CHAPTER 5

Seeking Portia and the Duke: Male and Female Judges Dispensing Justice in Paternity Cases in Morocco

Nadia Sonneveld

Introduction

This chapter focuses on the most recent reform of Moroccan family law (*mudawwana al-usra*) in 2004.[1] The main question guiding the analysis is: is there a difference in the way male and female judges dispense justice in family law cases, most particularly in paternity dispute cases?

The first codification of family law in Morocco in 1957–58 was conservative in nature. Moroccan women remained under the legal authority of their husbands, even having a legal obligation to obey them. And yet, the same women who had to pay obeisance in the private sphere were given far-reaching authority over both men and women in the public sphere when Morocco appointed its first woman judge in 1960.[2] This move turned Morocco into one of the first countries in the Muslim world to appoint women as judges. In comparison, it took Tunisia until 1968 to appoint its first female judge.

Nevertheless, in later decades, when Morocco started signing international treaties such as the Convention on the Elimination of all forms of Discrimation Against Women (CEDAW, 1993), the issue of women's obedience to husbands remained an important issue, to the extent that the Moroccan government insisted on including reservations in CEDAW to guarantee that international conventions would not undermine women's obligation to obey their husbands (Buskens 2003, 109).

1 Funding for this research project was made possible through a research grant from the Netherlands Organisation for Scientific Research (NWO).

2 Her name was Zaynab Abd al-Razzaq. She was born in 1938 in Fes. In August 1960, she was appointed to the so-called *sadad* court in Rabat. *Sadad* courts were the lowest courts, which had jurisdiction in matters which used to be adjudicated by religious tribunals (Liebesny 1975, 113). In February 1961, Zaynab's sister, Amina Abd al-Razzaq, who was born in Fes in 1937, was appointed as a judge too. The father of the sisters served as a judge in the small town of Tissa, some 50 kilometers north of Fes. In 2014, there were 3060 male judges (76,6 percent) and 939 female judges (23,4 percent) in Morocco (written information provided by the Ministry of Justice in Rabat on May 18, 2015).

Given the patriarchal nature of Moroccan family law, we focus here on its latest reform, commonly known as the *mudawwana al-usra*. The introduction of the reformed *mudawwana al-usra* on 4 February 2004 (hereafter MU2004) was hailed by many organizations and advocates of women's rights, both domestic and international, as a great step forward toward gender equality and women's emancipation in Morocco. Among the major changes were the provisions which: gave women (and men) access to unilateral divorce through a *tatliq* procedure called *shiqaq* (Articles 94–97); abolished the need for a marriage guardian (Articles 24–25); gave husband and wife the possibility to divide assets acquired during marriage equally in case of divorce by composing a written statement to be added to the marriage contract (Article 49); abolished women's obedience to their husbands and instead gave each spouse equal responsibility for the management and care of household and children's affairs (Article 51); and increased the marital age from 15 to 18 for both boys and girls (Article 19). These provisions provoked much controversy in Moroccan society, both before and after the draft law was enacted. In the public debate, conservatives, religious leaders, and Islamist groups opposed the draft law, saying that it was a Western invention that deviated from Islamic *shari'a* and Moroccan culture (Buskens 2003). In the years following the law's enactment, several studies portrayed a gloomy picture of its implementation in practice (El Hajjami 2009; Newcomb 2012; Rosen 2008; Žvan Elliott 2015). Apart from litigants', especially women's, ignorance of the law,[3] criticism frequently pointed to the ambiguities in the law and, given these open norms, the wide latitude judges enjoy in interpreting the law in a manner they deem appropriate. Judges were consequently accused of being corrupt and conservative. On a more positive note, anthropologist Rosen claimed in 2008 that it may "... be very relevant that in Morocco a large number of the lawyers are now women, and that [...] Moroccan women may already constitute more than 20% of the bench" (Rosen 2008, 139). This statement implies that, for reasons that Rosen does not make clear in his chapter, the gender of the judge may make a difference in the way justice is dispensed.

Rosen does not stand alone. Influenced by the 1982 publication of American feminist and educational psychologist Carol Gilligan's *In a Different Voice*, feminist legal scholars, such as Menkel-Meadow, asked whether women's different voices in moral development would lead them to bring a different perspective to bear on judidical adjudication processes as well (e.g. Menkel-Meadow 1985, 44; Chamallas 1999; Chunn and Lacombe 2000). Where men would follow

3 Žvan Elliott argues that the people in her fieldwork site, a village in rural southern Morocco, were not ignorant about the law; they even tricked the law (2015, 104).

an 'ethic of justice' (i.e. applying pre-existing general rules to the dispute in question in accordance with specified procedures), women were thought to bring the language of care, mercy, communication, and preservation of relationships into the adversial system of legal decision-making, which would preferably lead to solutions that the disputants would mutually agree to. Yet, importantly, Gilligan very clearly states in the beginning of her book that: "The different voice I describe is characterized not by gender but theme" (1993, 2) and "... the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus [on] a problem of interpretation rather than to represent a generalization about either sex" (1993, 2). Hence, when Gilligan introduces in her book the character of Portia, the heroine of Shakespeare's *The Merchant of Venice*, who disguises herself as a male lawyer[4] (1993, 105), this should not lead us to the conclusion that Portia, by interpreting the law in such a way that mercy prevails and death is prevented, embodies the female lawyer or judge (e.g. Rackley 2003). To the contrary, some scholars have argued that by dressing as a lawyer, Portia defies categorization as either a man or a woman (see overview in Rackley 2003, 34) and her actions should, moreover, not be interpreted as, using the words of Gilligan: "... bring[ing] into the masculine citadel of justice the feminine plea for mercy" (1993, 105). These scholars argue that instead of bringing mercy, Portia simply interpreted the law in a new manner. She rejected rigid, rule-oriented reasoning and instead utilized the ambiguities that surround legal reasons to arrive at an interpretation of the legal rules in which "... the letter of the law, the spirit of the law, the quality of mercy, love in friendship and in marriage ... are not forces contending with one another ... [but which] properly conceived ... work together (Lowenstein, quoted in Rackley 2003, 39). Therefore, by seeking alternatives within the legal framework, Portia represents the judge (or lawyer) who is the antipode of the Duke, the ruling male judge in *The Merchant of Venice*. In the play, the Duke clearly is a 'bouche de la loi,' that is to say, a judge who goes by literal interpretation of the black letter of the law. The Duke does this to the extent that he is unable to issue a ruling that would prevent the death of the accused, a close friend.

In this chapter, I pay particular attention to the implementation of the 2004 family law reform in the courthouses of Morocco. As stated above, the main question guiding the analysis is: is there a difference in the way male and female judges dispense justice in family law cases, most particularly in paternity dispute cases? In other words, do Moroccan male judges employ 'the

4 Portia disguised herself as a male jurist and is alternately interpreted as a lawyer, judge, or law clerk (Menkel-Meadow 2005, 274).

Duke approach,' in that they are more rule-oriented than their female peers who, employing 'the Portia approach,' interpret the law in a flexible manner in order to arrive at a situation in which (family) relationships are preserved?

The data to answer this question were collected during a period of fieldwork lasting from January 2015 until August 2015.[5] During this period, I presented 61 family law judges a hypothetical case involving a paternity dispute, asking them what they would do when confronted with such a case. The sample of 61 judges consisted of 36 males and 25 female judges, from 17 different courts of first instance and two courts of appeal in Morocco. The courts were dispersed over nine legal districts.[6]

This chapter consists of four sections. Section one provides an outline of the academic debate on the gendered nature of judgeship in Muslim majority countries. We shall see that scholars hold divergent views on whether or not the judge's gender makes a difference in dispensing justice. Focusing on Morocco specifically, various academic studies have concluded that the implementation of the MU2004 is obstructed in practice for a number of reasons, such as poverty, women's ignorance of the law, and importantly, corruption and conservatism among judges (Ennaji 2011; Sadiqi and Ennaji 2006; Zoglin 2009). The judges I interviewed frequently claimed that they were torn between a discrepancy between the law they had to apply and the social reality with which their clients confronted them. In sections two and three, therefore, the focus shifts to the social and legal reality in which paternity claims arise. Section two highlights a difference between what I call 'informal marriage' and 'secret marriage.' Both are illegitimate from a legal perspective because they are not registered with the relevant state authorities. But where informal marriages are made public and socially accepted, secret marriages are concluded without the knowlegde and consent of the two families and the community in which the man and woman live. Regardless of whether the child is born of an 'informal' or 'secret' marriage, we shall see that people in a given community attempt to avoid the consequences caused by illegitimacy by attaching the child to the lineage (*nasab*) of a 'father' who might not be its biological father.

Given the fact that the 61 judges interviewed all state that the MU2004 is the most important source in dispensing justice in family law matters, section

5 This chapter and the analysis presented is part of ongoing research. One part of the research is quantitative in nature and seeks to provide an answer to the question which factors (including gender) have an influence on judicial decision-making in the family courts of Morocco. The second part of the research is qualitative in nature and seeks to explain why this is the case.

6 There are 16 legal districts in Morocco. For an overview, see: http://www.justice.gov.ma/lg-1/cartejudiciaire/default.aspx#.

three examines how paternity is defined in the MU2004 and how it can be proven in case of dispute. Section four shows how judges, faced with a claim for paternity, try to bring the spirit of the MU2004 in line with the social reality of Moroccan society, and whether they apply the 'Duke' or 'Portia' approach to resolve the dispute.

1 Speaking about the Judge: Male Dukes and Female Portias?

The assumption that female lawyers or judges have a different voice, which shows more understanding and awareness of the interests of women who bring their grievances for legal discussion by interpreting the legal rules in a flexible way has been of much dispute by scholars focusing on gender and judging in the West (see for an overview Rackley 2003, 39). Nevertheless, domestic and international organizations for the rights of women have often advocated the inclusion of women into the judiciary, in general (Beijing 1995),[7] in the Muslim world at large, and in Morocco specifically. They had and have various reasons for doing so.[8] One important reason to have women work as judges, they argue, is that they bring a female perspective to bear. This will improve women's access to justice, as female litigants will feel more comfortable disclosing the secrets of the house to a female judge than to a male judge (see for example, Mehdi, this volume). Interestingly, these alleged distinctive characteristics of Muslim female judges have also been detected in Muslim male judges. From the 1990s onwards, a growing number of scholars analyzing historical court records in different regions of the Muslim world have demonstrated that Muslim male judges interpreted the law on the basis of non-legal considerations, a practice which Max Weber in his ideal types of law referred to as 'khadi-justice' (Kronman 1983, 76). Named after the judge presiding over a *shari'a* court, Weber regarded such practices as 'substantively irrational lawmaking': 'irrational' because the adherence to fixed principles was absent, and 'substantive' because both legal and non-legal norms were taken into account (Kronman 1983, 76–77).[9] Scholars studying Ottoman court records have shown that, from the fifteenth to the early twentieth century, Muslim male judges employed great flexibility in interpreting the teachings of the four schools of

7 Held in 1995, the Beijing conference was the fifth United Nations conference on women.

8 For a review of scholarly literature on this subject, see Hunter (2015, 4–7).

9 Much has been said about the problems associated with Weber's classification of four ideal types of legal thought, a debate that falls outside the scope of the present discussion. See for more Sonneveld (2010).

Islamic jurisprudence.[10] They were concerned with the context in which the dispute was embedded and applied *'urf* (local custom) within the limits set by the principles of the Islamic *shari'a* (Rosen 2008, 135; Sonbol 1996, 12). Scholars have heralded the flexibility of these male *qadi*s (judges) as contributing to the ability of female litigants to obtain their rights (e.g. Agmon 1996, 138–139). After the emergence of nation-states in the twentieth century and the subsequent codification of the teachings of the four schools of law into national law-codes, the flexibility that characterized the *shari'a* courts/judges was greatly diminished, some of these scholars argue (e.g. Charrad 2011, 421; Sonbol 1996, 12; Tucker 1998, 185). It seemed that in the process of modernization, 'the Portia approach' gave way to 'the Duke approach,' and Muslim male judges became 'bouches de la loi.'

Following on the study of historical Ottoman court records in the 1990s, in the 2000s, the study of contemporary application of *shari'a*-based legislation in modern courts became increasingly popular among scholars of gender in the Middle East. These studies present a mixed picture of the way (mostly) male judges dispense justice in family law cases, a divergence, which is also demonstrated by the chapters in this book. Oftentimes, scholars have come to the conclusion that judges are careful to safeguard the interests of the weaker parties in the legal dispute, namely women and children, by interpreting the law, usually family law, in a flexible manner.[11] Other scholars have demonstrated the opposite.[12] These divergent conclusions show that codification of family law matters does not necessarily work to the disadvantage of women litigants.[13] Interestingly, while some scholars lament the rigidity that came with the codification of family law matters, women's rights activists in the Muslim world

10 *Fuqaha* (scholars in *fiqh*), who studied the sources of Islamic law, including the primary ones such as the Qur'an and the sayings and doings of the Prophet (*sunna*), mainly laid down their understandings of the sources in four main schools of (Sunni) Islamic jurisprudence around the tenth century CE: the Hanafi, Hanbali, Maliki and Shafi'i schools. Each school has a certain geographical distribution, with the Hanafi school being dominant in areas formerly occupied by the Ottoman Empire. The Hanbali school has most of its adherents in Saudi Arabia and Qatar. The Maliki school is dominant in northwest Africa, and the Shafi'i school of Islamic jurisprudence in Southeast Asia.

11 See, for example, Lindbekk (2013) for Egypt; Peletz (2002) for Malaysia; Shehada (2005) for Palestine.

12 See, for example, Al-Sharmani (2008) for Egypt; Sonneveld (2010; 2012) for Egypt; Voorhoeve (2014) for Tunisia.

13 It should be noted, that most of these studies deal with female litigants and male judges. Sonneveld (forthcoming) argues why it is important to also take account of the perspectives of female judges and male litigants.

were instrumental in demanding codified family laws, which, they argued, had to be detailed to the extent that judges' discretion would be restricted considerably and rulings would become more unified (Welchman 2007, 22–23).

Codification of Shari'a-Based Family Law Matters in Morocco

In Morocco, family law matters were first codified in 1957 and 1958, immediately after Morocco gained independence from France in April 1956. Prior to codification, Moroccan judges in family law cases dispensed justice on the basis of leading works grounded in the teachings of the Maliki school of Islamic jurisprudence (Al-Akhrisi 2005, 17). Due to the flexibility of the teachings of the Maliki school of law, judges took into account local *'urf* (customary law) and *taqalid* (customs and habits), with the result that there was great diversity in the way they ruled on a particular issue. After independence, King Muhammad V established a royal committee with the special task of drafting a code of family law, which would put an end to this diversity and which would help judges in dispensing justice in a uniform manner (Al-Akhrisi 2005, 17), based on the teachings of the Maliki school of jurisprudence and in line with the demands of modern times. These goals were reflected in the name of the committee: '*mudawwana* of all Islamic jurisprudence rulings.'

The royal committee was headed by the then Minister of Justice (Abd al-Karim Ibn Jalun) and consisted of ten members, most of whom were graduates from the famous al-Qarawiyyin University for Islamic studies in Fes (Al-Akhrisi 2005, 21).[14] The committee was established on 19 October 1957 and after three meetings, on November 15, 1957, it presented a draft law on marriage and divorce. The draft was based on a proposal provided by the Ministry of Justice. The King approved it on November 22, 1957. The law was enacted in January 1958 (Zahir Sharif 1–57–343). The other books on the effects of birth (Book Three, 1–57–379, December 18, 1957), legal capacity and representation (Book Four, no. 1–58–019, January 25, 1958), wills (Book Five, February 20, 1958), and inheritance (Book Six, no. 1–58–112, April 3, 1958) were implemented in the months that followed.

Henceforth, Moroccan codification explicitly served to make the process of judicial decision-making more uniform. While codification would curtail judges' flexibility in using their discretion and dispensing justice case-by-case, studies of Morocco have nevertheless presented a mixed picture. Rosen, who conducted ethnographic fieldwork in a Moroccan courthouse in Sefrou[15] between 1970 and 1980 concludes that judges (just as their historical

14 For a list of their names, see Al-Akhrisi (2005, 21).

15 Sefrou is a medium-sized town near Fes, in the foothills of the Middle Atlas Mountains.

counterparts) favour regularized process over the mechanical application of formal laws (Rosen 2008, 135) and their actions are geared towards mediation in legal disputes. He notes that "... the aim of the qadi is to put people back in the position of being able to negotiate their own permissible relationships without predetermining just what the outcome of these negotiations ought to be" (Rosen 1989, 134).

At the same time, in a study of family law disputes brought before two courthouses in Morocco in 1989, one in Rabat, the other in Sale,[16] Mir-Hosseini findings are different, at least with regard to claims for legal paternity of children. The codification of the teachings of the Maliki school of Islamic jurisprudence in 1957 had significant impact on legal claims to establish paternity since marriages, which were socially valid but not registered with the relevant state authorities (known as *fatiha*), were not recognized by the modern legal system as valid marriages. When the father denied the union in such cases, there was no way the mother could claim paternity for her children and demand registration of the children in the family civil status booklet of their alleged father (Jordens-Cotran 2007; Mir-Hosseini 2000, 145).[17]

In a study conducted after the implementation of the *mudawwana al-usra* in 2004, El Hajjami examines the impact of age, gender, formation and milieu on the attitude of 18 judges in three courts in and around Marrakech towards the MU2004, including the way the judges implemented the law in practice (El Hajjami 2009, 31). Her sample consisted of three female judges (one of whom worked in the Marrakesh Court of Appeal) and 15 male judges. She notes that compared to their male counterparts, the female judges were more sensitive to the interests of female litigants in alimony cases, while they held equally disapproving views on how the MU2004 abolished the need for a marriage guardian and raised the minimum age of marriage to 18 (El Hajjami 2009, 33–34). In general, El Hajjami found it difficult to detect a gender difference in these judges' attitudes to the reformed family law and this included their attitudes to Articles 16 and 156 MU2004, which deal with recognition of marriage (*zawaj*) and engagement (*khutuba*) respectively. Some judges (their number is not specified) said that social reality, with which they are daily confronted in the courthouses, such as illiteracy, poverty and the weight of tradition, led them to rule contrary to their religious and personal beliefs. Although the majority of

16 Sale is located on the Atlantic Ocean, on the right bank of the river Bou Regreg. Rabat is located opposite Sale, on the other side of the river.

17 The family civil status booklet (*kunnash al-hala al-madaniya*) records vital events of different family members, such as birth, death, marriage and divorce (law on civil status, Article 1) and serves as an identity card for children. It enables children to receive medical care, register at school, and is proof of their legal filiation (Mir-Hosseini 2000, 216).

the 18 judges said Articles 16 and 156 were legitimizing extramarital sexual relationships and pregnancies, almost all judges acknowledged their importance in protecting the interests of (unborn) children and young engaged women (El Hajjami 2009, 39). Similarly, in an ethnographic study on the impact of the women's right discourse on different categories of women in a rural area in southern Morocco, Žvan Elliott shows how a senior male judge heading a family law court clearly felt that social reality often left him no choice but to authorize a request for underage marriage, especially when the minor girl was pregnant (Žvan Elliott 2015, 107–112).

2 The Social Reality of Paternity Disputes

Meknes-Tafilalt: Ifrane.[18] January 2015. Going with my research assistant, Taziri, through the judges' questionnaire in a teahouse in a large provincial town in the Middle Atlas Mountains, Northern Morocco. Altitude of 1250 metres. Cold but sunny. We sit outside. Questions about divorce. About alimony. About polygamy. Every question reminds her of an event experienced by a sibling. A neighbour. Herself. She speaks freely. Almost angrily. Coming close to the end of the questionnaire, the question about paternity and illegitimate birth appears. Her tone changes. Images of suffering. The story of the child in the bag follows:

> Not even a week ago, they found her. A three-month-old baby girl in a bag just outside of town. They were a group of children on their way to school. The baby girl was well-dressed. She even had a pacifier in her mouth and looked healthy. The children had reported to the police who had come and taken her. She is probably in the hospital now where the staff will take care of her until someone comes to take her into *tabanni* (adoption). If nobody comes she will be brought to an orphanage.

Taziri pauses. Flashbacks from longer ago:

> My neighbours could not have children and so they adopted a boy. That must have been 20 or 30 years ago. Everybody in our neighborhood knew that the boy was not their biological son but nobody told him openly,

18 The first part of the geographical reference refers to the name of the legal district. As already stated, there are 16 legal districts in Morocco. The second part of the reference refers to the name of the legal subdistrict. Each subdistrict is further divided into a certain number of courthouses.

> until two years ago, when somebody revealed the secret in a fit of anger. The boy, he is a young man now, threatened to kill his mother. "Tell me the truth. I want to know who my real father and mother are," he yelled frantically. The mother told him she truly did not know. She only knew that she had taken him from the hospital and that they had raised him as their own son. He even carried the name of his adoptive father. In the end the son accepted his new reality. His adoptive parents had taken good care of him. They were growing old. Now it was time to take care of them.

Secret Marriage: Undesired and Illegitimate Children

It is a well-known fact that Moroccan hospitals are home to a significant number of infants whose mothers either abandon them right after having given birth in the hospital or who, as in the case described above, leave their babies alone in the street to the mercy of strangers, whom they hope will subsequently surrender the baby to the hospital. Drawing from years of professional experience, Nouzha Guessous, a medical doctor and professor at Hassan II University in Casablanca, and one of the three female members of the royal commission for the elaboration of the *mudawwana al-usra*, narrates how the hospital in Casablanca where she worked had a special facility for unmarried women with children.[19] Usually, these children are born of a relationship which is, first, not officially registered, and, second, socially not approved of by parents, family, and the community in which the father and mother of the child live. These relationships, which I hereafter refer to by the term 'secret marriage,' include: secret love affairs; situations in which, in return for sexual favours, male employers make false marriage promises to young live-in domestic servants; and rape. In a study of illegitimate children in 1990's Moroccan society, anthropologist Jamila Bargach found that in addition to special facilities for abandoned children, hospitals also house large waiting rooms where couples who (usually) cannot have children of their own, anxiously wait for their dream to be realised: becoming a parent. Sometimes these 'adoptions' are officially regulated. Sometimes they are not (Bargach 2002. See also Borm 1994, 206). Taziri knows it all too well:

> A rich woman I know could not have children and so she asked me to help her adopting a child. [Taziri uses the word *tabanni*. Again.] I called the hospital and the nurse told me that they were looking for a solution for a pregnant woman who wanted to abandon her child after birth. The baby she was carrying was conceived outside of wedlock and she could

19 Informal communication, Ifrane, December 1, 2014.

> not see how to take care of the child once it was born. She agreed to leave her baby to the care of the rich woman immediately after birth. In return, the rich woman promised to take her in until the time of delivery. The realization that she would never see her child grow up made the poor expecting mother cry uncontrollably. For days, she hardly ate, just cried. In the end, she changed her mind, saying that she could not give up her child. The rich lady also changed her mind. She would keep her promise and look after the expecting woman until the day of delivery, but she no longer wanted to have the child. This woman, she said, will bring problems. In the end, the choice was made for them as the child died within a day after birth.[20]

Sexual relationships outside of marriage are forbidden under Morocco's penal law and can lead to up to one to 12 months' imprisonment in the case of fornication (Article 490), and one to two years' imprisonment in the case of adultery (Article 491). And yet, the occurence of childbirth from 'secret marriages' is a common one, not only in big cities such as Casablanca but also in the provincial town where Taziri and the members of her lower-middle class neighbourhood, all had, in one way or another, experience in dealing with the phenomenon of illegitimate childbirth, for example, by being an unmarried mother, by being a 'broker' between the pregnant woman and the childless couple, or by 'adopting' an abandoned or bastard child. Adoption in the sense of transferring all rights and responsibilities, including filiation and inheritance, from a child's biological parent(s) to the adoptive parent(s) is strictly forbidden in Islam and void under the MU2004 (Article 149). The anecdotes narrated above illustrate, however, that for the sake of the abandoned or bastard child, people are willing to turn a blind eye to and condone fictive kinship ties.

While the women in the cases described above decided to keep their babies until after delivery, there are also women who deal differently with situations of undesired pregnancy, by aborting the child, or by keeping and raising it. It is probably fair to say that the more extensive the financial possibilities, the higher the likelihood that the expecting unwed mother will opt for abortion. Although legally prohibited, abortion is a rather easy and safe option for women who are financially well off. Discussing this subject during a lecture in a Moroccan university course on gender and development, I was surprised to hear that some female students knew exactly where to have an abortion should the need arise, details which they had learned from friends who had

20 Meknes-Tafilalt: Ifrane, March 3, 2015.

already undergone the process.[21] Other women, who do not have this option or who are against abortion, keep their babies and assume responsibility for the child's upbringing. Depending on the area, in such cases, the unwed mothers are sometimes assured of support by members of their (extended) families, despite the fact that their pregnancies are the result of a short-term secret relationship engaged in by the mother without the knowledge of her parents and/or community. For example, in Ain Leuh, a small town not far from Taziri's hometown, ethnographic research conducted in 1988 and 1990 demonstrated that Berber women who are sex workers do not fear repercussions from family members. These women and their children were even maintained and taken in if the financial situation of the family permitted this (Bakker and Borm 1994, 164). In one case, I witnessed a fight in court between a woman who was beating a man who appeared to be the biological father of her child. Many years ago, in a state of drunkenness, the man had visited the woman, a sex worker working in Ain Leuh, and fathered the child. At the time, the woman had felt so secure in the support of her brother that she had demanded the biological father to provide financially for the child, something which the biological father agreed to after the (non-judicial) DNA test, which he had requested, had proved the biological bond between him and the girl. When I told the coordinator of a local community development association about the incident in court he was not surprised, saying that in this part of the Middle Atlas mountains it is not unusual for parents with sufficient financial means to take back a daughter who has lost her virginity or who got pregnant out of wedlock.

Informal Marriage: Desired but Illegitimate Children

In addition to the category of unwanted children, there is probably a much larger category of children who are illegitimate in the eyes of the state but not in the eyes of the community into which they were born. In such cases, the child is desired, but the marital relationship of its parents is simply not registered with the relevant state authorities. In what follows I call these relationships 'informal marriages.' In contrast to the cases presented above, such children are not the product of a secret relationship, but of a communal one, whereby the sexual relationship between the father and the mother is embedded in a socially recognized marriage (often even arranged by that same community), with the birth of children seen as the natural outcome of this relationship. There are several reasons why parents do not register their marriage.[22] According to most judges interviewed, informal marriages con-

21 Al-Akhawayn University, Ifrane, November 24, 2014.

22 For the case of Egypt and the United Arab Emirates, see Hasso (2011). For Egypt, see Sonneveld (2012).

ducted through a communal ceremony called *fatiha* (in which the first verse of the Qur'an, the *fatiha*, is recited) are part and parcel of local custom; and when the distance between the village and the office of the *'udul* (the government employees responsible for registering marriage) and the courthouse is significant or blocked by snow for part of the year, people simply postpone registration of their marriages. This reality has prompted the Ministery of Justice to urge judges to visit the villages that fall within the jurisdiction of the courthouse. These so-called *jalasat tanaquliyya* (mobile sessions) are primarily aimed at registering a large number of informal marriages in one day and prevent paternity disputes from arising.[23] Talking about her experiences, a woman judge in her late twenties from a courthouse in the Middle Atlas learnt about the following local custom, of which she, originally from a big city two hours away, was initially unaware, but which, she felt, forced her to let the best interest of the child take priority over the MU2004's new provision on polygamy:

> Meknes-Tafilalt: Ifrane. January 27, 2015. When children born in a village in the area of the courthouse reach the age of four, their parents will want to send them to school. Since there are no schools in the village, the father sends the children to a school in this town. As the distance to the village is too far, the father rents an apparment in town for his wife and their children. The father goes back to the village where his work is and marries another woman who will look after him, that is to say, who will cook for him, do his laundry and all other household chores. This is preferable to taking a housekeeper, who might steal or not be so committed. He will ask the court permission to marry the second wife. Although the law of 2004 has made it much more difficult for men to be granted judicial authorization for a polygamous marriage, we will most likely grant him this permission. We do this for the sake of the children's education and because it is an *'urf* [local custom] to which the first wife has no objections.

I ask her whether the father will have children with the second wife:

> Yes, and when they reach the age of four, they will also move into the household of the first wife and her children in town. The second wife will remain in the village to look after the husband. The two wives might also alternate. We, as judges, have enough grounds to refuse such a request. After all, the first wife is not barren, nor is she ill. However, this is a local

23 See, for example, the following newspaper article: http://www.maghress.com/map/29550. Accessed April 11, 2016.

> custom and something people have done for decades. The new regulation on polygamy will not change this practice. As long as the father recognizes the children from both marriages, there is no problem: the children are eligible for medical care and can be registered for school. But when the father, for whatever reason, denies paternity, the interest of the children is in serious jeopardy. In such cases, the burden of proving the marriage falls on the wife in the same way an unwed pregnant mother must provide evidence of a marital relationship, a prerequisite for securing *nasab* [lineage]. We do not want *zina'* [fornication or adultery] to arise and therefore we are inclined to accept such requests for polygamy.

What transpires from the account of this judge is the juxtaposition she makes of *nasab* and *zina'*, that is to say, of lineage and adultery/fornication. Like all other judges interviewed, this judge attaches great importance to *nasab* in securing children's legal and social rights in Moroccan society. Under *shari'a* *nasab* refers to lineage and signifies the reputed relationship with regard to father and mother. *Nasab* is the most fundamental organizational principle of Muslim society and the preservation of proper *nasab* is one of the main purposes of the *shari'a* (e.g. Bargach 2002; Geertz 1979; Sachedina 2009, 103). While lineage to the mother is established through birth (see also MU2004, Article 146), lineage to the father can only be established through marriage. It is the most fundamental relationship as the child follows the father in *nasab* (Welchman 2007, 143). It is the only way a child will be entitled to his or her father's surname, maintenance and inheritance. Children whose paternal *nasab* is unknown, that is to say, who are born out of *zina'*, oftentimes suffer great social stigma. Under *shari'a*, the prevailing custom (*'urf*) is a major source of legitimacy that relates a child to his or her biological parents, most particularly the father (Sachedina 2009, 103). The following section demonstrates how *nasab* is codified in the *mudawwana al-usra*. After all, as we have seen in section one, the interviewed judges believed the MU2004 to be the most important source of judicial decision-making.

3 The Legal Reality of Paternity Cases

Paternity disputes in Morocco constitute a small percentage of all legal disputes related to family law matters, both before (Mir-Hosseini 2000, 141) and after the 2004 law reform (Ministry of Justice).[24] Nevertheless, in all the stud-

24 This is confirmed by statistics I drew from court archives in seven courts dispersed over five legal districts. I took May 2014 as the point of analysis. Paternity disputes were

ies mentioned above, both judges and academics present the claims for legal paternity for children as significant since they most poignantly point out the difference between codified law and social reality (e.g. Mir-Hosseini 2000, 141). Without any prompting, both the family law judges in El Hajjami's study and the family judge in Žvan Elliott's study pointed out how Articles 16 and 156 of the MU2004 especially bring to light a discrepancy between their personal beliefs and the daily social reality with which they are confronted when litigants turn to the court to find a solution for their undocumented marriages and the resulting pregnancies and offspring.

During the period of my fieldwork, there was ongoing public and parliamentary debate about Article 16 of the *mudawwana al-usra*. This article reads:

> A marriage contract is the accepted legal proof of marriage.
>
> If for reasons of force majeure the marriage contract was not officially registered in due time, the court may take into consideration all legal evidence and expertise;
>
> During its enquiry the court shall take into consideration the existence of children or a pregnancy from the conjugal relationship, and whether the petition was brought during the couple's lifetimes;
>
> Petitions for recognition of a marriage are admissible within an interim period not to exceed five years from the date this law goes into effect.[25]

Until February 2014, this article gave couples who had married without official registration of the relationship the opportunity to register the marriage retroactively during two subsequent periods of five years following the promulgation of the law in 2004. Although people could no longer register undocumented marriages retroactively at the time of my fieldwork (January 2015–August 2015), the continued occurrence of informal marriages forced the parliament to consider a new period of retroactive marriage registration.

Now that the road to *thubut al-zawaj* (proof of marriage) is closed, at least temporarily, and, hence, also the possibility to establish paternity indirectly, couples or single (unwed) mothers have no option but to prove *nasab* directly. Tracing *nasab* from the mother's side is usually easy, as filiation to the birth mother produces the same effects regardless of whether the children are

---

classified under two headings: proof of paternity and proof of marriage. For example, in one big courthouse in the Fes-Boulemane legal district, out of 366 family law cases, 16 requests for proof of marriage (*thubut al-zawaj*) were made and none for proof of paternity (*thubut al-nasab*).

25 Unofficial translation of the *mudawwana al-usra*. See: http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/

the result of a legitimate or illegitimate relationship (MU2004, Article 146). However, illegitimate filiation to the father does not produce any of the effects of legitimate filiation (MU2004, Article 148) because paternity has always been, and still is, connnected with licit sexual relationships through marriage on a social, legal, and religious level.[26] Consequently, both before and after the 2004 legal reform, children from couples in unregistered marriages were illegitimate in the eyes of the state. However, whereas before 2004, mothers in informal marriages stood no chance of proving paternity when the alleged father denied it,[27] after 2004, mothers in unregistered marriages can prove paternity, even when the putative father denies it, through a procedure called *shubha*.

Proving Paternity in a New Way: Shubha and Engagement

According to the MU2004, paternity can be established in three ways: *al-walad li l-firash* (conjugal bed); *iqrar* (acknowledgement by the father); and *shubha* (sexual relationships by error) (Article 152). Both the doctrine of *al-walad li l-firash* and *iqrar* were already included in the 1993 family law, and while this equally applies to the principle of *shubha* (Article 87 of the 1993 family law), the way the MU2004 defines *shubha* is innovative.

The doctrine of the *al-walad li l-firash* refers to a situation in which a child is conceived in the marital bed. This concept derives from Islamic jurisprudence (*fiqh*) and is the most important way through which a child can be attached to its father's lineage (*nasab*) and all its concomitant rights, such as the right to the father's family name, maintenance (*nafaqa*), and inheritance. The MU2004 only recognizes marriage by way of an official marriage contract. When the marital bond is proven by the marriage contract and the child is born no less than six months after the conclusion of marriage, or a year after divorce, the paternity of the child is proven even when the father denies it (Article 153).

A second way to attach a child to its father's lineage (*nasab*) is through acknowledgement by the father through a procedure called *iqrar* (Article 160). As the MU2004 does not demand proof of *nasab* through witness testimonies or DNA, this is a relatively easy way for a man to acknowledge paternity of a child that, while biologically his, was conceived outside the marital bed, as happened in the abovementioned case of the man who fathered a child with a

26 Or ownership of a slave woman in older times (Shabana 2013, 158).

27 Under the old family law of 1993, it was formally forbidden to investigate paternity of a child conceived during the engagement period (El Hajjami 2009, 147–148). But if both parties agreed, they could register the marriage retroactively (Jordens-Cotran 2007; Mir-Hosseini 2000, 145), after which filiation to the father would be established automatically.

sex worker in Ain Leuh. *Iqrar* can even be used to attach a child to the lineage of a man who is not its biological father, as happened in the cases presented above, where childless couples adopted babies abandoned in hospitals (see also Buskens 1999).

While the doctrine of *al-walad li l-firash* and *iqrar* are not new, the *mudawwana al-usra* introduced a new understanding of *shubha*: engagment. The equation of *shubha* with engagement makes it easier for women to successfully establish paternity for their children. In contrast to the situation prior to 2004, when mothers in 'secret' or 'informal' marriages stood hardly a chance of proving paternity when the alleged father denied it, nowadays mothers in 'informal' marriages can request legal proof of paternity through Article 156 of the MU2004. This article clearly defines pregnancy during engagement as a form of *shubha*, a sexual relationship by error:

> If an engagement takes place by an offer and acceptance but for reasons of force majeure the marriage contract was not officially concluded, and during the engagement period the engaged woman shows signs of pregnancy, the child is affiliated to the engaged man on the grounds of sexual relations by error when the following conditions are met:
> a. If the two engaged person's families are aware of the engagement, and if the woman's legal tutor, if required, has approved the engagement;
> b. If it appears that the engaged woman became pregnant during the engagement period;
> c. If the two engaged persons mutually acknowledge that they are responsible for the pregnancy.
>
> These conditions are established by a judicial decision not open to appeal.
>
> If the engaged man denies responsibility for the pregnancy, all legal means may be used to prove paternity.[28]

In contrast to the situation predating 2004, Article 156 offers women the opportunity to establish paternity of their children without an official marriage contract, even when the alleged father denies it. The judges in El Hajjami's study felt that Articles 16 and 156 open the way to *zina'* and this, they claimed, violated their personal and religious beliefs. At the same time, they felt that the best interest of the child required them to acknowledge paternity of children born out of unregistered relationships. It is not clear whether these judges were referring to 'informal marriages' only or whether they would even grant

28 Translation provided by: http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/

paternity to children born from 'secret marriages.' Article 156 of the MU2004, which requires that 'the two engaged person's families are aware of the engagement,' seems to imply that paternity can be established in cases of 'informal' marriage. In the next section, I explore, first, whether the 61 interviewed judges would grant paternity in the following hypothetical case of a paternity claim petitioned by a child born of a 'secret marriage,' and, second, whether there is a difference between male and female judges in the way they dispense justice in this case. The case is stated as follows:

> A ten-year-old boy is born of a 'secret marriage' [*'alaqa ghayr shara'iya*]. Although his mother knows who the father of the child is, the alleged father denies paternity. This prompts the mother to bring a court case and demand her son's legal rights, such as lineage (*nasab*), maintenance (*nafaqa*) . . .

4 The Judge Speaking: Male Dukes and Female Portias?

Meknes-Tafilalt: Ifrane. February 12, 2015. The corridor leading to Judge A's office is long and narrow. A few benches are placed against the wall. They make the corridor look even narrower. The court is situated in the mountains. Sun and snow outside. The walls of the courthouse do not absorb the sun, just the cold. Judge A is the judge responsible for the authorization of marriages, including underage ones. For the past few days, marriages of minors have been a recurrent topic of heated debate on Moroccan television. Opponents say it harms the health of young brides and also deprives them of proper education. Proponents argue that it prevents the occurrence of *zina'*, a graver danger. Taziri and I wait for our appointment with Judge A. Four other ladies want to consult with him, too, but none of us focus on the door of his office; instead we are drawn to the sight of a young girl who occupies one of the few seats in the corridor. Is she 15? Maybe 16? She looks uncomfortable. Frightened, even.

She is the first to go inside. Her empty seat breaks the silence. Three standing women urge me to sit down in her seat. Next to me sits a voluptous lady, probably in her sixties. She fills me in: the girl (*al-bint*) is here to ask the judge permission to marry. Her parents were here, too. It seems her father was a little against it, but her mother was very eager to see her married. I think the judge will decline her request. Looking me straight in the eyes, she says, I hope so:

> I married when I was 13, through *fatiha*. The marriage was not registered. When my first child, a son, was born, I asked my husband to register the baby. He refused and ran off instead. What could I do but register

> the child in my name? I took all responsibility for his upbringing, emotionally and financially. When my son grew older, he put up a terrible fight with his father and demanded the father to recognize him as his son. After all these years, the boy's father's finally recognized him. Now my little boy is married to a Moroccan woman. They live in Italy and they just had a baby. My son was lucky. But marrying at a young age puts a mother and her children at great risk. Really, women should never marry this way.

A little later, inside the office of Judge A, this 39-year-old male judge tells us the more complete story. The poorly educated girl of 15 or 16 years had intended to marry a man who was not only 30 years her senior, but who was also a highly educated journalist. This great difference in their ages was what led Judge A to disapprove of the marriage. He had spoken first with the father, mother, and daughter, and asked both parents individually whether the girl genuinely wanted to marry the man. Both had said yes. He then asked them to leave the room to tell the girl that he could not approve of the marriage. The age gap was too great and there was also a great difference in their education. People should aspire to more suitability (*kafa'a*) in age, background, etc, he said. He was certain that the journalist would use the girl as a servant. I asked his opinion on Article 20, which deals with the minimum age of marriage, currently set at 18, and a source of heated public and parliamentary debate. He sighed:

> Personally, I would like the minimum age to be raised from 18 to 20. Children should not raise children. Most of all, however, I hope parliament will put a stop to allowing exemptions from age requirements for marriage. These exceptions make life hard for judges. We can never do it right. When we reject a request for marriage of a minor, and problems arise [*zina'*], they will blame it on us. When we authorize such a request, and problems arise, they will equally put the blame on us. In 2012, Amina Filali's request for marriage was granted by a judge. It did not take her long to commit suicide.[29]

A few days later, when I am in a courthouse one hour down the mountain, in the Fes-Boulemane legal district, I ask a female judge what she thinks of Judge A's statement regarding how the judge can 'never do it right.' It is my first encounter with this judge. She, Judge W, has a flamboyant personality, to say

29 Amina Filali was a 16-year-old girl from a town in north Morocco who is alleged to have committed suicide after a judge authorized the marriage to the man who had raped her. At the time of her suicide, in 2012, her case was the focus of extensive media attention, both in and outside Morocco.

the least. She enters her office flipping her long black hair over her shoulders. Her big black sunglasses give her a dominant and self-assured appearance, as does her skirt, which does not cover her knees, and her knee-high boots with high heels. She shares her office with three other male colleagues and appears to feel anything but intimidated. Upon hearing my question, she nods in agreement:

> Fes-Boulemane: Fes. April 4, 2015. A few years ago, a 13-year-old girl had requested the judge responsible for the authorization of underage marriages for permission to marry. He did not hesitate to decline her request. A year later she was back. This time visibly pregnant. She had filed for proof of marriage and I was responsible for her case. She told me that if I declined her request, she would give birth to a bastard. I felt I had no choice. I could not put the future of the girl and the baby she was expecting in jeopardy. I felt extremely bad about it, but even more so when various organisations for the rights of women and children accused me of having violated the interest of the mother and the child. How do they know what it is like to choose between two evils? I had no choice. Had I declined her request, I would have given the mother and the baby the worst possible start in life.

Although both Judge A and Judge W deeply believe that the marriage of minors should vanish from practice altogether, they worry about the consequences of such a new legal provision, most particularly about the occurence of illicit sexual relationships (*zina'*) and illegitimate birth. This worry translates into the way Judge A responded to the hypothetical case I presented her. In this case, the child was clearly presented as a bastard. Judge A nevertheless responded that the judge should still research whether the child was born of an 'informal' or a 'secret' marriage. The best solution, he believed, was to have the alleged father compensate the child, an innovative way of dealing with the issue of financial responsibility as it relates to illegitimate childbirth (explained in more detail in section four).

The majority of the 61 judges interviewed felt uncomfortable when I asked them what they would do when presented with a case in which a mother claims paternity for a child born of a relationship, which is not only *ghayr qanuniya* (non-legal, i.e. unregistered) but also *ghayr shara'iya* (un-Islamic). The MU2004 clearly states that illegitimate filiation to the father does not confer any of the effects of legitimate filiation (Article 148). Most judges recommended the mother to simply claim proof of paternity. As long as she does not disclose any of the particularities pertaining to the relationship of which the child was born, they will not probe, and will simply try to find a way to attach

the child to the lineage of its alleged father in the same way they would for a man who comes to court to acknowledge paternity for a child which is not his biological child or which was born out of official marriage. The judges will accept the father's recognition (*iqrar*) and not verify his claim as long as he does not make it explicit that he is not the biological father (or that the child was conceived out of official marriage).[30] When I asked them why, they said that, first, Article 160 on *iqrar* does not request any additional evidence, and, second, that the interest of the child overrides any other concern. Things are different, though, when a parent leaves no room for doubt by honestly and immediately confessing that the child is born to parents who are not married, not even engaged. In my hypothetical case, this prompts the judges to have recourse to four different approaches. Regardless of whether they use the 'Duke' or 'Portia' approach, we shall see that all judges work towards the best interest of the child.

Portia One: Proving Engagement through DNA

As the snow in the mountains surrounding Ifrane begins to melt and the roads leading out of the mountain are no longer closed, I am able to visit courthouses in areas outside the legal district Meknes-Tafilalt, such as Tanger-Tetouan in Morocco's northwest corner, where I visit a courthouse located on the Atlantic coast. In the context of discussing the hypothetical case, I ask the head of the family court what he thinks of Judge W's predicament caused by the courtcase of the pregnant young girl. Judge Mh is quick to propose a different course of action: I would not have granted the girl *thubut al-zawaj* (proof of marriage) because I do not want to encourage the phenomenon of underage marriage. Instead, I would have suggested *thubut al-nasab* (proof of *nasab*) on the basis of *shubha*. My primary aim is to protect the child. I ask Judge Mh what he would do in case the father denies paternity. Without hesitating, he responds that he will encourage the mother to request a DNA test: "*ruh al-qanun tismah*" (the spirit of the law allows this), even in the absense of witnesses. He says:

> Tanger-Tetouan: Tanger. February 17, 2015. There are five goals (*maqasid*) in Islam, of which *nasab* is one. *Fuqaha* have closed the doors of *ijtihad* (independent reasoning) centuries ago, with the result that if somebody comes up with an innovative interpretation, that person will be accused of deviating from Islamic law [*mukhalif 'an al-shari'a al-islamiya*]. But

30 One of the (male) judges in my sample said that a ruling of the Agadir Court of Appeal was groundbreaking in this respect. The ruling was issued on December 4, 2007, No. 07/154 (on file with author).

> science (*'ilm*) is important in Islam, so what conflict (*khilaf*) between science and Islamic law are we talking about?[31]

A male judge heading a small courthouse tucked away deep in the Middle Atlas mountains is even more outspoken:

> Fes-Boulemane: Boulemane. June 25, 2015. These days, witnesses are no longer of much use. What do witnesses actually witness? That the couple consumes a cup of tea in a teahouse? That they sit together in a car? Does this prove anything? It is so much better to make use of modern science, notably DNA. The results of DNA testing give almost complete certainty with regard to paternity.

According to Welchman, organizations for the rights of women in Morocco had lobbied for the inclusion in the MU2004 of possibilities for mothers in unregistered marriages to prove paternity through DNA. The introduction of the requirement of a 'formal' engagement (Article 156, a), however, obstructs access to this remedy, they argue.[32]

Nevertheless, both Judge Mh and the judge in the Fes-Boulemane district do not hesitate to grant a mother in an unregistered marriage the authorization to request a DNA test, even if she has no witnesses to prove that she was engaged to the alleged father. Moving to the southern Atlantic Coast, two judges (one woman and one man) in a family court in the legal district Souss-Dra'a (Agadir-Idawtanan) say they would act in exactly the same way. Lamenting the large number of tourists visiting the city where the courthouse is located, they claim that they have to deal with numerous occasions when mothers request paternity of children born out of wedlock. Similar to Judge Mh and the judge in the Fes-Boulemane district, they will first try to establish engagement but if this attempt fails, they will urge the mother to request a DNA test, even when the

31 See also Shabana (2013, 191–192).

32 These organizations also consider the cost of the test, born by the woman, prohibitive, at some $ 350 US (Welchman 2007, 145). When I ask judge Mh whether it is expensive for women (and men) to request a DNA test, he is quick to respond that the test costs around 2000 MAD, but that it is not so much the costs of the test but the scarcity of officially recognized clinics that forms a far greater problem. There are two clinics in Morocco, one in Rabat, the other in Casablanca, which can perform the test. This, he claims, means that most litigants have to travel great distances: "in one of our court cases, it took a woman between three and four years to settle the case and this is because she had to travel a lot and because these two clinics are overburdened."

alleged father denies the engagment and/or paternity.[33] These judges' view on the use of DNA in paternity disputes is supported by a number of other judges. Of the 61 judges to whom I presented the hypothetical case, a group of six male and two female judges say they will authorize the use of DNA, even when the first requirement of Article 156 is not fulfilled, namely, that the two engaged person's families are aware of the engagement, and the woman's legal tutor, if required, has approved the engagement. Overall, the fact that 13 percent of the interviewed judges encourage the use of DNA testing in paternity disputes as a source of evidence independent of another source of evidence (i.e. witnesses) indicates two things. First, these judges define 'engagement' in a manner that not only allows children of 'informal' but also those of 'secret' marriages to be attached to the lineage of their biological fathers, even when the latter opposes it. Compared to the situation under the previous family law of 1993, where not even mothers in 'informal' marriages could prove paternity without the support of the father; this is a remarkable development.

Secondly, the women's rights organizations referred to by Welchman are not completely correct in claiming that the requirement of engagement obstructs access to the use of DNA in paternity dispute cases. And yet, it is equally untrue to claim that "Now . . .[Moroccan] courts will use scientific testing to resolve the [paternity] dispute," as claimed by Hursh in a study on Moroccan women's rights in Islamic law (Hursh 2012, 266–267). After all, the other 53 judges in the sample (87 percent) displayed greater reticence in allowing DNA. This, however, does not mean that they let the interest of the alleged father override that of the child and its mother.

Duke One: Al-Walad li l-Firash

Table 1 is a schematic represenation of the way the 61 judges in the sample responded to the hypothetical case on paternity in a context of legally and socially prohibited sexual relationships. As stated, judges approach the issue of illegitimate childbirth in four different manners and the table clearly shows that the largest group of judges (group one) adhere to the *al-walad li l-firash* doctrine. These judges said that when the child is not born within the confines of the marital bond, Article 148 of the MU2004 does not permit the judge to attach the child to the lineage of the putative father. By denying the ten-year-old boy in the hypothetical case attachment to the lineage of his father, these judges expose him to significant stigmatization in a society where illegitimate childbirth is anything but accepted. Women judges were over-represented in this group, relatively and almost absolutely as well. Interestingly, these judges

33 Personal interview, May 27, 2015.

TABLE 1 *The Different Approaches of Judges According to Sex*

		% women judges	% male judges	% total
1	**Al-walad li l-firash**	52 (13)[a]	36 (13)	43 (26)
2	**Al-walad li l-firash & compensation**	0 (0)	19 (7)	11.5 (7)
3	**Shubha: through witnesses and DNA**	28 (7)	17 (6)	21 (13)
4	**DNA**	8 (2)	17 (6)	13 (8)
5	**No fill**	12 (3)	11 (4)	11.5 (7)

a The number between brackets signifies the absolute number of judges.

were quick nevertheless to justify their approach in terms of the best interest of the child. In this particular case, they acknowledged, the doctrine of the conjugal bed did not protect the boy but, seen in a wider perspective, the MU2004 as well as jurisprudence from the Court of Cassation use the doctrine of the conjugal bed to protect children and their mothers. Indeed, analyzing various rulings on paternity disputes issued by the Court of Cassation between 2006 and 2008 make it clear that in the majority of the cases the claimants are husbands who try to negate paternity and frequently request a DNA test. The magistrates of the Court repeatedly declined these husbands' claims, including their requests for DNA, ruling that as long as the child is born within the bonds of marriage (i.e. no sooner than six months after the conclusion of marriage and no longer than one year after divorce), the husband has no right to negate paternity of children that were born during the period in which he was married to their mother, not even when there were strong reasons to believe that the alleged father was not the biological father of the children in question. After all, so they argued, *nasab* is [not only a private matter, but also] a matter of public policy.[34] According to the interviewed judges, the marital paternity presumption is a better way to safeguard the interest of children than DNA. After all, DNA can be used to establish but also to negate paternity. Allowing large-scale use of DNA testing in paternity disputes is like opening a can of worms, a female judge in the Fes-Boulemane-Sefrou district stated. Husbands will request DNA testing on a large scale and many families will fall apart. This judge, like the other judges of group one, urged unwed mothers not to reveal in court the circumstances under which their children were born. If they do not

34 Court of Cassation. Ruling No. 363/2/1/2006, December 20, 2006.

say it, we will not ask for it and it will give us an opportunity to see whether we can prove engagement through witnesses, she concluded.

Duke Two: Proving Engagement Through Witnesses

In opposition to their colleagues in group one, the second largest group of judges (group three) would pretend not to have heard the honest confession of the mother as this allows them to explore the existence of an 'engagement.' They define engagement in an open manner, as a formal or informal intention to marry. By requesting minimal evidence, that is to say, a minimum number of witnesses, they try to avoid the consequences that accompany illegitimate childbirth. In terms of evidence, they prefer witnesses over the use of DNA testing because a DNA test can be used to establish paternity as well as negate it. For this group of seven female and six male judges, including Judge W, DNA is a last resort, only to be used when the 'engagement' has been proven by witnesses, and moving down the ladder of requirements mentioned in Article 156, when the alleged father denies paternity. While these judges view the presence of witnesses as essential, they differ in the number of witnesses they believe are necessary to prove the 'engagement.' According to one male judge, the required number of witnesses used to be 12 (*lafif*) under the old family law of 1993 (see also Jordens-Cotran 2007; Mir-Hosseini 2000, 171). The MU2004 does not stipulate a definite number of witnesses, merely stating that the families of the engaged couple must be aware of the relationship. While most judges accept a lower limit of two witnesses, Judge W said that when a mother comes to court to prove the paternity of her child, and she can only find one witness to confirm the 'engagement' then 'we will turn a blind eye' [and attach the child to the *nasab* of its alleged father].

Although these judges use considerable discretion in establishing the number of required witnesses, they are 'bouches de la loi' in that they follow the different steps of Article 156 carefully. This group of judges, which prefers the relative uncertainty of witnesses over the certainty of DNA testing in establishing paternity, includes more female than male judges, both relatively and absolutely.

Portia Two: Al-Walad li l-Firash and DNA Testing Combined

There are two groups of judges in which women are conspicious by their absence. The third largest group (group four) consists almost solely of male judges (6 male and 2 female). As we have seen above, they are the judges who advocate the use of DNA testing, even when the child is born outside the conjugal bed (less than six months after the conclusion of marriage or more than a year after divorce). In contrast to their colleagues in group three, they do not insist on witnesses and feel that they are morally permitted to deviate from

the law (i.e. Article 156 MU2004). Hence, should the interest of the child and its mother so require, they do not hesitate to request a DNA test.

The smallest group of judges (group two) consists of seven male judges, including Judge A, who adhere to the doctrine of the conjugal bed but in such a way that the financial interest of the child is always secured. They use a combination of old and modern evidence collecting techniques to protect the child's interest. When Islamic doctrine cannot be used to prevent illegitimacy, they use DNA testing as a basis on which they can oblige fathers to maintain their biological children. Moving between the dictates of Islamic law as embodied in the *al-walad li l-firash* doctrine and the best interest of the child, they argue that a child should not suffer from mistakes its parents had made. Both the father and the mother should carry responsibility for the upbringing of the illegitimate child. A positive DNA test does not attach the illegitimate child to the father's lineage, but forces the latter to shoulder the financial responsibility for the child's upbringing. According to a former family law judge, one judge who had established the biological bond between a father and a child through a DNA test, subsequently had resorted to the law on obligations and contract (*qanun al-iltizamat wa l-'uqud*) to force the father to extend financial compensation (*ta'wid*) to the mother of the minor child. This male judge's ruling had caused heated debates, within the legal profession as well as in the public media, with the result that awarding financial compensation to the mother is still anything but common legal practice in paternity dispute cases.[35] The fact that seven judges in my sample still recommended this course of action in case of illegitimate childbirth indicates their strong wish to interpret the MU2004 in a manner that protects the best interest of the child as well as of the mother who is shouldering the main responsibility for the child's upbringing.

5 Conclusion

The publication of *In a Different Voice* by Carol Gilligan in the early 1980s inspired feminist legal scholars to ask whether women's different voice in moral development would be a characteristic that also pertains to the performance of women legal professionals. Inspired by the way Gilligan had included Shakepeare's male figure, the Duke, and the female figure, Portia, in her analysis, feminist scholars argued that where male judges (Dukes) would follow an 'ethic of justice' (i.e. applying pre-existing general rules to the dispute in question in accordance with specified procedures), female judges (Portias)

35 Personal interview with Judge F. Taza, May 14, 2015.

would follow an 'ethic of care' and bring into the adversial system of legal decision-making the language of care, mercy, communication, and preservation of relationships. In this chapter I asked whether there is indeed a difference in the way male and female judges dispense justice by focusing on the category of family law in Morocco, particularly paternity dispute cases under the new law of 2004: the *mudawwana al-usra*.

Based on a sample of 25 female and 36 male judges, I found that judges responded to a hypothetical case regarding proof of paternity in a situation of illegitimate childbirth in four different ways. Two groups of judges employed the 'Duke' approach, in that they followed the law and jurisprudence rather strictly with the result that the child in the case was deprived of rights such as inheritance and financial maintenance by its father. Together, these two groups of judges not only constituted the majority of the judges (64 percent) but also the greater majority of female judges (80 percent).

In contrast, the two other groups of judges employed the 'Portia' approach, in that they interpreted the law in an innovative way, by allowing the use of DNA testing and by awarding mothers financial compensation, thereby securing the financial rights of the child in question. These two groups constituted a minority of 24.5 percent[36] consisting of almost only male and hardly any female judges. On the basis of these observations, one might be tempted to raise the question why male family law judges in my sample follow an 'ethic of care,' or the 'Portia' approach, in relatively greater numbers than women family law judges who, employing an 'ethic of justice,' are more rule-oriented and therefore share features characteristic of the male Duke?

In this research, however, the gender of the judge is not a decisive, but rather a contributory factor to the different ways of achieving justice in paternity cases. After all, not all male judges are Portias while not all female judges are Dukes. It is only through a quantitative analysis that we can start detecting other factors, such as education, age, years of professional experience and political activism, which equally contribute to the way family law judges in Morocco try to achieve justice. Therefore, I argue that it is more interesting to ask why the majority of the Moroccan family law judges in the sample follow an 'ethic of justice' and deprive the child of essential rights such as financial care and attachment to the lineage of its father?

I argue that, in contrast to the perspective of their minority colleagues, the perspective of the majority judges in clear cases of illegitimate childbirth is informed by a broader and longer-run perspective with regard to the legal and social consequences that accompany the use of modern evidence-collecting

36 The remaning judges (11.5 percent) had not provided an answer to the case.

techniques such as DNA testing. While in the hypothetical case DNA testing can be used to *establish* paternity, in many other cases it can be equally used by husbands to *negate* paternity and, hence, disturb family stability in Moroccan society. The majority judges are very careful to not open the floodgates of husbands raising court cases in which they dispute the paternity of children that were born during the period of their marriage to the children's mothers. These judges believe that the best interest of the child should be an overriding factor, but not at the expense of family stability in a more general sense. This explains why, in the end, all judges, irrespective of whether they are men or women, prefer to turn a blind eye. They do not want the mother to disclose in court the circumstances under which her child was conceived. This allows them to investigate her case by remaining within the boundaries of the law and in the process protect both children's interest and family stability. In this, the male and female judges in my sample are clearly a product of the Moroccan society in which they were born and raised, and in which the consequences of illegitimate childbirth are often mitigated by strategies, such as adoption, which, while legally forbidden, are widespread and serve to protect the child and its mother from the grave consequences that illegitimate childbirth can have in Moroccan society.

References

Agmon, Iris. 1996. "Muslim Women in Court Attending to the Sijill of Late Ottoman Jaffa and Haifa: Some Methodological Notes." In *Women, the Family, and Divorce Laws in Islamic History*, edited by Amira El Azhary Sonbol, 126–140. Syracus, New York: Syracuse University Press.

Al-Akhrisi, Su'ad. 2005. *Min Mudawwana al-Ahwal al-Shakhsiyya ila Mudawwana al-Usra: Masar al-Ta'adilat wa Mutalib al-Haraka al-Nisa'iyya*. Rabat: Dar al-Salam.

Bakker, Jogien and Julie-Anne Borm. 1994. "Prostituées in de Gedoogzone van de Lokale Traditie." In *Vrouwen van de Midden Atlas: Vrij of Vroom?*, edited by Bernhard Venema and Jogien Bakker, 145–172. Utrecht: Jan van Arkel.

Bargach, Jamila. 2002. *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*. Lanham, United States: Rowman & Littlefield Publishers.

Borm, Julie-Anne. 1994. "Gescheiden Vrouwen en de Voorzieningen voor de Kinderen." In *Vrouwen van de Midden Atlas: Vrij of Vroom?*, edited by Bernhard Venema and Jogien Bakker, 197–223. Utrecht: Jan van Arkel.

Buskens, Léon. 1999. *Islamitisch Recht en Familiebetrekkingen in Marokko*. Amsterdam: Bulaaq.

Buskens, Léon. 2003. "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging 'Public Sphere'." *Islamic Law and Society*10 (1): 70–131.

Chamallas, Martha. 1999. *Introduction to Feminist Legal Theory*. Gaithersburg: Aspen Law & Business.

Charrad, Mounira M. 2011. "Gender in the Middle East: Islam, State, Agency." *Annual Review of Sociology* 37: 417–437.

Chunn, Dorothy E. and Dany Lacombe. 2000. "Introduction." In *Law as a Gendering Practice*, edited by Dorothy Chunn and Dany Lacombe, 2–18. Oxford: Oxford University Press.

Ennaji, Moha. 2011. "Women's NGOs and Social Change in Morocco." In *Women in the Middle East and North Africa: Agents of Change*, edited by Fatima Sadiqi and Moha Ennaji, 79–88. London: Routledge.

Geertz, Hildred. 1979. "The Meaning of Family Ties." In *Meaning and Order in Moroccan Society: Three Essays in Cultural Analysis*, edited by Clifford Geertz, Hildred Geertz, and Lawrence Rosen, 315–391. Cambridge: Cambridge University Press.

Gilligan, Carol. 1993. *In a Different Voice: Psychological Theory and Women's Development*. Third edition. Cambridge: Hardvard University Press.

El Hajjami, Aïcha. 2009. *Le code de la famille à l'épreuve de la pratique judiciaire*. Marrakesh: El Watanya.

Hasso, Frances S. 2011. *Consuming Desires: Family Crisis and the State in the Middle East*. Stanford: Stanford University Press.

Hunter, Rosemary. 2015. "More Than Just a Different Face? Judicial Diversity and Decision-Making." *Current Legal Problems* 2015: 1–23.

Hursh, John. 2012. "Advancing Women's Rights Through Islamic Law: The Example of Morocco." *Berkeley Journal of Gender, Law & Justice* 27 (2): 252–306.

Jordens-Cotran, Leila. 2007. *Nieuw Marokkaans Familierecht en Nederlands IPR*. The Hague, the Netherlands: Sdu Uitgevers.

Kronman, A.T. 1983. *Max Weber*. Stanford: Stanford University Press.

Liebesny, Herbert J. 1975. *The Law of the Near and Middle East: Readings, Cases, and Materials*. New York: State University of New York Press.

Lindbekk, Monika. 2013. "Enforcement of Personal Status Law by Egyptian Courts." In *Adjudicating Family Law in Muslim Courts*, edited by Elisa Giunchi, 87–105. New York: Routledge.

Menkel-Meadow, Carrie. 1985. "Portia in a Different Voice: Speculations on a Women's Lawyering Process." *Berkeley Journal of Gender, Law & Justice* 1 (1): 39–63.

Menkel-Meadow, Carrie. 2005. "Portia Redux: Another Look at Gender, Feminism, and Legal Ethics." In *Lawyers' Ethics and the Pursuit of Social Justice": A Critical Reader*, edited by Susan D. Carle, 274–281. New York: New York University Press.

Mir-Hosseini, Ziba. 2000. *Marriage on Trial: A Study of Islamic Family Law*. Second edition. London: I.B.Tauris.

Newcomb, Rachel. 2012. "Justice for Everyone? Implementation of Morocco's 2004 *Mudawana* Reform." In *Interpreting Divorce Laws in Islam*, edited by Rubya Mehdi, Werner Menski and Jørgen S. Nielsen, 105–127. Copenhagen: DJØf Publishing.

Peletz, Michael Gates. 2002. *Islamic Modern: Religious Courts and Cultural Politics in Malaysia*. Princeton, N.J.: Princeton University Press.

Rackley, Erika. 2003. "Reassessing Portia: The Iconic Potential of Shakespeare's Woman Lawyer." *Feminist Legal Studies* 11: 25–44.

Rosen, Lawrence. 1989. The Anthropology of Justice: Law as Culture in Islamic Society. Cambridge, United States: Cambridge University Press.

Rosen, Lawrence. 2008. "Revision and Reality in the Family Law of Morocco." In Law and Religion in Multicultural Societies, edited by Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand and Gordon Woodman, 131–144. Copenhagen: DJØF Publ.

Sachedina, Abdulaziz. 2009. *Islamic Biomedical Ethics: Principles and Application*. Oxford: Oxford University Press.

Sadiqi, Fatima and Moha Ennaji. 2006. "The Feminization of Public Space: Women's Activism, the Family Law and Social Change in Morocco." *Journal of Middle East Women's Studies* 2 (2): 86–114.

Shabana, Ayman. 2013. "Negation of Paternity in Islamic Law between Li'ān and DNA Fingerprinting." *Islamic Law and Society* 20 (3): 157–201.

Al-Sharmani, Mulki. 2008. "Egyptian Family Courts: A Pathway of Women's Empowerment?" *Hawwa* 7 (2): 89–110.

Shehada, Nahda. 2005. *Justice without Drama: Enacting Family Law in Gaza City Shari'a Court*. PhD diss., The Hague: Institute of Social Studies.

Sonbol, Amira el-Azhary. 1996. *Women, the Family, and Divorce Laws in Islamic History*. Syracuse: Syracuse University Press.

Sonneveld, Nadia. 2010. "Khul' Divorce in Egypt: How Family Courts Are Providing a 'Dialogue' between Husband and Wife." *Anthropology of the Middle East* 5 (2): 100–120.

Sonneveld, Nadia. 2012. *Khul' Divorce in Egypt: Public Debates, Judicial Practices, and Everyday Life*. Cairo and New York: American University in Cairo Press and Oxford University Press.

Sonneveld, Nadia. Forthcoming. "From the Liberation of Women to the Liberation of Men? A Century of Family Law Reform in Egypt."

Tucker, Judith E. 1998. *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley: University of California Press.

Voorhoeve, Maaike. 2014. *Gender and Divorce Laws in North Africa: Shari'a, Custom and the Personal Status Code in Tunisia*. London: I.B. Tauris.

Welchman, Lynn. 2007. *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*. Amsterdam: ISIM/Amsterdam University Press.

Zoglin, Katie. 2009. "Morocco's Family Code: Improving Equality for Women." *Human Rights Quarterly* 31 (4): 964–984.

Žvan Elliott, Katja. 2015. *Modernizing Patriarchy: The Politics of Women's Rights in Morocco*. Austin: University of Texas Press.