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Male and Female Judges in Morocco Dealing with Minor Marriages

Towards a Relational Understanding of Family Law

Nadia Sonneveld

Assistant professor, Leiden University, Leiden, the Netherlands

n.sonneveld@law.leidenuniv.nl

Abstract

Rather than being an exception, judicial permission for minor marriage has become a rule in Morocco. Based on legal analysis and anthropological fieldwork in 2015, I show that the gender of the judge does not significantly contribute to the way the provision on minor marriage is implemented in Moroccan courthouses. Instead, I argue in favour of an approach that is grounded in a relational understanding of law. Both male and female judges were manoeuvring the *internal incompatibilities* contained within and between state laws, which are the result of *external recognition*—in other words, the recognition of other normative orders, notably customary law practices. This relational understanding of law, and the ambiguities it naturally results in, amounts to a better understanding of law in action than the distinction between an “ethic of justice” and an “ethic of care,” which highlights gender-specific ways of legal decision-making, which are not supported by the Moroccan case.

Keywords

Morocco – minor marriage – male and female judges – internal compatibility – external recognition – relational understanding of law

Introduction

Meknes-Tafilalt.¹ April 2015. A sister tells about her brother and his unfortunate love affair. At the time, everybody was talking about it in the small Middle Atlas town. She was 17, almost 18 years old; he is in his early twenties. They liked each other, and one thing led to another, and they ended up having a sexual relationship. Of course, they knew they were going against the grain. In Moroccan society, sexual relations outside of marriage are strongly condemned, and so the young couple had wanted to get married. But the woman's guardian (*walī*) had not agreed and had actually charged the young man, and with extramarital relationships being an offence under Morocco's penal law, the young man was sent to prison. The sister believes that her brother's sexual relation with a minor added to the gravity of his punishment. Time and again they told him he would be released in a month. In the end, he stayed inside for more than three years, and missed the funeral of his father by five days. The sister worries about her brother a lot. He is now leading a secluded life and tries to avoid meeting with people as much as he can. Although she believes that what the young couple has done is wrong, she also feels that a prison sentence is too heavy a punishment. It seems most people in the small town agree with her. These things have happened before, and there usually was a solution: marriage.

In this paper, I analyse the case presented above in relation to the Moroccan 2004 family law reform on minor marriage (*zawāj al-qāṣir*), in the framework of what I call a relational understanding of law.² Based on legal analysis and anthropological fieldwork in Moroccan courthouses in 2015, I will show why it is difficult for judges, both male and female, to implement major reforms introduced in one field of law (family law), when these reforms are ambiguous and not upheld by accompanying reforms in other fields of law and normative

1 In order to protect the identity of the people concerned, I indicate the name of the legal district only.

2 I wish to express special thanks to Professor Doris Gray, who made it possible for me to conduct the fieldwork as a scholar-in-residence of Al-Akhawayn University in Ifrane, Morocco. I also thank the anonymous reviewer and my colleagues of the Intimate Legal Interactions reading group at the Van Vollenhoven Institute for Law, Governance, and Society, Leiden Law School, for providing valuable feedback. The research on which this article is based was made possible through a grant from the Netherlands Organisation for Scientific Research (NWO) for the research project "Shari'a in Revolution: An Assessment of the Attitude of Moroccan Justice Seekers and Legal Professionals toward the Mudawwana."

beliefs existing in society at large. Specifically, when the age for marriage is raised to 18 for both males and females, but extramarital sexual relations remain legally punishable and socially condemned, it forces young people in Morocco to either delay first sexual intercourse or perform this and other forms of sexual intimacy secretly. When unmarried individuals lack the opportunities or “capabilities” (Nussbaum 2000) to engage in sexual relations, then raising the marriageable age will not necessarily lead to the desired social change (delay of minor marriages, pregnancies, and childbirth) but may instead increase instances of illegal sexual relationships, unregistered marriages, youth detention, unregistered childbirth, and abortions (illegal in Morocco).³

Generally, social change refers to changes or variations in the structure of social relationships and in the organisation of a society that lead to social transformations. Social transformations may be seen as positive or negative depending on the viewpoint of stakeholders (Gray and Sonneveld 2018, 3). Various scholars have shown how legal changes in the field of shari‘a-based family law in Muslim-majority countries often lead to heated debates, with opponents not necessarily being the “religious” stakeholders or proponents the “secular” ones (Gray 2013; Sonneveld 2012). Given the controversy shari‘a-based family law reforms provoke in Muslim-majority countries, Morocco included, the question arises how such reforms will be implemented in judicial practice. Introducing women-friendly or child-friendly legislation is one thing, but such legislation might actually be a form of *nonchange* when it is not implemented in judicial practice (Gray and Sonneveld 2018, 6; see also Willman Bordat and Kouzzi 2018). In this paper, I ask whether the Moroccan reform on minor marriages has turned out to be a *nonchange* by analysing, first, how it was implemented by judges, and, second, whether the gender of the judge is a factor that accounts for the specific way it was implemented.

In this paper, *nonchange* refers to a situation where a legal provision is not implemented according to the spirit of the law by those who are supposed to implement it.⁴ Although street-level bureaucrats such as social assistants and non-state actors played a role in the way the reform was implemented (e.g., Engelcke 2018), I take judges as the only example of street-level bureaucrats in this study. First, Morocco does not have a discretionary minimum marriageable age. This is relevant for the process of adjudication, as it increases the discretionary power of judges. Second, as judges themselves have made very

3 In this paper, I use the term “illegal” rather than “illicit” to indicate that sex outside marriage is not only socially condemned but also punishable under criminal law.

4 *Nonchange* on the level of judicial practice does not preclude social change occurring on other levels. See, e.g., Fioole (forthcoming).

clear, they are responsible for delivering the final decision (to grant or not to grant permission to marry). Most importantly, I focus on judges because the issue of minor marriage appeared extremely important to them; minor marriage was not the subject of my research, yet judges almost always brought it to my attention.

In October 2003, the Moroccan king, Muhammad VI, announced the introduction of a significant reform of the 1993 Personal Status Law.⁵ Approved by parliament in February 2004, the new law was called *mudawwanat al-usra*. In the remainder of this paper, I will use either “the 2004 family law” or “the family law” to refer to this new law. In the preamble to the new family law, the king states that the main objectives of the law are equality between men and women, and between husbands and wives, by “doing justice to women,” “protecting children’s rights,” and “preserving men’s dignity.” Among the major changes were provisions that gave women (and men) access to unilateral divorce through a *tatliq* procedure called *shiqāq* (Arts. 94–97); abolished the need for a marriage guardian (Arts. 24–25); allowed the husband and wife to divide assets acquired during marriage equally in case of divorce by composing a separate contract to be added to the marriage contract (Art. 49); and abolished women’s obedience to their husbands and instead gave each spouse equal responsibility for the management and care of the household and children’s affairs (Art. 51). Relevant in the context of this paper is the provision that increased the marriageable age from 15 to 18 for both boys and girls (Art. 19).

It has often been argued that the reformed family law was, and continues to be, implemented in deviation of the spirit of the law because of judges’ conservatism (El Hajjami 2009; Mouaqit 2007; Newcomb 2012; Rosen 2008; Žvan Elliott 2015).⁶ In discussing the shortcomings of the 2004 Moroccan family law, Rosen says 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” (2008, 139). For reasons that Rosen does not make clear, it seems that the gender of the judge may make a difference in the way justice is dispensed. In his study on the implementation of the 2004 family law by 35 judges (6 females, 29 males), Mouaqit also hypothesizes that a higher percentage of women among Morocco’s judiciary would render a more “feminine approach” to women litigants’ issues more likely (2007, 150–51). Scholars focusing on other Muslim-majority countries have arrived at diverging conclusions regarding the way male and female judges deal with family law cases. Most studies deal with male judges. In these studies, it is often pointed out that

5 The 1993 law was an amendment of the 1957/58 Personal Status Law.

6 Another factor often stated is the lack of legal awareness in Moroccan society.

male judges are protective of female litigators' interests in the field of family law. This applies both to the past⁷ and to what Lynn Welchman calls a third phase of Muslim family law development in the Arab world (2007, 13), which roughly started in the early 1980s.⁸ Along similar lines, Monika Lindbekk (2013) has shown that male judges in Egypt lay great emphasis on mercy and the principle of protection for the weak in their rulings. However, other research on Egyptian court practice has shown the opposite (al-Sharmani 2008; Sonneveld 2010, 2012). Studies on female judges in Muslim-majority countries show that women in positions of judicial authority do not necessarily take the side of

- 7 E.g., Abdal-Rehim Abdal-Rahman Abdal-Rehim, "The family and gender laws in Egypt during the Ottoman period," in *Women, the family, and divorce laws in Islamic history*, edited by Amira el-Azhary Sonbol (Syracuse, NY: Syracuse University Press, 1996); Rosemary Admiral, *Women and Islamic law in Marinid Morocco*, PhD diss. (University of Illinois, 2016); David S. Powers, "Women and courts in the Maghrib, 1100–1500," in *Dispensing justice in Muslim courts: Qadis and their courts*, edited by M. Khalid Masud, Rudolph Peters, and David S. Powers (Leiden: Brill, 2006), 383–410; Amira Sonbol El Azhary, *Women, the family, and divorce laws in Islamic history* (Syracuse, NY: Syracuse University Press, 1996); Judith E. Tucker, *In the House of the Law: Gender and Islamic law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998).
- 8 E.g., John R. Bowen, *Islam, law, and equality in Indonesia: An anthropology of public reasoning* (Cambridge: Cambridge University Press, 2003); Léon Buskens, *Islamitisch Recht en Familiebetrekkingen in Marokko* (Amsterdam: Bulaaq, 1999); Jessica Carlisle, "Raconter des histoires: L'arbitrage des demandes de divorce judiciaire Damas," in *La Syrie au présent: Reflets d'une société*, edited by Baudouin Dupret, Zouhair Ghazzal, Youssef Courbage, and Mohammed Al-Dbiyat (Paris: Broche, 2007a), 661–70; Jessica Carlisle, "Mother love: A forced divorce in Damascus," *Anthropology in the Middle East* 2 (1) (2007b), 89–102; Susanne Dahlgren, *Contesting realities: The public sphere and morality in southern Yemen* (Syracuse, NY: Syracuse University Press, 2010); Esther van Eijk, *Family law in Syria: Patriarchy, pluralism and personal status laws* (London: I. B. Tauris, 2016); Stijn van Huis, "Khul' over the longue durée: The decline of traditional *fiqh*-based divorce mechanisms in Indonesian legal practice," *Islamic Law & Society* 26 (1–2) (2019), 58–82; Monika Lindbekk, "Enforcement of personal status law by Egyptian courts," in *Adjudicating family law in Muslim courts*, edited by Elisa Giunchi (New York: Routledge, 2013), 87–105; Michael Gates Peletz, *Islamic modern: Religious courts and cultural politics in Malaysia* (Princeton, NJ: Princeton University Press, 2002); Lawrence Rosen, *The anthropology of justice: Law as culture in Islamic society* (Cambridge: Cambridge University Press, 1989); Nahda Shehada, *Justice without drama: Enacting family law in Gaza City Shari'a Court*, PhD diss. (Institute of Social Studies, The Hague, The Netherlands, 2005); Mulki al-Sharmani, "Egyptian family courts: A pathway of women's empowerment?" *Hawwa* 7 (2) (2008), 89–110; Nadia Sonneveld, "Khul' divorce in Egypt: How family courts are providing a 'dialogue' between husband and wife," *Anthropology of the Middle East* 5 (2) (2010), 100–20; Nadia Sonneveld, *Khul' divorce in Egypt: Public debates, judicial practices and everyday life* (Cairo: American University in Cairo Press, 2012); Maaike Voorhoeve, *Family law in Islam: Divorce, marriage and women* (London: I. B. Tauris, 2012); Maaike Voorhoeve, *Gender and divorce in North Africa: Shari'a, Custom and the personal status law in Tunisia* (London: I. B. Tauris, 2014).

the female litigant.⁹ Taken together, these studies underscore the necessity to not treat gender as a separate factor influencing judges' decision-making processes.

Despite the fact that this abundant legal-anthropological literature shows that gender is not a decisive factor in influencing judges' decision-making, scholars and activists have often advocated the inclusion of women into the judiciary in order to enhance justice for women. Following feminist and educational psychologist Carol Gilligan's famous *In a Different Voice*, they argue that women tend to employ an "ethic of care," in contrast to men, who are believed to employ an "ethic of justice." Where women are believed to bring into the adversarial system of legal decision-making the language of care, mercy, communication, and the preservation of relationships, men are said to apply pre-existing general rules to the dispute in question in accordance with specified procedures (e.g., Menkel-Meadow 1985; Schultz and Shaw 2013). Given that almost 25% of the Moroccan judiciary is comprised of women, it forms a good case to test whether this assumption holds, especially in the case of minor marriage.¹⁰ In an earlier paper, I showed that, in contemporary Morocco, male judges are more inclined to employ an "ethic of care" than their female counterparts—that is to say, they are more inclined to interpret the law in a loosely defined manner when the interest of children is at stake (Sonneveld 2017). This, of course, does not automatically mean that the same applies to court cases where minors request permission to marry, nor does it mean that the outcome of judicial discretion is necessarily positive from a human rights perspective.¹¹

Based on fieldwork in 2015, I argue that the gender of the judge does not play an important role in the way the provision on minor marriage is implemented

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- 9 See, e.g., on Tunisia, Maaïke Voorhoeve, "Tunisian female judges and 'the mobilization of the emancipative potential of the Tunisian Family Law,'" in *Women judges in the Muslim world: A comparative study of discourse and practice*, edited by Nadia Sonneveld and Monika Lindbekk (Leiden: Brill, 2017), 178–203; on Indonesia, Euis Nurlaelawati and Arskal Salim, "Female judges at Indonesian religious courtrooms: Opportunities and challenges to gender equality," in *Women judges in the Muslim world: A comparative study of discourse and practice*, edited by Nadia Sonneveld and Monika Lindbekk (Leiden: Brill, 2017), 99–122; and on Malaysia, Najibah MohdZin, "Female judges in Malaysian shari'a courts: A problem of gender or legal interpretation?" in *Women judges in the Muslim world: A comparative study of discourse and practice*, edited by Nadia Sonneveld and Monika Lindbekk (Leiden: Brill, 2017), 153–77.
- 10 Interview with legal expert, Ministry of Justice, Rabat, 16 October 2014. In 2014, there were 3,060 male judges (76.6%) and 939 female judges (23.4%) in Morocco (written information provided by the Ministry of Justice in Rabat on 18 May 2015).
- 11 As laid down in, e.g., the Convention on the Rights of the Child.

in Moroccan courthouses. Instead, I argue in favour of an approach that is grounded in a relational understanding of law, in order to account for the way male and female Moroccan judges deal with requests for minor marriages. I begin by describing what a relational understanding of law is, paying attention to its two fundamental pillars, external recognition and internal compatibility. I proceed to show how external recognition and internal compatibility play a role in the way male and female Moroccan judges deal with minor marriage cases, and unregistered marriage and unregistered childbirth—closely related topics, as we will see. I conclude by arguing that a relational understanding of law improves our understanding of law in action; it shows that ambiguity is often built into the fabric of law, which, in the case of minor marriage, leads to different understandings within one law—within one law provision even—of what it means to be a child in Moroccan society. Given this ambiguity, the distinction between an “ethic of justice” and an “ethic of care” falls short in explaining the behaviour of judges, be they male or female.

A Relational Understanding of Law

External Recognition

A relational understanding of law approach is twofold. It first follows in the steps of legal scholar Ralf Michaels, who proposes to accept not one but two rules of recognition in furthering our understanding of law (2017, 90). The first rule of recognition was developed in the 1950s and 1960s by legal philosopher H. L. A. Hart, and it proclaims that “a developed legal system requires its recognition as law by its officials” (ibid.). Hart considered this rule of *internal recognition* to be part of what he called “secondary rules.” Briefly, secondary rules explain the procedures through which the rules of law (the primary rules) are made, modified, and enforced. In addition to Hart’s primary and secondary rules, Michaels claims that, in the current context of global legal pluralism, a legal system is not complete without tertiary rules, which focus on the relations between different normative orders. One such tertiary rule is the rule of *external recognition*: “Law is law insofar as it is recognised externally by other legal systems” (ibid.). Instead of focusing solely on the way state law recognises other legal orders or normative systems (which is how external recognition is usually studied), Michaels advocates to build in “interlegality” from the beginning. Coined by Bonaventura de Sousa Santos, “interlegality” refers to “the interpenetration between different normative orders, mostly between national law and customary law” (Thomas 2009, 165). Studies on interlegality usually take state law as a point of departure, and study how and when it penetrates

other normative systems. Michaels argues that, in a context of global legal pluralism, “these inter-relations are not an afterthought to the concept of law; they are constitutive” (ibid., 95) because “effectively a legal system cannot operate vis-à-vis other legal systems unless it is recognized by those other legal systems” (ibid., 106). Hence, the rule of external recognition leads to a situation where parts of a given normative system are either formally or informally incorporated in another normative system. It no longer is a question of whether external recognition takes place, but instead of how it takes place.

The royal speech that the Moroccan king, Muhammad VI, gave in October 2003 to the Moroccan parliament on the family law reform, and in which he introduced the draft law, illustrates that external recognition is constitutive to the 2004 family law reform. In his speech, the king, as Commander of the Faithful (*amīr al-mu'minīn*), made it clear that the reformed law was based on several sources, notably Islamic principles, human rights principles, and the realities of Moroccan society (Yavuz 2016). The preamble to the family law reiterates this:

The government has made the promotion of human rights a priority which lies at the very heart of the modernist democratic social project of which the King is a leader. Doing justice to women, protecting children's rights and preserving men's dignity are a fundamental part of this project, which adheres to Islam's tolerant ends and objectives, notably justice, equality, solidarity, *ijtihād* and receptiveness to the spirit of our modern era and the requirements of progress and development. (Preamble, 2004 family law)

Both in the royal speech and in the preamble to the family law, it is implicitly acknowledged that, without these sources (i.e., Islamic principles, human right principles, and the social realities of Moroccan society), the law would exist as a law (as a primary rule, the rules themselves), but one without effective status externally. Such a law would not have “emergent properties.” An emergent property, according to Archer, “has the generative capacity to modify the power of its constituents in fundamental ways and to exercise causal influences *sui generis*” (1995, 174). The realisation that external recognition matters is clearly reflected in some provisions of the reformed family law, where the formal aim is stated in relation to the social realities of Moroccan society. Article 19, for instance, which proclaims that the age for marriage is 18, is followed by Article 20, which gives judges room to make well-substantiated exceptions, which should be in the interest (*maṣlaḥa*) of the boy (*al-fatī*) and the girl (*al-fatat*). And, where Article 16 states that the only proof of marriage is a

marriage contract (*wathīqa ‘aqd al-zawāj*), the last paragraph of Article 16 also gives couples in unregistered marriages the opportunity to register their marriages retroactively. In these provisions, international human rights principles, Islamic law principles, and customary law practices play a fundamental role in the creation of the primary rules of state law. Raising the marriageable age to 18 for both boys and girls enhances gender equality (Art. 19), but without losing sight of *maṣlaḥa* (Art. 20). *Maṣlaḥa* is an Islamic principle that refers to the best “interest.” In Article 20, *maṣlaḥa* refers to the “interest” of the boy or girl, which, among other things, requires the proper registration of unregistered marriages (Art. 16), the so-called *zawāj al-fātiḥa*, known as *fātiḥa* marriages, customary marriages that are socially recognised and celebrated but which are not registered with the relevant state authorities.

Under French colonialism, Amazigh (Berber) customary law was accepted as a source of law. After independence in 1956, the new government immediately abolished Berber customary law (Buskens 2003), a situation that has not changed since. However, when we apply Michaels’ understanding of the rule of external recognition—the idea that law is law insofar as it is recognised externally by other legal systems—we see that, while not constitutionally recognised, customary law takes a prominent place in the reformed family law. Given the ambiguities pointed out above, how do judges deal with them?

Some scholars have criticised Hart’s conception of law for leaving no room for judicial discretion (Dworkin 1977). They claim that the concept of secondary rules (i.e., how the primary rules are made, modified, and enforced) does not deal well with interpretation by a large category of bureaucrats responsible for implementation of the primary rules, neatly coined by Michael Lipsky in 1969 as the “street-level bureaucrats.” This category includes civil servants, social workers, teachers, police officers, and judges, whose discretion would lead to the formation of new rules in such a manner that it would no longer be possible to identify Hart’s primary rules (the rules themselves). In the case of judges, who do not see themselves as lawmakers, I suggest that discretion leads not to new rules but to a more detailed understanding of a particular law (provision). We would, then, think of a law provision as being an entity with emergent properties and speak of a process of “structural elaboration” (Archer 1995).

By working with the rule of external recognition, we have come to an understanding of a conception of law that can be applied to all existing normative orders—to local custom, religious law, national law, international law, and so forth. This understanding of law treats normative orders as equal, in the sense that they all exist as substantive entities (autopoietic law), while they often also depend on recognition by other normative orders (allopoietic law)

in order to be able to exercise the rights that derive from being a normative system (e.g., Dupret and Voorhoeve 2012, 7). Distinguishing between these different normative orders, however, is not necessarily easy.

Over four decades of fieldwork and study into the Amazigh oral tradition have led scholar Michael Peyron to the conclusion that *azerf* (the customary law of Morocco's Atlas Mountain region) and shari'a-based law have influenced each other for centuries (2018, 291–92). Peyron's and others scholars' work show that, in this region in North Africa, "external recognition" has been omnipresent for centuries (e.g., Buskens 2000; Hoffman 2010) and has contributed to an allopoietic understanding of law—that is to say, by recognising other normative orders, a normative order elaborates itself.¹² There has been much scholarly debate on how to distinguish between different normative orders. Ewick and Silbey (1998), Tamanaha (2001), and Dupret (2007) claim that law is what people say it is. In their footsteps, I focus on judges' understanding of law. The judges I interviewed clearly made a distinction between different normative orders (see also the following section, "Judges Dealing with Minor Marriage"): when I asked them what they considered to be the most important sources of judicial decision-making, they would mention state law (*al-qānūn*) first, and, after that, variably, customary law (*ʿurf*), Islamic jurisprudence (*fiqh*), case law, and international law.¹³ The interviewed judges understood the 2004 family law to be a hybrid of different normative orders. Simultaneously, they also applied an autopoietic understanding of the family law. Michaels speaks of the rule of external recognition as being part of the tertiary rules of law (the relation between different normative orders). In this paper, I propose to speak of the rule of external recognition as a ground rule, to emphasise that it plays a fundamental role in the creation of the primary rules. This has implications for the secondary rules, the rule of recognition in particular. How do judges and other street-level bureaucrats apply the primary rules of law? Next, I pay attention to the primary rules of law in the context of internal compatibility.

Internal Compatibility

In addition to working with the rule of external recognition, I suggest that a relational understanding of law also requires us to focus on the primary rules (i.e., on the rules themselves), specifically the *internal compatibility* of a law

12 In general, see also Gani Aldashev et al., "Using the law to change the custom," *Journal of Development Economics* 97 (2) (2012), 182–200.

13 See also Monika Lindbekk, *Polygyni i Egypt mellom regjering og disiplinarmakt*, MA thesis (University of Oslo, 2006) and Baudouin Dupret, "Legal pluralism, plurality of laws, legal practice: Theories, critiques, and praxiological re-specification," *European Journal of Legal Studies* 1 (1) (2007), 1–26, in their studies of judges in Egyptian family court cases.

(provision), within and between the various law fields of a given normative order. In our case, it means that we study a family law provision not in isolation but in relation to other family law provisions and other fields of state law. In the case presented at this paper's opening, family law and penal law both played an important role. I also pointed out the discrepancy between the constitution, which no longer recognises customary law as a source of law, and the reformed family law, where customary practices are constitutive to the formation of the primary rules of law.

Sociolegal scholars working on Moroccan law usually focus on the family law reform of 2004, which was heralded by domestic and international civil society organisations as one of the most progressive shari'a-based reforms in the Muslim world, and as an important step towards gender equality and the empowerment of women (as discussed in Engelcke 2018: 1514; Gray 2013; Žvan Elliott 2015). In 2015, a reformed version of the penal law was introduced. Similar to the family law reform project, it explicitly served to bring the penal law in line with the demands of modern times and with changing circumstances in Moroccan society, among others by changing the provisions on fornication and adultery. It failed, however, to attract scholarly attention.

This lack of attention can partly be explained by the fact that scholars working on law in the Middle East and North Africa, this author included, usually focus on the reform of religion-based law, almost always law based on Islamic shari'a.¹⁴ Given that family law is by and large the only field of law where the principles of Islamic shari'a still apply, this leads to a dominant focus on family law and the way it is implemented in judicial practice.¹⁵ But there is at least one problem associated with this focus.¹⁶ As noted, when scholars focusing on gender in the Middle East and Muslim-majority countries observe a discrepancy between law in the books and law in practice, they usually attribute it to judicial conservatism or to the gender of the judge, or to both. However, a discrepancy between law in the books and law in practice oftentimes can

14 See footnote 8.

15 See also Baudouin Dupret and Maaïke Voorhoeve, "Family law in Islam: Introduction," in *Family law in Islam: Divorce, marriage and women*, edited by Maaïke Voorhoeve (London: I. B. Tauris, 2012), 1.

16 It also leads to a one-sided focus on Muslim women, to the detriment of other social categories, such as non-Muslims, men, and migrants. Betty de Hart, Nadia Sonneveld, and Iris Sportel, "New perspectives on gender in shari'a-based family law studies: Moving beyond the women's issue," *Religion & Gender* 7 (1) (2017), 42–52. For exceptions, see van Eijk, *Family law in Syria*, and Monika Lindbekk, "Between the power of the state and the guardianship of the Church: Orthodox Copts seeking divorce," in *Eugen Ehrlich's sociology of law*, edited by K. Papendorf, S. Machura, and A. Hellum (Zurich: Lit Verlag, 2014), 179–202, who deal with Christian family law in Syria and Egypt, respectively.

be explained by instances of internal incompatibility between laws existing within one legal order, as famously pointed out by scholars such as political scientist Michael Lipsky (1983) and sociolegal scholar Marc Galanter (1981). For instance, where the Moroccan family law proclaims that marriage should be consented to by both parties, until 2014, Moroccan penal law stated that a rapist could escape imprisonment by marrying his victim (Art. 475). Hence, legal orders are not necessarily internally homogeneous, with rules neatly supplementing each other (see also Bano 2009, 425–26), and the prevalence of internal incompatibilities reveals the parameters within which the various street-level bureaucrats of the Moroccan state apparatus are supposed to implement a law according to the intention of the legislator.

In-depth review of family law and other relevant laws and regulations provides the legal background necessary to understand the actions of litigants, as well as of judges, civil registrars, and others involved in implementing them. This does not mean that internal compatibilities and external recognition alone explain the decision-making of street-level bureaucrats, in our case judges. Inadequate resources, challenges to authority (Lipsky 1983, 7), and personal attributes, such as age, educational background, political orientation, might also play a role. What I am trying to say is that in accounting for judicial decision-making, scholars have often overlooked the possibility of internal incompatibilities having an effect on the way a law (provision) is implemented. Lipsky speaks of “divided community sentiments” as a considerable source of bureaucratic strain (1983, 8). As public officials, street-level bureaucrats are expected to treat their clients in an impartial and neutral manner, while at the same time they should also treat and judge each case on its unique merits, a conflict especially judges suffer from (1983, 9). The notion of divided community sentiments neatly ties in with the question posed above as to what extent judges in minor marriage cases will take into account customary law practices and other normative orders. Dealing with the relationships between family members—husbands and wives, parents and children—family law regulates the most intimate relationships in an individual’s life (Fretwell Wilson 2018, 6), and in most Muslim-majority countries in a moreover divinely ordained manner. Forced to deal with the ambiguities in the family law, it is likely that, in using their discretion, Moroccan judges will have different understandings of what delivering justice means. As noted, feminist scholars have advocated a distinction between “an ethic of justice” and “an ethic of care” to further our understanding of gender and law. This distinction, however, presupposes that laws are void of ambiguities, something which is not the case in the Moroccan family law, where at least two normative orders, state law and customary law, with different ideas about marriage, are built into one law, even into one law provision.

Hence, in order to arrive at a sound and comprehensive understanding of the workings of a law reform in a given context, we should study *external recognition* and *internal compatibility* as possible sociolegal structures with emergent properties. In what follows, I will use the Moroccan family law provision on minor marriages to illustrate my argument. The data underpinning my argument were collected during a period of fieldwork lasting from January 2015 until August 2015. During this period, I spoke with 61 judges. Fifty-four judges were interviewed on the basis of a structured-questionnaire and seven on the basis of a topic list. Some judges were interviewed twice. Although the questionnaire did not include questions on minor marriages, during the interviews judges frequently brought up the subject, usually in relation to questions in the questionnaire on unregistered marriage and childbirth. This is a significant observation in itself. Thirty-six judges were male and twenty-five were female. They worked in 17 different courts of first instance and two courts of appeal in Morocco, in both rural and urban areas. The courts were dispersed over nine legal districts.¹⁷

Judges Dealing with Minor Marriage: The Encompassing Importance of Registration

As noted, for the interviewed judges formal state law (*al-qānūn*) was the most important source in their decision-making processes. This also applies to the one female judge who was educated in a shari'a faculty.¹⁸ Next to *al-qānūn*, a combination of law and jurisprudence (*ijtihād al-qādī*), sometimes in combination with international treaties, religious law (*fiqh Islāmī*), customary law, and deliberation among judges also were important sources.¹⁹ There was only one judge who did not include *al-qānūn* in his answer and who indicated that the most important sources were Islamic jurisprudence and the Court of Cassation's case law.²⁰ Since all the other judges said that Moroccan

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

18 In Morocco, there are two educational paths open to students wishing to become judges. A large majority of Moroccan judges receives an education in a secular law school, where a BA certificate suffices for them to be admitted to the Institute of Judicial Training in Rabat. A small number is educated in a shari'a faculty. See also Aicha El Hajjami, *Le code de la famille à l'épreuve de la pratique judiciaire* (Marrakesh: El Watanya, 2009), 32.

19 Three judges did not answer the question.

20 Interview with married male judge with children in his late thirties in Meknes-Tafilalt legal district, 31 March 2015.

state law plays an important role in their judicial decision-making processes, I now focus on the different law provisions dealing with minor marriages to see whether they are internally compatible, both within and between laws.

Article 19 of the 2004 family law states, “Men and women acquire the capacity to marry when they are of sound mind and have completed eighteen full Gregorian years of age.” Article 20, however, allows judges to make exceptions in certain circumstances:

The family affairs judge in charge of marriage may authorise the marriage of a boy or a girl below the legal age of marriage as stipulated in preceding article 19, in a well-substantiated decision explaining the interest and reasons justifying the marriage, after having heard the parents of the minor who has not yet reached the age of capacity or his/her legal tutor, with the assistance of medical expertise or after having conducted a social enquiry.”²¹

As said, the purpose of raising the age of marriage was and is to put a stop to early marriage and childbirth (e.g., Jordens-Cotran 2007, 93–94) and, relatedly, to reduce the number of unregistered marriages and childbirths (ibid.). While in the 1993 Personal Status Law, unregistered marriages could be given formal status retroactively (Jordens-Cotran 2007), the reformed law no longer accepts unregistered marriages as proof of marriage, and couples in these marriages were given five years to formally register their marriages retroactively, as laid down in Article 16:

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 (*al-‘alāqat al-zawjiyya*), 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.

21 Unless indicated otherwise, the translation of the family law provisions is based on an unofficial translation by <http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana>.

The role of Moroccan organisations for the rights of women was instrumental in pushing through these, and other, reforms.²² The central role of family law in the Moroccan feminist movement is a well-known fact: “Ever since its inception in the mid-forties of the last century, the Moroccan feminist movement has evolved around the family law Code” (Sadiqi 2008, 325).²³ Despite the initial euphoria, in the years following the implementation of the reformed family law, it became clear that, in the majority of cases, judges—both male and female—granted requests for underage marriage. For example, in 2011, out of 46,927 requests made (out of a total 300,000 marriages), 42,028 requests were granted (89.6%) and 4,899 were declined (10.4%). Of these requests, 46,601 were made on behalf of underage females (99.31%) and 326 on behalf of underage males (0.69%) (Ministère de la Justice et des Libertés 2012, 11).²⁴ Most female applicants were 17 years old (66.4%—27.2% were 16, 5.7% were 15, and 0.7% were 14; *ibid.*). These numbers show that most applicants were females between the ages of 16 and 18, and that almost all of their requests were granted. An exception was turned into a rule. While it would be tempting to speak of a *nonchange*, we should bear in mind that the law might have been successful in achieving at least two of its intended outcomes, decreasing the number of unregistered minor marriages, and decreasing also the number of unregistered childbirths—salient issues to which I turn later.²⁵ The high percentage of minor marriage requests granted raised considerable criticism from domestic and international civil society organisations, which accused Moroccan (male) judges of being conservative (El Hajjami 2009; Newcomb 2012; Rosen 2008; Sadiqi 2008, 336; Žvan Elliott 2015). But were they?

22 Interview with former judge and member of the Royal Commission, Zhour El Horr, Casablanca, 19 May 2015.

23 For an analysis of the difference between “feminists” and “Islamic feminists,” see Katja Žvan Elliott, *Modernizing patriarchy: The politics of women’s rights in Morocco* (Austin: University of Texas Press, 2015).

24 For statistics covering the period 2004–10, see Dörthe Engelcke, “Interpreting the 2004 Moroccan family law: Street-level bureaucrats, women’s groups, and the preservation of multiple normativities,” *Law & Social Inquiry* 43 (4) (2018), 1540.

25 Ironically, this might mean that the official age of marriage has decreased after the implementation of the family law in 2004. Official statistics, which I do not possess, should determine whether this is the case. Conversely, it could also be argued that people, aware of the fact that judges usually do not grant permission for marriages under the age of 16, postpone marriage until at least the each of 16. Fieldwork by Fioole (forthcoming) shows that this is indeed the case. This would be an instance of customary law or local custom recognising aspects of state law.

Judges Dealing with Ambiguities in the Law

Fes-Boulemane. April 4, 2015. A female judge relates: "A few years ago, a 13-year-old girl had requested the judge responsible for the authorisation 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.

This female judge in her early fifties was a strong opponent of minor marriage. She nevertheless felt that, in this and other cases, she had no choice but to recognise the unregistered marriage of the pregnant "girl." In various parts of Moroccan society, an unmarried female is usually referred to as "*bint*" (girl), even if she has long passed the legal age of majority. A female who marries below the official age of marriage, such as the 13-year-old female in the case presented above, is considered a *mra* (*mar'a* in standard Arabic, woman). Moroccan judges, as we will see, make a difference between females whom they consider too young for marriage (below the age of 16), and those whom they usually grant permission to marry (between the ages of 16 and 18), and those of majority age (18 years and older). In this paper, I follow in the footsteps of the Moroccan judges and refer to a female younger than 16 as a "girl," a female between the ages of 16 and 18 as a "young woman," and a female older than 18 as a "woman."

The judge in the interview fragment, and most of her colleagues, both male and female, worried a great deal about the consequences of unregistered marriage and childbirth, and they often pointed to internal incompatibilities within family law that, they claimed, encouraged this. Most notably, where Article 19 sets the marriageable age at 18, Article 20 allows judges to make exceptions. Irrespective of judges' opinion on minor marriages, they usually felt that it was not them who were turning an exception into a rule, but that people continued bringing requests for minor marriage to the court, knowing very well that the law allows for exceptions and that most judges would feel pressured to grant such requests and avoid instances of unregistered childbirth from occurring.

Proper birth registration was of great concern to all judges interviewed. Legally, children born outside of official marriage are denied paternal filiation. Even when the child is socially recognised—because the unregistered relationship of the parents is socially recognised—legally, it will remain without paternal filiation when the parents cannot prove the unregistered marriage, the so-called *fātiḥa* marriage referred to above. Consequently, the child will not carry the surname of the father, and it will not have a legal claim to inherit from and to be financially maintained by the biological father. Under the 1993 Personal Status Law, claims for paternal recognition outside official marriage were not accepted. The reformed family law does allow for paternal recognition retroactively, in Article 156, but only in the context of customary marriage—that is to say, “engagement” (*khitba*). The fact that a registered marriage is denoted as marriage (*zawāj*), and a socially recognised and celebrated, but unregistered (customary) marriage as engagement (*khitba*), places the latter in an inferior position. Here, the rule of external recognition does not put two different normative orders on an equal footing but places customary law in an inferior position. It raises the question as to what extent other normative orders, especially customary law and Islamic law, are thought to contribute to progress and development. Are these sources recognised as normative orders with a status equal to that of state law, or is their recognition only a temporary measure, aimed at eradication of important features of this other normative order: unregistered (minor) marriage and unregistered childbirth?

Children who are born outside “marriage” or “engagement” are not entitled to paternal filiation. Hence, should the love affair of the couple in our case have led to childbirth, the child would have been considered to be the product of *zina* (fornication or adultery) and would have lacked any of the rights mentioned above. By carrying the surname of the mother, it would moreover face social stigmatisation and difficulties in gaining access to health care and education.

Another major inconsistency the interviewed judges frequently lamented about concerned Article 16, on unregistered marriages. In an interview in Casablanca, without any prompting, Zhour El Horr, formerly a judge and then a member of the Royal Advisory Commission for the revision of the Moroccan family code, said that there were many problems with Article 16 in judicial practice. While she and the other members of the Royal Commission had intended it to be only a temporary solution to a “problem” (i.e., unregistered marriage) they had wanted to become an exception, in practice the interim period had already been extended twice, and at the moment of the interview was again under parliamentary review.²⁶ In 2016, the parliament agreed to

²⁶ Casablanca, 19 May 2015.

extend the interim period once more. The Royal Advisory Commission played a crucial role in the drafting of the reformed family law. Its members were appointed by the king, who, for a first time, appointed women to the commission. According to El Horr, it had taken the commission many years to arrive at a draft that could be presented to the Moroccan parliament.

What the interview with El Horr makes clear is that the drafters of the law had hoped that by introducing new legislation they could eradicate two closely related customary practices: unregistered marriage and minor marriage. The drafters of the law realised that, for the reformed family law to have external effect, they had to formally incorporate these aspects of customary law first in order to be able to annihilate them later.

Most of the interviewed judges were of the opinion that while unregistered marriages were not valid from a legal point of view, these unions were nevertheless in line with the requirements set by the shari'a. After all, these unions were called *fātiḥa* marriages, after reading the first verse of the Qur'an at the time of the contracting of the marriage in the local community. The female judge educated at a shari'a faculty disagreed. She was the only one who advocated abolishing Article 156 on "engagement," since this article, she claimed, dealt with pregnancy during *khitba*, and this was against what she called "Islamic society" (*al-mujtama' al-Islāmī*). Judges' overriding concern, however, was not the religious validity of *fātiḥa* marriages per se but rather the effects non-registration of these unions would have on daily life. As the female judge educated at the shari'a faculty stated: "It is a pity that in certain regions people still do not register marriage because of some traditions. Law does not provide solutions (to children born out of wedlock), only society does. People should not have children without a legal basis."

My interviews with the lower court judges made it clear that formal registration of marriage mattered more to them than the age of marriage. In their understanding, cases of minor marriage potentially involved at least two minors, the minor woman and the child(ren) she would bear. In Moroccan society, marriage and childbirth are closely related, not only in social life but also from a formal legal perspective. The reformed family law states that the goal of marriage is "the creation of a stable family" (Art. 4). Being confronted with individual cases of unregistered marriage and minor marriage on a daily basis, the judges felt they were not in a position to wait for the intended external effects of Article 16 (on retroactive marriage registration) and Articles 19–20 (on minor marriage) to take effect. Instead, they wanted to strike a balance between the interests (*maṣlaḥa*) of the minor mothers-to-be and their children—that is to say, between those whom they considered to be close to reaching the age of maturity and those whom they considered totally dependent on care provided by others. To make sure that only "young women" would marry

below the legal age of marriage, judges collectively set a standard in 2007: only requests for marriage by minors aged 16 years and older were to be accepted. The medical expertise and the social inquiry, which the family law sets as requirements in evaluating a request for minor marriage (Art. 20), illustrate the close relationship between marriage and childbirth. In 2011, judges used medical expertise (40.43%), a social inquiry (37.26%), or a combination of medical expertise and a social inquiry (22.30%) to determine whether a minor marriage request should be granted (Ministère de la Justice et des Libertés 2012, 11). A female judge responsible for the minor marriage requests in her district claimed that the medical test primarily serves to testify whether the “young woman” is physically fit to have children, and the social inquiry to determine whether she is mentally mature enough to shoulder the responsibilities of managing a household and raising children.²⁷

Irrespective of their position on minor marriage, the interviewed judges believed that dealing with ambiguities in the law made it difficult to perform their work in a satisfactory manner—that is to say, in a way that ensures that social relationships are preserved, not only in the minors’ immediate social surroundings but also in society at large, and that prevents children born from unregistered marriages from facing difficulties in dealing with Morocco’s bureaucracy later in life, when they have to be enrolled in school, for example. The following example illustrates this:

Meknes-Tafilalt. May 12, 2015. Maryam is the judge responsible for dealing with requests for minor marriage in this court at the foot of the Middle Atlas Mountains where, she claims, *fātiḥa* marriages are common. When I ask her under what conditions she would decline a request, this firm woman in her early fifties immediately says that if a minor is below the age of 16, she will not even consider reviewing her case. She does feel, however, that the interim period included in Article 16 on unregistered marriages, and which is now under parliamentary debate, should be extended indefinitely, for the sake of children’s right (*ḥuqūq abnā’*). It is in the interest of the child (*maṣlaḥat al-tīfl*) that it will be registered in the family booklet (*al-ḥālat al-madaniyya*).

The family civil status booklet (*kunnāsh al-ḥālat al-madaniyya*) records vital events of different family members, such as birth, death, marriage and divorce

27 Interview with married female judge with children in her fifties, 12 May 2015. See also Leila Jordens-Cotran, *Nieuw Marokkaans Familierecht en Nederlands IPRI* (The Hague: Sdu Uitgevers, 2007), 95–96.

(Law on Civil Status, Art. 1) and serves as an identity card for children. It enables children to receive medical care and register at school, and is proof of their legal filiation. For these reasons, the registration of *fātiḥa* marriages mattered a great deal to her. Together with other judges in the court, she had participated in numerous mobile sessions (*jalsāt tanaquliyya*) organised by the Ministry of Justice. During these sessions, judges would meet with people in the villages surrounding the courthouse and help them to register their *fātiḥa* marriages retroactively. Statistics from her court showed that in May 2014, forty-nine requests for minor marriage were granted. Nine minors were born in 1996 and would turn eighteen that year;²⁸ twenty-five were born in 1997 (16–17 years old); thirteen were born in 1998 (16–17 years old) and 2 were born in 1999 (15–16 years old). Similar to the national statistics mentioned earlier, the statistics from this court show that, during this period, the majority of the female minors were between 16 and 18 years old. In some cases, this judge would order a medical test to see whether the “young woman” was fit to bear children. The test, she said, costs MAD 200 (approx. EUR 20), a substantial amount for many a Moroccan family. One of her male colleagues, a family law judge in his early thirties, clearly opposed the marriage of minors. “How can she raise a family when she is sixteen?” he rhetorically asked me. In contrast to Maryam, he was against the registration of *fātiḥa* marriages retroactively. Another male judge in his early thirties, who worked in a courthouse in the Kenitra legal district, asked me, also rhetorically, why minor marriage should be a problem—because most cases of divorce, domestic violence, and non-payment of maintenance (*naḥaqa*) occur in marriages where the spouses are still very young. But what can you do? When you decline a request for minor marriage, they will marry anyway, through *fātiḥa*. Article 20, he said, had become the default reality. When I asked him whether the interim period for the registration of *fātiḥa* marriages should be reopened, he said, “Yes, you cannot deny reality.”²⁹

What transpires from these interview fragments is that none of these judges was advocating minor marriage, and while they thought differently about the registration of unregistered marriages retroactively, in the end, their main goal was to make sure that children to be born would be formally registered. To these judges, the preservation of social relationships mattered on both the micro and macro level. In their eyes, denying formal recognition of the sexual relationship amounted to putting in jeopardy the future of the children, who would be born in any case, irrespective of formal recognition by state officials like them.

28 Probably after the summer; people prefer to marry in the summer. See also my interview with a social expert in a courthouse in the Kenitra legal district, 30 June 2015.

29 Interview with unmarried male judge in his early thirties, 30 June 2015.

Judges' emphasis on the preservation of social relationships broadly is an important aspect of the so-called "ethic of care," a way of legal decision-making usually associated with women. The analysis, however, has made it clear that this is problematic for two reasons. First, both male and female judges interviewed take account of the social realities of Moroccan society, especially when they fear the welfare of children is in jeopardy. It shows that the distinction between an "ethic of justice" and an "ethic of care" is not gender sensitive. More importantly, this distinction does not do justice to the ways in which Moroccan judges operate in minor marriage cases. After all, with the incorporation of external normative orders in Morocco's reformed family law, it is hard to tell whether judges who want to preserve intimate relationships are following an "ethic of justice" or an "ethic of care." The distinction between an "ethic of justice" and an "ethic of care" assumes that formal law is clear and unambiguous, but with the rule of external recognition being constitutive to the 2004 family law, the reformed law is anything but clear and unambiguous.

The judges interviewed almost always referred to minor marriage in the context of arranged marriage and local custom (*'urf*). While this indicates that judges take local custom and social reality into account, they seldom referred to situations as described in the beginning of this paper, where young people in love have sex outside of wedlock without parental approval, despite the fact of this being common empirical reality, as fieldwork by Annerienke Fioole (forthcoming) east of Rabat points out. This raises two questions. First, do judges feel motivated to take local custom into account because they personally believe these local normative orders matter in judicial decision-making, or because they are constitutive of the laws they state they have to work with and as such they feel compelled to use them? Second, and in line with this, do judges refrain from referring to love affairs because they themselves prefer to close their eyes to this empirical reality, or because the law, as we have seen, does not take this empirical reality into account? In the next section, I propose answers to these questions by analysing the way male and female family law judges respond to a hypothetical case on childbirth arising from a relationship that is neither formally nor socially recognised. The findings show that judges prefer to work with love affairs merely within the confines of state law.

Judges Dealing with Love and Unregistered Childbirth

The family law is a central piece in the Moroccan judicial arsenal because it touches on practically all the other aspects of the Moroccan legal system. (Sadiqi, "Central role of the family," 335)

In the case presented at this paper's opening, there was indeed a close relationship between minor marriage and sex outside of marriage, and between the role family law and penal law played in this. In the context of sexual relationships, the judges interviewed differentiated between what they called an *'alāqa qānūniyya* (a legal relationship) and an *'alāqa shar'iyya* (a relationship based on Islamic shari'a). The former denotes a sexual relationship, which is recognised under Moroccan state law, while the latter denotes one that is valid under religious law but not under state law. The love affair of the young couple involved a type of sexual intimacy that was neither *qānūnī* nor *shar'ī*, so constituted a criminal offence under Moroccan state penal law.

The introduction of the family law in 2004 was followed by changes in other laws, such as the provision that gave Moroccan mothers the right to pass on citizenship to their children, and Law 103.13 on the Elimination of Violence Against Women, which was approved by parliament in February 2018, and which made domestic violence a criminal offence. As mentioned, there was also a significant reform of the penal code in 2015. Changes included a provision against sexual harassment in the streets and provisions to combat discrimination, racism, and incitement to hatred. The reformed penal law was heavily debated on social media. The issues that provoked most controversy were the ones that remained unaltered: the death penalty; the breaking of the Ramadan fast in public; and, relevant for our discussion, the provisions dealing with fornication and adultery. Article 490 states that persons of different sex who have entered into a sexual relationship without being married, face between one month and one year in prison. Article 491 states that married persons accused of adultery face between one and two years in prison. Combined, the increase in marriageable age and the continued criminalisation of premarital sex lead to the contradictory situation that, while the goal of the family law reform on marriageable age is to reduce early marriage, pregnancy and childbirth, non-reforms in penal law increase the probability that both formal and informal instances of early marriage, pregnancy, and childbirth will increase.

In contrast to Moroccan family and criminal law provisions, members of Morocco's different communities, both urban and rural, have long recognised that once children reach puberty, managing sexual feelings is not easy. To avoid premarital sex, minors, especially women, are encouraged to marry soon after they have become physically mature, at an age that is not seldom below the official age of marriage. Nevertheless, should premarital sex occur, a solution is to have the couple marry and, especially in case of pregnancy, prevent a situation of unregistered childbirth from happening (see also Fioole forthcoming).

Anthropological fieldwork by Annerienke Fioole indicates that it is unusual for people to charge people with sex outside of marriage as a matter of

first recourse. This cannot be attributed to a lack of legal awareness.³⁰ Fioole found that people are very much aware of the legal implications of sex outside marriage. This contradicts findings by (international) donors, which claim that legal awareness is low among certain social categories, usually women, the lowly educated, and rural inhabitants. Because of this social and legal awareness, people prefer those involved in illegal sexual affairs to marry. They sometimes even push an unwilling “boyfriend” to marry his “girlfriend” by threatening to charge him with a criminal court case. In some cases, the marriages are registered with the relevant state authorities; in other cases, they are only recognised within the social community—the *fātiḥa* marriages mentioned earlier. Frequently, these unregistered marriages are formally registered at a later stage, usually when children have to be registered for school. The fact that many Moroccans in unregistered *fātiḥa* marriages want to register their relationship with the relevant state authorities (retroactively) is an example of a non-state normative order (customary law) recognising another normative order (state law). The same applies to Moroccans of minor age (and their families) who come to court to ask the judge permission to marry, and, finally, to the maternal uncle in the case presented at the beginning, who refused to give his niece permission to marry. Instead, he charged her boyfriend with a criminal offence under state law. In the case presented at the paper’s opening, it was quite ironic that the woman in question was one month short of reaching the age of majority. If she had been 18, she would not have needed the consent of her legal representative (*nāʾib al-sharʿ*), and the couple could have turned their informal love affair into an officially recognised marital union, at least in theory.³¹

The refusal of the woman’s uncle, her marriage guardian, left the young woman in a position where *no justice was done* to her; she was unmarried, but no longer a virgin, and therefore unlikely to marry in the future. While premarital sex usually tarnishes the reputation of women in a much more severe way than it does men’s, the young man in our case was sent to prison. Unable

30 In her research in southern Morocco, Žvan Elliott also noticed that people’s awareness of the 2004 family law is much higher than claimed by civil society organisations. Žvan Elliott, *Modernizing patriarchy*.

31 If the legal representative does not agree, the 2004 family law offers a minor the possibility to request a judge to grant permission (Art. 21). Jordens-Cotran even mentions that if the father is absent (the father of the female minor in our case was dead), the mother of the minor can grant permission to the marriage. Jordens-Cotran, *Nieuw Marokkaans Familierecht*, 94–95. In the period 2004–10, the percentage of marriages concluded without a marriage guardian increased from 14.6% to 20.8%. Engelcke, “Interpreting the 2004 Moroccan family law,” 1541.

to bury his deceased father, and build up the financial resources to marry and become a “real” man, his time in prison tarnished his *dignity* to such an extent that he felt ashamed to face people after his release and decided to retreat from society.

Judges interviewed rarely referred to the consequences of sex outside marriage under the penal law system. A possible explanation is that such cases form a small percentage of the total amount of cases. Further research should establish whether this is true. Another explanation is that the judges I interviewed are family law judges who do not work on criminal court cases (sometimes, the building is even separate from the main court, precisely to avoid children from being exposed to people charged with criminal offences). But even when I confronted them with a hypothetical case of illegal sex and resulting childbirth, they did not refer to penal law. In this case, a woman had had a sexual relationship that was neither *qānūnī* nor *sharʿī* and which had resulted in the birth of a son. The biological father denied paternity, and this prompted the mother to seek formal recognition of her child in court. I asked the judges what they would do when confronted with such a case.

Of the 61 judges who were asked to reflect on the case, none referred to the possible consequences of her (and the father’s) act under penal law. Instead, a married female judge with children, in her late thirties, who worked in a provincial court in the Meknes-Tafilalt legal district, asked why my questionnaire included this case on illegitimate childbirth in the first place. The family law, she said, only deals with children born within the bounds of marriage.³² I was surprised to hear her and many of the other judges say that the mother should ask for recognition of paternity without explicitly mentioning that the child was conceived outside of marriage. Only by keeping this reality hidden from legal scrutiny would they be able to find ways to filiate the child to the lineage of the father—namely, by trying to prove that the child was conceived during a period of “engagement” (Art. 156).

On closer inspection, the behaviour of the judges shows that they wanted to remain within the bounds of state law, because this was the only way they could establish a relationship between the child and its biological father that was both *qānūnī* and *sharʿī*. Again, it is not easy to explain the behaviour of judges in terms of them either employing an “ethic of care” or an “ethic of justice.” While an “ethic of justice” implies that judges follow the black letter of the law, irrespective of the consequences, the response of the judges makes clear that they precisely wanted to avoid the legal consequences that following the law would have on the child, and instead worked towards establishing an

³² Meknes-Tafilalt, 27 February 2019.

important social relationship with the biological father (“ethic of care”) by relying on other provisions of the same law—namely, Article 156 on “engagement.”³³

Hence, when the rule of external recognition applies, and one normative system adopts contradicting features of another normative system, then ambiguity is built into the fabric of the law—in this case, state family law. This observation feeds into my argument about the importance of considering a relational understanding of law, where different provisions of the law are read in connection to each other.

I asked judges what they would do should the mother bluntly confess that her child was born out of an illegal sexual relationship. One group of judges (13 female and 13 male judges) would not have considered her case, not even under the pretext of “engagement” (Art. 156), claiming that the child was born outside marriage, be it a registered or a *fātiḥa* marriage. Seven other male judges claimed the same but would nevertheless have used a DNA test to see if they could establish a biological bond. This would not lead to paternal filiation, but it would be a way of forcing the biological father to pay maintenance to his child. The other judges, 9 females and 12 males, would still try to filiate the child to its father by employing a loose understanding of “engagement.” They used expressions such as “*rūḥ al-qānūn tismah*” (the spirit of the law allows it) to make clear that, by looking for witnesses—and, if needed, using DNA tests—they were still adhering to the requirements laid out in Article 156.

In summary, one group of judges retained a strict understanding of “*khitba*” only referring to *fātiḥa* marriages; others stretched its meaning to also include children born from “love affairs.”³⁴ The majority of the female judges (52%)

33 This article reads: “If an engagement takes place by 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 filiated 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.

34 For more details, see Nadia Sonneveld, “Seeking Portia and the Duke: Male and female judges dispensing justice in paternity cases in Morocco,” in *Women judges in the Muslim world: A comparative study of discourse and practice*, edited by Nadia Sonneveld and Monika Lindbekk (Leiden: Brill, 2017), 123–52.

and male judges (56%) belonged to the first group, while 36% of the female and 33% of the male judges belonged to the second group.³⁵ This small sample shows that, in their response to a hypothetical paternity dispute case, there was hardly a difference between female and male judges. Irrespective of their gender, these family law judges preferred the mother to not confess illegitimate childbirth to begin with. If the mother were nevertheless to confess this, most judges would decline her case and not try to establish paternal filiation, while a smaller, but significant group of judges would use a flexible understanding of “engagement” to filiate the child to its father.

Although it remains to be seen how the judges interviewed would have ruled on the unfortunate case of the young couple presented at this paper’s opening, based on my fieldwork in Morocco in 2015, as well as on the fact that national statistics show that Moroccan judges grant almost all requests for minor marriage, I feel safe in concluding that, in all likelihood, they would have granted the couple permission to marry, to prevent a situation of unregistered childbirth from occurring. Here, the importance of registering sexual relationships supersedes the importance of the age of first sexual contact. Various domestic and international women’s rights organisations have heavily criticised Morocco’s judges for turning an exception into a rule, accusing them of being conservative. In contrast, I would argue that their deliberations are grounded in a relational understanding of law, according to which judges navigate between recognition of other legal orders and normative systems (external recognition) and internal incompatibilities within and between state laws (internal compatibilities) to arrive at a ruling that does justice to Morocco’s multifaceted social reality, a reality in which room has to be made for “traditional” customary marriages, and sometimes even for “modern” love affairs, in such a way that the social and legal effects of unregistered childbirth are avoided.

Conclusion

Rather than being an exception, judicial permission to marry under the legal age of marriage has become a rule in Morocco. In this paper, I have asked whether the Moroccan reform on minor marriages has turned out to be a *nonchange* by analysing, first, how it was implemented in judicial practice by judges, and, second, by detecting whether the gender of the judge was a factor accounting for the specific way it is implemented. For civil society organisations, the explicit goal of the reform on minor marriage was to reduce the

35 Three female (12%) and four male judges (11%) did not respond to the hypothetical case.

number of minor marriages. To their dismay, the number of granted minor marriage requests increased in the years following the introduction of the family law in 2004. This, however, does not mean that the total number of minor marriages (i.e., registered and unregistered) has gone up. The judges interviewed were oriented to reducing the number of unregistered marriages. To them, marriage, first sexual intercourse, and childbirth were closely related, and formal registration of sexual relationships was a goal more important than reducing the formal age of marriage. By granting permission to requests for minor marriages of (mostly) “young women” between the ages of 16 and 18, they de facto lowered the marriageable age from 18 to 16. While they turned an exception into a rule, it would be too early to speak of a *nonchange*. After all, through their practices, they might have contributed to a reduction in the number of unregistered marriages and unregistered childbirths.

In their professional lives, judges were manoeuvring the *internal incompatibilities* contained within and between state laws, which, I argued, were the result of *external recognition*, (i.e., the recognition of other normative orders, notably customary law practices). This relational understanding of law, and the ambiguities it naturally results in, amounts to a better understanding of law in action than the distinction between an “ethic of justice” and an “ethic of care,” which is grounded in an understanding of state law as being unambiguous, and which highlights gender-specific ways of legal decision-making, which are not supported by the Moroccan cases on minor marriage and unregistered childbirth.

The love affair of the couple presented at this paper’s opening does not have an end. After he was released from prison, they started seeing each other again. She still lives with her mother and regularly disappears for a day or two to meet with him. They are still dating, and they still want to get married.

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