record of this session, which nevertheless had a formal character in that the judge both emphasised the court's interest in resolving the dispute and handed over the case to the arbiters under his direction.

An interesting aspect to established Damascus family court procedure with regard to these cases is that the arbiters appointed by the judge were invariably professionals. Although there is provision for the appointment of arbiters from the spouses' families (Article 112:3), the claimant was neither informed of this option nor asked about their preferences. Spouses were simply told to attend the court on one of the two days in the week on which the arbiters attached to the court were present.⁶⁵ Lawyers colluded in this process, since it is court routine, and case files record lawyers making

⁶⁰ Article 112:3 SPSL (1953) Alami & Hinchcliffe 1996: 234.

⁶¹ For similar findings, see Boukassi 2007: 200.

⁶² Article 112: 3 SPSL (1953) Alami & Hinchcliffe 1996: 234-235.

⁶³ In 2005 Damascus had six central *shari'a* courts, amongst which new cases were allocated equally.

⁶⁴ These cases, in the event that the court is satisfied that a defendant is aware of the court date, are nevertheless sent onto sessions with the arbiters, since the Article 113.2 of SPSL states that refusal of one of the spouses to attend sessions will not effect consideration of the case.

⁶⁵ The judge with whom I initially worked could only remember one case in his career involving non-professional arbiters that reached a successful judgement. The husband, who was living in Egypt, requested the appointment of arbiters from his and his wife's family. Much of the arbitration took place over the phone and the ruling from the Court of First Instance was subsequently contested but upheld by the Court of Appeal.

statements in court at the start of the arbitration process to the effect that ‘there is no one from the family who can reconcile them.’

The question of who undertakes the arbitration sessions (*tah*k_m*) has significant bearing on the enactment of both the litigants’ and judge’s agency. Both Moroccan and Syrian law requires that arbiters try to resolve the conflict and report back to the court (SPSL Article 113-115, *Moudawana* Article 95-97). Syrian law explicitly empowers arbiters to identify the causes of the dispute and, if they are unable to resolve it, to attribute blame for the breakdown of the marriage. This attribution is formulated in the form of a recommendation on the amount of *mahr* (dower) that the wife is entitled to keep on the termination of the marriage. Article 114 states that if responsibility for the marital breakdown lies solely, or mostly, with the husband then the wife should be awarded her full financial entitlements. However, if the fault is fully, or mostly, that of the wife’s, or divided equally between the spouses, then the arbiters ‘should decide on a judicial divorce between them on the basis of repayment of the dower in full or in part’ (SPSL Article 114.3). Furthermore, when submitting their recommendation to the court Damascus court arbiters are not required to give reasons for their decision which the judge is obliged to rule on if it has followed the correct procedure (SPSL Article 115).⁶⁶

In contrast, although Moroccan law does not specify who can be appointed as arbiters to consider judicial divorce claims on the grounds of discord, Moroccan lawyers and legal advice workers stated that judges generally appointed litigants’ relatives to this task. As in Israeli state *shari’a* courts’ consideration of discord claims, arbiters are not officials of the court, although they are involved in the claim on the court’s behalf.⁶⁷ Article 97 of the *Moudawana* (2004) states that if the arbiters are unable to reconcile the spouses, ‘the court shall make written mention of this in an official report of the proceedings, and grant the divorce as well as fix the vested rights to be paid ... taking into account each spouse’s responsibility for the cause of the separation’.⁶⁸ The Moroccan judge is not therefore bound, but should apparently be informed, by the arbiters’ findings.

Moroccan women’s NGOs lobbying for judicial appointment of professional arbiters, argue that this role would be better undertaken by counsellors or social workers.⁶⁹ Legal advice workers and lawyers suggest that the appointment of family members as arbiters is likely to lead to a continuation of an on-going dispute. While Damascus arbiters give their sessions a formal character by calling witnesses and requiring them to swear an oath on the Qur’an before they testify, Moroccan informants report informality in Moroccan arbiters’ conduct of judicial divorce cases. In addition, they argue, that there is a lack of anonymity in the Moroccan process, in which spouses discuss their private lives in front of family members. These critics argue that although Moroccan judges retain the authority to rule both on a judicial divorce and its financial consequences, without professional involvement in Moroccan claims they are ill-served by the arbiters’ reports.

⁶⁶ El-Alami & Hinchliffe 1996: 234-235.

⁶⁷ Abou Ramadan 2006: 266.

⁶⁸ Global Rights 2005: 27.

⁶⁹ For similar findings see Boukassi 2007: 200.

Litigants' Claims, Court Responses and Financial Rulings

Moroccan NGO assessments of family court practice shortly after the 2004 reform noted failures to observe the proper procedure for judicial divorce and confusion amongst some judges as to the interpretation of the legal definition of discord, but my fieldwork suggests that all claims made for judicial divorce on these grounds are now granted in both Marrakesh and Damascus.⁷⁰ In the Damascus court, women seeking divorce are directed to submit their claim on the grounds of discord rather than harm, their relatives are sidelined in the appointment of arbiters and lawyers' requests for judicial rulings on financial compensation are ignored. As a result, the court efficiently processes judicial divorce claims, routinely granting divorce to persistent claimants and awarding financial settlements. Much legal practice in the Marrakesh family courts reflects this procedure, with legal advice workers, sympathetic lawyers and apparently some court personnel, advising women to request divorce on the grounds of discord rather than harm on the understanding that their claim will be successful. Litigants' agency to make and try to establish a claim of harm seems therefore to be constrained both by the institutional structures of evidential requirements and by legal professionals' shared understanding of efficacious legal practice.

The institutional structure of legal rules, court procedure, financial costs and access to legal advice seem predisposed towards the granting of judicial divorce claims on the grounds of discord. This outcome is largely founded in judges' interpretations of the provisions 'open' character, and the lack of formal evidential standards that have to be met in order for a ruling to be procedurally correct. During interviews about their attitudes to some of the reforms contained in the *Moudawana* (2004), Moroccan judges cited twenty-eight claims justifying the granting of a 'discord' divorce, including poor treatment of the wife, incompatibility between the spouses, a change in the husband's character, physical violence, adultery, a lack of respect, the husband's addiction to drugs or alcohol, the wife's discovery that the husband is unemployed and demands for 'unnatural' sexual intercourse.⁷¹ Damascus arbiters heard very similar claims and noted matters that also included indifference to children, the wife's failure to take care of the home, interference or hostility from in-laws, disloyalty, the husband's meanness or wife's profligacy and the existence of a co-wife.

However, although the granting of divorce in Damascus and Marrakesh family courts is almost a certainty, the financial outcome of such rulings is less predictable. Claims made by litigants and their witnesses during judicial divorce hearings, and court personnel's assessments of claims are central not only as the basis for judicial rulings on divorce, but also on its financial consequences. Article 84 of the *Moudawana* (2004) outlines ex-wives financial entitlements following judicial divorce as 'the delayed dowry if appropriate, maintenance for the *idda*' (legal waiting period) and the consolation gift, which is assessed based on the length of the marriage, the financial means of the husband, the reasons for the repudiation, and the

⁷⁰ See Centre D'Informations et D'Observation des Femmes Marocaines (2006). I did hear of one recent judicial divorce claim in Marrakesh in which the judge refused to rule in favour of the claimant. The wife, who was the claimant, had been married to her husband for three days when she lodged her claim with the family court. Her husband had apparently been imprisoned the day after the marriage. The lawyer who told me about this case said that the judge felt the couple had not been married sufficiently long to know whether their marriage was in 'discord'.

⁷¹ Zeidguy 2007: 225-226.

degree to which the husband has abused this right.⁷² Following discord divorce, judges are therefore obliged to award wives all of the financial entitlements that would flow from repudiation, but have discretion as to whether to grant an additional award of *mut'a* (compensation) depending on the court's assessment as to who is at fault for the marital breakdown.

The SPSL (1953) differs quite significantly from the *Moudawana* (2004) both in reflecting the attribution of blame in the amount of *mahr* that the ex-wife will receive, and in making separate provision through Articles 116-117 allowing for financial compensation of women who have been divorced 'without reasonable cause' and who will suffer 'misery and hardship'.⁷³ The Syrian judge is not mandated to consider the SPSL's provision for financial compensation when processing judicial divorce claims, but must rule on what proportion of a wife's *mahr* the husband should pay.⁷⁴ In practice, although lawyers sometimes quoted Articles 116-117 in their submissions to the court, the judge did not make any awards of *mut'a* during my fieldwork, and stated that he could not remember a single case in his career in which he granted a claim for compensation following a divorce.

In spite of the institutional bias against *mut'a* awards in Damascus, and the guarantee of full entitlement to *mahr* in Marrakesh, there remains a lot to be financially gained or lost by spouses in a judicial divorce case. Marrakeshi husbands can be penalised through court rulings awarding compensation payments in favour of their wives, in addition to the cost of any unpaid *mahr*. Judicial divorce rulings I encountered in Damascus awarded women anything from 40% to 100% of their *mahr*, which could constitute a significant expense to men. However, despite the similarity in the unpredictable financial circumstances of Marrakesh and Damascus family court judicial divorces, the structures through which courts make awards differ. This is largely due to which court personnel have agency in the decision making process. Damascus procedure requires spouses to attend four sessions with professional arbiters who evaluate their cases during sessions in which social structures are mobilised and make recommendations which the family court judge will rubber stamp.⁷⁵ In contrast, Marrakesh lawyers and legal advisers stated that judges tend to make awards based on the duration of the marriage and the husband's income, rather than their evaluations of the causes of marital discord. Some Moroccan lawyers argued that judicial awards appeared to be arbitrary, with apparently little scope for female claimants to explain their case.

⁷² Article 84 continues that: 'During the iddat period the wife remains in the conjugal home, or, if need be, in a suitable home based on her and the husband's financial situation. Failing this, the court shall fix an amount of money to cover housing expenses to be deposited with the court as part of the vested rights due to the wife.' Article 84, *Moudawana* (2004).

⁷³ Article 117, SPSL (1953).

⁷⁴ Although *mahr* is payable by the husband to the wife on the conclusion of their marriage, social practices vary. The agreed sum is usually split into a prompt and a deferred amount, and was recorded on marriage contracts in Damascus as amount of that was due immediately (*mu'ajjal*), and an amount that should be paid later (*mu'ajjal*) in the event of divorce or the husband's death. In practice, many men do not pay the prompt sum in Damascus and owe it to their wives as a debt. This arrangement is authorised by the court. Legal workers and lawyers in Marrakesh said that most Moroccan women do receive their *mahr* in full or in part on contracting their marriage.

⁷⁵ However, if the respondent to a judicial divorce request fails to attend this does not invalidate the arbitration process. Article 113:2, SPSL (1953).

The Damascus Arbiters and the Mobilization of Social Structures

Damascus arbiters' recommendations to the court regarding rulings on judicial divorce claims are largely the product of the mobilization of social structures by spouses, their families and friends, attending lawyers and the arbiters themselves. As I have noted, discord and its financial consequences, can be read as an 'open norm' in the legal rules. In addition, the arbiters' final report to the *shari'a* court does not have to contain justifications for their recommendation, and the judge is obliged to abide by the arbiters' opinion as long as the judicial divorce process has been procedurally correct.⁷⁶ This procedure clearly allows arbiters considerable authority in conducting and concluding judicial divorce cases.

F.A., one of the two Damascus arbiters whose work I observed most frequently, described the important qualities required from arbiters as knowledge of the law and the *shari'a*, an understanding of how people 'are', and familiarity with the working of society in general. He noted that people of all types came to the sessions (trendy, religious, poor etc.) and from all walks of life (military officers, doctors, engineers, electricians); the arbiters' task was to understand each way of thinking. In addition, he often clarified the process in the terms laid down by the legal rules as 1/ to attempt to achieve reconciliation (*sulh*) between the spouses, 2/ to promote open discussion of all the issues, 3/ to understand the spouses' problems, & 4/ to apportion responsibility for the discord.

Arbiters' enactment of agency in undertaking these tasks, and the dynamics of their interactions with spouses, their families, lawyers and friends, demonstrated behaviour that both reinforced and contested social structures. These brief descriptions are not exhaustive, and the interactions involved could be open to variant interpretations. However, these limited examples from my field notes do illustrate the diversity of arbiter's behaviours and claims, which both negotiate and reproduce social structures during the judicial divorce process:

1/ *prompting*,

She becomes tearful and struggles to continue calmly. She is advised by F.A. to take her time and that they are here to listen to her.

"I don't want to put any ideas into your head, say whatever you want." F.A. seems to be tracing the marriage from its origins in an attempt to pinpoint the origins of the problem. "What was the kind of irritation? Someone hits, someone drinks, someone else likes women..."

2/ *direct questions*,

The Fs ask her if he is mean, to which she responds vividly.

3/ *overt disapproval*,

Before they married, she explains, she hoped for a husband who prayed, did not curse and enjoyed home life but was to discover that: "He's a man who loves parties and girls and cafes." F.A. intervenes to remind her that it is unnecessary to air everything since we are here to attempt reconciliation. She does not object.

⁷⁶ Article 115, SPSL (1953).

F.A. asks her what happened to this love? Where did it go? He argues that it isn't possible for such a strong attachment to simply disappear.

4/ *placing onus on couple (ie. to meet),*

Following this the husband urges her to speak only to interrupt her forcefully when she's three or four words into what she's got to say. He isn't chastised by either of the F's. F.A. suggests that he buy her a mobile phone so that they can stay in touch, but he says that he's already offered to do that.

When the husband arrives F.A. ushers them into the second room where they are left alone for a quarter of an hour-or-so...

5/ *non-response,*

At this point she leaves her first person narrative to ask: "What am I supposed to do?" Neither of the arbiters respond.

6/ *rule giving/moral boundaries (either regarding the legal process or in general life),*

They begin to argue vociferously during which he shouts: "Every word is a lie!" He's nearly in tears. F.A. calls them to order by noting that: "You've not come for the sake of money ... Why is there no order to this discussion?" He refers to the Qur'an and reprimands the husband for calling his wife a liar: "You're bigger than this. If you think something isn't true then say 'it isn't true' like that."

F.A.'s winding up of the session is interesting since he takes on the mantle of speaking for the husband, while preventing the husband from interrupting with an opinion of his own. "He's a good man, he yearns for you, he appreciates that you are honest." It's at this point that the husband tries to interrupt and is shushed. "If he furnishes the house, will you think about reconciliation?"

The F's later explain to me that this wife left the marital home, angered by her husband's second marriage, but later returned. She's now demanding that he rent her separate accommodation. Which the F's feel he clearly can't afford. I ask if it's her right to demand it. F.A. replies that both wives are entitled to equal financial maintenance, accommodation and sexual access. But that the husband is poor and agreed to a substantial dower payment, so they have to be practical about all of this.

7/ *religious instruction,*

F.A.'s manner alters between friendly familiarity, stern (during which he quotes from the *ahadith*) and fatherly.

The husband repeats the bare facts of their marriage several times; that she is 2 _ years older than him and had 2 children from a previous marriage. He says that his mother cried on the phone when she heard the news. F.A. interrupts him to cite marriage between Prophet Muhammad and Khadija.

8/ *legal advice,*

She has recently agreed to reconciliation after sessions in which she alleged that her husband used to hit her. She returned to the house 15 days ago. The 5-point list that she shows F.M gives some insight into her thinking about this decision, it includes a request that the husband to stop the violence and to acknowledge that he owes her the S£200,000 (\$4,000) that she has personally lent him. The issue of violence comes first and she opens this passage by referring to the ideal of a shared, supportive marital life.

F.A. is still coming in and out, so she tells F.M. that: “I’m like a man... I carry everything. Sometimes I get irritable, but he doesn’t do a thing. Every day I ask him to bring milk or call the repairman or go to the market, but he says he isn’t free. I’m tired.”

F.M. agrees: “It’s hard if you’re working and trying to keep the house comfortable.”

F.M. describes her list (several times) as “logical”. He’s still reading it when F.A. comes in and asks to be taken up to speed. During F.M.’s explanation the wife says: “He hasn’t hit me for a long time.”

F.M. adds the explanation to F.A.: “But she’s frightened that he will hit her.”

F.M. listens as she explores her worries and tries gentle persuasion, while F.A. is the more formal referring to the children and purpose of marriage. But it’s clear that her main concern is the violence: “I want you to make sure that he’ll stop hitting me.”

F.A. responds very informally, including me: “You’ve just told us that he’s – what is it Jessica? – ‘stop it’.”

Still, it’s noted that he hasn’t turned up to this session although F.A. adds that the children are well taken care of materially. He’s apparently never been to the sessions. She’s due to have a meeting with her lawyer soon that he will be expected to attend and which will be a test of his commitment. She wants to know: “If he hits me where should I go? When should I do something?”

F.M. responds that in that case she should act “immediately.” He has already assured her that if things should go wrong she can reopen her divorce claim. F.A. adds that they would like her to stay in touch since it remains their responsibility to oversee the process. He says: “We’ll miss you. Hopefully you’ll be comfortable and happy.”

“There are three issues: divorce, reconciliation and the dower. We can give you the divorce because we can see that your life is impossible. But for the sake of the dower we need to know who’s at fault.”

F.A. adds: “We need to know the reason. Not for ourselves but for the report, because it’s clear that you’re upstanding and tortured. You should help us. Why? For the sake of yourself.”

She’s not reassured by this and appears resentful, prompting F.A. to reassure her: “If you leave here unhappy, I swear, we will be unhappy.”

She is also worried about custody of her son, which the husband has apparently threatened to take from her. F.A. tells her that: “He has no right to claim custody until he’s 13 ... no, it’s changed to 15.”

9/ *appeals to relatives and spouses’ lawyers,*

F.A. raises the possibility of a *mukhala’a* and calls in the mother to discuss it. The mother is asked for her understanding of the discord. She says that there is “no respect between the families.” Most of the Fs’ probing focuses on the father who the mother describes as “not humane, moral or normal at all.”

F.M. asks why the divorce case was opened 1_ months after the signing of the marriage contract. The mother said that she urged the daughter not to marry until she knew the husband’s character better. When the Fs suggest *mukhala’a* the mother expresses doubts that the husband would agree to it after only 6 months. There is some discussion of money during which F.A. congratulates the wife on the agreed dower, and she says that she wants the full sum.

The Fs pursue the possibility offered *mukhala’a*. During which the mother asks if the gold is the rightful property of the daughter. F.A. replies that it is, of course. But the main problem remains the father, who the mother says: “Is not normal, that’s not just me saying it, anyone who meets him would say the same thing.”

10/ *proposing resolutions.*

This leads F.A. into suggesting that a solution to the wife’s dilemma might be an agreement of *mukhala’a*. The wife doesn’t know what this is and has to have it explained by her lawyer. She’s not happy and demands: “How will I live?” F.A. asks the wife if determinedly set on divorce to which she replies: “Every story I hear (about him) I become more determined to reject him.”...

Still urging her to consider *mukhula* a F.A. suggests that she suggest a settlement of £100,000 to her husband and reassures her that it would be finalised officially in the office.

The husband hands an envelope containing the backdated maintenance payments over to the wife in the office. This is an act about which he appears slightly self-conscious. He feigns snatching it back which makes everyone laugh. But F.A. strictly instructs her: “Don’t give it to him and don’t give it to your family. It’s for the house.” To which she nods her understanding.

F.A. underlines it by firmly telling him: “The children have need of you [financially].”

Although the arbiters’ involvement in the process is institutional, their understanding of the causes of marital discord in each case was highly dependent on social claims. In enacting their agency, arbiters often asserted the institutional structures of the legal process and their own court authorised authority empowering them to ask questions (2) and elicit information (1). They also attempted to sanction what they perceived as behaviour that disrupted the possibility of reconciliation and made it clear that spouses should submit to this aspect of the process (4). Other assertions of their professionalism might be in apparently partisan support of one spouse (6) or when providing legal reassurance or direction (7). However, arbiters would also defer to spouses and lawyers in order to try to secure a resolution (9) and they would appeal directly to spouses to try to reach an agreement (10). If these attempts were unsuccessful, arbiters would award divorces to persistent claimants and frankly told me that very few couples reconciled once legal proceedings had begun.

With a view to this legal conclusion, arbiters were attuned to spouses claims, complaints and concerns (1, 2, 3, 6, 7, 9, 10), although they sometimes seemed to find it difficult to know how to respond (2). As repeat players in the judicial divorce process, the arbiters had extensive experience of spouses’ alleged difficulties and were practiced at responding reflexively to each case. In undertaking the sessions arbiters were able to draw on ‘characterization of a given situation against the background of past patterns of experience’ in considering ‘possible trajectories of action’ that may have moved the process along or concluded a case.⁷⁷

Wives and husbands entering the judicial divorce process had no previous experience of it, although lawyers or court personnel may have previously briefed them about it. Spouses were aware of the arbiters’ authority within sessions and, informed that frankness would benefit their claims, demonstrated a complex enactment of agency:

11/ *challenge*,

While he’s out she asks: “What will be the justice from the sitting?”

F.A. takes a phone call and gestures for F.M to continue with the session. But when he asks the husband to begin, he retorts that he’d prefer to wait for F.A.’s full attention. (This is the third example of behaviour during this session that might be perceived as defiant – the husband previously having previously left to go to the pharmacist and taken notes as the Fs and his wife were speaking. F.M. later mentions it to F.A. judgementally.)

⁷⁷ Emirbayer & Mische 1998: 997-8.

12/ *ascription of meaning to events,*

She notes that they had a wedding party, but only because he insisted on it despite her lack of enthusiasm since he loves celebrations.

He repeats several times the bare facts of their marriage; that she is 2 _ years older than him and had 2 children from a previous marriage. He says that his mother cried on the phone when she heard the news.

She too wants to talk about violence: "The first thing is that he hits me." She says that it started after she became pregnant. She lost the foetus at three months. Her husband disputes this saying it was 4 months. She becomes irritated and settles the date at 3 _ months. She claims that she had a miscarriage after he assaulted her. He doesn't deny hitting her, but said it was light and that he can't have been responsible for her losing the baby.

In addition, she alleges that he dislikes her family. He says insulting things about them. He counters that her sister had a kitten with blue eyes and that she and her family joked that it looked like him.

13/ *assent (including receptivity to arbiters prompts),*

F.A. stresses the need for communication. The husband insists that a wife should trust her husband. He says he's heard her father shouting while they're on the phone together: "Don't talk to him!" F.A. reminds them that their marriage is their business. He advises them to go out together with the children to a nice restaurant with a garden. She says she can't be alone with them (I think because they'll argue) and he says that her father has banned her from the house. But F.A. persists with his suggestion that they have a change of scene.

At this point the husband's mobile rings, he picks it up, checks the number and turns it off. F.M. jokes that he should answer the phone in front of his wife so that she can hear who's calling him. The husband is pressing the suggestion that they eat out together as she leaves. Afterwards he remains in the room to explain to the Fs that he is often greeted by girls in the street because he's given them swimming lessons. He teaches girls aged 14-19 and is often recommended by the pool staff as a teacher.

14/ *self-definition (ie. as hard-working, honest, religious),*

F.M asks her if she was provided with any new clothing and she says not. She claims that while her co-wife is well provided for, she has barely any comforts. He promises to bring pieces of furniture, but they never materialise.

The husband says that he works as much as he can, but he has 5 other children and if he doesn't work they won't eat. He continues with an elaborate description of her poor housekeeping – drawing out lines of dust along the edge of the room with his finger. In reply to F.A.'s question, he says that they live in a traditional house in which: "Everyone has their own room to go to." They were married in 2001 after a 2 month engagement.

F.M asks if he equally divides out his nights, which he says that he does and she doesn't contest this. The husband states that he wants to reconcile.

15/ *pleading,*

At this point she leaves her first person narrative to ask: "What am I supposed to do?"

They sit down and he opens by stating that she is his “life” and his “eyes” whilst presenting her with a small red silk purse. She turns her face away from the purse, which he persists in trying to show her. F.A. encourages us to eat and drink and the husband urges his wife to comply, but she (almost silently) refuses. F.A. asks him to translate what is going on for me. He turns to me and says in English: “Tell my wife to come back to me. She is my eyes, my[pause]”. I offer “Life?” He replies: “Yes. She must come back. Tell her this. She understands you.”

16/ *silence,*

Before they married, she explains, she hoped for a husband who prayed, did not curse and enjoyed home life but was to discover that: “He’s a man who loves parties and girls and cafes.” F.A. intervenes to remind her that it is unnecessary to air everything since we are here to attempt reconciliation. She does not object.

F.A. asks if it was a love match? She seems shy of answering this question, but confirms it. She’s also asked (twice?) if her family approved of the match. They did. When asked how the relationship developed he says that they met through mutual friends at university and that it progressed through phone calls to the engagement. F.A. asks if they had a wedding party and is surprised (“Why not?”) when she says that they didn’t. She replies the neither of them thought it was important.

F.A. then seems to be trying to encourage the husband into making some declaration of love, but he just sits with his head slightly hanging and looking embarrassed. He just about manages a nod in response to the question: “Do you want her?”

17/ *deference to family/lawyer,*

Her father opens by saying of the husband that: “He has no compassion, morals or manners.” He continues by saying that: “This guy doesn’t like work. He likes drinking, smoking, bad company and ‘women of the night’ ... [pause] ..If you know what I mean.”

He doesn’t pay the bills (father claims to have paid a S£500 electricity bill), doesn’t repay loans and wants to take the house. The father says at one point that: “I’m worried that this case will lead her to go back to him.”

Then there is the matter of the violence. The father asks the daughter to explain what happened which makes her clearly upset. She says that he hit her and threw her to the floor. The father repeats this last part almost word for word.

18/ *persistence/repetition,*

The husband tries to interrupt frequently using some polite, but insistent phrase; sometimes is reproached by F.A. and occasionally allowed to continue.

19/ *religious/moral argument,*

The wife’s brother is frank about the sexual problems in his sister’s marriage. He complains that he and the husband had a conversation in which the husband said that he liked to have intercourse five or six times a day. He comments: “Are we animals?”

The next witnesses are the husband’s sisters. F.A. remarks that they look alike as they hand over their ID cards. There is a slightly broader, initially more vocal sister (S1) and a slighter, increasingly talkative sister (S2). When he asks if they had any personal differences with the wife, S1 replies: “Not before all this.”

S1’s first criticism is of the wife’s general comportment. She mentions a “skirt like this” indicating a length just over the knee. She describes how the wife would stick her chest out provocatively in public and wore full make-up. “You know how when women sit on the bus they carry themselves like this [pulls her knees tight together and hunches over slightly] and if there’s a man sitting next to them put their handbag in between

[mimes pushing handbag down beside her thigh] like this? Not her. She'd sit spread out."

S1 describes how the relationship prior to the marriage was long and fraught. She says that she advised the wife: "It's better that you leave him." Although the couple were engaged the relationship did subsequently break up. "We were surprised when the same girl was back after 2 years... We like women to be appropriately dressed." The strains continued after the marriage with S1 claiming that: "There was war between them. Always, always. I was the peacemaker between them."

20/ *ignoring the process*

They begin arguing vociferously during which he shouts: "Every word is a lie!" He's nearly in tears. F.A. calls them to order by noting that: "You've not come for the sake of money ... Why is there no order to this discussion?"

Together with behaviour that perhaps replicates (13, 15, 16) and challenges (11, 20) the institutional structures of the legal process and the arbiters' authority, spouses mobilise social structures by trying to appeal to assert their own interpretations of events (12), impose self-definitions (14), defer to an alternative authority (17) or insist that arbiters acknowledge a repeated complaint (18). It is clear from these interactions that the interpretation and relevance of arguments and claims referenced to social structures are highly contestable during the sessions. While many wives remembered their wedding party as a happy occasion during the sessions, a description of disagreements about whether to hold one could highlight a husband's alleged profligacy (12). Disputes about a husband's failure to adequately provide for his family could equally be reconfigured as evidence of his carefulness to be equally fair to all of his dependents (14).

When their references to social structures was challenged by arbiters or elicited their apparent disapproval (16, 18, 20), spouses reflexive responses included renewed self-justification (13), elaboration of earlier statements (14), avoidance of conflict (16) or persistent repetition (18). This behaviour concords with Emirbayer and Mische's depiction of actors' enacting 'relationships to the past through a retrospective-prospective process of *identification*, in which possible trajectories are located against a backdrop of prior typifications from experience, and relationships to the present through *experimentation*, in which alternative courses of action are tentatively enacted in response to emerging current situations.'⁷⁸

Agency and Marrakesh Family Court Judicial Divorce Rulings

In processing judicial divorce claims, Damascus court appointed arbiters are at least partly dependent on spouses' assessments and interpretations of their marriages; encouraging open discussion (7,14), tolerating highly expressed emotions (4, 5, 8, 10, 11, 12, 15, 19) and noting persistent claims (7,18). One of several institutional aspects to the Damascus and Marrakesh judicial divorce processes, the appointment of court ordered arbiters facilitates efficient legal conclusions to cases. As a result, persistent female claimants in Damascus and Marrakesh are guaranteed a judicial divorce regardless of their class, judicial attitudes or the types of evidence they can present to the court.

⁷⁸ Emirbayer & Mische 1998: 988.

Parallels between actors' enactment of agency in respect of mobilising social structures during hearings are less certain, since the Damascus and Marrakesh legal systems differ both in their allocation of agency to court personnel and the potential for the mobilisation of social structures by spouses. Damascus judicial divorce cases are simultaneously arenas in which power is negotiated, norms are mobilised in ingenious ways and claims are artfully deployed, and fields in which these strategies are limited, shaped and enabled by judicial attitudes, state legal rules, and social structures. While lawyers' describe similar dynamics in Marrakesh judicial divorce cases, and legal advice workers urge female claimants to be frank when making claims in front of the family court judiciary, the court process is reported as being brief with little time accorded to hearing women's complaints or their reasons for requesting divorce. The structural possibilities allowing women to assert their interpretations of events therefore appear more favourable in the Damascus judicial divorce context.

In pressing the significance of their evaluation of events and arguing that they are deserving of some financial award, women in Damascus replicate some social structures by responding to arbiters' prompts and mobilising widely recognised social norms (such as honesty, chastity, hard work), but are able to contest and negotiate others (authority, appropriate gender roles). This enabling of agency is a product of the 'openness' of discord to various interpretations, the duration of the arbitration process and the authority invested in experienced arbiters to make binding recommendations to the court. Moroccan lawyers argue that similar enactment of agency by female claimants in Marrakesh is problematic, since family court judges do not fully explore the origins of discord, and cannot rely on information provided by the arbiters. As a result, they argue, Marrakesh court compensation awards are unrelated to the facts of a marriage other than its duration and the husband's income.

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